April 2, 2007

Patricia E. Ryan, Executive Director
Maine Human Rights Commission
51 State House Station
Augusta, ME 04333-0051
BY FAX and U.S. MAIL

Re: Commission's Proposed Rules 94-348,
Concerning Sexual Orientation and Gender Identity and Expression

Dear Ms. Ryan:

I write to submit the views of Gay & Lesbian Advocates & Defenders (GLAD) on the Commission's proposed rules identified above. As you know, GLAD is New England's leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression.

GLAD supports the proposed regulations in their entirety as consistent with law and as important guidance to employers, human resource professionals, attorneys and the general public. We recognize that the regulations largely track existing regulations concerning discrimination based on sex, and to some degree, religion. We write to address three particular points.

I. The Commission's Definitions of Gender Identity and Gender Expression Are Consistent with Law.

Section 3.02 D (1) & (2) of the Proposed Rule, the definitions of the terms "gender identity" and "gender expression," are consistent with the legal framework of Maine law and the better thinking in the social sciences.

A. Background

By way of background, although the words "sex" and "gender" often are used synonymously, the terms are now commonly understood to refer to two distinct yet related ideas. The word "sex" is regularly defined as relating solely to one's physical anatomy at birth, that is, being born male or female. The word "gender," by contrast, has come to refer to those characteristics traditionally or stereotypically associated with being male or female. For example, gender stereotypes drive the assumptions that only women wear make-up and men must wear pants or that women are naturally gentle and men are

naturally aggressive. See, e.g, Dobre v. National R.R. Passenger Corp. (Amtrak) 850 F. Supp. 284, 286 (E.D. Pa. 1993) ("The term "sex" in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term "gender" refers to an individual's sexual identity.") (internal citation omitted). The Commission's regulations capture that essential insight.

The phrase "gender identity" refers to one's self-identification as a man or a woman, as opposed to one's anatomical sex at birth. Usually, one's gender identity comports with one's anatomical sex, that is, people born with the physical characteristics of males usually identify as men and those with the physical characteristics of females identify as women. However, one's gender identity does not always align with one's anatomical sex. Thus, for some people, including those who identify as transsexual or transgender, gender identity and anatomical sex are discordant. This could occur if someone born male has a strong internal self-image and self-identification as a woman, or if someone born female has a strong internal self-image and self-identification as a man. Some transsexual or transgender people may seek medical treatment in the form of hormone therapy or surgery to correct their physical sex to agree with their gender identity.

The phrase "gender expression" refers to how society views and interprets one's gender identity, that is, recognizing someone as a woman or a man. Here, one's gender identity very well may comport with one's anatomical sex, but may nonetheless be perceived by others as gender non-conforming. This may be a case where someone who is born male and self-identifies as a man, but is perceived by others as feminine, or someone born female who self-identifies as a woman, but is seen by others as masculine.

The term "transgender," is an umbrella term to describe anyone who in some way(s) does not conform to gendered stereotypes. This may include transsexual people but also includes masculine appearing women and feminine appearing men. A transgender person is one whose innate sense of being male or female differs from their birth sex. See Declaratory Ruling on Behalf of John/Jane Doe, November 9, 2000, available at: http://www.ct.gov/chro/cwp/view.asp?a=2526&Q=315942.

B. Maine's Definitions Are Consistent with the Medical and Legal Interpretations of These Terms.

The Commission's definitions are in accord with those in the medical field. Gender Identity Disorder (GID) is a serious medical condition and is recognized as such in both the International Classification of Diseases-10 (ICD-10) and the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) published by the American Psychiatric Association.[1] Transsexualism is a severe form of GID, defined by an intense discomfort

[1] While GID is presently listed as a "mental disorder" in the DSM-IV, recent medical research into the etiology of the condition has concluded that there is rigorous scientific evidence that the condition has a neurobiological etiology. See Jaing-Ning Zhou, et al., A Sex Difference in the Human Brain and Its Relation to Transsexuality, 378 Nature 68-70 (1995); F.P. Kruijver, et al., Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus, 85(5) J. Clin. Endocrinology & Metabolism, 2034-41

with one's assigned sex and with one's primary and secondary sex characteristics. For people who suffer from profound GID, there is a conflict between the person's body and the person's psychological identity as male or female. This conflict creates intense emotional pain and suffering. If left untreated, this condition can result in dysfunction, debilitating depression and, for some people without access to medical care and treatment, suicide and death. To avoid these results, it is vitally important that transsexual people seek out appropriate medical treatment.

Before physicians will assist a person in irreversibly changing his or her sex by hormone therapy or surgical intervention, the medical standards of care require that such a person live for a year as a person of the gender to which he or she seeks to transition. This is known as the "real life" test. See, e.g., The World Professional Ass'n for Transgender Health, Inc. (formerly known as The Harry Benjamin International Gender Dysphoria Association) Standards of Care, available at: http://www.wpath.org/Documents2/socv6.pdf.

In addition, the Commission's definitional regulations are consistent with those of other states which have addressed the issue.[2]

- Minnesota's 1993 law establishes protections for transgender people under the rubric of "sexual orientation," which is defined to include "having or being perceived as having a self image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363A.03 subd. 44 (1996).
- Rhode Island's 2001 non-discrimination statute was amended to explicitly include "gender identity or expression" as a protected category. The statute defines "gender identity or expression" to include "a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth." R.I. Gen. Laws § 11-24-2.1(a)(8) (2001).
- New Mexico's 2003 amendment to its state Human Rights Law now defines "gender identity" to mean "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth." N.M. Stat. Ann. § 28-1-2(Q).
- California enacted a law in 2003 to clarify that the definition of "sex" in the California Fair Employment and Housing Act (FEHA) includes a person's actual

(2000); F.P. Kruijver, Sex in the Brain, Netherlands Institute for Brain Research, Publisher, ISBN: 90-808705-2-8, October 2004.

[2] For a complete list of the jurisdictions that prohibit discrimination on the basis of gender identity, see http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions. At the state level, these also include New Jersey: S362, 2007 Leg., Reg. Sess. (N.J. 2007), Hawaii: Haw. Rev. Stat. § 489-2 (2006), Washington: Wash. Rev. Code Ann §49.60 et. seq. (West 2006), and the District of Columbia: 2001 D.C. Stat. 2-1401.01 et. seq., in addition to the states discussed below.

or perceived sex, including a person's "identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with [that person's] sex at birth." Cal. Gov't Code § 12926; Cal. Penal Code § 422.76.

- In 2005, Illinois amended its non-discrimination law to include "sexual orientation" and "gender identity" so that the statutory definition of sexual orientation now includes "actual or perceived . . . gender-related identity, whether or not traditionally associated with the person's designated sex at birth. 775 Ill. Comp. Stat. 5/1-103(O-1) (2005).

II. Although The Issues May Currently Be Unfamiliar to Maine Employers, the Commission's Definition Provides a Helpful Framework for Addressing Common Concerns About Transgender Employees.

A. Concerns About Cross-Dressing In the Workplace Are Misplaced.

Some people may be concerned that legal protection from discrimination based on gender identity and gender expression will lead to an increase in cross-dressing in the workplace. Notably, this has not been an issue in any of the reported cases in the states or local jurisdictions protecting transgender people from discrimination.

Secondly, Maine's regulations are crafted to protect against an employee alternating his or her gender identity or expression in the workplace. "Gender identity" requires an identity, that is, a deeply felt and publicly acknowledged sense of self.[3] In addition, under the proposed regulations, the term "gender expression" means the "consistent" manner in which a person expresses gender-related characteristics. An employee whose gender expression was not expressed in a "consistent manner" and faced adverse action on that ground would have to face the threshold issue of whether he or she was in a protected class.

Furthermore, protecting transgender people from discrimination does not mean that employers can no longer require their employees to present a neat and professional appearance. Rather, such protections would only permit people to dress in a way that comports with their gender identity or with the "consistent manner" in which they express their gender identity. Notably, stereotypes about proper attire, such as that women may not wear pant suits in court, have eroded over time concurrent with increasing consciousness of embedded sexism in previously unquestioned societal norms. To the extent that dress requirements have marginalized women (or men) in the workplace or interfered with their ability to do their jobs, those requirements have been

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[3] Gender identity is set early and not considered susceptible to change. Kosilek v. Maloney, 221 F. Supp. 2d 156, 163 (D.Mass. 2002) ("The consensus of medical professionals is that transsexualism is biological and innate."); Doe v. McConn, 489 F.Supp. 65, 78 (S.D.Tex. 1980) ("Most, if not all, specialists in gender identity are agreed that the transsexual condition establishes itself very early, before the child is capable of elective choice in the matter, probably in the first two years of life; some say even earlier, before birth during the fetal period."); In re Heilig, 816 A.2d 68, 78 (Md. Ct. App. 2003) ("Because transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in 'curing' the patient.").

challenged successfully under well-established sex discrimination laws.[4] On the other hand, dress rules upholding benign distinctions in employer dress codes are nearly uniformly upheld.[5]

B. Going To The Bathroom Is A Private Matter In Which Common Sense and Compassion Should Govern.

Another concern often articulated when discussing protecting transgender people from discrimination is which bathroom people will use. Like everyone else, transgender people deserve to use bathroom facilities with safety and dignity. The mandate of 5 M.R.S.A. sec. 4566 to ensure "full human rights and personal dignity" applies across the board to persons with protected characteristics.

As a practical matter, and as the Commission's definitions implicitly suggest, people should be allowed to use the bathroom that matches their gender identity. Individuals identifying themselves, and living their lives, as women would use the women's restroom. Likewise, people identifying themselves, and living their lives, as men would use the men's restroom.

It would be unreasonable to force people to use only the bathroom that comports with their anatomical sex for a variety of reasons. For example, with a female-to-male transsexual who has transitioned from female to male by taking hormone with or without surgery, it would be wholly inappropriate to ask him to use the women's restroom. Because his gender expression would be similar to any non-transgender man, requiring him to use the women's restroom in conformity with his anatomical sex would actually cause more distraction than the more reasonable policy of permitting him to use the men's room. Similarly, requiring a transgender woman (a person who may have been ascribed the sex of male at birth but has a female gender identity or expression) to use

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4 For cases decided under Title VII, see E.E.O.C. v. Sage Realty Corp., 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (ruling that employee could not be required to wear a "sexually revealing uniform"); Marentette v. Michigan Host Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980) (suggesting sexually provocative dress code requirement would be impermissible). Dress codes with one-sided advantages have also been struck. See, e.g., O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (finding a dress code requiring female sales clerks to wear a "smock" while allowing male sales clerks to wear shirts and ties impermissible, even absent a discriminatory motive because it perpetuated sexual stereotypes); Carroll v. Talman Fed. Sav. And Loan Ass'n of Chicago, 604 F.2d 1028, 1029-30 (7th Cir. 1979) (striking down a dress code that required women to wear a uniform but allowed men to wear business suits).

5 See, e.g., Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755-56 (9th Cir. 1977) (stating that "[a]ny claim that [dress codes which "require male employees to conform to different grooming and dress standards than female employees"], "standing alone, constitutes unequal treatment of the sexes is without merit"); Tavora v. New York Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (distinguishing the disparate "employment policies resulting in significantly different levels of pension and health benefits for males and females" from hair length policies that are different for men and women). See also Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir.1998) (grooming policy prohibiting men, but not women, from wearing long hair does not violate Title VII); Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175 (3d Cir.1985) (holding that "dress codes are permissible under Title VII as long as they, like other work rules, are enforced even-handedly between men and women, even though the specific requirements may differ.").

only the bathroom that comports with her anatomical sex would be similarly degrading to that woman. In addition, there is simply no legitimate way to make "anatomy checks" before determining who can use what restroom.

At GLAD, we have received reports from masculine looking lesbians who have been challenged for using women's facilities. While a person might have a view about what a woman should look like, that view cannot control. Asking a lesbian to prove she is a woman is not permissible, and under the same logic, it is equally objectionable to ask a transgender person to prove their identity. Legitimate concerns about security or privacy can and should be addressed without intruding upon the dignity and safety of transgender people.

When going to the bathroom, you cannot really know what the anatomical sex is of the person in the next stall next to you. Permitting transgender people to use the bathroom that comports with their gender identity does not change that in any way. Any rule to the contrary would be discriminatory by definition.

2. Reasonable Accommodation Is a Lawful and Human Response to Employees Who Are Medically Intervening to Change Their Gender.

Section 3.12 (F) of the proposed regulations creates an obligation to make reasonable accommodations with respect to rules, policies, practices, or services that apply directly or indirectly to gender identity or expression. The concept or "reasonable accommodation" as well as "undue hardship" for an employer are well-established in Maine law and need no discussion here.

This obligation is consistent with law, medical practice and common sense. For example, during the "real life" test period in which a person is ascertaining his or her certitude about a different gender identity, the duty of reasonable accommodation provides an interactive model in which the employer and employee work out a plan that meets the employee's needs without undue hardship to the employer. This could include topics ranging from what trainings to do with co-workers so that they understand that the gender change does not affect the work performance or person they have known, and helping employees understand that the transitioning employee is responding to a legitimate medical condition.

As to bathrooms, during the real life test, or before the employee has committed permanently to the new gender, is the time when single stall bathrooms, now common at many work sites, as well as curtains in a dressing area, are eminently reasonable accommodations. There is certainly a great deal of room in negotiating over what is reasonable in the transition period with the touchstone being that the employee should not be required to use facilities inconsistent with the gender to which the person is transitioning. However, after an employee has completed the real life test and has undergone endocrinological, surgical, or other steps to change his or her anatomy or

appearance, the employee should then be treated like all other male or female employees, as the case may be.

III. The Fringe Benefits Regulations Acknowledge the Anti-Gay Discrimination Effectuated By a Marriage-Based Benefits Scheme.

Proposed regulation 3.12 (F) provides that, except as otherwise provided in state or federal law, it is an unlawful practice to provide unequal fringe benefits to employees with a same-sex domestic partner and a similarly situated married employee. Such benefits are a form of compensation to which the non-discrimination mandate applies. See Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 682 (1983) ("Health insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'" for purposes of Title VII).

A. Disparate Treatment

To the extent that employers extend such fringe benefits, the Commission is simply acknowledging the disparate treatment that inheres in an employer's choice to use marriage as the eligibility criterion for family benefits. Since same-sex couples may not currently marry under Maine law, an employer's choice to use marriage as the predicate for family benefits sets up a criterion that gay and lesbian employees can never meet, but heterosexual employees can.

While some of the case law provides that no discrimination occurs when all unmarried employees are treated alike,[6] the better reasoned cases reject that argument and compare same-sex couples to opposite sex couples. Using precisely that comparator, the Alaska Supreme Court held that spousal limitations in the provision of benefits to state employees to care for their families constituted disparate treatment discrimination. Alaska Civil Liberties Union v. State of Alaska, 122 P.3d 781, 787 (Alaska 2005). That Court further stated,

> The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in

[6] These cases include Ross v. Denver Dep't of Health and Hosps., 883 P.2d 516 (Colo. Ct. App. 1994); Hinman v. Dep't of Personnel Admin., 167 Cal. App. 3d 516 (1985); Phillips v. Wis. Personnel Comm'n, 482 N.W.2d 121 (Wis. Ct. App. 1992); Beaty v. Truck Insurance Exchange, 6 Cal. App. 4th 1455 (1992); Rutgers Council of AAUP Chapters v. Rutgers, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997).

> Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.

122 P.3d at 788. See also Levin v. Yeshiva Univ., 754 N.E.2d 1099, 1111 (N.Y. 2002) (Kaye, C.J., concurring in part) (lower court "erred by holding that the appropriate comparison groups were unmarried heterosexual students versus unmarried homosexual students" in sexual orientation discrimination claim); Foray v. Bell Atlantic, 56 F. Supp. 2d 327, 330 (S.D.N.Y. 1999) (dismissing claim challenging same-sex only benefit plan under Title VII on grounds that unmarried same-sex and unmarried different-sex couples are not similarly situated because the former may not marry).

Focusing on the proper inquiry, the State's conditioning of family benefits on marriage facially discriminates against gay and lesbian employees.

> By restricting the availability of benefits to "spouses," the benefits programs "by [their] own terms classif[y]" same-sex couples "for different treatment." Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, because of the legal definition of "marriage," the partner of a homosexual employee can never be legally considered as that employee's "spouse" and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are facially discriminatory.

Alaska Civil Liberties Union, 122 P.3d at 789 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256 (1979)).

The Commission's proposed regulation simply recognizes that employers must make benefits available in a nondiscriminatory fashion.

B. Disparate Impact

In addition to disparate treatment, a marriage predicate for family benefits, even if facially neutral, has a discriminatory disparate impact on gay and lesbian employees in violation of the non-discrimination law. See E.E.O.C. v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 601 (1st Cir. 1995) ("Discrimination may also result from otherwise neutral policies and practices that, when actuated in real-life settings, operate to the distinct disadvantage of certain classes of individuals."). Conditioning of family benefits on marriage has an extreme disparate impact, as it prevents 100% of gay and lesbian employees, who cannot marry under state law, from ever accessing these benefits. While heterosexual employees may marry and thus access the benefits, a marriage-based system poses a total bar to benefits for gay and lesbian employees.

Courts across the country have recognized that conditioning benefits discriminates on the basis of sexual orientation. In Levin v. Yeshiva University, 754 N.E.2d 1099 (N.Y. 2002), the New York Court of Appeals reinstated a claim of housing discrimination by gay and lesbian medical students precluded from living in student housing with their committed same-sex partners because they were not married. Id. at 1103-06. As Chief Judge Kaye explained,

> [The defendant's] policy of providing partner housing to married students is facially neutral with respect to sexual orientation. That policy, however, has a disparate impact on homosexual students, because they cannot marry and thus cannot live with their partners in student housing. By contrast, heterosexual students have the option of marrying their life partners.

754 N.E.2d at 1111.

In the employment context, the Court of Appeals of Oregon ruled that denying insurance benefits to the same-sex partners of state employees constituted impermissible sexual orientation discrimination due to the discriminatory effect of the marital requirement for benefits. See Tanner v. Oregon Health Sci's. Univ., 971 P.2d 435, 448 (Or. Ct. App. 1998). Faced with the university's argument that no discrimination occurred because health insurance was available on equal terms to all unmarried employees, the Tanner court stated: "That reasoning misses the point." Id. So long as "[h]omosexual couples may not marry," such policies mean that "the benefits are not made available" to lesbians and gay men on an absolute basis. In other words, "for gay and lesbian couples," obtaining benefits under such policies is "a legal impossibility." Id.

In sum, unless exempted by operation of some other law, as long as same-sex couples may not marry, employers cannot adopt a marriage-based criterion for fringe benefits without running afoul of the non-discrimination law.

For all of the above reasons, GLAD supports the regulations of the commission as consistent with the Maine Human Rights Act as well as common sense and compassion. Thank you for your consideration of these views.

Truly yours,

Mary L. Bonauto