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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA CO. CIRCUIT COURT

MEN & WOMEN AGAINST DISCRIMINATION,
a West Virginia corporation,

Plaintiff,

v.

CIVIL ACTION NO. 08-C-1056
JUDGE: Stucky

THE FAMILY PROTECTION SERVICES BOARD, a West Virginia public body, corporate and politic, *et al.*

Defendants.

FILED
MAR 17 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISION OF THE COURT

This matter is before the Court for consideration of cross motions for summary judgment. Counsel for each party appeared before the Court for oral argument on these motions on the 29th day of June, 2009. The Court has considered the oral presentation of counsel, the motions, exhibits, interrogatories, depositions, affidavits and memoranda of the parties submitted in support of their respective motions. The Court has further considered the entire contents of the official Court file in this matter. Based upon all of this the Court states the following findings of material fact:

1. Men & Women Against Discrimination is a non-profit charitable corporation organized to promote fairness and gender equality in the implementation of the purposes of the West Virginia Domestic Violence Act and the manner in which services are provided pursuant to that Act to the citizens of the State of West Virginia.

2. The Family Protection Services Board is a public body created pursuant to the provisions of *W. Va. Code* §48-26-301.

EXHIBIT
A

3. The Family Protection Services Board was both created and defined by *W. Va. Code* §§48-26-101 and 48-26-202; the legislative act both defining and creating the Family Protection Services Board is known as the "West Virginia Domestic Violence Act."

4. The West Virginia Domestic Violence Act, *W. Va. Code* §§48-26-101, *et seq.*, defines domestic violence within the meaning of the Act in terms of absolute gender neutrality without reference in any regard to the gender of either the alleged perpetrator or victim. *W. Va. Code* §§48-27-201, 202, 204.

5. The Family Protection Services Board acts as an agency or instrumentality of the State of West Virginia to implement a portion of the West Virginia Domestic Violence Act; the statutory duties of the Board relative to the West Virginia Domestic Violence Act are set forth in *W. Va. Code* §48-26-401. Those duties include the establishment and enforcement of a system of standards for annual licensure for all domestic violence shelters and programs in the State of West Virginia, the implementation of a perpetrators' intervention program for the perpetrators of domestic violence and the award to domestic violence programs and/or shelters, for each fiscal year, ninety-five percent (95%) of the total funds collected and paid over during the fiscal year into the West Virginia Family Protection Fund, a special revenue account established pursuant to *W. Va. Code* §48-2-604 and supported by a tax or fee in the sum of fifteen dollars ($15.00) collected by the county clerks of the various counties of West Virginia for each marriage license issued in each county during the fiscal year.

6. In carrying out its duties regarding the appropriation of funds from the West Virginia Family Protection Fund, the Family Protection Services Board must comply with the "funding application requirements" specified in *W. Va. Code* §48-26-601 which provides in pertinent part:

> (c) A family protection shelter or program may not be funded initially if it is shown that it discriminates in its services on the basis of race, religion, age, sex, marital status, national origin or ancestry. If such discrimination occurs after initial funding, the shelter or program may not be refunded until the discrimination ceases.

7. In order to apply for funding to be allocated by the Family Protection Services Board, a "family protection program" or "family protection shelter" or "a program for victims of domestic violence" as defined by *W. Va. Code* §§48-26-204, 48-26-206, 48-27-207 must be licensed programs as defined by those provisions of the Code.

8. The Family Protection Services Board has adopted administrative rules pursuant to the authority delegated to it by the legislature; these rules can be found in Title 191 of the *West Virginia Code of State Rules*.

9. In §191-1-2.1 *West Virginia Code of State Rules*, the Family Protection Services Board has defined its purposes in pertinent part as follows:

> "to provide ongoing administration and allocation of the West Virginia Family Protection Funds and to establish and enforce a system of standards for the annual licensure of domestic violence programs."

10. Section 191-2-1 *et seq.* of the *West Virginia Code of State Rules* contains the Family Protection Service Board's established general standards and procedures for the licensure of family protection programs as specified in *W. Va. Code* §48-26-401. The standards and procedures for licensure provide that any "certified domestic violence advocate" must be employed by a licensed family protection program and further have been approved by the board of directors of the West Virginia Coalition Against Domestic Violence as meeting the eligibility standards in the Coalition Against Domestic Violence Advocate Certification Program. *West Virginia Code of State Rules* §91-2-2.2.

11. The Family Protection Services Board licensing standards for family protection programs require, among other things, that no family protection program can be licensed unless its board of directors shall have adopted and monitored implementation of written personnel policies that shall, at a minimum, assure that at least one-third (1/3) of its direct service providers are certified by the West Virginia Coalition Against Domestic Violence as "certified domestic violence advocates." *West Virginia Code of State Rules* §191-2-3.2.k.12.

12. The Family Protection Services Board's licensing standards for family protection programs further require that each program, to maintain licensure, must report to the board on an annual basis the number of "certified domestic violence advocates" on its staff and the proportion of domestic violence advocates on staff to non-certified advocates.

13. Certification as a Domestic Violence Advocate is not available to the general public but only to employees of programs that are members of the private trade group known as the West Virginia Coalition Against Domestic Violence.

14. There is no statutory basis for the Family Protection Services Board's exclusive reliance on certification by the West Virginia Coalition Against Domestic Violence, nor does any statute or rule specify with any degree of particularity what standards or requirements are to be met for certification and licensure that is a precondition to the receipt of public funding.

15. The West Virginia Coalition Against Domestic Violence is a private trade association funded in part by dues paid to it by programs licensed and funded by the Board.

16. Contrary to the intention of the Legislature to combat domestic violence in a comprehensive fashion, this rule denies licensure to any entity that did not adhere to whatever requirements the Coalition from time to time adopts. This could include a group staffed by the most prominent and well-educated individuals working in the field of domestic violence in the United States.

17. Because this rule regarding certification of domestic violence advocates deprives the plaintiffs and its constituent members the opportunity to even seek certification necessary to more legitimately convey its message and fulfill its mission, enforcement of this rule regarding the certification of domestic violence advocates has a substantial chilling effect on the plaintiff's rights of free speech.

18. The Plaintiff, in the representative capacity of its constituents, wishes to advocate against the incidence of domestic violence and to assure that programs funded by the State of

West Virginia receive fair allocation of funds; the ability to hold itself out as including among its membership individuals who are "certified domestic violence advocates" would add additional legitimacy to plaintiff's ability to exercise its free-speech rights and to carry out its mission without necessity that participants comply with the ideology, certification requirements, or gender bias of a private organization to whom a state agency has delegated certification authority without the adoption of objective standards and requirements stated in a gender neutral fashion for such certification

19. *West Virginia Code 48-26-404* mandates the Board to propose rules for programs of intervention for perpetrators of domestic violence. The enabling statute specifically directs that the rules shall include criteria and required qualifications concerning education, training and experience for providers of intervention programs. The Legislature has directed that the standards adopted by the Board must be based upon and incorporate three principles: (1) the focus of a program is to end the acts of violence and ensure the safety of the victim and any children or other family or household members, (2) domestic violence constitutes behavior for which the perpetrator is accountable, and (3) although alcohol and substance abuse often exacerbate domestic violence, it is a separate problem which requires specialized intervention or treatment.

20. In response to this legislative mandate the Board adopted *Rule 191-3-3*. A part of this rule requires that all educators/facilitators working in licensed perpetrator intervention programs shall have a minimum of 30 hours of training approved by the Board including, but not limited to, (1) the dynamics of domestic violence within the context of power and control, (2) the effects of domestic violence on victims and their children and the critical nature of victim contacts and safety planning and (3) ***the understanding that domestic violence is deeply rooted in historical attitudes towards women and is intergenerational.***

21. The promulgation of this rule forms the basis for the Board's official position that perpetrator intervention programs should actually be and, in fact are, administered as "batterers" intervention programs with the fundamental premise that only men can be batterers and therefore only men are appropriate candidates for participation in perpetrator intervention programs. ?

22. The Legislature has expressed a clear intention to provide for licensure and funding of perpetrator intervention programs that are gender-neutral; the Board, acting on its own, has ignored this intent and created a gender specific program that includes only men and excludes all women.

23. As a result of the Board's adoption of *Rule 191-3-3,* women are deprived of the benefits of participation in perpetrator intervention programs and male victims of domestic violence perpetrated upon them by women are deprived of the benefits they may receive from their spouse, sibling or significant other's participation in an approved program.

24. The plaintiff, in the representative capacity of its constituents, desires to speak out and advocate for the equal access to perpetrator intervention programs for both male and female perpetrators; the ability of the plaintiff to hold itself out as including among its membership individuals who are "certified domestic violence advocates" would add legitimacy to the plaintiff's ability to exercise its free-speech rights and carry out this mission; inability to include such "certified domestic violence advocates" within its membership has a substantial chilling effect on the plaintiff's ability to deliver its message of gender-neutrality.

25. *Rule 191-2-4.11* places additional licensing standards on programs that also serve as domestic violence shelters. The standards in this section are in addition to the program standards set forth in 191-2-3, so that the same issues relative to staffing by Coalition certified Domestic Violence Advocates apply.

26. The plaintiff, on behalf of its constituent members, desires to advocate for the gender-neutral treatment of persons seeking services from domestic violence shelters; the ability of the plaintiff to have as a part of its membership persons certified as domestic violence advocates would enhance the plaintiff's ability to deliver this message.

27. The plaintiff, on behalf of its constituent members, desires to advocate for equal access to domestic violence shelter services for both men and women and adolescent male and

female children; the plaintiff is unable to carry out this advocacy because *Rule 191-2-4.11* mandates that any licensed shelter must have a written process for obtaining alternative lodging to house victims of domestic violence and their children ***when the residential facility is filled to capacity or is unable to accommodate special needs populations, including adult and adolescent males.***

28. *Rule 191-2-4.11* not merely allows, but requires as a condition to licensure that any domestic violence shelter must adopt and adhere to the principles of "separate but equal treatment" based on gender; the practical effect of this rule is to exclude adult and adolescent males from their statutory right to safety and security free from domestic violence for no reason other than their gender; by the application of this rule male victims of domestic violence are rejected from licensed domestic violence shelters in West Virginia even when those shelters are otherwise unoccupied.

29. The existence of the separate but equal provisions of *Rule 191-2-4.11* has a substantial chilling effect on the ability of the plaintiff to advocate for the providing of services at domestic violence shelters on a gender-neutral basis.

30. The Board's adoption and implementation of *Rule 191-2-4.11, Rule 191-3-3* and *Rule191-2-1* has a present and substantial chilling effect on the plaintiff and its constituent members' expression of their speech, thoughts and ideas relative to domestic violence by depriving them of even the opportunity to attain certified domestic violence advocate status or even the opportunity to apply for program funding.

31. The defendants do not make appropriations from the West Virginia Family Protection Fund; the defendant's sole responsibility with regard to this fund is the formulation of a method for distribution of those funds by The West Virginia Department of Health and Human Resources.

32. The defendant's adoption and implementation of *Rule 191-to-4.11, Rule 191-3-3* and *Rule 191-2-1* have a direct effect on funding eligibility by limiting the universe of entities that can make application for funding.

33. Implicit in the plaintiff's prayer for injunctive relief is a substantive challenge to the validity of *Rule 191-2-4.11, Rule 191-3-3* and *Rule 191-2-1* that can be dealt with by the Court in this action by way of declaratory relief.

Based upon the foregoing findings of fact, the court states the following conclusions of law:

It is fundamental law that the legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or that alters or limits its statutory authority. *Rowe v. West Virginia Department of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982).

The intent of the West Virginia legislature relative to domestic violence is crystal clear. The legislature has found that every person has a right to be safe and secure in his or her home and family and to be free from domestic violence. *West Virginia Code 48-27-101 (A.) (1)*. To secure this right to all West Virginians the legislature has defined domestic violence and those who can be perpetrators or victims of domestic violence in the strictest of gender-neutral terms. *W. Va. Code* § 48-27-204. Every person, regardless of gender, enjoys a statutory right to participation in and receipt of domestic violence services offered by facilities licensed and funded in whole or in part by the state of West Virginia.

Section *191-2-1 et seq.* of the *West Virginia Code of State Rules* contains the Family Protection Service Board's established general standards and procedures for the licensure of family protection programs as specified in *W. Va. Code* §48-26-401. The standards and procedures for licensure provide that any "certified domestic violence advocate" must be employed by a licensed family protection program and further have been approved by the board

of directors of the West Virginia Coalition Against Domestic Violence as meeting the eligibility standards in the Coalition Against Domestic Violence Advocate Certification Program. *West Virginia Code of State Rules* §191-2-2.2. The Family Protection Services Board licensing standards for family protection programs require, among other things, that no family protection program can be licensed unless its board of directors shall have adopted and monitored implementation of written personnel policies that shall, at a minimum, assure that at least one-third (1/3) of its direct service providers are certified by the West Virginia Coalition Against Domestic Violence as domestic violence advocates. *West Virginia Code of State Rules* §191-2-3.2.k.12.

These rules exceed the authority granted to the Board. Nowhere in the enabling statute is the Board authorized to delegate the setting of standards for licensed facilities to a private trade organization such as the Coalition. In practice this rule excludes any person who does not adhere to the gender biased fundamental beliefs of the Coalition from applying for and receiving the status of certified Domestic Violence Advocate

Certification as a Domestic Violence Advocate is not available to the general public but only to employees of programs that are members of the private trade group known as the West Virginia Coalition Against Domestic Violence. Contrary to the intention of the legislature to combat domestic violence in a comprehensive fashion, this rule denies licensure to any entity that does not adhere to whatever requirements the Coalition from time to time adopts. This could include a group staffed by the most prominent and well-educated individuals working in the field of domestic violence in the United States.

The legislature has expressed a clear intention to provide for licensure and funding of perpetrator intervention programs that are gender-neutral. The Board, acting on its own, has morphed this intent into a gender specific program that includes only men and excludes all women. As a result, women are deprived of the benefits of participation in perpetrator intervention programs. Male victims of domestic violence perpetrated upon them by women are deprived of the benefits they may receive from their spouse, sibling or significant other's

participation in an approved program. This rule conflicts with the clear intent of the legislature and is void.

The defendant asserts that the plaintiff lacks standing to prosecute this case. The defendant says that the plaintiff lacks standing because it has never applied for certification as a domestic violence advocate nor has it ever sought licensure of a program or shelter. This argument is not well taken since it is abundantly clear from the language of the defendant's regulations that such applications on the part of the plaintiff or its constituent members would be futile.

Standing requirements are relaxed in First Amendment cases where "an overbroad statute [acts] to 'chill' the exercise of rights guaranteed protection." *United States v. Blaszak*, 349 F.3d 881, 888 (6th Cir. 2003). *See also Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (the "overbreath doctrine provides an exception to the traditional rules of standing and allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain statute is so broad as to 'chill' the exercise of free speech and expression.").

In the instant case, Plaintiff is challenging the constitutionality of the defendant's rules on their face because of their chilling effect on the plaintiff's exercise of its First Amendment rights and because these regulations on their face do not comply with the expressed intention of the legislature. Under such circumstances litigants are permitted to challenge a statute or rule not just because their own rights of free expression are violated, but because of a judicial prediction or assumption that the rule's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Sec'y of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956-957 (1984) (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

Numerous courts, including the United States Supreme Court, have determined that a self-imposed chilling effect on speech constitutes a sufficient injury in fact to confer standing. For example, in *Virginia v. Am. Booksellers Assoc.*, 484 U.S. 383 (1988). The lower courts have agreed, conferring standing on a wide range of plaintiffs whose expression is chilled by

government. *See, e.g., St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006) ("[w]hen a party brings a pre-enforcement challenge to a statute that provides for criminal penalties and claims that the statute chills the exercise of its rights to free expression, the chilling effect alone may constitute injury"); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (a plaintiff who is harmed by the infringement of another person's right to free speech has standing to challenge that infringement because the harm establishes standing); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (plaintiffs met the threshold for establishing standing for a First Amendment claim by demonstrating an actual and well-founded fear that a law prohibiting speech will be enforced against them).

In this case the plaintiff has established the actual and well-founded reality that rules adopted by the defendants prohibit the plaintiff and its constituent members from expressing their views regarding the gender-neutral nature of domestic violence by seeking certification as certified domestic violence advocates or the operators of licensed domestic violence programs, shelters or perpetrator intervention programs. In view of the reality of the plaintiff's situation, the Court concludes that the plaintiff has standing to prosecute this action.

Because the provisions of the defendant's Rule 191-2-1, Rule 191-to-4.11 and Rule 191-3-3 conflict with the express intention of the legislation that authorized the promulgation of these rules, and further because the continued implementation of these rules has an actual well-founded and real chilling effect on the plaintiff and its constituent members' exercise of their First Amendment rights to advocate the gender-neutral nature of domestic violence programs in the state of West Virginia, these rules are null and void.

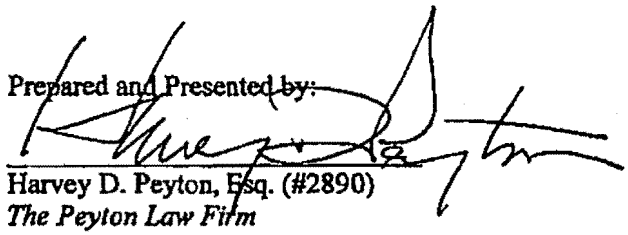
IT IS SO ORDERED.

ENTERED this 2 day of Oct., 2009.

JAMES C. STUCKY, JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5 DAY OF October, 2009
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared and Presented by:



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