



**Statement by Jennifer Levi, Esq.  
 Before the Joint Committee on the Judiciary in Support of H. 502/S. 764  
 An Act Relative to Transgender Equal Rights**

Honorable Co-Chairs Senator Creem, Representative O’Flaherty and Members of the Committee:

I am grateful for the opportunity to testify in strong support of H. 502/ S. 764, An Act Relative to Transgender Equal Rights. This legislation would add “gender identity or expression” protections to the Massachusetts hate crimes law, Chapter 22C, as well as to Massachusetts non-discrimination statutes, including the Massachusetts general anti-discrimination protections in employment, housing, credit and lending, Chapter 151B; the Massachusetts education laws, Chapters 71 and 76; and the Massachusetts public accommodations laws, Chapter 272. The proposed legislation updates Massachusetts hate crimes and non-discrimination laws to ensure that they clearly and uniformly protect all people, regardless of their gender identity or gender expression.

I am the Director of the Transgender Rights Project at Gay & Lesbian Advocates & Defenders (GLAD) where I have worked for the last 13 years. 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/AIDS, a key focus of my work has been addressing the violence and pervasive discrimination faced by transgender people in employment, housing, public accommodations, education, and other areas. I am also a Professor of Law at Western New England College whose teaching and research interests focus on the subjects of this legislation. My goal today is to explain why it is so crucial that the legislature add the phrase “gender identity or expression” to the Massachusetts non-discrimination statutes.

**I. Transgender People Desperately Need Legal Protection From Violence and Discrimination.**

The need to protect people from violence and discrimination on the basis of gender identity or expression is great.

Every day across this country, transgender people are disproportionately the victims of non-random, targeted violence. They include a Chelsea, Massachusetts transgender woman who, just a few months ago, was severely beaten and hospitalized as a result of the attack.<sup>1</sup> The beating was vicious, targeted, and only the most recent, public reminder of the vulnerability of transgender people simply when walking on our streets. In another recent case, Jamie Rondeau, a

---

<sup>1</sup> Hannah Clay Wareham, *MTPC: Trans woman brutally beaten in Chelsea*, Bay Windows, Mar. 1, 2011, at <http://www.baywindows.com/index.php?ch=news&sc=blog&sc2=news&sc3=&id=116842>.

citizen of the Commonwealth, was beaten on the streets of Lowell in 2009.<sup>2</sup> The attackers repeatedly called Jamie “faggot” and made sexual slurs directed toward their victim. And while it is difficult to accurately document the frequency of these crimes due to vast underreporting, it is clear that hate-based violence against transgender people is a widespread and significant problem.

Likewise, employment discrimination can severely undermine an individual’s ability to make a living and support his/her family. A recent survey completed by The Task Force reported that transgender individuals experience unemployment at twice the national rate. The report also found that 47% of participants had experienced an adverse job event, including termination, as a result of their transgender status.<sup>3</sup> Every year, GLAD’s Infoline receives hundreds of calls from transgender people in Massachusetts and throughout New England reaching out for legal information because of their having faced serious employment discrimination simply because someone at the workplace learned of their being transgender.

Unfortunately, these cases and calls represent just the tip of the iceberg. Transgender people throughout Massachusetts face serious discrimination every day in jobs, housing, and public accommodations. I hear from these people every day when they call GLAD for help. Unfortunately, when they do call, I have to tell them there are no explicit protections for them in Massachusetts law. Because of this pervasive prejudice, discrimination and misunderstanding, transgender people need a law to allow them to do that which most people take for granted – walk safely on our streets, work, seek and find housing, and use public accommodations without being subjected to prejudice and discrimination.

The absence of legal protections for this marginalized and stigmatized community violates the spirit of Massachusetts’ commitment to freedom and liberty for its citizens. The proposed law would make clear that such discrimination and violence is condemned by state policy.

## **II. Explicit Protections Are Needed To Fill A Void in Massachusetts Law.**

There are no clear, explicit and established laws protecting transgender individuals in Massachusetts from discrimination – under either state or federal anti-discrimination laws. Explicit protections for transgender individuals will help affirm and clarify Massachusetts anti-discrimination protections, so that it is clear to all that Massachusetts does not tolerate discrimination based upon a person’s gender identity or expression.

While GLAD understands that transgender people have some basic protections under state and federal courts’ and our state’s human rights commission’s interpretation of existing sex and disability laws, because these protections do not appear explicitly in state law they are often ignored and may yet be challenged.

---

<sup>2</sup> Lowell Sun, Feb. 20, 2009, *Bill aims to protect transgender people from hate crimes*, at <http://jacknicas.com/2009/02/21/bill-aims-to-protect-transgender-people-from-hate-crimes/>.

<sup>3</sup> Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.

The modern national trend in case law interpreting sex discrimination protections is for both state and federal courts to interpret existing sex discrimination prohibitions to protect transgender individuals. See, e.g., Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008) (holding that an employer's refusal to hire employee because she informed them of her intention to transition from male to female was "literally discrimination 'because of sex'"); Barnes v. City of Cincinnati, 401 F.3d 729 (6<sup>th</sup> Cir. 2005) (finding that a party can state a claim for relief under Title VII by alleging sex stereotyping was the driving force); (Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6<sup>th</sup> Cir. 2004); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995); Lie v. Sky Pub. Corp., 2002 WL 31492397 (Mass. Super. 2002); Jette v. Honey Farms, 2001 WL 1602799 (Mass. Comm'n Against Discrimination Oct. 10, 2001) & Millett v. Tutco, 2001 WL 1602800 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (holding that transgender people are protected by state law prohibitions against sex and disability discrimination); Doe ex rel. Doe v. Yunits, 2000 WL 33162199 (Mass. Super. 2000) (holding that a transgender student had stated viable sex and disability discrimination claims under state law), *aff'd sub nom.* Doe v. Brockton School Committee, 2000 WL 33342399 (Mass. App. Ct. 2000), Doe ex rel. Doe v. Yunits, 2001 WL 664947 (Mass. Super. 2001).

However, there is not complete uniformity across these court decisions, and some courts have found otherwise. See, e.g., Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10<sup>th</sup> Cir. 2007); Oiler v. Winn-Dixie Louisiana, Inc., Order and Reasons, 2002 WL 31098541 (E.D. La. Sept. 16, 2002). As a result, legal uncertainty and inconsistency exists in Massachusetts as to the extent of discrimination protections for transgender individuals.

By adding explicit protections for gender identity or expression alongside other characteristics in Massachusetts non-discrimination and hate crimes laws, H. 502/ S. 764 provides clarity to our courts and citizenry as well as promotes consistency in our laws. Employers, landlords, businesses, educators and all Massachusetts citizens deserve clarity in our laws. In addition, the specificity of language included in H. 502/S. 764 is necessary as a matter of due process for perpetrators to ensure that transgender people are protected against targeted hate-based violence.

### **III. Gender Expression Is A Necessary Protection Under This Bill.**

In this bill, "gender identity or expression" is defined as "a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's physiology or assigned sex at birth." This concept refers to people whose identification as either male or female does not match up with what they were assigned at birth, transgender individuals who transition from their assigned birth sex to the one more concordant with their internalized sense of who they are as male or female (often referred to as their brain sex or gender identity). It also includes any person whose outward expression of their gender does not fall within society's stereotypes of what a man or woman should act like, such as a masculine woman and a feminine man.

The term gender identity without the addition of the phrase gender expression could potentially be interpreted to only include transsexual people – people who have transitioned medically from one sex to another. If the phrase gender expression is left out – it leaves out people who may have characteristics or mannerisms typically associated with the other gender but who identify with the gender that they were born. For example, that could potentially leave out women with

short hair or men with high-pitched voices from protections against being fired for nothing related to their job performance.

Protections for a person's gender-related expression – including appearance, behavior and mannerisms – need to be broad because our past experience has shown that sex discrimination and race discrimination protections have sometimes been interpreted narrowly by some courts, not recognizing the relationship between a person's appearance, behavior, and mannerisms, and that person's identity (core sense of who they are). For example, a recent federal appellate court ruled that an employer could fire a female employee for not wearing make-up even though wearing make-up for that person would be distressing and disruptive of that person's ability to do her job. Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9<sup>TH</sup> Cir. 2006). This would not have been the case if there had also been broad protections based upon characteristics associated with a person's sex. This historical lesson demonstrates the need for broad protections for a person's gender expression.

Because such explicit language is necessary to provide complete protections not only to the transgender population but the entire population, protections based upon a gender-related appearance, expression, or behavior have become a standard protection for states adding comparable protections to their laws, including the 14 states (cited below) that have added such provisions to their antidiscrimination laws.

#### **IV. All Individuals Deserve To Be Able To Use Public Restrooms In Safety And With Privacy; Nothing In H. 502/ S. 764 Undermines Anyone's Safety or Privacy**

It is unfortunate that this testimony even has to address the matter of restroom safety. However, I am not blind to the fact that those who oppose equality and fairness for transgender people have targeted this as an area of focus in order to bolster opposition to the bill. The fact that everyone deserves to use restrooms in safety and with privacy should not be a contentious statement. Taking this as given, the public accommodations provisions of this bill that extend to restrooms are essential in order for transgender people to simply live their lives. This bill would preserve a common sense rule that people who live their lives and look like women should use the women's restroom. People who live their lives and look like men should use the men's room. Any other rule, including any exemption from this bill's protections, is unworkable and nonsensical.

Everyone needs to use restrooms, including transgender people. Excluding bathrooms and other sex-segregated facilities from our non-discrimination laws would lead to more confusion and more problems, not less. With or without the inclusion of bathrooms and locker rooms in our laws, employers, schools, and other entities will have to figure out how to address the needs and concerns of transgender employees, students, patrons, and customers. Ensuring that transgender people can use bathrooms and other sex-segregated facilities consistent with their gender identity is simple, fair, and quickly becoming the workplace norm.

Any other policy is unworkable. Requiring a transgender person access based on whether or not they have had surgery or undergone any particular medical protocol would lead to absurd and unworkable results.

The truth is that you cannot tell what kind of medical treatment a transgender person has undergone or whether, for example, they have had surgery unless you see them unclothed, which is not likely in most, if not all, bathroom facilities. And, while some legislators are worried that allowing transgender people to use the bathroom that matches their gender identity may cause discomfort or unease among non-transgender patrons, the opposite is usually the case. Having a transgender man with full facial hair and a bald head – who appears to the world for all intents and purposes as indistinguishable from a non-transgender man – use the women's room because he has not had genital (or any other transition-related) surgery is far more problematic for most people than giving him access to the men's room.

And, for the more uncommon transgender person who does not "pass" as well, our laws should not further stigmatize and marginalize that person who is precisely the person most at risk of discrimination, prejudice, and violence. A recent horrific example of violence against a transgender woman patron at a Maryland McDonald's restaurant (captured on film, no less, by an employee who jeered at the patron and was later terminated) who was seemingly targeted because she used the women's restroom, serves to underscore this point.

If you look at history, customer discomfort and so-called preferences have often been used to justify race and sex discrimination. That was wrong then and it's wrong now. Courts have seen through those justifications and rejected the suggestion that they are "legitimate" or "non-discriminatory." Massachusetts should as well.

Non-discrimination laws change public attitudes not just because of the actual protections they extend to a marginalized and stigmatized group, but also because of the message they send that discrimination is wrong and should not be the norm. Creating an exemption from the law for bathrooms or other sex-segregated facilities threatens to undermine all of the protections included in the non-discrimination law by sending the message that while we should tolerate transgender employees, students, and patrons, non-transgender people should not be made to share public facilities with them. Solutions, such as creating a separate space for the transgender person – or worse, forcing them to use the wrong bathroom – publicly stigmatizes them and exacerbates the problem the law is trying to address in the first place.

The undisputed fact is that transgender people pose no threat of safety or violation of privacy to non-transgender people in bathrooms or other facilities. There is absolutely no support for that belief. Transgender-inclusive non-discrimination laws have existed for many years and now cover nearly 41% of the U.S. population (including 14 other states<sup>4</sup> and more than 132 cities and

---

<sup>4</sup> See Act effective Oct. 1, 2011, ch. 112, 2011 Nev. Laws BDR 53-272 (revises provisions governing discriminatory employment practices in Nevada to prohibit discrimination on the basis of gender identity); Cal. Penal Code § 422.56 (hate crimes), Cal. Civ. Code § 51 (public accommodations), Cal. Gov't Code §§ 12920, 12940 (housing/property and employment); Colo. Rev. Stat. §18-9-121 (hate crimes), Colo. Rev. Stat. § 24-34-601 (public accommodations), Colo. Rev. Stat. § 24-34-502 (housing/property), Colo. Rev. Stat. § 24-34-502 (employment); Haw. Rev. Stat. § 489-2 et seq. & § 515-2 et seq.; 77 Ill. Comp. Stat. Ann. 5/1-103; Iowa Code Ann. § 216.2, § 216.6 et. seq.; Me. Rev. Stat. Ann. tit. 5, § 4553 (definition), § 4591 (public accommodations), § 4581 (housing/property), § 4595 (credit), § 4571 (employment), & § 4601 (education); Minn. Stat. § 363A.03 et. seq. (nondiscrimination laws) & Minn. Stat. §§ 609.2231, 609.595, 609.748, 611A.79 (hate crimes); N.J. Stat. Ann. § 10:5-4 et. seq.

counties nationwide). No problems relating to safety or privacy have materialized in these other states, cities, and towns.

The Boston Area Rape Crisis Center, the Massachusetts Society for the Prevention of Cruelty to Children, the Massachusetts Chapter of the National Organization for Women, along with the Massachusetts Commission on the Status of Women have supported this bill and denounced opponents' arguments about bathrooms as meritless. It is time to ignore these frivolous and disrespectful attacks and focus on the real and pressing issue of discrimination and violence against a vulnerable sector of our community.

#### **V. Nothing in this Bill Undermines an Employer's Ability to Enforce Reasonable Dress, Grooming and Appearance Requirements**

An employer or school may require employees to follow reasonable dress codes and reasonable grooming standards; nothing in this bill changes that. Transgender individuals will still be required to follow an employer's reasonable and lawful dress codes for men and women. The transgender employee or student simply must be permitted to conform to the dress code and standards of the gender with which they identify.

The reality is that social norms about dress and appearance are changing and courts have had to deal with complaints by both men and women about the restrictiveness of enforced and sometimes outdated social norms about appearance requirements. In cases where a dress code objectifies women or creates a perception that women are less professional than men, some courts have disallowed such gender-based dress codes. See Carroll v. Talman, 604 F.2d 1028, 1032-33 (7<sup>th</sup> Cir. 1979), cert. denied, 445 U.S. 929 (1980) (“[T]he disparate treatment is demeaning to women. While there is nothing offensive about uniforms per se, when some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.”) Where dress codes simply differentiate between men and women employees but do not affect either group adversely, most courts have upheld such rules.

The importance of this legislation is that it ensures that transgender people who are well-qualified and capable of working are permitted to work and can do so with the dignity they deserve. This bill does not change the fact that if a gendered appearance requirement in the workplace is currently permissible, it may be enforced. It simply ensures that transgender people will be allowed to perform in those workplaces effectively.

---

(nondiscrimination laws) & N.J. Stat. Ann. § 2C:16-1 (hate crimes); N.M. Stat. § 28-1-2 (definition), § 28-1-7 (nondiscrimination laws), & § 31-18B-2 et seq. (hate crimes); Or. Rev. Stat. §147.100 (definition), § 659A.030 (nondiscrimination laws), & § 166.155 (hate crimes); R.I. Gen. Laws § 34-37-3 (definition), § 11-24-2 (public accommodations), § 34-37-4 (housing/property), § 34-37-4.3 (credit) & § 28-5-7 (employment); Vt. Stat. Ann. tit. 1, § 144 (definition), Vt. Stat. Ann. tit. 9, § 4502 (public accommodations), Vt. Stat. Ann. tit. 9, § 4503 (housing/property), Vt. Stat. Ann. tit. 8, § 10403 (credit), Vt. Stat. Ann. tit. 21, § 495 (employment), & Vt. Stat. Ann. tit. 13, § 1455 (hate crimes); Wash. Rev. Code §49.60.030 et. seq.; D.C. Code § 2-1401.02 (definition), § 2-1402.11 et. seq. (nondiscrimination laws), & § 22-3701 (hate crimes).

Some opponents of this legislation have said that this bill will encourage people to cross-dress in the workplace or “flip-flop” in their appearance. These scenarios simply do not happen in reality. This issue is always and only raised in the hypothetical. I have yet to hear it raised in association with any actual experience or real, live person. Despite years of well-established laws in place with comparable protections in other states and municipalities, there have been no outbreaks of cross-dressing or so-called flip-flopping in the workplace.

**VI. Massachusetts Will Join Other States And Local Jurisdictions That Ensure Freedom From Discrimination Based On Gender Identity or Expression.**

Massachusetts need not fear that by explicitly prohibiting discrimination based on gender identity or expression, it will be entering into uncharted territory. Instead, Massachusetts will join the growing number of state and local governments that have already recognized that preventing discrimination based on gender identity and expression is both necessary and desired and therefore should be addressed explicitly in law. In passing H. 502/ S. 764, Massachusetts would become the 15<sup>th</sup> state to explicitly prohibit discrimination against transgender people, joining Iowa, Minnesota, Maine, Rhode Island, Vermont, California, Hawaii, Illinois, New Jersey, New Mexico, Nevada, Colorado, Oregon and Washington. The District of Columbia also has a comparable non-discrimination law.

Over 30 years ago, Minneapolis became the first municipality to adopt transgender-specific non-discrimination language. Since then, the number of additional jurisdictions that have adopted similar measures has grown at a dramatic rate. In addition, there are hundreds of employers and dozens of universities with non-discrimination policies protecting transgender people.<sup>5</sup> It is time for Massachusetts to join this national movement toward equality and freedom from discrimination and violence for all citizens, regardless of their gender identity or expression.

May 27, 2011

Submitted by:

Jennifer Levi, Esq.  
Director, Transgender Rights Project  
Gay & Lesbian Advocates & Defenders  
[jlevi@glad.org](mailto:jlevi@glad.org)

---

<sup>5</sup> A small sampling of Massachusetts universities and employers with non-discrimination policies protecting transgender people includes: Harvard University, Brandeis University, Bridgewater State College, Massachusetts Maritime Academy, M.I.T., American Express, Bank of America, Walgreens, Staples, Harvard Pilgrim Healthcare, and Raytheon. For a complete list see <http://www.transgenderlaw.org/college/index.htm#policies> and <http://www.transgenderlaw.org/employer/index.htm>.