



*TESTIMONY OF THE JUVENILE
JUSTICE COALITION LGBTQ
WORK GROUP
BEFORE THE BOARD OF
CORRECTION*

RE: PREA Rule Making
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Submitted on behalf of the Juvenile Justice Coalition, LGBTQ
Workgroup

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The Juvenile Justice Coalition (JJC) is a network of child advocacy groups, legal service providers, alternative sentencing programs, and community-based organizations working to make the juvenile justice system in New York State more fair and effective. The JJC is coordinated by the Correctional Association of New York, an independent, non-profit organization founded by concerned citizens in 1844. It was granted unique authority by the New York State Legislature to inspect prisons and to report its findings and recommendations to the legislature, the public, and the press. The JJC works to decrease the number of New York youth entering jails and prisons, reduce the disproportionate incarceration of youth of color, ensure the legal rights of all court-involved youth, improve outcomes for young people confined in youth justice institutions, and promote a youth development approach to youth justice. The bulk of our work is done through a working group structure. The LGBTQ work group is one such group of the JJC, which advocates for the needs and rights of LGBTQ youth in the youth justice system. The JJC played an instrumental role in the decision by the State Office of Children and Family Services (OCFS) to create and issue a groundbreaking lesbian, gay, bisexual, transgender and questioning (LGBTQ) anti-discrimination policy in 2008. We worked closely with the New York City Administration for Children's Services (ACS) on a similar LGBTQ anti-discrimination policy, and we continue to work together to strive for its implementation, as well as the institution of best practices for LGBTQ youth in their care. We also work on a number of safety and medical issues for system-involved LGBTQ youth.

Introduction

Based on our collective experience and expertise in regard to LGBTQ justice system impacted youth, we are testifying today to the placement needs of 16- and 17-year-old transgender youth in custody of the Department of Correction (DOC). We appreciate the Board of Correction's (BOC) decision not to incorporate PREA Standard § 115.42(g), which could negatively impact the operation of the Transgender Housing Unit (THU) or similar voluntary housing dedicated to transgender people in custody. Though even without explicit incorporation of this provision of the CFR, it is our group's understanding that the THU will be imminently closed and urge further action by the BOC to ensure that it remain open.

In addition to the maintenance of the current THU, further action is needed to ensure the safety of all transgender people in DOC custody, particularly transgender adolescents. Our testimony focuses on the following recommendations:

- All transgender youth are placed in housing units by their gender identity, unless the young person objects to such placement.
- The Board of Corrections should consider and adopt the New York City Administration for Children's Services (ACS) LGBT anti-discrimination policies and best practices to ensure that 16 and 17 year olds in DOC custody are placed in facilities based on their gender identity and preferred housing arrangement.
- The Board of Corrections should adopt policies and practices that are consistent with the spirit of New York City Human Rights Law and Mayor DeBlasio's executive order ensuring that transgender people are able to use facilities in accord with their gender identity.

- The Board of Corrections should adopt policies and practices that are consistent with the recommendations of all mainstream child welfare and social science organizations that protection from discrimination and affirmation of identity are essential to transgender youth's well-being.

New York is one of only two states where youth are automatically treated as adults in the criminal justice system at age 16, regardless of the severity of the alleged offense. As a result, youth 16 and older who are accused of a crime and detained in NYC jails are in the custody of the DOC. The Mayor's office just announced a plan to move 16- and 17-year-olds from Rikers to the building that currently houses the ACS secure detention facility Horizons. Because the age of criminal responsibility in New York State is 16, this facility would be operated by DOC, not ACS. Securing the necessary approvals to renovate and repurpose the facility will take four or more years. In the interim, as 16- and 17-year-olds continue to be detained at Rikers, BOC must take immediate steps to ensure that the vulnerable population of transgender youth are protected from well-documented risks of sexual abuse.

Problem

Transgender youth are at risk for sexual abuse and currently unable to access DOC's voluntary housing unit for transgender women ages 18 and up.

Transgender women face high risk of sexual abuse in prison. A study of people incarcerated in a California prison found that 59% of transgender women housed in men's prisons had been sexually abused while incarcerated, compared to 4 percent of cisgender people in men's prisons¹. The American Academy of Child and Adolescent Psychiatry notes that "[r]esearch demonstrates that transgender youth are at increased risk for being bullied, harassed and physically assaulted. They also have a higher incidence of suicide attempts. For these reasons, transgender youth face particular challenges in juvenile justice and other correctional systems."²

The DOC currently operates the THU which serves as a voluntary housing option for some transgender women but as noted above even this imperfect unit is on the brink of closure. In any event, while this alternative housing is critically important for the women it serves, it is a single option that is simply not able to meet the housing needs of all transgender people in DOC custody. Transgender youth are one such population for which the adult THU does not represent a viable alternative, due to the sight and sound separation of adults and adolescents in DOC custody. We support the continuation of the THU for all transgender women who volunteer to be housed in the unit, but we urge the BOC to consider the best practice of placing individuals based on self-identified gender identity.

Recommendations

Each youth should receive an assessment of their safety concerns, needs, and preferences to determine placement, and placement decisions for transgender youth should be based on their gender identity unless the youth objects to such placement.

¹ Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Irvine: Center for Evidence-Based Corrections, University of California, 2007), 3

²http://www.aacap.org/AACAP/Policy_Statements/2016/Policy_Statement_on_Transgender_Youth_in_Juvenile_Justice_and_other_Correctional_Systems.aspx

The PREA standard requires that placement decision be made on a case by case basis with considerations for the individual’s “health and safety” as well as considerations for “management or security problems”. The standard also indicates that a transgender individual’s own views on placement be given serious consideration in making determinations of placement³. In the DOC, this is particularly important for transgender adolescents for whom the THU is not a housing option. And while the PREA standard requires more than is currently being done by DOC, it is by no means a best practice and has resulted in very little positive change for transgender individuals in prison and jail settings.

Particularly for the transgender youth who are already misplaced in adult settings, the need for gender identity based placements absent an objection from the young person is critical.

Some young people may have safety or other objections to such placements but gender identity should be the presumption for determining placement⁴. Furthermore, PREA Standards §§ 115.42, 115.242, and 115.342 state that housing and facility placement for transgender people must be made on a case-by-case basis and that the detained individual’s views of their own safety must be given serious consideration in this process. These regulations also require reassessment of placement at least twice a year. The reassessment should include a review of any threats to safety experienced by these individuals. Isolating youth is not an appropriate alternative to placing youth based on the gender identity and should not be relied upon to safely house transgender youth. While separating youth may in some instances provide some forms of protection, research shows that isolation is extremely harmful to the well-being of adolescents, who suffer greater physical, emotional, and psychological harm from being placed in isolation.⁵ Isolation should never be a substitute for placing transgender youth in housing that meets their gender identity and developmental needs.

The Board of Corrections should adopt the policies and practices of the New York City Administration for Children Services regarding the placement and treatment of transgender youth in their juvenile justice detention and placement facilities, which serve a similar population of youth.

Youth arrested prior to their 16th birthday and charged either in Family Court on juvenile delinquency charges or in Supreme Court on juvenile offender charges may be detained pre-trial in juvenile detention overseen by ACS. Youth adjudicated on juvenile delinquency charges by Family Court may be placed outside of their home in juvenile justice placements overseen by ACS and operated by contract agencies throughout the city. BOC should consider the policies and practices put in place by ACS to serve this similar population of youth. In its policy *Promoting a Safe and Respectful Environment for Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Their Families Involved in the Child Welfare, Detention and Juvenile Justice System*⁶,

³ <http://www.prearesourcecenter.org/sites/default/files/content/prisonsandjailsfinalstandards.pdf>

⁴ http://www1.nyc.gov/assets/acs/pdf/lgbtq/FINAL_06_23_2014_WEB.pdf

⁵ See, e.g., Human Rights Watch/American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, 2012 (“*Growing Up Locked Down*”), p. 15-16, 20-32, available at: <https://www.aclu.org/files/assets/us1012webwcover.pdf>. See also New York State Bar Assoc, Committee on Civil Rights, Report to the House of Delegates Solitary Confinement in New York State, 2013, p. 8-9, available at: <https://www.nysba.org/solitaryreport/>.

⁶ http://www1.nyc.gov/assets/acs/pdf/lgbtq/LGBTQ_Policy.pdf

ACS outlines expectations for the placement of transgender youth. ACS directs that it is “most appropriate” for transgender youth in congregate care to be placed based on their gender identity and also states that transgender youth should not automatically be placed in a facility that aligns with their assigned gender at birth. Transgender youth should also have access to individual sleeping arrangements if available. In addition to placement requirements, ACS dictates considerations for privacy for transgender youth in regard to undressing, showering and utilizing bathrooms. Specifically transgender youth in ACS’s care are allowed individual stall bathrooms, are allowed to shower privately, and are not required to shower or undress in front of other youth. Furthermore, PREA Standard §115.42(f) specifies that transgender people in custody shall be given the opportunity to shower separately from others.

ACS policy flows from PREA requirements and, notably, New York State regulations that govern the administration and operation of youth detention facilities. Youth detention regulations explicitly prohibit staff and volunteers from engaging in discrimination of youth on the basis of gender identity.⁷ They also require that youth detention providers “promote and maintain a safe environment” and “take reasonable steps to prevent discrimination and harassment against youth by other youth, promptly investigate incidents of discrimination by staff, volunteers and youth, and take reasonable and appropriate disciplinary action when such incidents occur.”⁸ The Office of Children’s Services policy governing juvenile detention facilities outside of New York City, consistent with regulation, sets out the expectation that local districts and voluntary agencies will adopt “written policies and promote practices that prohibit discrimination of LGBTQ youth because of their sexual orientation or gender identity” and that all children and youth should receive appropriate individualized treatment that respects gender and sexual orientation⁹

In addition to the directives outlined in regulation and in ACS’s policy, ACS outlines further best practices and guidance in *Safe and Respected: Policy, Best Practices, and Guidance for Serving Transgender and Gender Non-Conforming Children and Youth Involved in the Children Welfare, Detention, and Juvenile Justice System*¹⁰. We encourage the BOC to consider these best practices when rulemaking for the similarly aged justice system involved adolescents in DOC custody. The best practices guide reiterates the need to place youth in settings that match their gender identity, in most cases. They additionally highlight the need to assess the position of youth in a private setting. Youth should not be automatically placement based on the gender designated on documentation pertaining to the youth nor should youth be assumed to be transgender. ACS notes that not all TGNC youth prefer to be placed in housing that matches their gender identity. For example, they note that this may particularly be the case for transgender boys who may feel at risk if placed with other men. When making housing decisions, youth must always have necessary access to opportunities for socialization.

New York’s legal distinction that 16 and 17-year-olds are prosecuted as adults should not mean that they are, therefore, second class citizens in regards to conditions of confinement and do not

⁷ 9 NYCRR 180.5(a)(6)

⁸ Id.

⁹ http://ocfs.ny.gov/main/policies/external/ocfs_2009/infos/09-ocfs-inf-06%20promoting%20a%20safe%20and%20respectful%20environment%20for%20lesbian%20gay%20bisexual%20transgender%20and%20questioning%20%20children%20and%20youth%20%20in%20out-of-home%20placement.pdf

¹⁰ http://www1.nyc.gov/assets/acs/pdf/lgbtq/FINAL_06_23_2014_WEB.pdf

have the right to the same right to safety and freedom from discrimination under the law as their, for example, developmentally similar 15-year-old peers. The result from such practice is to essentially include within punishment a refusal to recognize the core of a person's being. The City is now saying that upon arrest, the day after one's 16th birthday, it will not only force a young person into an adult setting but will strip from a transgender young person their core gender identity by placing, for example, a transgender girl who has been treated as a girl for all other purposes in a men's facility.

The Board of Corrections should adopt policies and practices that are consistent with the spirit of New York City Human Rights Law and Mayor DeBlasio's executive order ensuring that transgender people are able to use facilities in accord with their gender identity.

Even if correctional facilities are not entities covered by New York City Human Rights Law – though we believe they are - as citizens of New York City, 16 and 17-years-olds have the expectation that they will not be discriminated against by city government.¹¹ Discrimination in facilities on account of gender identity is contrary to the spirit of New York City's Human Rights Law. Similarly, Mayor De Blasio's recent executive order, and the accompanying extensive media campaign, has made it clear to all New Yorkers that transgender people have the right and expectation that their identity will be honored and respected while using bathrooms and other facilities in city-owned buildings.¹² Transgender youth in city-owned correctional facilities¹³ should have no less of an expectation of full respect for their identity. Moreover, from a youth's perspective the message they now receive from the Department of Corrections is that because they have been accused of a crime they have fewer rights than other New Yorkers. This is contrary to constitutional principles, the spirit of New York City's Human Rights law and Mayor DeBlasio's executive order. Transgender youth already receive far too many messages from society that they are "less than" or "sub-human" and a New York City government department should not also be sending such a damaging and harmful message.

The Board of Corrections should adopt policies and practices that are consistent with the recommendations of all mainstream child welfare and social science organizations that protection from discrimination and affirmation of identity are essential to transgender youth's well-being.

In its March 16, 2016 policy statement "Transgender Youth in Juvenile Justice and Other Correctional Settings", The American Academy of Child and Adolescent Psychiatry states that the Academy "opposes all discrimination based on gender identity. Consistent with this position, the Academy recommends that detention and corrections staff classify and house all youth consistent with their gender identity, as the youth defines it."¹⁴ Numerous other organizations are unequivocal in their positions that discrimination and mistreatment of children on account of their gender identity is contrary to a child's well-being.¹⁵

¹¹ <http://www.nyc.gov/html/cchr/html/coverage/law-coverage.shtml>

¹² <http://www1.nyc.gov/office-of-the-mayor/news/223-16/mayor-de-blasio-mandates-city-facilities-provide-bathroom-access-people-consistent-gender#/0>

¹³ <http://www.nyc.gov/html/doc/html/about/history.shtml>

¹⁴ http://www.aacap.org/AACAP/Policy_Statements/2016/Policy_Statement_on_Transgender_Youth_in_Juvenile_Justice_and_other_Correctional_Systems.aspx

¹⁵ http://www.lambdalegal.org/sites/default/files/what_the_experts_say_2015.pdf

Conclusion

Transgender sixteen- and seventeen-year-old youth do not currently have a safe alternative for housing at Rikers and are particularly vulnerable to sexual abuse and mistreatment. Youth detained in the juvenile justice system in New York City are protected by state law and ACS' LGBTQ non-discrimination policies, including their practice to place transgender girls in the girls unit in their secure detention facilities. We urge the BOC to adopt ACS's LGBT anti-discrimination policies and best practices: 16 and 17- year olds in DOC custody should be housed based on their gender identity and the safety needs and views of each transgender youth must be prioritized. DOC should further ensure that transgender youth are not housed in isolation. In addition, we further urge the implementation of these guidelines for all older adolescents and young adults in DOC custody, including maintaining the THU for transgender women who voluntarily chose be placed on the unit. We support ACS's recommendation for the placement of TGNC youth that "the individual needs, emotional and psychological safety, and physical safety of youth must take precedence over convenience¹⁶".

Thank you for the opportunity to submit testimony on the safety needs of transgender youth in DOC custody.

¹⁶ http://www1.nyc.gov/assets/acs/pdf/lgbtq/FINAL_06_23_2014_WEB.pdf