



COUNCIL OF THE DISTRICT OF COLUMBIA  
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WASHINGTON, DC 20004

**MARY M. CHEH**

Councilmember, Ward 3  
Chair, Committee on Public Services and Consumer Affairs

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Alexis Taylor, Esq.  
General Counsel  
District of Columbia Office of Human Rights  
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Dear Ms. Taylor,

I write today to express deep concern regarding the Notice of Proposed Rulemaking, published in the July 11, 2008 issue of the *District of Columbia Register*. These amendments to Title 4, Chapter 8 of the DCMR seem ill-advised, both as a matter of policy and as a matter of law.

The proposed addition of §§ 801.3<sup>1</sup> and 801.4<sup>2</sup> appear antithetical to the purpose of the Human Rights Act and therefore arguably beyond the rulemaking authority of the Office of Human Rights and the Commission on Human Rights. The Human Rights Act, codified at D.C. Code § 2-1401 *et seq.*, seeks “to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of . . . gender identity or expression.” Proposed subsections 801.3 and 801.4, however, provide that these protections do not flow to individuals “incarcerated, institutionalized, or otherwise within the District’s custody.” Given that nothing in the statute provides for such a carve-out, the agencies have promulgated a rule arguably inconsistent with the HRA, and “it is axiomatic that a regulation be consistent with the statute under which it was promulgated,” *District of Columbia v. Catholic Univ. of America*, 397 A.2d 915, 919 (D.C. 1979). Therefore, the agencies appear to have acted beyond their legal authority and the proposed subsections should be withdrawn.

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<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.

The proposed repeal of § 802.2<sup>3</sup> presents different problems. First and foremost, it is entirely unclear what problem the proposed rulemaking is attempting to solve. The only obvious problem with requiring single-occupancy restrooms to be labeled with gender-neutral signage, as is now required, would be the potential cost to businesses associated with purchasing anew such signs. This, though, is a legally insufficient reason given that the HRA expressly precludes using an increased cost to a business, without more, as a basis for avoiding the mandates of the law. D.C. Code § 2-1401.03(a). Assuming, though, that there is some legitimate rationale for these amendments—which is certainly not obvious—that rationale is surely outweighed by the mischief they will cause. With respect to transgender patrons, gender-neutral signage serves an important function in preventing harassment based on the perceptions of others, rather than the gender identity of the individual. Removing this safeguard allows a return to the discrimination and harassment that led to § 802.2 in the first place, and without any obvious benefit.

Finally, the proposed addition of § 806.5<sup>4</sup> is simply bad policy, especially given the realities of the transgender experience. In a situation in which a gender-specific legal name appears on the badge of an individual expressing the opposite gender, problems arise for both the wearer and the observer, undercutting the purpose of the badge. First, it creates the opportunity for embarrassment and harassment for the wearer. Second, it creates confusion or misidentification for the observer. In the end, I believe it represents bad policy.

I urge the Office of Human Rights and the Commission on Human Rights to withdraw their proposed rulemaking and keep intact the important protections afforded to transgender people by the Human Rights Act.

Sincerely,



Mary M. Cheh  
Councilmember, Ward 3

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<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> § 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.