



www.aclu-nca.org

# American Civil Liberties Union of the National Capital Area

1400 – 20th Street NW, Suite 119 Washington, DC 20036-5920 202-457-0800

*11,000 ACLU-NCA Members Locally, 550,000 ACLU Members Nationwide*

EXECUTIVE DIRECTOR  
Johnny Barnes

LEGAL DIRECTOR  
Arthur B. Spitzer

LEGISLATIVE COUNSEL  
Stephen M. Block

STAFF ATTORNEY  
Fritz Mulhauser

August 1, 2008

Alexis Taylor, Esq.  
General Counsel  
District of Columbia Office of Human Rights  
441 4<sup>th</sup> Street, NW  
Suite 570 North  
Washington, DC 20001

## Re: Notice of Proposed Rulemaking to Amend Chapter 8 of Title 4 DCMR

Dear Ms. Taylor:

The ACLU of the National Capital Area urges the Office of Human Rights and the Commission on Human Rights to withdraw the subject Notice of Proposed Rulemaking published in the July 11, 2008 issue of the *District of Columbia Register*. The proposed changes are contrary to the Human Rights Act as a matter of law. Furthermore, the proposal is flawed as a matter of public policy and in the process of its introduction.

### The Proposed Addition of Sections 801.3 and 801.4 to 4 DCMR Would Violate the Human Rights Act and are Beyond the Agency's Authority

Proposed new sections 801.3<sup>1</sup> and 801.4<sup>2</sup> would remove the requirement that the Department of Corrections and all other agencies and institutions that have custodial responsibility for persons (such as the Department of Mental

<sup>1</sup> 801.3 Nothing in this chapter shall require an agency of the District of Columbia government to classify, house, or provide access to gender-specific facilities to transgender individuals according to their gender identity or expression if the transgender individual is incarcerated, institutionalized, or otherwise within the District's custody. A District agency may make reasonable inquiry to determine whether an individual in custody is transgender.

<sup>2</sup> 801.4 Classification and assignment for transgender individuals within District government custody shall be based on, among other things, the safety and security of the transgender individual, the needs of the facility, and the safety and security of the other individuals in the facility to which the transgender person is assigned.

Health and Youth Rehabilitative Services) respect the gender identity and expression of transgender persons. This would be inconsistent with the recent amendments to the Human Rights Act, which prohibit discrimination based on gender identity or expression, and would therefore be beyond the Office's and Commission's power, as "it is axiomatic that a regulation be consistent with the statute under which it was promulgated." *District of Columbia v. Catholic University of America*, 397 A.2d 915, 919 (D.C. 1979).

#### The Repeal of 4 DCMR § 802.2 is Bad Public Policy

Section 802.2<sup>3</sup> was added to the transgender regulations to enable transgender persons to use single-occupancy restrooms without being challenged as to whether they were using the appropriate facility. Single occupancy, gender-neutral restrooms are commonplace, for example on airplanes and trains; they cause no confusion or other difficulty. There is no apparent reason to deny transgender persons this accommodation. Beyond that, gender-neutral single occupancy restrooms accommodate women in general. Typically, in comparison to the availability of men's restrooms, there are too few restrooms for women.<sup>4</sup> Gender-neutral signage will ameliorate that situation in establishments that have single-occupancy restrooms.

#### The Addition of 4 DCMR § 806.5 is Bad Public Policy

New section 806.5<sup>5</sup> would require transgender persons employed by the District government to be identified on their ID badges by their pre-transition names, absent a formal name change. Would the executive branch also require these employees to have their ID photos be their pre-transition likenesses? As illustrated by this example, not only would the proposed rule humiliate a trans woman by making her wear a badge with a man's name, it would undercut the very purpose of an ID badge, which is to enable a security guard to confirm that the person wearing the badge matches the badge.

---

<sup>3</sup> 802.2 All entities covered under the Act with single-occupancy restroom facilities shall use gender-neutral signage for those facilities (for example, by replacing signs that indicate "Men" and "Women" with signs that say "Restroom").

<sup>4</sup> See, e.g., Nicholas Confessore, "Council Passes a Bill to Shorten the Line at the Ladies' Room," *The New York Times*, May 26, 2005 (reporting passage of the Women's Restroom Equity Bill, requiring establishments "to maintain roughly a two-to-one ratio of women's bathroom stalls to men's stalls and urinals," in an effort to eliminate the "long lines at the ladies' room [that] have long been a frustrating fact of life").

<sup>5</sup> 806.5 Identification badges for employees of the District of Columbia government must state the employee's legal name, as documented by the Department of Human Resources. The name affixed on the badge shall be changed after the employee provides proof of a formal name change through a court of competent jurisdiction.

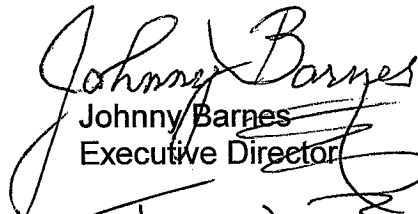
The Process for the Issuance of the Proposed Rulemaking is Flawed

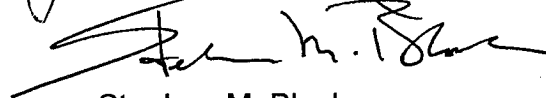
On June 12, 2008, Ms. Jeri Hughes filed a complaint with your Office concerning the Department of Corrections Operations Memorandum of May 10, 2008 concerning the treatment of transgender inmates. The response to her complaint appears to be the issuance of the subject Proposed Rulemaking on July 11, 2008. Both as a matter of law and public policy, that response was wrong.

As Ms. Hughes points out in her July 21, 2008 comments on the Proposed Rulemaking, the Human Rights Act mandates mediation of complaints.<sup>6</sup> As of the date of her comments, she states that there has been no effort to mediate her complaint.

Respecting the gender identity or expression of transgender persons while ensuring their security when in the custody of the District is not an easy matter. A solution that is appropriate for the District jail may not be appropriate for persons confined at St. Elizabeths Hospital, and vice versa. Simply decreeing that the Human Rights Act's protection of transgender persons no longer applies to these institutions is no answer; the Human Rights Act *does* apply to them. A mediated discussion that includes all concerned parties is needed. Until appropriate solutions are found, the Notice of Proposed Rulemaking must be withdrawn. Otherwise, the likelihood of reaching workable solutions that comply with the Human Rights Act is diminished.

Sincerely,

  
Johnny Barnes  
Executive Director



Stephen M. Block  
Legislative Counsel

---

<sup>6</sup> D.C. Code § 2-1403.04.