



Legislative Affairs
One Whitehall Street
New York, NY 10004
212-607-3300
www.nyclu.org

**Testimony of Allie Bohm
On Behalf of the New York Civil Liberties Union
Before the Senate Standing Committee on Crime Victims, Crime, and
Corrections and the Senate Standing Committee on Ethics and Internal
Governance Regarding the Impact of Sexual Assault in the Prison System**

March 3, 2022

The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to submit the following testimony regarding the impact of sexual assault in the prison system. The NYCLU, the New York state affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 180,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution through an integrated program of litigation, legislative advocacy, public education, and community organizing. Because of the NYCLU's experience representing transgender individuals who are or have been incarcerated, the NYCLU strongly supports the Gender Identity Respect, Dignity, and Safety Act (A.7001-B/S.6677).

In 2018, the NYCLU's client (in a case brought jointly by co-counsel the NYCLU, the Transgender Legal Defense & Education Fund, and the law firm BakerHostetler), Jena Faith, a transgender woman, was incarcerated for four weeks in a men's general population unit. As soon as she arrived in the unit, a cisgender man who was also incarcerated in the unit began to sexually harass and proposition Jena. He rubbed his feet on her legs, tried to hold her hand, and blew kisses at her. He told her that he wanted to marry her and wrote her love letters. When Jena complained to guards about the harassment, they told her that she could not file a written grievance. Eventually, they transferred her to another section of the men's general population unit. This did not stem the harassment from either the cisgender men who were incarcerated in that unit or from guards.¹ Fearing for her safety, Jena hid in her cell, leaving only for meals and to shower; she spent approximately twenty hours of every day in her cell and was unable to fully access the physical facilities and programming generally available to men who were incarcerated in the unit. Jena did not

¹ Guards also persistently misgendered Jena throughout her time in the men's general population unit and refused to administer her prescribed hormone therapy medication, although they ensured that she received all of her other prescribed medications. Amended Complaint, *Faith v. Steuben County*, No. E2019-1208CV (N.Y. Supp. Ct. 2019).

bother to complain to staff this time, because she learned from prior experience that they would not protect her. Jena’s ordeal did not end with her release. As a result of the mistreatment and harassment she suffered, Jena has been unable to sleep and experiences night terrors.²

Although Jena’s experience took place in Steuben County Jail, it could just as easily have taken place in state Department of Corrections and Community Supervision (DOCCS) custody. Transgender people who are incarcerated are about ten times more likely to be sexually assaulted than the general prison population.³ Transgender women who are housed in male facilities are at particularly high risk. For example, a California study found that transgender women who were presumptively housed with men were thirteen times more likely to be sexually assaulted than cisgender men incarcerated in the same facilities.⁴

Assaults by facility staff are a particular problem; a disproportionate number of transgender women incarcerated in New York State DOCCS experience sexual violence by corrections officers. According to a recent survey by the Sylvia Rivera Law Project and TakeRoot Justice, fully seventy-five percent of respondents, the majority of whom are transgender women of color, “reported at least one instance of sexual violence by corrections officers.”⁵ Eighty-one percent of those who experienced sexual violence at the hands of corrections officers reported that violence to another DOCCS employee, an Office of Mental Health employee, or a volunteer, and yet the majority were met with inaction from DOCCS – or, worse, survivors experienced retaliation for reporting and were involuntarily transferred to isolated confinement. As respondents explained to Sylvia Rivera Law Project and TakeRoot Justice,

“I was only told that happens in prison.”

“I was accused of lying.”

“[T]hey . . . put me in [a Special Housing Unit] . . . It was ‘brushed under the rug’ and I remained in SHU for 6 . . . months for no reason!!!”

“Sent to the box, had mail thrown away, had personal property destroyed, received multiple retaliation behavior reports.”⁶

Prisons and jails have a responsibility to protect people who are incarcerated from sexual violence whether that violence is perpetrated by corrections staff or by other incarcerated people. If they fail to do so, they risk running afoul of the Eighth Amendment to the U.S.

² Amended Complaint, *Faith v. Steuben County*, No. E2019-1208CV (N.Y. Supp. Ct. 2019).

³ NATIONAL CENTER FOR TRANSGENDER EQUALITY, LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS 13 (2018).

⁴ *Id.*

⁵ SYLVIA RIVERA LAW PROJECT & TAKEROOT JUSTICE, IT’S STILL WAR IN HERE: A STATEWIDE REPORT ON THE TRANS, GENDER NON-CONFORMING, INTERSEX EXPERIENCE IN NEW YORK PRISONS AND THE FIGHT FOR TRANS LIBERATION, SELF-DETERMINATION, AND FREEDOM 27 (2021).

⁶ *Id.* at 27 – 28.

Constitution, which prohibits cruel and unusual punishment,⁷ as well as the New York State Human Rights Law and other state civil rights laws.

The most straightforward way to protect transgender, gender nonconforming, nonbinary, and intersex people who are incarcerated from sexual assault is to presumptively house them according to their gender identities. Unlike the transgender women in DOCCS custody who participated in Sylvia Rivera Law Project and TakeRoot Justice’s survey and who all reported being housed in male facilities,⁸ Jena had the experience of being housed in a female jail for several days before she was suddenly transferred to the male facility. When Jena was housed in the female facility, she did not face the same epithets, threats, or torment she faced in the men’s unit; she did not feel as harassed, uncomfortable, or unsafe; she was not the subject of any discipline; and she was able to avail herself of the physical facilities and programming generally made available to the women housed in that unit.⁹

Indeed, the U.S. Department of Justice has interpreted the Eighth Amendment to require that transgender, gender nonconforming, nonbinary, and intersex people who are incarcerated be housed in facilities that align with their gender identities where necessary to provide reasonable safety.¹⁰ Furthermore, the Equal Protection Clause of the U.S. Constitution prohibits treating transgender people differently than cisgender people without a compelling state justification, and courts have applied this rule in the context of housing in prisons and jails.¹¹

In 2020, Jena settled with Steuben County, and the jail agreed to:

- Presumptively house people consistently with their gender identities, with a list of reasons that cannot be used as the basis for a denial.
- Ensure that staff at the jail respect a person’s self-identified gender identity in all other contexts, including name and pronoun use, and searches.
- Ensure access to clothing, toiletry items, and grooming standards consistent with a person’s gender identity.

⁷ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (Prison officials may be liable for sexual assault by another incarcerated person where “the official knows of and disregards an excessive risk to inmate health or safety.”).

⁸ SYLVIA RIVERA LAW PROJECT & TAKEROOT JUSTICE, *IT’S STILL WAR IN HERE: A STATEWIDE REPORT ON THE TRANS, GENDER NON-CONFORMING, INTERSEX EXPERIENCE IN NEW YORK PRISONS AND THE FIGHT FOR TRANS LIBERATION, SELF-DETERMINATION, AND FREEDOM* 17 (2021).

⁹ Amended Complaint, *Faith v. Steuben County*, No. E2019-1208CV (N.Y. Supp. Ct. 2019).

¹⁰ *Diamond v. Ward*, 20-cv-00453, at *9 (M.D. Ga. Apr. 22, 2021) (Doc. No. 65).

¹¹ *Hampton v. Baldwin*, 2018 WL 5830730, at *11 (S.D. Ill. Nov. 7, 2018) (applying heightened scrutiny where the majority of transgender people are housed based on genitalia or sex assigned at birth); *Monroe v. Jeffries*, 19-cv-1060, at 18-19 (C.D. Ill. Apr. 9, 2020) (Doc. No. 41); *see also Doe v. Mass. Dep’t of Corr.*, 2018 WL 2994403, at *9 (D. Mass. June 14, 2018) (applying heightened scrutiny to classifications based on transgender status); *Tay v. Dennison*, 2020 WL 2100761, at *2 (S.D. Ill. May 1, 2020) (finding transgender incarcerated women are similarly situated with incarcerated cisgender women).

- Ensure access to medical care consistent with a person’s gender identity.¹²

The Gender Identity Respect, Dignity, and Safety Act (A.7001-B/S.6677) would codify these critical protections statewide, as well as put limits on involuntary protective custody, because involuntary protective custody, which is functionally identical to solitary confinement, disincentivizes people from reporting sexual assault and harassment¹³ and often increases vulnerability to sexual assault and harassment.¹⁴

There is every reason to believe that these protections will be effective and workable throughout the state. The New York State Sheriffs’ Association was involved in negotiating the settlement in Jena’s case and ultimately signed off on the Steuben County policy.¹⁵ Moreover, Connecticut, Massachusetts, and California¹⁶ have all enacted similar protections legislatively, and New Jersey agreed to a similar policy in a settlement to litigation.¹⁷

Unfortunately, the Governor is advancing a different proposal for the treatment of transgender, gender nonconforming, nonbinary, and intersex people who are incarcerated as Part B of her FY2023 Public Protection and General Government Article VII legislation (PPGG). The Governor’s proposal merely codifies DOCCS’s existing practices, which, as described above¹⁸ fail to keep transgender, gender nonconforming, nonbinary, and intersex people who are incarcerated safe from sexual violence. DOCCS’s existing policies are particularly dangerous for transgender women.¹⁹

In fact, the Governor’s proposal is less protective than the federal Prison Rape Elimination Act (PREA), which sets a floor for the treatment of transgender, gender nonconforming, nonbinary, and intersex people who are incarcerated. The Governor’s proposal focuses on generalized “safety, security or health concerns” that could have nothing to do with the impacted person’s own wellbeing rather than emphasizing, as PREA requires, the impacted person’s health and safety.²⁰

¹² Settlement Agreement and Release of Claims, *Faith v. Steuben County*, No. E2019-1208CV (N.Y. Supp. Ct. 2019).

¹³ Cf. SYLVIA RIVERA LAW PROJECT & TAKEROOT JUSTICE, IT’S STILL WAR IN HERE: A STATEWIDE REPORT ON THE TRANS, GENDER NON-CONFORMING, INTERSEX EXPERIENCE IN NEW YORK PRISONS AND THE FIGHT FOR TRANS LIBERATION, SELF-DETERMINATION, AND FREEDOM 27 – 28 (2021).

¹⁴ *Id.* at 23 – 24.

¹⁵ See *Faith v. Steuben County*, NYCLU, <https://www.nyclu.org/en/cases/faith-v-steuben-county> (last visited Feb. 24, 2022).

¹⁶ Conn. Gen. Stat. § 18-81ii (West 2018); M.G.L.A. ch.127 § 39A(c) (West 2018); Cal. Penal Code §§ 2605-06 (West 2021).

¹⁷ N.J. Department of Corrections Internal Management Procedure, PCS.001.TGI01 at 3 (2021), available at https://www.aclu-nj.org/files/6516/3000/3727/2021.08.26_ACLIU-NJ_GSE_Letter_to_Passaic_County.pdf.

¹⁸ See p. 2 *supra*.

¹⁹ *Id.*

²⁰ Compare A.9005-A/S.8005-A, Part B, 2021-2022 Reg. Sess. (N.Y. 2022) (decisions “shall be made on a case-by-case basis, with careful consideration given to housing consistent with the individual’s gender identity, following an individualized and informed assessment but subject to denial based on

Had the Governor’s proposal been law at the time the parties negotiated the settlement in Jena’s case, it would have undermined efforts to convince Steuben County to adopt the meaningful reforms it eventually agreed to.

The NYCLU urges the Committees to do everything in their power to ensure that Part B of the Governor’s PPGG proposal is removed from the final budget and to advance the Gender Identity Respect, Dignity, and Safety Act (A.7001-B/S.6677). Ensuring that transgender, gender nonconforming, nonbinary, and intersex people are presumptively housed according to their gender identities and treated with respect will not only prevent sexual violence in prisons and jails, but it will also literally save lives.

The NYCLU thanks the Committees for the opportunity to provide testimony and for their consideration of this critically important issue.

safety, security or health concerns”) *with* 28 C.F.R. § 115.42(c) (“In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency 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.”), § 115.42(e) (“A transgender or intersex inmate’s own views with respect to his or her own safety shall be given serious consideration.”).