



Workforce Issuance

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☐ Policy ☒ Information

To: Chief Elected Officials
MassHire Workforce Board Chairs
MassHire Workforce Board Directors
MassHire Career Center Directors
MassHire Fiscal Officers
MassHire DCS Operations Managers

cc: WIOA State Partners

From: Alice Sweeney, Director
MassHire Department of Career Services

Date: May 20, 2022

Subject: **Notification of Interpretation of WIOA Sec. 188 to Include Discrimination Based on Sexual Orientation**

Purpose: To notify MassHire Workforce Boards, MassHire Career Center Operators, and other workforce development partners of the Department of Labor (DOL), Civil Rights Center (CRC) Notification of Interpretation of WIOA Sec. 188 to Include Discrimination Based on Sexual Orientation.

Background: DOL is informing the public that, consistent with the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., DOL, beginning April 7, 2022, will interpret the prohibition on discrimination on the basis of sex in Section 188 of the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. 3248, to include discrimination on the basis of sexual orientation. DOL will continue to interpret and enforce Section 188's prohibition on discrimination on the basis of

sex to include discrimination on the basis of gender identity and transgender status, as set forth in the regulations issued under Section 188. 29 CFR 38.7.

The Civil Rights Center at DOL is responsible for enforcing Section 188 of WIOA and regulations issued under Section 188, which prohibit exclusion of an individual from participation in, denial of the benefits of, discrimination in, or denial of employment in the administration of or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA on various bases, including sex. 29 U.S.C. 3248(a).

On June 15, 2020, the U.S. Supreme Court held that the prohibition on employment discrimination based on sex in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., encompasses discrimination based on sexual orientation, gender identity, and transgender status. The Court concluded that the plain meaning of "because of sex" in Title VII necessarily includes discrimination because of sexual orientation, gender identity, and transgender status. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753-54 (2020).

Since *Bostock*, at least one Federal circuit court of appeal has concluded that the plain language of Title IX's prohibition on sex discrimination must be read similarly, and the Supreme Court has denied review of that decision. *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020), petition for cert. denied, No. 20-1163 (June 28, 2021).

On March 26, 2021, the Civil Rights Division of the U.S. Department of Justice, the agency charged with coordination of the implementation and enforcement of Title IX by executive agencies, issued a memorandum concluding that "the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation." The Civil Rights Division reached this conclusion after considering the text of Title IX, *Bostock* and other Supreme Court case law, including dissenting opinions, and developing jurisprudence in this area, including the circuit court opinion cited above. The Civil Rights Division subsequently updated its Title IX Legal Manual to state that the Department of Justice interprets Title IX to prohibit discrimination based on gender identity and sexual orientation.

In addition, on June 22, 2021, the Office for Civil Rights of the U.S. Department of Education, the agency responsible for that Department's enforcement of Title IX, published a notice in the Federal Register clarifying that it will enforce Title IX's prohibition on discrimination based on sex to include discrimination based on both sexual orientation and gender identity the Office for Civil Rights concluded that the Supreme Court's interpretation of sex discrimination in *Bostock* properly applies to Title IX based on the textual similarity between Title VII and Title IX; subsequent case law including the *Grimm* decision cited above, as well as cases

recognizing the harm that students may endure as a result of differential treatment based on gender identity or sexual orientation; and the Civil Rights Division's memorandum discussed above.

Section 188 of WIOA expressly incorporates Title IX's prohibition on sex discrimination. 29 U.S.C. 3248(a)(2) (specifying that "[n]o 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 [funded or otherwise financially assisted in whole or in part under Title I of WIOA] because of . . . sex (except as otherwise permitted under title IX of the Education Amendments of 1972 . . .)"); see also id. 3248(a)(1) (providing that "programs and activities funded or otherwise financially assisted in whole or in part under [WIOA] are considered to be programs and activities receiving Federal financial assistance" for the purpose of applying the prohibition against discrimination on the basis of sex under Title IX).

Consistent with the Supreme Court's interpretation of Title VII in *Bostock* and with the case law and interpretations discussed above applying the same conclusion to Title IX, beginning April 7, 2022, CRC interprets Section 188's prohibition on discrimination on the basis of sex to include discrimination on the basis of sexual orientation, as well as gender identity and transgender status. This interpretation will guide CRC in processing complaints and conducting investigations and compliance reviews, but it does not determine the outcome in any case, which will depend on the specific facts and circumstances. Any action taken by CRC in a specific case will take account of all relevant facts and legal requirements, including, where applicable, Title IX's religious exemption and other exemptions, which are incorporated into Section 188, see 29 U.S.C. 3248(a)(2), and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq.

Action Requested: Please make sure appropriate MCC Employment Service (ES) staff (including, but not limited to Complaint Officers), local Equal Opportunity Officers (EOO) are aware of this information.

It is important for ES staff to be educated on this type of information so they can properly identify and process complaints and apparent violations. Please remember, 20 CFR 658.411(c)(2) requires MDCS and MCCs to immediately log and refer complaints and apparent violations related to potential violations of Civil Rights laws and regulations such as those under Title VI of the Civil Rights Act or sec. 188 of WIOA.

Effective: Immediately.

Inquiries: Please direct all questions to Jose Ocasio at jose.ocasio@detma.org. Also, indicate Issuance number and description.