



November 3, 2022

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Investigation Request: U.S. Department of Justice Executive Office for Immigration Review Antideficiency Act and Government Employees Training Act Violations

Dear Inspector General Horowitz:

America First Legal (“AFL”) is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans. A whistleblower has provided us with a mandatory training program given to Executive Office for Immigration Review (“EOIR”) employees titled “Pronouns and Preferred Names in Immigration Court.” We write now to request that your office investigate whether this program violates the Antideficiency Act, 31 U.S.C. §§ 1341(a)(1) and 1342, and the Government Employees Training Act, 5 U.S.C. § 4101(4).

I. Background

A whistleblower has provided AFL with an internal U.S. Department of Justice email, dated October 11, 2022, directing all Executive Office for Immigration Review (“EOIR”) employees to complete a mandatory “hour-long session” on “Pronouns and Preferred Names in Immigration Court” taught by Tess Feldman of the Los Angeles LGBT Center on October 17, 2022. According to the email, all EOIR employees must have either attended the live session or viewed the recording by November 30, 2022. *See* Exhibit 1. AFL has also been provided with the slides from the training. *See* Exhibit 2.

This evidence established that EOIR employees are being required, on official time, to undergo “training” on the “problems with misgendering a [migrant alien],” the “problems with making assumptions about a [migrant alien]’s gender identity and pronouns,” and the “importance of identifying and using a [migrant alien]’s preferred

name in court.”¹ Among other things, EOIR employees are required to view and affirm “The Genderbread Person,” a graphic representation of the notion that gender identity, sexual attraction, romantic attraction, gender expression, and anatomical sex are each unique, unrelated components of gender and sexual identity.²

II. The “Pronouns and Preferred Names” Training Is Illegal

The Antideficiency Act, 31 U.S.C. § 1341(a)(1), provides that an agency may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation, or involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. An agency “may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”³

The Government Employees Training Act, 5 U.S.C. § 4104(4), provides that an agency may permit unappropriated training only if the training “improve[s] individual and organizational performance and assist[s] in achieving the agency’s mission and performance goals.”⁴ While an agency head has broad discretion to decide which types of training to provide, he or she “is not authorized to expand the statutory definition or pay for items not contemplated by the definition.”⁵

The subject training violates both statutes.⁶ First, Congress did not appropriate funds for it. Second, the training does not reasonably advance EOIR’s statutory mission of adjudicating immigration cases “by fairly, expeditiously, and uniformly interpreting and administering the Nation’s immigration laws.”⁷ Identifying an alien’s preferred

¹ See Exhibit 1.

² See Exhibit 2 at 2.

³ 31 U.S.C. § 1342.

⁴ 5 U.S.C. § 4101(4); a covered training “(1) Supports the agency’s strategic plan and performance objectives; (2) Improves an employee’s current job performance; (3) Allows for expansion or enhancement of an employee’s current job; (4) Enables an employee to perform needed or potentially needed duties outside the current job at the same level of responsibility; or (5) Meets organizational needs in response to human resource plans and re-engineering, downsizing, restructuring, and/or program changes.” 5 C.F.R. 410.101(d).

⁵ U.S. GOV’T ACCOUNTABILITY OFF., B-286026, PAYMENT OF FEES FOR ACTUARIAL ACCREDITATION EXAMINATION REVIEW (June 12, 2001) (quoting U.S. GOV’T ACCOUNTABILITY OFF, B-187525, PAYMENT OF EXPENSES FOR BAR REVIEW COURSE, BAR EXAMINATION, AND COURT ADMISSION (Oct. 15, 1974), available at <https://bit.ly/3gZ2joj>).

⁶ The GAO interprets 5 U.S.C. § 4101(4) to be “sufficiently broad and flexible to enable an agency to provide whatever training is necessary to develop the skills, knowledge, and abilities that will best qualify employees for the performance of official duties.” *Id.* at 4 (quoting U.S. GOV’T ACCOUNTABILITY OFF., B-182398, QUESTIONS ABOUT THE AUTHORITY OF INDIVIDUAL AGENCIES TO USE THEIR RESPECTIVE APPROPRIATIONS TO FUND THE ACTIVITIES OF THE NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN’S YEAR (Mar. 29, 1976)).

⁷ EXEC. OFF. FOR IMMIGR. REV., *About the Office*, U.S. DEP’T OF JUST. (last updated May 18, 2022), <https://bit.ly/2Ja9VSG>.

“gender” does not help EOIR employees adjudicate immigration cases “fairly, expeditiously, and uniformly,”⁸ and, in fact, the training made no pretense of doing so. Rather, the training’s stated purpose is “to create a government that upholds the ideals of inclusion, diversity, equity, and accessibility.”⁹ Thus, even employees who will never encounter a transgender alien in the course of their employment are required to attend.

III. Requested OIG Action

Because Congress has not appropriated funds for the “Pronouns and Preferred Names” training, and because the training does not purport to “improve individual and organizational performance and assist in achieving the agency’s mission and performance goals,” Attorney General Merrick Garland and EOIR Director David L. Neil exceeded their discretion in mandating it.¹⁰ Also, in the absence of an appropriation, EOIR is prohibited from accepting voluntary services from the Los Angeles LGBT Center.¹¹

Furthermore, AFL is deeply concerned that Biden Administration political officials may direct or encourage EOIR supervisors to discriminate against or punish federal employees with sincerely held beliefs that are inconsistent with the ideology imposed by this training. An EOIR employee who is concerned, for example, about the possibility that a woman or girl may be subjected to physical assault or rape by an allegedly “transsexual” male, may be disciplined for insubordination.¹² Also, there is ample reason to believe that an employee who refuses the indoctrination on religious grounds will be singled out for harassment and discrimination.

EOIR plays a critical role in controlling the United States’ borders. It has suffered from the diversion of critical resources and an unsustainable immigration case backlog, causing tens of thousands of illegal migrants to be released into the interior of the United States. But rather than devoting every resource available to reducing the backlog and carrying out its statutory mission, EOIR has elected instead to ignore the law and waste thousands of work hours indoctrinating its employees on welcoming transgender illegal aliens. Therefore, we ask that you investigate AFL’s findings and gather additional evidence; to recommend corrective action concerning the problems, abuses, and deficiencies you uncover; and submit your findings and recommendations to the head of agency, the congressional committees of jurisdiction, and to AFL.

[signature page follows]

⁸ EXEC. OFF. FOR IMMIGR. REV., *About the Office*, U.S. DEP’T OF JUST. (last updated May 18, 2022), <https://bit.ly/2Ja9VSG>.

⁹ See Exhibit 1.

¹⁰ 5 U.S. Code § 4101(4).

¹¹ 31 U.S.C. §§ 1341(a)(1) & 1342.

¹² See, e.g., Matt Masterson, *Lawsuit: Female Prisoner Says She Was Raped by Transgender Inmate*, WTTW.com (Feb. 19, 2020), <https://bit.ly/3DFE7Qy>.

Sincerely,

/s/ Michael Ding
Michael Ding
America First Legal Foundation

Cc: The Hon. Dick Durbin, Chair, Senate Committee on the Judiciary
The Hon. Chuck Grassley, Ranking Member, Senate Committee on the Judiciary
The Hon. Jerrold Nadler, Chair, House Committee on the Judiciary
The Hon. Jim Jordan, Ranking Member, House Committee on the Judiciary
The Hon. Henry J. Kerner, Special Counsel

EXHIBIT 1

Tue 10/11/2022 2:03 PM

IDEA Program, EOIR (EOIR)

Mandatory Training: Pronouns and Preferred Names in Immigration Court

o All of EOIR

As we continue to work together to support the many initiatives across the Federal workforce to create a government that upholds the ideals of inclusion, diversity, equity, and accessibility, EOIR will host Tess Feldman, staff attorney and Immigration Law Project manager at the Los Angeles LGBT Center at noon on October 17, 2022. In an hour-long session, "Pronouns and Preferred Names in Immigration Court," Ms. Feldman will discuss the following topics:

1. Problems with misgendering a respondent.
2. Different types of gender identities and pronouns and problems with making assumptions about a respondent's gender identity and pronouns.
3. Tips for identifying the respondent's pronoun when the respondent has limited English proficiency.
4. Why a respondent's legal name may differ from their current name.
5. Obstacles respondents may face in obtaining an official name change order.
6. The importance of identifying and using a respondent's preferred name in court when addressing the respondent, to create a welcoming and respectful environment.

Though the discussion is specific to the immigration court setting, the underlying principles apply much more broadly so this training is mandatory for all EOIR employees. As some of you may be unavailable, for work or personal reasons, at the scheduled training time, we will record the session and make it available on LearnDOJ.

I encourage you to attend the live session. All EOIR employees must attend the live training or view the recording by **November 30**.

A calendar invite from the IDEA Program will be forthcoming.

EXHIBIT 2

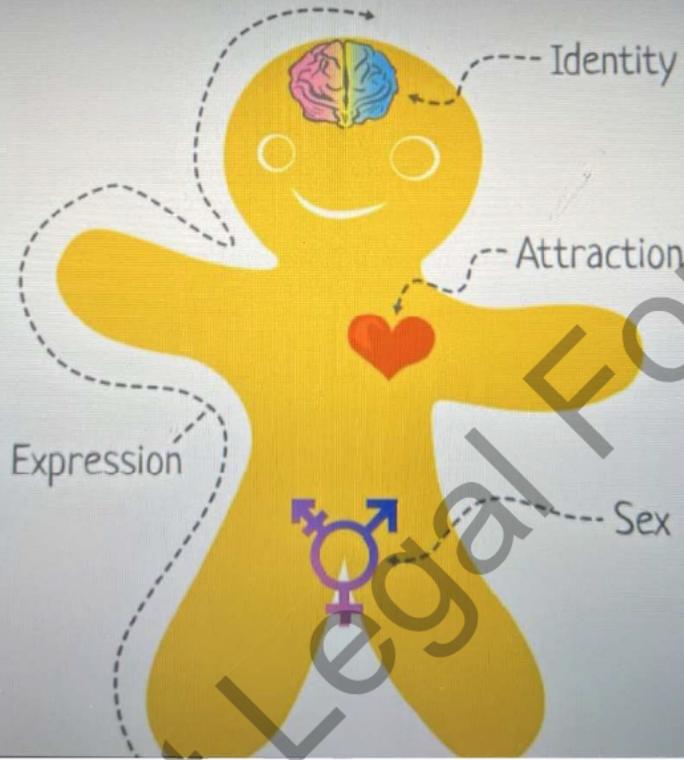
Information Session

The following information does not establish EOIR policy in these areas, but is provided to assist with recognizing these issues in the context of case adjudication in EOIR's immigration courts and to ensure that all individuals involved in EOIR proceedings are treated with dignity and respect.



- **Gender Identity is distinct from sexual orientation**
- **Gender Identity**
An individual's personal sense of having a particular gender
- **Sexual Orientation**
A person's identity in relation to the gender or genders to which they are sexually attracted; the fact of being heterosexual, homosexual

The Genderbread Person v4 by its pronounced METROsexual



⊖ means a lack of what's on the right side

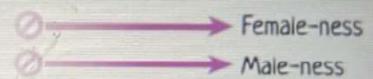
Gender Identity



Gender Expression

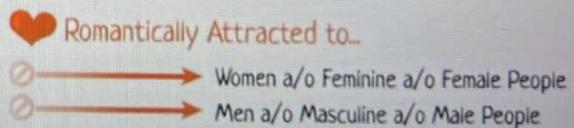
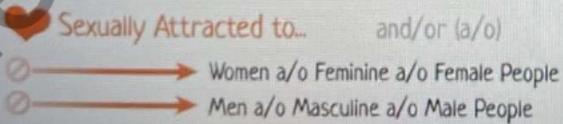


Anatomical Sex



Identity ≠ Expression ≠ Sex
Gender ≠ Sexual Orientation

Sex Assigned At Birth
 Female Intersex Male





Common Assumptions

- Nonbinary Person
- Trans woman, trans man
- Gender Queer

Problems caused by misgendering

Examples from Experience

- Dead-naming during testimony
- Incorrect pronouns at the start of the day
- Respondent doesn't feel safe using a restroom

Name Changes

- Why change a name?
 - Taking a new name when getting married
 - Removing a triggering family name
 - Chosen name affirms gender identity
 - Safety: Need to have documents match gender expression
 - Workplace
 - Home
 - Travel Documents
 - Driver's License

Name Changes

- Why NOT change a name?
 - No safe mailing address for the new name
 - Fear of losing a case, returning to home country with different documents
 - Safety
- When a Respondent **cannot** change a name
 - Fee, fee waiver denial
 - *This relates to identity documentation
 - NGC Order denied in local jurisdiction
 - NGC not available in local jurisdiction

Creating
Safety for
LGBTQ+
Respondents:
What can we
do?

Clear & Safe
Communication

Know local laws re:
preferred name

Ask for more information
if needed

Set a functional timeline



Benefits to
creating a
space of
tolerance and
respect

- Respondent safety
- All parties (OCC, Immigration Judge, Respondent) on "the same page"
- Avoid delays over documentation
- Clear understanding of basis of case and how the parties connect (Adjustment, Cancellation of Removal, Asylum)
- Credibility