STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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The Honorable John Carney
Governor

John McNeal
SCPD Director

MEMORANDUM

DATE: June 21, 2017

TO: All Members of the Delaware State Senate and House of Representatives

FROM: Ms. Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

RE: H.B. 5 (Equal Protection)

This legislation was introduced on May 16, 2017 as a revised version of H.B. No. 2. As of May 30, it awaited action by the House Administration Committee.

As background, the 14th Amendment to the U.S. Constitution provides that no state may "deny any person within its jurisdiction the equal protection of the laws." The federal "equal protection" clause has been invoked by the courts to invalidate discrimination against persons with disabilities. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) [Supreme Court invalidated requirement of special use permit for group home housing individuals with intellectual disabilities as based on irrational prejudice and inconsistent with Equal Protection]. Many states include variations of the "equal protection" mandate in their respective state constitutions. For example, the New York State Constitution (§11) reflects the following standard: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

In 2016, former Senator Peterson discovered that the Delaware Constitution omits an equal protection clause. In response, she introduced legislation (S.B. No. 190) as the first leg of a Constitutional amendment to add an equal protection clause. S.B. No. 190 proposed to add the following provision to the Delaware Constitution:

> §21. Equal protection
>
> Section 21. Equal protection under the law shall not be denied or abridged because of

race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity, or national origin.

For background on the 2016 bill, see the attached articles. The legislation was introduced late in the session and was ultimately laid on the table.

H.B. No. 5 proposes the adoption of a shorter version than the 2016 bill:

§21. Equal protection

Section 21. No person shall be denied equal rights under the law.

This version is ostensibly more analogous to the federal Equal Protection clause which does not explicitly list protected classes. It is conceptually analogous to statutes which foster fundamental fairness in application of laws. For example, the Delaware Bill of Rights for persons with intellectual disabilities (16 Del.C. Ch. 55) reflects the following "equal protection" sentiment without using that term:

§5501 Basic rights.

Persons diagnosed with intellectual disabilities or other specific developmental disabilities have the same basic rights as other citizens.

Consistent with the synopsis, the Delaware judiciary would be expected to establish jurisprudence concerning the interpretation of the clause. There appears to be considerable bipartisan support for H.B. No. 2 which lists 22 House and 10 Senate sponsors/co-sponsors. However, a 2/3 vote in successive General Assemblies would be required to amend the Delaware Constitution.

Given the potential benefit of the Constitutional amendment to protect the rights of individuals with disabilities, the SCPD is endorsing the proposed legislation.

Thank you for your consideration and please contact SCPD if you have any questions regarding our position or observations on the proposed legislation.

cc: Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

HB 5 equal protection 6-21-17

Legislation proposed on equal protection

DELAWARE LEGISLATIVE SESSION

MATTHEW ALBRIGHT

Some General Assembly members want to place protections against discrimination in the Delaware Constitution.

They want to add one sentence to the document that has been Delaware's highest law since 1897: "Equal protection under the law shall not be denied or abridged because of race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity or national origin."

"We would make a statement of Delaware's values that we treat everyone equally, no matter who they are," said state Sen. Karen Peterson, D-Stanton, sponsor of the bill to make the amendment.

The bill comes amid national calls to amend the U.S. Constitution to stop gender discrimination and legislation in Arkansas and Indiana that allows businesses to refuse service to gay people, citing religious reasons. The U.S. Justice Department is suing North Carolina over its law requiring transgender people to use public restrooms and showers corresponding to the gender on their birth certificate.

Delaware has created various laws aimed at banning discrimination in things like employment and housing over the past few years. Most recently, began enforcing rules barring insurance companies from charging higher rates to transgender people or denying coverage for trans-related health care.

Peterson argues there are still plenty of holes in the laws of state and local governments that could be exploited. State agencies could decide to charge men more for fishing permits than women, set age limits on driver's licenses or refuse to provide certain accommodations for prisoners with disabilities, she said.

"There are a thousand other things covered by Delaware code where none those protections exist," Peterson said. "Rather than pick them off one by one, this is an umbrella."

EQUAL, Page 5A

Equal

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The bill was unveiled earlier this month in the midst of a busy legislative session, so it's not clear yet how many lawmakers support the change. All 12 Democrats are listed as co-sponsors, and Peterson said at least one Republican, state Sen. Cathy Cloutier, R-Heatherbrooke, asked to be added after the bill was listed. The session ends June 30.

Republican Senate Minority Leader Gary Simpson, of Milford, said he is skeptical. "I think this legislation is unnecessary since all the classes mentioned in the bill are already covered under existing law," Simpson said. "What are we gaining except election-year pandering?"

Democrats will need some Republican support because constitutional amendments require a two-thirds vote. In the Senate, for example, Democrats hold 12 of 21 seats, so they would need two Republicans.

A constitutional amendment would be both symbolically and practically powerful, said Widener Law School professor Erin Daly.

"From a general perspective, it's hugely important, because what the constitution does is embody the state's values," Daly said. "It confirms that this is a fundamental value of Delaware and its citizens that we don't arbitrarily discriminate."

If anti-discrimination rules were placed in the constitution, Daly said, judges will be required to apply "strict scrutiny," the highest level of judicial rigor, when hearing discrimination cases. The state would have to prove an overwhelmingly important interest if it were to take any kind of action that treats one category of resident different from another.

A constitutional amendment also would mean that laws protecting equal rights would be much harder to overturn. "Laws can be repealed. They can be narrowed. They can fail to give the full measure of protection," Daly said. "It entrenches the values we are seeking to protect."

Daly said most state constitutions have equal protection clauses, though who exactly is protected varies from state to state.

Daly and Peterson are both in a group called DelawareERAnow, dedicated to passing the federal Equal Rights Amendment, which would expand the U.S. Constitution's equal protection clause to state that women have the same rights as men.

Peterson said the idea for her Delaware amendment came when she was looking at how the equal protection clause of the Delaware Constitution stacked up to the U.S. Constitution.

"Lo and behold, Delaware doesn't have one," Peterson said. "Our thought is, we absolutely should have one."

The News Journal - 06/15/2016 - A01

EQUAL PROTECTION AMENDMENT

Move to ban bias stalls in Del. Senate

JAMES FISHER

THE NEWS JOURNAL

A precedent-setting amendment to the state constitution that would bar discrimination in the law based on sexual orientation, gender identity, race, sex, age and several other factors was tabled Tuesday before it could come up for a vote in the Senate.

"There were some people who thought it was moving too fast, although it was introduced a month ago," said Sen. Karen Peterson, D-Stanton, the sponsor of SB 190. "If I had taken it to a vote today, the votes would not have been there."

As constitutional amendments go, Peterson's is short, adding one sentence: "Equal protection under the law shall not be denied or abridged because of race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity or national origin."

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Measure

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Sen. Ernie Lopez, R-Lewes, one of the moderate Republicans in Dover, said in a statement he'd be recorded as "not voting" on the bill if a vote was held Tuesday because the amendment's protections are already enshrined in state laws. He praised the amendment for trying to "create more of an atmosphere of equality and protection for those among us who feel most vulnerable," but said it was a "false choice" and redundant.

Peterson referenced the shooting at an Orlando gay nightclub over the weekend. "Violence against women has reached epidemic proportions and hatred and intolerance of gays and transgenders is still very much with us, as Sunday's events have shown," she said.

But Lopez, in a statement, said the Orlando shooting should have delayed a vote on SB 190. "In the wake of Orlando, there should have been a pause and time for reflection," he said.

Many states, including Delaware, have passed laws widening legal protections for gay, lesbian, bisexual and transgender people. But enshrining those nondiscriminatory norms in state constitutions requires even more votes than passing a bill does.

Thirty-one states had passed constitutional amendments banning gay marriage, but the Supreme Court's 2015 decision finding that the U.S. Constitution grants same-sex couples the right to marry invalidated those amendments.

"Much is left uncovered by legislation," said Peterson, who stunned colleagues in the Senate Tuesday when she announced she would not run for a fifth term. "I've seen bills sail through the General Assembly in less than a week. That's how fast laws can change and protections can disappear unless they're in the state constitution."

Every Senate Democrat is a sponsor of the amendment, but Democrats need some Republican allies because constitutional amendments require a two thirds vote. In the Senate, the 12 Democrats need two Republicans to support the amendment for a total of 14 favorable votes; Peterson told reporters there is currently support from "13 and a half" members.

In the 41-member House, 28 votes are necessary. And to succeed, two General Assemblies in a row will have to support the amendment by two thirds margins.

Rodney A. Smolla, dean of the Delaware Law School, testified in favor of the amendment, saying the rights people consider most crucial, like freedom of speech and freedom of religion, are locked in by constitutional definition.

"They have more presence and more resiliency" than regular statutes, Smolla said.

The Delaware Family Policy Council, which unsuccessfully fought the process that made same-sex marriage legal in Delaware, opposes the amendment. "The idea that laws should be fair to all citizens, regardless of who they are, should unite us on common ground. But SB 190 singles out specific classes to protect, while excluding others," said the group's director, Nicole Theis, in a statement. "This is not true equality."

Peterson, the state's first openly gay state lawmaker, was a leading champion of the same-sex marriage law that passed in 2013. She announced her decision not to run again after noting her wife, Vikki Bandy, was in the Senate chamber.

"I wanted her to be with me as I announce my retirement. I will not be running for re-election this year," Peterson said as several colleagues gasped in surprise. "You just know in your heart when it's time. And it's true. For me, it's time."

Sen. F. Gary Simpson, R-Milford, praised Peterson.

"Sen Peterson and I probably disagree on a few things that have come before us this year," Simpson said. "I could always count on what she said to me to be her heartfelt analysis of the issue before us and I always respected her for that."

No other candidate has filed for Peterson's seat in either party. Candidates have until July 12 to declare an intent to run. Peterson's decision puts pressure on the Democratic caucus to find a candidate who can hold the seat and not erode the Democrat's three-vote majority in the Senate.

Sen. Karen Peterson, D-Stanton, tells reporters why she tabled a constitutional amendment guaranteeing equal protection on Tuesday.

JAMES FISHER/THE NEWS JOURNAL