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DC Office of Human Rights
441 4th Street, NW
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Washington, DC 20001

Re: DC Trans Coalition Comments on DC Office of Human
Rights Notice of Proposed Rulemaking

Dear Ms. Taylor:

The DC Trans Coalition (DCTC) is responding to the proposed rulemaking of the D.C. Office of Human Rights (OHR) and Commission on Human Rights (CHR), as published on July 11, 2008, in the District of Columbia Register (Vol. 55, No. 28, pp. 007566-007567). Please note these comments are being submitted within the thirty day period for public comment following publication.

The DC Trans Coalition is a grassroots organization of transgender, transsexual, and gender variant individuals and their allies who seek to secure and protect the civil rights of the entire Washington DC trans community. As defined in the DC Municipal Regulations, title 4, § 899.1, “gender identity or expression” refers to “a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.” This phrase is typically understood to identify transgender, transsexual, gender variant, cross-dressed, androgynous, and intersex individuals or individuals whose identity or behavior differs from stereotypical or traditional gender expectations. These individuals will hereinafter be identified as “trans people” or the “trans community.” DCTC understands that the proposed rules seek to amend Chapter 8 of Title 4 of the District of Columbia Municipal Regulations governing “Gender Identity or Expression,” and as such, we believe that comments made by DCTC, an organization which represents the individuals and communities most effected by these proposed rules, should be given due weight.

These proposed amendments allow DC agencies to exempt those individuals who are held in police custody, incarcerated, or institutionalized from the protection of the DC Human Rights Act providing for nondiscrimination on the basis of gender identity or expression, effectively eviscerating the Act. In addition, the proposed rules repeal the requirement of gender-neutral signage for single-occupancy rest rooms. With the exception of the privacy-related provisions in proposed § 805.3, the DC Trans Coalition strongly opposes the proposed regulations.

Proposed Amendments to § 801

The amendments proposed by the Office of Human Rights to DC Municipal Regulations, title 4, § 801 purport to clarify that the chapter does not require the District government to respect gender identity and expression with regard to incarceration, institutionalization, or other District custody. However, the proposed regulations do not comply with the DC Human Rights Act, they are discriminatory against trans people, and they endanger the safety of trans individuals. DCTC therefore recommends that the proposed rules not be adopted. Instead, we recommend that the OHR adopt rules explicitly requiring the DC government to respect gender identity or expression when it holds individuals in custody, and we invite the OHR to work with local community groups, such as DCTC, and affected District agencies, such as the Department of Corrections, to effectuate this policy.

The proposed regulations are, in actuality, not a clarification, but a nullification of the Human Rights Act for certain District agencies. They specifically carve out protections guaranteed in the Act and allow District agencies to discriminate against populations held in custody on the basis of gender identity or expression. When enacting the D.C. Human Rights Code, the Council of the District of Columbia specifically noted its intent to “secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including... gender identity or expression.” D.C. S.T. § 2-1401.01. The Council unequivocally and unanimously intended to prevent discrimination against trans people by DC government agencies. Specifically, the Act provides that, “it shall be unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit on the basis of an individual’s actual or perceived... gender identity or expression.” D.C. S.T. § 2-1402.73.

By asserting that, “[n]othing 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,” the proposed regulation allows for discrimination on the basis of gender identity or expression in direct opposition to the Human Rights Act. D.C. Reg. vol. 55, no. 28, p. 7566. The proposed regulation allows and encourages District government agencies to refuse to provide gender appropriate facilities, services, and benefits to trans people, which the Human Rights Code recognizes as an “unlawful discriminatory practice,” continuing their nonconformity with the Human Rights Law. D.C. S.T. § 2-1402.73.

In addition, the proposed regulations directly conflict with current OHR regulations pertaining to gender identity or expression. In seeking to implement the provisions of the Human Rights Code prohibiting discrimination, the D.C. Office of Human Rights and Commission on Human Rights adopted regulations which “includ[e] all agencies of the District of Columbia government and its contractors.” D.C. Mun. Regs. tit. 4, § 800.1. Specifically, the OHR identified discriminatory practices particular to the District of Columbia Government, including, “refusing to provide any facility, service or program, or benefit of the Government of District of Columbia; engaging in verbal or physical harassment; creating a hostile environment; and denying access to restroom facilities and other gender specific facilities that are consistent with

the person's gender identity or expression." D.C. Mun. Regs. tit. 4, § 801.1(e). Clearly, the proposed regulations will allow D.C. government agencies to refuse facilities, services, and benefits to trans people; create a hostile environment for trans people; and deny access to restroom facilities and other gender specific facilities to trans people which are consistent with the person's gender identity or expression. These are all practices that the OHR has previously recognized as discriminatory and not in compliance with the Human Rights Act.

Further, the proposed regulation fails to provide any sort of basis for this exception. Noting only that "[t]he Office determined that individuals who are in police custody, incarcerated, or institutionalized provide unique circumstances which the previous regulations did not address," the OHR issued a Notice of Proposed Rulemaking without any sort of fact-finding or explanation of these circumstances. D.C. Reg. vol. 55, no. 28, p. 7566. There is no provision in the Human Rights Act that allows for agencies to discriminate on the basis of gender identity or expression with regard to individuals in D.C. government custody.

As the District agency responsible for effectuating the Human Rights Act, OHR has a duty to enforce the Act, and the agency may not choose to abdicate this responsibility. Carving out an exception where none currently exists would certainly be contrary to the HRA. See Scopelliti v. Town of New Castle, 210 A.D.2d 339, 340 (N.Y. Supreme Ct. Appellate Division 1994) (In creating an exemption not written into the NY Human Rights law, agency's action was arbitrary and capricious). While exceptions exist in the Human Rights Act, none of these exceptions pertain to District agencies, nor do they allow agencies to discriminate against individuals in their custody. Due to the complete lack of written regulatory history and fact-finding, we can only surmise that the proposed regulations are arbitrary and capricious, and given the "massive discrimination that transgender and transsexuals face," that these proposed regulations represent a significant danger to the trans community. D.C. O.H.R. FY2006 Annual Report, p. 7 (March 1, 2007).

The proposed regulations, by allowing (if not inciting or condoning) discrimination on the basis of gender identity or expression in the case of D.C. government custody, allow D.C. agencies to actively harm trans people and place them in threat of physical danger. Although the proposed regulations purport to assign transgender individuals on the basis of "the safety and security of the transgender individual," by creating an exemption for D.C. government custody, in practice, they encourage classification and assignment solely based on primary sex characteristics. D.C. Reg. vol. 55, no. 28, p. 7566. The regulation would allow, for example, the Department of Corrections to continue to place transgender women into prison facilities designated for men, in direct conflict with their gender identity and expression. Thus, these proposed regulations allow D.C. agencies to misclassify a trans person as a member of the opposite gender, and so deny them gender-appropriate clothing and medical services, and in general subject them to a hostile environment.

Because most prison facilities, including the District's jails, refuse to tally trans people or violence against them, there are no readily available statistics regarding violence against trans people in prison, nor the number of trans people in prison. However, Amnesty International has noted that transgender individuals "are at a high risk of violence from other prisoners; transgender women in particular may be at heightened risk of torture or ill-treatment if they are

placed in male jails or holding cells, as such placement may put an individual at risk of physical or sexual assault.” Amnesty International, Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the U.S. 60 (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>. Through our extensive contact with the trans community, DCTC has become aware of numerous incidents of violence, sexual assault, and rampant discrimination against trans people. Indeed, such violence has become commonplace and expected in the District’s jails. Trans people denied gender appropriate facilities are subject to sexual assault, sexually transmitted and other diseases, harassment, and physical violence.

Under the Eighth Amendment of the US Constitution, a claim of cruel and unusual punishment arises when prison officials are “deliberately indifferent” to a substantial risk of harm. Farmer v. Brennan, 511 U.S. 825 (1994). In Farmer, the Supreme Court stated: “Clearly, placing plaintiff, a twenty-one year old transsexual, into the general population at [USP-]Lewisburg, a [high-]security institution, could pose a significant threat to internal security in general and to plaintiff in particular.” *Id.* at 849. The proposed regulations, by failing to respect the gender identity or expression of trans inmates, do little to address this substantial risk of harm and continue to allow District agencies to endanger trans people in violation of the Human Right Act. The District’s own Inspector General has already noted the increased risks of harm and liability faced by the District, stating that, “[t]he potential effects of DOC violating District regulations regarding gender identity and expression could result in harassment or assault of inmates and liability for the District.” D.C. Office of Inspector General, MAR 08-I-005, (April 4, 2008).

DCTC, as well as other trans rights and prison violence reduction groups, has engaged in ongoing efforts to reform the policies of D.C. agencies which hold individuals in custody with regard to discrimination on the basis of gender identity or expression. We believe that, with time, such agencies might be brought into compliance with the D.C. Human Rights Act. For example, DCTC was able to work cooperatively with the Metropolitan Police Department to help that agency establish a set of transgender policies which seek to reduce discrimination against trans people on the basis of gender identity or expression.

The Office of Human Rights and the Commission on Human Rights should work in tandem with groups such as DCTC in order to implement the provisions of the Human Rights Act. Instead, these proposed regulations frustrate the trans community and undermine our efforts to secure human rights for trans people. OHR did not consult in any way with the trans community prior to formulating the proposed regulations, and the proposed regulations do not reflect the trans community’s needs. If allowed, the proposed regulations will largely cripple our efforts to prevent discrimination as it provides a shelter for D.C. agencies to be in noncompliance with the Human Rights Act. For example, the District of Columbia Office of Inspector General released a Management Alert Report (MAR-08-005) on April 4, 2008, regarding deficiencies with the DOC’s classification of transgender individuals according to genitals rather than based on gender identity or expression, as required by the Human Rights Act and current regulations. The proposed regulations may allow the DOC to justify continuing to house individuals based on genitals rather than gender identity or expression, although as we describe above, this practice violates the D.C. Human Rights Act.

Proposed Amendments to § 802

Through its regulations effectuating the Human Rights Act, the OHR specified that all “individuals [have] the right to use gender-specific restrooms and other gender-specific facilities such as dressing rooms, homeless shelters, and group homes that are consistent with their gender identity or expression.” D.C. Mun. Regs. tit. 4, § 802.1. This provision is of vital importance to trans people, because entering gender-based spaces can be very dangerous for individuals with an atypical gender presentation. For example, this regulation helps to protect such individuals from arrest, discrimination, and harassment.

The proposed regulations seek to eliminate § 802.2, which requires that “single-occupancy restroom facilities shall use gender-neutral signage for those facilities.” D.C. Mun. Regs. tit. 4, § 802.2. This provision allows single-occupancy restrooms to be available to anyone who wishes to use them, regardless of gender. While such gender-neutral bathrooms are particularly important to the trans community, those individuals who have a gender atypical presentation, and individuals who do not identify with either gender, nontrans people such as parents with children and also women, who must often contend with long lines at single-gender bathrooms, also benefit. DCTC believes that the current regulation provides a benefit to the entire community, regardless of gender identity or expression, at only a trivial cost, and therefore, that the regulations should not be repealed.

The only cost associated with the current regulation for District businesses would be the cost of the appropriate signage. While the OHR has noted its difficulty both with informing entities covered by the Act about this requirement and enforcing this requirement, DCTC contends that a failure to enforce this regulation should not be reason to repeal it. If the public is unaware of the requirements of this subsection, then OHR has made an inadequate effort to inform local businesses and educate the public about this provision. OHR is capable of working with representatives of other District agencies, including health inspectors and building inspectors, as well as local community groups to educate businesses about the regulation and enforce its requirements. The simple fact that OHR has not yet made adequate efforts to enforce this provision does not justify its repeal.

Furthermore, the current regulation prevents problems for trans people using such bathrooms in the first instance, rather than providing an unreliable recourse should such individuals be harassed. Trans people subject to discrimination or harassment due to gendered bathrooms will frequently not file a complaint due to the difficulty and expense of doing so. Unfortunately, such harassment can be commonplace, and few trans people have the time or desire to seek redress for every instance of this type of discrimination. Also, such individuals may receive harassment from other customers, which creates an issue of discrimination that cannot be easily remedied by OHR. The current regulation, however, allows individuals to file complaints about an establishment, for failing to meet the gender-neutral single-occupancy bathroom requirement. While the OHR has indicated that such complaints may become a nuisance (although the regulation has been in place for nearly two years and this threat has not materialized), these complaints are easily remedied, serve to bring businesses into compliance with the regulation, and actively reduce future incidents of harassment against trans people.

Proposed Amendments to § 806

The final OHR proposed regulation requires that “[i]dentification badges for employees of the District of Columbia government must state the employee’s legal name, as documented by the Department of Human Resources.” D.C. Reg. vol. 55, no. 28, p. 7567. DCTC objects to this proposed regulation because it is unnecessary and it is unduly burdensome to trans people. Firstly, DCTC contends that this requirement is a matter of District employee policy, and that therefore it should be proposed by the DC Department of Human Resources rather than issued under the authority the Human Rights Act by the OHR.

Secondly, the proposed regulation does not comport with actual District practice. The District government does not actually use each employee’s legal name in every instance. For instance, District identification badges might not state one’s middle name, they might use initials for given or middle names, or they might remove suffixes. In fact, little conformity exists between current identification badges. While the District accommodates this variation in identification badges (and will presumably continue to do so), this provision will place an additional burden on individuals whose used names vary considerably from their legal names (such as many trans people).

Furthermore, changing one’s name can be an expensive, time-consuming, and burdensome procedure. District employees (trans or otherwise) should not be forced to legally change their names just to avoid being labeled with an inaccurate or outdated name. Many other city and state governments, and even the federal government, manage to maintain identification tags that correspond to each employee’s commonly used name. This regulation provides little benefit to the District while creating a potentially large burden for trans people, and therefore it should not be adopted.

If you should have any questions with regard to our formal comments, please do not hesitate to contact me. Additionally, we are certainly willing to meet with representatives from the Office of Human Rights in order to further discuss these proposed regulations and the impact on our community.

Sincerely,


Alison M. Gill