



The “Bathroom Bill” (SB 97) Memorandum of Opposition

The “Bathroom Bill” suffers from a variety of significant defects. If this bill were to be passed, the vagueness and unintelligibility of the “Bathroom Bill’s” definition of “gender identity” would make it impossible for employers, landlords, and owners of public accommodations to know precisely what conduct was protected. Also, the “Bathroom Bill” would hurt Delaware businesses and compromise the safety and privacy of women and girls. Delaware Family Policy Council (DFPC) urges Members of the State Legislature to vote “NO” on this unnecessary and divisive legislation.

1. The “Bathroom Bill’s” definition of “gender identity” is vague and unintelligible.

The “BATHROOM BILL” purposes to prohibit discrimination on the basis of “gender identity” in “employment, public works contracting, housing, public accommodations, and the insurance business.” Thus, the key provision of the “BATHROOM BILL” is its definition of “gender identity.” Section 3 of the “BATHROOM BILL” reads as follows: “gender identity means a gender-related identity, appearance, expression or behavior of a person, regardless of the person’s assigned sex at birth.”

This vague and unintelligible definition raises more questions than it answers. May a person’s gender identity change from day to day? More specifically, if an employee identifies as a man one day and as a woman the next, must his/her employer accommodate those day-to-day identity shifts by allowing the person to dress in accordance with them? How is an employer, landlord, or public accommodation to know which behaviors constitute an expression of gender identity? If a male who is dressed as a male is denied access to a ladies’ bathroom in a place of public accommodation, and that male argues that he must be allowed to use the ladies’ room on the basis of “gender identity,” must he be granted access? Is the owner of the place of public accommodation subject to civil liability if that owner refuses to grant access? How is the owner of a public accommodation to determine whether a person’s claims of “gender identity” are being made in good faith? For purposes of this bill, does it even matter?

The “BATHROOM BILL’s” definition of “gender identity” has been criticized for years. DFPC contends that the vagueness and unintelligibility of this definition are deliberate. The uncertainty about what the language actually means creates a legal environment of fear and intimidation.



2. The “BATHROOM BILL” is an anti-business proposal.

The “BATHROOM BILL” would hurt Delaware’s businesses in three ways. First, as stated above, the vagueness and unintelligibility of the definition of “gender identity” would make it impossible for businesses to know which behaviors engaged in by employees or customers must be accommodated. “BATHROOM BILL” would leave business owners to wonder how to implement its provisions, or (worse yet) leave them at the mercy of future state regulations. Second the “BATHROOM BILL” would open up a new avenue of potential liability for businesses—liability for real or invented transgressions upon a newly created civil right to “gender identity.” Third, the “BATHROOM BILL” invites the State of Delaware to substitute its judgment on a controversial issue for the judgment of Delaware business owners. Currently, a number of Delaware businesses have adopted policies of nondiscrimination regarding gender identity. While DFPC disagrees with those policies, DFPC believes that businesses—not the government—are in the best position to set policies regarding gender identity based on their own unique environments, needs, customers, employees, and values. There is no good reason for the state to substitute its judgment on this controversial issue for the judgment of Delaware business owners, who are already beleaguered by many burdensome state laws and regulations. Members of the Legislature who are concerned about the well-being of Delaware businesses should vote “no” on the “BATHROOM BILL”.

3. “BATHROOM BILL” would compromise the safety and privacy of women and girls.

The “BATHROOM BILL” is referred to as “the Bathroom Bill” for a reason: It would give biological males who claim to have female gender identities access to women’s bathrooms and locker rooms in places of public accommodation. Section 4 of the bill provides that it “All persons within the jurisdiction of this State are entitled to the full and equal accommodations, facilities, advantages and privileges of any place of public accommodation regardless of the... gender identity... of such persons.”

The State of Washington has passed a law similar to “BATHROOM BILL”. Recently, that law made national news¹ because it was interpreted to allow a 45-year-old biological male to fully undress in the ladies’ locker room at Evergreen College in front of women and girls. According to ABC News, a “privacy curtain” has been installed—but the biological male continues to use the locker room based upon Washington’s “Bathroom Bill.” If the “BATHROOM BILL” becomes law, Delaware can anticipate similar scenarios—whether involving transgender persons or involving males who claim to be transgender in order to access women’s bathrooms and locker rooms for exhibitionistic, voyeuristic, or predatory purposes.

In 2010, then-Congressman Barney Frank (D-MA) was interviewed by an LGBT publication regarding transgender issues in the proposed federal Employment Non-Discrimination Act. Rep. Frank made the following comments regarding congressional negotiations on ENDA:

Essentially, there are full protections for people who are transgender with a couple of provisos: One – the employer can ask for a gender consistent dress code. No mustaches and dresses. Two – people with one set of genitals do not have a legal right to get naked in

¹ See www.abcnews.go.com/blots/headlines/2012/11/transgender-student-in-womens-locker-room-raises-uproar/, accessed March 12, 2013.



front of the other set... Some accommodation has to be made there. If you insist on the right for unrestricted access to bathrooms – we lose. (emphasis added)²

Despite repeated expressions of concern regarding the privacy implications of the “BATHROOM BILL”, Delaware’s “BATHROOM BILL” advocates have not offered any limitations relating to the use of bathrooms and locker rooms by persons of the opposite sex. Thus, Members of the Delaware State Legislature who support the “BATHROOM BILL” are supporting a special-interest bill that ignores the privacy and safety of women and girls in an effort to accommodate the preferences of one special interest group. Those Members are also positioning themselves to the left of Barney Frank.

4. The “BATHROOM BILL” would create unnecessary difficulties for schools.

In 2011, the State of Massachusetts passed a law similar to the “BATHROOM BILL”. The law—known as The Massachusetts Transgender Equal Rights Act—went into effect in July of 2012. Accordingly, the Massachusetts Board of Elementary and Secondary Education adopted new regulations and directed the Massachusetts Department of Elementary and Secondary Education to provide guidance to school districts regarding implementation. The Department responded by providing *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment*.³ This *Guidance* document includes the following language relating to restrooms, locker rooms, and changing facilities:

In all cases, the principal should be clear with the student (and parent) that the student may access the restroom, locker room, and changing facility that corresponds to the student’s gender identity... Transgender students who are uncomfortable using a sex-segregated restroom should be provided with a safe and adequate alternative, such as a single “unisex” restroom or the nurse’s restroom.

The Guidance document goes on to make clear that while the comfort level of a transgender student matters, the comfort level of other students (to say nothing of parents) is unimportant:

Some students may feel uncomfortable with a transgender student using the same sex-segregated restroom, locker room or changing facility. *This discomfort is not a reason to deny access to the transgender student...* (emphasis added.)

The “BATHROOM BILL” provisions regarding schools invite a scenario where similar requirements are imposed on Delaware’s public schools. In addition to being burdensome, unnecessary, and irrelevant to the educational process, these types of requirements focus only on the preferences of students with gender identity issues; they ignore the needs and concerns of all other students, as well as the cost involved in compliance. Aside from transgender activists, the only Delawareans who would be pleased by this proposed policy change would be high school boys, who would have the opportunity to identify as transgender in order to enter girls’ locker rooms.

² See <http://lgbtpov.frontiersla.com/2010/04/12/rep-barney-frank-on-enda-dadt-and-how-lgbts-should-lobby-like-the-nra/>, accessed March 12, 2013.

³ See <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>, accessed March 12, 2013.



5. Transvestism and transsexuality are not appropriately addressed within the framework of civil rights legislation.

“BATHROOM BILL” advocates seek to woo Members of the Legislature by presenting this legislation as a method for remedying an injustice. The problem with this approach is that “BATHROOM BILL” would likely create more injustices than it would redress. Also, while civil rights legislation is best utilized to protect against discrimination based on innate characteristics (race, gender) and constitutionally-protected rights (religion), the “BATHROOM BILL” addresses a chosen behavior that is not constitutionally protected.

Gender Identity Disorder or Gender Dysphoria is a psychiatric condition listed in the Diagnostic and Statistical Manual. “BATHROOM BILL” advocates would have the State of Delaware accommodate persons suffering from Gender Identity Disorder by mandating the social acceptance of behaviors associated with the disorder. While this approach may appear compassionate, it is not truly compassionate to seek to normalize what is abnormal, or to indulge a person who wishes to believe something that is untrue. The fact is that a male is a male, and a female is a female. Advocates of this legislation can argue that times have changed, but they cannot credibly argue that humanity as a gendered species has changed. A truly compassionate and just approach to any person with a psychiatric disorder is to help the person to overcome it.

6. “BATHROOM BILL” would further expand the reach of Delaware’s fundamentally flawed hate crimes law.

Delaware Family Policy Council is an organization that values the inherent dignity and worth of every person. As such, DFPC condemns any acts of hatred or mistreatment directed against anyone for any reason, including hatred or mistreatment based on gender identity issues. To put it simply, we support neither hate nor crimes. However, DFPC respectfully disagrees with Delaware’s existing hate crimes law and does not support expanding it to include new protected categories. Crimes against persons who dress or identify as members of the opposite sex can and should be punished just like any other crimes.

