March 24, 2016

Submitted Electronically

Naomi Barry-Perez
Director
Civil Rights Center
U.S. Department of Labor
200 Constitution Avenue NW, Room N-4123
Washington, DC 20210

Re: Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workplace Innovation and Opportunity Act, RIN 1291-AA36

Dear Ms. Barry-Perez:

On behalf of the United States Conference of Catholic Bishops, Institutional Religious Freedom Alliance, National Association of Evangelicals, Ethics & Religious Liberty Commission of the Southern Baptist Convention, Christian Medical Association, Christian Legal Society, Family Research Council, First Liberty Institute, and National Catholic Bioethics Center, we respectfully submit the following comments on the proposed Department of Labor

("DOL") regulations on the nondiscrimination and equal opportunity provisions of the Workplace Innovation and Opportunity Act ("WIOA"). 81 Fed. Reg. 4494 (Jan. 26, 2016).

The proposed regulations are intended to implement Section 188 of the WIOA. Among other things, Section 188 forbids discrimination on the basis of sex, except as otherwise permitted under Title IX of the Education Amendments of 1972.

We agree that the prevention of discrimination on the basis of sex in job training and placement programs funded under the WIOA is a laudable statutory goal. The regulations proposed by DOL are objectionable, however, because, without statutory authority and in some respects in direct violation of relevant federal statutes, they—

- define "sex" to include "transgender status" and "gender identity." 81 Fed. Reg. at 4550 [§ 38.7(a)].

- define sex discrimination to include differential treatment on the basis that the individual "identifies with a gender different from that individual's sex assigned at birth." 81 Fed. Reg. at 4550 [§ 38.7(b)(6)].

- define sex discrimination to include differential treatment on the basis that "the individual has undergone, is undergoing, or is planning to undergo, any processes or procedures designed to facilitate the individual's transition to a sex other than the individual's sex assigned at birth." *Id.*

- define sex discrimination to include "[d]enying individuals access to the bathrooms used by the gender with which they identify." 81 Fed. Reg. at 4550 [§ 38.7(b)(9)].

- fail to recognize or enforce the exceptions to sex discrimination under Title IX, exceptions that are expressly referenced in Section 188 of the WIOA.

Lastly, the preamble to the regulations invites comment on whether sexual orientation should be a protected category under the regulations. For the reasons discussed below, it should not.

I. Sex Discrimination

Section 188 states in pertinent part:

> (a)(1) FEDERAL FINANCIAL ASSISTANCE.—For the purpose of applying the prohibitions of discrimination … on the basis of sex under title IX of the Education Amendments of 1972 …, programs and activities funded or otherwise financially assisted in whole or in part under this Act are considered to be programs and activities receiving Federal financial assistance.

> (a)(2) PROHIBITION ON DISCRIMINATION REGARDING PARTICIPATION, BENEFITS, AND EMPLOYMENT.—No individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity because of … sex (*except as otherwise permitted under title IX of the Education Amendments of 1972*)…. [Emphasis added.]
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> (e) REGULATIONS.—The Secretary shall issue regulations necessary to implement this section…. Such regulations shall adopt standards for determining discrimination … that are *consistent with the Acts referred to in subsection (a)(1)* [*i.e.*, including Title IX]…. [Emphasis added.]

The proposed regulations define the term "sex" to include "transgender status" and "gender identity." 81 Fed. Reg. at 4550 [§ 38.7(a)]. The regulations would forbid differential treatment on the basis that the individual "identifies with a gender different from that individual's sex assigned at birth," or on the basis that the individual "has undergone, is undergoing, or is planning to undergo, any processes or procedures designed to facilitate the individual's transition to a sex other than the individual's sex assigned at birth." 81 Fed. Reg. at 4550 [§ 38.7(b)(6)]. The regulations would also make it unlawful to "deny[] individuals access to the bathrooms used by the gender with which they identify." 81 Fed. Reg. at 4550 [§ 38.7(b)(9)].

For several reasons, the inclusion of transgender status and gender identity in the proposed regulations is an erroneous interpretation of the law.

First, Section 188 says nothing about transgender status or gender identity. Instead, it uses the term "sex." The ordinary dictionary definition of "sex" is the character of being male or female. Webster's New World Dictionary (3d College ed.). Since Section 188 is silent as to transgender status and gender identity, there is no textual basis for including those categories in the regulations.

Second, most courts have held that transgender status and gender identity are not protected classifications under federal statutes forbidding sex discrimination.[1] Were it otherwise,

[1] *E.g.*, *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) ("This court agrees with … the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII"); *Johnston* v. *Univ. of Pittsburgh*, 97 F.Supp.3d 657, 674-78 (W.D. Pa. 2015) (rejecting the claim that Title IX forbids discrimination on the basis of gender identity or transgender status).

Recognition by federal agencies of sex discrimination claims based on transgender status and gender identity is a relatively recent phenomenon, a fact that weighs against it. *See Fowlkes* v. *Ironworkers Local 40*, 790 F.3d 378, 386 (2d Cir. 2015) (noting that, until recently, "the EEOC had developed a consistent body of decisions that did not recognize Title VII claims based on the complainant's transgender status," and citing EEOC decisions that so hold);

dress and grooming standards, and the reservation of restrooms and dressing areas, based on biological sex might be in question. Indeed, DOL embraces precisely that result, as the proposed regulations would require giving individuals "access to the bathrooms used by the gender with which they identify," even if different from their biological sex, and forbid "gender norms and expectations for dress." 81 Fed. Reg. at 4550 [§ 38.7(b)(9) & (d)(1)]. The case law is to the contrary, holding that standards with respect to dress, grooming, and restroom usage, when based on biological sex, do *not* violate federal laws banning sex discrimination.[2]

To be sure, some courts have allowed transsexuals to assert sex discrimination claims under Title VII on the theory, adopted in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), that sex discrimination includes adverse treatment based on stereotypical views about men and women. If, however, DOL's intent is to follow *Price Waterhouse*, then its use of the terms "transgender status" and "gender identity" is both over-inclusive and under-inclusive. It is over-inclusive because it goes beyond what *Price Waterhouse* proscribes by way of sex discrimination. *See* notes 1-2, *supra*. It is under-inclusive because claims of sex stereotyping under *Price Waterhouse* do not require a showing of discrimination based on transgender status or gender identity.[3] In any event, DOL's use of these terms is apparently *not* to ensure compliance with *Price Waterhouse* because DOL proposes, in a *different* part of the regulations, to forbid discrimination based on sex stereotypes. 81 Fed. Reg. at 4550 [§ 38.7(d)].

Young v. *United Parcel Service, Inc.*, 135 S. Ct. 1338, 1352 (2015) (EEOC is not entitled to deference when it takes a position that is inconsistent with its previously stated views); *G.G.* v. *Gloucester County School Board*, No. 4:15cv54, 2015 WL 5560190 at *9 (E.D. Va. Sept. 17, 2015) (rejecting the Department of Education's "newfound interpretation" that school must provide biological girl claiming to be male with access to the boys' bathroom).

[2] Dress and grooming: *Jespersen* v. *Harrah's Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004) (holding that "grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex" under title VII); *Nichols* v. *Azteca Rest. Enters*., 256 F.3d 864, 875 n.7 (9th Cir. 2001) (stating that "there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards"), cited with approval in *Etsitty*, 502 F.3d at 1224-25; *Creed* v. *Family Express Corp*., No. 3:06-CV-465RM, 2009 WL 35237, at *8-10 (N.D. Ind. Jan. 5, 2009) (finding no violation of Title VII to terminate transgender employee who refused to conform to dress code and grooming policy). Restrooms: *Etsitty*, 502 F.3d at 1225 (concluding that "an employer's requirement that employees use restrooms matching their biological sex … does not discriminate against employees who fail to conform to gender stereotypes"); *Johnson* v. *Fresh Mark*, 98 Fed. App'x 461 (6th Cir. 2004) (concluding that an employer did not violate Title VII when it refused to allow an employee, born male but preparing for sex change surgery, to use the women's restroom).

[3] *Smith* v. *City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (noting that an individual's status as a transsexual is irrelevant to a claim of sex discrimination under Title VII); *EEOC* v. *R.G. & G.R. Harris Funeral Homes*, 100 F.Supp.3d 594, 598-99 (E.D. Mich. 2015) (noting that "like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII"). Ann Hopkins, the plaintiff in *Price Waterhouse*, is a prime example. Hopkins was denied admission to partnership in her accounting firm because of her perceived masculine mannerisms and for not dressing more "femininely." There is no indication that she identified with *being* a man – if anything, that was a stereotype imposed on her by the defendant. Further, as courts have noted, there are limits to how far one can stretch *Price Waterhouse*. There is no suggestion in the opinion, for example, that Title VII required Price Waterhouse to allow Ms. Hopkins to cross-dress at work or to use the men's restroom, and the case law is to the contrary. *See* note 2, *supra*.

Third, even if the WIOA prohibits discrimination on the basis of gender identity, which is not the case, then efforts in the current Congress to enact the Equality Act, a bill that would forbid discrimination on the basis of gender identity in federal programs,[4] would be inexplicable. There would be no proposal in the current Congress to prohibit gender identity discrimination in federally-funded programs if federal law already prohibited it.[5]

Fourth, even if Section 188 prohibits differential treatment based on transgender status and gender identity, which, again, is not the case, the prohibition is subject to exceptions by virtue of the text of Section 188(a)(2) and (e). As noted earlier, Section 188(a)(2) forbids sex discrimination on the basis of sex "*except as otherwise permitted under title IX*" (emphasis added). Section 188(e) requires the Secretary to promulgate regulations for determining discrimination that are "*consistent with the Acts referred to in subsection (a)(1)*" (emphasis added), including Title IX. For that reason, the exceptions to the prohibition on sex discrimination under Title IX apply with equal force to the prohibition on sex discrimination set forth in Section 188.

Title IX's prohibition on sex discrimination is subject to several statutory exceptions. For example, religious organizations are exempt if the statute's application would be inconsistent with the organizations' religious tenets. 20 U.S.C. § 1681(a)(3).[6] In addition, institutions may maintain "separate living facilities for the different sexes," 20 U.S.C. § 1686, a provision that the government has construed to authorize separate toilets, locker rooms, and shower facilities on the basis of sex. 34 C.F.R. 106.33. Courts have rejected the claim that Title IX requires giving biological males/females access to bathrooms reserved for the opposite sex. *G.G.*, 2015 WL 5560190 at *6-9 (school does not violate Title IX by forbidding biological female identifying as male to use the boys' restroom); *Johnston*, 97 F.Supp.3d at 672-73 ("University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination").

All these exceptions, and others set forth in Title IX, apply here because Congress expressly incorporated them in Section 188.

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[4] Equality Act, S. 1858, § 6 (amending 42 U.S.C. § 2000d to forbid discrimination on the basis of gender identity by any program or activity receiving federal financial assistance); H.R. 3185, § 6 (same).

[5] The Equality Act endorses the actions of federal agencies that have construed "[n]umerous provisions of Federal law" to include gender identity discrimination (S. 1858, § 2(8); H.R. 3185 § 2(8)), an endorsement that would be unnecessary if Congress had already banned gender identity discrimination.

[6] Even if Title IX and Section 188 did not already require it, a religious exception for religious organizations would be supported by other federal law, including the Religious Freedom Restoration Act, insofar as the proposed prohibition of differential treatment based on gender identity and transsexual status interferes with the ability of a religious organization to require adherence to religiously-grounded employee conduct standards.

Fifth, on the issue of bathrooms in particular, construing Section 188 to require access by persons of one biological sex to bathrooms reserved to persons of the opposite sex is not a purpose that should lightly be attributed to Congress. Not only is the affirmative expression of such a purpose entirely lacking in the plain wording of the legislation, but such a construction would violate basic and legitimate expectations of bodily privacy. If patients[7] and prison inmates[8] have a protectable interest in bodily privacy, as courts have held (*see* notes 7 and 8, *supra*), so do those who participate in WIOA's job training and placement programs. *See G.G.*, 2015 WL 5560190 at *13-15 (citing the interest in privacy in rejecting claim of gender identity discrimination arising out of school board's policy on restroom access). Prisoners retain this right to bodily privacy even though, by virtue of lawful incarceration, they have surrendered many other civil liberties. Participants in DOL programs have surrendered none of theirs.

Because Section 188 does not bar differential treatment based on transgender status or gender identity, those categories should be deleted from the final regulations. Even if Section 188 were properly construed to forbid discrimination on these bases, which is not the case, the final regulations must, by virtue of the directive in Section 188, have the exemptions specified in Title IX. These include but are not limited to: (a) an exemption for religious organizations; and (b) an exemption permitting the maintenance of separate bathrooms based on biological sex. Since the statute is clear on its face, no further authority is needed, but if more authority were thought necessary, then the former exemption would also be supported by RFRA and other federal law, *see* note 6 *supra*, and the latter by considerations of privacy. *See* notes 7 and 8, *supra*, and accompanying text.

None of this is to suggest that a person eligible to participate in federally funded job training and placement programs should be excluded from those programs. The purpose of these congressionally mandated regulations, however, is not to create freestanding nondiscrimination policies, but to enforce a specific provision of the WIOA, and that provision says nothing about

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[7] *See, e.g., Healey* v. *Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) (assigning female child care specialist to night shift was not unlawful because the presence of both males and females on all shifts was necessary to meet the therapeutic and privacy needs of a mixed-sex patient population of children and adolescents in a psychiatric hospital); *Jones* v. *Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987) (male patients in a hospital have a right to a hospital orderly who is male); *Local 567* v. *Michigan Council*, 635 F. Supp. 1010 (E.D. Mich. 1986) (patients in a state mental hospital have a right to a personal hygiene aide of the same sex); *Backus* v. *Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981) (ob-gyn patients have a privacy right to an obstetrical nurse who is female), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Fesel* v. *Masonic Home of Delaware*, 447 F. Supp. 1346 (D. Del. 1978) (female residents of a retirement home have a right to a nursing aide who is female). In each of the cited cases, patient privacy interests prevailed over a claim of sex discrimination.

[8] *Everson* v. *Mich. Dep't of Corr.*, 391 F.3d 737, 757 (6th Cir. 2004) ("a convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners."); *Lee* v. *Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) ("Most people … have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.").

transgender status or gender identity. DOL may (and should) carry out Congress's intent, but obviously has no power to create classifications that Congress neither contemplated nor directed.

II. Sexual Orientation

The regulations say nothing about sexual orientation. The preamble, however, includes a series of statements about it and invites comment.

The statements in the preamble are equivocal. On the one hand, DOL asserts that it "support[s] banning discrimination on the basis of sexual orientation" as a "matter of policy." 81 Fed. Reg. at 4509 (preamble). DOL also cites a recent decision by the EEOC holding that Title VII's ban on sex discrimination forbids sexual orientation discrimination in the workplace. *Id.*

On the other hand, DOL concedes that "[t]o date, no Federal appellate court has concluded that … Federal laws prohibiting sex discrimination … prohibit[] discrimination on the basis of sexual orientation, and some appellate courts … [have] reached the opposite conclusion." 81 Fed. Reg. at 4509.

DOL concludes that "[t]he final rule should reflect the *current* state of nondiscrimination law, including with respect to prohibited bases of discrimination. [DOL] seek[s] comment on the best way of ensuring that this rule includes *the most robust set of protections supported by the courts on an ongoing basis*." 81 Fed. Reg. at 4509-10 (emphasis added).

Just as it lacks statutory authority on transgender status and gender identity, DOL has no statutory authority to treat sexual orientation as a protected class. As DOL acknowledges (81 Fed. Reg. at 4509), no federal appellate court has treated sexual orientation as a protected class under a sex discrimination statute.[9] A single EEOC decision to the contrary—unsupported as it is by statutory text or legislative history, and contradicted by the case law—is an aberration, and for that reason provides no justification for construing "on the basis of sex" to include sexual orientation.[10]

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[9] Federal courts of appeals have uniformly held, for example, that Title VII does not forbid discrimination on the basis of sexual orientation. *Larson* v. *United Air Lines*, 482 Fed. App'x 344, 348 n.1 (10th Cir. 2012); *Gilbert* v. *Country Music Ass'n*, 432 Fed. App'x 516, 520 (6th Cir. 2011); *Pagan* v. *Gonzalez*, 430 Fed. App'x 170, 171-72 (3d Cir. 2011); *Dawson* v. *Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005); *Osborne* v. *Gordon & Schwenkmeyer Corp*., 10 Fed. App'x 554, 554 (9th Cir. 2001); *Richardson* v. *BFI Waste Sys.*, 2000 WL 1272455, *1 (5th Cir. Aug. 15, 2000); *Hamner* v. *St. Vincent Hospital & Health Care Center, Inc*., 224 F.3d 701, 704, 707 (7th Cir. 2000); *Higgins* v. *New Balance Athletic Shoe*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins* v. *Baltimore Gas & Elec. Co*., 77 F.3d 745, 751-52 & n.3 (4th Cir. 1996); *Williamson* v. *A.G. Edwards and Sons*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum* v. *Gulf Oil Corp*., 597 F.2d 936, 938 (5th Cir. 1979) (binding on the Eleventh Circuit, as well as the Fifth, because it was decided before October 1, 1981, as held in *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)). Courts often do not differentiate between same-sex attraction and same-sex conduct; none of the cited cases affirmatively suggests that either sexual attraction or sexual conduct is protected under Title VII.

[10] That it took the EEOC half a century to come to its decision, after an unsuccessful effort in Congress over decades to add sexual orientation to the list of prohibited categories under Title VII, counsels strongly against giving that decision determinative (or even persuasive) weight. *See Young* v. *United Parcel Service, Inc.*, 135 S. Ct. at 1352

That the WIOA does not bar sexual orientation discrimination is also evident from the introduction in the current Congress of the Equality Act. If enacted, the Equality Act would, among other things, prohibit sexual orientation discrimination in federally funded programs.[11] No such proposal would have been made in the current Congress if federal law already included such a prohibition. Non-enactment of a bill defining sex to include sexual orientation "is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation." *Simonton* v. *Runyon*, 232 F.3d at 35.

DOL's duty is not to ensure "robust protections" or to implement its own "policy" preferences. 81 Fed. Reg. at 4509-10. Its duty is to enforce the statute. WIOA, § 188(e). Again, no one eligible to participate in job training and placement programs should be excluded from these programs. The congressionally mandated purpose of the regulations, however, is to enforce a provision of the WIOA. That provision says nothing about sexual orientation.[12]

Conclusion

The proposed regulations conflict with Section 188 of the WIOA and are otherwise inconsistent with federal law. For that reason, they violate the Administrative Procedure Act. *See* 5 U.S.C. § 706 (authorizing a court to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

We urge DOL to take the following steps in the final regulations:

- Delete references to transgender status and gender identity. If the references are retained, which they should not be, then the final regulations must, by virtue of the express language of Section 188, include the exemptions specified in Title IX. These include, but are not limited to, exemptions: (a) for religious organizations; and (b) permitting the maintenance of separate bathrooms based on biological sex.

- Include no prohibition on discrimination based on sexual orientation.

(novel agency positions that contradict longstanding agency views are not persuasive); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (repeated rejection of sexual orientation nondiscrimination bills is "strong evidence," in light of case law consistently rejecting sexual orientation discrimination claims, of Congress's intent not to allow such claims).

[11] S. 1858, § 6 (amending 42 U.S.C. § 2000d to forbid discrimination on the basis of sexual orientation by any program or activity receiving federal financial assistance); H.R. 3185, § 6 (same).

[12] If the term "sexual orientation" is construed to include same-sex sexual conduct, application of a prohibition on differential treatment based on such conduct to a religious organization may also infringe upon its right, under the First Amendment and the Religious Freedom Restoration Act, to hire and retain staff whose beliefs and practices are consistent with those of the organization.

The changes urged in this comment letter are critical and, without them, the regulations are unlikely to be upheld.

Respectfully submitted,

Galen Carey
Vice President for Government Relations
National Association of Evangelicals

Anthony R. Picarello, Jr.
Associate General Secretary & General Counsel
United States Conference of Catholic Bishops

Carl H. Esbeck
Legal Counsel
National Association of Evangelicals

Michael F. Moses
Associate General Counsel
United States Conference of Catholic Bishops

David Stevens, MD, MA (Ethics)
CEO, Christian Medical Association

Stanley Carlson-Thies
Founder & Senior Director
Institutional Religious Freedom Alliance

David Nammo
Executive Director & CEO
Christian Legal Society

Russell Moore
President
Ethics & Religious Liberty Commission
Southern Baptist Convention

Kimberlee Wood Colby
Director, Center for Law & Religious Freedom
Christian Legal Society

Kelly Shackelford
President & CEO
First Liberty Institute

David Christensen
Vice President of Government Affairs
Family Research Council

Matthew Kacsmaryk
Deputy General Counsel
First Liberty Institute

Dr. Marie T. Hilliard, JCL, PhD, RN
Director of Bioethics and Public Policy
The National Catholic Bioethics Center