



NEW YORK
CITY BAR

COMMITTEE ON
LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS

ANNA M. POHL
CHAIR
747 THIRD AVENUE
NEW YORK, NY 10017
PHONE: (646) 231-3405
FAX: (646) 562-3401
anna.pohl@thomsonreuters.com

CHRIS REPOLE
SECRETARY
666 THIRD AVENUE
FL 30
NEW YORK, NY 10023
PHONE: (212) 545-4019
FAX: (212) 972-3213
chris.repole@gmail.com

December 21, 2015

Caroline J. Downey
General Counsel
Division of Human Rights
One Fordham Plaza, 4th Floor
Bronx, New York 10458
cdowney@dhr.ny.gov

Re: Comments on Gender Identity Discrimination, proposed regulation Section 466.13, I.D. HRT-44-15-00033-P

Introduction

The New York City Bar Association (the “City Bar”) is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The Committee on Lesbian, Gay, Bisexual and Transgender Rights (the “Committee”) addresses the legal and policy issues that affect lesbian, gay, bisexual, and transgender individuals. The Committee respectfully submits these comments on the Division of Human Rights’ proposed regulations clarifying that the New York State Human Rights Law (“Human Rights Law”) prohibits discrimination based on gender identity, gender expression and transgender status.¹

The proposed amendments, if enacted, will codify existing case law holding that transgender and gender-nonconforming people are protected under the categories of sex and disability. They will bring New York in line with well-established federal interpretations of parallel federal civil rights law. These regulations would put covered entities on notice about the unlawfulness of discrimination against transgender and gender non-conforming individuals in the areas of employment, housing, public accommodations, access to credit and private education. Therefore, the Committee supports the proposed regulations and offers additional recommendations for how the Division can strengthen and clarify the proposed regulations in order to achieve their intended purpose of eliminating discrimination against transgender New Yorkers.

A. Transgender New Yorkers experience high rates of discrimination

Explicit regulatory clarifications are needed because of the pervasive, on-going discrimination against people who are transgender and/or gender nonconforming. Transgender and gender non-conforming people face devastating levels of discrimination in employment, housing, and public accommodations.

¹ 37 N.Y. Reg. 21 (Nov. 4, 2015).

Transgender workers experience unacceptable rates of workplace discrimination. The 2015 LGBT Health and Human Services Needs Assessment found that out of almost 900 transgender and gender-nonconforming New Yorkers, nearly one in three reported being fired and 42% reported being not hired because of their gender identity.² In a prior survey of 531 transgender New Yorkers, one in five reported being fired because of gender identity, 37% reported not being hired because of gender identity, and nearly 3 out of 4 reported harassment on the job because of their gender identity or expression.³ Unfortunately, these data are comparable to other surveys from New York and around the nation.⁴

Housing discrimination against transgender people is rampant. The 2015 LGBT Health and Human Services Needs Assessment found that more than one in ten transgender New Yorkers reported being denied housing because of being transgender or gender non-conforming, and more than a quarter reported being harassed by neighbors.⁵ An earlier nationwide study found that 19% of transgender respondents were denied housing, 11% were evicted, and 19%

² M. Somjen Frazer & Erin E. Howe, *Transgender health and economic insecurity: A report from the 2015 LGBT Health and Human Services Needs Assessment Survey*, 8 (2015) (878 respondents in the survey identified themselves as transgender and/or gender non-conforming), <http://www.prideagenda.org/sites/default/files/PDFs/TG%20health%20and%20economic%20insecurity%20report%20FINAL.pdf>.

³ Jaime M. Grant et al., *Findings of the National Transgender Discrimination Survey: New York Results*, 1 (2011), http://www.endtransdiscrimination.org/PDFs/ntds_state_ny.pdf.

⁴ See Make the Road New York, *Transgender Need Not Apply: A Report on Gender Identity Job Discrimination*, 12 (2010) http://www.maketheroad.org/pix_reports/TransNeedNotApplyReport_05.10.pdf (using matched pair testing and a survey to measure employment discrimination against transgender people in New York City, results showed a 42% net rate of discrimination against transgender job seekers; that for 11 out of the 24 employers tested, the transgender job applicant received no offer, but the control group tester did; only one transgender tester received a job offer in the first round, 59% percent of survey participants experienced employment discrimination, and 49% had never been offered a job living openly as a transgender person); Brad Sears & Christy Mallory, *Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies*, The Williams Institute, 4 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/employment-discrimination-complaints-2008-2014.pdf> (finding that workers filed discrimination complaints based on sexual orientation and gender identity discrimination with state agencies at a higher frequency than race and sex discrimination complaints); Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, 9 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf (finding 90% of transgender individuals surveyed nationwide reported experiencing harassment, mistreatment or discrimination on the job, or took actions like hiding who they are to avoid it, and 47% said they had experienced an adverse job outcome, such as being fired, not hired, or denied a promotion because of being transgender or gender nonconforming); District of Columbia Office of Human Rights, *Qualified and Transgender: A report on results of resume testing for employment discrimination based on gender identity*, 6 (2015), http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf (resume testing found that 48% of employers appeared to prefer at least one less qualified cisgender (non-transgender) applicant over a more qualified applicant perceived to be transgender and that 33% of employers offered interviews to one or more less qualified applicants perceived as cisgender while not offering an interview to the more qualified applicants perceived as transgender); Transgender Law Center, *State of Transgender California Report: Results from the 2008 California Transgender Economic Health Survey*, 1 (2009), <http://transgenderlawcenter.org/wp-content/uploads/2012/07/95219573-The-State-of-Transgender-California.pdf> (70% of respondents reported having experienced workplace discrimination related to their gender identity); and Shannon Minter & Christopher Daley, National Center For Lesbian Rights & Transgender Law Center, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities*, 14 (2003), <http://www.nclrights.org/wp-content/uploads/2013/07/transrealities0803.pdf> (reporting nearly half of transgender respondents reported experiencing job discrimination).

⁵ Frazer & Howe, *supra* note 2, at 4.

had been homeless simply because of being transgender.⁶ In that same survey, New Yorkers fared no better than the rest of the nation.⁷ Transgender people of color experienced housing discrimination at up to three times the rate of their white counterparts.⁸

Transgender people also face high rates of unequal treatment and harassment in places of public accommodation. Among transgender New Yorkers, 53% reported having been harassed in public accommodations, 18% being treated unequally by a government agency or official, and 17% being denied medical care.⁹ Accommodations in which discrimination is most frequent included retail stores, the police, doctors and hospitals, and government agencies.¹⁰ In other words, transgender people are discriminated against when accessing basic necessities.

Discrimination comes at a cost to New York State. The Williams Institute estimates that denial of housing and job loss due to bias against transgender people costs New York State millions of dollars a year in Medicaid and homeless services expenditures and that reducing or eliminating employment discrimination against transgender people could generate millions of additional dollars in income tax revenue.¹¹

A recent report also links discrimination against transgender people with involvement in the sex trade.¹² The report analyzed the information from the National Transgender Discrimination Survey, which found that 10.8% of the overall survey respondents reported having participated in sex work and an additional 2.3% indicated that they had traded sex for rent or a place to stay. Black and Black Multiracial respondents had the highest rate of sex trade participation overall (39.9%), followed by those who identified as Hispanic or Latino/a (33.2%).¹³ Those involved with sex work were far more likely to have reported experiencing employment, education and housing discrimination. For example, an overwhelming majority (69.3%) of sex workers reported experiencing an adverse job outcome in the traditional workforce because of discrimination (vs. 44.7% of non-sex workers).¹⁴ And transgender people

⁶ *Injustice at Every Turn*, *supra* note 4, at 106.

⁷ *Nat'l Transgender Discrimination Survey: New York Results*, *supra* note 3, at 1 (19% of respondents had been denied a home, 18% had been homeless, and 8% had been evicted).

⁸ *Injustice at Every Turn*, *supra* note 4, at 107 (respondents reported being denied housing because of being transgender at the following rates: American Indian 47%; Black 38%; Multiracial 32%; Latino/a 26%; Asian 17%; White 15%).

⁹ *Nat'l Transgender Discrimination Survey: New York Results*, *supra* note 3, at 2.

¹⁰ *Injustice at Every Turn*, *supra* note 4, at 124-134 (in the following establishments respondents reported particularly high rates of unequal treatment or service, harassment or disrespect, and physical assault respectively: retail stores-32%, 37%, 3%; police officers- 20%, 29%, 6%; doctors office or hospital- 24%, 25%, 2%; gov't agency or official 22%, 22%, 1%).

¹¹ Jody Herman, *The Cost of Employment and Housing Discrimination against Transgender Residents of New York*, The Williams Institute, 1 (2013), <http://williamsinstitute.law.ucla.edu/research/transgender-issues/ny-cost-of-discrimination-april-2013>. See also Center for American Progress and Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* (2015), <http://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf>.

¹² Erin Fitzgerald et al., *Meaningful Work: Transgender Experiences in the Sex Trade* (2015), http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf.

¹³ *Id.* at 4.

¹⁴ *Id.* at 16.

who lost a job due to anti-transgender bias were almost three times as likely to engage in the sex trade (19.9% vs. 7.7%).¹⁵ Over half (54.6%) of all survey respondents who were currently homeless also had been involved in the sex trade.¹⁶ The respondents who were involved in the sex trade were at increased risk for HIV infection,¹⁷ drinking or misusing drugs,¹⁸ suicide attempts, mistreatment and assault by law enforcement and abuse while incarcerated.¹⁹ Ending discrimination against transgender people is an important step in ensuring that people do not have to engage in sex work simply to survive.

B. The Division has the authority to promulgate Section 466.13, which is in harmony with the Human Rights Law and has a rational basis.

The Division has clear authority to enforce the Human Rights Law by promulgating Section 466.13. New York State Executive Law § 295.5 gives the Division a power and a duty to promulgate rules and regulations to carry out the provisions of the Human Rights Law.²⁰ Section 466.13 falls well within “the extensive powers granted to the Division of Human Rights in the Executive Law” in order to “reflect the broad thrust of this fundamental policy” in “combating discrimination.”²¹ Indeed, the Division has been “empowered” with broad authority “to take appropriate action to eliminate and prevent such practices.”²² Accordingly, the proposed regulations are in line with the Division’s authority as set forth in the Human Rights Law.

1. Section 466.13 is in harmony with the Human Rights Law’s broad public policy goals of eliminating discrimination.

The Division’s authority to promulgate regulations is not absolute; all regulations must be in harmony with the Human Rights Law.²³ A regulation cannot contradict the will of the Legislature as codified in the statute.²⁴ Here, the statute itself provides that the Human Rights Law must “be construed liberally for the accomplishment of the purposes thereof.”²⁵

¹⁵ *Id.*

¹⁶ *Id.* at 17.

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 24.

¹⁹ *Id.* at 18.

²⁰ See also *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 133 (N.Y. 1965).

²¹ *Batavia Lodge No. 196, etc. v. State Div. of Human Rights*, 35 N.Y.2d 143, 145-46 (1974).

²² *Holland v. Edwards*, 307 N.Y. 38, 43 (1954).

²³ E.g., *Matter of Jones v. Berman*, 37 N.Y.2d 42, 53 (N.Y. 1975) (“Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute”).

²⁴ E.g., *Human Rights v. Genesee Hosp.*, 50 N.Y.2d 113 (N.Y. 1980) (“[I]f it contravenes the will of the Legislature, as expressed in the statute, the regulation must fall.”); *Weiss v. City of New York*, 95 N.Y.2d 1, 4-5 (N.Y. 2000) (“It is a fundamental principle of administrative law that an agency cannot promulgate rules or regulations that contravene the will of the Legislature”).

²⁵ N.Y. Exec. Law § 300 (2015). See also *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 183 (1978); *New York Inst. of Tech. v. State Div. of Human Rights*, 40 N.Y.2d 316, 324-25 (1976); *City of Schenectady v. State Div. of Human Rights*, 37 N.Y.2d 421, 428 (1975).

Furthermore, “the statute is an expression of New York State’s commitment to equality within society, based on anti-discrimination principles.”²⁶ As such, the Human Rights Law reflects the “State’s strong and important public policy against discrimination.”²⁷ Section 466.13 is a necessary and important step to carrying out the mandate of the Human Rights Law to eliminate sex and disability discrimination in New York.

2. Section 466.13 has a rational basis, namely the urgent need to eliminate pervasive discrimination facing transgender New Yorkers.

As demonstrated in Section A above, the Human Rights Law is currently not being adequately enforced with respect to transgender people.²⁸ Despite the fact that transgender people have been recognized as protected under the Human Rights Law since 1977,²⁹ covered entities are still unclear on their duty to not discriminate against transgender and gender-nonconforming people, and are greatly in need of regulations to spell out what discrimination against these individuals looks like and how they can avoid it.

C. Section 466.13 is not unreasonable, arbitrary or capricious because courts have long recognized that transgender people are protected under the categories of sex and disability in local, state and federal laws.

1. The Division’s interpretation of the statutory term “sex” is consistent with New York courts’ interpretation of that term.

To date, every state court in New York to consider whether the Human Rights Law’s prohibition on sex discrimination covers discrimination on the basis of gender identity or expression has agreed with the interpretation of the Human Rights Law sought to be codified in Section 466.11. As early as 1977, the New York County Supreme Court held that the U.S. Tennis Association violated the Human Rights Law by requiring transgender tennis player Renee Richards to undergo genetic testing in order to ban her from competing with other female athletes at the U.S. Open.³⁰ Since then, and for nearly four decades, the conclusion that the Human Rights Law’s prohibition on sex discrimination covers discrimination on the basis of

²⁶ *Margerum v. City of Buffalo*, 24 N.Y.3d 721, (2015) (Rivera, J., concurring in part and dissenting in part).

²⁷ *New York Inst. of Tech.*, 40 N.Y.2d at 324-25 (1976).

²⁸ In a recent study conducted by the Williams Institute on the utilization of state agency complaint processes by lesbian, gay, bisexual, and transgender individuals in response to experiences of discrimination and harassment, data for transgender and gender-nonconforming New Yorkers had to be removed from analysis because New York’s statute or regulations do not expressly include gender identity and gender expression, and so it is not readily apparent how many transgender and gender-nonconforming people are filing complaints on the basis of “sex,” “disability,” or even “sexual orientation.” Such data is absolutely necessary in order for state officials and legal advocates to better understand the lived experiences of this vulnerable community, and to address their needs more efficiently and effectively. See Christy Mallory and Brad Sears, *Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014*, The Williams Institute, 2-3 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Employment-Discrimination-Complaints-2008-2014.pdf>.

²⁹ See *Richards v. United States Tennis Assn.*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977).

³⁰ *Id.* at 272.

gender identity or expression has been repeatedly upheld by New York state courts.³¹

New York courts generally defer to the interpretation of a statute issued by the administrative agency charged with enforcing the statute, although a court will give less weight to the agency's interpretation when the question “is one of pure statutory reading and analysis.”³² Whatever level of deference a court would give the Division, its interpretation of the term “sex” in these regulations simply embodies the interpretation given to the same term by New York courts. Further, “where the practical construction of a statute is well known, the Legislature may be charged with knowledge of that construction and its failure to act may be deemed an acceptance.”³³ That is, given that the legislature has not taken action to stop courts from interpreting the Human Rights Law to protect transgender individuals, the Division’s interpretation should be upheld.

2. The Division’s interpretation of the statutory term “disability” is consistent with New York courts’ interpretation of that term.

New York courts have consistently recognized gender dysphoria³⁴ as a protected disability for at least the past 12 years. In *Doe v. Bell*, the court held that a state foster care facility violated the Human Rights Law by not reasonably accommodating the plaintiff’s needs related to gender dysphoria by preventing her from wearing female clothing.³⁵ This finding was consistent with the text of the statute, which provides that “disabilities are not limited to physical or mental impairments, but may also include ‘medical’ impairments.”³⁶ To qualify as a “disability” under the current law, a condition “may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being ‘demonstrable by medically accepted clinical or laboratory diagnostic techniques.’”³⁷ The plain language of the statute means that “a medically diagnosable impairment as necessarily a disability for purposes of the NYHRL.”³⁸ Here, gender dysphoria is a medically accepted clinical diagnosis in the DSM-5 so

³¹ See, e.g., *Doe v. City of New York*, 976 N.Y.S.2d 360, 363-64 (Sup. Ct. 2013) (denying City’s motion to dismiss plaintiff’s claim that she was denied access to benefits by HASA in violation of New York City and New York State Human Rights Laws (gender and disability) when it refused to change the name and gender marker on her benefits card and intentionally referred to her by former name and male pronouns); *Hispanic Aids Forum v. Estate of Bruno*, 839 N.Y.S.2d 691, 696 (Sup. Ct. 2007) (rejecting defendants’ argument that neither the New York City of State Human Rights Laws protects transgender persons); *Buffong v. Castle on Hudson*, No. 05-CV-11634, 2005 WL 4658320, at *2 (N.Y. Sup. Ct. 2005) (“[A] transgender[] person states a claim pursuant to New York State’s Human Rights Law on the ground that the word ‘sex’ in the statute covers transsexuals.”).

³² See *Kurcsics v. Merchants Mutual Ins. Co.*, 49 N.Y.2d 451, 459 (1980).

³³ *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 287 (2009) (citing *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 90 (1976)).

³⁴ “Gender identity disorder” (GID) was the previous name of the diagnosis in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV). “Gender dysphoria” is the name in the 2013 DSM-5.

³⁵ 754 N.Y.S.2d 846, 851 (Sup. Ct. N.Y. County 2003) (“GID is a disability under the State Human Rights Law”); *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 779 (Sup. Ct., Kings Cty. N.Y. 2013) (“Doe’s disorder has been clinically diagnosed ... using the medically accepted standards set forth in the DSM-IV. No more is required for Doe to be protected from discrimination under the State Human Rights Law.”)

³⁶ *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 218 (N.Y. 1985).

³⁷ *Id.* at 218-19 (quoting N.Y. Executive Law § 290).

³⁸ *Reeves v. Johnson Controls World Servs.*, 140 F.3d 144, 155 (2d Cir. 1998).

the statute requires nondiscrimination and the provision of reasonable accommodations like any other recognized disability. Therefore, the Division’s interpretation of the statutory term “disability” is consistent with state law.

3. The Division’s interpretation of the statutory term “sex” is consistent with the interpretation of federal courts and agencies.

Like the Human Rights Law, a multitude of federal statutes prohibit discrimination on the basis of sex, and such prohibitions have been interpreted to encompass a prohibition on discrimination on the basis of gender identity. For example, federal courts and authorities have interpreted Title VII of the Civil Rights Act to prohibit employment discrimination on the basis of gender identity and expression.³⁹ As the Equal Employment Opportunity Commission has held, “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII.”⁴⁰ The U.S. Attorney General affirmed this interpretation in a 2014 memorandum.⁴¹ The Department of Labor has taken the same position in internal guidance and proposed regulations,⁴² as has the Office of Personnel Management in its regulations.⁴³

Similarly, the Departments of Education and Justice have clarified on multiple occasions that, under Title IX of the Education Amendments of 1972,⁴⁴ “discrimination based on gender identity, including transgender status, is discrimination based on sex.”⁴⁵ The Department of Housing and Urban Development has concluded that the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, which prohibits discrimination on the basis of sex in housing,⁴⁶ covers claims based on sex stereotypes and gender identity.⁴⁷ The Department of Health and Human Services (HHS) has long recognized that sex discrimination under Section 1557 includes

³⁹ 42 U.S. Code § 2000e-2 (2015).

⁴⁰ *Macy v. Dep’t of Justice*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, *12 (Apr. 20, 2012).

⁴¹ See Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014).

⁴² Department of Labor, *Discrimination on the Basis of Sex*, Proposed Rule, 80 Fed. Reg. 5246 (Jan. 30, 2015); Office of Federal Contract Compliance Programs (OFCCP) Dir. 2015-1, *Handling individual and systemic sexual orientation and gender identity discrimination complaints* (Apr. 16, 2015); OFCCP Dir. 2014-02, *Gender Identity and Sex Discrimination* (Aug. 19, 2014).

⁴³ See 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105.

⁴⁴ 20 U.S.C. § 1681(a) (2015).

⁴⁵ Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. filed Oct. 28, 2015); Statement of Interest of the United States at 5, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54 (E.D. Va. filed June 29, 2015); Statement of Interest of the United States at 12, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. filed Feb. 24, 2015); Dep’t of Educ., *Title IX Resource Guide*, 1 (Apr. 2015); Dep’t of Educ., “Questions and Answers on Title IX and Sexual Violence,” 5 (Apr. 29, 2014).

⁴⁶ 42 U.S.C. § 3604 (2015).

⁴⁷ *HUD v. Toone*, Charge of Discrimination, FHEO Nos. 06-12-1130-8; 06-121363-8 (Ofc. Hear. & App. Aug. 15, 2013); Memorandum from John Trasviña to FHEO Regional Directors, *Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression* (June 2010).

discrimination against transgender people.⁴⁸ HHS has investigated and resolved complaints of transgender discrimination, including discrimination on the basis of sex in the assignment of patient rooms⁴⁹ as well as access to a sex-specific cancer screening program.⁵⁰ Additionally, HHS recently issued proposed regulations under Section 1557 that explicitly define sex to include sex stereotyping and gender identity.⁵¹

In agreement with the aforementioned federal agencies, an ever-growing number of federal courts have found that discrimination on the basis of gender identity and sex stereotyping is discrimination on the basis of sex in employment,⁵² education⁵³ and health care.⁵⁴

4. The Division’s interpretation of the statutory term “disability” is consistent with the interpretation of other state and federal courts and agencies.

Section 446.13 is also consistent with the interpretation of similar provisions in at least nine other jurisdictions, including Connecticut, Florida, Illinois, Chicago, Massachusetts, New Hampshire, New Jersey, New York, Washington, that have recognized transgender status as an impairment under disability nondiscrimination provisions.⁵⁵

⁴⁸ 42 U.S.C. 18116(a) (2015); *and* Letter from Leon Rodriguez, Dir., Office of Civil Rights, Dep’t of Health and Human Services, to Maya Rupert, Fed. Policy Director, Nat’l Center for Lesbian Rights (July 12, 2012) (OCR Transaction Number: 12-000800), <http://perma.cc/RB8V-ACZU> (“We agree that Section 1557’s sex discrimination prohibition extends to claims of discrimination based on gender identity ... and will accept such complaints for investigation.”).

⁴⁹ U.S. Dep’t of Health and Human Services Office for Civil Rights, *The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients* (July 14, 2015), <http://www.hhs.gov/ocr/civilrights/activities/agreements/TBHC/statement.pdf>.

⁵⁰ U.S. Dep’t of Health and Human Services, *OCR Enforcement under Section 1557 of the Affordable Care Act Sex Discrimination Cases*, <http://www.hhs.gov/ocr/civilrights/understanding/section1557/casesum.html> (last visited, Dec. 7, 2015).

⁵¹ Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172, 54216 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

⁵² *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); *Smith v. City of Salem*, 378 F.3d 566, 572-73 (6th Cir. 2004) (holding that transgender plaintiff sufficiently stated constitutional and Title VII sex discrimination claims based on his allegations that he was discriminated against because of his gender-nonconforming behavior and appearance); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (stating that discrimination on the basis of being transgender is “literally” discrimination on the basis of sex).

⁵³ *See, e.g., Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011); *ED v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

⁵⁴ *Rumble v. Fairview Health Services*, No. 14-cv-2037 SRN/FLN, 2015 WL 1197415, slip op. at 36-37. (D. Minn. Mar. 16, 2015) (denying a motion to dismiss finding sufficient facts alleged that the hospital discriminated against a transgender man because of his gender identity or transgender status).

⁵⁵ *Comm’n on Human Rights & Opportunities v. City of Hartford*, No. CV094019485S, 2010 WL 4612700, at *13 (Conn. Super. Ct. Oct. 27, 2010) (finding transsexualism to be a “physical disability,” giving rise to a cognizable claim under Connecticut state nondiscrimination law); *Dwyer v. Yale University, Commission on Human Rights & Opportunities*, Opinion Nos. 0130315 and 0230323 (Conn. Comm’n on Human Rights & Opportunities 2005), <http://www.ct.gov/chro/cwp/view.asp?a=2528&Q=316044> (recognizing transsexualism as a mental disability under the Connecticut Fair Employment Practices Act); *Smith v. City of Jacksonville Corr. Inst.*, No. 88-5451, 1991 WL 833882, at *11, *12 (Fla. Div. Admin. Hearings Oct. 2, 1991) (holding that an individual with gender dysphoria is

And recently the United States issued a statement of interest in a pending case supporting the position that gender dysphoria is protected under the Americans with Disabilities Act (ADA) because gender dysphoria may result from a physical impairment.⁵⁶ While the ADA explicitly excludes “transsexualism . . . [and] gender identity disorders not resulting from physical impairments” from the definition of “disability,”⁵⁷ the Human Rights Law has no such exclusion.⁵⁸ Gender dysphoria naturally falls under the definition of disability, which is why it needed to be singled out for exclusion under the ADA.⁵⁹ Where the definition of disability is more broadly defined in New York law than in parallel federal law, the Human Rights Law is to be interpreted to offer more protections;⁶⁰ thus gender dysphoria should be included in that definition.

“disabled” and therefore covered by the Florida Human Rights Act because “such individual does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties and in this case has had at least two major life activities impaired”); *Evans v. Illinois Dept. of Human Rights*, No. 1994CF0270, 1999 IL. HUM LEXIS 260 (Ill. Hum. Rts. Com. Nov. 18, 1999) (“[T]he Administrative Law Judge finds that transsexualism is a ‘handicap’ within the meaning of the [Illinois] Human Rights Act.”); *Evans v. Hamburger Hamlet*, No. 93-E-177, 1996 WL 941676, at *8, *9 (Chicago Comm’n Human Rel. May 8, 1996) (holding that gender dysphoria is a disability under the Chicago Human Rights Ordinance); *Lie v. Sky Publishing Corp.*, No. 013117J, 2002 WL 31492397, at *6 (Mass. Super. Oct. 7, 2002) (holding gender identity disorder to be a physical or mental impairment that in its unmitigated form substantially impairs one or more major life activities); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000) (holding that a transgender student had stated a viable discrimination claim under state disability law); *Jette v. Honey Farms Mini Market*, No. 95 SEM 0421, 2001 WL 1602799 (M.C.A.D. Oct. 10, 2001) (holding that transsexual employees are protected by state law prohibitions against disability discrimination); *Doe v. Electro-Craft Corp.*, 1988 WL 1091932 at *5 (N.H. Super. Apr. 8, 1988) (allowing investigation of an employment discrimination complaint alleging handicap based on transsexual status, finding transsexualism is associated with substantial limitation in the major life activities of social and occupational functioning as well as caring for oneself); *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 367 (N.J. Super. Ct. App. Div. 2001) (“[G]ender dysphoria is a recognized mental or physical disability that can be demonstrated psychologically by accepted clinical diagnostic techniques and qualifies as a handicap”); *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993) (recognizing that gender dysphoria is an “abnormal condition” eligible for protection under Washington law although not finding discrimination in this instance). *Cf. Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470 (Iowa 1983) (rejecting a claim that transsexualism was a “physical or mental impairment” arguing that it did not impair her ability to work).

⁵⁶ Second Statement of Interest of the United States at 6, *Blatt v. Cabela’s Retail*, No. 5:14-cv-4822-JFL (E.D. Pa. filed Aug. 15, 2014) (urging the court to “adopt this proposed construction, under which Plaintiff’s gender dysphoria would not be excluded from the ADA’s definition of ‘disability’”).

⁵⁷ 42 U.S.C. § 12211(b)(1) (2015).

⁵⁸ The ADA was passed in 1990, subsequent to the Human Rights Law. Pub. L. No. 101–336, 104 Stat. 327 (1990).

⁵⁹ The ADA was based on the Rehabilitation Act, which had no exclusion and courts had interpreted to include transgender individuals. *See Blackwell v. U.S. Dep’t of Treasury*, 639 F.Supp. 289, 290 (D.D.C.1986) (transvestitism is a protected handicap under Rehabilitation Act); *Doe v. United States Postal Serv.*, 37 Fair Empl.Prac.Cas. (BNA) 1867, 1869 (D.D.C.1985) (transsexualism is a protected handicap under Rehabilitation Act). Animus toward transgender people and a desire to ensure that they were not protected led to the ADA exclusion. *See Plaintiff’s Memorandum of Law in Opposition to Defendant’s Partial Motion to Dismiss Plaintiff’s First Amended Complaint, Blatt v. Cabela’s Retail*, No. 5:14-cv-4822-JFL (E.D. Pa. filed Aug. 15, 2014) (detailing the legislative history).

⁶⁰ *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 218-19 (N.Y. 1985) (finding that because the term “disability” is more broadly defined in New York than under the Rehabilitation Act, New York’s definition includes disabilities that may not be covered under Federal law); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 154-156 (2d Cir. 1998) (noting legislative history calling for coextensive interpretation of state and federal disability discrimination statutes, but interpreting Human Rights Law to be more protective based on different statutory definition).

D. Recommendation: Add a subsection explaining the purpose of Section 466.13.

After Section 446.13(a) on Statutory Authority, the Committee proposes the addition of a subsection on purpose:

(b) Purpose. In order to meet the obligations to prohibit discrimination based on sex as set forth in the Human Rights Law, the Division of Human Rights adopts this chapter for the following purposes:

(1) To provide guidance with regard to the requirements of the law to all employers, housing providers, businesses, organizations, educational institutions, and State government agencies and contractors in seeking compliance with the Human Rights Law;

(2) To educate the public on the behaviors, conduct, and actions that constitute unlawful discrimination based on gender identity or expression;

(3) To ensure that transgender, gender-nonconforming, and intersex people are treated in a manner consistent with their identity or expression, rather than according to their presumed or assigned sex or gender; and

(4) To guide the internal processing of complaints filed with the Commission on Human Rights.

E. Recommendation: Section 466.13(b) Definitions: Adopt gender-neutral pronouns and define “intersex.”

The Committee proposes the following language (in italics) be added to Section 466.13(b):

(1) Gender identity means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.

(2) A transgender person is an individual who has a gender identity different from the sex assigned to *them* at birth.

(3) Gender dysphoria is a recognized medical condition related to an individual having a gender identity different from the sex assigned to *them* at birth.

(4) Intersex conditions, sometimes referred to as a Difference/Disorder of Sex Development, refer to medically-diagnosed reproductive or sexual anatomy and/or chromosomal patterns that transgress typical definitions of male or female.

The use of gender-neutral pronouns is more inclusive of non-binary individuals who are neither male nor female, both, or a combination of male and female.

The discussion of the needs of people with intersex conditions is undertaken in Section H below.

F. Recommendation: Section 466.13(c) Discrimination on the basis of gender identity is sex discrimination.

The Committee proposes the following language (in italics) be added to Section 466.13(c):

(1) The term “sex” when used in the Human Rights Law includes gender identity, *gender expression, sex stereotypes*, the status of being transgender, *and the status of being intersex*.

(2) The prohibitions contained in the Human Rights Law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected category, also prohibit discrimination on the basis of gender identity, *gender expression, sex stereotypes*, the status of being transgender, *or the status of being intersex*.

(3) Harassment on the basis of a person’s gender identity, *gender expression, sex stereotypes*, the status of being transgender, *or the status of being intersex* is sexual harassment.

The proposed definition of “gender identity” includes “appearance” and “expression” regardless of whether those things are “different from that traditionally associated with the sex assigned to that person at birth.”⁶¹ However, protections would be strengthened by explicitly including “gender expression” and “sex stereotypes” under the definition of sex. That is the approach that HHS adopted in recent Section 1557 proposed regulations: “On the basis of sex includes, but is not limited to, on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, or gender identity.”⁶²

With the proposed regulations as written, a woman who was assigned female at birth and identifies as female might still be fired, for example, for wearing typically masculine clothing if an employer deems that to not be in compliance with their dress code. “Sex stereotyping” case law has, to date, not sufficiently protected individuals whose gender expression transgresses gender norms to any significant degree. Under Title VII, for example, men can be fired for having long hair⁶³ and women can be fired for not wearing makeup.⁶⁴

⁶¹ 37 N.Y. Reg. 21, 22 (Nov. 4, 2015).

⁶² Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172, 54216-17 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92) (defining sex stereotypes as “stereotypical notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include expectations that gender can only be constructed within two distinct opposite and disconnected forms (masculinity and femininity), and that gender cannot be constructed outside of this gender construct (individuals who identify as neither, both, or as a combination of male and female genders”).

⁶³ See, e.g., *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1089 (5th Cir. 1975) (en banc) (holding that grooming standards prohibiting long hair on men do not constitute “sex plus” discrimination because Title VII does not protect plaintiffs from discrimination on the basis of non-immutable sex characteristics); *Hayden ex rel. AH v. Greensburg Community School*, 743 F. 3d 569 (7th Cir. 2014) (detailing long line of hair length cases that have been upheld because equal burdens are imposed on men and women).

⁶⁴ *Jespersen v. Harrah's Operating Co., Inc.*, 392 F. 3d 1076 (9th Cir. 2004) (holding that casino’s grooming policy “did not constitute sex discrimination because it imposed equal burdens on both sexes.”).

Employers would likely argue under the proposed regulations that they were not discriminating on the basis of “gender identity” or even “gender expression,” but that they simply have a dress code that everyone must follow. Explicit prohibitions on sex stereotyping would help to emphasize that a dress code itself cannot be rooted in sex stereotypes, and should ideally be gender-neutral. It would also offer clearer protections for individuals in institutional settings, who may be denied the ability to wear their hair, clothing, or makeup in a gender nonconforming way because of gendered dress codes.

Protections based on “transgender status” are important to provide full protection and must be retained in the final version. For example, in a case where a drug treatment facility denied a transgender man a job as a male urine monitor, the defendants argued in their motion to dismiss, “While New Jersey law prohibits discrimination on the basis of gender identity or expression, it does not expressly hold the same as to transgender status.”⁶⁵ They further argued that “Defendants did not discriminate against Plaintiff by not allowing him the freedom to express his gender identity. Instead, Defendants decided not to hire Plaintiff for the open male urine monitor position on the basis that he could not do the job function that requires a bona fide occupational qualification [namely, being male].”⁶⁶ In many—if not most—instances of discrimination, transgender individuals are being discriminated against because people are uncomfortable with the person’s physical anatomy or history of gender transition, not simply because the person has a particular gender identity or expression.⁶⁷ “Transgender status” is thus a more accurate way to capture this particular form of sex discrimination.

There is also a need to clarify that excluding transgender individuals from single-sex spaces is unlawful sex discrimination. Human Rights Law § 296(2)(b) provides that:

Nothing in this subdivision shall be construed to prevent the barring of any person, because of the sex of such person, from places of public accommodation, resort or amusement if the division grants an exemption based on bona fide considerations of public policy; nor shall this subdivision apply to the rental of rooms in a housing accommodation which restricts such rental to individuals of one sex.

There can be a perceived need to address such provisions in cases where transgender people are being denied use of single-sex facilities. Courts have noted that an exception for sex-specific facilities does not address the question of whether it is legal to deny a transgender person the use of a facility that matches their affirmed sex. In *Doe v. Regional School Unit 26*, the Maine Supreme Judicial Court found that a school violated the Maine Human Rights Act and discriminated against a transgender student when it prohibited her from using the girls’

⁶⁵ Memorandum of Law in Opposition to Plaintiff’s Cross-Motion for Summary Judgment and in Further Support of Defendants’ Motion for Summary Judgment at 4, *Devoureau vs. Camden Treatment Assoc.*, No. L-1825-11 (New Jersey Superior Ct. *filed* July 23, 2013).

⁶⁶ Memorandum of Law in Support of Defendants’ Motion for Summary Judgment at 29, *Devoureau vs. Camden Treatment Associates*, No. L-1825-11 (New Jersey Superior Ct. *filed* June 26, 2013).

⁶⁷ “Past and present biological sex characteristics are the only factors distinguishing transgender women from cisgender women, making it reasonable to infer that discrimination against transgender employees is a reaction to those differences. As some commentators have argued, “[r]evulsion” to transgender bodies “seems to lie at the root of most transgender discrimination.” Case Comment: *EEOC Affirms Protections For Transgender Employees*: Macy v. Holder, 126 Harv. L. Rev. 1731, 1735 (2013), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol126_macy_v_holder.pdf.

communal bathroom and required her to use the unisex staff bathroom.⁶⁸ This was the case even though another Maine statute required schools to maintain bathrooms that were “[s]eparated according to sex.”⁶⁹ Similarly, the Colorado Division of Human Rights found it unlawful to exclude a six-year-old transgender girl from the girls’ bathroom even where Colorado law permits public accommodations to be sex-specific.⁷⁰ The proposed additional regulations below can eliminate covered entities’ possible confusion over Human Rights Law § 296(2)(b) and make clear its irrelevance to questions concerning transgender people’s use of single-sex facilities.

G. Recommendation: Section 466.13(d) Discrimination on the basis of gender dysphoria is disability discrimination.

1. Definition of disability

The Committee proposes the following language (in italics) be added to Section 466.13(d)(2):

The term “disability” when used in the Human Rights Law includes gender dysphoria, *transsexualism, gender identity disorder, or any other medical, mental, anatomical, physiological, genetic or neurological diagnosis stemming from being a gender other than that typically associated with one’s sex assigned at birth.*

Codifying one particular diagnostic term is overly limiting. It does not account for the inevitable evolution in terminology that will occur as the stigmatization of transgender people decreases and the medical community’s understanding of the etiology and treatment of gender dysphoria continues to evolve. “Gender dysphoria” is merely the current term for the diagnosis in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth ed. (DSM-5). Gender dysphoria has been recognized and treated in modern medicine since the early 1900’s and was first included as “transsexualism” in the DSM-III over 30 years ago and in the DSM-IV, it was known as “gender identity disorder.”⁷¹ In the U.S., the International Classification of Diseases, Tenth Revision, Clinical Modification (ICD-10-CM) is used to classify all medical conditions. “Gender dysphoria” does not appear in the ICD-10-CM, but only “gender identity disorders” and “transsexualism.”⁷² Accordingly, the broader, more inclusive, language proposed here allows such evolution and should be adopted in the final regulation.

Additionally, the proposed regulation is too narrow in that it conflates “disability” with

⁶⁸ 86 A.3d 600 (Me. 2014).

⁶⁹ *Id.* at 605.

⁷⁰ *Mathis v. Fountain-Fort Carson School District 8*, No. P20130034X, 8 (Colo. Civ. Rts. Div. 2013), http://www.transgenderlegal.org/media/uploads/doc_529.pdf.

⁷¹ See Friedemann Pfäfflin, *Mental Health Issues*, in PRINCIPLES OF TRANSGENDER MEDICINE AND SURGERY 169, 170-71, 173 (Randi Ettner et al. eds., 2007).

⁷² F64 Gender identity disorders, *International Classification of Diseases, Tenth Revision, Clinical Modification* (ICD-10-CM) (2015), http://www.cdc.gov/nchs/data/icd/icd10cm/2016/ICD10CM_FY2016_Full_PDF.ZIP [Tabular.pdf page 228].

“impairment.” Under the statutory definition of disability, gender dysphoria would be the impairment. The definition of disability in Human Rights Law § 292.21 recognizes that individuals with impairments can face stigma and discrimination even if the impairment is in a controlled state. By equating “gender dysphoria” with “disability,” this could be misinterpreted as applying only to people who are currently experiencing clinically significant distress, which is part of the definition of “gender dysphoria” in the DSM-5. It could exclude those transgender people who may have experienced gender dysphoria in the past, but are still facing discrimination because of it, indeed perhaps directly because they took steps to address their impairment in the form of living openly according to their affirmed sex.

2. Recommendation: Reasonable accommodation & harassment

The Committee proposes the following language (in italics) be added to Section 466.13(d)(4):

Refusal to provide reasonable accommodation for persons with gender dysphoria, where requested and necessary, and in accordance with the Division’s regulations on reasonable accommodation found at 9 NYCRR § 466.11, is disability discrimination. *Reasonable accommodations may include, but are not limited to:*

ensuring that people can use single-sex facilities, including restrooms and locker rooms, and participate in single-sex programs or jobs in accordance with their gender identity without proof of any particular medical treatment;

allowing people to comply with sex-specific dress or grooming standards in accordance with their gender identity without proof of any particular medical treatment, including allowing an individual to maintain a gender neutral appearance or to comply alternately with both male and female dress codes;

allowing people to use their initials or a preferred name without proof of a legal name change;

using an individuals’ pronoun or title without proof of any particular medical treatment;

allowing additional medical or personal leave for transgender-related care.

(6) The prejudices or mere discomfort of others cannot be used as evidence that an accommodation is not “reasonable” or poses an “undue burden.”

(7) Harassment on the basis of a person’s gender dysphoria is harassment on the basis of disability.

Section 466.13(d)(4) makes clear that refusal to provide reasonable accommodation for persons with gender dysphoria is disability discrimination, which is in accordance with existing case law.⁷³ However, the existing examples in 9 NYCRR § 466.11 do not provide enough clarity for the types of reasonable accommodations that people with gender dysphoria may require.

The regulations should explicitly clarify that covered entities shall make reasonable

⁷³ *Doe v. Bell*, 754 N.Y.S.2d 846, 856 (Sup. Ct. N.Y. Cty. 2003); *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 764 (Sup. Ct., Kings Cty. N.Y. 2013).

accommodations for individuals with gender dysphoria to follow dress codes and grooming standards consistent with their gender identity. Current regulations do not “require accommodation of behaviors that do not meet the employer’s workplace behavior standards that are consistently applied to all similarly situated employees, even if these behaviors are caused by a disability. This would include, but not be limited to: dress codes, grooming standards . . . though reasonable and necessary deviations must be allowed as accommodations.”⁷⁴ While at least one subsequent court decision clarifies that modifications to a dress code may be a reasonable accommodation for gender dysphoria,⁷⁵ the existing regulation could cause confusion to an employer if not clarified. Furthermore, living consistently with one’s gender identity in all aspects of life, including wearing clothing culturally consistent with one’s gender, is a crucial part of the medical treatment for gender dysphoria. Therefore, the regulations should clarify that reasonable accommodations may include modification to a dress code or grooming standards.

Many transgender people are not able to obtain a court-ordered name change for a variety of reasons. New York law protects the right to change one’s name through common use without a court order.⁷⁶ As noted above, living consistently with one’s affirmed sex in all aspects of life is a crucial part of the medical treatment for gender dysphoria. Conversely, forcing a transgender person to use their given name may publicize information about their gender history to others against their will, which can lead to distress, harassment and even violence. Therefore, the final regulations should expressly codify the right to use one’s preferred name as a reasonable accommodation.

Similarly, deliberate use of improper pronouns has been recognized as discrimination under the categories of disability and sex. In *Doe v. City of New York*, the purposeful use of male pronouns to refer to a transgender woman and disregard for a legal name change order by staff of the HIV/ AIDS Services Administration was sufficient to state a cause of action under the New York City and/or State Human Rights Law under the categories of sex and disability.⁷⁷

The Division should make it clear that the prejudices or mere discomfort of others cannot be used to deny a reasonable accommodation. This argument would typically arise in the context of sex-specific facilities like bathrooms and locker rooms. Courts have found that mere discomfort and unfamiliarity with transgender people is not a legitimate basis to exclude transgender people from single-sex facilities.⁷⁸

⁷⁴ 9 NYCRR § 466.11 (g)(1)(i) (2015).

⁷⁵ See *Doe v. Bell*, 754 N.Y.S.2d at 856.

⁷⁶ *In re Furick*, 33 Misc. 3d 169, 170 (Sup. Ct. 2011) (“[I]t is important to note that ‘anybody may change their names without asking the approval of the court at any time and, provided fraud was not the inspiration for the act, the new name will be as effectively assumed and recognized as if its use had been provided for by a court order’ (*Eisenberg v. Strasser*, 1 Misc.3d 299, 768 N.Y.S.2d 773 [Sup. Ct., Kings County, 2003], citing *Application of Lipschutz*, 178 Misc. 113–4, 32 N.Y.S.2d 264 [Sup. Ct., Queens County, 1941]). The common law right to change one’s name is not merely a theoretical option, it is a real and recognized one. The judicially ordered name change process found in Civil Rights Law § 60, *et seq.*, neither adds nor detracts from a person’s existing common law right to change his or her name (*Matter of Conde*, 186 Misc.2d 785, 720 N.Y.S.2d 727 [Civ.Ct., Kings County, 2000], citing *Application of Ellerby*, 99 Misc.2d 691, 416 N.Y.S.2d 968 [Civ.Ct. King’s County, 1979]; *Application of Sakaris*, 160 Misc.2d 657, 610 N.Y.S.2d 1007 [Civ.Ct. Richmond County, 1993], citing *Smith v. United States Cas. Co.*, 197 N.Y. 420, 90 N.E. 947”).

⁷⁷ 976 N.Y.S.2d 360, 364 (Sup. Ct. N.Y. Co. 2013).

⁷⁸ *E.g., Dep’t. of Fair Employment and Housing v. American Pacific Corp.*, No. 34-2013-00151153-CU-CR-GDS (Cal. Sup. Ct. March 13, 2014), <http://www.dfeh.ca.gov/res/docs/Announcements/Lozano%20final%20order.pdf>

H. Recommendation: Add a section clarifying that intersex status discrimination is disability discrimination.

The Committee proposes that the following subsection be added to the final regulation:

(e) Discrimination on the basis of intersex status is disability discrimination.

(1) The term “disability” is defined in Human Rights Law § 292.21 as recited in (d)(1) of this section.

(2) The term “disability” when used in the Human Rights Law includes intersex status. Others, including medical professionals, may regard intersex traits as impairments when those traits do not in fact impair health or bodily function.

(3) The prohibitions contained in the Human Rights Law against discrimination on the basis of disability, in all areas of jurisdiction where disability is a protected category, also prohibit discrimination on the basis of intersex status.

(i.) Places of public accommodation, including clinics and hospitals, are obligated under § 296.2(a) to refrain from discriminating on the basis of disability, which includes intersex status.

(ii.) Prohibited discrimination includes, but is not limited to, rendering a course of treatment that is (a) not medically necessary and (b) otherwise unlawful, such as clitoral reduction surgery (N.Y. Penal Law § 130.85), on the basis of intersex status without the informed consent of the intersex person.

(4) Refusal to provide reasonable accommodation for intersex persons, where requested and necessary, and in accordance with the Divisions regulations on reasonable accommodation found at 9 NYCRR § 466.11, is disability discrimination.

(5) Harassment on the basis of a person's intersex status is harassment on the basis of disability. Harassment includes, but is not limited to, conducting medically unnecessary examinations of the bodies of intersex children (a) without first obtaining parental consent, or the consent of the child if old enough to be involved in their own medical care, (b) for purposes unrelated to the health of the intersex person, such as to serve as a “teaching tool” for medical professionals in training or to satisfy providers' curiosity.

The Committee urges the Division to explicitly include and account for intersex individuals under the definition of “disability.” “Intersex,” sometimes called a Difference in Sex Development, refers to the estimated one in 2,000 people born with a reproductive or sexual

(denying motion to dismiss for claim brought under California state law where transgender man was denied the use of men’s locker room, noting “Defendant's hypothetical assertions of emotional discomfort about sharing facilities with transgender individuals are no different than similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation in housing, education, and access to public facilities like restrooms, locker rooms, swimming pools, eating facilities and drinking fountains.”); *Cruzan v. Special School District*, No. 1, 294 F.3d 981, 984 (8th Cir. 2002) (finding it was not sexual harassment or religious discrimination for a non-trans woman to share a restroom with a trans woman).

anatomy and/or chromosome pattern that doesn't fit typical definitions of male or female.⁷⁹ Typically, individuals who are intersex are diagnosed in infancy by a medical professional. Intersex conditions may be referred to in medical records as “Disorders of Sex Development” as well as by specific terms for particular conditions, such as congenital adrenal hyperplasia, Klinefelter’s syndrome, Turner’s syndrome, hypospadias, and others. Unfortunately, intersex individuals are often subjected in childhood to harmful and non-consensual surgeries in an attempt to “normalize” their bodies, and this practice is increasingly recognized as unethical or illegal.⁸⁰ While some people are identified as intersex at birth, others only learn of their intersex status in puberty or adulthood.⁸¹

Some intersex individuals decide at some point to transition from the gender they were assigned at birth to another gender, and thus may also identify as transgender; others may identify with their sex assigned at birth for their entire lives. While some people born intersex do claim intersex as an identity, intersex is fundamentally a physical condition and is distinct from gender. That is, a person born intersex may ultimately identify as a man, a woman, or a non-binary gender, and may be straight, gay/lesbian, bisexual, or asexual—as all people may.

I. Recommendation: Add a section to provide more specific guidance on what constitutes discrimination under Section 446.13.

The Committee proposes that the following subsection be added to the final regulation:

- (f) Discrimination based on sex or disability shall include but not be limited to:
- (1) Refusing the use of any sex-specific facilities in a manner consistent with an individual’s gender identity, as expressed by the individual, such as restrooms, locker rooms, homeless shelters, dormitories, jails or detention centers, group homes, youth housing, substance use treatment programs, hospital facilities, etc.;
 - (2) Deliberately and repeatedly misusing an individual's preferred name, form of address or gender-related pronoun, regardless of whether the individual has legally changed their name;
 - (3) Informing others that an individual is transgender or intersex without their consent;
 - (4) Deliberately or repeatedly asking invasive or unwelcome questions about an individual's body, gender identity or expression, gender transition, or transgender or intersex status;
 - (5) Taking adverse action or failing to preserve confidentiality after learning through a background check or other means that a person is transgender or intersex for employment, housing or any other application;

⁷⁹ Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 161 (2000).

⁸⁰ See Julie A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 LOY.L.A. L. REV. 849, 856-862 (2012) (providing historical overview of medical approach to “correcting” intersex conditions at birth in light of medical advancements, social movements, and developing legal theories around personal and anatomical autonomy).

⁸¹ See e.g., Julianne Imperato-McGinley et al., *Steroid 5 Alpha-Reductase Deficiency in Man: An Inherited Form of Male Pseudohermaphroditism*, 186 SCIENCE 1213 (1974).

- (6) Taking adverse action when an applicant does not mention a change of gender or name change associated with a change in gender for employment, housing or any other application, except where the applicant withholds a legal name when the employer specifically requests it for a legitimate business purpose;
- (7) Denying individuals the right to comply with any existing dress codes and/or grooming standards in a manner consistent with their gender identity or gender expression, or prohibiting them from maintaining a gender-neutral appearance that is consistent with existing dress codes;
- (8) Other discrimination in employment settings, including but not limited to:
 - (A) Failing to stop or prevent harassment by coworkers, management, or others.
 - (B) Sponsoring, funding or administering an employee health insurance plan or health program that discriminates on the basis of gender identity, including through discriminatory exclusions of medically necessary care related to gender transition or denying services on the basis of gender identity or related medical conditions.
 - (C) Disqualifying an individual from a position on the basis of their transgender status or gender identity. In the narrow circumstances where sex is a bona fide occupational qualification (BFOQ), any BFOQ must be applied in a manner consistent with their gender identity.
 - (D) Denying reasonable accommodations when requested by the employee (including medical leave) for transgender-related health care needs that are consistent with such accommodations that are provided for other medical needs. Such needs include but are not limited to time off for medical or counseling appointments, surgery, recovery from surgery, and any other transgender-related procedures.
- (9) Other discrimination in educational institutions, including but not limited to:
 - (A) Failing to use the student's preferred name or pronoun in all student records where it is legally permissible to do so, regardless of whether an individual has legally changed their name or gender.
 - (B) Denying a student access to a single-sex educational program or activity that is most consistent with their gender identity.
 - (C) Publicizing a student's transgender or intersex status, former name or sex assigned at birth and medical history to others, including to a minor individual's parents, without their consent when disclosure is not required by law.

The above protections and respect for the affirmed sex of transgender people is well established in New York and in other jurisdictions. New York City, for example, recognizes the affirmed sex of transgender individuals on NYC birth certificates, without requiring surgery or

hormone treatments.⁸² The City also allows individuals to self-designate their sex for purposes of placement in single-sex homeless shelters⁸³ and for designating the gender marker on NYC municipal identification cards.⁸⁴ The NYC Commission on Human Rights, among other things, recognizes that transgender individuals may use single-sex facilities according to their affirmed sex and that asking for identification to do so is evidence of discrimination under the New York City Human Rights Law.⁸⁵ The NYC Department of Education’s Transgender Student Guidelines provide comprehensive guidelines, including the right to dress, use facilities, participate in sports and other sex-specific activities in accordance with one’s gender identity.⁸⁶

On the state level, similar recognition and protections exist. Many local jurisdictions in New York already provide protections from gender identity discrimination.⁸⁷ NYS birth certificates⁸⁸ and driver licenses and IDs⁸⁹ can be corrected without proof of surgery or hormones. The NYS Education Department has similarly issued *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students*.⁹⁰

The Federal government also recognizes the affirmed sex of transgender people without

⁸² NYC Dep’t of Health and Mental Hygiene, *Frequently Asked Questions about Correcting a NYC Birth Certificate*, <http://www.nyc.gov/html/doh/html/services/vr-corrections-faq.shtml#6> (last visited Dec. 15, 2015) (“The Health Department no longer requires proof of convertive surgery.”).

⁸³ Department of Homeless Services policy provides that transgender clients should have appropriate access to bathrooms and showers, and that residents may dress in accordance with their gender identity, regardless of what sex is listed on their ID. NYC Department of Homeless Services, Division of Adult Services, *Transgender/Intersex Clients*, Procedure 06-1-31 (2006), http://coalhome.3cdn.net/c7a840f68c28233a37_8qm6bngdv.pdf.

⁸⁴ New York City Administrative Code Title 3 Section 3-115(c)(1) (2015), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1709715&GUID=96D7B94F-F24B-4308-8F29-6C559BF444EB>.

⁸⁵ New York City Commission on Human Rights, *Guidelines Regarding Gender Identity Discrimination, a Form of Discrimination Prohibited by The New York City Human Rights Law*, 5 (2006), http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis_English.pdf (“Requiring individuals to provide identification as a means of identifying their gender before allowing them to use the restroom or other sex-segregated facility” suggests discriminatory conduct has occurred.).

⁸⁶ NYC Dep’t. of Education, *Transgender Student Guidelines*, <http://schools.nyc.gov/RulesPolicies/TransgenderStudentGuidelines/default.htm> (last visited Dec. 15, 2015).

⁸⁷ Christy Mallory and Sarah Liebowitz, *Local Laws and Government Policies Prohibiting Discrimination Based on Gender Identity in New York*, The Williams Institute, 2-3 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Liebowitz-NY-local-laws-Jun-2013.pdf> (Some cities with protections include Albany, Binghamton, Buffalo, Ithaca, New York City, Rochester, and Syracuse and counties include Suffolk, Tompkins, and Westchester).

⁸⁸ Letter from Guy Warner, Director, Bureau of Vital Records, N.Y. State Dep’t of Health, Overview of N.Y. State Birth Certificate Amendment Process (2014), <http://www.empirejustice.org/assets/pdf/policy-advocacy/doh-bc.pdf> (last visited Dec. 15, 2015).

⁸⁹ N.Y. Dep’t of Motor Vehicles, *Memorandum from Patricia B. Adduci, Comm’r, to All Issuing Officers* (Apr. 29, 1987), <http://rnytg.org/wp-content/uploads/2012/10/DMVGenderChangeMemo.pdf>.

⁹⁰ NYS Education Department, *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students* (2015), http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf.

regard to surgical or hormonal status in numerous contexts: Social Security records,⁹¹ U.S. passport,⁹² immigration documents,⁹³ federal employee records,⁹⁴ and Veterans Health Administration records.⁹⁵

The Human Rights Law is interpreted to be at least as protective as comparable federal laws, such as Title VII.⁹⁶ Agencies across the federal government have already made it explicit that under Title VII and other sex discrimination laws, equal treatment includes the use of single-sex facilities consistent with a person's gender identity. The EEOC has held that an employer's refusal to provide equal access to workplace facilities that are consistent with an employee's gender identity, solely because the employee is transgender, violates Title VII.⁹⁷ The Justice Department has also adopted this view in litigation and case resolutions under Title IX⁹⁸ and the

⁹¹ Soc. Sec. Admin, *RM 10212.200 Changing Numident Data for Reasons other than Name Change* (2013), <https://secure.ssa.gov/poms.nsf/lnx/0110212200> (“Surgery is no longer required to change the sex field on the Numident.”).

⁹² U.S. Dep't of State, 7 Foreign Aff. Manual § 1310(d) Appendix M (2015), <http://www.state.gov/documents/organization/143160.pdf> (“Sexual reassignment surgery is not a prerequisite for passport issuance based on gender change.”). To correct the sex designation on a passport, a doctor must certify that the individual has had “appropriate clinical treatment,” *id.* at § 1320(b)(1)(g), but “[o]ther medical records are not to be requested,” *id.* at § 1310(e).

⁹³ U.S. Citizenship & Immigration Services, Adjudication of Immigration Benefits for Transgender Individuals; Addition of Adjudicator's Field Manual (AFM) Subchapter 10.22, <http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1/Chapter10-22.html> (requiring a medical certification stating that “the individual has had appropriate clinical treatment for gender transition to the new gender”).

⁹⁴ Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace (May 27, 2011), <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance> (allowing for the gender marker on records to be corrected based on submission of an updated passport, updated state driver's license or identification card, or a physician's certification that the employee has had appropriate clinical treatment for gender transition).

⁹⁵ Department of Veterans Affairs, *Providing Health Care for Transgender and Intersex Veterans*, Veterans Health Administration Directive 2013-003, 3 (2013), http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2863 (requiring that transgender veterans' patient records be “consistent with the patient's self-identified gender.”).

⁹⁶ *See, e.g., Sogg v. Am. Airlines*, 603 N.Y.S.2d 21, 23 (N.Y. App. Div. 1993) (applying Title VII case law on burden and order of proof to Human Rights Law case); *Nevins v. Blockbuster Ent. Group*, 950 F.Supp. 60, 63 (E.D.N.Y. 1996) (“New York Executive Law § 296 provides similar protections to Title VII law, and as result, is subject to the same analysis.”).

⁹⁷ *Lusardi v. McHugh*, E.E.O.C. App. No. 0120133395 (Apr. 1, 2015). *See also* EEOC v. Deluxe Financial Services, Inc., No. 15-cv-02646-ADM-SER (D. Minn. Civ., filed June 4, 2015) (alleging that Defendant has “a companywide policy or practice that discriminates against transgender female employees by precluding them use of a restroom that is consistent with their sex.”). *See also* EEOC, *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination* (Aug. 27, 2015), http://www1.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm (noting that enforcement of Title VII with respect to transgender people is a top Commission enforcement priority).

⁹⁸ Statement of Interest of the United States, G.G. *ex rel.* Grimm, *supra* note 45; Statement of the United States, Tooley, *supra* note 45; Resolution Agreement between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013); Resolution Agreement between the Downey Unified School District and the U.S. Department of Education, Office for Civil Rights (OCR Case No. 09-12-1095 Oct. 8, 2014).

implementation guidance under the Violence Against Women Act.⁹⁹ Numerous other federal agencies have also adopted this view, including the Office of Special Counsel in a 2014 decision;¹⁰⁰ the Department of Labor guidance for the Job Corps programs¹⁰¹ and other employment and training programs,¹⁰² in proposed sex discrimination rules for federal contractors,¹⁰³ and in bathroom guidelines from the Occupational Safety and Health Administration (OSHA);¹⁰⁴ the Department of Education in guidance on single-sex classes and programs under Title IX;¹⁰⁵ the Department of Housing and Urban Development in guidance for homeless shelters and transitional housing programs;¹⁰⁶ the Department of Homeland Security's Immigration and Customs Enforcement has issued guidelines allowing for placement of transgender individuals in sex-specific facilities according to their gender identity;¹⁰⁷ and the Veterans Health Administration issued a directive that, among other things, makes single-sex facility and room assignments based on "self-identified gender, irrespective of appearance and/or surgical history."¹⁰⁸

In addition to the federal government, at least 13 states, the District of Columbia and numerous other cities, have, by regulations, guidance, case law, or specific statutory language, clarified that state laws prohibiting gender identity discrimination require that transgender individuals have access to sex-specific facilities consistent with their gender identity.¹⁰⁹

⁹⁹ See Dep't of Justice, *Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013*, at 9 (Apr. 9, 2013).

¹⁰⁰ Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Jane Doe) (Aug. 28, 2014).

¹⁰¹ Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015).

¹⁰² Training and Employment Guidance Letter No. 37-14, Training and Employment Guidance Letter on Gender Identity, Gender Expression and Sex Stereotyping (May 29, 2015).

¹⁰³ Discrimination on the Basis of Sex, Notice of Proposed Rulemaking, RIN 1250-AA05, 80 Fed. Reg. 5247 (Jan. 30, 2015); Department of Labor, Office of Federal Contract Compliance Programs, *Frequently Asked Questions EO 13672 Final Rule* (2015), http://www.dol.gov/ofccp/lgbt/lgbt_faqs.html#Q35.

¹⁰⁴ Occupational Safety and Health Admin., *A Guide to Restroom Access for Transgender Workers*, (2015), <https://www.osha.gov/Publications/OSHA3795.pdf>.

¹⁰⁵ Dep't of Educ., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, 25 (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

¹⁰⁶ Dep't of Hous. and Urban Dev., Notice CPD-15-02: Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities (Feb. 2015).

¹⁰⁷ U.S. Immigration and Customs Enforcement, *Further Guidance Regarding the Care of Transgender Detainees* 11, (June 29, 2015), <https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf>.

¹⁰⁸ *Providing Health Care for Transgender and Intersex Veterans supra* note 95, at 8. That approach is consistent with hospital best practices regarding transgender individuals. Lambda Legal, the New York City Bar, and the Human Rights Campaign Foundation, *Creating Equal Access to Quality Health Care for Transgender Patients: Transgender-Affirming Hospital Policies* (2013) http://www.lambdalegal.org/publications/fs_transgender-affirming-hospital-policies.

¹⁰⁹ See, e.g., Occupational Safety and Health Admin., *A Guide to Restroom Access for Transgender Workers*, 2-3 (2015), <https://www.osha.gov/Publications/OSHA3795.pdf> (referencing laws of Colorado, Delaware, the District of

Providing specific guidance on the topics enumerated above not is only in accordance with the established consensus of interpreting nondiscrimination laws as they relate to transgender and gender-nonconforming people, but it is also necessary to fully carry out the Division’s purpose of clarifying how gender identity discrimination may constitute sex and disability discrimination under the Human Rights Law.

J. Conclusion.

The proposed amendments and the Committee’s suggested additions are comparable to the current policies of numerous local, state and federal agencies and are consistent with existing case law. The Committee urges the Division to adopt the amendments as detailed above to ensure that the benefits of the law reach every New Yorker who needs them.

Columbia, Iowa, Vermont, Washington); City and County of San Francisco Human Rights Commission, Compliance Guidelines to Prohibit Gender Identity Discrimination (2003), <http://sf-hrc.org/compliance-guidelines-prohibit-gender-identity-discrimination>; New Jersey law provides that sex-specific facilities are permitted “provided individuals shall be admitted based on their gender identity or expression.” N.J.S.A. 10:5-12(f)1 (2015).