On behalf of the New York Civil Liberties Union (NYCLU) and other stakeholders, we write to urge the State Commission on Correction (SCOC) to promulgate standards aimed at ensuring the health and safety of lesbian, gay, bisexual, transgender, and gender non-conforming people in county jails throughout the State. Although local correctional facilities are required to comply with the Prison Rape Elimination Act (PREA), many facilities do not have compliant policies or adequate training in place. In fact, when we wrote to local officials regarding Rensselaer County’s insufficient policies to protect transgender people in the County jail, they responded that they will not address the needs of transgender inmates “until the Commission on Correction begins requiring those to be addressed.” For these reasons, we request a meeting with the SCOC as soon as possible to discuss steps it can take to ensure that sheriff departments across the State take these requirements seriously and protect the LGBT people in their custody.

The Prison Rape Elimination Act (PREA)

In recognition of the staggering incidence of rape and sexual violence in confinement settings, Congress passed PREA unanimously and President George Bush signed it into law in 2003. PREA specifically recognizes that being lesbian, gay, bisexual, or transgender significantly increases the risk of sexual assault and harassment while confined. The Justice Department’s Bureau of Justice Statistics, for instance, found that 34% of transgender women incarcerated in jails have experienced one or more incidents of sexual assault, a rate nearly ten times higher than other incarcerated people.

1 See Email from Rensselaer County Attorney Stephen A. Pechenik to Erin Beth Harrist dated February 26, 2018 (attached as Exhibit A to this letter).
PREA required the DOJ to gather data on sexual violence in prison and jails and created the National Prison Rape Elimination Commission to study the problem and recommend regulations.\(^3\) After nine years of study and commentary by experts, the DOJ in May 2012 promulgated comprehensive regulations implementing PREA that set baseline requirements for all confinement facilities across the country – including county facilities.\(^4\) These regulations require agencies that run confinement facilities to adopt written policies mandating zero tolerance towards all forms of sexual abuse and harassment and outlining an approach to prevent, detect, and respond to such conduct.

Several regulations are aimed specifically at protecting LGBT and gender non-conforming people in light of the research on the dangers to this community in confinement settings. For instance, the regulations prohibit cross-gender searches absent exigent circumstances and prohibit searches of a transgender or intersex inmate for the purpose of determining genital status. 28 C.F.R. § 115.15. They require training on how to conduct respectful searches of transgender and intersex inmates and on communicating effectively and professionally with LGBT, intersex, and gender non-conforming inmates. Id. §§ 115.15, 115.31. They require an objective screening instrument to ensure that a person’s vulnerability to sexual victimization is considered when making housing and other placement decisions. Id. § 115.41-115.42.

Specifically with regard to transgender and intersex inmates, the regulations prohibit housing decisions based solely on genital status and require that a facility seriously consider the person’s own views of his or her own safety needs. Id. § 115.42. Finally, the regulations restrict the use of involuntary protective custody for those who may be at risk of sexual victimization. Id. § 115.43.

These regulations are an important first step to protect people in New York county jails from sexual violence and harassment, as recognized by the New York City Board of Correction when it recently adopted rules consistent with PREA.\(^5\) Government agencies are also bound by the United States Constitution to protect prisoners from sexual violence and abuse whether perpetrated by their own staff or by other prisoners. The Supreme Court firmly established this duty in Farmer v. Brennan, 511 U.S. 825 (1994), holding that deliberate indifference to a substantial risk of sexual assault violates prisoners’ rights under the Cruel and Unusual Punishment Clause of the Eighth Amendment. The duty to protect against sexual assault also applies to pre-trial detainees. See e.g., Cash v. County of Erie, 654 F.3d 324 (2d Cir. 2011).

Explicit in the Supreme Court’s jurisprudence is the recognition that sexual violence is an affront to human dignity and leads to severe psychological and physical effects for the people it impacts.

\(^3\) See 34 U.S.C. § 30301 et seq.

\(^4\) PREA applies to “any confinement facility of a Federal, State, or local government” including “any local jail or police lockup.” 34 U.S.C. § 30309(7); see also id. § 30309(8) (defining “prison rape” for purposes of PREA). The PREA standards impose requirements on “agencies,” which are defined as “the unit of a State, local, corporate, or nonprofit authority . . . with direct responsibility for the operation of any facility that confines inmates, detainees, or residents[,]” 28 C.F.R. § 115.5; see also 28 C.F.R. §§ 115.11-115.93 (setting forth requirements for “adult prisons and jails”).

\(^5\) See Chapter 5 of the NYC Board of Correction Minimum Standards.
Local New York Facilities Are Not Compliant with PREA

In 2015 we submitted Freedom of Information Law requests to the largest county jails in New York State, specifically Broome, Erie, Monroe, Nassau, Oneida, Onondaga, Orange, Rensselaer, Schenectady, Suffolk, and Westchester, seeking information about their policies, practices, and training with regard to ending sexual assault and abuse. While some facilities were PREA-compliant in some areas, other facilities failed to adopt any policies – PREA-compliant or otherwise – designed to protect people from sexual violence or failed to implement some of the most significant PREA reforms.

By way of summary, a third of the facilities have no policy mandating zero tolerance to sexual abuse and harassment.\(^6\) A third of the facilities likewise have no policies limiting cross-gender searches and, among those who do have relevant policies, several fail to address how to respectfully search transgender inmates. Almost all of the responding counties failed to train their staff on how to communicate with LGBT, intersex, and gender non-conforming inmates. As for housing and placement decisions, while many facilities generically require that an inmate’s risk of victimization be considered, the vast majority do not use an objective screening instrument as PREA requires.\(^7\) Similarly, only one of the counties has a policy reflecting the PREA guidelines designed to ensure safe housing placements for transgender people.\(^8\)

The failure to implement PREA-compliant policies and the inconsistency of those policies that are in place demonstrate the need for the SCOC to mandate policy reform in this area. While PREA applies to local correctional facilities, the lack of any meaningful enforcement or accountability mechanisms in PREA means that New York jails will not take steps to comply unless the SCOC takes action. This need is powerfully illustrated by the position of counties such as Rensselaer, which declared it would not address the safety of trans prisoners unless the SCOC required it. Although there is little publicly available data on the frequency of sexual assault in New York jails outside of New York City, the data that does exist indicates a serious problem that should be promptly addressed.\(^9\) The NYCLU continues to hear reports of LGBTQ people who are harassed or subjected to sexual abuse in county facilities.

---

\(^6\) We welcome the opportunity to provide a more detailed report on the analysis of the FOIL responses at the SCOC’s request.

\(^7\) The SCOC’s current minimum standards require a screening instrument, but the mandated considerations are not consistent with the PREA regulations. See 9 NYCRR 7013.7(b).

\(^8\) In contrast, New York City now requires that transgender inmates are housed consistent with their gender identity unless there are compelling security concerns. See Letter from Commissioner of the Human Rights Commission to General Counsel for NYC DOC dated April 13, 2018 (attached as Exhibit B to this letter). For instance, a transgender man may be at a serious safety risk housed in a male prison.

\(^9\) A May 2013 Bureau of Justice Statistics study reported on several New York county facilities. Some of those numbers are particularly concerning. For instance, Schenectady County Jail reported that 4.4% of inmates experienced inmate-on-inmate abuse. The Ulster County Law Enforcement Center reported 6.1% of inmates experienced sexual misconduct by staff. Allen J. Beck et al., Sexual Victimization in Jails and Prisons Reported by Inmates, 2011-12 at 79 (Bureau of Justice Statistics, May 2013).
The SCOC Should Adopt Minimum Standards to Ensure the Safety and Well-Being of LGBT People In County Facilities

We urge the SCOC to adopt minimum standards addressing the concerns outlined above. To that end, we request a meeting with the SCOC to discuss steps it can take to ensure the health and safety of LGBTQ, gender non-conforming, and intersex New Yorkers.

Sincerely,

Erin Beth Harrist

New York State Coalition Against Sexual Assault
Pride Center of the Capital Region
New York State Coalition Against Domestic Violence
New York Campaign for Alternatives to Isolated Confinement
Mental Health Association in New York State
New York Association of Psychiatric Rehabilitation Services, Inc.
Independent Living Center of the Hudson Valley, Inc.
New York Association on Independent Living
EXHIBIT A
Dear Ms. Harrist:

I was finally able to get to your January 16th correspondence. My conversation with the Undersheriff lead me to conclude that you and I will be wasting our time dealing with transgender policy issues until the Commission on Correction begins requiring those to those to be addressed.

Thank you.
Very truly yours,

STEPHEN A. PECHENIK
Rensselaer County Attorney

Stephen A. Pechenik
Ned Pattison County Government Center
1600 Seventh Avenue
Troy, New York 12180
Voice: (518) 270-2950
Fax: (518) 270-2954
E-Mail: spechenik@rensco.com

***CONFIDENTIALITY NOTICE*** This E-Mail message and any documents accompanying this E-Mail transmission contain information from the law offices of the Rensselaer County Attorney, which information is "Privileged and confidential attorney-client communication and/or work product of counsel." If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution and/or the taking of or refraining from taking of any action in reliance on the contents of this E-Mail information is strictly prohibited and may result in legal action being instituted against you. Please reply to the sender advising of the error in transmission and delete the message and any accompanying documents from your system immediately. Thank you.
EXHIBIT B
VIA FIRST CLASS MAIL & EMAIL

Heidi Grossman, Esq.
General Counsel
Department of Correction
75-20 Astoria Boulevard
East Elmhurst, New York 11370
Heidi.Grossman@doc.nyc.gov

Re: Modification of Exemption Pursuant to N.Y.C. Admin. Code § 8-107(4)

Dear Ms. Grossman:

On March 7, 2016, Mayor de Blasio signed Executive Order 16 ("EO 16"), requiring that all employees of City agencies and members of the public who utilize City services be allowed to use the single-sex facilities that most closely align with their gender identity. On March 10, 2016, the Department of Correction ("DOC") requested an exemption to EO 16 to the extent that it "applies to decision[s] about where to house inmates in [DOC’s] custody." 1 On March 28, 2016, the New York City Commission on Human Rights ("Commission") provisionally granted DOC a partial exemption.

After additional review, and as discussed in further detail below, the Commission has reached a final determination that DOC must house inmates consistent with their gender identity. The Commission has determined that the state law governing housing of prisoners, Correction Law § 500-b(3), does not conflict with EO 16 and that the provisional exemption issued on March 28, 2016 must be modified.

Earlier this year, the Commission communicated to DOC its intent to rescind or modify the exemption and requested that DOC provide additional information, including references to any applicable laws or regulations that might impact DOC's ability to fully comply with EO 16. In response, on March 19, 2018, the Commission received an email from the New York City Law Department, on behalf of DOC, indicating that, pursuant to the federal Prison Rape Elimination Act ("PREA"), which is aimed at curtailing prison rape and sexual assault, and the New York City Board of Corrections ("BOC") rules implementing PREA, DOC must engage in an individualized assessment of all inmates to determine levels of risk of victimization and abusiveness. 2 PREA and the rules implementing it that have been promulgated by the U.S. Department of Justice and BOC are designed to detect, prevent, and respond to sexual abuse and harassment of incarcerated people, and aim to provide specific protections for inmates who are

---

1 Letter from Heidi Grossman to Melissa Woods (March 10, 2016).
2 See 28 C.F.R. § 115.41; 40 R.C.N.Y. § 5-17.
particularly vulnerable to sexual assault, such as transgender and gender non-conforming people. Specifically, PREA rules require DOC to assess all inmates, taking into account factors such as whether they are or are perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming; their previous experience of sexual assault; their own perception of vulnerability; their gender identity and whether they identify as male, female, or non-binary; and any prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse.

Determinations made by DOC, based on these factors and others required by PREA and BOC rules, may at times conflict with the requirement of EO 16 that all inmates be housed in accordance with their gender identity. The Commission finds, however, that there is a bona fide public interest in ensuring that DOC can comply with PREA and BOC requirements to perform individualized assessments for inmate housing, because such assessments are critical to ensuring the health and safety of transgender and gender non-conforming inmates, other inmates vulnerable to assault and harassment, and the safety of DOC staff. Accordingly, the Commission concludes that a modification of the exemption is warranted to allow DOC to perform individualized assessments of inmate housing assignments consistent with PREA, BOC rules, and other applicable law.

DOC's partial exemption is now modified as follows: unless otherwise required pursuant to an individualized analysis as required by sections 115.41 through 115.43 of PREA, sections 5-17 through 5-19 of the BOC rules, and/or any other relevant provisions of law, or in response to the express preferences and safety concerns of an inmate to the contrary, DOC must house inmates consistent with their gender identity. Pursuant to the exemption, all bases for any housing placement inconsistent with gender identity must be documented in writing and made available for review by the Commission's Office of the Chair, upon request. If necessary, DOC may redact identifying or otherwise confidential information provided to the Commission's Office of the Chair when responding to such requests.

The Commission recognizes that DOC may face challenges in modifying policies and practices in its facilities and securing the safety and well-being of inmates and staff. At the same time, there is a pressing need to ensure that inmates are housed in accordance with EO 16 and

4 28 C.F.R. § 115.41; 40 R.C.N.Y. § 5-17.
5 28 C.F.R. § 115.42; see NATIONAL PREA RESOURCE CENTER, FAQ (March 26, 2016), https://www.prearesourcecenter.org/node/3927 (last visited Apr. 13, 2018) (stating that a PREA complaint standard must give serious consideration to transgender or intersex inmates' own views with respect to safety and "must consider the transgender or intersex inmate's gender identity — that is, if the inmate self-identifies as either male or female.")
6 Information requested pursuant to the modified exemption will be used solely by the Commission's Office of the Chair for purposes of monitoring DOC's compliance with the exemption and assessing whether the exemption continues to be warranted based on bona fide considerations of public policy. Such information will not be shared with the Commission's Law Enforcement Bureau. Redactions consistent with this modified exemption do not apply to responses to requests for information, investigatory demands, and discovery demands issued by the Commission's Law Enforcement Bureau to DOC.
with fundamental principles of dignity and equality. Therefore, the effective date of this modification will be October 13, 2018, providing DOC six months to develop and implement internal policies and practices consistent with this modification. The Commission requires that DOC submit progress reports, to be submitted by June 15, 2018, August 15, 2018, and October 14, 2018, indicating all relevant information related to implementation of this modification, including: (i) a summary of DOC’s plan for implementation and any changes made to the plan since DOC’s last report; (ii) a summary of the persons and entities involved in the implementation and planning process; (iii) a description of the steps that have been taken to implement the plan since the last report; (iv) a description of remaining steps to be taken and the anticipated timing for completion of those steps; and (v) a summary of implementation difficulties, if any, that DOC has encountered that it believes may be relevant to the Commission’s assessment of DOC’s compliance with the modified exemption.

Additionally, DOC shall provide a letter to the Commission, due January 15, 2019 and each January 15 thereafter, summarizing: (i) the status of DOC’s compliance with this exemption; (ii) the procedures and policies implemented towards this goal, and specifically identifying new procedures and policies, if any, adopted since the prior year’s submission; and (iii) for the prior year, the number of applications made by or on behalf of inmates seeking to be housed consistent with their gender identity, the number of requests granted, and a summary of the bases for any denials.

Please contact the Commission with any questions or concerns you may have. Lauren Elfant, Chief of Staff, and Zoe Chenitz, Policy Counsel, are available to assist you. You may contact Ms. Elfant at lelfant@cchr.nyc.gov or (212) 416-0155, and you may contact Ms. Chenitz at zchenitz@cchr.nyc.gov or (212) 416-0199.

Sincerely,

CARMELYN P. MALALIS
Commissioner and Chair
New York City Commission on Human Rights