

August 1, 2008

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

Dear Ms. Taylor:

On behalf of the Equity Project, a collaboration of Legal Services for Children, the National Center for Lesbian Rights, and the National Juvenile Defender Center, we write to oppose the proposed amendments to the District of Columbia Municipal Regulations regarding the gender identity and expression provision of the D.C. Human Rights Act. The Equity Project is a national initiative to ensure fairness, dignity, and respect for lesbian, gay, bisexual, and transgender (LGBT) youth in delinquency courts.¹ We are particularly concerned about the potential devastating impact of the proposed regulations on youth committed to the Department of Youth Rehabilitation Services (DYRS) custody.

The District's Human Rights Act serves as a national model because of its expansive prohibition against gender-identity discrimination.² The new proposed Sections 801.3 and 801.4 of the regulations, however, would roll back the broad protections of the Act. Section 801.3 provides that agencies would not be required "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." To be valid, regulations must be consistent with the statutes under which they are promulgated.³ By carving out a wide-reaching exception, Sections 801.3 and 801.4 squarely contradict the original intent of the law – to end discrimination based on gender identity or expression in the District⁴ – and as such, constitute an improper use of rulemaking authority.

¹ For more information, please visit www.equityproject.org.

² D.C. Code § 2-1402.73.

³ *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").

⁴ D.C. Code § 2-1401.01.

Regulations cannot alter the statutes under which they are promulgated,⁵ yet these proposed regulations aim to do just that. According to media reports, the proposed rules were initiated after the D.C. Inspector General issued an opinion suggesting the Department of Corrections' policy on inmate gender identification violated the District's human rights regulations.⁶ Rather than complying with the law, the District is now attempting to make an end run around the Human Rights Act by doing through regulation what can only be achieved through statutory amendment: exempting entire agencies from the provisions against gender-identity discrimination.

The safe and non-discriminatory treatment of transgender youth in the justice system should be a District priority. A disproportionate number of transgender youth are involved in juvenile justice systems nationwide.⁷ Widespread discrimination and prejudice against transgender individuals, a general lack of understanding of gender identity, and other factors, such as lack of familial support, place transgender youth at greater risk for juvenile justice involvement.⁸ Once these youth enter the system, they are often treated harshly and placed in facilities where they are sexually and physically abused and harassed. Such identity-based harassment and abuse can have serious negative impacts on the youth entrusted to state care.⁹

Increasingly, courts and policymakers are recognizing the need for policies and practices to protect transgender youth in secure facilities and group homes. In 2006, for example, a federal district court held in *R.G. v. Koller* that the Hawaii Youth Correctional Facility (HYCF) violated the due process rights of the LGBT youth in its custody by placing youth in isolation for their alleged protection and by allowing the youth to endure pervasive verbal, physical, and sexual abuse.¹⁰ One of the plaintiffs was a transgender girl who was originally placed in the girls' unit but was subsequently transferred to the general boys' unit where she was subjected to physical and sexual assaults. The defendants' own experts submitted declarations stating that they believed that male-to-female transgender wards, like the plaintiff, were "better off . . . with the girls than anywhere else . . . and that the placement kept them physically and psychologically safe." *Id.* at 1145. *R.G. v. Koller* makes clear that juvenile justice agencies that house youth

⁵ See *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936).

⁶ Richard J. Rosendall, "Guarding Our Gains," *Metro Weekly*, July 31, 2008, available at <http://www.metroweekly.com/gauge/commentary.php?ak=3665>, last visited July 31, 2008.

⁷ Feinstein, R., Greenblatt, A., Hass, L., Kohn, S., & Rana, J. (2001). *Justice for all? A report on lesbian, gay, bisexual, and transgendered youth in the New York juvenile justice system*. New York: Lesbian and Gay Project of the Urban Justice Center; Wilber, S., Ryan R., & Marksamer, J. (2006). *CWLA best practice guidelines: Serving LGBT youth in out-of-home care*. Atlanta, GA: Child Welfare League of America; Woronoff, R., Estrada, R., & Sommer, S. (2006). *Out of the margins: A report on regional listening forums highlighting the experiences of lesbian, gay, bisexual, transgender, and questioning youth in care*. Atlanta, GA: Child Welfare League of America.

⁸ Marksamer, J. (2008). *And by the Way, Do You Know He Thinks He's a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Juvenile Delinquency Courts*. *SEXUALITY RESEARCH AND SOCIAL POLICY*. 5, 72-23.

⁹ See *R.G. v. Koller*, 415 F.Supp.2d 1129, 1143-1144 (D. Hawai'i, 2006) (citing testimony of Dr. Robert Bidwell, an expert in adolescent medicine at the John A. Burns School of Medicine at the University of Hawaii).

¹⁰ *Id.* at 1154-59.

without regard for their gender identity or expression put transgender youth at risk of serious danger and can incur liability as a result.

More recently, the New York State Office of Children and Family Services (OCFS) adopted a policy that prohibits discrimination of youth in its custody who self-identify as, or are perceived to be, lesbian, gay, bisexual, transgender, or questioning (LGBTQ).¹¹ In addition to requiring training on working with LGBTQ youth for all OCFS staff, the policy creates a Decision-making Committee to consider issues such as placement of youth based upon gender identity or gender expression, as well as the wearing of uniforms that is consistent with a youth's identified gender.¹² The policy also allows residents to request use of a preferred first name rather than legal name, and requires staff to refer to youth by their pronoun of choice.¹³ As New York state has acknowledged, ensuring the fair treatment of transgender youth in its custody is both necessary and possible. No inherent conflict exists between protecting the rights of transgender youth in facilities and the state's administrative responsibilities; quite the contrary, protecting the rights of transgender youth is essential to ensuring that facilities comply with constitutional mandates.

The District's own law enforcement policies have also moved in a positive direction. The Metropolitan Police Department (MPD) adopted a policy to ensure that transgender arrestees "are processed and housed safely and efficiently to the greatest extent possible."¹⁴

With the proposed regulations, the District is now reversing the progress it has made and stepping directly out of line with the increasing momentum around the country to ensure the safety of transgender youth in the juvenile justice system. We urge you not to rollback the important protections provided in the Human Rights Act and instead focus on ensuring that all transgender individuals, including youth in DYRS custody, do not experience discrimination based on their gender identity and are treated with the dignity and respect to which they are entitled.

Very truly yours,

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National Juvenile Defender Center

Jody Marksamer
National Center for Lesbian Rights

Shannan Wilber
Legal Services for Children

¹¹ OCFS Policy and Procedures Manual 3442.00 (March 17, 2008).

¹² OCFS Policy and Procedures Manual, Appendix: LGBTQ Youth PPM 3442.00 at 2.

¹³ *Id.* at 7.

¹⁴ General Order of the D.C. Metropolitan Police, PCA-501.02.