March 2, 2016

Catherine E. Lhamon
U.S. Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Bldg.
400 Maryland Avenue, SW
Washington, DC 20202-1100

RE: Recent Legal Developments Concerning Sexual Orientation Discrimination Coverage Under Title IX

Assistant Secretary Lhamon:

On behalf of the Human Rights Campaign's more than 1.5 million members and supporters nationwide, I write to bring to your attention a series of critical legal developments relevant to the Department of Education's interpretation of Title IX in the context of agency rulemaking and policy implementation. As this letter details, a series of federal courts and the EEOC have determined that discrimination based on sexual orientation is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964[1] and Title IX of the Education Amendments of 1972.[2] We urge the Department to publish explicit guidance providing that discrimination on the basis of sexual orientation is per se sex discrimination under Title IX. This interpretation is consistent with current legal doctrine, and is also essential to ensuring that LGBT individuals have access to the services and programs that they are entitled to.

Sexual Orientation Discrimination Under Title IX

In the December 2015 case *Videckis v. Pepperdine University*[3] a California federal judge determined that two female students had an actionable sex discrimination claim under Title IX against Pepperdine University for alleged discrimination on the basis of sexual orientation. The

[1] 42 U.S.C. § 2000(e)-(2).
[2] 20 U.S.C. § 1681(a).
[3] 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

two students alleged that the coach of the basketball team, of which they were both members, assumed the two were in a relationship with one another, and based on that assumption, asked inappropriate questions and made discriminatory comments toward them. The university argued that the students could not allege discrimination on the basis of sexual orientation as an independent claim under Title IX. The court rejected this argument and held that discrimination on the basis of sexual orientation is an actionable claim on the basis of sex under Title IX. The court reasoned "A plaintiff's 'actual' sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis." This determination relied heavily on the EEOC's decision in *Baldwin v. Foxx*[4] addressing Title VII coverage for sexual orientation discussed in greater detail below. As you are aware, courts have typically looked to Title VII for guidance when interpreting Title IX coverage.[5] Both statutes also share a similar legislative history.[6] Given this well-established history and interpretation, we urge you to consider the following developments in Title VII case law when determining the scope of Title IX coverage for lesbian, gay, and bisexual students.

Historic Deference to EEOC Policy

As a rule, executive branch agencies look to the EEOC's interpretation of Title VII to determine coverage for purposes of sex discrimination claims.[7] For example, the Department of Labor has cited EEOC's authority to dictate enforcement policy relating to Title VII in recently proposed rules engaging sex discrimination and civil rights protections. In January 2015, the Office of Federal Contract Compliance Programs at the Department of Labor announced a Notice of Proposed Rulemaking updating the rules that govern how federal contractors and subcontractors prohibit sex discrimination.[8] Throughout this proposed rule, the Department of Labor specifically details its intent to align Departmental policy with current case law and EEOC policy regarding interpretation of the term "sex" under Title VII. Similarly in the proposed rule published January 26, 2016 implementing the nondiscrimination and equal opportunity provisions of the Workforce Innovation and Opportunity Act the Department specifically

[4] 2015 WL 4397641 at *5 (E.E.O.C. July 16, 2015). The Commission has developed this interpretation in a long series of decisions prior to Baldwin. See, e.g., *Complainant v. Cordray,* 2014 WL 7398828 (E.E.O.C. Dec. 18, 2014); *Complainant v. Donahoe,* 2014 WL 6853897 (E.E.O.C. Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs*, 2014 WL 5511315 (E.E.O.C. Oct. 23, 2014); *Complaint v. Johnson,* 2014 WL 4407457 (E.E.O.C. Aug. 20, 2014); *Couch v. Dep't of Energy,* 2013 WL 4499198(E.E.O.C. Aug. 13, 2013); *Brooker v. U.S. Postal Serv*., 2011 WL 3555288 (E.E.O.C. May 20, 2013); Castello v. U.S. Postal Serv., 2011 WL 3560150 (E.E.O.C. Dec. 20, 2011); *Veretto v. U.S. Postal Serv*., 2011 WL 2663401 (E.E.O.C. July 11, 2011).

[5] See, e.g., *Franklin v. Gwinnett County Schools*, 503 U.S. 60, 75 (1992) (adopting Title VII precedent regarding sexual harassment in schools); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090-91 (D. Minn. 2000) (discussing application of Title VII precedent).

[6] See, e.g., *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir.2012) (the legislative history of Title IX "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII").

[7] Federal regulations also explicitly dictate interagency coordination and deference to EEOC guidelines in the context of employment discrimination investigations and complaints. See, e.g., 29 C.F.R. 1691.4.

[8] *Discrimination on the Basis of Sex*; Proposed Rule, 80 Federal Register 20 (January 20, 2015) pp. 5246-5279.

provides that it "defers to the EEOC's interpretations of Title VII law as it applies to applicants and employees of employers receiving WIOA Title I financial assistance."[9] Despite this stated intent, however, the Department failed to fully implement the EEOC policy regarding sexual orientation discrimination under Title VII. As discussed below, the EEOC's policy regarding sexual orientation discrimination coverage under Title VII could not be more clear.

EEOC Has Established Sexual Orientation Discrimination as Unlawful Sex Discrimination under Title VII

January 2015

On January 29, 2015, the EEOC published a final determination concluding that discrimination on the basis of sexual orientation was unlawful under Title VII in *Cote v. Wal-Mart.*[10] In this case, the EEOC found that Wal-Mart had discriminated against an employee when it denied the employee the opportunity to enroll her same-sex spouse in company provided health care benefits. The EEOC explicitly stated in the determination that the employee had experienced discrimination on the basis of sex under Title VII.

July 2015

In July 2015 in *Baldwin v. Foxx*,[11] the EEOC ruled in favor of a Department of Transportation employee who alleged that he did not receive a promotion because of his sexual orientation. The EEOC found that Title VII prohibits employers from relying on "sex-based considerations" when making personnel decisions and that these protections apply equally to LGB individuals under Title VII. The agency concluded that the Department of Transportation wrongfully relied on sex-based considerations when supervisors declined to promote the complainant due to his sexual orientation. The EEOC held that discrimination on the basis of sexual orientation constitutes sex discrimination under Title VII because sexual orientation is inseparably linked to sex-based considerations. The Commission clearly stated that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." The EEOC further clarified that "[a] complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account."

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[9] *Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act*; Proposed Rule (January 26, 2016) pp. 4494-4571.

[10] EEOC Charge No. 523-2014-00916 (Jan. 29, 2015).

[11] 2015 WL 4397641 at *5 (E.E.O.C. July 16, 2015). The Commission has developed this interpretation in a long series of decisions prior to *Baldwin*. See, e.g., *Complainant v. Cordray*, 2014 WL 7398828 (E.E.O.C. Dec. 18, 2014); *Complainant v. Donahoe*, 2014 WL 6853897 (E.E.O.C. Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs,* 2014 WL 5511315 (E.E.O.C. Oct. 23, 2014); *Complaint v. Johnson,* 2014 WL 4407457 (E.E.O.C. Aug. 20, 2014); *Couch v. Dep't of Energy,* 2013 WL 4499198(E.E.O.C. Aug. 13, 2013); *Brooker v. U.S. Postal Serv.,* 2011 WL 3555288 (E.E.O.C. May 20, 2013); *Castello v. U.S. Postal Serv*., 2011 WL 3560150 (E.E.O.C. Dec. 20, 2011); *Veretto v. U.S. Postal Serv.,* 2011 WL 2663401 (E.E.O.C. July 11, 2011).

January 2016

In January of this year, the EEOC also filed a brief in support of the plaintiff in *Evans v. Georgia Regional Hospital,* a case in which a former security officer at a state-funded hospital alleges that she was unlawfully targeted for termination because of her sexual orientation.[12] The EEOC's brief in this case presents the Commission's clear and consistent policy regarding sexual orientation discrimination stating that, "Title VII's prohibition on sex discrimination encompasses a prohibition on sexual orientation discrimination. This interpretation is most consistent with the statutory language prohibiting employment discrimination 'because of. . . sex.' 42 U.S.C. 2000e- 2(a). It also flows naturally from binding precedent because sexual orientation discrimination (1) relies on illegal sex stereotyping, (2) constitutes gender-based associational discrimination, and (3) involves impermissible sex-based considerations."

March 2016

In March, the EEOC announced that it filed two sex discrimination cases based on sexual orientation, *EEOC v. Scott Medical Health Center*[13] and *EEOC v. Pallet Companies, dba IFCO Systems NA*[14]. In a statement announcing the suits, EEOC General Counsel David Lopez specifically provided that, "With the filing of these two suits, EEOC is continuing to solidify its commitment to ensuring that individuals are not discriminated against in workplaces because of their sexual orientation."

In *Scott*, the Commission charged that a gay male employee was subjected to harassment due to his sexual orientation, charging that the worker's manager repeatedly used various anti-gay epithets when referring to him and made other highly offensive comments related to his sexuality. The EEOC further charged that no action was taken to end the harassment when it was brought to the attention of the clinic director. Similarly, in *IFCO Systems*, the EEOC charged that a lesbian employee was harassed by her supervisor because of her sexual orientation. The Commission charged that the supervisor made numerous comments to her regarding her sexual orientation and appearance and made sexually suggestive and lewd gestures towards the employee. The employee was terminated following a formal complaint regarding the harassment to management and the employee harassment hotline.

Federal Case Law Supports the EEOC Interpretation and Reflect a Clear Legal Trajectory

The EEOC policy is not a novel outlier. Rather, it reflects a steady, consistent development of case law affirming that discrimination on the basis of sexual orientation is a form of sex discrimination. In addition to the determination in *Videckis v. Pepperdine Univ*. discussed

[12] Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and Reversal, Evans v. Georgia, No. 2:16-cv-00225-CB.
[13] No. 2:16-cv-00225-CB (W.D. Pa. filed Mar.1, 2016).
[14] No. 1:16-cv-00595-RDB (D. Md. filed Mar. 1, 2016).

above,[15] a federal judge in *Isaacs v. Felder Services*, LLC, also incorporated this reasoning in October 2015 stating that "[t]o the extent that sexual discrimination occurs not because of the targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from heterosexually defined gender norms, this, too is sex discrimination, of the gender-stereotyping variety."[16]

Videckis and *Isaacs* build on the 2014 determination in *Hall v. BNSF Railway Co.,* in which a federal judge allowed an LGBT plaintiff's sex discrimination claim under Title VII and the Equal Pay Act to proceed to the next step of litigation.[17] In *Hall*, a worker challenged the company's denial to provide healthcare coverage to a same-sex spouse when the coverage was available to workers with different-sex spouses. The judge explicitly provided that the plaintiff "experienced adverse employment action in the denial of spousal health benefit due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." This 2014 decision echoed the holding in *Heller v. Columbia Edgewater Country Club,* a 2002 case in which the court clearly stated that an employer is engaged in unlawful discrimination if the employee would have been treated differently if she were a man dating a woman, instead of a woman dating a woman.[18]

A 2014 Seventh Circuit decision, *Muhammad v. Caterpillar, Inc.,* is also instructive. In this case, the plaintiff alleged that his co-workers subjected him to both racial and sexual harassment, including references and slurs related to his sexual orientation.[19] When the plaintiff informed his supervisor of the hostile work environment, he was suspended. The district court granted summary judgment for Caterpillar, relying on precedent that Title VII's protections from harassment only apply to gender and not sexual orientation. A Seventh Circuit panel upheld the decision and affirmed the lower court's interpretation that Title VII protections do not extend to sexual orientation discrimination. Although the Seventh Circuit later denied the plaintiff's motion for a panel rehearing, the panel, significantly, amended its original opinion by removing the explicit language stating that Title VII did not extend to discrimination based on sexual orientation. The ruling was affirmed on other grounds and no longer relies on Title VII's supposedly limited scope. This significant deletion illustrates an important shift in judicial reasoning and signals the increased viability of future claims based on sexual orientation in the context of Title VII.

We recognize that despite this clear legal trajectory, some may urge you to ignore these developments-- citing cases from the vault of Title VII's history as evidence of its well-settled limitations. In light of these detractors, we urge you to consider the EEOC's thorough review of this case law in *Baldwin.* The findings are compelling and reveal decades of judicial reluctance

[15] *Supra note* 1.
[16] 2015 U.S. Dist. LEXIS 146663, at *10 (M.D. Ala. Oct. 29, 2015) (internal quotation marks omitted).
[17] 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).
[18] 195 F. Supp. 2d 1212, 1223-24 (D. Or. 2002).
[19] Appeal No. 12-173 (7th Cir. 2014).

to engage in a legitimate analysis of the question and instead show a disturbing trend of unexamined reliance on dated decisions that, in some cases, even fail to reflect the current legal standard.[20] As the court in *Videckis* provided in December 2015, "The line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct."[21]

We appreciate the opportunity to provide this information. Should you have any questions regarding this letter please contact Robin Maril on my staff at (202) 423-2854.

Sincerely,

Sarah Warbelow
Legal Director

[20] The court in *Simonton v. Runyon*, for example summarily rejected each of the plaintiff's claims that the harassment and discrimination he experienced was prohibited discrimination on the basis of sexual orientation under Title VII. The Simonton court also relied on *DeSantis v. Pacific Tel. & Tel. Co.* to dismiss the plaintiff's claim concluding that Congress did not intend for Title VII protections to extend to sexual orientation-based discrimination. This 1979 case concluded that "Congress had only traditional notions of 'sex' in mind" when the 1964 Civil Rights Act was passed.

[21] *Videckis* 2015 WL 8916764 at 16-17.