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SB 761

Correctional Facilities- Transgender, Nonbinary, and Intersex Inmates (Transgender Respect, Agency, and Dignity Act)

MCAA Position: **OPPOSE**

TO: Judicial Proceedings Committee

DATE: March 10, 2023

FROM: Brandon Foster, Director of
Corrections Charles County Detention
Center

Local jails in Maryland have a constitutional obligation to ensure the equitable treatment of all inmates and to provide for their safety and health. Our policies and procedures reflect those obligations, and we strive to accomplish these goals. The limits and requirements of this bill are a form of micromanagement that would make it very difficult to meet the goal of safe and effective case management.

Correctional managers are very aware of transgender issues related to incarceration. There is generally more awareness of transgender issues today than there ever has been. For correctional managers, these issues are much more complex than just how one identifies or their preferred honorifics and pronouns. Our policies reflect the recent decision by the 4th Federal Circuit Court whereby the decision for placement of an inmate cannot solely be based on a person's genitalia. Case management teams must objectively consider several factors when classifying and placing inmates. An inmate's safety is priority in making these critical decisions. A good classification policy considers safety, health, vulnerability, current criminal charges, past criminal and behavioral history, gender identity, and many other factors. Unfortunately, we could not meet our constitutional obligations if these decisions were left almost entirely to an inmate's preference.

There are parts of this bill that where we agree. We agree that the definition of "gender identity" should be consistent with Section 20-101 of the State Government Article. We also agree with Section 9-618 of this bill which requires correctional facilities to adopt non-discriminatory policies. And I can assure you that they already exist in jails and prison in Maryland.

Parts of this bill are ambiguous as to whether it applies to local facilities, state facilities, or both. Title 9 of the Correctional Services Article generally applies to both. It appears Section 9-619 of this bill applies to locals, but Section 9-620 seems to only apply to state facilities. I suggest that some of the language must be clarified.

I believe it is too soon to pass legislation on this issue when we give it real-world consideration. There is considerable ongoing litigation related to these issues. Passing this bill would most certainly lead to an explosion of litigation in Maryland. Some of the legal questions that remain are:

- Is it a constitutional violation to place an inmate, not according to preference, but according to several other legitimate risk factors?
- Do officers have a legitimate harassment complaint when required to search someone of the opposite biological sex?
- Is it a constitutional violation under the 1st amendment to compel speech by officers to use the preferred pronouns and honorifics of an inmate?

I expect that the courts, and possibly the U.S. Supreme Court, may make future rulings on these issues. In the meantime, it is probably unwise to pass legislation that would likely lead to a flood of litigation and could cost the State and local governments in Maryland millions.

For these reasons, I ask this committee to give SB 761 an unfavorable report.