

June 28, 2001

VIA FACSIMILE & REGULAR MAIL

Senator -----

Dear Senator -----:

This letter is a follow-up to some of the questions you raised at the committee hearing on Tuesday, May 30 on H5920, a bill to add “gender identity and expression” to Rhode Island’s non-discrimination laws. In particular, I want to assure you that the language used in the bill is narrowly and specifically intended to ensure that transgender people are protected from discrimination based on gender-related identity, expression, and behavior.

The language reflects a recognition that there is an array of transgender people who face discrimination. The language of the bill was drafted to cover the various types of transgender people, including : (1) transsexual people who undergo full sex-reassignment, including sex-reassignment surgery and hormone therapy, ; (2) transgender people who transition with hormone therapy only (and do not undergo surgery); and (3) transgender people who do not undergo any medical intervention but whose gender-related expression is not consistent with their assigned sex at birth.

The bill does not use the terms “transgenderism” or “transsexualism” because doing so would create an equal protection problem by prohibiting gender-based discrimination only for one specific group, which is contrary to the way all other non-discrimination laws are drafted. Rhode Island’s other non-discrimination provisions do not single out or name a specific protected group, but rather identify protected characteristics and prohibit discrimination based on those characteristics.

For example, the law prohibits sex discrimination, rather than prohibiting discrimination against women. Similarly, the law prohibits race discrimination, rather than prohibiting discrimination against African-Americans or other specific racial groups. This identification of prohibited characteristics, rather than identification of the persons who are covered by the law ensures equal treatment for all Rhode Island citizens.

In the case of H5920, consistent with other non-discrimination laws, the bill’s language identifies the protected characteristics that give rise to discrimination against

transgender people, namely, gender-related identity, gender-related expression, and gender-related behavior. It puts the burden on complainants to prove that they suffered discrimination because of those gender-related characteristics.. As is true for all nondiscrimination laws, any person (not just a transgender person) will be eligible to bring a discrimination claim under H5920, but the claim will *only* be successful if the complainant can prove that he or she was discriminated against because of the protected characteristics. The gatekeeping mechanism for frivolous claims is their failure in the Human Rights Commission and courts.

In addition to raising equal protection problems and being at odds with other non-discrimination laws, using the word “transgender” in the bill would also be inadvisable because the term is of recent vintage and does not yet have fully established or universally shared meaning. Including it in a law before there is a collective understanding of its full scope would be unwise and potentially have unforeseen outcomes, perhaps most troubling of which is that it could exclude people who face discrimination but do not necessarily identify as transgender or who may not be understood to be transgender by a court.¹

The language in H5920 identifies the characteristics that are typically targeted by those who discriminate against transgender people and prohibits decisions in employment, housing, public accommodations, and lending to be made on the basis of those characteristics.. The requirement that the discrimination must be based on *gender-related* expression, *gender-related* identity, and *gender-related* behavior, ensures an appropriately narrow interpretation of the law.

As with Rhode Island’s other non-discrimination laws, the burden will always remain on the plaintiff to demonstrate that the motivating factor giving rise to the discrimination was *gender-related*, as the law requires. Although no law can prevent specious claims from being advanced, there is no reason to think that prohibiting this type of discrimination will give rise to a disproportionate number of such claims. There is nothing in the bill that would allow a complainant to by-pass the usual evidentiary requirements for proving discrimination or to succeed on a claim in which the basis of discrimination is anything other than gender-related identity, expression or behavior.

In this regard, it is worth noting that the language in H5920 has been used in a number of other state and local jurisdictions. The track record in these other jurisdictions is encouraging. There is no indication that employers, administrative agencies, or courts are having any problem applying or interpreting the language in a way that is reasonable and consistent with legislative intent.

In closing, I simply want to reiterate the compelling need for this law. The discrimination that transgender people face is rampant and pervasive. Currently, the

¹ For example, consider the case of Brandon Teena, the young transgender man from Nebraska who was brutally raped and ultimately murdered by two associates when they learned that he was not biologically female. Nothing the record of that case or even in the facts as subsequently learned clearly indicate that he identified or even thought of himself as transgender.

Rhode Island Human Rights Commission rejects discrimination complaints brought by transgender people stating that the law simply does not provide any jurisdictional grounds for that agency to accept such claims. The Commission supports the legislation and has testified that it is not concerned about any explosion of claims. Moreover, the Commission has looked closely at the language and does not believe that it is overly broad in any way. I strongly urge you to support this legislation and would be happy to discuss more specifically any remaining concerns you have regarding its language.

Very truly yours,

Jennifer L. Levi, Esq.
Gay and Lesbian Advocates and Defenders