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**Comments from the New York Civil Liberties Union  
on  
Proposed Regulation Section 466.13, I.D. HRT-27-19-00002-P**



**ACLU of New York**

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Dear Ms. Allen:

The New York Civil Liberties Union, the state affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters. The NYCLU's mission is to defend and promote the fundamental principles, rights, and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York. This includes the principles of equality and personal autonomy implicated by the Proposed Regulations that are the subject of these comments.

New York State's Division of Human Rights ("DHR" or the "Division") has proposed regulations related to the implementation of the Gender Expression Nondiscrimination Act ("GENDA"), chapter 8 of the Laws of New York 2019, amending, among other statutes, the New York State Human Rights Law (the "HRL") to explicitly name "gender identity or expression" as a protected category covered by the law's antidiscrimination provisions, *see* Executive Law § 296. We greatly appreciate that since 2015 DHR has had regulations in place confirming that discrimination based on gender identity and expression is a form of sex discrimination and that discrimination based on gender dysphoria is a form of disability discrimination. Unfortunately, the Proposed Regulations do nothing more than conform the existing regulation with the text of GENDA; this change fails to provide the kind of regulatory clarity required to effectuate the law.

In light of its long history of vigorously defending the rights and liberties of transgender and gender nonconforming individuals, the NYCLU submits these comments to offer recommendations for how DHR can strengthen the Proposed Regulations to best achieve their intended purpose of clarifying the law and eliminating discrimination against transgender and gender nonconforming New Yorkers. **While the NYCLU applauds the Division's longstanding commitment to combating discrimination against transgender and gender nonconforming people, it urges the Division to use this opportunity to do more than insert the text of GENDA into its regulations. As recognized by other agencies tasked with enforcing the same or similar antidiscrimination protections, most notably the New York City Commission on Human Rights, additional regulatory guidance is necessary**

**to ensure that the antidiscrimination provisions at the heart of this rule are better understood and enforced.**

The following comments provide a detailed analysis of the Proposed Regulations and specific recommendations for strengthening them, as well as additional references supporting these recommendations.

**I. The Proposed Regulations Would Benefit From More Specific Examples of Prohibited Discrimination and Reasonable Accommodations.**

Because these regulations will, according to the Division’s regulatory impact statement, give effect to a statutory amendment “intended to expand rights for New Yorkers based on gender identity or expression” and “declare[] it a civil right of New Yorkers to have the opportunity to obtain employment, education, use of places of public accommodations, ownership, use, and occupancy of housing accommodations and commercial space without discrimination on the basis of gender identity or expression,” we recommend that the Division include specific guidance highlighting some of the most common scenarios in which discrimination—perhaps unintended or misunderstood by regulated parties—occurs.

Similarly, in the context of disability discrimination, the Proposed Regulations would benefit from additional examples of reasonable accommodations to which transgender and gender nonconforming individuals might be entitled. Proposed Section 466.13(e)(4) makes clear that the refusal to provide a reasonable accommodation for persons with gender dysphoria constitutes disability discrimination. However, the examples of reasonable accommodations currently offered in 9 NYCRR § 466.11 do not provide clarity on the specific types of reasonable accommodations that people with gender dysphoria may require.

We propose the addition of the following subsection:

(f) Discrimination based on gender identity or expression, sex, or disability shall include but not be limited to:

(1) Deliberate Refusal to Use an Individual’s Self-Identified Name, Pronoun, or Title. A covered entity’s deliberate refusal to use an individual’s self-identified name, pronoun, and gendered title constitutes a form of prohibited discrimination where the refusal is motivated by the individual’s actual or perceived gender or disability and creates a hostile environment or constructive denial of service. This is the case regardless of the individual’s sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual’s identification. Asking someone in good faith their name or which pronoun they use is not a prohibited form of discrimination.

a. Examples of violations.

i. Deliberately calling a transgender woman “Mr.” after she has made clear that she uses female titles. Deliberately



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using the pronoun “he” for a non-binary person who is perceived as male but has indicated that they identify as nonbinary and use the pronouns “they,” “them,” and “theirs.”

- ii. Conditioning an individual’s use of their self-identified name on obtaining a court-ordered name change or providing identification in that name. For example, a covered entity may not refuse to call a transgender student by her self-identified name because her self-identified name does not appear on her birth certificate.
- iii. Asking or requiring an individual to provide information about their medical history or proof of having undergone medical procedures to use their self-identified name, pronoun, or title.
- iv. Refusing to use an employee’s self-identified name in their email account.
- v. Failing or refusing to include a patient’s self-identified name and self-reported gender in their medical record, resulting in the patient being misgendered by staff, even if a patient’s sex assigned at birth or gender transition may be recorded for the purpose of providing medical care.

(2) Refusing to Allow Individuals to Use Single-Gender Facilities or Participate in Single-Gender Programs Consistent with their Gender Identity. Covered entities must allow individuals to use single-gender facilities—such as bathrooms, locker rooms, housing accommodations, or hospital rooms—and participate in single-gender programs consistent with their gender identity, regardless of their sex assigned at birth, anatomy, medical history, appearance, or the sex indicated on their identification. It is not a defense to a charge of discrimination that some people, including, for example, customers, other program participants, tenants, or employees, may object to sharing a facility or participating in a program with a transgender, non-binary, or gender nonconforming person. Such objections are not a lawful reason to deny access to that transgender, non-binary, or gender nonconforming individual.

a. Examples of violations.

- i. Prohibiting a person from participating in the single-gender program consistent with their gender identity or expression because they do not conform to gender stereotypes.
- ii. Requiring a gender nonconforming person to provide proof of their gender to access the single-gender program or facility corresponding to their gender.



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- iii. Requiring a non-binary person to use a single-occupancy restroom instead of a shared bathroom.
- iv. Barring a transgender girl from participating in a single-gender after-school program out of concern that she will make other students uncomfortable.
- v. Forbidding a transgender person from sharing a room with people of the same gender in a residential treatment facility with single-gender shared rooms.

(3) *Imposing Different Dress or Grooming Standards Based on Gender.* Covered entities may not require dress codes or uniforms, or apply grooming or appearance standards, that impose different requirements for individuals based on their gender. It is not a defense to a charge of discrimination that a covered entity has a violative dress code because it is catering to the preferences of its customers or clients.

a. Examples of violations.

- i. Requiring different uniforms for men and women. While covered entities may provide different uniform options that are typically associated with men and women, it is unlawful to require an employee to wear one style instead of the other.
- ii. Permitting only female students to wear makeup or jewelry to school.
- iii. Requiring only men to wear ties to dine at a restaurant.

(4) *Providing Unequal Employee Benefits Based on Gender.* Covered entities offering benefit plans must offer benefits equally to all employees regardless of gender and may not provide health benefit plans that deny, limit, or exclude services based on gender. To be non-discriminatory with respect to gender, health benefit plans may not exclude coverage for transgender care, also known as transition-related care or gender-affirming care.

a. Examples of Violations

- i. Offering health benefits that exclude coverage for procedures based on gender. For example, offering health benefits that cover prostate cancer screening for cisgender men but not for transgender women or nonbinary individuals.
- ii. Offering health benefits that exclude from coverage, or limit

coverage for, health care related to gender transition, including, but not limited to, hormone replacement therapy, psychological or psychiatric treatment, hormone suppressers, voice training, or surgery.

- iii. Giving twelve weeks of paid parental leave to mothers but only two weeks to fathers. While a differential in parental leave may be permissible if based on physical recovery from childbirth, it may not be premised on a parent's gender.
- iv. Employers selecting a benefit plan offering health benefits that deem certain medical procedures available to only one sex, thereby excluding intersex people who may be registered under another.



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(5) Revealing a Person's Transgender or Gender Nonconforming Status Without Their Consent. A covered entity may not deliberately disclose a person's transgender, gender nonconforming, or intersex status, or their gender dysphoria diagnosis, without consent.

a. Examples of Violations

- i. Publicizing a student's transgender status, former name, or sex assigned at birth and medical history to classmates or classmates' parents, without consent;
- ii. Revealing an employee's assigned sex at birth or former name to colleagues without consent;
- iii. Taking adverse action or failing to preserve confidentiality after learning that a person is transgender or intersex through a background check or review of medical records.

(6) Using Gender to Justify Refusing a Request for Accommodation. Gender may not be the basis for a covered entity to refuse, withhold, or deny a request for accommodation for disability or other request for changes to the terms and conditions of an individual's employment, participation in a covered program, or use of a public accommodation, which may include additional medical or personal leave or schedule changes. Covered entities must treat leave requests to address medical or health care needs related to an individual's gender identity in the same manner as requests for all other medical conditions. Covered entities must provide reasonable accommodations to individuals undergoing gender transition, including medical leave for medical and counseling appointments, surgery, and recovery from gender affirming procedures, surgeries, and treatments as they would for any other medical condition.

a. Examples of Violations

- i. Providing a reasonable accommodation for a cisgender woman undergoing medically necessary reconstructive breast surgery but refusing to provide the same accommodation to a transgender woman undergoing the same medically necessary surgery.
- ii. Requesting medical documentation to verify leave time from transgender or non-binary employees or participants, but not cisgender employees or participants.
- iii. Denying access to single-gender facilities, including restrooms and locker rooms, and programs or jobs in accordance with their gender identity or expression without proof of a particular medical treatment;
- iv. Denying a transgender person’s request to use their initials or a preferred name without proof of a legal name change;



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These suggested examples reflect common types of prohibited discrimination suffered by transgender and gender nonconforming New Yorkers. Effective March 9, 2019, New York City’s Commission on Human Rights (NYCCHR) adopted its own regulation covering many of the scenarios included in this suggested addition to the Proposed Regulations.<sup>1</sup> New York City’s regulation interprets and offers much-needed guidance on a provision of the New York City Human Rights Law that provides substantially similar antidiscrimination protections as the New York State Human Rights Law.<sup>2</sup> Even though the NYCCHR has, for several years, published a sub-regulatory guidance document containing similar examples of prohibited discrimination,<sup>3</sup> the NYCCHR found that adopting a regulation was required in order to “establish certain definitions and clarify the scope of protections with regard

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<sup>1</sup> The regulation is codified in Sections 2-01 (Definitions) and 2-06 (“Prohibition on Discrimination Based on Gender”) of title 47 of the Rules of the City of New York, *available at* [http://rules.cityofnewyork.us/sites/default/files/adopted\\_rules\\_pdf/cchr\\_final\\_gender\\_rule\\_approved\\_by\\_law\\_1.10.2019.pdf](http://rules.cityofnewyork.us/sites/default/files/adopted_rules_pdf/cchr_final_gender_rule_approved_by_law_1.10.2019.pdf).

<sup>2</sup> *See id.* (interpreting N.Y.C. Admin. Code §§ 8-101, *et seq.*, which prohibits discrimination on the basis of, *inter alia*, “sex, gender identity and gender expression” and “disability”).

<sup>3</sup> *See* NYCCHR, *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression* (last updated Feb. 15, 2019), *available at* <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf>.

to” the law.<sup>4</sup> Beyond New York City, other jurisdictions—including California<sup>5</sup> and the District of Columbia<sup>6</sup>—have adopted similarly specific and robust regulations.

New Yorkers outside of New York City deserve the same clarity and commitment from the DHR to ensure that the protections of the Human Rights Law are as well-understood and well-enforced as New York City’s law. For that reason, the DHR should expand on the laudable first step it took in 2018 when it released two two-page fliers offering limited guidance on certain forms of prohibited discrimination—*Protections Against GENDER IDENTITY DISCRIMINATION Under the New York State Human Rights Law*<sup>7</sup> and *New Yorkers Are Protected From Gender Identity Discrimination By Hospitals*<sup>8</sup>—and codify a more robust set of enforcement principals and guidelines in its GENDA regulations.

On the issue of access to sex-segregated facilities, state court decisions in New York and other jurisdictions relating to similar state laws have held that transgender individuals cannot legally be barred from communal sex-segregated facilities that are consistent with their gender identity,<sup>9</sup> as confirmed by the aforementioned guidance from the DHR itself<sup>10</sup> and other New York agencies including the State Education Department<sup>11</sup> and the Office of the Attorney General.<sup>12</sup> And on the issue



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<sup>4</sup> *Id.* (Statement of Basis and Purpose of Rule).

<sup>5</sup> Cal. Code of Regs. §§ 11030, 31, 34, available at <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalTextRegTransgenderIdExpression.pdf>

<sup>6</sup> D.C. Mun. Reg. §§ 4-800-08; 4-899, available at [http://dcrules.elaws.us/dcmr/t4\\_ch4-8](http://dcrules.elaws.us/dcmr/t4_ch4-8).

<sup>7</sup> New York State Division of Human Rights, *Protections Against GENDER IDENTITY Discrimination Under the New York State Human Rights Law* (2018), available at <https://dhr.ny.gov/sites/default/files/pdf/DHR-gender-identity-brochure.pdf>.

<sup>8</sup> New York State Division of Human Rights, *New Yorkers Are Protected From Gender Identity Discrimination By Hospitals* (2018), available at [https://dhr.ny.gov/sites/default/files/pdf/postings/DHR\\_Gender\\_Identity\\_Handout.pdf](https://dhr.ny.gov/sites/default/files/pdf/postings/DHR_Gender_Identity_Handout.pdf).

<sup>9</sup> See *Wilson v. Phoenix House*, 42 Misc. 3d 677, 698 (Sup. Ct. Kings County 2013) (holding that denying a transgender woman access to residential treatment facility programs and amenities consistent with her gender identity violated the New York State Human Rights Law); *Doe v. Regional School Unit 26*, 86 A.3d 600, 607 (Maine 2014) (denying a transgender girl access to communal girls room constitutes unlawful discrimination); *Mathis v. Fountain-Fort Carson Sch. Dist.*, Colo. Div. of Civ. Rights Determination (June 17, 2013) (same), available at <http://bit.ly/1LpFiU5>.

<sup>10</sup> See DHR, *Protections Against GENDER IDENTITY Discrimination Under the New York State Human Rights Law* (“Denying use of facilities consistent with an individual’s gender identity is discriminatory.”); *New Yorkers Are Protected From Gender Identity Discrimination By Hospitals* (“Unlawful discrimination” includes “denying the use of . . . facilities consistent with a person’s gender identity.”).

<sup>11</sup> New York State Education Dep’t, *Guidance to School Districts for Creating a Safe and Supportive Environment for Transgender and Gender Nonconforming Students* (July 20, 2015), at 9-10, available at <http://bit.ly/1CSy1ZC>.

<sup>12</sup> See, e.g., Letter from the Office of the Attorney General and the New York State Education Department (February 28, 2018) (endorsing 2015 NYSED guidance regarding access to “gender-segregated facilities”), available at <http://www.nysed.gov/common/nysed/files/nysed-oag-joint-guidance-letter-2-28-18.pdf>.

of misgendering, using improper names, and questioning the authenticity of a person’s gender identity, DHR guidance correctly notes that such behavior constitutes a prohibited form of discrimination,<sup>13</sup> consistent with the rulings of New York courts that have addressed the question. As one court noted, the “purposeful use of masculine pronouns in addressing” someone with a female gender identity “is not a light matter, but one which is laden with discriminatory intent.”<sup>14</sup>

While existing guidance is a helpful first step, a more fulsome set of regulatory rules would enhance the DHR’s ability to combat the pervasive and widespread discrimination against transgender and gender nonconforming New Yorkers that GENDA seeks to eliminate. By including more specific examples of some of the most common forms of prohibited discrimination against transgender and gender nonconforming New Yorkers in its rule, DHR would significantly improve the Proposed Regulations’ ability to offer clarity and guidance to those seeking to comply with the Human Rights Law and to those who believe they have been subjected to unlawful discrimination.



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## **II. The Proposed Changes Are Necessary: New Yorkers Continue to Experience High Rates of Discrimination Based on Gender Identity and Expression.**

The explicit regulatory clarifications described above are needed because of the severe, pervasive discrimination that persists against people who are transgender and gender nonconforming. The NYCLU receives a substantial number of individual intakes every year involving transgender or gender nonconforming New Yorkers who have been fired, harassed, subjected to violence, turned away from businesses, subjected to discriminatory policies, or otherwise mistreated based on their gender identity and expression, and our work with community advocates, partner organizations, and local groups around the state has exposed us to the stories of hundreds more.

The stories of our clients and allies are not unique; indeed, they highlight a systemic problem. Transgender and gender nonconforming people, in particular transgender women of color, currently face devastating levels of discrimination in all areas of life.

Transgender workers experience disproportionately high rates of employment discrimination. The 2015 LGBT Health and Human Services Needs Assessment found that nearly a third of transgender and gender nonconforming New Yorkers reported being fired, and 42% reported not being hired, because of their gender identity.<sup>15</sup> In a 2017 report based on a similar survey, 15% reported being fired and

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<sup>13</sup> See DHR guidance *supra* at n. 10.

<sup>14</sup> *Doe v. City of New York*, 976 N.Y.S.2d 360, 364 (Sup. Ct. N.Y. County 2013); see also *Doe v. Bell*, 754 N.Y.S.2d 846, 851 (Sup. Ct. N.Y. County 2003) (refusing to accommodate a transgender person by allowing them to adhere to a dress code consistent with their gender identity constituted prohibited discrimination).

<sup>15</sup> 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)

26% reported not being hired because of their gender identity.<sup>16</sup> In addition, 24% of transgender and gender nonconforming workers reported being harassed on the job because of their gender identity or expression.<sup>17</sup> These data are comparable to other surveys from New York and around the nation.<sup>18</sup>

Housing discrimination against transgender people is also rampant. In 2015, 13.4% of New York respondents to one survey reported being denied housing because they were transgender or gender nonconforming, and 27.1% reported being harassed by neighbors.<sup>19</sup> A similar 2017 report found that 21% of respondents reported being denied housing or evicted based on their gender identity, 11% became homeless because of their gender identity, and 30% who experienced homelessness avoided a shelter due to being mistreated as a transgender person.<sup>20</sup>

Transgender and gender nonconforming people also face high rates of discrimination and harassment in places of public accommodation. In a 2017 report based on a survey of transgender and gender nonconforming New Yorkers, 35% experienced discrimination, 29% reported having been verbally or physically harassed in public accommodations, and 61% having been discriminated against by police.<sup>21</sup>

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identified themselves as transgender and/or gender nonconforming), <http://www.prideagenda.org/lgbtdata>. (All websites were last accessed Dec. 21, 2015.)

<sup>16</sup> *2015 US Transgender Survey: New York Results* (2017) at 1, <http://www.transequality.org/sites/default/files/USTS%20NY%20State%20Report%20%281017%29.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> See Make the Road New York, *Transgender Need Not Apply: A Report on Gender Identity Job Discrimination* 12-13 (2010) (Using matched pair testing and a survey to measure employment discrimination against transgender people in New York City, the report revealed a 42% net rate of discrimination against transgender job seekers. In eleven out of the 24 employers tested, the transgender job applicant received no offer, but the control group tester did. Only in one instance did a transgender tester receive 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.), [http://www.maketheroad.org/pix\\_reports/TransNeedNotApplyReport\\_05.10.pdf](http://www.maketheroad.org/pix_reports/TransNeedNotApplyReport_05.10.pdf); Brad Sears & Christy Mallory, *Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies* (2015) (finding that workers filed discrimination complaints based on sexual orientation and gender identity discrimination with state agencies at a similar frequency to race and sex discrimination complaints), <http://williamsinstitute.law.ucla.edu/research/workplace/evidence-of-employment-discrimination-based-on-sexual-orientation-and-gender-identity-an-analysis-of-complaints-filed-with-state-enforcement-agencies/>; 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) (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 more qualified applicants perceived as transgender), <http://ohr.dc.gov/page/QualifiedAndTransgender>.

<sup>19</sup> Frazer & Howe, *supra* note 1, at 9-10.

<sup>20</sup> *2015 US Transgender Survey: New York Results* (2017) at 2.

<sup>21</sup> *Id.*



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This discrimination is unacceptable, and it also comes at an economic cost to New York State. The Williams Institute estimates that denial of housing and job loss due to bias against transgender people costs New York State millions of dollars per year in Medicaid and homeless services expenditures.<sup>22</sup> The Institute has also estimated that reducing or eliminating employment discrimination against transgender people would generate millions of additional dollars in income tax revenue.<sup>23</sup>

Discrimination against transgender and gender nonconforming New Yorkers is overwhelming and pervasive, and the DHR has a responsibility to address this crisis with urgency. We respectfully submit that adopting our proposed changes to the regulation would be a meaningful step towards a better future for all New Yorkers.



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### III. The Division Has the Authority to Include the Proposed Changes in its Final Regulation.

The Division has clear authority to enforce the Human Rights Law by promulgating a final regulation that includes the proposed additions described above. Executive Law § 295 gives the Division broad authority—and a duty—to promulgate rules and regulations to carry out the provisions of the Human Rights Law.<sup>24</sup> The proposed final regulation falls well within “the extensive powers granted to the Division of Human Rights in the Executive Law” and “reflect[s] the broad thrust of [its] fundamental policy” of “combating discrimination.”<sup>25</sup>

### IV. Conclusion

The NYCLU thanks the Division of Human Rights for proposing regulations that begin to address the unlawful discrimination experienced by so many transgender New Yorkers. Our recommended amendments and additions are comparable to the current policies of other state and local agencies and are consistent with existing case law. We urge the Division to adopt the recommendations as detailed above to ensure that the benefits of the law reach every New Yorker who needs them.

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<sup>22</sup>Jody Herman, Williams Institute, *The Cost of Employment and Housing Discrimination against Transgender Residents of New York* 1 (2013), <http://williamsinstitute.law.ucla.edu/research/transgender-issues/ny-cost-of-discrimination-april-2013>.

<sup>23</sup> *Id.*

<sup>24</sup> See also *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 133 (1965).

<sup>25</sup> *Batavia Lodge No. 196 v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 145-46 (1974).

Respectfully Submitted,



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