GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL

March 16, 2009

The Honorable Phil Mendelson, Chairperson
Committee on the Judiciary and Public Safety
John A. Wilson Building, Suite 402
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: Bill 18-66, the "Domestic Partnership Judicial Determination of Parentage Act 2009"

Dear Chairperson Mendelson:

After reviewing the Committee Report on Bill 18-66, the "Domestic Partnership Judicial Determination of Parentage Act of 2009" (bill) issued on March 10, 2009, along with the accompanying Committee Print of the bill, I would like to congratulate you and your staff on the many improvements that have been made to the bill since its introduction last April. As noted in the report, the Committee Print incorporates comments from a variety of stakeholders, including Professor Nancy Polikoff and the other drafters, advocates, family law experts, representatives of the Department of Health, and staff from the Child Support Services Division and the Legal Counsel Division of my office. This version not only protects the rights of parents and children in families formed through domestic partnerships, it also removes provisions found objectionable by the federal Office of Child Support Enforcement ("OCSE"), clarifies parental relationships for children conceived through artificial insemination, discourages the disestablishment of parental relationships created through legal presumptions, and ensures that the process for determining parentage in the District continues to be workable and to reflect sound policy. As revised, the bill significantly expands and improves our existing law.

Although the bill provides important legal recognition to the relationships that domestic partners and other individuals have with the children they raise, I remain concerned that the bill could potentially place federal funding for the District's child support and TANF programs at risk, as detailed in my February 20, 2009 letter. From a policy perspective, the extension of parental rights and responsibilities to individuals in domestic partnerships is consistent with the goals of Title IV, Part D of the Social Security Act, approved January 4, 1975 (88 Stat. 2351; 42 U.S.C. § 651 *et seq.*) ("Title IV-D"), which is designed to ensure that children have and receive support from two legal parents. Moreover, federal law does not explicitly prohibit the states from legislatively extending parental rights to individuals on a basis other than marriage or genetic relationship. I have previously noted, however, that there are provisions in Title IV-D and its accompanying regulations that the federal Office of Child Support Enforcement ("OCSE") could construe as being inconsistent with the bill, and, because the bill amends provisions of District

law that are subject to federal requirements, my Office will be required to submit the bill to OCSE for review as part of the process for updating the District's state plan. *See* 45 C.F.R §§ 301.13, 392.70. As I indicated in my February 20, 2009 letter, I believe it would be prudent to obtain OCSE's views on the final version of the bill prior to its enactment to avoid a potential assessment of penalties and the need for corrective action. I therefore intend to submit the Committee Print, the report, copies of the amended sections, and the attached letter to OCSE for an expedited review.

I hope you will consider deferring further action on the bill until we receive OCSE's response. A positive decision by OCSE will allow the District and other states that may be developing similar legislation to implement these valuable protections openly and in cooperation with our federal regulators.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

PJN/lae

Enclosure

cc: Brian Moore, Legislative Counsel, Committee on Public Safety and the Judiciary
Wayne C. Witkowski, Deputy Attorney General, Legal Counsel Division
Tonya A. Sapp, Deputy Attorney General and Director of Legislative Affairs
Benidia A. Rice, Deputy Attorney General, Child Support Services Division
Laurie A. Ensworth, Senior Assistant Attorney General, Legal Counsel Division
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Richard Rosendall, Vice President for Political Affairs, Gay and Lesbian Activists Alliance
Robert Summersgill, Activist
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David Catania, Council of the District of Columbia
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Harry Thomas, Jr., Council of the District of Columbia
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
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February 20, 2009

The Honorable Phil Mendelson, Chairperson
Committee on Public Safety and the Judiciary
John A. Wilson Building, Suite 402
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: Bill 18-66, the "Domestic Partnership Judicial Determination of Parentage Act 2009"

Dear Chairperson Mendelson:

With this letter, I would like to share my thoughts and recommendations concerning Bill 18-66, the "Domestic Partnership Judicial Determination of Parentage Act of 2009" ("bill"), currently pending before the Committee on Public Safety and the Judiciary. As you know, this bill would protect the rights of same sex couples by, among other things, extending the marital presumption of parentage to members of domestic partnerships and clarifying the parental rights of individuals who create a child through artificial insemination.[1] The purpose of the bill is to give legal recognition to the relationships that same sex partners have with the children they care for, and we support this laudable objective. Since the bill was introduced, however, we have had concerns about its practical impact, based on the manner in which it was originally drafted. We have also been troubled by the bill's potential for exposing the District to monetary penalties if the federal Office of Child Support Enforcement ("OCSE") were to find that the bill itself, or its implementation, places the District out of compliance with child support program requirements imposed under Title IV, Part D of the Social Security Act, approved January 4, 1975 (88 Stat. 2351; 42 U.S.C. § 651 *et seq.*)("Title IV-D"). My office is particularly sensitive to child support compliance concerns because the Office of the Attorney General ("OAG") is the District's IV-D agency, and we only recently emerged from a federal penalty status based on a past inability to satisfy federal performance requirements.[2]

[1] The bill is not limited to domestic partnerships involving same-sex couples, however. In the District, heterosexual couples, family members, and others can also form domestic partnerships.

[2] The District paid in excess of $4.2 million in federal child support penalties assessed against the TANF block grant in fiscal years 2004 through 2006.

Given the importance of the policies the bill advances, we have invested considerable effort in attempting to resolve these issues. Over the past several months, my staff has worked closely with the bill's drafters, representatives of our Child Support Services Division ("CSSD"), the Department of Health ("DOH"), and Committee staff to propose solutions to drafting issues presented by the original version. We believe these discussions have resulted in improvements to the bill. For example, it is our understanding that the version the Committee is considering will include changes that: 1) clarify that the domestic partner presumption will apply only to the domestic partner of the child's mother, thereby eliminating the possibility of multiple parents; 2) exclude domestic partnerships between blood relatives from those subject to the parentage presumption; 3) eliminate problematic amendments to the Uniform Interstate Family Support Act contained in the initial version; 4) remove changes to the definitions of born in and out of wedlock to reduce federal compliance concerns; 5) place limits on the time during and the circumstances under which parentage established by a presumption may be disestablished by a third party; 6) clarify the presumptive effect of voluntary acknowledgements of paternity and genetic testing results; 7) add clarity and formality to the process by which a person's name will be added to a child's birth certificate under the bill;[3] and 7) make conforming amendments to promote the consistency of the bill's changes with the existing provisions of Chapters 9 and 23 of Title 16 of the District of Columbia Official Code. These changes would help ensure that, if the bill is enacted, the District's law on the establishment of parentage will continue to articulate a clear, coherent process.

In addition to providing recommendations on the bill's language, we have attempted to ascertain OCSE's position on the bill's proposed establishment of a presumption of parentage for domestic partners, requirements for birth certificates, and other amendments. Several provisions of Title IV-D and its accompanying regulations establish processes through which child support agencies must establish paternity for children born to unmarried parents. These provisions also specify when an individual's name may be listed as a father on a birth certificate, and indicate the manner in which paternity establishments may be counted in determining whether a state has met its performance requirements. The bill's extension of the marital presumption to domestic partners can be construed as consistent with the goals of Title IV-D in that it could allow the District to establish parentage and obtain child support for more children. However, Title IV-D and its regulations are geared toward the establishment of paternity for children who are born out of wedlock, and it is not clear that OCSE would recognize, for federal program purposes, parental rights and responsibilities legislatively established on behalf of same-sex and heterosexual couples in domestic partnerships under District law.

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[3] DOH has additional concerns about the fiscal impact of changes to this process and ambiguities concerning the confidentiality of documents filed in artificial insemination cases.

We submitted an early version of the bill to OCSE for review in May 2008, and received a response, dated September 24, 2008, that suggests that OCSE could find that a number of the bill's provisions violate federal law. Specifically, OCSE's letter stated that a violation of section 466(a)(5(D)(i) of Title IV-D might occur if, in the absence of a voluntary acknowledgement of paternity, the name of an unmarried father in a domestic partnership were listed on the child's birth certificate.[4] Further, the OCSE letter noted that, under the federal Defense of Marriage Act, Pub. L. 104-199 ("DOMA"), only a legal union between one man and one woman may be considered a marriage for the purposes of federal programs, and that, as a result, Title IV-D requirements, including those relating to the calculation of paternity establishment performance, would apply to children born to domestic partnerships to the same extent as they apply to out-of-wedlock births. Finally, the OCSE letter questioned, but did not resolve, whether, consistent with Title IV-D requirements, a state may statutorily extinguish the right of a semen donor to establish the paternity of a child in the absence of an agreement by the birth mother that the donor shall be a parent,[5] and whether, in the case of such an agreement, the donor's name may be added to the birth certificate in the absence of a voluntary acknowledgement. These comments suggest that OCSE might well find these and other provisions that remain in the bill to be in conflict with federal law.

In response to the compliance concerns expressed in the OCSE letter and the recommendations of the drafters, we have contacted the child support programs in several other states that have domestic partnership and civil union statutes similar to the bill to ascertain how they have implemented their legislation and whether they have received any response from OCSE. Seven states have similar legislation – Massachusetts, New Jersey, Oregon, California, New Hampshire, Connecticut, and Vermont – and, to date, we have discussed the bill with representatives of five of them.[6] We have received similar information from each jurisdiction we have contacted. With the exception of Massachusetts, which recognizes same-sex marriages, these jurisdictions generally confine domestic partnerships and civil unions to same-sex couples. In addition, some of these states have indicated that they extended parental rights to same sex couples without amending their paternity or birth certificate laws. According to the individuals we spoke with, OCSE is generally aware of their statutes, the number of domestic partnership and

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[4] The OCSE letter does not address whether the listing of a second mother who is the domestic partner of a child's birth mother would also violate this provision, or whether CSSD would be required to establish paternity for the child notwithstanding the domestic partnership presumption.

[5] The drafters have observed that this provision is contained in the Uniform Parentage Act, as a model approach to the establishment of parentage in cases of assisted reproduction involving artificial insemination.

[6] We have had conference calls with representatives of Vermont, New Jersey, and California, and had email correspondence on this issue with Massachusetts and New Hampshire. We are in the process of scheduling conversations with Oregon and Connecticut, as well as conversations with additional people in California and Massachusetts.

civil union cases they have handled is small, and OCSE has not taken regulatory action against any state based on the enactment or implementation of their legislation. We were typically advised, however, that OCSE has not directly addressed this issue with them and that questions remain about how OCSE will determine specific Title IV-D requirements should apply to cases subject to their statutes.

Given the language of Title IV-D, OCSE's letter, and the lack of information from another state indicating a clear finding by OCSE that similar legislation has raised no regulatory concern, it is my opinion that enactment of the bill could pose significant risk to the District. If OCSE were to conclude that the bill placed the District out of compliance with federal law, the District could lose the entire 66% federal share of its funding for the child support program. Further, if the District were unable to fund the child support program with local dollars after losing the 66% federal share, it could also risk losing the entire TANF block grant because having a functioning Title IV-D program is a condition for the receipt of TANF funds. Further, penalties could be assessed against the TANF block grant even if the District did not lose or replaced all of its federal Title IV-D funding. These fiscal consequences could occur in the following ways.

Under section 454(20) of Title IV-D, each state must have laws in effect that are required under section 466 of Title IV-D and must implement the procedures required by those laws. As noted above, the bill proposes several changes to current District law which OCSE could find to be inapposite to section 466 on its face. For example, the bill creates a requirement that a domestic partner's name be included on a child's birth certificate without there being a marriage or a voluntary acknowledgment of paternity as required by section 466(a)(5)(D). While other states' domestic partnership and civil union laws may have this result in practice, their statutes do not all explicitly require it. Additionally, OCSE could find that CSSD would not be complying with the paternity establishment regulations for children born out-of-wedlock pursuant to 45 CFR 302.31 by recognizing the parentage of children born to domestic partnerships. Pursuant to section 455 of Title IV-D, funding is provided only to IV-D programs for amounts expended pursuant to the operation of an approved state plan. Therefore, if OCSE were to disallow the District's state plan because of inconsistent legislation, or if OCSE were to determine that CSSD was not operating according to its state plan by not providing required services, funding for the IV-D program could be withdrawn. This could result in CSSD losing its federal funding, and consequently the District's TANF funding if the federal child support share were not replaced.

The District might also incur penalties under section 409(a)(8) of the Social Security Act, which requires a reduction in the TANF block grant of 1 - 2% based on several factors. One is a finding after an audit that the child support program failed to meet all of its state plan requirements, as described above. In addition, the TANF block grant could be reduced under section 409(a)(8) because of a failure to have reliable performance data or a failure to meet performance measures, specifically for paternity. The bill could raise

data reliability issues if OCSE disagrees with the way CSSD characterizes parentage establishments under the bill. For example, if CSSD includes children of domestic partnerships as children born-in-wedlock, OCSE could say that under DOMA (and local law), domestic partnerships are not "marriages" and therefore the children cannot be counted as born-in-wedlock. If these children are considered to be born out-of-wedlock, the question would be whether OCSE would consider parentages established under the domestic partnership presumption as legitimate paternity/parentage establishments recognized under the federal regulations. Although CSSD has been meeting its data reliability requirements for the last three years, if there were many of these cases and the data reliability auditors disallowed them, they could cause CSSD to fail a data reliability audit, thus exposing the District to penalties.

In addition, if CSSD does not seek paternity adjudications or acknowledgments for children born to domestic partnerships because of the bill and OCSE does not honor the domestic partnership presumption, this could reduce the agency's percentage of out-of-wedlock cases where paternity is established. Again, if there are many of these cases, they could cause CSSD to fail to satisfy performance requirements and subject the District to TANF block grant reductions. In this situation, one should note the District is a statewide Paternity Establishment Percentage reporting jurisdiction. This means it must rely on the rate of paternity establishment in all out-of-wedlock births in the District to calculate its paternity establishment performance percentage, rather than just those out-of-wedlock births in the IV-D case load. As a result, CSSD would have to count the children in all domestic partnerships in this measure even though paternity might not be established according to the federal rules. We do not have much information about how many domestic partnership cases with children exist but we expect that there will not be many. If this assumption is true, they may not have a significant impact on CSSD's percentages.

If OCSE were to find that the bill is inconsistent with federal law, the regulations do provide for a period in which the District can take corrective action (*e.g.*, repeal the legislation, change CSSD's practices, or correct CSSD's data) before penalties are imposed. With respect to data reliability and performance penalties, the federal regulations allow IV-D agencies one year to become compliant. *See* section 409(a)(8). In practice, however, the time period is much shorter – typically about five months – because OCSE usually does not issue its findings until well into the corrective action year. The IV-D agency has until December 31 of the year following the year of the finding to remedy the noncompliance.

Based on the bill's uncertain impact on the District's ability to maintain compliance with federal child support requirements and the potential for significant monetary penalties, I recommend that the Council exercise caution in proceeding with this legislation. At a minimum, I suggest that the Committee provide OAG with an opportunity to re-submit

the final version of the bill to OCSE for further review and receive a final determination of its regulatory sufficiency prior to the first reading.

Thank you for considering these comments and recommendations concerning the bill. Please feel free to contact me if you would like to discuss this matter further.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

cc: Brian Moore, Legislative Counsel, Committee on Public Safety and the Judiciary
Wayne C. Witkowski, Deputy Attorney General, Legal Counsel Division
Tonya A. Sapp, Deputy Attorney General and Director of Legislative Affairs
Benidia A. Rice, Deputy Attorney General, Child Support Services Division
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Richard Rosendall, Vice President for Political Affairs, Gay and Lesbian Activists Alliance
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Tommy Wells, Council of the District of Columbia

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL

March 16, 2009

Ms. Juanita De Vine
Regional Program Manager
Office of Child Support Enforcement
Administration for Children and Families, Region III
150 S. Independence Mall West, Suite 864
Philadelphia, PA 19106-3499

Re: Bill 18-66, the "Domestic Partnership Judicial Determination of Parentage Act 2009"

Dear Ms. De Vine:

On May 23, 2008, I requested an opinion from the Office of Child Support Enforcement ("OCSE") on the impact of the proposed "Domestic Partnership Judicial Determination of Parentage Act of 2008" ("bill") on the District of Columbia's compliance with federal child support requirements under Title IV, Part D of the Social Security Act, approved January 4, 1975 (88 Stat. 2351; 42 U.S.C. § 651 *et seq.*). The bill was drafted by a reputable family law professor in the District and introduced in the Council of the District of Columbia ("Council") on behalf of individuals and groups advocating for the recognition of the parental rights of individuals who create families through domestic partnerships. The bill created a presumption of parentage in the domestic partner of a natural parent that operated in a manner similar to the marital presumption under existing District law. We requested OCSE's opinion on the bill because we were concerned that some of its provisions, particularly the bill's amendments to the District's version of the Uniform Interstate Family Support Act ("UIFSA"), might contravene federal requirements. You responded on September 24, 2008 that portions of the bill, including the amendments to UIFSA and bill's change to the definition of "born out of wedlock", could indeed raise compliance issues under Title IV-D and the federal Defense of Marriage Act, Pub. L. 104-199. We provided OCSE's comments to the Council and other stakeholders for their consideration in connection with further action on the bill.

Since our last communication with you concerning the bill, the Council has been working with the drafters, advocates, family law experts, and representatives of my Office and other District agencies to address the issues you raised in your letter and other concerns about the bill. This process has resulted in significant changes to the bill that OCSE originally reviewed, a revised version of which was reported on favorably by the Council's Committee on Public Safety and the Judiciary on March 10, 2009. Among other things, these changes clarify the bill's

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applicability, add provisions relating to the disestablishment of parentage, and determine the parental rights of individuals who agree to create children through artificial insemination. The current version also eliminates the amendments to UIFSA and the changes to the definition of "born out of wedlock" that OCSE found problematic. We believe that the recent changes improve the bill. Many of its current provisions are based on the 2002 Uniform Parentage Act and the American Bar Association's 2008 Model Act Governing Assisted Reproductive Technology and are similar to provisions enacted in other states.

Although the bill has been revised in a manner that addresses many of OCSE's concerns, I am requesting that OCSE conduct an additional, expedited review of the current version to ensure that, if the bill is enacted, the District will not suffer any negative regulatory consequences. The current version does not alter the definition of marriage under District law or change, to a significant degree, the manner in which parentage may be established for children who do not have two legal parents. What the bill does do, however, is expand the categories of people who, under local law, may be considered to be the legal parents of the children they create and care for while discouraging the disruption of stable family relationships. In doing so, the bill reflects the District's desire to join a growing number of states that are giving legal recognition to the richness and diversity of American families. Some of Title IV-D's paternity provisions incorporate a more traditional conception of parentage that is limited to relationships arising out of marriage and genetics, and, these provisions could be viewed as inconsistent with the new protections the bill would afford. However, federal law does not appear to prohibit states from extending parental rights and responsibilities to additional people, and recognizing these legal relationships for child support purposes would advance Title IV-D's goal of ensuring that children have and receive support from two legal parents.

I would appreciate it if you could provide OCSE's determination concerning the bill's compliance with federal child support requirements as soon as possible. The bill has broad support in the Council and we expect that the full Council will consider it during its next legislative session in early April. If the revised bill will result in a finding of regulatory non-compliance, it will be important for my Office to advise the Council of this fact before the bill in enacted. For your convenience, I am enclosing the Committee Print of the bill, the Committee Report, and copies of the District's current parentage law highlighting the bill's amendments. If needed, please feel free to contact me on 727-3400 and I will make my staff available to discuss the bill's impact on the District's existing legislation.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

PJN/lae

Enclosures

cc: Benidia A. Rice, Deputy Attorney General, Child Support Services Division
Tonya A. Sapp, Deputy Attorney General for Health and Human Services
Wayne C. Witkowski, Deputy Attorney General, Legal Counsel Division