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VIA ELECTRONIC MAIL

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**Re: *Comments to Gender Identity Discrimination, Proposed Rule ID No. HRT-44-15-00033-P***

Dear Ms. Downey:

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) appreciates the opportunity to provide comments in response to the Notice of Proposed Rule Making Regarding Gender Identity Discrimination, ID No. HRT-44-15-00033-P (hereinafter the “Proposed Rule”), by **New York State’s Division of Human Rights (the “Division”)**. As the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and people living with HIV through impact litigation, policy advocacy, and public education, Lambda Legal has a strong interest in ensuring that LGBT people and gender-nonconforming people can live their lives without discrimination, harassment, or stigma. Accordingly, **Lambda Legal’s Transgender Rights Project works to ensure the equal dignity of transgender and gender-nonconforming people in New York and nationally.**

**Lambda Legal strongly supports the Division’s efforts to eliminate discrimination against transgender and gender-nonconforming people, and commends the Division for the issuance of the Proposed Rule.** The Proposed Rule clarifies that the prohibition on sex discrimination within the **New York State Human Rights Law (“Human Rights Law”)** encompasses discrimination on the basis of gender identity, gender expression, transgender status, or sex stereotypes. It also clarifies that gender dysphoria is a disability under the Human Rights Law. The Proposed Rule, thus, reflects **New York State’s commitment to equality within society and to combat discrimination.**

**We provide these comments in support of the Division’s efforts to achieve the Human Rights Law’s purpose of eliminating, remedying, and preventing discrimination in New York State.**

**EXECUTIVE SUMMARY**

In New York State and throughout the country, transgender and gender-nonconforming people experience high rates of discrimination, harassment, stigma, and

other serious challenges. Yet, discrimination, prejudice, and intolerance threaten not only the rights and liberties of transgender and gender-nonconforming New Yorkers; they also menace the very foundations and general welfare of New York State.<sup>1</sup> The Proposed Rule represents a necessary step to ensure that the purposes of the Human Rights Law are effectively executed. To be sure, as set forth by New York courts, the Human Rights Law already protects transgender and gender-nonconforming people, but the Proposed Rule is a necessary clarification to make such protections explicit.

The Proposed Rule accomplishes several important objectives. The Proposed Rule serves to educate **the public about how the Human Rights Law's prohibition on sex discrimination** protects transgender and gender-nonconforming people from discrimination on the basis of gender identity, gender expression, transgender status, or sex stereotypes. It also assists employers, housing providers, businesses, organizations, service providers (including government), and other entities in understanding their responsibilities under the Human Rights Law.

**Accordingly, Lambda Legal's comments address the following key points:**

First, the Proposed Rule is a necessary step to address the alarming rates of discrimination transgender and gender-nonconforming people face in employment, housing, education, health care, and access to services and public accommodations within New York State.

Second, the Proposed Rule is in line **with New York's statutory scheme** because the Division has explicit and broad authority to enact the Proposed Rule. And, the **Proposed Rule's** transgender-inclusive definition of sex as inclusive of gender identity, gender expression, transgender status, or sex stereotypes is in accordance with **New York State and federal case law, as well as New York's statutory scheme. The Proposed Rule's definition of disability as inclusive of gender dysphoria is in accordance with New York State case law**, and with a growing number of courts and agencies of other states and the federal government. Thus, the Proposed Rule serves to clarify and make explicit the protections afforded by the Human Rights Law to transgender and gender-nonconforming people in New York.

However, Lambda Legal recommends that the definitions of sex and gender identity be further clarified in order to avoid confusion and to ensure the inclusion of non-binary identities, gender expression, and sex stereotypes. Lambda Legal also recommends that the definition of disability be further clarified to ensure protection from discrimination on the basis of gender dysphoria, whether actual ***or perceived***.

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<sup>1</sup> N.Y. Exec. Law § 290(3).

Third, Lambda Legal strongly recommends that the Division clarify in the Proposed Rule that access to single-sex facilities shall be determined in accordance with **an individual’s gender identity**. **Such clarification is necessary to avoid confusion and ensure that transgender people are treated with equal dignity within New York State.**

Fourth, Lambda Legal vehemently urges the Division to reject any requests for a religious exemption or limitation to be incorporated into the Proposed Rule. The adoption of any religious exemption or limitation would severely undermine the purpose and effectiveness of the Human Rights Law.

## **LAMBDA LEGAL COMMENTS ON THE PROPOSED RULE**

### **A. TRANSGENDER AND GENDER-NONCONFORMING PEOPLE EXPERIENCE HIGH RATES OF DISCRIMINATION.**

Transgender and gender-nonconforming people—across our nation and New York State—face discrimination, harassment, stigma, and other serious challenges at alarming rates. The challenges faced by transgender and gender-nonconforming people encompass all aspects of daily life, including employment, housing, education, health care, and access to services and public accommodations. In addition, transgender and gender-nonconforming people are doubly victimized in our criminal justice system: they are disproportionately affected by bias-motivated crime, including violence and harassment, and disproportionately policed and criminalized by law enforcement. The Proposed Rule is, therefore, not only a necessary clarification of the law; it also sends a **powerful message that in New York State “every individual . . . is afforded an equal opportunity to enjoy a full and productive life.”**<sup>2</sup> As the United States Supreme Court noted earlier this year, “[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”<sup>3</sup>

#### Employment

In New York State, the rates of discrimination against transgender and gender-nonconforming people are alarming. Seventy-four percent (74%) of transgender and gender-nonconforming New Yorkers have experienced harassment or mistreatment in the workplace because of their gender identity or expression.<sup>4</sup> In addition, between 20-

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<sup>2</sup> *Id.*

<sup>3</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

<sup>4</sup> Nat’l Ctr. for Transgender Equal. and Nat’l LGBTQ Task Force, *Findings of the National Transgender Discrimination Survey: New York Results* (May 2010), at 1, available at [http://www.transequality.org/sites/default/files/docs/resources/ntds\\_state\\_ny.pdf](http://www.transequality.org/sites/default/files/docs/resources/ntds_state_ny.pdf) (last visited Dec. 17, 2015) (hereinafter “NCTE NY Survey”).

32% of transgender and gender-nonconforming New Yorkers have been fired or denied a promotion because of their gender identity or expression, and 37-42% have not been hired for the same reason.<sup>5</sup> Such rates of discrimination have been confirmed through matched pair testing. Indeed, a matched pair testing study conducted in New York City found a 42% net rate of discrimination against transgender job seekers.<sup>6</sup> Based on these statistics, approximately 11,600 transgender and gender-nonconforming New Yorkers have lost a job, 21,500 have not been hired for a job, and 11,600 have been denied a promotion due to discrimination on the basis of gender identity and expression.<sup>7</sup> As a result of these alarming rates of workplace discrimination, transgender and gender-nonconforming New Yorkers are twice as likely to be unemployed and 140% more likely to be in poverty than cisgender New Yorkers.<sup>8</sup>

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<sup>5</sup> *Id.* See also Somjen Frazer and Erin Howe, N.Y. State AIDS Inst. and LGBT Health & Human Serv. Network, *Transgender health and economic insecurity: A report from the 2015 LGBT Health and Human Services Needs Assessment Survey* (2015), at 8, available at <http://www.prideagenda.org/sites/default/files/PDFs/TG%20health%20and%20economic%20insecurity%20report%20FINAL.pdf> (last visited Dec. 17, 2015) (“One third (32.2%) reported being unfairly fired due to their gender identity or expression and just over two in five (42.2%) reported not being hired for the same reason.”); Make the Road N.Y., *Transgender Need Not Apply: A Report on Gender Identity Job Discrimination* (Mar. 2010, updated May 2010), at 4, available at [http://www.maketheroad.org/pix\\_reports/TransNeedNotApplyReport\\_05.10.pdf](http://www.maketheroad.org/pix_reports/TransNeedNotApplyReport_05.10.pdf) (last visited Dec. 17, 2015) (according to 2009 survey, 59% percent of transgender workers in New York City reported experiencing job discrimination and 49% had never been offered a job living openly as a transgender person).

<sup>6</sup> See Make the Road N.Y., *supra*, at 4. Cf. Dist. of Columbia, Office of Human Rights, *Qualified and Transgender: A report on results of resume testing for employment discrimination based on gender identity* (2015), at 6, available at [http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender\\_FullReport\\_1.pdf](http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf) (last visited Dec. 17, 2015) (“48 percent of employers appeared to prefer at least one less-qualified applicant perceived as cisgender over a more-qualified applicant perceived as transgender.”).

<sup>7</sup> Jody L. Herman, The Williams Inst., *The Cost of Employment and Housing Discrimination against Transgender Residents of New York* (Apr. 2013), at 2, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-NY-Cost-of-Discrimination-April-2013.pdf> (last visited Dec. 17, 2015).

<sup>8</sup> See Frazer and Howe, *supra*, at 3. Cisgender refers to people whose gender identity is the same as their assigned or presumed sex at birth. See Lambda Legal, *Protected and Served? Glossary* (2015), available at <http://www.lambdalegal.org/protected-and-served/glossary> (last visited Dec. 17, 2015).

## Housing

Transgender and gender-nonconforming New Yorkers also face alarming rates of discrimination in housing. Indeed, transgender and gender-nonconforming New Yorkers are more than twice as likely to rent than own a home.<sup>9</sup> As a result, transgender and gender-nonconforming New Yorkers are disproportionately subjected to the housing rental market and face significant barriers to accessing safe and affordable housing. Between 13-19% of transgender and gender-nonconforming New Yorkers have been denied housing because of their gender identity or expression.<sup>10</sup> Forty percent (40%) of transgender and gender-nonconforming people move into less desirable homes or apartments as a result of anti-transgender bias, a rate that is even higher for transgender and gender-nonconforming people of color.<sup>11</sup> And more than one in four transgender and gender-nonconforming New Yorkers have been harassed by neighbors.<sup>12</sup> It is therefore unsurprising that transgender and gender-nonconforming people in New York are more than twice as likely to be homeless as a result of their gender identity or expression.<sup>13</sup> They are also twice as likely to suffer housing insecurity (i.e., have difficulty paying for housing or utilities).<sup>14</sup>

Addressing housing discrimination is also of particular salience for transgender and gender-nonconforming older adults and youth. Studies confirm that transgender

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<sup>9</sup> See NCTE NY Survey, *supra*, at 1 (“23% reported owning their home compared to 67% of the general U.S. population”); Frazer and Howe, *supra*, at 9 (“In addition to facing lower incomes and poverty, transgender respondents were more than twice as likely to rent rather than own their homes (77.8% vs. 60.2% OR=2.31).”).

<sup>10</sup> See NCTE NY Survey, *supra*, at 1 (“19% were denied a home/apartment”); *id.* (“8% were evicted”); Frazer and Howe, *supra*, at 9 (“Just over thirteen percent (13.4%) had been refused housing because of their gender identity or expression[.]”).

<sup>11</sup> Ctr. for Am. Progress and Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* (Feb. 2015), at 5, available at <http://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf> (last visited Dec. 17, 2015).

<sup>12</sup> See Frazer and Howe, *supra*, at 9-10 (“[M]ore than one in four (27.1%) had been harassed by their neighbors.”).

<sup>13</sup> See NCTE NY Survey, *supra*, at 1 (“18% had become homeless because of their gender identity/expression”); Frazer and Howe, *supra*, at 9 (“Transgender respondents were more than twice as likely to have ever been homeless (30.7% vs. 15.3%, OR=2.46) and were about twice as likely to have been homeless at the time of the survey (3.2% vs. 1.6%, OR=2.01).”).

<sup>14</sup> See Frazer and Howe, *supra*, at 9 (“Even those who were housed were much more likely to be housing insecure (48.7% vs. 33.3%, OR=1.90).”).

and gender-nonconforming older adults in particular struggle to find senior housing where they are treated fairly.<sup>15</sup> Indeed, in a national survey of LGBT older adults in long-term care facilities, nearly one in four of the LGBT older adults reported being verbally or physically harassed by other residents and nearly one in six reported being verbally or physically harassed by staff.<sup>16</sup> In addition, because many transgender and gender-nonconforming youth are forced out of their homes or run away due to family rejection or abuse, transgender and gender-nonconforming youth use drop-in centers, street outreach programs, and housing programs at disproportionately high rates.<sup>17</sup> Indeed, a disproportionate number of homeless youth serviced by agency providers reported identifying as transgender or gender-nonconforming.<sup>18</sup> Yet, despite their overrepresentation in the homeless youth population, transgender and gender-nonconforming homeless youth report higher rates than the general homeless youth population of needing assistance with both short- and long-term housing and being unable to find services.<sup>19</sup> Indeed, according to one study, approximately one in five LGBT youth were unable to access short-term shelter, and 16% could not get assistance with longer-term housing—rates that are approximately double those of non-LGBT homeless youth.<sup>20</sup>

### Education

Discrimination against transgender and gender-nonconforming New Yorkers also permeates educational settings throughout New York State. Indeed, 75% of transgender and gender-nonconforming K-12 students in New York report being harassed because of

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<sup>15</sup> See Ctr. for Am. Progress, *supra*, at 5; Justice in Aging, *LGBT Older Adults In Long-Term Care Facilities: Stories from the Field* (June 2015), available at <http://www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf> (last visited Dec. 17, 2015).

<sup>16</sup> See Justice in Aging, *supra*, at 9.

<sup>17</sup> See Soon Kyu Choi et al., The Williams Institute, *Serving Our Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness* (June 2015), at 4, 5, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-June-2015.pdf> (last visited Dec. 17, 2015).

<sup>18</sup> *Id.* at 4.

<sup>19</sup> See Andrew Cray et al., Ctr. for Am. Progress, *Seeking Shelter: The Experiences and Unmet Needs of LGBT Homeless Youth* (Sept. 2013), at 23, available at <https://www.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf> (last visited Dec. 17, 2015).

<sup>20</sup> *Id.*

their gender identity or expression.<sup>21</sup> In addition, 35% of transgender and gender-nonconforming K-12 students in New York reported being physically assaulted in school.<sup>22</sup> These rates are similar to those found by national surveys.<sup>23</sup> Indeed, Lambda Legal's *Protected and Served?* national community survey similarly revealed that one in four of the transgender and gender-nonconforming students who responded to the survey felt they were treated harshly by school officials because of their gender identity or gender expression.<sup>24</sup> As a result, less than one-third of transgender and gender-nonconforming youth surveyed in New York report feeling accepted by their peers,<sup>25</sup> more than half avoid going to school due to harassment, and one in six have left school altogether.<sup>26</sup>

Consequently, transgender and gender-nonconforming New Yorkers have less favorable educational outcomes than cisgender New Yorkers. Indeed, transgender New Yorkers above age 24 report being three times more likely to have less than a high school education and only half as likely to have a college degree.<sup>27</sup>

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<sup>21</sup> See NCTE NY Survey, *supra*, at 1. See also N.Y. Civil Liberties Union, *Dignity for All? Discrimination Against Transgender and Gender-nonconforming Students in New York State* (June 2015), at 3, available at [http://www.nyclu.org/files/publications/dignityforall\\_final\\_201508.pdf](http://www.nyclu.org/files/publications/dignityforall_final_201508.pdf) (last visited Dec. 17, 2015).

<sup>22</sup> See NCTE NY Survey, *supra*, at 1.

<sup>23</sup> See Joseph G. Kosciw et al., Gay, Lesbian & Straight Ed. Network, *The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools, A Report from the Gay, Lesbian & Straight Education Network* (2014), at 22-23, available at [https://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report\\_0.pdf](https://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf) (last visited Dec. 17, 2015); Joel Baum et al., Human Rights Campaign and Gender Spectrum, *Supporting and Caring for our Gender Expansive Youth: Lessons from the Human Rights Campaign's Youth Survey* (2012), at 10, available at <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Gender-expansive-youth-report-final.pdf> (last visited Dec. 17, 2015) (37% of gender-expansive youth reported "frequently or often" being verbally harassed and called names at school).

<sup>24</sup> Lambda Legal, *Protected and Served? School Security, Policing and Discipline* (2015), available at <http://www.lambdalegal.org/protected-and-served/schools> (last visited Dec. 17, 2015).

<sup>25</sup> See Baum, *supra*, at 10 ("Less than one-third (30 percent) of gender-expansive youth reported 'strongly agreeing' that most of their peers do not have a problem with their identity as an LGBT person.").

<sup>26</sup> See NYCLU, *supra*, at 4.

<sup>27</sup> See Frazer and Howe, *supra*, at 3.

In 2010, New York State commendably enacted the Dignity for All Students Act (DASA), which created explicit protections for students based on their perceived or actual gender identity, gender expression, and sexual orientation.<sup>28</sup> However, even with **DASA’s passage**, transgender and gender-nonconforming public school students in New York continue to experience high rates of discrimination.<sup>29</sup> Moreover, DASA applies only to public schools.<sup>30</sup> Accordingly, the Proposed Rule is necessary to clarify that transgender and gender-nonconforming students in private educational institutions in New York are explicitly protected from discrimination and, *at minimum*, have the same rights and protections from discrimination as students in New York public schools. **Indeed, one of the explicit purposes of the Human Rights Law is “to eliminate and prevent discrimination . . . in educational institutions.”**<sup>31</sup>

### Health Care

Discrimination against transgender and gender-nonconforming people in health care is also rampant. In New York, 17% of transgender and gender-nonconforming people report they have been refused health care due to their gender identity or expression, and 29% have postponed needed medical care, when sick or injured, due to discrimination.<sup>32</sup> Consequently, transgender and gender-nonconforming people in New York are nearly 50% more likely to be in fair or poor

*“I saw a doctor in New York and told her how I wanted [chest surgery]. She looked at me sternly and said, ‘I can’t believe you are wasting my time. Do you know what your problem is? You just want to be a boy. You want to be a boy and that’s never gonna happen so just do yourself a favor and get over it.’ Then she left the room abruptly. I grabbed my things and bolted down the street, feeling like the biggest freak in the world.”*

NTDS Report, *infra*, at 84.

<sup>28</sup> N.Y. Educ. Law §§ 11(6), 12(1).

<sup>29</sup> *See* NYCLU, *supra*, at 12 (“During the 2012–13 school year, New York schools reported 24,478 incidents of harassment and discrimination. The reported incidents occurred at schools in every county in the state. Of the incidents reported, 4,756 (19 percent) were incidents related to a **student’s perceived or actual sex, gender or sexual orientation. No category of harassment or discrimination made up as many incidents as these three categories combined, except ‘other’** which covers a broad array of categories. Of the reported incidents, 1,863 were related to a **student’s perceived or actual sexual orientation, 1,738 were categorized under sex discrimination and 1,155 were based on gender.**”).

<sup>30</sup> *See* N.Y. Educ. Law § 10. Relatedly, while the New York Court of Appeals recently held that the Human Rights Law did not apply to public school districts, it confirmed its applicability to private educational institutions. *See North Syracuse Cent. School Dist. v. State Div. of Human Rights*, 19 N.Y.3d 481 (2012).

<sup>31</sup> N.Y. Exec. Law § 290(3).

<sup>32</sup> *See* NCTE NY Survey, *supra*, at 2.



health when compared to cisgender people, and they are three times more likely to report inadequate insurance.<sup>33</sup> In addition, transgender people in New York are nearly nine times more likely than cisgender people to be HIV positive.<sup>34</sup> And, alarmingly, 36% of transgender and gender-nonconforming people in New York report attempting suicide at some point in their life, 22 times the rate of the general population of 1.6%.<sup>35</sup> **But obtaining health care is difficult, at best, when doctors' offices, hospitals, and other sources of health care are often unsafe spaces for transgender and gender-nonconforming people. Over one-quarter of transgender and gender-nonconforming people (28%) report being verbally harassed in a doctor's office, emergency room, or other medical setting and 2% of transgender and gender-nonconforming people report being physically assaulted in a doctor's office.**<sup>36</sup>

#### Access to Services and Public Accommodations

To compound the discrimination faced in employment, education, housing, and health care, 53% of transgender and gender-nonconforming people in New York have been verbally harassed or disrespected in a place of public accommodation or service, including hotels, restaurants, buses, airports and government agencies.<sup>37</sup> And nearly two-thirds (63.9%) of transgender and gender-nonconforming people have been refused use of a bathroom due to their gender identity or expression.<sup>38</sup> This pervasive discrimination prevents transgender and gender-nonconforming New Yorkers from fully participating in the economic, cultural, and intellectual life of New York State.<sup>39</sup>

Disturbingly, 18% of transgender and gender-nonconforming people in New York have been denied equal treatment by a government agency or official and 11% have been denied equal treatment or harassed by judges or court officials.<sup>40</sup> Indeed, Lambda

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<sup>33</sup> See Frazer and Howe, *supra*, at 4, 10-11.

<sup>34</sup> See NCTE NY Survey, *supra*, at 2.

<sup>35</sup> *Id.*

<sup>36</sup> See Jaime M. Grant et al., Nat'l Ctr. for Transgender Equal. and Nat'l LGBTQ Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), at 74, available at [http://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) (last visited Dec. 17, 2015) (hereinafter "NTDS Report").

<sup>37</sup> See NCTE NY Survey, *supra*, at 2.

<sup>38</sup> See Frazer and Howe, *supra*, at 10.

<sup>39</sup> See N.Y. Exec. Law § 290(3).

<sup>40</sup> See NCTE NY Survey, *supra*, at 2.

**Legal's *Protected and Served?*** national community survey found that 33% of transgender and gender-nonconforming people who responded to the survey and had been involved with the court system heard discriminatory comments about sexual orientation or gender identity/expression in the courts, a number that increased to 53% if the transgender or gender-nonconforming person was a person of color.<sup>41</sup>

### Criminal Justice

The discrimination faced by transgender and gender-nonconforming people is further compounded by their victimization in our criminal justice system. In New York, nearly one third (32%) of transgender and gender-nonconforming people have experienced serious physical violence, while one in five (21%) transgender and gender-nonconforming New Yorkers are also unfairly arrested, harassed, or physically harmed by police.<sup>42</sup> When compared to the general population, transgender people and gender-nonconforming people suffer a disproportionate amount of violence and crime. For example, in 2014, transgender women were 1.6 times more likely to experience physical hate violence, 2.9 times more likely to experience discrimination, 2.4 times more likely to experience harassment, and 1.9 times more likely to experience threats and intimidation compared to the general population of survivors of crimes.<sup>43</sup>

The unconscionable and disproportionate rate at which transgender and gender-nonconforming are exposed to violence and other bias-motivated crime is further exacerbated by the additional victimization they suffer at the hands of law enforcement, which was reflected in **Lambda Legal's *Protect and Served?*** national community survey.<sup>44</sup> For example, in the five-year span covered by the survey, 32% of transgender and gender-nonconforming respondents who had contact with police reported that **police officers' attitudes toward them had been hostile**.<sup>45</sup> More than one in five

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<sup>41</sup> Lambda Legal, *Protected and Served? Courts* (2015), available at <http://www.lambdalegal.org/protected-and-served/courts> (last visited Dec. 17, 2015).

<sup>42</sup> See Frazer and Howe, *supra*, at 10.

<sup>43</sup> See Nat'l Coal. of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2014* (2015), at 35, available at [http://www.avp.org/storage/documents/Reports/2014\\_HV\\_Report-Final.pdf](http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf) (last visited Dec. 17, 2015) (hereinafter "NCAVP Report").

<sup>44</sup> See also NCAVP Report, *supra*, at 9 (noting that transgender people were 4.6 times more likely to experience any police violence and 6.1 times more likely to experience physical police violence).

<sup>45</sup> Lambda Legal, *Protected and Served? Police* (2015), available at <http://www.lambdalegal.org/protected-and-served/police> (last visited Dec. 17, 2015). See also NCAVP Report, *supra*, at 11 (27.36% of survivors reported hostile attitudes from the police in 2014).

transgender and gender-nonconforming survey respondents also reported being verbally assaulted, physically assaulted, and/or sexually harassed by police.<sup>46</sup> Thirty-four percent (34%) of transgender and gender-nonconforming respondents reported being falsely accused by police.<sup>47</sup> The experiences of discriminatory and violent policing suffered by transgender and gender-nonconforming people serve as a barrier to accessing critical support and protection from law enforcement when transgender and gender-nonconforming people are victims of violence and other criminal activity.

In addition, 58% of transgender and gender-nonconforming respondents to the national community survey reported police indifference or lack of proper response to reports of property crime.<sup>48</sup> Forty-nine percent (49%) of transgender and gender-nonconforming people (56% of transfeminine and 46% of transmasculine respondents)<sup>49</sup> reported inadequate responses and neglect by police to their complaint of intimate partner violence.<sup>50</sup> And a staggering 52% of transgender and gender-nonconforming survey respondents—a rate that increased to 65% of transgender and gender-nonconforming people of color—reported inadequate police responses to their reports of sexual assault.<sup>51</sup>

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<sup>46</sup> Lambda Legal, *Protected and Served? Police*, *supra* (22% of transgender and gender-nonconforming people reported being verbally assaulted by police, 4% reported being physically assaulted and 7% reported being sexually harassed). *See also* NCAVP Report, *supra*, at 35 (“**Transgender people were 4.6 times more likely to experience police violence compared to cisgender survivors and victims. Transgender people were 6.1 times more likely to experience physical violence when interacting with the police compared to cisgender survivors and victims.**”).

<sup>47</sup> Lambda Legal, *Protected and Served? Police*, *supra*.

<sup>48</sup> *Id.*

<sup>49</sup> **Transfeminine is a broad term used to describe individuals who were assigned the sex “male” at birth, but whose gender identity is along the feminine spectrum of gender.** This can encompass those who have medically transitioned and those who have not, and may include (but is not limited to) those who identify as trans women, MTF (male-to-female), transgender female, transsexual female, genderqueer, etc. **Transmasculine is a broad term used to describe individuals who were assigned the sex “female” at birth, but whose gender identity is along the masculine spectrum of gender.** This can encompass those who have medically transitioned and those who have not, and may include (but is not limited to) those who identify as trans men, FTM (female-to-male), transgender male, transsexual male, genderqueer, etc. *See* Lambda Legal, *Protected and Served? Glossary*, *supra*.

<sup>50</sup> Lambda Legal, *Protected and Served? Police*, *supra*.

<sup>51</sup> *Id.*

The economic consequences of discrimination against transgender and gender-nonconforming New Yorkers.

Finally, the economic consequences of discrimination against transgender and gender-nonconforming people in New York are dire both for those being discriminated against and for the State of New York.

In 2008, as a result of discrimination, transgender people reported twice the unemployment rate of the general population (14% compared to 7%), with much higher rates for transgender people of color.<sup>52</sup> A bout of unemployment can result in more than **\$100,000 in lost earnings over one's career.**<sup>53</sup> Studies show that the discrimination and hostile environments transgender and gender-nonconforming face in employment, housing, health care, education, and credit can result in both higher costs and less income.<sup>54</sup>

The costs of discrimination are also borne by New York State. It is estimated that employment and housing discrimination against transgender New Yorkers may cost between \$1.5 and \$7 million in Medicaid and housing program expenditures to New York State, not including additional millions in state income tax revenues that could be generated if employment discrimination were reduced.<sup>55</sup> If transgender and gender-nonconforming New Yorkers had equitable incomes, they would also generate millions of dollars more in annual income tax revenues for the State.<sup>56</sup>

The Proposed Rule is necessary to remedy the alarming rates of discrimination against transgender and gender-nonconforming New Yorkers.

The alarming and disproportionate rates of discrimination against transgender and gender-nonconforming New Yorkers illustrate clearly **that the Division's Proposed Rule** is a necessary step towards remedying the untenable circumstances faced by transgender and gender-nonconforming New Yorkers. And while the Human Rights **Law's proscription on sex discrimination** already prohibits such discrimination, the

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<sup>52</sup> Ctr. for Am. Progress et al., *supra*, at 4.

<sup>53</sup> *Id.*

<sup>54</sup> *See generally* Ctr. for Am. Progress et al., *supra*.

<sup>55</sup> *See* Jody L. Herman, The Williams Inst., *The Cost of Employment and Housing Discrimination against Transgender Residents of New York* (Apr. 2013), at 1, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-NY-Cost-of-Discrimination-April-2013.pdf> (last visited Dec. 17, 2015).

<sup>56</sup> *Id.* at 2-3.

Proposed Rule clarifies and makes it unequivocally clear that discrimination on the basis of gender identity, gender expression, transgender status, and sex stereotypes is illegal.

Moreover, clarifying that the Human Rights Laws protects transgender and gender-nonconforming people from discrimination serves to affirm the equal dignity of transgender and gender-nonconforming New Yorkers. **The State’s imprimatur through the adoption of the Proposed Rule would send a powerful message that invidious discrimination cannot be tolerated. Indeed, the Proposed Rule “reflects the State’s strong historical commitment to eliminating discrimination and assuring its citizens equal access” and opportunity—a compelling state interest of the highest order.**<sup>57</sup>

**B. THE PROPOSED RULE IS IN HARMONY WITH THE TEXT AND PURPOSE OF THE HUMAN RIGHTS LAW.**

The Proposed Rule is in harmony with the text and purpose of the Human Rights Law and **is in keeping with the interpretations of similar provisions by New York’s** courts, agencies, and the legislature, as well as an ever-growing number of federal and other state agencies and courts across the country. Nonetheless, the Proposed Rule could be improved by providing further clarity and ensuring that protections for gender-nonconforming people are made explicit. Lambda Legal therefore makes several recommendations to the Division that would clarify the Proposed Rule and ensure that its purposes are effectively carried out.

**i. The Division has the Authority and Power to Promulgate the Proposed Rule.**

The Human Rights Law “is an expression of New York State’s commitment to equality within society”<sup>58</sup> and reflects the “State’s strong and important public policy against discrimination.”<sup>59</sup> The Division has “extensive powers” to “reflect the broad thrust of [the State’s] fundamental policy” to “combat[] discrimination.”<sup>60</sup>

There is no question that the Division “has the power to promulgate rules and regulations to carry out the provisions of the [Human Rights Law] and the policies

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<sup>57</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

<sup>58</sup> *Margerum v. City of Buffalo*, 24 N.Y.3d 721, 735 (2015) (Rivera, J., concurring in part and dissenting in part).

<sup>59</sup> *New York Inst. of Tech. v. State Div. of Human Rights*, 40 N.Y.2d 316, 324-25 (1976).

<sup>60</sup> *Batavia Lodge No. 196, etc. v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 145-46 (1974).

formulated by it.”<sup>61</sup> Furthermore, as explained below, the Proposed Rule is in harmony with the Human Rights Law text and purpose.<sup>62</sup> Moreover, the statute itself and New York courts mandate that the Human Rights Law “be construed liberally for the accomplishment of the purposes thereof.”<sup>63</sup>

Because the Proposed Rule seeks to clarify and make explicit the protections from discrimination already forbidden by the Human Rights Law, and adopted by New York courts, the Division should make its purpose explicit within the Proposed Rule.

### **RECOMMENDATION**

- We recommend that the Division add a new subsection after § 466.13(a) as follows:

*(b) Purpose. In recognition that the Human Rights Law’s prohibition on sex discrimination, as interpreted by New York courts, covers discrimination on the basis of gender identity, gender expression, transgender status, and sex stereotypes, and in order to meet its obligation to combat discrimination as set forth in the Human Rights Law, the Division adopts this chapter for the following purposes:*

*(1) To assist employers, housing providers, businesses, organizations, service providers (including government), and other entities in understanding their responsibilities under the Human Rights Law;*

*(2) To educate the public about the prohibition of sex discrimination, particularly as it protects transgender and gender-nonconforming people;*

*(3) To inform individuals of their rights under the Human Rights Law; and*

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<sup>61</sup> *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 133 (1965). See also N.Y. Exec. Law § 295(5) (“The division, by and through the commissioner or his or her duly authorized officer or employee, shall have the following functions, powers and duties: . . . To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practices of the division in connection therewith.”).

<sup>62</sup> See *Jones v. Berman*, 37 N.Y.2d 42, 53 (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.”).

<sup>63</sup> N.Y. Exec. Law § 300. See also *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 183 (1978); *New York Inst. of Tech.*, 40 N.Y.2d at 324-25; *City of Schenectady v. State Div. of Human Rights*, 37 N.Y.2d 421, 428 (1975).

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

**ii. *Discrimination on the Basis of Gender Identity, Gender Expression, Transgender Status, or Sex Stereotypes Are Forms of Sex Discrimination.***

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, gender expression, or sex stereotypes has agreed with the interpretation of the Human Rights Law sought to be codified by the Proposed Rule.<sup>64</sup> Indeed, as early as 1977, the New York County Supreme Court, Special Term, held that the U.S. Tennis Association violated the Human Rights Law by requiring transgender tennis player Renee Richards to undergo chromatin testing in order to ban her from playing against other female athletes at the U.S. Open.<sup>65</sup> 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 gender identity has been repeatedly upheld by New York state courts.<sup>66</sup> Likewise, federal courts that have interpreted the Human Rights Law

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<sup>64</sup> Prior to the 2002 amendments to the New York City Human Rights Law clarifying that discrimination on the basis of gender identity and expression were prohibited, New York state courts similarly interpreted the prohibition on sex discrimination under the New York City Human Rights Law to encompass discrimination on the basis of gender identity, gender expression, transgender status, or sex stereotypes. *See, e.g., McGrath v. Toys "R" Us*, 3 N.Y.3d 421, 434-35 (2004) (discussing cases interpreting the NYCHRL as covering transgender plaintiffs); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 396 (Sup. Ct. 1995) (“[A]n employer who harasses an employee because the person, as a result of surgery and hormone treatments, is now of a different sex has violated our City prohibition against discrimination based on sex.”).

<sup>65</sup> *See Richards v. United States Tennis Assn.*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977).

<sup>66</sup> *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 her 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 nor State Human Rights Laws protect transgender persons); *Buffong v. Castle on Hudson*, No. 05-CV-11634, 2005 WL 4658320, \*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.”).

have agreed that its prohibition on sex discrimination encompasses discrimination on the basis of gender identity or expression.<sup>67</sup>

Thus, even if one were to accord “less weight” to the Division’s interpretation of the term “sex” because the regulations at issue are considered a question “of pure statutory reading and analysis,”<sup>68</sup> the interpretation promulgated here simply embodies the interpretation given to the same term by New York courts. And “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.**”<sup>69</sup> Indeed, in recently enacted legislation, the New York legislature has similarly defined gender to “include a person’s gender identity or expression.”<sup>70</sup>

In further support of the Division’s interpretation of the Human Right Law’s prohibition on sex discrimination, federal courts have confirmed that discrimination on the basis of gender identity (including gender expression, gender transition, and transgender status) or sex-based stereotypes is “*literally*” discrimination on the basis of sex.<sup>71</sup> Consistent with this case law, agencies across the federal government have also interpreted prohibitions on sex discrimination to encompass discrimination on the basis of gender identity or transgender status. For example, in 2012, the Equal Employment Opportunity Commission (EEOC) held that “intentional discrimination against a transgender individual because that person is transgender is, by definition,

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<sup>67</sup> See *Rentos v. Oce-Office Systems*, No. 95-cv-7908, 1996 WL 737215, \*26 n.3 (S.D.N.Y. Dec. 24, 1996) (“[T]he State law similarly outlaws discrimination against transsexuals as a form of unlawful ‘sex’ discrimination.”).

<sup>68</sup> See *Kurcsics v. Merchants Mutual Ins. Co.*, 49 N.Y.2d 451, 459 (1980).

<sup>69</sup> *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)).

<sup>70</sup> N.Y. Educ. Law § 11(6).

<sup>71</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); see also *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (discrimination against a transgender individual “is sex discrimination, whether it’s described as being on the basis of sex or gender”; noting “several circuits have so held”); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *United States v. Southeastern Okla. State Univ.*, No. 15-cv-324, 2015 WL 4606079, \*2 (W.D. Okla. July 10, 2015); *Rumble v. Fairview Health Servs.*, 2015 U.S. Dist. LEXIS 31591, \*4-5 (D. Minn. Mar. 16, 2015) (sex discrimination prohibition “necessarily” encompasses bias based on gender identity or transgender status); *Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014).



**discrimination based on sex and such discrimination therefore violates Title VII.**<sup>72</sup> The United States Attorney General affirmed this interpretation in a 2014 memorandum.<sup>73</sup> And the federal Departments of Education (ED) and Justice (DOJ) have clarified that discrimination based on gender identity, including transgender status, is discrimination based on sex under Title IX.<sup>74</sup> The federal Departments of Health and Human Services,<sup>75</sup> Labor,<sup>76</sup> Housing and Urban Development (HUD),<sup>77</sup> and Office of Personnel Management<sup>78</sup> have also taken the same position.

**Thus, the Division's Proposed Rule** is a correct application of the Human Right Law's plain words. By explicitly articulating the Human Right Law's application to discrimination on the basis of gender identity, gender expression, transgender status, or sex stereotypes, the Proposed Rule's definition of sex discrimination will provide needed clarity and address a widespread and urgent problem.

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<sup>72</sup> *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, \*12 (Apr. 20, 2012); *see also Lusardi v. Dep't of the Army*, E.E.O.C. No. 0120133395, 2015 WL 1607756, at \*7 (Apr. 1, 2015).

<sup>73</sup> *See Att'y Gen. Mem., Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); *see also* Statement of Interest of the United States at 14, *Jamal v. Saks*, No. 14-cv-02782 (S.D. Tex. Jan. 26, 2015).

<sup>74</sup> *See, e.g.*, United States Br., *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015); Statement of Interest of the United States, *Tooley v. Van Buren Pub. Sch.*, No. 14-cv-13466 (E.D. Mich. Feb. 24, 2015); Dep't of Educ., Office of Civil Rights, *Title IX Resource Guide* (Apr. 2015); Dep't of Educ., Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014).

<sup>75</sup> *See* Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172, 54,176 (proposed Sept. 8, 2015) ("OCR has . . . interpreted sex discrimination to include discrimination on the basis of gender identity."); *see also* Letter from Leon Rodriguez, Director, Dep't of Health & Human Serv., Office for Civil Rights, to Maya Rupert, Federal Policy Director, Nat'l Ctr. for Lesbian Rights (Jul. 12, 2012).

<sup>76</sup> Dep't 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).

<sup>77</sup> *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).

<sup>78</sup> *See* 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105.

Accordingly, Lambda Legal supports the proposed definitions of sex, gender identity, and transgender person. Read together, these definitions recognize that prohibitions on sex discrimination extend to people of all gender identities—including transgender and non-transgender men and women as well as people of non-binary genders. However, the Proposed Rule's definitions of sex and gender identity, while accurate, could be further clarified in order to avoid confusion and ensure the inclusion of non-binary identities. We propose language to clarify both definitions. We also further recommend that the Division explicitly make clear that discrimination on the basis of sex stereotypes is sex discrimination and that such discrimination is distinct from discrimination on the basis of gender identity.

**RECOMMENDATION**

- We recommend that the definition of gender identity in Section 466.13(b) be revised as follows:

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~~ ***an individual's internal sense of gender, which may be male, female, neither, both, or a combination of male and female, and which may be*** different from that traditionally associated with the sex assigned to that person ***individual's sex assigned*** at birth.

- We recommend that Section 466.13(c) be revised as follows:

**(1) The term "sex" when used in the Human Rights Law includes gender identity, gender expression, and the status of being transgender, and sex stereotypes. Gender identity is a defining component of sex.**

**(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, or the status of being transgender, or sex stereotypes.**

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

- We also recommend that the Division add a definition of sex stereotypes to Section 466.13(b) as follows:

**(4) Sex stereotypes refers to 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 the expectation that individuals consistently identify with one and only one of two genders (male or female), and that they act in conformity with the gender-related expressions stereotypically associated with that gender.*

iii. ***Discrimination on the Basis of Gender Dysphoria Is a Form of Discrimination on the Basis of Disability.***

We commend the Division for clarifying that discrimination on the basis of gender dysphoria constitutes discrimination on the basis of disability. Such an interpretation of the Human Rights Law is in harmony with the statute, as interpreted by New York courts. The Proposed Rule is also consistent with the interpretation of numerous agencies and courts across the country.

**Under the Human Rights Law, “disabilities are not limited to physical or mental impairments, but may also include ‘medical’ impairments.”**<sup>79</sup> New York courts have found gender dysphoria (formerly termed “gender identity disorder”) to constitute a disability protected under the Human Rights Law. That is because the Human Rights Law “provides that disabilities are not limited to physical or mental impairments, but may also include ‘medical’ impairments.”<sup>80</sup> Indeed, 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.<sup>81</sup>

The Proposed Rule is also consistent with the interpretation of similar disability nondiscrimination provisions by agencies and courts across the country.<sup>82</sup> Indeed,

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<sup>79</sup> *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 218 (1985). *See also Reeves v. Johnson Controls World Servs.*, 140 F.3d 144, 155 (2d Cir. 1998) (“literal reading of the statute, taking no account of the seemingly clear legislative purpose to enact a definition of disability coextensive with comparable federal statutes, treats a medically diagnosable impairment as necessarily a disability for purposes of the NYHRL.”).

<sup>80</sup> *See Doe v. Bell*, 754 N.Y.S.2d 846, 850-51 (Sup. Ct. 2003) (“GID is a disability under the State Human Rights Law.”); *Wilson v. Phoenix House*, 978 N.Y.S.2d 748 (Sup. Ct. 2013).

<sup>81</sup> *Bell*, 754 N.Y.S.2d at 853 (“exempting Jean Doe from the Atlantic Transitional dress policy is a reasonable accommodation. The record establishes that, because of her GID and the treatment she has been receiving for her condition, Jean Doe needs to be able to wear feminine clothing, including dresses and skirts now banned under the ACS-approved dress policy. The evidence before the court establishes that, because of her disability, Jean Doe experiences significant emotional distress if denied the right to wear such feminine clothing.”).

<sup>82</sup> In keeping with the Proposed Rule, state courts in Connecticut, Massachusetts, New Hampshire, New Jersey, and Washington have held that gender dysphoria, gender identity, or transsexualism qualify as a disability under their nondiscrimination laws. *See Comm’n on*

gender dysphoria is a recognized disability that can be demonstrated by accepted clinical diagnostic techniques and qualifies as a handicap.<sup>83</sup> In addition, DOJ has recently affirmed that gender dysphoria is protected under the Americans with Disabilities Act because gender dysphoria may result from a physical impairment.<sup>84</sup>

**Lambda Legal supports the Proposed Rule’s clarification that gender dysphoria is a disability under the Human Rights Law and the proposed definition of gender dysphoria. However, gender dysphoria is often misunderstood and many transgender and even gender-nonconforming people often are discriminated against based on the perception that they suffer gender dysphoria. The Proposed Rule is also too narrowly drawn to account for the evolution and etiology of gender dysphoria. Indeed, “Gender dysphoria” is merely the current term for the diagnosis in the American Psychiatric**

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*Human Rights & Opp. v. City of Hartford*, No. CV094019485S, 2010 WL 4612700, at \*13 (Conn. Super. Ct. Oct. 27, 2010); *Lie v. Sky Publishing Corp.*, No. 013117J, 2002 WL 31492397, at \*6 (Mass. Super. Ct. Oct. 7, 2002); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000); *Doe v. Electro-Craft Corp.*, 1988 WL 1091932, at \*5 (N.H. Super. Ct. Apr. 8, 1988); *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 367 (N.J. Super. Ct. App. Div. 2001); *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993). Similarly, agencies tasked with enforcing the nondiscrimination laws of their respective jurisdictions in Connecticut, Florida, Illinois, Chicago, and Massachusetts have also found gender dysphoria to be a disability under their nondiscrimination laws. *See Dwyer v. Yale University, Comm’n on Human Rights & Opp.*, Op. Nos. 0130315 and 0230323 (Conn. Comm’n on Human Rights & Opp. Nov. 29, 2005), available at <http://www.ct.gov/chro/cwp/view.asp?a=2528&O=316044> (last visited Dec. 17, 2015); *Smith v. City of Jacksonville Corr. Inst.*, No. 88-5451, 1991 WL 833882, at \*11, \*12 (Fla. Div. Admin. Hearings Oct. 2, 1991); *Evans v. Illinois Dept. of Human Rights*, No. 1994CF0270, 1999 IL HUMAN RIGHTS 260 (Ill. Hum. Rights Com. Nov. 18, 1999); *Evans v. Hamburger Hamlet*, No. 93-E-177, 1996 WL 941676, at \*8, \*9 (Chicago Comm’n Human Rel. May 8, 1996); *Jette v. Honey Farms Mini Market*, No. 95 SEM 0421, 2001 WL 1602799 (M.C.A.D. Oct. 10, 2001).

<sup>83</sup> *Enriquez*, 777 A.2d at 376.

<sup>84</sup> *See* Second Statement of Interest of the United States at 6, *Blatt v. Cabela’s Retail*, No. 14-cv-4822 (E.D. Pa. 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.’”). While the ADA purportedly excludes “transsexualism . . . [and] gender identity disorders not resulting from physical impairments” from the definition of “disability,” 42 U.S.C. § 12211(b)(1), the Human Rights Law contains no such exclusion. Moreover, the ADA was based on the Rehabilitation Act, which had no exclusion and was interpreted by the courts to include transgender individuals. *See Blackwell v. U.S. Dep’t of Treasury*, 639 F. Supp. 289, 290 (D.D.C. 1986); *Doe v. United States Postal Serv.*, 37 Fair Empl. Prac. Cas. (BNA) 1867, 1869 (D.D.C. 1985). Nonetheless, the Human Rights Law’s definition of disability has been interpreted to be both broader and more encompassing than its federal counterparts. *See Xerox*, 65 N.Y.2d at 218-19 (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*, 140 F.3d at 154-156.

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 1900s 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."<sup>85</sup> Moreover, the International Classification of Diseases, Tenth Revision, Clinical Modification (ICD-10-CM), which is used to classify medical conditions in the United States, does not reference "gender dysphoria," but does reference "gender identity disorders" and "transsexualism."<sup>86</sup> Accordingly, we recommend that the Proposed Rule's definition of disability be modified in order to avoid confusion and to ensure that people who are perceived to have gender dysphoria or have been diagnosed with different terminology are protected under the Human Rights Law.

**RECOMMENDATION**

- We recommend that Sections 466.13(d)(2), (3), and (5) be revised as follows:

(2) The term "disability" when used in the Human Rights Law includes *actual or perceived* gender dysphoria, *transsexualism, gender identity disorder, or any other medical diagnosis stemming from having a gender identity different than that typically associated with one's sex assigned at birth.*

(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 *actual or perceived* gender dysphoria.

...

(5) Harassment on the basis of a person's *actual or perceived* gender dysphoria is harassment on the basis of disability.

***C. The Division Should Clarify That Access to Single-Sex Facilities Shall Be Based on an Individual's Gender Identity.***

The Division should provide *specific and clear* guidance that access to single-sex facilities shall be consistent **with an individual's gender identity.** Because the Proposed

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<sup>85</sup> See Friedemann Pfäfflin, *Mental Health Issues*, in PRINCIPLES OF TRANSGENDER MEDICINE AND SURGERY 169, 170-71, 173 (Randi Ettner et al. eds., 2007).

<sup>86</sup> F64 Gender identity disorders, *International Classification of Diseases, Tenth Revision, Clinical Modification* (ICD-10-CM) (2015), available at [http://www.cdc.gov/nchs/data/icd/icd10cm/2016/ICD10CM\\_FY2016\\_Full\\_PDF.ZIP](http://www.cdc.gov/nchs/data/icd/icd10cm/2016/ICD10CM_FY2016_Full_PDF.ZIP) [Tabular.pdf page 228] (last visited Dec. 17, 2015).

Rule is silent with regards to access to single-sex facilities, including restrooms, Lambda Legal recommends that the Division add a subsection to the Proposed Rule making clear that access to single-sex facilities shall be **based on an individual's gender identity**. Such a provision would avoid confusion, prevent the perpetuation of a pernicious form of discrimination, and eliminate the need for needless litigation.

As previously noted, nearly two-thirds (63.9%) of transgender people in New York have been refused use of a bathroom due to their gender identity or expression.<sup>87</sup> Such pernicious discrimination imposes a stigma upon transgender people and contributes to lower self-esteem and serious mental health conditions, such as depression and suicidality.<sup>88</sup> Discriminatory policies and practices with regards to restrooms and other single-sex facilities also inflict physical harm by causing transgender people to **fast, dehydrate themselves, or "hold it in" all day simply to avoid** the stigma, harassment, and rejection associated with having to use a different restroom than the one that matches their gender identity.<sup>89</sup> What is more, denial of access to **single-sex facilities in accordance with an individual's gender identity interferes** with medically necessary treatment for gender dysphoria.<sup>90</sup> Treating gender dysphoria typically involves social role transition, wherein transgender people come to live all aspects of their lives consistently with their gender identity.

In light of the above, federal agencies and courts have recognized that access to single-sex facilities must be granted **in accordance with people's gender identity**. For example, both ED and DOJ have determined that Title IX's prohibition on sex discrimination necessarily means that access to single-sex facilities must be granted consistent with their gender identity.<sup>91</sup> The EEOC has likewise determined that employees must be given access to restrooms in the workplace in accordance to their gender identity.<sup>92</sup> Similarly, HUD has issued guidance and regulations ensuring that

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<sup>87</sup> See Frazer and Howe, *supra*, at 10.

<sup>88</sup> Letter from James A. Ferg-Cadima, Acting Deputy Asst. Sec'y of Policy, Office of Civil Rights, U.S. Dep't of Educ. (Jan. 7, 2015), available at <http://www.lambdalegal.org/sites/default/files/28-2.pdf>.

<sup>89</sup> See Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 66 (2013).

<sup>90</sup> Eli Coleman et al., World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 5, 8-10 (7th ed. 2012).

<sup>91</sup> See, e.g., United States Br., *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015); Letter from James A. Ferg-Cadima, Acting Deputy Asst. Sec'y of Policy, Office of Civil Rights, U.S. Dep't of Educ. (Jan. 7, 2015).

<sup>92</sup> *Lusardi*, 2015 WL 1607756, at \*7.

single-sex facilities in federally-funded housing programs place people in accordance to their gender identity.<sup>93</sup>

Moreover, the clarification we recommend is in keeping with other New York agencies' interpretations of similar statutes. In July 2015, the New York State Education Department (NYSED) issued guidance to school districts throughout New York on how to create safe and supportive environments for transgender and gender-nonconforming students.<sup>94</sup> In its guidance, and relying in part on the guidance of ED and DOJ with regards to Title IX, NYSED emphasized that prohibiting a student from accessing the restrooms that match his or her gender identity is unlawful sex discrimination.<sup>95</sup> As previously noted, DASA prohibits discrimination on the basis of gender, which is defined to include gender identity or expression.

Finally, the private biases of others or generalized or speculative safety and privacy concerns cannot be used to justify discriminatory policies and practices that would prevent transgender people from accessing the single-sex facilities consistent **with their gender identity. DOJ has specifically stated that “generalized assertions of safety and privacy cannot override” a “guarantee of equal [] opportunity” such as the one embodied by the Human Rights Law.**<sup>96</sup> It is the objecting party who finds the presence of a transgender person in a restroom or other single-sex space disconcerting who bears the burden of utilizing a different restroom, and not the transgender individual.<sup>97</sup>

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<sup>93</sup> *See, e.g., Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs*, 80 Fed. Reg. 72,642 (proposed Nov. 20, 2015) (to be codified at 24 C.F.R. pt. 5), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2015-11-20/pdf/2015-29342.pdf> (last visited Dec. 17, 2015); Dep't of Housing & Urban Dev., Office of Cmty. Planning & Dev., *Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities*, Notice CPD-15-02 (Feb. 20, 2015), *available at* <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf> (last visited Dec. 17, 2015).

<sup>94</sup> N.Y. Educ. Dep't, *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender-nonconforming Students* (July 2015), *available at* [http://www.p12.nysed.gov/dignityact/documents/Transg\\_GNCGuidanceFINAL.pdf](http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf) (last visited Dec. 17, 2015).

<sup>95</sup> *Id.* at 9-11.

<sup>96</sup> *See United States Br., G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015).

<sup>97</sup> *See Cruzan v. Special Sch. Dist. # 1*, 294 F.3d 981 (8th Cir. 2002) (affirming dismissal of suit by non-transgender female teacher alleging discrimination and violation of her privacy based on school's policy allowing transgender female teacher to use the women's restroom and finding that objecting teacher could use other restrooms); Letter from Adele Rapport, Regional Director, Office of Civil Rights, U.S. Dep't of Educ., OCR Case No. 05-14-1055 (Nov. 2, 2015), at 12,

While the Human Rights Law specifically allows for the creation of single-sex spaces and facilities,<sup>98</sup> access to such single-sex facilities **must** be determined in **accordance with a person’s gender identity or expression.**<sup>99</sup> The establishment of single-sex spaces and facilities **does not and cannot** dictate the use of restrooms and other single-sex facilities in a way that discriminates against transgender people.<sup>100</sup>

In light of the above, we **strongly** urge the Division to explicitly clarify within the Proposed Rule that access to single-sex facilities shall be determined according to a **person’s gender identity. Such clarification would avoid confusion and ensure that** a pernicious form of discrimination against transgender and people is not perpetuated.

**RECOMMENDATION**

- We recommend that a new subsection to Section 466.13(c) be added as follows:

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**available at** <https://assets.documentcloud.org/documents/2501220/letter-from-the-u-s-dept-of-education-to-daniel.pdf> (“Those female students wishing to protect their own private bodies from exposure to being observed in a state of undress by other girls in the locker rooms, **including transgender girls, could change behind a privacy curtain.**”).

<sup>98</sup> See N.Y. Exec. Law § 296 (2)(b) (“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.”).

<sup>99</sup> Anticipating the need for such explicit clarification, New Jersey’s Law Against Discrimination’s similar provision regarding the establishment of single-sex facilities specifies that such **access must be based on an individual’s gender identity or expression.** See N.J. Stat. § 10:5-12(f)(1) (“nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex, **provided individuals shall be admitted based on their gender identity or expression,** from refusing, withholding from or denying to any individual of the opposite sex any of the accommodations, advantages, facilities or privileges thereof on the basis of sex.” (emphasis added)).

<sup>100</sup> See *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 606 (Me. 2014) (“Although school buildings must, pursuant to section 6501, contain separate bathrooms for each sex, section 6501 does not—and school officials cannot—dictate the use of the bathrooms in a way that discriminates against students in violation of the MHRA.”).



*(4) To the extent the establishment of single-sex facilities is permitted by law, individuals shall be admitted to single-sex facilities, including but not limited to restrooms, locker rooms, and housing, based on their gender identity.*

***D. The Division Should Reject Any Requests to Adopt Religious Exemptions or Limitations.***

The Division should reject any requests to adopt religious exemptions or limitations. Any such exemption or limitation would be improper for multiple reasons and could significantly hamper New York State's "extremely strong statutory policy of eliminating discrimination," as embodied by the Human Rights Law.<sup>101</sup>

Sadly, many people and institutions have sought to support discrimination using religious justifications. Indeed, religious justifications have been proffered for, *inter alia*, race discrimination,<sup>102</sup> sex discrimination,<sup>103</sup> marital status discrimination,<sup>104</sup> and sexual orientation discrimination.<sup>105</sup> But it is well established that discrimination is

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<sup>101</sup> *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216 (1991).

<sup>102</sup> For example, courts properly rejected claims that Christian schools should be exempt from laws against race discrimination based on their beliefs that "mixing of the races" would violate God's commands (see *Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983)), and that such beliefs should exempt restaurant owners who refused to serve African American customers. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Courts likewise appropriately have rejected religious objections to laws and policies against interracial relationships and marriage. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (invalidating state law against interracial marriage despite religious arguments for racial segregation); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships).

<sup>103</sup> See, e.g., *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (notwithstanding sincere religious beliefs, school violated antidiscrimination law by offering unequal health benefits to female employees); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (school not permitted to refuse to hire women bus drivers to accommodate religious objections of male student bus riders).

<sup>104</sup> See, e.g., *Smith v. Fair Emp. and Hous. Comm'n*, 913 P.2d 909, 925 (Cal. 1996) (rejecting religious objection of landlord to fair housing law requiring equal treatment of potential tenants regardless of marital status); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

<sup>105</sup> See, e.g., *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (rejecting religious defense of supervisor fired for harassing lesbian subordinate); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (rejecting religious discrimination claim of employee fired for anti-gay proselytizing intended to provoke coworkers); *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d

harmful and that religious motives for discriminatory conduct do not ameliorate those harms.

The purpose of the Human Rights Law (and the Proposed Rule) is not to ensure that *some* employment, housing, services, or public accommodations are available to individuals. To the contrary, the purpose of the Human Rights Law is to ensure that *all* employment, housing, services, or public accommodations are available to individuals on an equal basis. **Indeed, the State and the Division have a “responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life.”**<sup>106</sup> **That is because “discrimination . . . menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.”**<sup>107</sup>

Equal enforcement of the Proposed Rule and the Human Rights Law is the only way to truly further the State’s “**compelling state interest in preventing discrimination.**”<sup>108</sup> Accordingly, the Division should reject any requests to adopt **religious exemptions or limitations and, instead, follow the “usual rule” that “citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets.**”<sup>109</sup> The Human Rights Law and its purpose would be severely damaged by the adoption of any religious exemption or limitation beyond what is already contained in the text of the statute.

## **CONCLUSION**

We greatly appreciate the Division’s efforts to clarify the scope of the Human Rights Law through the Proposed Rule. We strongly support the adoption of the

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1152 (N.D. Cal. 2001) (rejecting religious defense of supervisor who harassed gay subordinate with warnings he would “go to hell” and pressured him to join workplace prayer services).

<sup>106</sup> N.Y. Exec. Law § 290(3).

<sup>107</sup> **2002 McKinney’s Session Law News of NY Ch. 2 at A-1971** (Dec. 2002). *See also* S. Rep. 88-872, 88th Cong., 2d Sess., *reprinted in 1964 U.S.C.C.A.N at 2370* (“**Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.**”).

<sup>108</sup> *Matter of Mill Riv. Club, Inc. v. State Div. of Human Rights*, 873 N.Y.S.2d 167, 173 (N.Y. App. Div. 2d Dep’t 2009). *See also Roberts*, 468 U.S. at 624 (holding that Minnesota Human Rights Act’s prohibition on sex discrimination “**serve[d] interests of the highest order**”); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (acknowledging that nondiscrimination laws serve “**a compelling interest in providing . . . equal opportunity**”).

<sup>109</sup> *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 526 (2006).

Proposed Rule in order to make clear that discrimination on the basis of gender identity, gender expression, transgender status, or sex stereotypes constitutes discrimination on the basis of sex. Likewise, we support the adoption of the Proposed Rule in order to make clear that discrimination on the basis of gender dysphoria constitutes discrimination on the basis of disability. However, for the reasons set forth above, we again respectfully and vigorously urge that the final rule address the following points of critical importance to transgender and gender-nonconforming people in New York:

1. Clarify that the scope of protections under the Proposed Rule includes protections for individuals with non-binary gender identities, as well as from discrimination on the basis of gender expression or sex stereotypes;
2. Clarify that the scope of protection against disability discrimination under the Proposed Rule includes protection from discrimination on the basis of perceived as well as actual gender dysphoria, transsexualism, gender identity disorder, or any other medical diagnosis stemming from having a gender identity different **than that typically associated with one's sex assigned at birth**;
3. Make clear that access to single-sex facilities is to be determined on the basis of **an individual's gender identity**; and
4. Reject any requests to adopt a religious exemption or limitation.

We thank you for considering these comments and for your work to implement the crucial civil rights protections of the Human Rights Law so that LGBT people and gender-nonconforming people are afforded an equal opportunity to enjoy a full and productive life in New York State.

Most respectfully submitted,

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