SYLVIA RIVERA LAW PROJECT

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Derrick D. Cephas, Acting Chair & Vice-Chair
NYC Board of Correction
1 Centre Street, Room 2213
New York, NY 10007

October 6, 2017

Dear Members of the Board of Correction,

The Sylvia Rivera Law Project ("SRLP") thanks the Board of Correction ("the Board") for encouraging the submission of written testimony in response to the six-month variance request submitted by the New York City Department of Corrections ("NYC DOC" or "the Department") on September 8, 2017, regarding sections 5-17(f); 5-17(g); and 5-18 of the Board's Minimum Standards.[1]

As was previously testified during the September 12, 2017 hearing, **SRLP strongly urges the Board not to grant this request and to consider the possibility of sanctions against DOC for failure to meet the Standards.**

SRLP works with transgender, gender non-conforming, and intersex people ("TGNCI" people) who are people of color or low-income. We offer direct legal services to people in the New York City area, including those held by the NYC DOC and people incarcerated by New York State. Staff from SRLP attempt to provide legal and cultural programming twice a month to individuals housed in the Manhattan Detention Center's Transgender Housing Unit ("THU"), in addition to providing direct legal services to TGNCI individuals housed in any of the NYC DOC units. Since August 2015, when we first began to offer these classes, SRLP has served roughly 75 TGNCI individuals in the NYC DOC.

SRLP submitted comments throughout the federal rulemaking process concerning the National Prison Rape Elimination Act Standards ("PREA Standards").[2] In 2011 and 2014, SRLP provided a series of trainings to NYC DOC staff on working with TGNCI individuals. In May 2015, we submitted extensive comments to the Board concerning the proposed rules submitted by the Public Advocate. In August 2015, we provided a lengthy submission regarding the adoption of minimum standards in line with federal PREA Standards. This submission included the testimonies of 11 TGNCI individuals who had been through the NYC jail system. Because of SRLP's extensive contacts with those individuals experiencing incarceration first-hand, SRLP is a legal and cultural expert regarding TGNCI people, incarceration, and sexual violence.

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[1] *See* Legal Aid Society, "Legal Aid Society Letter to Board of Correction re DOC PREA Variance Request," NYC Board of Corrections (Sept. 12, 2017), http://www1.nyc.gov/site/boc/meetings/sept-12-2017.page.

[2] Prison Rape Elimination Act, Prison and Jail Standards, 28 C.F.R. Part 115 (May 17, 2012).

Due to the nature of our work we will focus only on the variance request's impact on the housing of TGNCI individuals. We support and stand behind the comments submitted by the Legal Aid Society on September 11, 2017.[3]

We do want to take this moment to state that overall the numbers of reported acts of sexual violence, the investigations, and substantiations are appalling and representative of a blasé attitude towards ending sexual violence in the NYC jails. When one pauses to consider the many obstacles—both institutional and personal—facing those who report sexual violence, the fact that **there were 350 allegations between January 1 and July 1 of 2016 is amazing**.[4] This figure represents 350 instances wherein a person overcame the emotional and psychological difficulties caused by reporting sexual violence.

However, **any positivity brought by this figure is undercut by the horrific fact that only one allegation has been substantiated and 329 are still pending** and 21 were found to be unsubstantiated.[5] Clearly, a person does not report sexual violence to the same institution employing the individual who retains complete control over those who s/he abused, especially when all objective evidence suggests that their report will not be taken seriously and no penalties will befall the individual who abused them. This disturbing trend prevalent in NYC jails must be addressed quickly if people incarcerated in the NYC jails are to believe that their allegations of sexual violence will be seriously considered.

Housing TGNCI Incarcerated Individuals under the Federal, State, and City Laws

We want to begin by stating clearly our understanding of the federal, state, and city housing protections and rights for TGNCI people brought about by incarceration. The New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL") state that TGNCI people are to be trusted in our own self-assessment of who we are. The Department is brought into moral and ethical compliance with New York City and New York State laws when it allows TGNCI individuals incarcerated in the City jails to be housed based on their gender identity.[6] Moreover, the Department of Justice has issued clarifying statements regarding PREA specifically stating that transgender people are to be treated as the gender they identify with, unless they request otherwise or a documented security reason exists to house them otherwise.[7] This is echoed by the City's Minimum Standards.[8]

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[3] *See* Legal Aid Society, *supra* n.1.

[4] *See* Legal Aid Society, "Background on PREA Investigations," NYC Board of Corrections (June 13, 2017), http://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2017/June-13-2017/2017.06.13%20-%20PREA%20data%20to%20share.pdf.

[5] *Id.*

[6] *See* New York Human Rights Law, *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity and Expression: Local Law No. 3* (2002); N.Y.C. Admin. Code § 8-102(23) (guidance issued 12/15/2015); 9 NYCRR (2016) (State Human Rights Law explicitly applies to transgender individuals).

[7] Clarification of § 115.42(c) & (e) available at http://www.prearesourcecenter.org/node/3927.

[8] *See generally* New York City Board of Corrections, *Notice of Adoption of Rules*, § 5-18.

TGNCI individuals in NYC are afforded human rights protections under the law in every area of their lives until they experience incarceration. In our trainings at the THU we are asked time and again why gender identity is respected and discrimination—including misuses of pronouns and denial of gender appropriate living accommodations—is unlawful outside of the jail, yet once an individual is detained their rights are unlawfully forfeited. **Gender identity is an inherent truth** that does not change based upon an assumed criminal conviction, and the long-term devastating effects of continual denial of your gender identity—through forced housing with members of the incorrect sex, through continuous mis-identification, through harassing and violent comments—is not a consequence "ordinarily contemplated by a prison sentence."[9] Thus, the NYC facilities cannot impose such conditions upon a detained or incarcerated TGNCI person.

Both PREA and the Minimum Standards share language that placement determinations for a transgender or intersex individual shall be made on a "case-by-case" basis that is to consider whether placement would "ensure the [individual's] health and safety."[10] PREA takes as understood that individuals are to be placed in a facility with which they most identify unless: (1) they request otherwise; or (2) a documented security reason exists to house them elsewhere.[11] In other words, **it should be assumed that transgender women will be housed as women** unless either of the two conditions above is met. Any New York State laws that contradict this standard would constitute a violation of federal law. However, New York State laws are clear that the identities of male and female are more complex than mere genitalia. Harsh penalties are attached to any similar government agency that fails to recognize and respect this.[12]

In order to make housing determinations, PREA requires the Department to screen individuals for their risk of being subjected to sexual violence.[13] This screening tool must be available at intake and upon every transfer.[14] It is important to note that PREA provides that every individual must be re-assessed within 30 days of entry to a facility.[15] This is highly suggestive that the intake and assessment will be completed, and the individual appropriately placed, well before the 30 days are over.

This screening tool is then used to inform all housing, bed, work, education, and program assignments.[16] These determinations are *individualized*, meaning that, if upon investigation, it was found that every transgender and intersex person was given the same form answer then the DOC would not be in compliance. A transgender or intersex person's perception of their own

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[9] Hewitt v. Helms, 459 U.S. 460, 468 (1983).
[10] PREA § 115.42(c).
[11] Clarification of § 115.42(c) & (e) available, *supra* n.7.
[12] Section 297.4(c) of the NYSHRL defines the penalties for violating the law, ranging from compensatory damages to civil fines and penalties not to exceed $50,000 for unlawful discrimination and not to exceed $100,000 for unlawful discrimination found to be willful, wanton, or malicious.
[13] *See generally* § 115.42.
[14] *See generally* § 115.41.
[15] *See* § 115.41(f).
[16] *See supra* n.13.

safety must be given "serious consideration." We also take this moment to remind the Board that under National standards, complaints from staff or other incarcerated people are not clear and convincing reasons as to why a TGNCI person should not be housed in the facility they deem is safest for them.[17]

If the determination is made that protective custody is the most responsive housing situation at the moment it cannot be a permanent decision.[18] Not only must this decision be reviewed every 30 days, such decision must be documented in writing, all other available alternatives must have been assessed, and the individual must have access to the programs, privileges, education, and work opportunities that any other individual not in protective custody would access.

Why The Intake, Screening, and Assessment Tools Matter

The evaluation tool mentioned above is a key aspect of the Department's variance request. This screening tool, however, is a cornerstone of preserving the rights and dignity of TGNCI people as they enter the City's jails. Without this tool, we know from our ongoing work that TGNCI people are de-facto placed according to their genitalia and sex assigned at birth.

SRLP is unaware of any time in which the DOC *knowingly* housed a transgender woman at the Rose M. Singer Center. As was made in clear in the testimony from the Legal Aid Society, transgender women initially housed at Rose M. Singer are, universally to our knowledge, removed and placed in a men's unit. In addition to the individual mentioned by the Legal Aid Society, SRLP has previously testified at BOC hearings regarding two other transgender women we know who endured similar mistreatment.

One woman, CA, was housed at Rose M. Singer until she requested her hormones. When she clarified that she was a transgender woman, she was immediately moved to the THU, a unit in a men's facility. Another woman, MC, was housed at Rose M. Singer for the entirety of her time in the NYC jails. MC never identified herself as transgender to any DOC officers, civilians, volunteers, or her legal team. She spent her entire time without accessing her medically necessary hormones for fear that she would be moved to a men's facility.

As was mentioned during the September 12, 2017 Board hearing, SRLP worked with another individual—an intersex man—who was previously housed in the NYC jails as a man, completed a two-year sentence upstate in a men's facility, and actively identifies as a man. This individual was housed at Rose M. Singer Center upon his self-identifying to DOC staff as an intersex man. PREA staff who met with him repeatedly identified him as a transgender woman despite him never personally identifying as transgender or as a woman. Indeed, our client repeatedly told DOC staff that he was an intersex man. However, they continued to deny him his ability to self identify and insisted he was a transgender woman. PREA staff informed him that he must announce himself in the showers and under no circumstance was to shower in groups. Had any

[17] Clarification of 115.42(c) & (e) available, *supra* n.7.
[18] *See generally* § 115.43.

other NYC government agency done this, they would be subject to a lawsuit under the NYC Human Rights Law. As it is, DOC has never acknowledged this error.

Without this assessment tool there is no way for individuals to review their own placement, for advocates to review the placement of clients, and for the Department or the Board to review compliance with the law. As it stands, no tangible paperwork or recorded information as to why transgender and intersex individuals are housed where they are housed appears to exist. Without a recorded reason, neither the public nor the Board can know if the Department is providing the "serious consideration" required under national and local standards to an individual's own sense of safety or security. We also do not know why, despite clarification from the Department of Justice, transgender women are universally housed as men in the city jails when, according to the Department of Justice, they should primarily be housed as women, unless they request otherwise or a serious and recorded reason exists. Without this tool there is no way to consider how the housing determinations are made and any ongoing concerns in trends or violations.

This tool should, theoretically, be very similar to the THU screening instruments that the City allegedly has had in place since late 2014.[19] There is no reason we know of as to why this screening tool could not be available, even in a draft form, by September 2017.

Despite that the final rule of PREA was effected in 2012, despite the housing of transgender women in women's facilities by NYS DOCCS and the Federal Bureau of Prisons[20], and despite the effect of the Minimum Standards, NYC DOC is currently completely noncompliant with PREA in regards to meaningful housing assessments of transgender and intersex-identified individuals. Trans men are housed in women's facilities and trans women in men's facilities without any analysis of their individualized security needs, documentation of their requests, or meaningful check-in regarding their situation.

Lack Of Clear Housing Standards is Hurting Trans Women

We would like to emphasize to the Board the real-world effect the lack of these tracking tools, accountability measures, and clear standards have on our communities. In previous testimonies to the Board we quoted from our clients—transgender people who were either in DOC custody at the time or who had recently experienced the NYC jail system. As one woman wrote:

> I have been sexually assaulted by a sergeant and a C.O. I did not know how to react because they have the power to [set] me up with a weapon. All I could do was endure the

[19] *See generally* City of New York Department of Correction, *Transgender Housing Unit* effective date December 3, 2014, Classification Number 4498, Section V, pages 3 – 4; and Section VI(C0(1), page 8.

[20] U.S. Department of Justice, *Transgender Offender Manual*, 5200.04, Section 7 ("In order for an inmate to be considered for transfer to another location, including a facility housing individuals of the inmate's identified gender, the Warden should consult with the TEC prior to submitting a designation request to the DSCC, but this is not required.")

> abuse, physically and verbally. And without physical evidence, it's their word against mine. It's a crime how many of us trans women are raped or harassed, and if we say something we are segregated and placed in SHU.[21]

Housing transgender women as men—separating them from women and other transgender people—creates a culture wherein their dehumanization is normalized. Forcible sexual relationships with NYC DOC staff are violent and consistent conditions of their incarceration. A trans woman who survived the NYC jail system wrote to us stating, "We get abused by the officers wanting us to do sexual acts with them forcedly, if not, we get on their shit list and get raped or set up [for SHU]."[22]

Another transgender woman previously testified to the Board that she had requested THU housing for seven months before it was granted:

> I had to live with men for seven months. I was asking for trans housing [....] I had been approved for a mental health evaluation months [earlier], but I was only evaluated and moved [to the THU] after seven months of fighting, getting beat up by other inmates, being raped and sexually assaulted in jail.

A tracking mechanism, the very tool that the NYC DOC says it cannot produce due to computer system upgrades, would allow for the case of this woman—and any similarly situated women—to be immediately evaluated by the Board or other advocates. She should not have spent seven months in a men's facility while she requested a transfer. She should not have endured rape because the DOC failed to respond in timely manner to her request to be moved to a safer situation. By delaying this screening mechanism further, as requested by DOC, more women may endure similar situations.

The extraordinary control that NYC DOC staff exercise over every aspect of life cannot be forgotten. When the Department requests six more months due to updating its computer system it diminishes and trivializes the real world effect of its failure to honor the lives and identities of transgender and intersex people. As the Department spends six more months developing this computer system, transgender women will continue to be placed as men, without any mechanisms for accountability or oversight.

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[21] *See* Sylvia Rivera Law Project, "Testimony for The New York City Board of Corrections, Public Hearing on Proposed Rule to Amend Minimum Standards to Detect, Prevent and Respond to Sexual Abuse and Harassment of Persons Incarcerated in the New York City Jails and other facilities Operated by the New York City Department of Correction," NYC Board of Corrections (July 26, 2016), http://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/written-comments/slyvia_rivera_law_project.pdf.

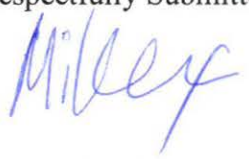
[22] *Id.*

Concerns Regarding the Variance Request

In closing, SRLP would like to state that there has yet to be any commentary from currently incarcerated TGNCI people on this variance request. Lack of public commentary from those most affected by this request calls into question the ability of the Board to grant the variance request without knowing the current and long-term effect of foregoing this important requirement. We ask that members of the Board visit both the THU and Rose M. Singer and speak to individuals there regarding their experiences at intake and upon placement within the facilities.

In ending this testimony, SRLP would like to echo the statements of Dr. Brenda Smith, Project Director for the United States Department of Justice, National Institute of Corrections Cooperative Agreement on Addressing Prison Rape and member of the National Prison Rape Elimination Commission, who has consistently stated that the way to end rape in prisons, jails, and detention centers is to not place people into these facilities. **Ending sexual violence means ending a culture where people are seen to be disposable, and where individuals are uprooted from community rather than strengthening resources available in and provided by communities**. SRLP centers this belief as a core guiding principal in this testimony. With this in mind, we request that the Board not grant the DOC variance concerning sections 5-17(f); 5-17(g); and 5-18 of the Board's Minimum Standards and to consider the possibility of sanctions against DOC for failure to meet the Standards.

Respectfully Submitted,



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