311 Murdock Road
Baltimore, MD 21212
December 2, 2015

Caroline J. Downey, General Counsel
Division of Human Rights
One Fordham Plaza, Fourth Floor
Bronx, New York 10458

Dear Ms. Downey:

Thanks for the opportunity to provide comment on I.D. No. HRT-44-15-00033-P, regarding Gender Identity Discrimination. My name is Catherine M. Brennan, and I am attorney admitted to practice in New York State. I am also a lesbian activist who participates in the ongoing and contentious political debate over the wisdom of gender identity laws. To that end, I and others maintain a blog called *Gender Identity Watch* to document efforts to override protections for Women and Girls through gender identity advocacy, laws and regulations. [1] On behalf of *Gender Identity Watch*, I submit this comment regarding the Division of Human Rights' ("Division") proposal to expand the definitions of sex discrimination and disability discrimination under the Human Rights Law by regulation and without holding a public hearing to cover "gender identity."[2] I note that the Division does so knowing that the New York State Assembly has repeatedly rejected similar efforts to amend the human Rights Law through the legislative process.[3] As an initial matter, I applaud and fully support anti-discrimination protections for transgender and transsexual people that do not run roughshod over rights of Women and Girls (hereinafter referred to also as "females.") Unfortunately, the Division, if it adopts the rule as proposed, will, in fact, undermine the rights of females to have space free from males, as, despite the willingness to suspend disbelief for the sake of political expediency, transwomen are, in fact, male.

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1 Because *Gender Identity Watch* advocates a feminist position in opposition to the current gender identity agenda pushed by GLBT organizations, transgender activists have targeted the blog and its authors for harassment. See, e.g., D.E. Nahmod, "Should 'Gender Identity Watch' Be Labeled a Hate Group?," South Florida Gay News (January 30, 2014). We reject these characterizations of our work and carry on with our advocacy because it is critically important in a democratic society to have a full and fair discussion of initiatives that undermine the rights of Women and Girls.

2 The concerns raised in this comment letter mirror the concerns raised to U.N. Women in 2011; you can read that letter here.

3 K. Lovett, "Gov. Cuomo to do end-run on Legislature regarding GENDA: sources," New York Post (October 22, 2015).

We note that the proposed rule would adopt a definition of "gender identity" that is entirely subjective. The current form of the proposed definition states that "gender identity" is "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." This definition is only understood in a culture in which sex stereotypes exist, and is only understood to the extent that one is willing to believe those stereotypes about Women and Girls. We also note that this definition violates the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"), which requires that state parties "must take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[4]

Further, and more importantly, this proposed definition of "gender identity" does not require any objective proof. Rather, it merely requires the person seeking protection on the basis of "gender identity" to assert that he or she identifies as the sex opposite his or her sex at birth. Further, because current New York law prohibits discrimination based on sex in a "place of public accommodation," which includes clinics, hospitals, bathhouses, swimming pools, gymnasiums and other spaces, this regulatory amendment to statutory law allows males to access space where Women and Girls have a reasonable expectation of privacy. To date, Women and Girls who object to sharing intimate, private space with males who "identify as female" have been labeled as "hateful" and "bigoted."[5] I would suggest that given the epidemic of violence Women and Girls experience at the hands of males, our objections to this overbroad public policy is more than reasonable and is worth, at the very least, a full, robust and fair public discussion.[6] According to the National Crime Victimization Survey, which includes crimes that were *not* reported to the police, 232,960 women in the U.S. were raped or sexually assaulted in 2006; this is more than 600 women every day.[7] There has been at least one reported case of a "transwoman" sexually assaulting women after accessing women-only space on the basis of this overbroad definition of gender identity.[8] Where such harm is

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4 CEDAW, Article 5(a). We note that the United States stands with such regressive countries as Iran and Sudan in not ratifying CEDAW. *See*, e.g., L. Baldez, **"**U.S. drops the ball on women's rights," CNN (March 8, 2013).

5 See, for example, the case of Yvette Cormier, a Michigan Woman who was banned from a Planet Fitness in Midland, Michigan because she objected to the presence of a man who identified as a woman in the Women's locker room. She is currently suing Planet Fitness for invasion of privacy, sexual harassment under state law banning sex discrimination in public accommodations, retaliation for invoking her rights under state law banning sex discrimination, breach of contract and intentional infliction of emotional distress. See also G. Vicci, "Planet Fitness Drops Members After Gender Identity Complaint," WNEM (March 6, 2015).

6 See, e.g., U.N. Women, "Facts and Figures: Ending Violence against Women," UN Women website (undated).

7 Bureau of Justice Statistics (table 2, page 15), "Criminal Victimization in the United States," (2006).

8 S. Pazzano, "A sex predator's sick deception," Toronto Sun (February 15, 2014). Transgender activists attempted to claim that the transwoman, Christopher Hambrook, "falsely" claimed to be transgender. However, Toby's Law, the law enacted by the Ontario, Canada Legislature in 2012 to amend the Human Rights Code to ban discrimination based on gender identity and gender expression, has a similarly subjective definition of "gender identity;" to wit, "those characteristics that are linked to an individual's intrinsic sense of self that is based on attributes reflected in the person's psychological, behavioural and/or cognitive state. Gender identity may also refer to one's intrinsic sense of manhood or womanhood. It is fundamentally different from, and not determinative of, sexual orientation." Like the definition in this proposed rule, there is no requirement under Ontario law that "gender identity" require a medical diagnosis, or even medical intervention. Hambrook, thus, did not "falsely" claim to be transgender; he fit the very definition of it.

foreseeable, such harm is avoidable, and I urge the Division to consider the harm it will inflict upon Women and Girls if it moves forward with its plans to adopt these proposed regulations.

It further does not help Women and Girls to add "gender identity" to the definition of "sex" because the proposed rule eviscerates the ability of Women and Girls to seek an exemption from the Human Rights Law to preserve female-only spaces. Current Human Rights Law provides that "(n)othing in (the Human Rights Law) shall be construed to prevent the barring of any person, because of the *sex* of such person, from places of public accommodation, resort or amusement if the (D)ivision grants an exemption based on bona fide considerations of public policy; nor shall (the Human Rights Law) apply to the rental of rooms in a housing accommodation which restricts such rental to individuals of one *sex* (emphasis added)."[9] This provision would allow the operators of a Women-only gym, locker room, bathroom, domestic violence shelter, rape crisis shelter, homeless shelter, and other similar spaces to seek an exemption from the Division to bar males from accessing their space. Under the Division's proposed rule, a male asserting a "female" gender identity must be permitted to use space designated for the opposite sex and his chosen "gender identity" – without regard to any action taken on the part of that individual to change his physiology to "become female" (i.e., sex reassignment surgery.) This is blatantly unfair to Women and Girls, and puts Women and Girls in the position of having to pretend a male person is a Women or Girl if he "says so." Indeed, such proposal is inconsistent with existing New York case law, which recognizes that people have a right to privacy on the basis of sex. In *State Div. of Human Rights ex rel. Johnson v Oneida County Sheriff's Department*, the court found that a county sheriff's department did not discriminate against a female deputy sheriff on the basis of sex when she did not obtain an appointment to position of sergeant. The court noted that uncontroverted testimony affirmed that the open position required the applicant to conduct daily announced and unannounced inspections of cell block areas to monitor security and sanitation conditions. The court concluded that because the inmates' toilet and shower facilities were in open view to personnel walking by cells, it would violate the privacy rights of male inmates to have woman monitoring their activities.[10] Surely, such privacy rights should also be afforded to Women and Girls accessing female-only spaces, regardless of the gender identity of the males seeking access to such space.

To avoid the most egregious consequences of the "subjective" and overbroad definition of "gender identity" proposed by the Division, I propose the following definition of gender identity – "a person's identification with the sex opposite her or his physiology or assigned sex at birth, which can be shown by providing evidence including, but not limited to, medical history, care or treatment of a transsexual medical condition, gender dysphoria, or related condition, as deemed medically necessary by the American Medical Association or American Psychiatric Association." I further propose that such definition not be included in the definition of "sex," as "gender identity" is wholly different

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9 NY CLS Exec § 296(2)(b).

10 119 A.D.2d 1006, 500 N.Y.S.2d 995, 1986 N.Y. App. Div. LEXIS 55945 (N.Y. App. Div. 4th Dep't 1986), aff'd, 70 N.Y.2d 974, 526 N.Y.S.2d 426, 521 N.E.2d 433, 1988 N.Y. LEXIS 79 (N.Y. 1988).

from sex and, instead, is more analogous to sex *stereotypes*.[11] A revised definition would protect the legal classification of sex while simultaneously providing a cause of action for discriminatory practices on the basis of a persistent and documented "gender identity." I further propose that the proposed rule make clear that nothing in the proposal undermines existing law that grants Women and Girls separate space created on the basis of sex, so that female-only spaces are preserved for Women and Girls.

With regard to the proposal to include "gender dysphoria" as a disability, I support this effort in part, but question the need for it. Currently, one cannot medically transition without a diagnosis of "gender dysphoria"[12] In order to meet the definition of "gender dysphoria, there are both duration and persistence requirements. Specifically, in adults and adolescents, the person seeking medical treatment must demonstrate a definite mismatch between the assigned gender (sic)[13] and experienced/expressed gender for at least six months' duration as characterized by at least *two or more* of the following features:

1. Mismatch between experienced or expressed gender and gender manifested by primary and/or secondary sex characteristics at puberty
2. Persistent desire to rid oneself of the primary or secondary sexual characteristics of the biological sex at puberty.
3. Strong desire to possess the primary and/or secondary sex characteristics of the other gender
4. Desire to belong to the other gender
5. Desire to be treated as the other gender
6. Strong feeling or conviction that he or she is reacting or feeling in accordance with the identified gender.

Additionally, the person seeking medical treatment must demonstrate that the gender dysphoria leads to clinically significant distress and/or social, occupational and other functioning impairment. There may be an increased risk of suffering distress or disability, but there has to be some sort of impairment in functioning.

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11 We note that under federal law, discrimination on the basis of sex stereotypes is illegal. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (U.S. 1989). Such prohibition has been extended to cover transgender individuals. *Macy v. Holder*, EEOC, Appeal No. 0120120821 (2012). Query why such advocacy is not sufficient to protect transgender people from discrimination in New York State. Indeed, the regulatory impact statement makes note of similar case law in New York State. *Richards v. U.S. Tennis Association*, 93 Misc.2d 713, 400 N.Y.S.2d 267 (Sup.Ct. N.Y. Co. 1977); *Maffei v. Kolaeton Industry, Inc.*, 164 Misc.2d 547, 626 N.Y.S.2d 391 (Sup.Ct. N.Y. Co. 1995); *Martin v. J.C. Penney Corp., Inc.*, 28 F.Supp.3d 153 (E.D.N.Y. 2014) ; *Hispanic Aids Forum v. Bruno*, 16 Misc. 3d 960, 839 N.Y.S.2d 691 (Sup.Ct. N.Y. Co. 2007); *Buffong v. Castle on the Hudson*, 2005 N.Y. Slip Op. 52314U, 12 Misc.3d 1193(A), 2005 WL 4658320 (Sup.Ct. Westch. Co. 2005).

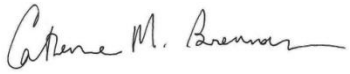
12 Gender Dysphoria, a new addition to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5"), is the new term for Gender Identity Disorder. Advocates and health professionals adopted the term "gender dysphoria" to prevent stigma and to ease clinical care for people who perceive and believe they are a different sex than their designated sex. American Psychiatric Association, "Gender Dysphoria," (2013). *See also* Fraser, L. *et al.*, "Recommendations for Revision of the DSM Diagnosis of Gender Identity Disorder in Adults," International Journal of Transgenderism (2010).

13 The actual word should be sex, not gender. Sex refers to biological reproductive capacity, including secondary sex characteristics. Gender is generally understood to be a broader term that incorporates cultural aspects, including stereotypes based on sex. See E. Hungerford, "Sex is not Gender," Counterpunch (August 2, 2013).

The proposed rule defines "gender dysphoria" as "a recognized medical condition related to an individual having a gender identity different from the sex assigned to him or her at birth." The proposed rule does *not* incorporate the full definition of gender dysphoria from the DSM-5, and, importantly, does not include the duration and persistence requirements. Additionally, it does not require the person seeking to invoke such definition that they are, in fact, impaired. Accordingly, we believe that the Division should amend its proposed definition of "gender dysphoria" to reflect that actual medical diagnosis of gender dysphoria as memorialized in the DSM-5. Alternatively, the Division could do *nothing*, as "gender dysphoria" is already a "disability" and is *already protected* under existing Human Rights Law.[14]

Thank you for the opportunity to submit this comment. As noted above, I believe the Division should have convened a public hearing on this proposed rule, as it concerns a matter of urgency and significance to Women and Girls. Failing that, I appreciate the opportunity to provide these comments to the Division. If I can provide additional information, I can be reached at the contact information included in this letter. Additionally, I ask the Division, pursuant to existing rule, to notify me by mail of any proposed rulemaking by the Division at the address above.[15]

Best,



Catherine M. Brennan

[14] Again, the Division notes case law affirming that gender identity is a disability in the regulatory impact statement that accompanied the proposed rule. *Wilson v. Phoenix House*, 42 Misc.3d 677, 978 N.Y.S.2d 748 (Sup.Ct. Kings Co. 2013); *Doe v. City of New York*, 42 Misc.3d 502, 976 N.Y.S.2d 360 (Sup.Ct. N.Y. Co. 2013).

[15] 9 N.Y. Codes, Rules and Regs. § 466.9.