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August 29, 2016

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RE: PREA Rule-Making

Dear Chair Brezenoff and Board Members:

We write to supplement prior written and oral testimony provided to the New York City Board of Correction (Board) concerning the PREA rule-making.

The Transgender Housing Unit (THU) is a critical space for some of the most vulnerable prisoners held in DOC custody. The THU must continue and should be improved to better serve and protect transgender, gender non-conforming and intersex (TGNCI) individuals in the City jails. Further, because our City jails must house people in accordance with the individuals' sense of their own personal safety as well as their self-determined gender identity, we write to alert you to, and oppose, the proposed Department Of Correction (DOC) plan to end the THU and provide separate housing for combined "vulnerable populations."¹

We urge the Board to include voluntary, non-restrictive, housing for the TGNCI population in its regulations to end sexual assault in the City jails. The Board Standards should include regulations that require the DOC to provide meaningful housing assessments of TGNCI individuals with a presumption that individuals may be housed consistent with their gender identity in compliance with PREA. The Board must bring to an end the unsafe housing of individuals based solely on their genital characteristics or assigned sex at birth. This practice places transgender women, in particular, at high risk of sexual assault when housed in men's facilities, and results in the harmful isolation of the TGNCI population in

¹ The information discussed herein is contained in an email sent on Friday evening, July 22, 2016, from Faye Yelardy to representatives from the Department of Justice, the Moss Group and advocates at the ACLU. The email, which responded to advocates' ongoing request for engagement on this issue, was shared with this group whom have been working together on this issue for years. Advocates signed to this letter were all represented at the June 8, 2016 meeting referenced in the July 26, 2016 testimony by the Sylvia Rivera Law Project (SRLP) and Legal Aid Society. At this meeting the option of expanding the THU as outlined in the July 22 email was discussed and vehemently opposed by all advocates present. Instead, numerous options were presented that reflected the needs of transgender individuals in DOC custody. All of these proposals are compliant with PREA. Instead of engaging further on this issue, DOC avoided any follow-up communication until the July 22nd e-mail informing advocates of the THU's closure.

the City jails. The current DOC proposal to close the THU fails to address the needs of the TGNCI community and demonstrates why the Board must take action through the rule-making process to do so.

The DOC has communicated to us its plan to end the THU, a unit that was supposed to provide a safe alternative to men's general population housing for transgender women. DOC claims to be doing so because the THU is, they suggest, out of compliance with Federal PREA standards prohibiting separate units based solely on LGBTI status.² However, not only does this ignore the fact that the THU is voluntary housing—and so does not violate PREA—but the plan does not incorporate the PREA standard which provides that a transgender or intersex person's own views with respect to his or her own safety must be given "serious consideration" (§5-18(e)) and that the Department must consider on a case-by-case basis whether a program or housing assignment—including assignment to a men's or women's facility—would ensure the individual's health and safety and would present current management or security problems (§5-18(c)).³ The closure of the THU suggests that the DOC is willing to walk away from the only reform that has meaningfully addressed the unique safety needs of the TGNCI population and instead adopt what amounts to a new form of protective custody housing.

The DOC Plan to End the Transgender Housing Unit (THU)

The DOC reports that it intends to provide separate housing for "vulnerable populations" that will include: "gay and bisexual men and women, non-English speaking inmates, partially physically disabled inmates, transgender men, gender non-conforming ("GN") inmates, those younger or new to detention," and others who also "can benefit from a unit with more supervision and less potential for contact with physically or sexually aggressive" individuals.⁴ In addition to being completely unfeasible, there has been absolutely no rational basis offered for combining these categories of persons in custody nor could there be. And perhaps most importantly, we can see no difference between this unit and all of the other protective custody units the Department has repeatedly created and

² The DOC also suggests that the *Nunez* Consent Judgment requirements, that DOC ensure the health and safety of vulnerable individuals in City custody, influences the need to create this new unit (and disband the THU). The Legal Aid Society is class counsel in *Nunez*, and can emphatically state that nothing in *Nunez* requires DOC to end the THU nor create this new unit.

³ Prior testimony reflects the adverse effects of incorrect housing placement and the heightened risk of sexual abuse that results from housing TGNCI individuals solely on the basis of genitalia. See, e.g. 7/26/16 SRLP Testimony, 7/26/16 Legal Aid Society Testimony and the many personal testimonies provided at the hearing on 7/26/16 by currently and formerly incarcerated TGNCI individuals.

⁴ The DOC email does not provide any explanation of what is meant by "young people" nor does it explain how genders will be separated between such units. We assume that the new unit does not include the 16-17 year old adolescent population. However, the DOC may intend to co-mingle the young adult population (18-21 year olds) with older inmates. Which raises the concern that even "young" transwomen will be housed with men. The creation of this unit does not address the needs of transgender youth and does not resolve the DOC failure to accept all women, including transwomen as women for the purpose of housing and protections from sexual assault.

which have without fail, been completely inadequate at meeting the safety and health needs of transgender prisoners.

Since this idea was floated to the group of Advocates signed below, several organizations made sure to speak to people currently or formerly incarcerated in the THU. The Sylvia Rivera Law Project (SRLP) asked individuals on four different occasions between the June 8th meeting and the July 26th hearing “if the THU was to be combined with another identity group, who would make the most sense and help you feel the safest?” One individual wrote in response that “as long as they want to mix us with men, it doesn’t matter who the men are.” It seems clear that no transgender woman who currently chooses the THU for safety would feel safe under this proposed scheme. Indeed, the very purpose of the unit is to create a unit for women who are already forced into a men’s facility against their will. To add in “other vulnerable groups” is to completely undermine the purpose of the unit. Another, whose testimony was submitted as Appendix J in the July 26, 2016 SRLP testimony wrote that “I feel that all prisons should have a housing unit for trans people.” A woman whose testimony was submitted as Appendix C wrote “I think that its best that we have trans housing [...] It’s a benefit for us trans women to be around each other and not isolated. Some of us don’t have family during incarceration, and our trans community helps one another.” Yet another, whose testimony was submitted as Appendix K wrote that “Transgender housing is needed to help us, to keep us out of harm’s way, to keep us from being used sexually by other inmates and officers.” In response to every survey, SRLP heard the resounding response that unless trans women were being housed with the non-transgender women at Rose M. Singer it made no sense to house people who are women with men.

The closure plan as outlined by DOC in the July 22nd e-mail includes a “goal” of “steady” officers assigned to the specialized unit who have “extra” training that will include working with LGBTI and gender-nonconforming individuals. The e-mail offers no detail on what this training will encompass, or whether such “extra” training will also theoretically be provided concerning working with persons with disabilities or others who also have specialized needs.⁵ The plan promises “extra required tours” by a Captain or Tour Commander, ignoring the fact that such rounds are already required by PREA if needed to deter sexual abuse. There is no proposed regular presence for medical or mental health staff in the plan. The email includes only a statement that DOC will “encourage” their presence on the unit for “education or just checking in.”

There is no indication that placement in the proposed unit to replace the THU will be voluntary. DOC simply states that placement will be “reassessed at least twice each year to comply with PREA” and that the full-time PREA Compliance Monitor will “ensur[e] that no one with sexual aggression backgrounds is housed in the unit.” While PREA proscribes involuntary protective housing to protect persons from sexual abuse, we believe

⁵ Staff from the ACLU and SRLP have volunteered dozens of hours to train officers on issues impacting the transgender population and have already invested in the development of training curriculum. This training has already been provided and can continue to be used, and expanded upon, at no cost to DOC. If the unit is expanded to include a myriad of other populations, this focused training and its accomplishments will be lost.

this is simply an attempt to circumvent that requirement. Based on our experience to date, we expect this will be “called” a general population housing unit with persons assigned there as “voluntary” protective custody, but individuals will be told that it is the only safe choice. Regardless, the particular protections that were developed over years of collaboration between advocates and DOC will be lost. And the inevitable increase in violence against transgender individuals that will flow from the closure of the THU will deepen distrust of DOC.

DOC indicates that the PREA Compliance Manager will regularly poll individuals “on what is working, what is not and what suggestions they may have,” and that DOC will “track and analyze incident data, inmate polling results, and staff feedback to make improvements that lead to the safest possible environment.” However, there is no indication about what will be tracked or whether information will be used for improvements for any purpose other than increasing safety.⁶

The DOC does provide that transgender and intersex individuals will be offered the opportunity to shower separately, as is required by PREA. However, the minimal promises of a dedicated grievance box, grievance forms, PREA posters and promise of “outside information” are clear indications of just how little DOC intends to offer in what will likely be yet another restrictive setting in the City jails.⁷ It is also little consolation that they intend to follow their existing obligations under federal law.

Conclusions and Recommendations

As proposed, the DOC plan to close the THU appears to do no more than to create involuntary protective custody housing for extremely vulnerable populations without *any* regard to specialized need and without *any* promise to provide a non-restrictive and safe setting with necessary programming, medical and mental health care. Placing TGNCI individuals into the equivalent of protective custody is barred by the PREA Standards and the Board should adopt regulations that affirmatively prevent such an outcome.

The Board must:

- Adopt a rule which requires the presumption that all individuals will be voluntarily housed in a facility in accordance with their gender identity unless the DOC articulates, in writing, a clear and convincing reason why such housing would present a danger to staff or other incarcerated persons. A person’s gender identity, assigned sex at birth or genital characteristics shall not constitute a clear and convincing reason under this standard.

⁶ Tracking information to improve conditions is a good idea; this can and should be done within the *current* THU housing.

⁷ As noted in the July 26, 2016 testimony of SRLP, inability to pay bail, lack of family or loved ones who can easily visit in jail and being housed in an incorrect facility already serves to isolate and deprive incarcerated TGNCI individuals of community. 7/26/16 SRLP Testimony, page 4.

- Adopt a rule that requires that DOC provide voluntary placement into an adolescent women's or women's units in a men's facility, for women housed in men's facilities. The rule should provide for access by adolescent women and women to such units regardless of pre-trial or sentence status.
- Adopt a rule that requires that DOC provide voluntary placement into an adolescent men's or men's unit in a women's facility, for men housed in women's facilities. The rule should provide for access by adolescent men and men to such units regardless of pre-trial or sentence status.⁸ These units must provide access to the same programming, hygiene products, clothing, and other services and supplies that individuals would have access to if they were housed according to their gender identity.
- Adopt a rule which requires that the DOC is subject to anti-discrimination requirements similar or parallel to those found in Local Law No. 3 (2002), NY. Admin. Code §8-102(23)(guidance issued 12/15/2015) and 9 NYCRR §466.13 (2016) and that all staff are trained on LGBTQI/TGNCI competency in order to prevent discriminatory harassment and bias-based treatment of incarcerated individuals by DOC staff.
- Adopt rules that provide for sufficient Board oversight through reporting by DOC to the Board and regular periodic reviews by the Board of compliance with the adopted PREA Board Standards.
- Adopt reporting requirements for any dedicated men's unit in the women's facilities and dedicated women's unit in the men's facilities to track and record information that will permit improvements to conditions in the units and access to the units, including:
 - The number of applications for the housing unit, the outcomes of the applications including reasons for denials, and information relevant to applicant's gender identity, age, and race;
 - When and where applications originate, which will permit investigations (and comparisons) of housing units with no applications versus units with numerous applications;
 - What programs are offered, and for each program: how frequently they meet, attendance, graduation, wait list and other data on use and utility.

⁸ Access to such a unit should not be unavailable due to age, pre-trial or sentence status. However, there may be a need to co-mingle groups that are ordinarily separated in order to avoid a unit that is default segregation because there are too few individuals within a specific status. Due to necessary separation of certain populations there will need to be access to such units in multiple settings particularly to keep adolescents separated from adults.

Thank you for this opportunity to supplement prior written and oral testimony provided to the New York City Board of Correction (Board) concerning the PREA rule-making.

Very Truly Yours,

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