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**Testimony of Allie Bohm
On Behalf of the New York Civil Liberties Union
Before the New York City Council Committees on Criminal Justice and
Women and Gender Equity on Oversight – The TGNCNBI Task Force Report
Update and TGNCNBI Individuals in Rikers**

January 25, 2023

The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to submit the following testimony regarding Oversight – The TGNCNBI Task Force Report Update and TGNCNBI Individuals in Rikers. 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.

The NYCLU is deeply grateful to the members of the Task Force on Issues Faced by TGNCNBI People in Custody for the critical work they undertook to document a crisis at Rikers, often at the expense of their own wellbeing, and for their thoughtful recommendations, which the NYCLU supports.

Because the NYCLU represents or has represented several transgender individuals who are or have been incarcerated in New York State, Task Force members asked us to share our experience and lessons to be learned from outside of the City.

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 in Steuben County, New York. Throughout her time in the men’s unit, guards persistently misgendered Jena and refused to administer her prescribed hormone therapy medication, although they ensured that she received all of her other prescribed medications. 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 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

Jena also 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.³

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.
- Ensure access to medical care consistent with a person's gender identity.⁴

There is every reason to believe that these protections will be effective and workable in New York City. 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.⁵ Moreover, Connecticut, Massachusetts, and California⁶ have all enacted similar protections legislatively, and New Jersey agreed to a similar policy in a settlement to litigation.⁷

¹ Amended Complaint, *Faith v. Steuben County*, No. E2019-1208CV (Supp. Ct., Steuben County 2019).

² *Id.*

³ *Id.*

⁴ Settlement Agreement and Release of Claims, *Faith v. Steuben County*, No. E2019-1208CV (Supp. Ct., Steuben County 2019).

⁵ See *Faith v. Steuben County*, NYCLU, <https://www.nyclu.org/en/cases/faith-v-steuben-county> (last visited Jan. 24, 2023).

⁶ Conn. Gen. Stat. § 18-81ii (West 2018); M.G.L.A. ch.127 § 39A(c) (West 2018); Cal. Penal Code §§ 2605-06 (West 2021).

⁷ 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.

What is more, these protections are required by Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishment,⁸ as well as the New York State Human Rights Law and other state civil rights laws. 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.⁹ 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.¹⁰

For these reasons, the NYCLU strongly supports Res. 0458, calling on the New York State Legislature to pass and the Governor to sign the Gender Identity Respect, Dignity, and Safety Act, which would codify statewide the critical protections Jena’s lawsuit secured in Steuben County, as well as put limits on involuntary protective custody, because involuntary protective custody is functionally identical to solitary confinement. We note that because 2023 is the start of a new legislative session, the resolution should be updated to reflect the legislation’s new bill numbers. We also note that the resolution text credits the NYCLU for research done by other organizations that we cite in our testimony and support memo on the bill; we encourage the Council to amend the resolution to credit the organizations that are responsible for that research.

The NYCLU also supports the Task Force’s edits to Int. 0355. While we are grateful for the spirit of the introduction, we are deeply concerned that the resolution as drafted would fail to result in meaningful change to DOC’s practices and, in doing so, would fail to keep transgender, gender nonconforming, nonbinary, and intersex people who are incarcerated safe. Indeed, the text of the introduction as drafted is at odds with the Gender Identity Respect, Dignity, and Safety Act, which Res. 0458 supports. We are grateful to the Task Force for proposing revisions to Int. 0355 that would ensure that transgender, gender nonconforming, nonbinary, and intersex people are presumptively housed according to their gender identities and treated with respect. We urge the Council to accept those revisions and further to amend the definition of intersex to reflect both the consensus of the intersex community as well as a more accurate explanation of intersex traits. The Council can do that by importing the definition of intersex already found in the City’s administrative code:

⁸ *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.”).

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

¹⁰ *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).

The term 'intersex traits or variations in sex characteristics' means the umbrella term for differences in reproductive or sex anatomy that may appear in an individual's chromosomes, genitals, secondary sex characteristics, or internal organs such as testes or ovaries, and may be identified at birth, or may not be discovered until puberty or later in life.

NYC Admin. Code sec. 17-119.16(a).

Finally, the NYCLU supports the spirit of Res. 0117 calling on the New York State Legislature to pass, and the Governor to sign, a bill that would mandate the Office of Court Administration (OCA) to update the securing order form to include a gender X option.¹¹ It is our understanding that Part R of the FY2023 Transportation, Economic Development, and Environmental Conservation (TED) Article VII legislation already imposed this requirement.¹² We encourage the Council to instead pass a resolution urging OCA to comply with this existing requirement.

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

¹¹ While we acknowledge that because there are only male and female jails, implementing X gender markers on securing orders will not impact where individuals are housed while in City custody, this change is important as a measure of respect. Indeed, the World Professional Association for Transgender Health (WPATH) specifically addresses the importance of not only obtaining accurate “gender marker[s] on key documents” but also of ensuring that organizations and institutions respect a person’s gender identity. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER AND GENDER DIVERSE PEOPLE (8th ed. 2022).

¹² N.Y. Civ. Rights Law § 79-q (McKinney) (All New York state agencies that collect demographic information about a person's gender or sex shall make available to the person at the point of data collection an option to mark their gender or sex as “x”); S.8008-C/A.9008-C Part R, 2021-2022 Reg. Sess. (N.Y. 2022).