

Stanley Brezenoff, Chair
NYC Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

May 30, 2015

Re: Submission of Comments and Recommendations in Response to the Hon. Letitia James' Petition for Rulemaking Implementing the Prison Rape Elimination Act within New York City jails

Dear Chair Brezenoff and the NYC Board of Correction:

The Sylvia Rivera Law Project strongly recommends that the Board of Correction adopt the petition of the Hon. Letitia James, Public Advocate, concerning the proposed Rulemaking for implementing the Prison Rape Elimination Act within New York City jails. Likewise, we strongly recommend the consideration and the adoption of the proposed additions and amendments of the Legal Aid Society's Prisoner Rights Project.

The Sylvia Rivera Law Project works with transgender, gender non-conforming, and intersex people (TGNCI people) who are of color or low-income. We offer direct legal services to people in the New York City area and people incarcerated by New York State. Staff from SRLP submitted comments throughout the rulemaking process concerning the Prison Rape Elimination Act and assisted in developing the Transgender Housing Unit newly opened on Rikers Island. We have also assisted in implementing updates to standards and training for the New York State Department of Corrections and Community Supervision concerning the impacts of PREA on TGNCI people.

SRLP provides direct legal services to 300-400 New Yorkers each year and we estimate that about 66% of our clients and members are either currently in prison or jail or are on probation or parole. As the population we serve is roughly 95% people of color we know that the intersections of race and gender identity make our communities over-policed and that TGNCI people are overrepresented in jails and prisons.

Reports on the sexual violence faced by transgender, gender non-conforming and intersex individuals in detention facilities are few. The vast majority of the SRLP's knowledge and expertise on these subjects comes from over ten years of working with TGNCI New Yorkers. From the few studies that exist, however, it is known that TGNCI people

experience disproportionate amounts of sexual violence.¹ We know that TGNCI people are more likely to be placed in isolation where they experience greater risk at the hands of jail and prison staff.² Within the context of city jails we know that TGNCI people disproportionately live below the poverty line and therefore are less likely to be able to pay any bail requirements.³ From our own work SRLP knows that many TGNCI people do not have family or loved ones who can easily visit them and the combination of being housed in an incorrect facility and being deprived of community places many TGNCI people in an excessively vulnerable state. Therefore, when sexual violence does occur many survivors – as the Legal Aid Society mentioned on page 4 of their letter – feel “complicit” and therefore do not speak of it to advocates, friends, or medical health providers.⁴

It is because of this that we are submitting this letter to the Board of Corrections. Many of the proposed rules from the Office of the Public Advocate and the Legal Aid Society would assist in breaking down barriers and ending the culture of sexual violence. In addition, SRLP is proposing additional recommendations and commentary. Throughout all of this, however, SRLP relies on the advice and 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 consistently states 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. With this as the core guiding principal SRLP respectfully submits the following.

Please note that all additions being suggested by SRLP to the existing petition are underlined while language already suggested by the Office of the Public Advocate is in bold.

¹ Sylvia Rivera Law Project It’s War in Here: a Report on the Treatment of Transgender and Intersex People in New York State Men’s Prisons 2007, p.19-23, 29, and 30; Just Detention Intl. *Targets for Abuse: Transgender Inmates and Prison Rape*, March 2013.

² See generally: Aviva Stahl, *Transgender Women in New York State Prisons Face Solitary Confinement, Sexual Assault Solitary Watch*, August 7, 2014; *Voices from Solitary: Cruel and Unusual Punishment Solitary Watch*. August 7, 2014; Testimony by the Campaign for Alternatives to Isolated Confinement, Submitted to the New York State Assembly, November 13, 2014.

³ Grant, Jaime M., Et. Al, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, p.2, 50-70.

⁴ One recent and striking example can be read about in a recent article published on May 12, 2015: Zoe Greenberg, *Sentenced to Abuse: Trans People in Prison Suffer Rape, Coercion, Denial of Medical Treatment* RH Reality Check, May 12, 2015.

Recommendations SRLP Strongly Endorses

Establishing a System-Wide PREA Coordinator

SRLP strongly endorses the Legal Aid Society's recommendation to create a System-Wide PREA Coordinator Requirement (recommended amendment to Chapter 1 of Title 40 of the Rules of the City of New York, at (k))

Monitoring Officer Behavior Following Allegations

SRLP strongly endorses the Legal Aid Society's recommendation to monitor an officer's behavior during and after an investigation (recommended amendment to Chapter 1 of Title 40 of the Rules of the City of New York as subparagraphs to paragraphs §1-18(c)(3) or as appropriate recommendations to DOC if too specific).

Establishing an Evidentiary Standard

Based upon our knowledge of working with individuals in the DOC and DOCCS systems we strongly agree that an evidentiary standard must be established (Chapter 1 of Title 40 of the Rules of the City of New York at §1-19 (f)(10)-(14)).

Long-Term Storage of all Videos

SRLP also strongly agrees with the comments of the Legal Aid Society that because of the reluctance to report sexual violence and with the advent of inexpensive digital video storage *all* video regardless of whether it has been part of an allegation of sexual violence, a disciplinary hearing, or other investigation should be stored for six months at a minimum. SRLP has represented clients who have taken up to a year to find the support, courage, and sense of safety to report their sexual violence. When this occurs, SRLP is often unable to offer any legal support as almost all evidence is no longer in existence. Moreover, this also creates obstacles with ensuring the individual receives the independent and culturally appropriate counseling they deserve as such services are often tied to legal claims. (Chapter 1 of Title 40 of the Rules of the City of New York §1-18 at (c)(4), and Chapter 1 of Title 40 of the Rules of the City of New York §1-18 at (c)(5)).

Data Collection of Complaints

We also strongly agree that data must be collected concerning repeated credible complaints lodged against specific staff members *and* that credible complaints should be analyzed for repeating times or places where sexual violence occurs. We regularly hear that stairwells, bathrooms, and supply cupboards are used as places for sexual violence and that sexual violence occurs at specific times of day. We have

worked with numerous individuals who have been forced to endure seeing their abuser return to the same steady shift or rounds after an investigation. We have found this to be especially problematic in “specialty” housing such as mental health observation units or protective custody where individuals have less freedom of movement and are often more vulnerable. Collecting this data is an important step towards shutting down these “opportunities” for sexual violence. (Chapter 1 of Title 40 of the Rules of the City of New York §1-10(i)(1)).

Third-Party/Neutral Victim Advocates

SRLP strongly endorses the recommendation of the Office of the Public Advocate to amend Chapter 1 of Title 40 of the Rules of the City of New York §1-18 on Assistance for Inmates making Allegations of Sexual Harassment or Abuse. In particular we strongly endorse (e)(iii) which states that the Department *shall* attempt to make available victim advocates from outside the DOC and (2) which states that if requested a victim *shall* be allowed to have support from a qualified “community based organization.” We particularly endorse this recommendation due to the ability for community-based organizations to provide culturally competent and language-specific services that are apart and separate from any aspect of the survivor’s detention or incarceration.

Creating Multiple Venues for Reporting Sexual Violence

SRLP strongly recommends the Office of the Public Advocate’s recommendation to allow for “at least one way” for individuals to report sexual violence to an entity not associated with the Department. We also strongly encourage the multiple ways in which reports may be taken (“verbally, in writing, anonymously, and from third parties”).

We know from our clients that many would rather remain silent than express such a vulnerable truth to a Department that exerts complete control over their daily lives. Allowing for neutral and culturally competent third parties to receive complaints may allow for an increase in reporting and an increase in people’s beliefs that the reports remain confidential and are expertly dealt with. (Recommendation Chapter 1 of Title 40 of the Rules of the City of New York §1-19(a)(1) and Chapter 1 of Title 40 §1-19(a)(6).

Recommended Changes or Additions from SRLP

Definition Addition

In order to assist Department staff, individuals held by the DOC, their advocates, and loved ones, SRLP recommends the adoption of the following definitions. These definitions reflect the definitions used in the final PREA Rule (28 CFR § 115.5) and those used in DOC Directive 4498 Transgender Housing Unit. We therefore recommend the following addition to Chapter 1 of Title 40 of the Rules of the City of New York §1-01 Non-discriminatory Treatment:

(1) The following terms will be defined as follows:

(1) Sexual Orientation: Sexual orientation refers to a person’s romantic and physical attraction. A continuum of sexual orientation exists.

(2) Gender Identity/Expression: Gender identity is the internal sense of feeling male, female, or some combination or absence of these feelings. This may or may not coincide with societal expectations for that gender. Gender expression is the manifestation of that identity.

(2) Gender Non-Conforming: This term refers to people whose appearance or manner does not conform to traditional societal gender expectations. A person who is gender non-conforming might identify as neither male nor female, both male and female, or as some combination.

(3) Transgender: Transgender is used to refer to someone who has a gender identity different from the sex the person was assigned at birth.

(4) Intersex: Intersex refers to a person whose sexual or reproductive anatomy, or chromosomal or hormonal pattern does not seem to fit societal definitions of male and female. Intersex medical conditions may also be referred to as disorders of sex development.

Training for DOHMH Staff

The Office of the Public Advocate has recommended that Chapter 3 of Title 40 of the Rules of the City of New York, §3-03 (c)(2) should be amended to include training around recognizing sexual abuse and harassment. After reading the recommendations of the Legal Aid Society on page 11-12 of their letter SRLP recommends adding the following language:

(v) how to detect signs of sexual abuse and sexual harassment including warning signs

Additional Language on Disciplinary Retaliation Following Reporting

SRLP strongly endorses the Legal Aid Society’s recommendation to not punish individuals for reporting sexual assault. We know that an individual being disciplined for surviving sexual violence is a pervasive problem throughout the New York State system where individuals receive disciplinary actions resulting in punitive solitary confinement for “engaging in sexual behavior” when that behavior is in fact non-consensual. In one instance an SRLP client received a disciplinary ticket for “causing a disturbance” when she attempted to ward off her attacker by screaming. We recommend additionally adding that for 90 days following such a report the individual must be monitored to ensure retaliatory disciplinary actions are not taken. We therefore recommend the following to Chapter I Title 40 of the Rules of the City of New York §1-19(a)(1)(iv):

(iv) Inmates shall not be punished for filing a complaint related to alleged sexual abuse or sexual harassment and any disciplinary actions taken against the individual for 90 days following the filing of the complaint shall be monitored for the possibility of being filed in a retaliatory nature.

Maintaining the Same Standards of Evidence for Prisoners and Officers

SRLP is concerned that the proposed Rulemaking from the Office of the Public Advocate creates two separate standards of evidence. A more intensive standard is proposed for claims of sexual violence by a DOC staff, contractors, or volunteer against an incarcerated person than the standard needed for one incarcerated person against another. Proposed amendments (f) and (g) to Chapter 1 of Title 40 of the Rules of the City of New York differ *only* in that sexual abuse of a DOC-held individual by a staff member, contractor, or volunteer must have had the “intent to abuse, arouse, or gratify sexual desire” while a claim of sexual abuse by of a DOC-held individual by another DOC-held individual need not allege there was the intent to abuse, arouse, or gratify sexual desire.

SRLP’s own knowledge of the difficulty in proving intent for claims brought under the 8th Amendment of the Constitution of the United States informs us that it is nearly impossible to prove the *intent* of a State employee, especially when actions may have occurred months or even years prior. Likewise, we are concerned that

individuals held within in DOC may receive excessive punishment for these claims and face a lesser standard *only* because of their status as being held by the DOC.

Upon review we believe that the standard of “(g)(4)penetration of the anal or genital opening, however slight by a hand, finger, object, or other instrument, that is unrelated to official duties” and “(g)(5) any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties” is sufficient and there is no need for an additional finding of intent.

Recognizing the Communication Needs of the Entire NYC DOC Population

SRLP is in strong support of the recommended rule change to Chapter 1 of Title 40 of the Rules of the City of New York §3-10(c)(3). SRLP knows that individuals with disabilities, especially developmental disabilities⁵, are often targeted for sexual violence and that individuals who communicate in ways other than English often face difficulty in reporting or communicating concerns within the DOC. In addition to all of the proposed amendments SRLP recommends the following:

(ix) How to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex, or gender non-conforming inmates, and inmates with limited or no English proficiency, inmates who are Deaf or Hard of Hearing, and inmates with developmental disabilities or delays.

Screening for Sexual Abuse Vulnerability –During the Intake Process

The Office of the Public Advocate has suggested that upon entry to a facility all individuals shall be screened to determine their risk to sexually abuse or to be a survivor of abuse. While screening can be an effective tool SRLP takes issue that this is worded to only imagine sexual abuse as committed by other people held by the DOC, and does not imagine that DOC staff might perpetrate abuse. SRLP hears regularly and repeatedly concerning sexual violations by DOC staff against our clients. We rarely hear complaints or concerns regarding other incarcerated individuals. We therefore request that this recommendation be amended to read:

(1) All inmates shall be assessed during an intake screening and upon transfer to another facility for their own risk of being sexually abused by anyone with whom they come in contact, or sexually abusive

⁵ See, e.g.: Leigh Ann Davis, MSSW, MPA *People with Intellectual Disabilities in the Criminal Justice System: Victims and Suspects* The Arc, August 2009.

towards other inmates. (Chapter 1 of Title 40 of the Rules of the City of New York §1-18)

Reporting to Inmates

SRLP recommends that the following language be added to Chapter 1 of Title 40 of the Rules of the City of New York §1-19(g) Reporting to inmates. Our hope is that the inclusion of this language will allow for more transparent and thorough investigations:

(1)Following an investigation into an inmate’s allegation that he or she suffered sexual abuse in a Department facility, the Department shall inform the inmate as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded. If the Department did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the inmate. If requested, the Department will supply this information in writing including information as to what investigative steps were taken and how the conclusion of unsubstantiated or unfounded was reached. It shall also be made clear what, if any, victim advocate services shall continue.

Additional Comments on working with TGNCI People

We strongly agree with the recommendations of the Legal Aid Society and of the Office of the Public Advocate concerning the needs of TGNCI people. SRLP agrees whole-heartedly with the Legal Aid Society that the Public Advocate intended to make it clear that, in alignment with the national PREA standards, housing assignments cannot be made solely on anatomy alone and that TGNCI-specific housing is allowed on a voluntary basis.

SRLP finds it imperative that the Department adopt the strictest interpretation of the Federal PREA Standard that individuals placed in segregated housing involuntarily receive an assessment of their options for housing, their general well-being and medical and mental health response to their current housing arrangement at least once in any 30 day period. 28 CFR 115(A). We provide the following recommendations and suggestions, however, based upon our experience and knowledge of TGNCI people. We recommend the following change to Chapter 1 of Title 40 of the Rules of the City of New York §1-18(g):

(g) Housing Transgender Gender Non-Conforming and Intersex Inmates. Placement in a male or female jail shall not be based solely on

an individual’s assigned sex at birth or their current anatomical state. In deciding whether to assign a transgender, **gender non-conforming,** or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the Department shall consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems.

(1) Placement and programming assignments for each transgender, gender non-conforming, or intersex inmate shall be reassessed at least twice a year to review any threats to safety experienced by the individual. This assessment shall be recorded and a copy of the material collected during the assessment and the final determination shall be made available to the individual.

(2) A transgender, gender non-conforming, or intersex inmate’s own views with respect to his or her own safety shall be given serious consideration.

(3) Transgender, gender non-conforming, and intersex inmates shall be given the opportunity to shower separately from other inmates.

(4) The Department shall maintain a housing program for female transgender prisoners who the Department has determined cannot be safely housed in a women’s jail. Assignment to such housing shall be voluntary. Prisoners in such housing shall have reasonable access to the same programs as other inmates in that jail.

Segregated Confinement is Not an Acceptable Housing Option

The Office of the Public Advocate recommended adding to Chapter 1 of Title 40 of the Rules of the City of New York §1-19(b) that “immediate action” must be taken by the Department to protect an individual from imminent sexual abuse. SRLP is extremely worried that TGNCI people and young people will face de-facto solitary confinement as an attempt at compliance with this rule. Segregated confinement is *never* an acceptable alternative to a lack of safe housing. The rationale behind the segregation does not stop the devastating mental and medical health affects that punitive segregation induces. Moreover vulnerable populations are made more vulnerable when they are restricted in the form of involuntary protective custody by placing them at greater risk for continued and isolated sexual violence. Many people who are young or transgender identified are actually more vulnerable to facing

additional abuse by Department staff when they are completely isolated from other people. Unfortunately, SRLP often hears from individuals who are ostensibly placed in “protective isolation” only to be repeatedly sexually abused by Department staff. We therefore recommend the following additional language:

(b) Protection duties. When the Department of Correction learns that an inmate is subject to a substantial risk of imminent sexual abuse it shall take immediate action to protect the inmate. Such immediate action shall NOT include placement in any form of segregated confinement including protective custody, administrative segregation, or similar housing. If an individual is pre-trial alternatives to incarceration and release shall be seriously considered. Should the person stay within the custody of the Department this information shall travel with the inmate to any facilities where he or she is housed during the duration of their incarceration.

Cross-Gender Viewing and Searches Should Be Limited in All Circumstances

The Office of the Public Advocate recommends adopting Chapter 1 of Title 40 of the Rules of the City of New York §1-18(d) on the limits to Cross-Gender Viewing and Searches. Sections (2) and (3) require that women held by the Department are not to receive cross-gender pat downs absent exigent circumstances and that this shall not restrict access to programming, etc. SRLP recommends that these provisions be extended toward transgender, gender non-conforming and intersex people thus:

(2) The Department shall not permit cross-gender pat-down searches of female inmates, inmates housed in women’s facilities, or inmates who have identified themselves as transgender, gender non-conforming, or intersex, absent exigent circumstances. The Department shall not restrict these inmates’ access to regularly available programming or other out-of-cell opportunities in order to comply with this provision

(3) The Department shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates, inmates housed in women’s facilities, or inmates who have identified themselves as transgender, gender non-conforming, or intersex.

(4) Any transgender woman with a medical or other permit to wear a bra will not be forced to remove her bra during searches where individuals strip to their underwear.

Programming for Women Additions

The Office of the Public Advocate also submitted proposed rulemaking to be added to Chapter 1 of Title 40 of the Rules of the City of New York §1-20 Programming for Women Inmates. SRLP supports and commends this addition and would like to suggest the following additions:

(a)Policy The City of new York recognizes the special factors, concerns, and needs involved in the supervision of women and adolescent female inmates in jail, which include lower risk for violence, familial and parental stressors and responsibilities; and high rates of trauma, drug, and alcohol histories. Specializes programs and services should be provided to meet these needs and enhance health and safety. The City of New York recognizes that not all women are housed within women’s facilities, and that not everyone in a women’s facility is female identified.

SRLP also recommends the addition of the following program to the list of “Preventive programs” to be made available to the extent funding and community resources are available:

23. Programming specific to the background of the individuals such as programming in languages other than English, programming specific to people under the age of 24, and programming for LGB and TGNCI people.

Respectfully Submitted,

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