



November 13, 2018

Mr. Ken Hyle
Assistant Director/General Counsel
Federal Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

Dear Mr. Hyle,

Thank you for giving us the opportunity to speak with you about the Bureau of Prisons’ (“Bureau”) May 11, 2018 Transgender Offender Manual Change Notice (“Change Notice”). While we appreciate your representation that the Bureau “will continue to use all available options to safeguard transgender offenders, and all inmates, from sexual abuse and other harm,” we still have concerns about what appears from the language of the Change Notice to be a policy shift that has been adopted by the Bureau.

What is most concerning about the Change Notice is the deletion from Section 5 of the Manual that “[t]he [Transgender Executive Council (“Council”)] will recommend housing by gender identity when appropriate,” coupled with the addition of the edict in Section 5 of the Transgender Offender Manual (“Manual”) that the Council “will use biological sex as the initial determination for designation” and that “designation to a facility of the inmate’s identified gender would be appropriate only in rare cases.” Moreover, the seeming policy change is reiterated in Section 7 of the Manual, when again it is indicated that the “designation to a facility of the inmate’s identified gender would be appropriate only in rare cases.”

Our concern for the safety of transgender inmates who identify as females is not hypothetical, but rather the product of considerable research, see National Prison Rape Elimination Commission Report 73–74 (2009), and the testimony of transgender inmates presented to the National Prison Rape Elimination Commission (“Commission”) that vividly described the brutality these inmates experienced while housed in male facilities.

We have no reason to question the veracity of your representation that the Bureau’s policy regarding the designation of transgender inmates has not been altered by the Change Notice. However, in any bureaucracy, especially one as large as the Bureau, it can be reasonably anticipated that the perspectives of the leadership of an agency will not be implemented as envisioned. And, that reality is particularly acute when a historically marginalized population like members of the transgender community are the subject of discretionary decisions.

Additionally, at some point someone else will occupy your position and that individual may not share your perspective.

Moreover, the title of the Change Notice itself suggests that a different result is envisioned by the mere issuance of the document. In fact, a literal reading of the words of the Change Notice conveys the impression that the designation of transgender inmates should virtually never result in a placement consistent with their gender identity. We believe that this will inevitably result in some transgender inmates who identify as females being placed in male facilities, where they will be brutally raped and subjected to other forms of sexual abuse.

We are not indifferent to the Bureau's need to balance the diverse legitimate interests and concerns it faces when assessing the designation of the vast number of inmates now being detained in Bureau facilities. Nonetheless, we take exception to the policy that gender identity designations should be "rare," and believe that designation based on gender identity should be available to all who seek it absent individualized considerations that suggest in particular cases that such designation is likely to jeopardize the safety of prison staff or other inmates. But to start the designation assessment from the perspective that placements based on gender identity are appropriate only in rare cases seemingly amounts to a presumption against such placements, when in fact we believe that the research and testimony presented to the Commission calls for the exact opposite presumption, particularly when inmates request that they be housed in facilities consistent with their gender identity.

At a time in the history of our country when it appears that the progress we have achieved in diminishing the hostile and discriminatory treatment of members of the transgender community is in jeopardy, we ask the Bureau to reevaluate the prudence of maintaining the language contained in the Change Notice.

Again, thank you for affording us the opportunity to express our concern about the designation of transgender inmates committed to the custody of the Bureau.

Sincerely,

The image contains five handwritten signatures stacked vertically. From top to bottom: 1) "Regret Smith" in cursive script. 2) "Jim C. Karp" in a stylized, bold font. 3) "Jamie Tolson" in a cursive script. 4) "Pat Nolan" in a cursive script. 5) "Brenda J. Smith" in a cursive script. Below these, at the bottom of the page, is another signature: "Cindy Stuedemann Johnson" in a cursive script.

Former Members of the National Prison Rape Elimination Commission

The Honorable Reggie B. Walton, Chair
Commissioner John A. Kaneb, Vice-Chair
Commissioner James E. Aiken
Commissioner Jamie Fellner
Commissioner Pat Nolan
Commissioner Brenda V. Smith
Commissioner Cindy Struckman-Johnson