

Alexis Taylor, General Counsel
District of Columbia Office of Human Rights
441 4th Street, N.W.
Suite 570 North
Washington, D.C. 20001

December 16, 2008

Dear Alexis Taylor:

I am writing on behalf of the Sylvia Rivera Law Project to oppose certain of the proposed amendments to Chapter 8 of Title 4 of the District of Columbia Municipal Regulations concerning gender identity and expression. The Sylvia Rivera Law Project is a not-for-profit organization dedicated to guaranteeing that all people are free to self-determine their gender identity and expression, regardless of income and race, and without experiencing harassment, violence, or discrimination. We are deeply concerned that the proposed amendments discussed below would undermine and roll back the basic human rights of transgender people in the District of Columbia, particularly for low-income transgender people of color.

Sections 801.3 and 801.4

The Sylvia Rivera Law Project opposes the passage of the proposed amendment to add §§801.3 and 801.4. Based on recent correspondence between the District of Columbia Office of the Inspector General and the District of Columbia Office of the Attorney General, it appears that it came to the attention of the Office of Human Rights that the Department of Corrections might not be in compliance with the D.C. Human Rights Act. It is disturbing that rather than acting to enforce the law in this instance, it appears that the Office of Human Rights has chosen to try to change the law through amending regulations. Such action would be a blatant violation of the Office of Human Rights' mandate. It is outside the authority of the Office of Human Rights to exempt the Department of Corrections or any other agencies from full applicability of the Human Rights Act. Such action could only be taken by the legislature.¹

Besides the fact that this amendments legally *may* not be made, however, they also absolutely *should* not be made. The proposed amendments would sweep well beyond applicability to the Department of Corrections to restrict the rights of transgender people in any form of District custody, be it civil commitment, foster care, juvenile detention, or police or corrections confinement. It is vital that the Office of Human Rights vigorously enforce the Human Rights Act in institutional settings because of the severe and pervasive human rights abuses against transgender people within them. Transgender people, particularly transgender people who are also marginalized on the basis of race, income, age, national origin, or disability, are

¹ Regulations cannot alter the statutes under which they are promulgated. *See Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936).

overrepresented in these settings because of police profiling, family rejection, and discrimination in employment and other aspects of life. Once within them, they face extreme and particular harms.

Rape, torture, humiliation, assault, sexual coercion, involuntary isolation, denial of medical care, denial of programming, denial of appropriate clothing, excessive and unjustified searches, and other abuses are daily realities for many transgender, intersex, and gender nonconforming people in correctional settings across the country.² A recent study in California found that 56% of transgender women in men’s prisons reported being sexually assaulted while in custody, in comparison with 4% of non-transgender men.³ At the Sylvia Rivera Law Project, we work every day with human beings in institutional custody who are experiencing grave violence and degradation, often at least in part due to inappropriate placement decisions.

The proposed amendments, which would give the Department of Corrections and other District agencies *carte blanche* to ignore transgender people who seek to be placed according to their own gender identity, are a highly inappropriate response to the human rights crisis confronting transgender, intersex, and gender nonconforming people in government custody. Indeed, they represent an alarming departure from the intent of the legislature and put transgender, intersex, and gender nonconforming people at unnecessary risk of harm. Rather than adopting these amendments, thoughtful and practical policies for the application of non-discrimination provisions can and should be developed, with input from affected communities and relevant agencies, in ways that meaningfully protect the safety and dignity of people who are incarcerated or otherwise institutionalized. Transgender individuals in District custody should be consulted, and information obtained from them should be taken into account, in any decisions about where they will be placed.

While the proposed § 801.4 uses the language of safety, in reality it would seriously undermine the safety of transgender prisoners and would not improve the safety of any other prisoners. The clause “among other things” would permit the Department to prioritize other considerations in addition to—or even *over*—prisoner safety. The proposed language could in fact be interpreted as an endorsement of the Department of Correction’s current policy that calls for segregation into

² Numerous reports and articles have documented these abuses. See, e.g., Sylvia Rivera Law Project, *It’s War in Here: A Report on the Treatment of Transgender and Intersex People in New York State Prisons* (2007) available at <http://www.srlp.org/documents/warinhere.pdf>; Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 Colum. Hum. Rts. L. Rev. 167 (2006); Amnesty International, *Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual, and Transgender People in the U.S.* (2005); Stop Prisoner Rape & ACLU National Prison Project, *Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners* (2005) at <http://www.spr.org/pdf/stillindanger.pdf>; Alexander Lee *Nowhere to Go but Out: The Collision Between Transgender and Gender Variant Prisoners and the Gender Binary in America’s Prisons* (2002) at http://www.srlp.org/documents/alex_lees_paper2.pdf.

³ Valerie Jenness, Cheryl L. Maxon, Kristy N. Matsuda & Jennifer Macy Sumner, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, April 27, 2007, Center for Evidence Based Corrections.

male or female facilities based solely on genitals. This profoundly unsafe, discriminatory, and inhumane policy contravenes the letter and the spirit of the Human Rights Act and needlessly puts transgender lives at risk.

In addition, §801.4 lists the safety of other individuals in the facility as a consideration, which singles transgender people out for a highly offensive and discriminatory analysis. The clear implication is that transgender people, simply because they are transgender, could somehow be a danger to other prisoners. This notion is based upon vicious and unfounded stereotypes that transgender women are more likely to commit sexual assault than other women and has no place in any government policy or practice, much less in regulations for a law intended to protect the civil rights of transgender people. Presumably the Department of Corrections and other District agencies already have procedures in place to preserve facility safety and security should any individual act in a threatening or violent manner within a facility. No special gender-based analysis of any theoretical risk posed by transgender, intersex, or gender nonconforming people to others is ever appropriate.

In order to truly improve safety for transgender people and others in its custody, the Office of Human Rights should withdraw the proposed §§801.3 and 801.4. The power of the Office of Human Rights would be far better used to facilitate collaboration of the Department of Corrections with members of the transgender community to develop policies grounded in principles of respect and fairness. Working closely and cooperatively with local transgender and prisoner rights groups, particularly those with formerly incarcerated transgender people in positions of leadership, is the best and most practical way to develop workable, humane policies that are consistent with law. Should the Department of Corrections or any other District agency fail to comply with its legal obligations under the Human Rights Act, the Office of Human Rights must act to hold that agency accountable.

Section 802.2

The Sylvia Rivera Law Project opposes the proposed repeal of §802.2, which currently requires businesses to use gender-neutral signage for any single-occupancy restrooms. §802.2 is a modest, common-sense provision that has the potential prevent serious violence against transgender people.

Harassment in restrooms is a common occurrence for many transgender people and others who have an appearance that does not match gender stereotypes. When transgender people are perceived to be using the “wrong” restroom, sometimes even when it is a single occupancy restroom, they can be beaten, threatened, humiliated, ejected from the premises, or falsely arrested. Large numbers of our clients, community members, colleagues, and employees have had these experiences. In fact, the Sylvia Rivera Law Project produced *Toilet Training*, a documentary that exposes discrimination and violence against transgender and gender nonconforming people in gender segregated public restrooms, specifically to raise public awareness and educate employers, school administrators, and others about this important issue.

Lack of access to gender neutral restrooms has a dramatic impact on the public lives of many transgender people. Many transgender people can be perceived as using the “wrong” restroom, no matter which facility they choose. Some transgender people live with the anxiety of trying to guess how their gender is being perceived in a particular space in order to decide which restroom may be safest for them. Transgender people will sometimes choose not to go to any public spaces more than absolutely necessary because of this very issue, profoundly limiting their access to employment, education, and a variety of public accommodations. Others will try to plan so that they only go to places that have gender neutral restrooms. For example, transgender community members have developed an online database of gender neutral restrooms, safe2pee.org, to improve safety planning with regards to restrooms. Moreover, in 2001 San Francisco Human Rights Commission conducted a “Gender Neutral Bathroom Survey” and found that 99% of transgender people surveyed and 97% of non-transgender women surveyed were in favor of gender neutral bathrooms.

While the provisions stating that businesses must permit transgender people to access restroom facilities on the basis of their gender identity are exceptionally important, alone they are not enough. Attitudes do not change overnight, and transgender people and others who do not fit gender norms will continue to be subject to violence in restrooms that are gender-segregated. The law will be difficult or impossible to enforce against many of the perpetrators of this violence, who are likely to be other patrons of or passersby in places of public accommodations. However, the violence can easily be prevented in the first place with simple gender neutral signage, which is presumably the reason why this regulation was originally promulgated.

Section 802.2 is a very simple, inexpensive, and effective measure. Like all new regulations, it will take both public education efforts and time for businesses to become aware of and come into compliance with the regulation. That is certainly no reason to abandon it or any other measure designed to protect civil rights. The only costs would be the very minimal expense of replacing the signs for restrooms. It is entirely possible that these minor costs would quickly be offset by increased business from transgender and other gender nonconforming people who would then feel safe patronizing these establishments. Gender neutral single occupancy restrooms are widely accepted by the public and are already in place in many businesses. No new construction would be required. There is simply no justification for the repeal of this provision.

Section 806.5

The Sylvia Rivera Law Project opposes the proposed § 806.5. It is outside the scope of the governing statute, unnecessary, and harmful to transgender workers.

§806.5 would clearly exceed statutory authority in that it functions only to create a new restriction on the rights of transgender workers and would not advance the purpose, letter or spirit of the governing statute in any way. All people have a broad right at common law to go by whatever name they choose, absent any fraudulent or criminal intent.⁴ Transgender people often face harassment, discrimination, and violence when forced to use a legal or birth name that does not

⁴ In re Phillips, 871 A.2d 513 (D.C. 2005); Brown v. Brown, 384 A.2d 632 (D.C. 1977).

match their gender identity because this “outs” them as transgender. Additionally, being forced to wear a badge with a name that contradicts one’s core sense of self creates a humiliating and hostile work environment for transgender employees. It may also simply be confusing and distracting if a transgender employee who has not completed a statutory name change has an employee identification card bearing a name other than the one he is she is known by in the workplace.

Many transgender people take advantage of statutory means to change their names. Others, however, cannot or do not. Like most legal proceedings, petitioning for a name change is often a public, time-consuming, and costly undertaking. It is not accessible or desirable for everyone. For those who do begin the process, it can take a significant amount of time to complete.

For example, the District of Columbia requires petitioners to publish notice of their name change in a newspaper for three consecutive weeks.⁵ This requirement is not only expensive, but can also be dangerous because it amounts to a very public outing of the individual as a transgender person. Particularly for those transgender people with a history of experiencing violence or threats and for those transgender people without a great deal of disposable income, this requirement can be a significant deterrent to pursuing a name change.

Some other transgender people may not seek to change their name because they are unaware of how to go about it or because they are concerned about the reaction of family members. Others, unfortunately, try but do not succeed because they encounter judges who because of bias or misinformation decline to grant a name change because the petitioner is transgender.⁶

Many employers find it easiest and best for the smooth operation of the workplace to use the preferred names of transgender and other employees on identification. This practice facilitates correct identification, avoids confusion when a person goes by a name different than what is on a badge or ID card, preserves the dignity of the employees, avoids the expense of issuing new badges following the completion of a name change process, acknowledges the common law rights of employees to go by chosen names, and avoids discrimination, harassment, or violence against transgender workers outed by their ID. It is neither logical nor legal to attempt to take authority away from the D.C. government to make these accommodations for its workers. Such a requirement certainly has no place in regulations for the gender identity provisions of the Human Rights Act.

⁵ DC Code § 16-2502 (2008).

⁶ See, e.g., Sylvia Rivera Law Project press release “Manhattan Judge Obstructs the Right of Four Transgender Women to Change Their Names,” August 7, 2006; <http://www.srlp.org/index.php?sec=03H&page=namechange.obstruction.release>; American Civil Liberties Union press release regarding *In re Rockefeller*, December 15, 2006, <http://www.aclu.org/lgbt/transgender/27707res20061215.html>; Lambda Legal press release regarding *Turner v. White*, January 17, 2008, <http://www.lambdalegal.org/news/pr/will-county-court-defy-rules.html>.

Thank you for the opportunity to submit these comments. We respectfully urge the Office of Human Rights to withdraw the proposed amendments §§801.3, 801.4, 802.2, and 806.5.

Respectfully submitted,

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