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February 2, 2018

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Re: Proposed Amendment of Various Nondiscrimination Rules of
the Unified Court System to Include Gender Identity and Expression

Dear Mr. McConnell:

Thank you for the opportunity to comment upon the Unified Court System's proposal to amend various nondiscrimination rules to add gender identity and expression as protected classes. I write in support of that proposal. In my role as Chair and Commissioner of the New York City Commission on Human Rights, I see firsthand the profound impact that discrimination has on the lives of transgender and gender non-conforming ("TGNC") people. I applaud the Uniform Court System for taking steps to protect TGNC people from discrimination in our state's judiciary, and urge that the proposed amendments be adopted.

The Commission on Human Rights is the New York City agency charged with enforcing the City's Human Rights Law, which broadly prohibits discrimination in housing, employment, and public accommodations because of race, religion or creed, color, age, national origin, alienage or citizenship status, gender, sexual orientation, disability, pregnancy, marital and partnership status, and status as a veteran or active military service member. It provides additional protections in employment based on caregiver status, arrest or conviction record, status as a victim of domestic violence, stalking, or sex offenses, unemployment status, and credit history. It also prohibits employers from inquiring about job seekers' salary history during the hiring process. In housing, it protects individuals from discrimination based on lawful occupation, the presence of children, and lawful source of income. The Human Rights Law also bars bias-based profiling by law enforcement and discriminatory harassment. It specifically includes gender identity and expression within the scope of its protections against gender discrimination.

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Discrimination is an insidious and pervasive problem that impacts all aspects of TGNC people's lives.¹ Too often, the discrimination that they experience in the world around them continues inside the courthouse. In one study, 66% of transgender women reported that their transgender identity was raised as an issue in court when it was not relevant.² Thirty-one percent of transgender women reported that their transgender identity was disclosed *against their will* during a court proceeding.³ These actions are just examples of what often occurs without the intention of harming TGNC people, though they constitute invasions of privacy that deny TGNC people access to justice. TGNC people, fearful of these invasions of privacy, often fear coming to court. Much work remains to be done to ensure nondiscriminatory access to the court system for TGNC people, and the Unified Court System's proposal is a laudable step in the right direction.

New York City has been at the forefront of efforts to combat discrimination against transgender people. In 2002, recognizing the profoundly debilitating impact of gender-based discrimination and the need to protect populations affected by such discrimination, New York City passed a transgender rights bill.⁴ The bill stated that the Human Rights Law's prohibition on gender discrimination includes a prohibition on discrimination based on gender identity and expression.⁵ The City's intent in amending the law was to state explicitly that the law prohibits discrimination against transgender people.⁶

More than a decade has passed since that time, and while we saw increasing public awareness during that period about the unique challenges that transgender people face with respect to discrimination, we continued to receive inquiries from the public regarding protections under the Human Rights Law. TGNC people and their advocates asked for clarification about their rights, while entities with obligations under the law asked for concrete examples of how the legal protections manifested in everyday life. To address the need, the Commission published *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression*.⁷

¹ M. Somjen Frazer & Erin E. Howe, Transgender health and economic insecurity: A report from the 2015 LGBT Health and Human Services Needs Assessment Survey (2015), available at <https://goo.gl/dYpy9h> (finding, in a survey of 878 transgender and gender-non conforming New Yorkers, that nearly one-third reported being fired and 42% reported not being hired because of their gender identity); S. E. James, J. L. Herman, S. Rankin, M. Keisling, L. Mottet, & M. Anafi, Report of the 2015 U.S. Transgender Survey (2016), available at <https://goo.gl/535ZoG> (finding that 23% of respondents had been refused a home or apartment or were evicted from their home because of their gender identity or expression; 30% of respondents who had a job in the prior year reported being fired, denied a promotion, or experiencing some other form of mistreatment related to their gender identity or expression; 24% reported being verbally harassed in a place of public accommodation, including hotels, restaurants, buses, airports and government agencies).

² Lambda Legal, Protected and Served?, Executive Summary (2015), available at <https://goo.gl/BWd2um>.

³ *Id.*

⁴ Report of the Governmental Affairs Division, Committee on General Welfare, Intro. No. 24, to amend the administrative code of the city of New York in relation to gender-based discrimination (April 24, 2002), available at <https://goo.gl/zVsJ47>.

⁵ N.Y.C. Admin. Code § 8-102(23).

⁶ *Supra* note 4.

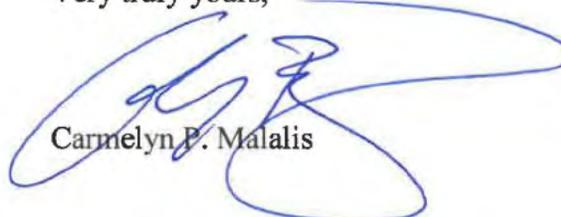
⁷ Available at <https://goo.gl/nrZJyn>.

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The guidance was needed to clarify the range of actions and situations that may constitute discrimination based on gender identity or expression under the Human Rights Law. I raise this guidance and the Commission's experience in preparing it to convey to the Unified Court System that a nondiscrimination policy is only a first step. Eradicating discrimination against TGNC people in the court system will require ongoing education and training at all levels of the judiciary to help people recognize the range of actions – from intentional disclosure of their transgender status to invasive questions about their private life or anatomy – that cause TGNC people to be discriminated against in courts.

I close by noting that individuals who believe they have experienced discrimination based on gender identity or expression may file a complaint with the Commission on Human Rights, or they may commence a civil action seeking redress under the Human Rights Law in various courts. Those courts are part of the Unified Court System, which makes this proposal even more important. Simply put, individuals should be able to enforce their right to be free from discrimination in a court that bars that discrimination. I commend the Unified Court System for its proposal to amend its nondiscrimination rules to include gender identity and expression, and urge that the proposal be adopted.

Very truly yours,



Carmelyn P. Malalis



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February 2, 2018

BY ELECTRONIC MAIL

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Re: Comment on Proposed Amendment of Various Non-Discrimination Rules of the Unified Court System

Dear M. McConnell,

We appreciate this opportunity to provide comments in response to the Request for Public Comment regarding amendments of various non-discrimination rules of the Unified Court System. Empire Justice Center is a statewide, multi-issue, multi-strategy public interest law firm focused on changing the “systems” within which poor and low-income families live in New York State. We believe in the critical importance of eliminating discrimination and harassment in all forms and ensuring that all people, especially lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) individuals and their families, do not face discriminatory barriers when seeking justice through our court systems. We offer the following comments in support of the amendments, as a means of ensuring access to justice for all New Yorkers, regardless of gender identity and gender expression.

Transgender people have a gender identity that differs from the sex they were assigned at birth.¹ Some transgender people seek medical treatment, such as surgeries

¹ GLAAD, “Media Reference Guide: Transgender Issues,” <http://www.glaad.org/reference/transgender> (last visited Jan. 31, 2018).

or hormone replacement therapy, as steps to conform their physiology to their gender identity; other transgender individuals do not alter their bodies physically, but wear clothing and use a name in their daily lives that match their gender identity.² Some transgender people do not identify as either men or women, but rather as non-binary, genderqueer, or something else altogether. Some transgender people legally change their name and amend their records and identification documents to reflect their authentic gender, but many do not wish to do so, or are prohibited from doing so by governing agencies in many jurisdictions. “Gender-nonconforming” is a term used to describe someone whose gender expression – or outward communication of their gender identity – differs from traditional expectations of masculinity or femininity.³ Discrimination based on gender identity or gender expression usually manifests as sex-stereotyping that targets an individual’s actual or perceived gender-nonconformity, or their expansive expression of gender that does not fit conventional ideas of gender. Not all transgender people are necessarily gender-nonconforming, and not all gender-nonconforming people are necessarily transgender.

As a civil legal services provider, Empire Justice Center’s LGBT Rights Project focuses many of its resources on serving low-income transgender and gender-nonconforming New Yorkers, as this demographic is, by far, the most adversely impacted by intersectional systems of oppression in our state and across the country. Over the past four and a half years, we have represented, counseled, or provided resources for hundreds of transgender and gender-nonconforming individuals across Upstate New York who experience discrimination, harassment, or violence in housing, employment, or places of public accommodation, as well as in court settings, due to their actual or perceived gender identity, gender expression, or status as transgender. Additionally, our intimate partner violence work has, for well over a decade, extensively focused on the needs of LGBTQI survivors and the many barriers and challenges they face—legal and non-legal—as they seek justice and refuge from abuse and violence. For this community of victims and their families, animus and discrimination based on gender identity and gender expression in our systems of justice not only undermines adequate and fair representation and outcomes, but also personal safety.

The following anecdotal experiences are but a couple examples that underscore the need for clarifying protections for this marginalized community in efforts to maximize access to justice in our state. All identifying details have been changed to protect the safety and confidentiality of these individuals.

Jessica

Jessica is a Black transgender woman who has faced discrimination her entire young life. Jessica overcame many challenges to successfully obtain a legal

² *Id.*

³ *Id.*

name change to Jessica and to update all of her government-issued identity documents to reflect her female gender identity. However, when she was arrested last year on a misdemeanor charge, the local police department and deputies at the county jail flatly refused to call her by her new legal name, instead reverting back to her former, stereotypically-masculine birth name that was on file from a prior arrest. When she brought this to the criminal judge's attention at arraignment, and asked to be called by her new legal name, the judge made a notice of the request in the record, but continued to call her by her former, stereotypically-masculine name as written on the court documents and police reports. By doing so, the court failed to respect Jessica's authentic gender identity and gender expression, and contributed to jeopardizing Jessica's safety by essentially exposing her transgender status in open court.

Sam

Sam is a non-binary person – someone who does not identify as strictly male or female, but rather outside the gender binary altogether. As a non-binary person, Sam uses gender-neutral pronouns (*e.g.*, they, them, their). Sam sought a judicial name change so they could obtain identity documents that more accurately reflected their non-binary identity in place of a stereotypically-feminine given name. At the advice of an attorney, Sam included information about their gender-neutral pronouns in their petition, so that the court could respectfully address them in any and all correspondence about their case. Sam also offered a proposed order for the judge to sign, which included a request to waive the publication requirement and seal their record in order to protect their personal safety. However, when Sam received the signed order, Sam saw that the judge had manually crossed out any reference of Sam as “they” and “their,” and handwrote above the words “he” and “his,” respectively. The edits to Sam's order were legally unnecessary, and only served to disregard and disrespect the petitioner's stated gender identity and gender expression, and render the judicial document inaccurate, as it no longer accurately reflected the petitioner's authentic gender identity.

Both of these scenarios may have been avoided had the judge and court staff had clear guidance in the rules of professional conduct about how to treat transgender persons before them, and had they been equipped with the knowledge and tools necessary to navigate the situations more respectfully.

To that end, Empire Justice Center provides copious training and technical assistance to attorneys, judges, and non-judicial court staff across the state to raise the bar of excellence in the legal profession around the effective and respectful representation and treatment of transgender and LGBTQ people. This work is timely and necessary, as systemic discrimination, harassment, and violence against transgender

people is alive and well throughout every facet of life and society, nationwide⁴ and in New York State.⁵ We are grateful that these proposed amendments codify essential nondiscrimination rules that align with our state’s existing laws and policies recognizing gender identity and gender expression as statuses worthy of protection under the law.⁶

Based on our experience and expertise, we offer the following recommended changes to the proposed amendments in order to ensure that the spirit of these proposed amendments are more effectively actuated:

- We recommend a more inclusive definition of “gender identity” beyond that provided in the supportive memo by the Failla Commission, which, by limiting gender identity to “an internal psychological sense of being a man or a woman,” could unintentionally entrench discriminatory issues related to non-binary people whose gender identities are not strictly male or female.

⁴ See e.g., S.E. James et al., *The Report of the 2015 U.S. Transgender Survey* (2016), available at

<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (last visited Jan. 31, 2018) (finding pervasive mistreatment, harassment, and violence in every aspect of life, including but not limited to family life, faith communities, identity documents, health, school environments, employment, public benefits, military service, housing, homelessness and shelter access, interactions with police, prisons and immigration detention, and accessing places of public accommodations).

⁵ Out of 1,779 transgender resident of New York State who responded to the 2015 U.S. Transgender Survey, 37% were living in poverty, 15% lost a job in their lifetime based on their gender identity, 74% were mistreated in grades K-12 because of their actual or perceived gender identity or gender expression, 27% experienced homelessness in their lifetime, only 12% were able to update all of their IDs to reflect their preferred name and gender while 63% had no accurate IDs in this regard, and 32% of those who saw a health provider in the prior year had a negative experience with that provider based on their gender identity, including verbal harassment, physical or sexual assault, or refusal of treatment. National Center for Transgender Equality, *2015 U.S. Transgender Survey: New York State Report* (2017), available at

<http://www.transequality.org/sites/default/files/USTS%20NY%20State%20Report%20%281017%29.pdf> (last visited Jan. 31, 2018).

⁶ 9 N.Y.C.R.R. § 466.13. See also., *Doe v. City of New York*, 976 N.Y.S.2d 360, 363-64 (Sup. Ct. 2013) (denying City’s motion to dismiss plaintiff’s claim that she was denied access to benefits by HASA in violation of New York City and New York State Human Rights Laws (gender and disability) when it refused to change the name and gender marker on her benefits card and intentionally referred to her by former name and male pronouns); *Hispanic Aids Forum v. Estate of Bruno*, 839 N.Y.S.2d 691, 696 (Sup. Ct. 2007) (rejecting defendants’ argument that neither the New York City of State Human Rights Laws protects transgender persons); *Buffong v. Castle on Hudson*, No. 05-CV-11634, 2005 WL 4658320, at *2 (N.Y. Sup. Ct. 2005) (“[A] transgender[] person states a claim pursuant to New York State’s Human Rights Law on the ground that the word ‘sex’ in the statute covers transsexuals.”).

- We suggest providing definitions to the terms “gender identity,” “gender expression,” and “transgender,” either in the rules themselves or by reference to definitions of these terms made elsewhere in the law, such as the Human Rights Law regulation 9 N.Y.C.R.R. § 466.13(b)(1) & (2):
 - Gender identity means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth;
 - A transgender person is an individual who has a gender identity different from the sex assigned to that individual at birth.
- We suggest providing a definition to the term “sex” which includes “gender identity” and “the status of being transgender,” either in the rules themselves or by reference to definitions of these terms made elsewhere in the law, such as the Human Rights Law regulation 9 N.Y.C.R.R. § 466.13(c)(1):
 - The term “sex” [...] includes gender identity and the status of being transgender.

Overall, Empire Justice Center strongly supports these proposed amendments, with the suggested improvements outlined above. We whole-heartedly commend the Office of Court Administration for its efforts to increase access to justice for all people in New York State. We also believe that codifying these protections is a critical first step and that the Office of Court Administration, together with the Failla Commission, should quickly work together with other stakeholders to develop and implement statewide training, education, and best practices for judges, court staff, and attorneys that can fulfill the promise of these new rules. As always, Empire Justice Center would be honored to participate and contribute to such efforts.

Thank you for your consideration of our comments.

Sincerely,

Milo Primeaux, Esq.

(he/him/his pronouns)

LGBT Rights Project Staff Attorney

Empire Justice Center

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Hon. Lawrence Marks
 Chief Administrative Judge
 25 Beaver Street, 11th Floor
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Dear Judge Marks:

The Advisory Committee on Judicial Ethics has reviewed and considered the Richard C. Failla LGBTQ Commission's proposal to amend the Rules Governing Judicial Conduct (22 NYCRR 100.2[D], 100.3[B][4]-[5]) to include "gender identity" and "gender expression."

We support the proposed changes.

Very truly yours,

G. Marlow & M. Walsh / CCS

George D. Marlow, Assoc. Justice
 Appellate Div., First Dep't (Ret.)
 Committee Co-Chair

Hon. Margaret T. Walsh
 Family Court Judge
 Acting Justice, Supreme Court
 Committee Co-Chair



Memorandum in Support **Comments on Proposed Amendment of Various** **Non-Discrimination Rules of the Unified Court System**

NYSBA #23

January 31, 2018

The New York State Bar Association supports the rules changes proposed by the LGBTQ Commission of the New York Courts to bar discrimination on the basis of gender identity or gender expression. The changes would amend the Attorney Rules of Professional Conduct, Rules of Judicial Conduct, Unified Court System Code of Ethics for Nonjudicial Employees, and Rules of the Chief Judge, regarding Career Service and Equal Opportunity.

The current non-discrimination rules address discrimination based upon sexual orientation, but do not include gender identity or gender expression. As noted in the LGBTQ Commission of the New York Courts Memorandum in support of the proposed changes, the principal aim of the rule changes is to "aid in the public efforts to institutionalize the Judiciary's commitment to eradicating discrimination and bias against all persons regardless of their sexual orientation, gender identity, or gender expression." Specifically precluding discrimination based upon gender identity or gender expressions will help ensure that all persons who are or become involved in our legal system are treated with fairness and dignity.

The Association has long supported policy measures, like those proposed by these rules changes, that would prohibit discrimination. This includes our strong support for passage by the Legislature of the Gender Expression Nondiscrimination Act (GENDA).

Based on the foregoing, the Association strongly supports these rules amendments to ensure fairness for all.



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February 1, 2018

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Re: Request for Public Comment on the Proposed Amendment of Various Non-Discrimination Rules of the Unified Court System

Dear Mr. McConnell:

Please be advised that the New York State Bar Association's Committee on Legal Aid unanimously supports the proposed rules changes to bar discrimination on the basis of gender identity or gender expression. These changes would amend the Attorney Rules of Professional Conduct, Rules of Judicial Conduct, UCS Code of Ethics for Nonjudicial Employees, and Rules of the Chief Judge, Career Service.

The Committee on Legal Aid is charged with the duty of considering methods and proposals for rendering legal aid to the poor and of maintaining a continuing study of the administration of justice as it affects the poor. Transgender individuals disproportionately experience poverty – a recent study by the National Center for Transgender Equality found that 29% of transgender respondents were living in poverty, compared to 14% of the U.S. population.¹ As a result, transgender and gender non-conforming individuals are less likely to be able to afford legal representation, and are more likely to need the assistance of Legal Aid or be self-represented litigants. The Committee on Legal Aid feels everyone who seeks help from our courts, particularly those low income people who are additionally marginalized because of gender, gender identity, or sexual orientation, deserved equal access to our court without any barriers created by discrimination.

¹ National Center for Transgender Equality, "The Report of the 2015 U.S. Transgender Survey", published December 2016, available at <https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

These proposed amendments ensure non-discrimination in all levels of the legal profession and courts are critical steps towards ensuring access to justice for all.

We support these proposed rule amendments to further these goals of fairness for all who engage the legal profession and our courts and encourage the Office of Court Administration to adopt the rules as proposed.

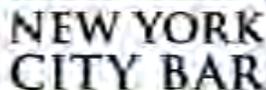
Very truly yours,



Keisha A. Williams, Esq.
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Sergio Jimenez, Esq.
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NEW YORK
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Re: Comments on and Recommended Changes to Proposed Amendment of Various Non-Discrimination Rules of the Unified Court System

Dear Mr. McConnell:

The New York City Bar Association (the “City Bar”) is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The Committee on Lesbian, Gay, Bisexual and Transgender Rights (the “Committee”) addresses the legal and policy issues that affect lesbian, gay, bisexual, and transgender individuals. The Committee thanks the Administrative Board of the Courts for proposing to explicitly include “gender identity” and “gender expression” in various court non-discrimination rules.¹ We strongly support this clarification. We offer the following comments in support of the proposed amendments and propose suggestions aimed at strengthening the amendments to further their intended purpose of eliminating discrimination.

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

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

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

I. BACKGROUND

a. Transgender New Yorkers experience high rates of discrimination

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

Transgender workers experience unacceptable rates of workplace discrimination. The 2015 LGBT Health and Human Services Needs Assessment found that out of almost 900 transgender and gender-nonconforming New Yorkers, nearly one in three reported being fired and 42% reported being not hired due to their gender identity.² Discrimination in hiring is particularly rampant, with one matched-pair testing survey showing a 42% net rate of discrimination against transgender job seekers.³ Of the nearly 1,800 transgender New Yorkers surveyed in the 2015 U.S. Transgender Survey, 18% of respondents in New York were unemployed and 37% were living in poverty.⁴

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

² M. Somjen Frazer & Erin E. Howe, *Transgender health and economic insecurity: A report from the 2015 LGBT Health and Human Services Needs Assessment Survey*, 8 (2015) (878 respondents in the survey identified themselves as transgender and/or gender non-conforming), https://gaycenter.org/file/docs/network/TGGNC-health-and-economic-insecurity-report-FINAL_rebranded-May-9.pdf.

³ Make the Road New York, *Transgender Need Not Apply: A Report on Gender Identity Job Discrimination*, 12 (2010) http://www.maketheroad.org/pix_reports/TransNeedNotApplyReport_05.10.pdf (using matched pair testing and a survey to measure employment discrimination against transgender people in New York City, results showed a 42% net rate of discrimination against transgender job seekers; that for 11 out of the 24 employers tested, the transgender job applicant received no offer, but the control group tester did; only one transgender tester received a job offer in the first round, 59% percent of survey participants experienced employment discrimination, and 49% had never been offered a job living openly as a transgender person).

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

⁵ *Id.*

⁶ *Id.*

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

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

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

⁷ *Id.*

⁸ *Id.*

⁹ See Brad Sears & Christy Mallory, *Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies*, The Williams Institute, 4 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Employment-Discrimination-Complaints-2008-2014.pdf> (finding that workers filed discrimination complaints based on sexual orientation and gender identity discrimination with state agencies at a higher frequency than race and sex discrimination complaints); S.E. James, J.L. Herman, S. Rankin, M. Keisling, L. Mottet & M. Anafi, *The Report of the 2015 U.S. Transgender Survey* 12-13 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [hereinafter *2015 U.S. Transgender Survey*] (finding an unemployment rate three times the national unemployment rate and that more than three-quarters of respondents who had a job in the past year took steps to avoid mistreatment in the workplace, such as hiding or delaying their gender transition or quitting their job); District of Columbia Office of Human Rights, *Qualified and Transgender: A report on results of resume testing for employment discrimination based on gender identity*, 6 (2015), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf (resume testing found that 48% of employers appeared to prefer at least one less qualified cisgender (non-transgender) applicant over a more qualified applicant perceived to be transgender and that 33% of employers offered interviews to one or more less qualified applicants perceived as cisgender while not offering an interview to the more qualified applicants perceived as transgender); Transgender Law Center, *State of Transgender California Report: Results from the 2008 California Transgender Economic Health Survey*, 1 (2009), <http://transgenderlawcenter.org/wp-content/uploads/2012/07/95219573-The-State-of-Transgender-California.pdf> (70% of respondents reported having experienced workplace discrimination related to their gender identity); See also Shannon Minter & Christopher Daley, National Center For Lesbian Rights & Transgender Law Center, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities*, 14 (2003), <http://www.nclrights.org/wp-content/uploads/2013/07/transrealities0803.pdf> (reporting nearly half of transgender respondents reported experiencing job discrimination).

¹⁰ Jody Herman, *The Cost of Employment and Housing Discrimination against Transgender Residents of New York*, The Williams Institute, 1 (2013), <http://williamsinstitute.law.ucla.edu/research/transgender-issues/ny-cost-of-discrimination-april-2013>. See also Center for American Progress and Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* (2015), <http://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf>.

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

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

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

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

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

¹² *Id.*

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

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

¹⁵ *Id.* at 84.

¹⁶ *Id.*

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

¹⁸ Erin Fitzgerald et al., *Meaningful Work: Transgender Experiences in the Sex Trade* 4, 16-17 (2015), http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf (Nearly 11 percent of the overall survey respondents reported having participated in sex work and an additional 2.3% indicated that they had traded sex for rent or a place to stay. Black and Black Multiracial respondents had the highest rate of sex trade participation overall (39.9%), followed by those who identified as Hispanic or Latino/a (33.2%). An overwhelming majority (69.3%) of sex workers reported experiencing an adverse job outcome in the traditional workforce because of discrimination (vs. 44.7% of non-sex workers). Over half (54.6%) of all survey respondents who were currently homeless also had been involved in the sex trade.).

¹⁹ *Id.* at 24.

²⁰ *Id.* at 18.

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

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

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

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

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

²² See, e.g., *Doe v. City of New York*, 976 N.Y.S.2d 360, 363-64 (Sup. Ct. 2013) (denying City’s motion to dismiss plaintiff’s claim that she was denied access to benefits by HASA in violation of New York City and New York State Human Rights Laws (gender and disability) when it refused to change the name and gender marker on her benefits card and intentionally referred to her by former name and male pronouns); *Hispanic Aids Forum v. Estate of Bruno*, 839 N.Y.S.2d 691, 696 (Sup. Ct. 2007) (rejecting defendants’ argument that neither the New York City or State Human Rights Laws protects transgender persons); *Buffong v. Castle on Hudson*, No. 05-CV-11634, 2005 WL 4658320, at *2 (N.Y. Sup. Ct. 2005) (“[A] transgender[] person states a claim pursuant to New York State’s Human Rights Law on the ground that the word ‘sex’ in the statute covers transsexuals.”)

²³ *Doe v. Bell*, 754 N.Y.S.2d 846, 851 (Sup. Ct. N.Y. County 2003) (“[Gender identity disorder] is a disability under the State Human Rights Law”); *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 779 (Sup. Ct., Kings Cty. N.Y. 2013) (“Doe’s disorder has been clinically diagnosed . . . using the medically accepted standards set forth in the DSM-IV. No more is required for Doe to be protected from discrimination under the State Human Rights Law.”).

²⁴ 9 NYCRR § 466.11, § 466.13.

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

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

II. RECOMMENDATION

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

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

For example (new material in *italics*):

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

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

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

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

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

Rules of Judicial Conduct (22 NYCRR Part 100)

22 NYCRR § 100.2(D):

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

22 NYCRR § 100.3(B)(4), (5):

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

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

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

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

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

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

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

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

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

²⁸ 45 C.F.R. § 92.4 (2018) (“On the basis of sex includes, but is not limited to, on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, or gender identity.”); Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172, 54216–17 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92) (defining sex stereotypes as “stereotypical notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include expectations that gender can only be constructed within two distinct opposite and disconnected forms (masculinity and femininity), and that gender cannot be constructed outside of this gender construct (individuals who identify as neither, both, or as a combination of male and female genders”).

²⁹ See, e.g., *Hayden ex rel. AH v. Greensburg Community School*, 743 F.3d 569 (7th Cir. 2014) (detailing long line of hair length cases that have been upheld because equal burdens are imposed on men and women); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1089 (5th Cir. 1975) (en banc) (holding that grooming standards prohibiting long hair on men do not constitute “sex plus” discrimination because Title VII does not protect plaintiffs from discrimination on the basis of non-immutable sex characteristics).

³⁰ *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004) (holding that casino’s grooming policy “did not constitute sex discrimination because it imposed equal burdens on both sexes”).

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

Protections based on “transgender status” provide clearer protections than gender identity and expression. For example, in a New Jersey case where a drug treatment facility refused to hire a transgender man as a male urine monitor, the defendants argued, “While New Jersey law prohibits discrimination on the basis of gender identity or expression, it does not expressly hold the same as to transgender status.”³² They further argued that “Defendants did not discriminate against Plaintiff by not allowing him the freedom to express his gender identity. Instead, Defendants decided not to hire Plaintiff for the open male urine monitor position on the basis that he could not do the job function that requires a bona fide occupational qualification [namely, being male].”³³ In many—if not most—instances of discrimination, transgender individuals are being discriminated against because people are uncomfortable with the person’s physical anatomy or history of gender transition, not because the person has a particular gender identity or expression.³⁴ “Transgender status” as a protected class is a more inclusive term to prohibit this particular form of sex discrimination and this term will help root out such pervasive biases.

Having explicit protections for people with intersex conditions ensures that they are protected from discrimination as well. “Intersex,” sometimes called a Difference in Sex Development, refers to the estimated one in 2,000 people born with a reproductive or sexual anatomy and/or chromosome pattern that doesn’t fit typical definitions of male or female.³⁵ Typically, individuals who are intersex are diagnosed in infancy by a medical professional. Intersex conditions may be referred to in medical records as “Disorders of Sex Development” as well as by specific terms for particular conditions, such as congenital adrenal hyperplasia, Klinefelter’s syndrome, Turner’s syndrome, hypospadias, and others. While some people are identified as intersex at birth, others only learn of their intersex status in puberty or adulthood.³⁶

Some intersex individuals decide at some point to transition from the gender they were assigned at birth to another gender, and thus may also identify as transgender; others may identify with their sex assigned at birth for their entire lives. While some people born intersex do claim intersex as an identity, intersex is fundamentally a physical condition and is distinct from

³² Memorandum of Law in Opposition to Plaintiff’s Cross-Motion for Summary Judgment and in Further Support of Defendants’ Motion for Summary Judgment at 4, *Devoureau vs. Camden Treatment Assoc.*, No. L-1825-11 (New Jersey Superior Ct. filed July 23, 2013).

³³ Memorandum of Law in Support of Defendants’ Motion for Summary Judgment at 29, *Devoureau vs. Camden Treatment Associates*, No. L-1825-11 (New Jersey Superior Ct. filed June 26, 2013).

³⁴ “Past and present biological sex characteristics are the only factors distinguishing transgender women from cisgender women, making it reasonable to infer that discrimination against transgender employees is a reaction to those differences. As some commentators have argued, ‘[r]evulsion’ to transgender bodies “seems to lie at the root of most transgender discrimination.” Case Comment: *EEOC Affirms Protections For Transgender Employees*: Macy v. Holder, 126 Harv. L. Rev. 1731, 1735 (2013), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol126_macy_v_holder.pdf.

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

³⁶ See e.g., Julianne Imperato-McGinley et al., *Steroid 5 Alpha-Reductase Deficiency in Man: An Inherited Form of Male Pseudohermaphroditism*, 186 SCIENCE 1213 (1974).

gender identity or expression. That is, a person born intersex may ultimately identify as a man, a woman, or a non-binary gender, and may be straight, gay/lesbian, bisexual, or asexual—as all people may.

III. CONCLUSION

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

Respectfully,

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

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



Mr. John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

February 1, 2018

***Public Comment for Proposed Amendment of Various Non-discrimination Rules of the
New York Unified Court System***

Dear Mr. McConnell,

The LGBT Bar Association of Greater New York (“LeGaL”) appreciates the opportunity to provide comments on the Proposed Amendment of Various Nondiscrimination Rules of the Unified Court System, issued on October 24, 2017.

LeGaL is one of the nation’s first bar associations of the lesbian, gay, bisexual, and transgender (LGBT) legal community and remains one of the largest and most active organizations of its kind in the country. LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community, promoting the expertise and advancement of LGBT legal professionals, and serving the larger community, including through its Helpline and free walk-in legal clinics, as well through direct representation and impact litigation.

We offer these comments to express our strong support for the implementation of the proposed amendment.

Our courts must be open to all. Discrimination, prejudice, and intolerance threaten the rights and liberties of transgender and gender-nonconforming New Yorkers. They also erode public trust in the fairness and integrity of the courts, undermine the confidence in the legal profession, and create barriers to access for those who may need the courts the most.

According to a recent national survey, out of the more than 1,000 survey respondents who were in contact with courts, 19% reported hearing a judge, attorney, or other court employee make negative comments about a person’s sexual orientation, gender identity, or gender expression. Additionally, 53% of transgender and gender non-conforming people of color, and 66% of transgender women reported experiencing these comments while in contact with the court system.



Moreover, the rates of employment discrimination against transgender and gender non-conforming people are alarming in New York State. Of the New Yorkers who responded to the 2015 U.S. Transgender Survey, 65% reported some form of harassment, mistreatment, or negative employment action because of their gender identity or expression. Additionally, 37% of the transgender New Yorkers surveyed were living in poverty and 18% were unemployed, which was more than three times the national unemployment rate at the time the survey was conducted.

The addition of gender identity and gender expression to Rule 8.4(g) of New York’s Attorney Rules of Professional Conduct will bring New York in line with the Model Rules of the American Bar Association, which in 2016 amended its Model Rules to include a prohibition of harassment or discrimination on the basis of gender identity by attorneys in the practice of law.

The proposal would also bring the courts into conformity with the New York Code of Rules and Regulations (NYCRR) § 466.13, which prohibits discrimination on the basis of gender identity, and New York State court opinions such as *Buffong v. Castle on Hudson*, 12 Misc. 3d 1193(A), 824 N.Y.S.2d 752 (Sup. Ct. 2005) (holding New York State Human Rights Law prohibition on sex discrimination includes transgender persons).

The injury inflicted by discrimination within the judicial system is most pernicious because the courthouse is “where the law itself unfolds.” The addition of formal rules requiring equal treatment of transgender and gender nonconforming people is an important step toward reducing discriminatory treatment and increasing public trust in the courts. As such, LeGaL strongly supports the proposal to amend various court rules to prohibit discrimination based upon gender identity and gender expression, and we thank you for considering these comments in furtherance of ensuring equal treatment within the court system.

Very sincerely yours,

Eric Lesh
Executive Director

Brett Figlewski
Legal Director



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February 1, 2018

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**Re: *Proposal of the Richard C. Failla LGBTQ Commission of the
New York Courts to Amend Court Rules to Prohibit
Discrimination Based on Gender Identity***

Dear Mr. McConnell:

We write on behalf of the Asian American Bar Association of New York (AABANY), an association of over 1,000 members, including practicing attorneys in the private and public sectors, in-house lawyers, judges, professors and law students in the State of New York. We write to express our support for the proposal of the Richard C. Failla LGBTQ Commission of the New York Courts to amend various court rules, including the attorney rules of professional conduct, rules of judicial conduct, and rules governing the conduct of employees in the Unified Court System to prohibit discrimination based on “gender identity” and “gender expression.”

AABANY was formed in 1989 as a not-for-profit corporation to represent the interests of New York Asian American attorneys, judges, law professors, legal professionals, legal assistants, paralegals and law students. The mission of AABANY is to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

According to 2010 census figures, New York City alone contains the highest total Asian American population of any American city--nearly 1 in 8 New Yorkers are Asian American. The diversity of our community--in origin, language, and religion--includes a diversity of sexual orientations and gender identities and expression. Particularly in this day, Asian Americans resorting to our esteemed courts should not face the added hurdle to justice of invidious discrimination based on gender identity or expression.



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Consistent with our mission, AABANY believes that all Asian Americans, indeed, all New Yorkers, be treated with dignity and respect under the law regardless of gender identity or expression. For these reasons, we support the proposed rule changes and urge their speedy implementation. Thank you.

Sincerely,

Dwight Yoo

President
Asian American Bar Association of New York



Organized 1876

QUEENS COUNTY BAR ASSOCIATION

90-35 148th Street, Jamaica, New York 11435 · (718) 291-4500 · Fax: (718) 657-1789 · WWW.QCBA.ORG

January 31, 2018

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Executive Director

Matthew J. Skinner, Esq.
Executive Director
The Richard C. Failla LGBTQ Commission of the New York State Courts
25 Beaver St., Room 919
New York, NY 10004

Dear Mr. Skinner:

As the Chair of the Queens County Bar Association LGBT Committee, I write to you on behalf of our members to express our strong support for your proposal to amend our court rules to prohibit discrimination based on gender identity and gender expression.

Our courts must be a beacon of justice and inclusion. Discrimination or bias against any individual must not be tolerated. Therefore, it is imperative that our court rules explicitly forbid discrimination based upon gender identity and gender expression so that every member of the public has confidence in the fairness of our judiciary.

Please advise the Administrative Board of the Courts that the Queens County Bar Association LGBT Committee urges the immediate and unqualified adoption of the proposal proffered by The Richard Failla LGBTQ Commission of the New York State Courts to prohibit discrimination based upon gender identity and gender expression.

Thank you for your consideration.

Sincerely,

JOHN F. DUANE
Chair, LGBT Committee



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mail@eriebar.org

www.eriebar.org

To: Office of Court Administration
Via email to rulecomments@nycourts.gov

From: Melinda G. Disare, President, Bar Association of Erie County

Date: January 30, 2018

Re: **Proposal of Failla LGBTQ Commission/Amendments to Rules
of the Unified Court System**

To Whom It May Concern,

At its meeting on January 23, 2018, the Board of Directors of the Bar Association of Erie County voted to support the recommendations set forth in the Failla LGBTQ's Commission's Proposal, dated October 24, 2017, regarding Proposed Amendments of Various Non Discrimination Rules of the Unified Court System.

If you have any questions, feel free to contact me.

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January 24, 2018

John W. McConnell, Esq.
Office of Court Administration
25 Beaver Street
11th Floor
New York, NY 10004

Re: Request for Public Comment on the Proposed Amendment of Various Non-discrimination Rules of the Unified Court System

Dear Mr. McConnell:

Please allow this correspondence to serve as the Minority Bar Association of Western New York's letter of support of the proposal offered by the Richard C. Failla LGBTQ Commission of the New York Courts, to amend the various court rules- including attorney rules of professional conduct, rules of judicial conduct, and rules governing the conduct of employees of the Unified Court System to prohibit discrimination based upon gender identity and gender expression, as proposed in the memorandum regarding same dated, October 24, 2017.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Tolulope F. Odunsi, Esq.
President, Minority Bar Association of Western New York



February 1, 2018

John W. McConnell, Esq., Counsel
Office of Court Administration
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New York, NY 10004

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President

Seymour W. James, Jr.
Attorney-in-Chief

Re: Request for Public Comment on the Proposed Amendment of
Various Nondiscrimination Rules of the Unified Court System

Dear Mr. McConnell,

The Legal Aid Society writes to applaud the Office of Court Administration's (OCA) proposed amendments to the state's attorney rules of professional conduct, rules of judicial conduct, and rules governing the conduct of employees of the Unified Court System to prohibit discrimination based upon "gender identity" and "gender expression." The Society takes its commitment to diversity very seriously and since 2006, we have been providing our staff with cultural humility trainings regarding the pervasive discrimination our clients experience on the basis of gender identity and expression (GI/E) and the expectation of affirming legal representation.

Even though courts in New York have long held that the term "sex" in New York State's Human Rights Law is inclusive of gender identity¹, the daily experience of our transgender, gender non-conforming, and non-binary (TGNCNB) clients range from feeling unwelcomed to the that of outright harmful discrimination. As the largest legal services organization in New York, we have all too often witnessed disparate treatment experienced by our TGNCNB clients. Our clients have been denied the use of their affirming names and pronouns, have been mocked by members of the legal profession and court employees, and have had to litigate for their right to services that affirm their gender identity. These experiences occur regardless of the fact that the New York City Human Rights Law and the New York State Human Rights Law have clear protections from discrimination on the basis of GI/E.

Over the past decade New York City courts have made significant strides in training courthouse communities on the experience of and service needs for the TGNCNB community. However, more needs to be done to ensure that regardless of GI/E each client receives affirming legal representation as well as an affirming courthouse experience. OCA's new diversity and inclusion continuing legal education requirements coupled with these amendments will work to ensure that increased education and a higher standard of practice will be the expectation in all courthouses statewide.

¹ *Richards v US Tennis Association*, 93 Misc.2d 713, 400 N.Y.S.2d 267; *Hispanic AIDS Forum v Estate of Bruno*, 16 Misc.3d 960, 839 N.Y.S.2d 691, 2007 N.Y. Slip Op. 27284.

February 1, 2018

Page 2

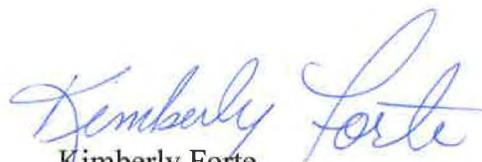
OCA showed its national leadership in establishing the Richard C. Failla LGBTQ Commission of the New York Courts in recognition of the necessary evaluation of court processes to ensure there is no disparate impact for LGBTQ individuals. With these amendments, OCA will join the American Bar Association which amended its Model Rules to be inclusive of nondiscrimination on the bases of GI/E in September 2016. It is the Society's firm belief that these efforts will go far in furthering the rights and affirmation of the LGBTQ communities and particularly the TGNCNB community.

The Legal Aid Society stands with OCA as partner in its effort to be more inclusive of all genders, and we offer any assistance we can to build our collective courthouse communities' awareness, affirmation, and support of the TGNCNB community.

Respectfully Submitted,



Seymour W. James, Jr.
Attorney-in-Chief



Kimberly Forte
Supervising Attorney
LGBT Law and Policy Initiative



New York Legal Services Coalition 123 William Street, 16th Floor
New York, New York 10038
917-268-2569 • maha@nylscoalition.org
www.nylscoalition.org
January 31st, 2018

Maha Syed,
Executive Director
New York Legal Services
Coalition

Anne Erickson
Co-Vice President
Empire Justice Center

Barbara Finkelstein,
Co-Vice President
Legal Services of the
Hudson Valley

Jeffrey Seigel,
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Nassau Suffolk Law Services

**Martin Needelman, Co-
Secretary**
Brooklyn Legal Services
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**Carla Palumbo, Co-
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Volunteer Legal Services
Project of Monroe County

Robert Elardo
Erie County Bar Association
Volunteer Lawyers Project,
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Sergio Jimenez
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Carolyn Silver
Lenox Hill Neighborhood
House

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

Re: Request for Public Comment on the Proposed Amendment of Various Non-Discrimination Rules of the Unified Court System

Dear Mr. McConnell:

Please be advised that the New York Legal Services Coalition supports the proposed rules changes to bar discrimination on the basis of gender identity or gender expression. These changes would amend the Attorney Rules of Professional Conduct, Rules of Judicial Conduct, UCS Code of Ethics for Nonjudicial Employees, and Rules of the Chief Judge, Career Service.

The New York Legal Services Coalition, formed in 2014, is a 501(c)3 nonprofit organization that consists of 50 civil legal services organizations, serving every county in New York State. Passionate about ensuring access to civil legal assistance, our member organizations range from large multi-service, multi-county or citywide organizations, to pro bono programs, to neighborhood based organizations meeting the needs of specific populations. Collectively, our members provide high quality civil legal services to hundreds of thousands of low income New Yorkers in matters relating to the essentials of life. The Coalition works to ensure fairness in the judicial system, advocates on legal issues affecting low-income communities, identifies and promotes best practices in the civil legal aid profession, and provides technical assistance and capacity building resources for its members.

Transgender individuals disproportionately experience poverty – a recent study by the National Center for Transgender Equality found that 29% of transgender respondents were living in poverty, compared to 14% of the U.S. population.¹ As a result, transgender and gender non-conforming individuals are less likely to be able to afford legal representation, and are more likely to need the assistance of Legal Aid or be self-represented litigants. The Committee on Legal Aid feels that this would be particularly problematic and therefore an important issue meriting our comment. These proposed amendments ensure non-discrimination in all levels of the legal profession and courts are critical steps towards ensuring access to justice for all.

We support these proposed rule amendments to further these goals of fairness for all who engage the legal profession and our courts and encourage the Office of Court Administration to adopt the rules as proposed.

Sincerely,

Maha Syed
Executive Director

¹ National Center for Transgender Equality, "The Report of the 2015 U.S. Transgender Survey", published December 2016, available at <https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

January 31, 2018

John W. McConnell, Esq.
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York 10004



Via email: rulecomments@nycourts.gov

Re: Request for Public Comment on the Proposed Amendment of Various Non-discrimination Rules of the Unified Court System

Dear Mr. McConnell:

Legal Services NYC (LSNYC) is the largest civil legal services provider in the country. LSNYC has been dedicated to serving LGBTQ communities for over 25 years. LSNYC's LGBTQ/HIV Advocacy Project is the largest direct services provider for low-income LGBTQ communities in the state. Every year, LSNYC's LGBTQ/HIV Advocacy Project represents hundreds of low-income LGBTQ clients across all of our practice areas.

Our clients, particularly transgender and gender non-conforming (TGNC) clients, face rampant discrimination every day of their lives. As a result of this discrimination, TGNC individuals are more likely to live in poverty. Living in poverty increases the likelihood of interactions with the court system. In our work, we witness and receive reports of bias against TGNC people in the court system. The very place we look to for justice and equal treatment—our courts—should be the last place TGNC individuals face bias and discrimination.

The proposed amendments are a much-needed addition to the codes of conduct and ethics. The amendments also modernize relevant regulations to parallel similar civil rights laws across New York State. We applaud the breadth of the application of the proposed rules to the judiciary, court personnel and attorneys. LSNYC fully supports and urges the immediate and unqualified adoption of the proposed amendments prohibiting discrimination based upon gender identity and gender expression.

Thank you for your considering our comments in support of the proposed rules. Should the committee request further comments or wish to contact LSNYC, please reach out to Christine Clarke, Director of LSNYC's Civil Rights Justice Initiative, at cclarke@lsnyc.org.

Sincerely,
Legal Services NYC

Legal Services NYC
40 Worth Street, Suite 606, New York, NY 10013
Phone: 646-442-3600 Fax: 646-442-3601 www.LegalServicesNYC.org
Raun J. Rasmussen, Executive Director
Susan J. Kohlmann, Board Chair



Beth E. Goldman, Esq.
President & Attorney-In-Charge

By Email

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

**Re: Comments on Proposed Amendment on Various Non-Discrimination Rules
of the Unified Court System**

Dear Mr. McConnell,

Thank you for the opportunity to comment on the essential revision of the anti-discrimination rules for the New York Courts. I am a Staff Attorney and Michael A. Young Fellow with the LGBTQ Law Project of the New York Legal Assistance Group (NYLAG). Founded in 1990, the New York Legal Assistance Group provides high quality free legal services to New Yorkers who cannot afford an attorney.

In 2017, NYLAG represented 218 transgender, and gender non-conforming (TGNC) clients in a variety of areas such as immigration, name and gender marker changes, family law, employment and housing discrimination, tenant's rights, public benefits, and other civil legal matters. We accompany our clients to courts in all five boroughs, so we have seen firsthand the impacts on our clients of discrimination in courtrooms by judges, attorneys, and courtrooms. We appreciate the chance to submit comments on the proposed amendment, and we hope our perspective will be helpful.

We support the effort of the Administrative Board of Courts and the Richard C. Failla LGBTQ Commission in taking steps to ensure equal access to the courts and justice regardless of gender identity and gender expression. We strongly support the explicit inclusion of protections for "gender identity" and "gender expression" in the Attorney Rules of Professional Conduct, the Rules of Judicial Conduct, the UCS Code of Ethics for Non-judicial Employees, and the Rules of the Chief Judge.¹ The proposed amendments to the court non-discrimination rules increase access for TGNC people in New York City courts. While these proposed amendments will not stop every instance of discrimination, they will create a means to hold judges, court employees, and attorneys accountable for their actions should they discriminate on the basis of gender identity or gender expression. We are confident that this accountability mechanism will translate into less discrimination towards our clients, and a means for redress should issues arise.

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

TGNC people are more likely to be the victims of discrimination at an alarmingly high and disproportionate rate. Transgender and gender non-conforming individuals in New York State had an unemployment rate of 18%, as compared to an average unemployment rate of 4.4%.² and 37% were below the poverty line,³ as compared to an average poverty rate of 15.7%.⁴ Nearly 15% of TGNC New Yorkers reported that they had lost a job in their lifetime because of their gender identity or expression, and 21% of TGNC New Yorkers experienced some form of housing discrimination in the past year.⁵ In addition to discrimination, TGNC people are often targets of harassment and violence as 46% have been verbally harassed in the past year and 54% experienced some form of intimate partner violence.⁶ These high rates of discrimination create a disparate need for legal services and engagement with the judicial system, and make it even more urgent that their access to courts be unimpeded by discrimination.

Unfortunately, TGNC clients face a variety of different forms of discrimination when attempting to access legal remedies. Most commonly, TGNC clients are misgendered and referred to using the wrong pronoun or title by judges, attorneys, and court staff, even after they have informed the court of their preferred name and pronouns. TGNC clients are often referred to the “father” even when they identify as and are known to their children as a second “mother.” This creates situations that are at best awkward, and at worst traumatic for our clients in situations that are often already deeply stressful. The constant and repeated denials of our clients’ identities create an atmosphere of hostility and translate into a fear of accessing courts.

A client who does not believe that the judge in her case takes her identity seriously, for instance, is far less likely to divulge personal details of domestic violence, or feel they will receive equal respect as a parent in a custody dispute. Even more basically, a client who feels themselves to be the victim of discrimination based on their gender presentation is unlikely to feel that the court can accurately judge a separate instance of discrimination they endured. Regardless of the court’s ability to actually help a client, if the client believes that a court will not take them seriously or offer real help, they may not return for future court dates, or may not bring another case the next time they have a legal problem. We think the proposed amendment will encourage TGNC people with important claims to avail themselves of legal remedies.

One of the most common interactions with the court system for TGNC individuals is to seek a court order for a name change to match their gender identity. Nationally, of those who

² New York State Community Action Association, *New York State Annual Poverty Report* (2017), http://nyscommunityaction.org/PovReport/2016/Poverty%20Report_2017_Master%20Doc.pdf.

³ National Center for Transgender Equality, *2015 U.S. Transgender Survey: New York State Report* (2017), (The 2015 U.S. Transgender Survey (USTS) is the largest survey examining the experiences of transgender people in the United States, with 27,715 respondents from all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas.) <http://www.transequality.org/sites/default/files/USTS%20NY%20State%20Report%20%281017%29.pdf>. [hereinafter *2015 U.S. Transgender Survey New York Report*].

⁴ New York State Department of Labor, *Unemployment Rate* (December, 2017), <https://labor.ny.gov/stats/laus.asp>.

⁵ *2015 U.S. Transgender Survey New York Report*, p2

⁶ National Center for Transgender Equality, *2015 U.S. Transgender Survey Executive Summary*, p13, (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

sought to change their name, 96% of TGNC did so through a court order.⁷ Nearly 35% of our cases from the last year involving TGNC clients were for name changes. These are often also some of the most fraught interactions that our clients have with New York City Courts.

TGNC people who go to court for name changes put themselves in a particularly vulnerable position, as they are essentially presenting their gender identity (in the form of a gendered name) to the court as something to be adjudicated. Name changes are generally done pro se, but many TGNC people in New York opt to bring representation, in part so that their attorneys can act as a buffer for whatever discrimination they may face in court. Moreover, many service providers in New York City will only file name changes in Manhattan Civil Court, because those filing elsewhere have faced heightened and persistent discrimination from all levels of court staff.

Name changes are urgent matters of safety for our clients. Having identity documents that match their identities allows TGNC people to move more freely and avoid daily interactions that range from tense to violent. The process to acquire this affirming court decision should not be marred, as it often is, by discrimination from the courts themselves. This amendment is so important, in part, because it would allow our clients to access remedies to everyday harassment without encountering additional discrimination along the way.

While misgendering is the most common form of discrimination we see in courthouses, it is hardly the only one. In 2015, 13% of TGNC people surveyed nationwide reported being denied equal treatment or service, verbally harassed, or physically attacked in courthouses.⁸ While not all of these instances are attributable to court staff, this staff sets the example for respectful treatment. If a person sees a TGNC person being continuously disrespected by court staff, attorneys, and judges, they are more likely to feel empowered to harass that person themselves. A norm of nondiscrimination will work its way to those in attendance at court.

Adding “gender identity” and “gender expression” to the various court non-discrimination rules is crucial to providing equal and fair access for transgender and gender non-comforting New Yorkers. It is our hope, that this change not only updates the law in New York and reduces discrimination but also expands the dialog within state justice system to create a welcoming environment for all New Yorkers. NYLAG strongly urges the Administrative Board of the Courts to approve the amendments.

Very Truly Yours,

Alejandra Caraballo, Esq.

⁷ National Center for Transgender Equality, *2015 U.S. Transgender Survey*, p82, (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁸ *Id.*, p16.



February 2, 2018

John W. McConnell, Esq.
 Counsel, Office of Court Administration
 25 Beaver Street, 11th Fl.
 New York, New York 10004

Comments of Lambda Legal Regarding Proposed Amendments to Various Nondiscrimination Rules of the New York Unified Court System

Submitted via e-mail: rulecomments@nycourts.gov

Dear Mr. McConnell,

Lambda Legal appreciates the opportunity to respond to the Request for Public Comment on the Proposed Amendment of Various Nondiscrimination Rules of the Unified Court System issued on October 24, 2017. Lambda Legal is 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 everyone living with HIV through impact litigation, policy advocacy, and public education. The communities served by Lambda Legal depend on access to fair and impartial courts. More specifically, Lambda Legal established its Fair Courts Project to facilitate the organization’s leadership in the fight for fair courts. Lambda Legal’s Transgender Rights Project works to ensure the equal dignity of transgender and gender-nonconforming people and people with nonbinary identities in New York and nationally, including work to ensure access to the courts when seeking name changes, gender marker corrections, and the various other reasons these communities come into contact with the courts. Additionally, Lambda Legal’s Youth in Out-of-Home Care Project advocates for LGBTQ youth who come into contact with the courts through child welfare, juvenile justice and other family and juvenile court proceedings. We offer these comments to express our strong support for the implementation of the proposed amendments and to make recommendations to further protect transgender people, gender-nonconforming people, intersex people and people with nonbinary gender identities in New York courts.

With the implementation of the proposed amendments, several important objectives would be accomplished. Discrimination on the basis of gender identity and gender expression by attorneys, judges, and non-judicial court employees would be explicitly prohibited¹, as would the manifestation of bias or prejudice on the basis of gender identity or expression by attorneys in proceedings before a judge and by judges in the performance of any judicial duties.²

¹ 22 NYCRR Part 1200, Rule 8.4 (g); 22 NYCRR §100.2 (D); 22 NYCRR §100.3(B)(4), (5); 22 NYCRR § 50.1(II)(C).

² 22 NYCRR §100.3(B)(4).

Additionally, gender identity and expression would be specifically added as protected categories to the equal employment opportunity policy of the New York State Unified Court System.³ Clear nondiscrimination rules help to prevent discrimination before it happens by notifying and educating people of their obligations. Importantly, these amendments to the Attorney Rules of Professional Conduct and the Rules of Judicial Conduct will provide mechanisms for redress through the disciplinary and grievance committees of the Appellate Divisions and the State Commission on Judicial Conduct, should an attorney or judge violate the provisions.

New York as a Leader

In August 2016, the American Bar Association amended Rule 8.4 of the Model Rules of Professional Conduct. As part of this amendment, a prohibition on harassment or discrimination on the basis of gender identity by attorneys in the practice of law became a black-letter rule.⁴ Importantly, adding gender identity and gender expression to Rule 8.4(g) of New York's Attorney Rules of Professional Conduct will extend protections in New York as intended by the amendments to the Model Rules. New York would be the third state to explicitly include a prohibition on discrimination based on gender identity and the second state to include both gender identity and gender expression in attorney rules of professional conduct.⁵ As such, New York is set to be among the states leading the way in improving protections for transgender people, gender-nonconforming people, and people with nonbinary identities in the legal system.

While the American Bar Association's Model Code of Judicial Conduct has not yet been similarly amended to explicitly include gender identity, seven states have incorporated into their codes of judicial conduct anti-bias provisions which include gender identity.⁶ Four of those states have also included gender expression.⁷ Here too, New York is set to be among the states steering the path forward in the work of eliminating prejudice and bias in the courts. The amendment of New York Unified Court System's various nondiscrimination rules is essential to ensure that all attorneys, judges, and court staff in New York are held to the same nondiscrimination requirements.

Discrimination in the Courts

When Lambda Legal conducted a national survey,⁸ of the more than 1,000 survey respondents who had been in contact with the courts during the preceding five years, nineteen percent (19%) reported hearing a judge, attorney or other court employee make negative comments about a

³ 22 NYCRR § 25.16(a).

⁴ Model Rules of Prof'l Conduct R. 8.4(g) (2016).

⁵ See Vermont Rule of Prof'l Conduct 8.4(g) (2017) (gender identity); Oregon Rule of Prof'l Conduct 8.4(a)(7) (2017) (gender identity and expression).

⁶ See Hawaii Judicial Conduct Rule. 2.3 (2017); Maine Judicial Conduct Rule 2.3 (2015); Massachusetts Judicial Conduct Rule 2.3, Comment 2 (2016); New Jersey Judicial Conduct Rule 3.6 (2016); New Mexico Judicial Conduct Rule 21-203 (2012); Oregon Judicial Conduct Rule 3.3 (2013); Pennsylvania Judicial Conduct Rule 2.3 (2014).

⁷ Hawaii Jud. Cond. R. 2.3 (2017); Massachusetts Jud. Cond. R. 2.3, Comment 2 (2016); New Jersey Jud. Cond. R. 3.6 (2016); Pennsylvania Jud. Cond. R. 2.3 (2014).

⁸ Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), available at www.lambdalegal.org/protected-and-served.

person's sexual orientation, gender identity or gender expression. People of color and transgender people reported higher incidences of negative language: While nineteen percent of respondents overall heard these anti-LGBT comments, 53% of transgender and gender-nonconforming people of color and 66% of transgender women reported experiencing these comments while using the courts. Our survey also solicited information regarding the level of trust respondents had in a range of government institutions. Only 28% of transgender and gender-nonconforming respondents "generally trusted" the courts, which was lower than the 38% percent who indicated trust in the police.⁹

In 2017, Lambda Legal assisted a transgender woman with addressing discriminatory treatment when in a Georgia municipal court regarding a traffic ticket. The prosecuting attorney in the case repeatedly referred to her as "he" and "him" when addressing or speaking about her. Prior to the hearing, he took her aside in a small room with four other people who were not identified to her to discuss the case. He then asked her whether she'd "had the full surgery," an inquiry about genital surgery. This experience was humiliating and extremely dangerous for her. The attorney purposefully disclosed her transgender status to everyone within earshot and refused to acknowledge a core aspect of her identity. The judge presiding over this case did not take steps to address the misgendering and disrespectful treatment. Lambda Legal brought this matter directly to the attention of the judge, who responded with an acknowledgment of her responsibilities and assurances that any future misgendering or other disrespectful treatment directed to transgender people in her courtroom would be promptly and appropriately addressed. Unfortunately, transgender people regularly face similar scenarios in courtrooms around the country. Ending this type of mistreatment requires enacting clear nondiscrimination rules, such as those currently proposed.

Experiences of Transgender Youth in Court

LGBT and questioning youth ("LGBTQ") are disproportionately involved in child welfare and juvenile justice systems and are disproportionately homeless compared to their non-LGBTQ peers.¹⁰ In one notable study, 5.9% of the foster youth surveyed identified as transgender, while estimates in the general population indicate that approximately one percent of youth are transgender.¹¹ Eleven percent of youth in the same study described themselves as gender-nonconforming.¹² Family and societal rejection and other negative experiences fuel system involvement, leaving LGBTQ youth particularly vulnerable when discriminated against by

⁹ *Id.*

¹⁰ It is estimated that only 5-7 percent of youth are LGBTQ, but they make up almost 25 percent of youth in the foster care system and 20 percent of youth in the juvenile justice system. See M. Currey Cook, Christina Wilson Remlin, and Rosalynd Erney, *Safe Havens: Closing the Gap Between Recommended Practices and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (2017), available at: https://www.lambdalegal.org/sites/default/files/tgnc-policy-report_2017_final-web_05-02-17.pdf; True Colors Fund & Nat'l LGBTQ Task Force, *At the Intersections: A Collaborative Report on LGBTQ Youth Homelessness* (2016), available at <http://attheintersections.org/>; <https://williamsinstitute.law.ucla.edu/research/transgender-issues/new-estimates-show-that-150000-youth-ages-13-to-17-identify-as-transgender-in-the-us/>.

¹¹ Bianca D.M. Wilson, et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, 6 (2014), https://williamsinstitute.law.ucla.edu/wpcontent/uploads/LAFYS_report_final-aug-2014.pdf; Herman, J.L., Flores, A.R., Brown, T.N.T., Wilson, B.D.M., & Conron, K.J. (2017). *Age of Individuals who Identify as Transgender in the United States*. Los Angeles, CA: The Williams Institute.

¹² Wilson, et al. at 6.

courts, lawyers, or judges, because children in government-funded care depend upon the watchful eye of the court to ensure they have safe places to live and receive services help address medical and behavioral health issues, including exposure to past trauma.

In the vast majority of court cases, children are represented by court-appointed attorneys and cannot choose representation by someone they know will be supportive and affirming. LGBTQ youth must rely upon judges and attorneys to treat them respectfully. The Office of Court Administration should clarify via comments associated with the rule, or in subsequent training, specific expectations regarding non-discriminatory practice of law in regard to transgender and gender-nonconforming youth.

Lambda Legal has seen firsthand what happens when youth in family and juvenile court settings are represented by attorneys who refuse to acknowledge or respect a youth's gender identity or appear in front of judges exhibiting bias. Such discrimination is emotional harm that immediately negatively impacts a youth's well-being and diminishes a youth's trust in adults who are supposed to advocate and protect them. In addition, as a practical matter, a youth is then forced to navigate around a biased attorney or judge to get needs related to their identity met, such as affirming health care. Elimination of this hurdle, allows youth to dedicate their time and emotional energy to school, recommended services or simply engaging in normal, pro-social life activities. Lydia, a former client of Lambda Legal's in the juvenile justice system in Texas, captured this critical point in a comment about her supportive parole officer, "Once I knew my parole officer was going to respect me and treat me fairly, I was able to focus on what I needed to do and work on positive things."¹³

Lambda Legal has also assisted in family court matters involving custody and visitation in which one parent is not affirming of a youth's identity and another is. While each case requires an individual determination regarding the best interests of the child, rules governing judicial conduct that prohibit discrimination on account of gender identity and gender expression provide clarity regarding dignity and respect afforded to the subject child during the course of the proceeding.

Prohibiting discrimination based on gender identity and gender expression will help to ensure that attorneys for children truly represent children's interests in court, that judges respond appropriately, and that children are protected from further harm by adults in positions of power and authority. Doing so is also consistent with the professional opinion of all mainstream social science and child welfare organizations, which have unanimously concluded that affirmation of identity in all aspects, such as access to sex-segregated facilities in accordance with identity, freedom to express gender, and respect for names and pronouns, promotes a child's wellbeing.¹⁴

¹³ See M. Currey Cook, Christina Wilson Remlin, and Rosalynd Erney, *Safe Havens: Closing the Gap Between Recommended Practices and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (2017), available at:

https://www.lambdalegal.org/sites/default/files/tgnc-policy-report_2017_final-web_05-02-17.pdf

¹⁴ Child Welfare League of Am., et al., *Recommended Practices to Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* (2012), available at <https://www.lambdalegal.org/sites/default/files/publications/downloads/recommended-practices-youth.pdf>; Brief of Amici Curiae American Academy of Pediatrics, American Psychiatric Association, American College of Physicians

Our courts must be open to all. Discrimination, prejudice, and intolerance threaten the rights and liberties of transgender, nonbinary, gender-nonconforming, and intersex New Yorkers. They also erode public trust in the fairness and integrity of the courts, undermine confidence in the legal profession, and create barriers to access for those who may need the courts the most.

Discrimination in Employment

In New York State, rates of employment discrimination against transgender and gender-nonconforming people are alarming. Sixty-five percent (65%) of New Yorkers who responded to the 2015 U.S. Transgender Survey reported some form of harassment, mistreatment, or negative employment action because of their gender identity or expression within the year prior to the survey.¹⁵ In addition, 37% of transgender New Yorkers surveyed were living in poverty, and eighteen percent (18%) were unemployed, which was more than three times the national unemployment rate at the time of the survey.¹⁶

While New York State and New York City law bar employment discrimination against transgender people, it is clear that this discrimination persists. The amendments to the Rules of the Chief Judge, Career Service and to the Attorney Rules of Professional Conduct will further reinforce that unequal treatment in employment of transgender, nonbinary, and gender-nonconforming people will not be tolerated within New York's court system. These amendments would also send a strong message to these communities that they are welcome to work in the legal profession and within the court system.

Recommendations

Lambda Legal respectfully makes the following recommendations to the current proposal in order to help ensure the experiences of transgender people, gender-nonconforming people, intersex people and people with nonbinary gender identities in the courts are free from discrimination, bias, and mistreatment.

1. Rather than adding gender identity and gender expression as separate protected characteristics within each rule, add an explanatory parenthetical after the term "sex" in 22 NYCRR Part 1200, Rule 8.4 (g), 22 NYCRR Part 100, 22 NYCRR § 50.1(II)(C), and 22 NYCRR § 25.16(a). We recommend the following language (additions in *italics*): "sex (*including gender identity or expression, sex stereotypes, transgender status, and variations in sex characteristics including chromosomes, genitals, gonads, and hormonal factors, whether or not they may be considered atypical for the sex assigned or presumed*),..."

and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016), vacated and remanded, *Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, No. 16-273, 2017 WL 855755, at *1 (U.S. Mar. 6, 2017), available at <https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-american-academy-pediatrics-et-al>.

¹⁵ 2015 U.S. Transgender Survey: New York State Report. (2017). Washington, DC: National Center for Transgender Equality, *available at*

<http://www.transequality.org/sites/default/files/USTS%20NY%20State%20Report%20%281017%29.pdf>

¹⁶ *Id.*

2. In addition to the rules currently being considered for amendment, we recommend an amendment to 22 NYCRR §1210.01, Posting. This section requires all attorneys with an office in New York State to post a “Statement of Client’s Rights.” The tenth numbered paragraph of enumerated rights states, “[y]ou may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.” Lambda Legal recommends the same parenthetical addition above be added to this rule (additions in *italics*): “sex (*including gender identity or expression, sex stereotypes, transgender status, and variations in sex characteristics including chromosomes, genitals, gonads, and hormonal factors, whether or not they may be considered atypical for the sex assigned or presumed*),...”
3. Lastly, we recommend that the right of court users to be free from discrimination, bias, and prejudice within New York’s court system on the basis of the characteristics designated in the various nondiscrimination provisions be clearly posted in all courthouses throughout the state. Instructions should be included on how to file a complaint should these provisions be violated.

These additions would further protect employees of the New York Unified Court System and people who use New York’s courts.

Conclusion

Discrimination within the judicial system inflicts highly pernicious injury because the courthouse is “where the law itself unfolds.”¹⁷ Formal rules requiring equal treatment of transgender people, gender-nonconforming people, intersex people and people with nonbinary gender identities will help reduce discrimination and increase public trust in the courts. Lambda Legal strongly supports the proposed amendments to the various nondiscrimination rules of the Unified Court System and respectfully encourages the Administrative Board of the Courts to include the proffered recommendations when finalizing these amendments. We thank you for considering these comments and for your commitment to ensuring equal treatment within the court system.

Respectfully Submitted,

LAMBDA LEGAL

**M. Currey Cook, Counsel and Youth in
Out-of-Home Care Project Director**
ccook@lambdalegal.org

Ethan Rice, Fair Courts Project Attorney
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120 Wall Street, 19th Floor
New York, NY 10005

¹⁷ *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991).

VOLUNTEER LAWYERS PROJECT

OF ONONDAGA COUNTY, INC.

February 2, 2018

John McConnell:
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: The Proposed Amendment of Various Non-discrimination Rules of the Unified Court System

Dear Mr. McConnell:

We are writing to you in support of amending the various court rules to prohibit discrimination based upon “gender identity” and “gender expression.” The Volunteer Lawyers Project of Onondaga County is pro bono legal services organization serving Central New York. We have a substantial practice serving transgender and gender nonconforming clients. Last year, we completed over 70 name changes for transgender clients throughout Upstate New York. We are writing to express strong support for the proposed changes to the OCA non-discrimination rules to include gender identity and gender expression as protected statuses.

The transgender population is a minority community that is targeted with animus-fueled violence and discrimination at extreme levels simply for being gender non-conforming. Due to the often-dire consequences of having their gender identity exposed, many transgender people are not publically “out” as transgender. That is because “out” transgender individuals face ongoing threats of identity-based violence and discrimination from the public-at-large—including inside courthouses around the state.

We have represented clients in New York State courts who have been intentionally mis-gendered and mis-named by opposing parties, their counsel, and judges themselves. This type of conduct is not only inappropriate since it could “out” transgender parties and subject them to the violence spotlighted above, but also since it delegitimizes the court. When the court, through its judges, counsel, and employees, is complicit in allowing animus to be shown towards transgender individuals by mis-gendering or mis-naming them, the court’s supposed impartiality is destroyed. A court that allows transgender discrimination is not a court that is impartial. And a court that is not impartial is likely not a court that is seen as fully legitimate by its citizens.

Because of these experiences of transgender clients and attorneys, this proposed amendment is strongly needed. Moreover, we would request that the court specifically state that intentional mis-gendering and mis-naming of transgender individuals be considered de facto harassment in violation of this the rules prohibiting discrimination based upon “gender identity” and “gender expression”.

Sincerely,



Sally Fisher Curran, Esq.
Executive Director
The Volunteer Lawyers Project of Onondaga County

Providing Equal Access to Justice to Those in Need

221 S. Warren St., Suite 200, Syracuse, NY 13202

(315) 471-3409 www.onvlp.org



February 2, 2018

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

Re: Comment in Response to the Proposed Amendment of Various Non-Discrimination Rules of the Unified Court System

Mr. McConnell,

On behalf of Gay Men's Health Crisis (GMHC), please accept these comments to the Proposed Amendment of Various Non-Discrimination Rules of the Unified Court System.

Established in 1981, GMHC is the oldest not-for-profit AIDS service organization in the U.S. GMHC is dedicated to providing direct services to people living with HIV/AIDS and the agency's legal department provides counsel and representation to many members of the LGBTQ community. GMHC applauds the Administrative Board of the Courts and the Richard C. Failla LGBTQ Commission of the New York Courts for this Proposed Amendment, and we appreciate the Judiciary's continued commitment to addressing discrimination experienced on the basis of sexual orientation, gender identity, and gender expression.

We commend the addition of gender identity and gender expression to the list of protected categories in both the practice of law and the conduct of judges, barring discrimination, bias, and prejudice on these bases. Further, we commend the similar addition of these protected categories to the rules governing the conduct of nonjudicial employees and career service employment practices.

The implementation of this Proposed Amendment will directly benefit countless members of the LGBTQ community who, due to their gender identity and expression, face discrimination in housing, employment, law enforcement, and more. This discrimination, which stems from the personally-held biases of laypeople and legal authorities alike, can both result in and substantially influence proceedings within the Unified Court System. By prohibiting this mistreatment to occur within the courts, this Proposed Amendment works to ensure that an equitable forum exists to address issues stemming from prejudice on the outside. The result will

be a more just court system, the decisions of which will have a positive ripple effect on society at large.

While this Proposed Amendment is a great step, we encourage the Judiciary to continue its efforts to eradicate discrimination and bias against all persons. Further, we hope to find that this Proposed Amendment works to ensure that nobody faces prejudice in the court system on the basis of their sexual orientation, gender identity, or gender expression, regardless of whether such orientation, identity, or expression is widely recognized or unique to the individual. GMHC is happy to provide any additional information and expertise that will assist in these efforts. Please contact Kamilla Sjodin, Esq., Managing Director, Legal Services (KamillaS@gmhc.org) or Austen Brandford, Esq., Staff Attorney (AustenB@gmhc.org) with any additional questions.

Sincerely,

Kamilla Sjodin, Esq., Managing Director, Legal Services

Austen Brandford, Esq., Staff Attorney



194 Washington Avenue, Suite 620
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p: 518.436.8408 · f: 518.436.0004
www.PPESacts.org

Planned Parenthood Empire State Acts

January 31, 2018

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

Re: Proposal on Changes to Ethics Rules

Dear Hon. Marks,

Planned Parenthood Empire State Acts (PPESA) is pleased to submit comments on the proposed changes to the non-discrimination policy of the Unified Court System. PPESA is New York's statewide advocacy organization for Planned Parenthood, representing affiliates across the state and advocating for reproductive health, rights and justice. Our nine affiliates provide confidential, compassionate and non-judgmental comprehensive reproductive health care services that include contraceptive care and counseling, pregnancy testing, prenatal and postpartum care, health education, treatment and counseling for sexually transmitted infections, breast and cervical cancer screenings and abortion services. In addition to these services, seven Planned Parenthood affiliates currently provide comprehensive transgender-related care.

PPESA recognizes that in order to lead healthy lives, transgender individuals must also be protected from the discrimination they so often face – including in the court system. PPESA has long supported legislative approaches to ensuring that protections for transgender individuals are enshrined in New York State law. We have also consistently supported efforts to ensure that transgender individuals can fully access health care services, including advocating to end the Medicaid program's restriction on coverage for medically necessary transgender-related health care services. Expanding the Unified Court System's non-discrimination policies to include "gender identity" and "gender expression" would secure much needed protections for all New Yorkers.

We offer our full support of the proposal by the Richard C. Failla LGBTQ Commission of the New York Courts to prohibit discrimination based upon "gender identity" and "gender expression". By including these provisions in the discrimination policy of the courts, the Unified Court System will be committing to eradicating discrimination and bias against all persons regardless of their sexual orientation, gender identity, or gender expression. PPESA commends the work the Failla LGBTQ Commission and encourages the Unified Court System to adopt these proposed amendments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Robin Chappelle Golston'.

Robin Chappelle Golston
President & CEO

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THE COUNCIL OF
THE CITY OF NEW YORK
DANIEL DROMM
COUNCIL MEMBER, 25TH DISTRICT, QUEENS

CHAIRPERSON
FINANCE
COMMITTEES
EDUCATION
AGING
CIVIL SERVICE & LABOR
IMMIGRATION
CIVIL RIGHTS

February 1, 2018

John W. McConnell, Esq.
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004

Re: Attorney Rules of Professional Conduct (22 NYCRR Part 1200)
Rules of Judicial Conduct (22 NYCRR Part 100)
UCS Code of Ethics for Nonjudicial Employees (22 NYCRR Part 50)
Rules of the Chief Judge, Career Service (22 NYCRR Part 25)

Dear Mr. McConnell:

As a New York City Council Member and lifelong civil rights activist, I am writing to commend the work of the Richard C. Failla LGBTQ Commission of the New York Courts and express my enthusiastic support for the proposed changes to court rules.

Adding gender identity and expression to non-discrimination provisions is a necessary first step. I hope our courts will also consider implementing more comprehensive guidelines and trainings aimed at making transgender and gender-nonconforming attorneys, judges, staff, and litigants feel welcome.

Thank you for your careful consideration of this comment. If you have any questions, please do not hesitate to contact me at (718) 803-6373.

Sincerely,

Daniel Dromm
New York City Council Member, 25th District

[REDACTED]

From: Katherine Harris <lostkathy@yahoo.com>
Sent: Thursday, October 26, 2017 10:19 PM
To: rulecomments
Subject: Proposed Amendment of Various Non-discrimination Rules of the Unified Court System

[REDACTED] [REDACTED]

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

Dear Mr. McConnell,

It would seem to me that attorneys and employees of the Unified Court System would already be in the practice of not discriminating towards an individual based on their gender identity and expression, whether that person is receiving legal counsel or employed by the legal system. In order for the system to work in a way that is truly fair to all, discrimination of any kind should be unlawful. Selective discriminatory practices have no place in the court system and only compound, for example, the difficult circumstances under which a person might require legal counsel. Furthermore, I find the following to be an issue of conflict between judges and those who may find themselves being judged:

22 NYCRR § 100.2(D):

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

A judge who has membership in a religious organization that clearly espouses that LGBT people are not welcome in their organizations, due to biblical interpretations, would experience direct conflict with his role as a judge and his organizational membership. His dedication to the preservation of religious teachings could effectively compromise another being judged in court. How can a judge be non-discriminatory and belong to any religious organization that itself discriminates based on their religious beliefs? I would think that a judge having such an affiliation would not be in a position to rule over a case involving a person who identifies as LGBTQ.

While I hope that the proposal will be adopted to include protections based on "gender identity" and "gender expression", I so to hope that consideration would be given to limiting the ability of any judge who is dedicated to a religious organizations preservation of anti-LGBTQ beliefs, to preside over any cases involving LGBTQ people who stand before his court. Thank you.

Katherine Harris
U.S. Army Retired

November 18, 2017

Office of Court Administration
Attn: John W. McConnell, Esq.
25 Beaver Street, 11th Fl.
New York, New York 10004.

RE: Proposed Amendment of Various Nondiscrimination Rules of the Unified Court System

Dear Mr. McConnell.

My name is Malita Picasso and I am a second year law student at the City University of New York School of Law and a resident of Brooklyn, New York. I am writing to express my support for the recently proposed amendments to the nondiscrimination provisions in the Rule of the Unified Court System. As both a legal professional and transgender person, I hope to provide some insight into the urgent need for institutionalized protections for transgender people in the justice system, civil and criminal.

Studies show that transgender and gender nonconforming people, particularly those who are young people of color, experience homelessness, poverty, unemployment, underemployment, school disciplinary sanctions and school dropout, at extremely high rates.¹ Together, these factors push many transgender and gender nonconforming people into circumstances in which they are more likely to interact with the justice system, particularly the criminal justice system.²

With this heightened exposure to the courts, high rates of transgender and gender nonconforming people report experiencing discrimination in the courts. A recent study found that 33% of transgender and gender nonconforming people who had been to court at least once within the past 5 year, reported having heard a judge, attorney, or other court employee make discriminatory or derogatory remarks about a person's sexual orientation or gender identity.³ This rate increases to 55% among transgender and gender nonconforming people of color.⁴ In this same survey, 26% of transgender and gender nonconforming people who had recently been to court reported that their gender identity were raised as an issue

¹ Center for American Progress and Movement Advancement Project, "Unjust: How The Broken Criminal Justice System Fails Transgender People" (May 2016), available at <http://www.lgbtmap.org/file/lgbt-criminal-justice-unjust.pdf>; Grant, Jaime M. Ph.D., Lisa A. Mottet, J.D., Justin Tanis, D.Min., et. al. "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey" (2011), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

² *Id.*

³ Lambda Legal, "Protected and Served? Courts," available at <https://www.lambdalegal.org/protected-and-served/courts>.

⁴ *Id.*

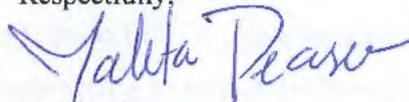
unnecessarily and inappropriately.⁵ Judges, attorneys and court employees frequently refuse to use the preferred names and pronouns of transgender and gender nonconforming people.

In light of these statistics, the proposed amendments to the nondiscrimination provisions are an important and urgently needed first step towards ensuring that transgender and gender nonconforming people are not being wrongfully denied justice on the basis of their gender identity or gender expression. I hope, however, that these rules will not be narrowly construed as to only prevent the most invidious and overt forms of discrimination. It is often much more subtle forms of antagonism and disrespect that prejudice transgender and gender nonconforming people in the courts.

I've witnessed judges scoff at a transgender criminal defendant's request for the judge to use appropriate gender pronouns. I have seen the dumbfounded and confused faces of court attorneys appointed to represent transgender or gender nonconforming individuals. These are the same attorneys that fail to request that transgender or gender nonconforming receive appropriate housing placements while in the custody of the New York City Department of Corrections. I've talked to friends and colleagues who recount stories of judges who blatantly disrespect transgender and gender nonconforming people in open court. This is not justice.

Moreover, additional incremental changes in the administration of the courts can significantly improve the quality of a transgender person's experience. Changes such as providing appropriate training to court staff on best practices for interacting with transgender people, and highlighting the importance of referring to transgender people by their preferred names and gender pronouns. As such, I support the proposed amendments and I hope that the State of New York continues to lead the way in recognizing the need to protect the most vulnerable and targeted communities among us.

Respectfully,



Malita Picasso

J.D. Candidate, May 2019

C.U.N.Y. School of Law

malita.picasso@live.law.cuny.edu

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COUNSEL'S OFFICE
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⁵ *Id.*



From: Jillian Weiss <jweiss@transgenderlegal.org>
Sent: Tuesday, January 23, 2018 1:21 PM
To: rulecomments
Subject: Comment re gender identity nondiscrimination



As Executive Director of the Transgender Legal Defense & Education Fund, Inc., a national non-profit organization located in New York City, I write in favor of a proposal, proffered by the Richard C. Failla LGBTQ Commission of the New York Courts, to amend various court rules to prohibit discrimination based upon "gender identity" and "gender expression."

As shown by various surveys, including the 2015 U.S. Transgender Survey, transgender people experience much discrimination, including discrimination in legal settings. The proposal would bring the court rules into conformity with New York State regulations that prohibit such discrimination under New York law, 9 NYCRR 466.13, and New York State court opinions such as *Buffong v. Castle on Hudson*, 12 Misc. 3d 1193(A), 824 N.Y.S.2d 752 (Sup. Ct. 2005) (holding New York State Human Rights Law prohibition on sex discrimination includes transgender persons).

The Transgender Legal Defense & Education Fund strongly supports this proposal.

Thank you for your consideration.

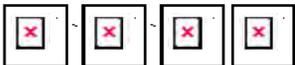
Jillian Weiss
Executive Director



Transgender Legal Defense
& Education Fund, Inc.

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w: transgenderlegal.org



[REDACTED]

From: Mallory Livingston <mjl@livingstonlegal.com>
Sent: Friday, February 2, 2018 11:45 AM
To: rulecomments
Subject: Public Comment on the Proposed Amendment of Various Non- discrimination Rules of the Unified Court System

[REDACTED] [REDACTED]

To Whom It May Concern:

The proposed changes comprised of adding "gender expression" and "gender identity" to the non-discrimination rules of the Unified Court System are a welcome development but are not likely to have the desired impact if court personnel are not provided instruction as to what constitutes discrimination based on gender expression and identity.

As a transwoman and a practicing trial lawyer since 1989, I can attest to the woeful lack of awareness and education, especially by the judiciary, when it comes to the issue of gender identity discrimination. As both an attorney and as a litigant, I have experienced such discrimination by judges whom I believe wanted very much to not discriminate against trans people. They simply lacked the tools and understanding to know what was and what was not discrimination.

By way of example, I once litigated a case where opposing counsel repeatedly insulted me by referring to me using male pronouns despite my female gender identity and obvious female gender expression. My clothing and gender presentation was very much in keeping with what is traditionally appropriate for a female attorney arguing a case before the bar. When I objected to the repeated insults, the presiding judge became irritated with me and silenced my objections by stating "I can't tell him what to call you." I don't believe the judge involved was purposefully trying to discriminate against me but instead simply did not understand that use of male pronouns in that situation was highly insulting. Certainly, the judge involved would not have tolerated any other kind of personal insult by anyone in the courtroom.

These rules are essential but unless court personnel understand what gender discrimination is, these new rules will not be effective.

Mallory Livingston, Esq.
305 Strathmore Drive
Syracuse, N.Y. 13207

[REDACTED]

From: kevin.brady@live.law.cuny.edu
Sent: Friday, February 2, 2018 8:30 PM
To: rulecomments
Cc: Kevin C. Brady
Subject: Request for Public Comment on the Proposed Amendment of Various Nondiscrimination Rules of the Unified Court System

[REDACTED] [REDACTED]

To: John W. McConnell, Esq.,
Counsel, Office of Court Administration,
25 Beaver Street, 11th Fl.,
New York, New York 10004
(212) 428-2160
rulecomments@nycourts.gov

From: Kevin Brady
569 Nostrand Avenue, Apt. 2F
Brooklyn, NY 11216
(516) 941-5041
kevin.brady@live.law.cuny.edu
alt: kcbrady@nycourts.gov

Re: Request for Public Comment on the Proposed Amendment of Various Nondiscrimination Rules of the Unified Court System

Date: February 2, 2018

Mr. McConnell and to whom else it may concern:

My name is Kevin Brady. I am a part-time law student at the City University of New York School of Law, as well as the secretary to a justice of the Nassau County Supreme Court since January 2015. It is in my role as both an active citizen of New York in legal training, as well as an out LGBTQ individual employed by the Unified Courts System, that I write to convey my enthusiastic support of the Office of Court Administration's proposed amendments to the Attorney Rules of Professional Conduct [22 NYCRR Part 1200, Rule 8.4(g)]; the Rules of Judicial Conduct [22 NYCRR Parts 100.2(D), 100.3(B) (4), (5)]; UCS Code of Ethics for Nonjudicial Employees [Part 50.1(II) (C)]; and the Rules of the Chief Judge, Career Service [Part 25.16(a)].

I support the proposed amendments not only because they are valid extensions of preexisting protections already provided to other protected classes of identity such as gender, race, and sexual orientation, protections which have already been deemed valid under the U.S.

Constitution and New York State Constitution, but more pressingly because they are

1. consistent with the public policy interests and goals of the justice system of the State of New York, and further
2. will partially remedy an unnecessary and dismaying void in the legal protections offered to transgender and gender non-conforming persons under the current statutes of both the State of New York and specifically the County of Nassau, in which I work and was a resident until last year.

In the August 29, 2017 memo entitled Exhibit A of the Request for Public Comment, a document signed by Hon. Elizabeth Garry and Hon. Marcy Kahn, it is noted that the current protections "as presently written... are addressed solely to discrimination based on sexual orientation. This is not inclusive of all the members of the LGBTQ communities, and we are therefore writing to request some specific changes."

It is my personal belief as both a student of the law and engaged member of the LGBTQ community of Greater New York that the inclusion of well-researched and reasonably specific definitions for "gender identity" and "gender expression" within the attached documents (see Exhibit A) will "aid in the public efforts to institutionalize the Judiciary's commitment to eradicating discrimination and bias against all persons regardless of their sexual orientation, gender identity, or gender expression," as expressed in the same memo. These clear definitions will provide a sound basis for the purposes of further educating the employees of the Unified Court System, including the esteemed members of the judiciary itself.

I want to specifically draw attention to the fact that the failure of the New York State Senate to pass legislation such as the Gender Expression Non-Discrimination Act (GENDA), or alternative similar legislation, as well as the failure of the Nassau County Legislature to amend its existing Human Rights Law, has left transgender residents of the jurisdiction of the court in which I currently work without basic non-discrimination protections with regard to such expectations of equal citizenry such as housing and employment. While it is not commonly the proper nor appropriate place of the judiciary to dictate to the democratically-elected State Legislature what specific pieces of legislation are worthy of passage, I firmly believe it is within the rights of the judiciary to respectfully point another branch of government towards an area of public policy in need of further attention, and further the natural duty of the judiciary and its admitted members of the bar who practice before it especially, to wear the ideals of justice and equality "on it sleeve" as an example to be modeled after and aspired to by both the private sector and other bodies of governance with which it interacts daily.

Further still, I would wholeheartedly express my support for, attest to the need for, and share my personal willingness to help facilitate the future educational programs that will be both beneficial and warranted for the purposes of implementing a good faith accordance with these amendments to these cited rules on the part of the all judicial and non-judicial employees alike. Mere alterations of the letters of rules will not alter

hearts and minds, nor serve the policies at the heart of these changes. A learned hand outstretched in the good faith effort to provide helpful education and firm guidance for not only all employees within the Unified Court System, but for members of the New York State Bar Association as well, is the only model my lived experience as a law student, court employee and LGBTQ citizen informs me will succeed in the implementation of these noble and very necessary changes to the Nondiscrimination Rules of the Unified Court System.

In summary, I write in support of the Office of Court Administration's proposed amendments to the Attorney Rules of Professional Conduct [22 NYCRR Part 1200, Rule 8.4(g)]; the Rules of Judicial Conduct [22 NYCRR Parts 100.2(D), 100.3(B)(4),(5)]; UCS Code of Ethics for Nonjudicial Employees [Part 50.1(II)(C)]; and the Rules of the Chief Judge, Career Service [Part 25.16(a)]. I further request that the Office of Court Administration follow through with effective educational programs and guidance to its employees as well as the attorneys who will appear before them in the coming years subsequent to these proposed and hopefully adopted changes to the Nondiscrimination Rules of the Unified Court System.

With appreciation for your time and efforts,

Kevin Brady,

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February 12, 2018

VIA EMAIL AND FIRST CLASS MAIL

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York 10004

Re: Albany County Bar Association's Comment on the Proposed Amendment of Various
Nondiscrimination Rules of the Unified Court System

Dear Mr. McConnell,

On behalf of the Albany County Bar Association ("ACBA"), I write to provide ACBA's support for the proposed changes to the various nondiscrimination rules pertaining to attorneys, judges and employees of the unified court system as outlined in your October 24, 2017 memorandum. It is critical to expand the current rules so as to ensure that there is no discrimination in our profession or in our courts including any discrimination based on gender identity or gender expression.

Thank you for your consideration on this important matter.

Sincerely,

Hon. Christina L. Ryba, ACBA President