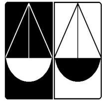

WASHINGTON LAWYERS′ COMMITTEE
FOR CIVIL RIGHTS & URBAN AFFAIRS

Delivered by Hand

August 11, 2008

Mr. Gustavo Velasquez, Director
Ms. Alexis Taylor, General Counsel
D.C. Office of Human Rights
441 4th Street, N.W., Suite 570 North
Washington, D.C. 20001

Re: Comments Regarding Proposed Regulations Amending DCMR Ch.8 Title 4 Governing Gender Identity and Expression

Dear Mr. Velasquez and Ms. Taylor:

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC"), a non-profit, public interest organization, seeks to eradicate discrimination and fully enforce the nation's civil rights laws through the provision of legal assistance. The Committee was formed in 1968 in response to both a national report issued by the National Advisory Commission on Civil Disorders identifying discrimination and poverty as the root causes of the recent social unrest, and a related call from members of the private bar to mobilize to meet the legal needs of underserved populations. In the Committee's almost 40-year history, its attorneys have represented thousands of individuals who have alleged discrimination in cases brought under both federal civil rights statutes and state and local civil rights laws. The D.C. Prisoners' Legal Services Project was founded in 1989. Throughout the 1990s, the Project engaged in broad-based class action litigation, improving medical and mental health services, reducing overcrowding, and improving overall conditions at the D.C. Jail and the Correctional Treatment Facility. In a transition designed to provide greater organizational stability as well as to better address the needs of our clients, the Project merged into the WLC in October 2006, creating the D.C. Prisoners' Project. Our mission and staff have remained unchanged, but we now are able to collaborate with the attorneys and staff at the premier civil rights organization in D.C.

We write in response to the Notice of Proposed Rulemaking published in Volume 55, Number 28 of the District of Columbia Register on July 11, 2008. The WLC opposes the proposal to amend Chapter 8, Title 4 of the District of Columbia Municipal Regulations by adding proposed section 801.3 and 801.4. These proposed new regulations would essentially exempt any agency of the District of Columbia from compliance with the DC Human Rights Act. Such an exemption would violate the Human Rights Law, relevant federal law, and principles of good public policy.

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I. The Department of Corrections and the MPD are not the only agencies with custody of individuals.

From the outset, it is important to note that although discussions and comments so far seem to have focused on the District of Columbia Department of Corrections ("DCDC"), it is not the only agency these proposed regulations would affect. Agencies in which individuals are, in some way, "incarcerated, institutionalized, or otherwise within the District's custody" include, but are not limited to, the Department of Mental Health, the Department of Health ("DOH"), the Department of Youth Rehabilitation Services, the Children and Family Services Administration ("CFSA"), the Metropolitan Police Department ("MPD"), DC General Ambulatory and Emergency Care Centers, the Fire and Emergency Medical Services Department, the Housing Authority, the Department of Human Services, and the Public Schools. It does not appear that any of these agencies were consulted before the proposed regulations were issued. At least some of these agencies already have policies which do take into account a person's status as a transgendered individual.

For example, the MPD last year issued a comprehensive regulation regarding proper treatment of transgender individuals.[1] Referring to this new policy, MPD Chief Cathy L. Lanier stated:

> I am proud that my Department is leading the way on this issue, and is the first police department in the country to develop such a policy without the need for litigation. The policy dictates not only how officers are to address transgender individuals from the initial stop and frisk, but also mandates procedures for transportation, detention and medical treatment. I have also instituted a training requirement for all officers to ensure that members of the GLBT community are respectfully treated. I want to thank the members of the transgender community who collaborated with us on this policy, as it represents a true community-police partnership.[2]

The DOH, through its Addiction Prevention and Recovery Administration, provides specific inpatient detoxification programs for lesbian, gay, bisexual and transgendered substance abusers. CFSA works to find suitable foster care placements for all children in their custody, including by taking into account their transgendered status children.[3] In order to do so, CFSA obviously must take a child's gender identity into account when finding suitable foster and adoptive parents.

These are only a few examples of agencies in the District that do classify and house individuals according to transgender status. All these agencies and their experts should have been consulted regarding the appropriateness of regulations concerning how they treat people within

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1. Available at:
http://newsroom.dc.gov/show.aspx?agency=mpdc§ion=4&release=12001&year=2007&file=file.aspx%2Frelease%2F12001%2FGO-501.02.pdf.

2. http://newsroom.dc.gov/show.aspx/agency/mpdc/section/4/release/12001/year/2007.

3. For more information about this initiative, you may contact Nicholette Smith-Bligen, Administrator, Office of Youth Development, Child and Family Services Agency, 400 6th Street SW, Washington, DC 20024, (202)727-7666.

their care. WLC believes that many of these agencies would agree that the proposed broad exemption from the Human Rights Act is neither necessary nor wise.

II. Classification Is a Broad Term: It Means More Than Assigning Someone to a Gendered Housing Unit

Proposed regulation 801.3 would excuse any agency of the District of Columbia from a requirement to "classify … transgender individuals according to their gender identity or expression" if the individual is in the custody of the agency. As mentioned above, this regulation would affect many DC agencies, and presumably each has its own classification definition and process.

Within the corrections field, however, it should be noted that classification is a much broader term than these proposed regulations assume. Classification means much more than just deciding if someone is male or female. Classification is a process whereby the corrections officials determine where, how, and with whom to house an individual and in which programs to put him or her. According to the American Corrections Association, classification is a "process for determining the needs and requirements of those for whom confinement has been ordered and for assigning them to housing units and programs according to their needs and existing resources.[4] The Federal Bureau of Prisons defines classification as "[t]he systematic subdivision of inmates into groups based on their security and program needs" and has a 108 page manual for the process.[5]

It would violate the law and common sense to remove transgender status from the long list of criteria that corrections should consider when classifying a person**.** The proposed regulations would remove transgender status alone from the list of considered characteristics. For example, under these proposed regulations, DOC could refuse to consider transgender status when pacing a male-to-female transgendered person in a cell with a sexual predator known to prey on transgendered people. Nothing in the District of Columbia law should even suggest that action would be acceptable, but these proposed regulations would do just that.

III. The Proposed Regulations Would Violate the DC Human Rights Act

The DC Human Rights Act states that "It is the intent of the Council of the District of Columbia . . . 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."[6] Specifically, the HRA requires that "it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived … gender identity or expression."[7]

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4. Glossary, Performance-Based Standards for Adult Local Detention Facilities (ACA 4th Ed. 2004) 185.

5. Program statement 5100.008, available at http://www.bop.gov/policy/progstat/5100_008.pdf.

6. 2 D.C. Code 1401.01.

7. 2 D.C. Code 1402.73.

The Office of Human Rights may only issue regulations and procedures "which are not in conflict with" the Human Rights Act.[8] This requirement only restates basic principals of administrative law: regulations must further the purpose of the underlying law, not nullify it.[9]

IV. The Proposed Regulations Would Violate the Eighth Amendment.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishments. Jails and prisons must take reasonable measures to guarantee the safety of the inmates.[10] Courts have held that the Eighth Amendment prohibits a variety of unsafe conditions in detention facilities, including the ones these proposed regulations would create.

Farmer v. Brennan, the leading case defining deliberate indifference in Eighth Amendment jurisprudence, warns of what can happen when a male-to-female transgendered individual is placed in general male population.[11] That case arose after Federal Bureau of Prisons officials housed Dee Farmer, a male-to-female transgender women in a general male population unit of a federal penitentiary.12 Within two weeks, Ms. Farmer was raped by another inmate.[13] In overturning and remanding a grant of summary judgment to the defendants, the Supreme Court reasoned that "[b]eing violently assaulted in prison is simply not "part of the penalty that criminal offenders pay for their offenses against society" and held that ignoring obvious safety concerns by placing a transgendered male-to-female inmate in a housing unit with violent male offenders creates an obvious risk of rape and assault, which would support a prisoner's claim of an Eighth Amendment violation.[14]

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8. 2 D.C. Code 1403.01.

9. *See Tenants of 738 Longfellow Street, N.W. v. District of Columbia Rental,* 575 A.2d 1205, 1213 (D.C. 1991). *See also District of Columbia v. Catholic University of America,* 397 A.2d 915, 919 (D.C. 1979) ("it is axiomatic that a regulation [must] be consistent with the statute under which it was promulgated"); *District of Columbia v. Jones,* 287 A.2d 816, 818 (D.C. 1972) ("a regulation which . . . create[s] a rule out of harmony with the statute is a mere nullity."). *See also Manhattan General Equipment Co. v. Commissioner of Internal Revenue,* 297 U.S. 129, 134 (1936).

10. *See Hudson* v. *Palmer*, 468 U. S. 517, 526–527 (1984).

11. *See Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 11 (1994)

12. *See id.*

13. See id.

14. *See Id.* Any variance from strong masculine presentation may make a male inmate vulnerable to rape and abuse. *See, e.g., Taylor v. Michigan Dep't of Corr.*, 69 F.3d 76, 82–84 (6th Cir. 1995) (noting that "small, youthful prisoners are especially vulnerable to sexual pressure"); *Young v. Quinlan*, 960 F.2d 351, 362 (3d Cir. 1992) (noting that "fellow inmates subjected [plaintiff] to sexual assault on several documented occasions, most likely because of [plaintiff's] youthful appearance and slight stature") *United States v. Gonzalez*, 945 F.2d 525, 526–27 (2d Cir. 1991) (noting that "even if [plaintiff] is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him ... susceptible to homophobic attacks"). A proper classification system should take all gender variant factors into account.

V. The National Prison Rape Elimination Commission Is Creating Standards that Contradict the Proposed Regulations

Congress passed the Prison Rape Elimination Act in 2003.[15] As part of the Act, Congress created the bipartisan National Prison Rape elimination Commission ("the Commission").[16] The Commission is charged with studying federal, state, and local government policies and practices related to the prevention, detection, response, and monitoring of sexual abuse in correction and detention facilities in the United States. As part of that work, the Commission is required to issue recommended standards for all correctional and detention facilities in the United States. Currently, draft standards have been released for public comment.[17]

Ultimately, the Commission will submit these recommended standards as part of its final report to Congress, the President, the Attorney General, the Department of Health and Human Services, and the governors and corrections directors of the states. Within a year of receiving the Commission's report, the United States Attorney General is required to consider the Commission's recommended standards and to promulgate national standards for the detection, prevention, reduction, and punishment of prison rape. States and the District of Columbia will have a year to adopt and comply with them or risk losing five percent of any federal grant funds provided for correctional purposes.

The draft standards require the opposite of what these new regulations propose. Sometime next year, it will become mandatory for every correctional system in the United States to consider transgender status of individuals during classification.[18]

For example, the Standards require:

> Staff provides heightened sight and sound supervision to inmates who are identified as vulnerable or potentially vulnerable. Vulnerable or potentially vulnerable inmates must be housed safely in the least-restrictive setting possible and must have access to the same privileges and programs as inmates housed in general population.
>
> … The purpose of this standard is to highlight the need to provide heightened protection— especially increased sight and sound supervision—for inmates who are identified as vulnerable and to do so in a way that does not unnecessarily isolate them or restrict their access to the regular rights and privileges of general population inmates. Too often, vulnerable inmates are placed in protective custody and lose their access to educational, vocational, and other programs as well as work assignments….
>
> To accomplish this successfully, staff must be able to both identify traditionally

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15. *See* 42 U.S.C. § 15601, et seq.

16. For more information about the Commission, see http://www.nprec.us/welcome.html.

17. Available at http://www.nprec.us/UpcomingEvents/5.1_MasterAdultPrison_andJail_andImmigrationStandardsClean.pdf (hereafter "Standards").

18. *See* 42 USC 15607.

> vulnerable populations (such as gay, lesbian, bisexual, and *transgender inmates*; deaf or speech- or sight-impaired inmates; inmates with mental or physical disabilities; inmates with limited English proficiency; inmates with past histories of sexual abuse; young inmates; and inmates who are physically weak) as well as make judgment calls about likely vulnerabilities based on experience in a given facility and with given populations. … Staff must be alert at all times to potential vulnerability.[19]

While the final standards may be somewhat different in detail than these draft standards, it is extremely likely that the standards requiring proper classification of and heightened protection for transgendered people will continue to be included. It makes no sense for the District of Columbia to adopt a regulation that flies in the face of this obvious upcoming legal requirement.

VI. The Proposed Standards Are Bad Public Policy for the District of Columbia

The District of Columbia, through its Office of Human Rights should be adopting only regulations that further a respectful open society. Under these proposed regulations, DC would be creating a system where discrimination and disrespect could continue to exist. Christopher Daley, the Director of the Transgender Law Center, provided testimony to the Commission on August 15, 2005.[20]

Mr. Daley's testimony outlines the harmful psychological effects caused when a corrections staff member refers to a transgendered person with the wrong pronoun. As he stated, "It is one thing to house someone who is female-to-male *with* women, but another entirely to house him *as* a woman."[21] These proposed regulations would allow such purposeful abusive behavior, and there is no good reason that DC should.

Furthermore, these proposed regulations would not require the DCDC to provide proper clothing. Providing bras is not enough. Jumpsuits are standard jail uniform for men and male-to-female transgender women. The women in the women's units are given scrubs-like uniforms. The jumpsuits require a person to disrobe completely when they use a toilet. For people with breasts, that is an embarrassing and dangerous situation in a male jail unit. DCDC should be required to give people clothing that is appropriate to cover secondary sex characteristics when they use the toilet.

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19. *See id.* Prevention Planning Standard 2, 18-19. The draft standards go one to specifically require that "Strip and visual body cavity searches of transgender inmates for the sole purpose of determining genital status should not be conducted." The DCDC unnumbered Operations Memorandum developed under the assumption these proposed regulations would be in force is in violation of this mandatory requirement.

20. A transcript of his oral testimony is available at http://www.nprec.us/docs/sf_atrisk4_cdaleystatement.pdf. Written testimony is available at http://transgenderlawcenter.org/pdf/prisonrape.pdf.

21. *Id*.

VII. Other Corrections Systems Do House Transgender People Other Than By Genitalia Alone

Other corrections systems do in fact house transgender prisoners differently than according to a genitalia based classifications systems. Kathleen M. Dennehy, former Commissioner of the Massachusetts Department of Corrections testified to the Commission that her department paid special attention to the housing of transgender inmates.[22]

Los Angeles and San Francisco Counties have wings of the local jails for self-identified transgender women. New York State Office of Children and Family Services, which runs that states juvenile justice housing, has dedicated units within all its facilities for transgender, and lesbian, gay, and bisexual youth.[23] New York State Department of Correctional Services has housed at least one male-to-female transgender women in women's units.[24] King County Washington (Seattle), Multnomah Country, Oregon (Portland), Minnesota , Idaho, Michigan, New Hampshire, Alaska and Arizona corrections departments all use multifaceted approaches to classifying and housing transgendered individuals based on factors other than genitalia.[25] Although not a United States jurisdiction, Canada is similar enough culturally to be instructive. Canadian correctional facilities are legally prohibited from treating transgender prisoners purely according to genitalia-based gender classifications.[26]

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22. *See* http://www.nprec.us/docs/miami_correctionsmgmt_dennehy.pdf.

23. *See* Policy and Procedure Manual 3441.00, IV (2008).

24. *See Farrell v. Coughlin*, 88 Civ. 7364, Stipulation and Order (United States District Court for the Southern District of New York) (1990).

25. Se*e, e.g.,* King Country Department of Adult and Juvenile Detention, Adult Divisions, General Policy Manual, Inmate Classification and Discipline, 6.03.007; Illinois Department of Corrections, Administrative Directive , Programs and Services, Medical and Health Care, Evaluations of Offenders with Gender Identification Disorders 04.03.104; Minnesota Department of Corrections, Policy 202.045, Evaluations and Placement of Transgender Offenders. *See also Crosby v. Reynolds*, 763 F. Supp. 666, 669–70 (D. Me. 1991) (upholding placement of preoperative transgender person undergoing hormone treatment, at her request and on the recommendation of the jail's contract physician, within the female population, even in the face of a challenge by the prisoner's female cellmate, who alleged it was a violation of her right to privacy); *Falls v. Nesbitt*, 966 F.2d 375, 376 (8th Cir. 1992) (describing a "special section of the prison reserved for those prisoners who are slight of build, physically weaker than the typical inmate, preyed upon, or, in many cases, homosexuals"); *McCray v. Bennett*, 467 F. Supp. 187, 190 (M.D. Ala. 1978) (describing segregation unit housing for, among others, "known homosexuals," prisoners who have histories of institutional violence, and those who are being punished for violating prison rules); *Inmates of Milwaukee County Jail v. Peterson*, 353 F. Supp. 1157, 1161 (E.D. Wis. 1973) (describing cell block housing for, among others, homosexuals and narcotic addicts undergoing treatment or detoxification); *Lucrecia v. Samples*, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *1–2 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (noting that prisoner who "had not as yet completed the transformation" lived in female section at Federal Correctional Institution Lexington).

26. *See Kavanagh v. Attorney General*, Canadian Human Rights Commission (2001), available at http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=264&lg=_e&isruling=0.

VIII. Conclusion

WLC opposes the proposed 801.3 and 801.4. These proposed regulations would violate the DC Human Rights Act and the Eighth Amendment. Moreover, they would be bad public policy for the District of Columbia. WLC would be willing to work with the Office of Human Rights and DCDC to create a legal and workable solution for housing transgender men and women safely when they are in the custody of the Department of Corrections.

Sincerely,

Rod Boggs
Executive Director

Phil Fornaci
D.C. Prisoners' Project Director

Deborah M. Golden
Staff Attorney

CC via email:
D.C. Mayor Adrian Fenty
Mr. Christopher Dyer, Director, Mayor's Office of GLBT Affairs
DCDC Director Devon Brown
D.C. Councilmember Vincent C. Gray
D.C. Councilmember Jack Evans
D.C. Councilmember Carol Schwartz
D.C. Councilmember David Catania
D.C. Councilmember Phil Mendelson
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