



Testimony of Jennifer Levi, Esq.
Gay & Lesbian Advocates & Defenders
Speaking in Opposition to LD 1046
An Act to Amend the Application of the Maine Human Rights Act Regarding Public Accommodations
Before the Joint Standing Committee on the Judiciary
Date of Hearing: April 12, 2011

Dear Senator Hastings, Representative Nass and distinguished committee members,

I am the director of the Transgender Rights Project of Gay & Lesbian Advocates & Defenders (GLAD). As an attorney at New England's leading legal rights organization dedicated to ensuring legal equality for lesbians, gay men, bisexuals, transgender people, and those living with HIV or AIDS, a key focus of my work has been addressing the pervasive discrimination faced by transgender people across a range of contexts, including in public accommodations, employment, and education. I testify today to urge this committee not to repeal provisions of the Maine Human Rights Act (MHRA) passed over 5 years ago that have become important protections for all people in Maine.

As this committee is well aware, in 2005 the Maine legislature added key provisions to the state's non-discrimination law to ensure that gay, lesbian, bisexual, and transgender people are protected against discrimination. The 2005 law added the term "sexual orientation" to existing non-discrimination law, which was approved by the majority of the electorate. In including a person's "gender identity" as part of the definition of sexual orientation, the law ensures that transgender people receive protections from the pervasive discrimination they face every day.

I wish to address three points in my written testimony. First, I want to address and define who it is that would be impacted by the bill considered today. Second, I will describe the current state of the law. Third, I will talk about the devastating legal and social consequences that would result from adoption of this bill as law.

I. Who are transgender people?

That term, "gender identity," refers to a person's deeply internalized sense of being either a man or a woman – often referred to as a person's "brain sex." For most people determined to be male at birth, their gender identity, or brain sex, is that of a man. For most people determined to be female at birth, their brain sex is that of a woman. However, for transgender people, that is not the case. A transgender person is someone whose gender identity is different than the gender identity typically associated with the person's birth sex. So, for example, a transgender man is a person whose brain sex is male but whose assigned sex at birth was female. A transgender woman is a person whose brain sex is female but whose assigned sex at birth was male.

For some transgender individuals diagnosed with Gender Identity Disorder (GID), having a brain sex that is different than their birth sex can cause serious and disabling psychological harm. GID is a serious medical condition recognized as such in both the Diagnostic and Statistical Manual of Mental Disorders (4th Ed., Text Revision) (DSM-IV-TR) and the International Classification of Diseases (10th Revision),¹ and is characterized in the DSM-IV-TR as a persistent discomfort with one's assigned sex and

¹ Diagnostic and Statistical Manual of Mental Disorders (4th ed.. Text revision) (2000) ("DSM-IV-TR"), 576-82, American Psychiatric Association; International Classification of Diseases (10th Revision) ("ICD-10"), F64, World

with one's primary and secondary sex characteristics, which causes intense emotional pain and suffering.² GID, if left untreated, can result in clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death.³

Because a person's brain sex can no more be changed than a person's sexual orientation or race, medical standards have developed to align a transgender person's body with their brain sex. The World Professional Association For Transgender Health, Inc. ("WPATH") is the leading international, interdisciplinary professional organization devoted to the understanding and treatment of gender identity disorders,⁴ and has established internationally accepted Standards of Care for providing medical treatment for people with GID, including social transition to the desired sex (called the Real Life Experience), hormone therapy and/or sex reassignment surgery, all of which are designed to promote the health and welfare of persons with GID.⁵

The ultimate goal of medical treatment of GID is to support the person's social role transition – that is outwardly expressing the person's brain sex so that others see the person for the man or woman that person sees himself or herself as. It includes, for example, dressing, grooming, and living consistent with the person's brain sex, which is all part of the Real Life Experience. In addition, for some people, treatment may also include cross-gender hormones (or for transgender youth prior to adolescence, hormone blockers to delay the onset of puberty). Finally, for a minority of transgender individuals, medical treatment of GID may also include one or more of a range of sex reassignment surgeries – examples of these include for transgender women, facial feminizing surgery, tracheal (or Adam's apple) reduction, phallus and testicle removal, as well as genital reconstruction. For transgender men, appropriate surgeries may include mastectomy, hysterectomy, as well as reconstructive chest and genital surgeries.⁶

The Standards of Care must be individualized for each person and need not include all three components available. The appropriate medical treatment plan for any person must be determined individually by a health care provider in consultation with that individual patient and often does not and should not include surgery. As such, there is no "one-size-fits-all" model for medical transition for transgender individuals.⁷

The reality is that there is no single definition of "biological sex" just as there is no single medical procedure that establishes gender transition for all transgender persons. Medical experts agree that a

Health Organization. The ICD further defines transsexualism as "[a] desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex." ICD-10, F64.0.

² DSM-IV-TR, 575-79.

³ Id. at 578-79.

⁴ <http://www.wpath.org>. WPATH was formerly known as The Harry Benjamin International Gender Dysphoria Association.

⁵ The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version (February, 2001). (<http://www.wpath.org/soc.htm>)

⁶ Id. See also "Clarification on Medical Necessity for Sex Reassignment Surgery," WPATH, available at www.wpath.org.

⁷ "Clarification on Medical Necessity for Sex Reassignment Surgery," WPATH, available at www.wpath.org.

person's sex is determined by a range of gendered characteristics, including that person's chromosomal make-up, external genitalia, internal sex organs (such as the presence or absence of male or female reproductive organs), secondary sex characteristics (such as facial and body hair or male or female breasts), as well as gender identity or brain sex.⁸ As discussed further below, for these reasons, LD 1046's incorporation of a "biological sex" standard is not only problematic but impossible to understand, much less enforce.

II. The current law is working.

The MHRA prohibits discrimination, across the board and without exception, against transgender people. Public accommodations, employers, schools, and other entities cannot treat someone differently or discriminate against that person simply because the person has a brain sex that does not match the person's birth sex. And for those protections to have any meaning, it must also protect a transgender person's ability to live their life consistent with his or her brain sex, including in restrooms. The MHRA ensures that all persons – transgender or not – have access to private facilities based on their gender identity or brain sex, and not based on their body parts or anatomy. Otherwise, the MHRA would be meaningless for transgender people to be able to live their lives with the gender congruence essential to their mental and physical health.

Such an understanding of the MHRA accords with national trends as well. Across the nation, twelve other states and the District of Columbia protect transgender individuals from discrimination without exceptions and without problems. In fact, human rights commissions responsible for enforcing comparable laws in Colorado and Iowa have issued explicit guidance clarifying that these protections allow a transgender person to use the restroom or locker room that matches their gender identity regardless of the person's birth sex.⁹

In Maine, over the last five years since the addition of protections for transgender people, business and schools have worked successfully to formulate policies regarding transgender individuals, including access to restrooms. Such a process is how anti-discrimination laws historically have worked – i.e. educating and incentivizing citizens, establishments, and institutions to treat a discriminated against group of people with dignity and respect, despite initial discomfort and fears. That has been true whether that new category of people has been African-Americans, women, or people with disabilities, and the same progress is happening now in Maine for transgender people's integration into our society and communities.

The reality is that the current law is working. In the almost six years since Maine added gender identity protections to the MHRA, according to the Maine Human Rights Commission ("MRHC") only three incidents have resulted in cases being filed with the MHRC involving transgender persons being denied access to restrooms. Of those three, one involving Denny's restaurant in Auburn has been fully resolved in a way that includes a public statement by the Defendant restaurant supportive of the plaintiff and her gender transition.¹⁰ The second case arises in the school context and involves not just access to the

⁸ See generally Julie A. Greenberg, "Defining Male And Female: Intersexuality And The Collision Between Law And Biology," 41 Ariz. L.R. 265 (Summer 1999).

⁹ "Sexual Orientation & Gender Identity: An Employer's Guide to Iowa Law Compliance," Iowa Civil Rights Commission, available at <http://www.transgenderlaw.org/ndlaws/iowaGuide.pdf>; "Sexual Orientation & Transgender Status: A Guide to the Public Accommodations Provisions of the Colorado Anti-Discrimination Act," Colorado Civil Rights Division available at <http://www.transgenderlaw.org/ndlaws/ColoradoFAQ.pdf>.

¹⁰ Freeman v. Realty Resources Hospitality, LLC, Third Am. Compl. (filed September 7, 2010 Androscoggin Sup. Ct.)

gender appropriate bathroom but also, more significantly, serious allegations of harassment and bullying against a transgender girl in school.¹¹ The bathroom access issue, in that case, is part and parcel of the allegation that the school's resolution of the harassment issues essentially ignored the harassers and focused exclusively on the transgender student, removing her from participation in school programs and activities. The final case is in an early stage and subject to confidentiality rules. If the purpose of anti-discrimination laws is to prevent discrimination before it occurs through fair and clear notice to businesses and schools and to remedy discrimination when it does happen, then the MHRA's protections for transgender people are working exactly as they should.

Now is not the time to disrupt this process of increasing inclusion and acceptance for transgender people. Twice the legislature considered bills comparable to this one – once before the current law passed and once after.¹² Both times such proposals were rejected because legislators realized that not only is there no principled way to exclude some transgender people from the law's protections in bathrooms while including others, but that excluding a transgender person from the restroom that matches his or her brain sex effectively guts the protections of the MHRA and sanctions discrimination against transgender people wholesale. The legislature should again reject such an attempt to insert discrimination into the MHRA.

III. LD 1046 is unworkable.

This bill would repeal provisions of the MHRA and create a new but completely indeterminate and unenforceable standard for granting patrons access to restroom facilities. Take the Denny's case as an example. The defendant in that case tried to enforce a so-called "biological rule," which it asserted meant a person's anatomy. But what that restaurant realized over time was that such a rule would require the restaurant to inquire about personal and private information of every customer seeking access to its bathroom facility – a policy no restaurant could or would ever want to enforce.

Moreover, Denny's attempted biological rule would also lead to absurd results, such as forcing a transgender man (i.e. a person born female but living as male) who has not had surgery but appears as masculine as any non-transgender man, including having a bald head and male facial and body hair, to use the women's room. That is because whether or not a transgender person has genital surgery has no effect whatsoever on what that person looks like to others. A transgender man can develop all the secondary sex characteristics, like a beard, bald head, male fat distribution and body hair, that we traditionally associate with men, simply through hormone treatment and without any surgery. While some transgender men have genital surgery, others do not.

In other words, there is simply no way, beyond physical inspection, to determine what a person's anatomy is from their outward appearance, in order to determine which restroom he or she should use under the proposed bill. What makes more sense and would cause the least confusion is to simply allow people to use the restroom consistent with their gender identity or brain sex.

To be clear, there are some transgender people who do not "pass" as well as others. For example, there are some transgender women (and transgender men) who some people may see as insufficiently feminine (or masculine, in the case of the transgender man). However, the fact that such a transgender

¹¹ Doe v. Clenchy, Complaint (file September 23, 2009 Penobscot Sup. Ct.)

¹² In 2005, the full Maine House of Representatives voted 83-67 to reject an amendment that would have provided that the Maine Human Rights Act "may not be construed to permit a person to use a locker room or bathroom facilities of a public rest room designated for use for a gender other than the gender of that person at birth [unless] the person has [undergone] a medical procedure in which that person's gender is changed..." H-86, 122nd Leg., 1st Reg. Sess. (Me. 2005). See also, Roll-calls and Actions for LD 1196, 122nd Leg., 1st Reg. Sess. (Me. 2005) for voting history.

woman is seen as insufficiently feminine has nothing to do with what medical steps she has taken to transition. For example, her inability to “pass” well as female is unrelated to whether she has had genital surgery or how long she has been on cross-gender hormones.

Instead, whether a transgender woman passes well has far more to do with the age at which she transitioned and her body structure than almost any other factor. For people offended by the idea of having to share a bathroom with a transgender woman they deem insufficiently feminine to use the women’s restroom, this bill would not prevent that situation, because at least some transgender women who have had surgery still appear sufficiently masculine to evoke discomfort from other patrons in the women’s restroom. As a result, this bill would simply create a marginalized group within a marginalized group without solving any of the concerns it was intended to address.

To the extent that the motivation behind this legislation is to address concerns that some people would hide behind existing law to prey on women or children in restrooms, nothing in the current law sanctions such conduct and nothing in this proposal diminishes it. Under the current law, a person must still have a legitimate or bona fide female gender identity in order to access the women’s room (or a legitimate or bona fide male gender identity to access the men’s room). Anyone accessing such facilities for improper purposes, regardless of their gender identity, is subject to criminal sanction. Anyone feigning to be of the other sex in order to engage in criminal activity has no lesser ability to do so under the standard proposed by LD 1046 than he or she has under the existing law. And, regardless, the reality is that proponents of LD 1046 can point to no factual scenarios either in Maine or any of the other 12 states and the District of Columbia to support any purported safety concerns.

IV. LD 1046 would create more litigation for businesses.

LD 1046 would create a litigation nightmare for businesses and schools. It injects confusion and uncertainty into the law, making it more difficult for businesses and schools to know in advance their legal obligations and would therefore lead to more litigation. It lacks any definition of “biological sex.” It imposes a default policy that businesses may not even be aware of. And it invites businesses to “profile” their customers to try to determine what their “biological sex” is, which in turn leads to customers filing more discrimination claims.

First, this bill imposes a default rule for determining access to a restroom at a public accommodation that is based on the person’s biological sex, yet fails to define biological sex at all. As discussed above, biological sex is determined through consideration of many factors. By leaving the term “biological sex” undefined, LD 1046 creates confusion and uncertainty in the MHRA.

However, even if “biological sex” is intended to mean a person’s anatomy, that still means that unless an establishment adopts and enforces some different rule, it must now enforce an anatomical rule in a non-discriminatory way. Yet, as discussed above, there is no way to determine what a person’s anatomy is based upon their outward appearance. Regardless, many business will likely still rely upon some method of “gender profiling” (i.e. how masculine or feminine a person looks) to enforce LD 1046. However, singling people out based on what they look like and requiring them (and not others) to provide proof of their biological sex is itself discrimination and would give rise to potential liability. Businesses would therefore be caught in a Catch-22 – required by default to enforce LD 1046’s so-called biological rule for restroom access, but unable to enforce LD 1046 without risking liability.

Instead, the only way a business could enforce LD 1046 in a consistent and non-discriminatory fashion without resorting to gender profiling would be through physical inspections, which raises serious privacy and medical confidentiality concerns and, again, risk of litigation. Not to mention that a person’s anatomy is personal, private information that nobody would want to be required to disclose (or worse, viewed) before being given access to a public facility.

For all of these reasons, I strongly urge this committee to vote ought not to pass on LD 1046, which would only inject uncertainty and confusion into the law as well as sanction discrimination in Maine.