



**COMMITTEE ON LESBIAN, GAY,
BISEXUAL AND TRANSGENDER RIGHTS**

NOAH E. LEWIS

CHAIR

3553 82ND STREET, #6D

JACKSON HEIGHTS, NY 11372

PHONE: (347) 612-4312

FAX: (347) 990-1781

nlewis@transcendlegal.org

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ALEJANDRA CARABALLO

SECRETARY

7 HANOVER SQUARE, FLOOR 18

NEW YORK, NY 10004

PHONE: (212) 659-6113

FAX: (212) 714-2206

acaraballo@nylag.org

By Email

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004
rulecomments@nycourts.gov

Re: Comments on and Recommended Changes to Proposed Amendment of Various Non-Discrimination Rules of the Unified Court System

Dear Mr. McConnell:

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 thanks the Administrative Board of the Courts for proposing to explicitly include “gender identity” and “gender expression” in various court non-discrimination rules.¹ We strongly support this clarification. We offer the following comments in support of the proposed amendments and propose suggestions aimed at strengthening the amendments to further their intended purpose of eliminating discrimination.

The proposed amendments will codify and add to existing case law holding that transgender and gender-nonconforming people are protected under the categories of sex and

¹ 22 NYCRR Part 1200, Rule 8.4 (g); 22 NYCRR Part 100; 22 NYCRR § 50.1(II)(C); 22 NYCRR § 25.16(a).

disability. The proposed amendments will bring court policy in line with well-established state and federal interpretations of analogous civil rights law. These amendments would aid in putting the New York State judiciary, members of the New York Bar, and employees of the Unified Court System on notice about the unlawfulness of discrimination against transgender, non-binary, and gender non-conforming litigants, attorneys, court employees, and job applicants.

I. BACKGROUND

a. Transgender New Yorkers experience high rates of discrimination

The explicit amendments to various non-discrimination rules of the Unified Court System are necessary because of pervasive, ongoing discrimination against transgender, non-binary, and/or gender nonconforming individuals. Transgender and gender non-conforming people face widespread discrimination in employment, housing, and public accommodations.

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 due to their gender identity.² Discrimination in hiring is particularly rampant, with one matched-pair testing survey showing a 42% net rate of discrimination against transgender job seekers.³ Of the nearly 1,800 transgender New Yorkers surveyed in the 2015 U.S. Transgender Survey, 18% of respondents in New York were unemployed and 37% were living in poverty.⁴

This poverty is related to the fact that 15% of respondents who have ever been employed reported losing a job in their lifetime because of their gender identity or expression.⁵ And one in four of those who held or applied for a job during that year reported being fired, being denied a promotion, or not being hired for a job they applied for because of their gender identity or expression.⁶ Respondents who had a job in the past year reported being verbally harassed (13%), physically attacked (1%), and sexually assaulted (1%) at work because of their gender identity or

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), https://gaycenter.org/file/docs/network/TGGNC-health-and-economic-insecurity-report-FINAL_rebranded-May-9.pdf.

³ 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).

⁴ National Center for Transgender Equality, *2015 U.S. Transgender Survey: New York State Report* (2017), <http://www.transequality.org/sites/default/files/USTS%20NY%20State%20Report%20%281017%29.pdf> [hereinafter *2015 U.S. Transgender Survey New York Report*].

⁵ *Id.*

⁶ *Id.*

expression.⁷ Finally, nearly one in four of those who had a job in the past year reported other forms of mistreatment based on their gender identity or expression during that year, such as being forced to use a restroom that did not match their gender identity, being told to present in the wrong gender in order to keep their job, or having a boss or coworker share private information about their transgender status with others without their permission.⁸ The New York data mirrors other surveys of inequality and discrimination across the nation.⁹

Discrimination comes at a serious cost to New York State. The Williams Institute estimates that denial of housing and job losses due to pervasive bias against transgender individuals costs New York State millions of dollars a year in Medicaid and homeless services support. If New York State reduced or eliminated employment discrimination against transgender people, New York State could generate millions of dollars in additional income tax revenue.¹⁰

Transgender people also face high rates of unequal treatment and harassment in places of public accommodation. Among transgender respondents in New York who visited a place of public accommodation where staff or employees thought or knew they were transgender, 35%

⁷ *Id.*

⁸ *Id.*

⁹ See 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); S.E. James, J.L. Herman, S. Rankin, M. Keisling, L. Mottet & M. Anafi, *The Report of the 2015 U.S. Transgender Survey* 12-13 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [hereinafter *2015 U.S. Transgender Survey*] (finding an unemployment rate three times the national unemployment rate and that more than three-quarters of respondents who had a job in the past year took steps to avoid mistreatment in the workplace, such as hiding or delaying their gender transition or quitting their job); 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), https://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); See also 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).

¹⁰ 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>.

experienced at least one type of mistreatment in the past year.¹¹ This included 15% who were denied equal treatment or service, 27% who were verbally harassed, and 2% who were physically attacked because of being transgender.¹² Nationwide, 13% of respondents whose transgender status was known reported being denied equal treatment or service, verbally harassed, or physically attacked in public accommodations in the past year in a court or courthouse and 6% when seeking legal services from an attorney.¹³

b. Transgender New Yorkers disproportionately engage with the judicial system.

Transgender people are disproportionately likely to interact with the courts in several ways. For example, transgender people must go to court to obtain a legal name change.¹⁴ Name change petitioners report being misgendered (called by the wrong pronoun or title such as Mr. or Ms.) and being asked intrusive questions about their medical treatments, such as whether they take hormones or have had any surgery.¹⁵ Nearly one in ten reported that they received unequal treatment or service, and 3% were verbally harassed.¹⁶

Furthermore, because of disproportionate rates of poverty and targeting of visibly transgender and gender nonconforming people by the police,¹⁷ transgender people are more likely to interact with the criminal justice system. For example, discrimination against transgender people in employment, education and housing discrimination leads to disproportionate involvement in the sex trade.¹⁸ Those who are involved in the sex trade are at increased risk drinking or misusing drugs,¹⁹ mistreatment and assault by law enforcement and abuse while incarcerated.²⁰ Ending discrimination against transgender people is an important step in ensuring that people do not have to engage in sex work simply to survive. But as long as

¹¹ 2015 *U.S. Transgender Survey New York Report*, *supra* note 4, at 2.

¹² *Id.*

¹³ 2015 *U.S. Transgender Survey*, *supra* note 9, at 16.

¹⁴ *Id.* at 82 (96% of respondents who changed their name did so through a court order).

¹⁵ *Id.* at 84.

¹⁶ *Id.*

¹⁷ See *D.H. v. City of New York*, No. 16-cv-7698 (SDNY filed Sept. 30, 2016) (alleging unjustified and discriminatory enforcement against transgender women of color of Penal Law § 240.37, Loitering for the Purpose of Engaging in a Prostitution Offense).

¹⁸ Erin Fitzgerald et al., *Meaningful Work: Transgender Experiences in the Sex Trade* 4, 16-17 (2015), http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf (Nearly 11 percent 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%). 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). Over half (54.6%) of all survey respondents who were currently homeless also had been involved in the sex trade.).

¹⁹ *Id.* at 24.

²⁰ *Id.* at 18.

transgender individuals are engaging with the judicial system for charges related to sex work, drug use, or crimes of poverty such as turnstile jumping, protections must be in place to ensure that they are treated fairly and respectfully.

c. It is well-established that transgender New Yorkers are protected under existing employment and public accommodations nondiscrimination laws.

Although transgender people are protected from discrimination in employment and public accommodations under federal, state and local nondiscrimination laws, adding explicit protections to the rules serves several purposes including: (1) placing affected parties on notice about their existing duties of fair treatment; (2) informing protected individuals about their right to seek redress; and (3) serving as a clear policy statement in favor of a judicial system that is open and welcoming to all litigants, attorneys, court staff and judges.

Clarifying court rules to explicitly protect transgender and gender nonconforming people helps make existing case law more transparent. Courts have recognized transgender people as being protected under the New York Human Rights Law since 1977,²¹ a conclusion that courts have consistently upheld under the categories of both sex²² and disability.²³ In 2016, the New York State Division of Human Rights promulgated regulations that explicitly establish gender identity as a protected status under the Human Rights Law under the categories of sex and disability.²⁴ Courts and the federal Equal Employment Opportunity Commission have similarly recognized transgender people as being protected under Title VII,²⁵ the federal law prohibiting

²¹ See *Richards v. United States Tennis Assn.*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977) (recognizing the exclusion of a transgender woman from a women's tennis competition was employment discrimination based on sex).

²² 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 or 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.")

²³ *Doe v. Bell*, 754 N.Y.S.2d 846, 851 (Sup. Ct. N.Y. County 2003) ("[Gender identity disorder] 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.")

²⁴ 9 NYCRR § 466.11, § 466.13.

²⁵ E.g., *Macy v. Dep't. of Justice*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, at *12 (Apr. 20, 2012) (holding that "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."); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) ("Price Waterhouse...does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual."); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (upholding a Title VII sexual orientation discrimination claim and implicitly rejecting *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (recognizing claim for sex discrimination under Equal Credit Opportunity Act, analogizing to Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (relying on Title VII cases to conclude that violence

sex discrimination in employment, as well as the Americans with Disabilities Act.²⁶ The federal Equal Protection Clause also protects transgender people from discrimination.²⁷

II. RECOMMENDATION

a. Include sex stereotypes, and intersex and transgender status in clarification of proposed amendments.

The Committee proposes that instead of adding gender identity and gender expression as separate protected statuses, that an explanatory parenthetical be added after the term “sex.”

For example (new material in *italics*):

against a transgender woman was violence because of gender under the Gender Motivated Violence Act). Additionally, the Third Circuit has implicitly assumed without deciding that transgender people may bring sex stereotyping claims. *See Stacy v. LSI Corp.*, 544 F. App'x 93, 97-98 (3d Cir. 2013). *See also Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (“Employment discrimination on the basis of transgender identity is employment discrimination ‘because of sex’ and constitutes a violation of Title VII of the Civil Rights Act.”); *Hughes v. William Beaumont Hosp.*, No. 13-cv-13806, 2014 WL 5511507 (E.D. Mich. Oct. 31, 2014) (transgender woman subjected to disparate treatment where decision maker testified that people would be uncomfortable with “a man acting as a woman”); *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 789 (D. Md. 2014) (denying motion to dismiss Title VII claim where plaintiff plausibly alleged that she was rejected both “because of her obvious transgendered status” and also her gender nonconformity); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (employer rescinded job offer when it learned during a background check that transgender female applicant had been assigned male at birth); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV- 0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (transgender woman advised to avoid wearing overtly feminine attire and ultimately fired because she failed to act like a man).

²⁶ *Blatt v. Cabela’s Retail*, No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (denying a motion to dismiss by finding that “gender dysphoria” was not excluded by § 12211 of the ADA).

²⁷ *E.g., Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (“[T]he Court concludes that transgender people are a quasi-suspect class” and “[a]ccordingly, the Court must apply intermediate scrutiny to defendants’ treatment of plaintiff”); *Karnoski v. Trump*, No. 2:17-cv-1297-MJP, slip op. at 16-17 (W.D. Wash. Dec. 11, 2017) (applying intermediate scrutiny to a policy of denying transgender-related health care to military service members); *Stone v. Trump*, No. 1:17-cv-02459-MJG, slip op. at 43-44 (D. Md. Nov. 21, 2017) (applying intermediate scrutiny to transgender people as a quasi-suspect class to find that military personnel denied coverage for surgery have an Equal Protection claim); *Doe v. Trump*, No. 1:17-cv-01597-CKK, slip op. at 60-61 (D.D.C. Oct. 30, 2017) (applying heightened scrutiny and granting preliminary injunction regarding the transgender military ban); *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-01537, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017) (applying intermediate scrutiny to find that excluding transgender students from restrooms consistent with their gender identity likely constitutes sex-based discrimination in violation of the Equal Protection Clause); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 872–74 (S.D. Ohio 2016) (finding that “transgender status is a quasi-suspect class under the Equal Protection Clause”); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that heightened scrutiny used for sex-based classifications applied to school policy requiring transgender student to use bathroom of sex listed on his birth certificate”); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (recognizing discrimination against transgender people as sex discrimination and applying intermediate scrutiny); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that the facts alleged by transsexual plaintiff to support claims of gender discrimination on the basis of sex stereotyping “easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution”).

Attorney Rules of Professional Conduct (22 NYCRR Part 1200, Rules 8.4(g)):

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex (*including gender identity or expression, sex stereotypes, or intersex or transgender status*), disability, marital status or sexual orientation.

Rules of Judicial Conduct (22 NYCRR Part 100)

22 NYCRR § 100.2(D):

(D) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex (*including gender identity or expression, sex stereotypes, or intersex or transgender status*), sexual orientation, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

22 NYCRR § 100.3(B)(4), (5):

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex (*including gender identity or expression, sex stereotypes, intersex or transgender status, or engaging in sexual harassment*), sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex (*including gender identity or expression, sex stereotypes, intersex or transgender status, or engaging in sexual harassment*), sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.

UCS Code of Ethics for Nonjudicial Employees 22 NYCRR § 50.1(II)(C):

C. Court employees shall not discriminate, and shall not manifest by words or conduct bias or prejudice, on the basis of race, color, sex (*including gender*

identity or expression, sex stereotypes, intersex or transgender status, or engaging in sexual harassment), sexual orientation, religion, creed, national origin, marital status, age or disability.

Rules of the Chief Judge, Career Service (22 NYCRR § 25.16(a)):

(a) It is the policy of the New York State Unified Court System to ensure equal employment opportunity for all employees and applicants for employment, without regard to race, color, national origin, religion, creed, sex (including *gender identity or expression, sex stereotypes, intersex or transgender status, or freedom from sexual harassment*), sexual orientation, age, marital status, disability, or, in certain circumstances, prior criminal record.

Protections would be strengthened by explicitly including “sex stereotypes” under the definition of sex. Such explicit protections have been adopted in other contexts, including nondiscrimination regulations under the Affordable Care Act.²⁸ Including these definitions ensures coverage for the protected classes the rule seeks to protect.

“Sex stereotyping” case law does not adequately protect individuals whose gender expression transgresses traditional gender norms. Title VII case law indicates that men can be fired for having long hair²⁹ and women can be fired for not wearing makeup.³⁰ For example, a woman who was assigned female at birth and identifies as female can still be fired for wearing typically masculine clothing if her employer deems that such clothing was not be in compliance with the dress code. Explicit prohibitions against sex stereotyping would emphasize that a dress code itself cannot be based on sex stereotypes and should be gender-neutral.³¹

²⁸ 45 C.F.R. § 92.4 (2018) (“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.”); 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”).

²⁹ See, e.g., *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); *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).

³⁰ *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”).

³¹ This is the approach adopted by the New York City Commission on Human Rights. New York City Commission on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002)*; *N.Y.C. Admin. Code § 8-102(23)* (2016), <https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page#3.4> (“[E]mployers and covered entities may not require dress codes or uniforms, or apply grooming or appearance standards, that impose different requirements for individuals based on sex or gender.”).

Protections based on “transgender status” provide clearer protections than gender identity and expression. For example, in a New Jersey case where a drug treatment facility refused to hire a transgender man as a male urine monitor, the defendants argued, “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.”³² 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].”³³ 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 because the person has a particular gender identity or expression.³⁴ “Transgender status” as a protected class is a more inclusive term to prohibit this particular form of sex discrimination and this term will help root out such pervasive biases.

Having explicit protections for people with intersex conditions ensures that they are protected from discrimination as well. “Intersex,” sometimes called a Difference in Sex Development, refers to the estimated one in 2,000 people born with a reproductive or sexual anatomy and/or chromosome pattern that doesn’t fit typical definitions of male or female.³⁵ 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. While some people are identified as intersex at birth, others only learn of their intersex status in puberty or adulthood.³⁶

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

³² 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).

³³ 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).

³⁴ “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.

³⁵ Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 161 (2000).

³⁶ 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).

gender identity or expression. 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.

III. CONCLUSION

The proposed amendments and the Committee’s suggested additions are comparable to the current policies of numerous local, state, and federal protections. The Committee urges the Administrative Board to adopt the amendments as detailed above to ensure that the benefits of the law reach every New York resident employed by or seeking employment with the Unified Court System and who will appear as an attorney or litigant in the court system.

Respectfully,

A handwritten signature in cursive script that reads "Noah E. Lewis".

Noah Lewis
Chair, Committee on Lesbian, Gay,
Bisexual, and Transgender Rights