

February 28, 2022

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Speaker of the Assembly Carl Heastie
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Assemblymember Helene E. Weinstein
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Re: Public Protection Article VII Legislation on “Gender-Affirming Treatment of Incarcerated Individuals”

Dear Leader Stewart-Cousins, Speaker Heastie, Senator Krueger, and Assemblymember Weinstein:

We represent numerous LGBTQ+ groups and allied organizations in New York State and write to express our opposition to Part B of the Governor’s FY2023 Public Protection General Governments (PPGG) Article VII legislation that purports to protect transgender, gender non-conforming, non-binary, and intersex (TGNCNBI) people in New York prisons and local jails. While we appreciate the Governor’s recognition that this is a serious issue that must be addressed, the language as written does not advance the goal of protecting TGNCNBI people from discrimination, violence, and abuse in prisons and jails. It will instead perpetuate the dire situation they currently face. We strongly urge you to oppose the Governor’s inadequate and harmful proposal and instead support the Gender Identity Respect, Dignity, and Safety Act (GIRDS) (A.7001-

B/S.6677) in its entirety.¹ Unlike Part B of PPGG, GIRDS is informed by impacted community members, is designed to enact meaningful change for incarcerated TGNCNBI people, and is consistent with the values of New York State.

As currently written, Part B of PPGG merely codifies what prisons and jails are *already required to do* under federal regulations promulgated in 2012 pursuant to the Prison Rape Elimination Act (PREA).² Because of PREA, both NYS Department of Corrections and Community Supervision (DOCCS) and the NYC Department of Correction (DOC) already have policies that provide for a case-by-case individualized assessment of requests to be housed according to gender identity. *See e.g.*, DOCCS Directive No. 4021 (providing for an individualized assessment “in order to maximize the inmate’s safety”; “Housing assignment by gender identity will be made when appropriate.”); *see also* DOCCS Directive No. 4401. Undeniably, PREA and the subsequent policies have failed to ensure that TGNCNBI people are housed safely. Most transgender women continue to be housed in men’s prisons and jails. A recent survey conducted by the Sylvia Rivera Law Project and TakeRoot Justice found that *all* female TGNC respondents, the majority of whom were people of color, were housed in men’s prisons.³ Two-thirds of TGNC respondents requested transfers due to safety issues and most were denied, often with cruel and inhumane language.⁴ 75% of TGNC respondents experienced sexual violence by correctional officers.⁵ 95% of TGNC respondents reported being verbally harassed and called derogatory names by corrections staff.⁶ In NYC DOC,

¹ Unlike A.7001-B, which reflects the most recent revisions to GIRDS, the companion bill in the Senate (S.6677) has not yet been updated, though we understand that Senator Salazar supports the updated language.

² In fact, the bill is less protective than PREA because it puts less emphasis on the impacted person’s health and safety. *Compare* Part B of PPGG (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 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.”).

³ Sylvia Rivera Law Project & TakeRoot Justice, *It’s Still War in Here: A Statewide Report on the Trans, Gender Non-Conforming, Intersex (TGNCI) Experience in New York Prisons and the Fight for Trans Liberation, Self-Determination, and Freedom* 17 (2021), available at <https://takerootjustice.org/wp-content/uploads/2021/06/Its-Still-War-In-Here-1.pdf>.

⁴ *Id.* at 18-21.

⁵ *Id.* at 27.

⁶ *Id.* at 24-25.

sixteen transgender women were housed in men's jails as of January 21. In short, the current DOCCS and DOC policies have not protected our community; nor will the almost identical language in the proposed Article VII legislation.

Strikingly, the Governor's proposal is also inconsistent with constitutional standards. As recently clarified by the U.S. Department of Justice, the Eighth Amendment requires placement in a facility that aligns with one's gender identity if necessary to provide reasonable safety. *Diamond v. Ward*, 20-cv-00453, at *9 (M.D. Ga. Apr. 22, 2021) (Doc. No. 65). In contrast, the Governor's proposal permits denial of gender-aligned placement for any discretionary and undefined "safety, security, or health concern" without prioritizing the safety of the impacted person. The Equal Protection Clause prohibits treating transgender people differently than cisgender people without a compelling state justification.⁷ Any "safety, security, or health concern" as determined by the unlimited discretion of correctional authorities cannot meet that heavy burden.⁸

As a state that has always prided itself on being a safe and welcoming place for the TGNCNBI community, New York should take this opportunity to enact meaningful change in this area. The impact of the existing policies on people's health, safety, and well-being is devastating. As described by one person,

For too many years, I had suffered years of abuse and indignities while housed with men in jails and prisons. Officers would often call me "it." Or, for example, when I was housed in a dorm with almost 50 men in Rikers Island in the summer of 2017, I was repeatedly verbally and physically harassed. I never felt safe; it was almost impossible to sleep. At no other time in my life have I experienced the deep hurt and pain I felt while housed with men in jails and prisons.

⁷ *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).

⁸ See *Monroe*, 19-cv-1060, at 21 (affirming earlier injunction ordering housing in a women's prison although it was "uncontroverted . . . that Plaintiff made threats against others and ha[d] engaged in incidents of sexual activity" while in the women's prison); *Hampton v. Baldwin*, 2018 WL 5830730, at *12 ("female inmates can be equally aggressive and violent . . . [y]et, no one would suggest those women should be housed in the men's division").

We urge you to read the experiences of other people subjected to these harmful policies, attached to this letter.

To finally help end this violence, fear, and inhumane treatment, New York must enact GIRDS. This bill creates a presumption of housing consistent with one's gender identity unless the person opts out of such placement or if there is *clear and convincing* evidence that a person presents a current danger of committing gender-based violence. The protections provided by GIRDS are consistent with other jurisdictions including in the tri-state area. In New York, Steuben County, as the result of a lawsuit brought by a transgender woman, adopted a policy that prohibits denial of gender-aligned housing on the basis of discriminatory reasons, including "(i) the anatomy or genitalia of the person whose housing placement is at issue, (ii) the sexual orientation of the person whose housing placement is at issue, (iii) the complaints of cisgender people who do not wish to be housed with a non-cisgender person due to that person's gender identity, or (iv) a factor present among the other people in the requested housing unit."⁹ Notably, the New York State Sheriffs' Association signed off on the Steuben County policy.¹⁰ Pursuant to a settlement, New Jersey recently adopted a policy whereby TGNCNBI people are presumptively housed according to their gender identity.¹¹ In September 2020, California enacted a law that permits TGNCNBI people to assess where they will be safest and choose where they would like to be housed.¹² New York should follow the lead of these and other¹³ jurisdictions and enact the Gender Identity Respect, Dignity, and Safety Act.

In addition to the housing protections, additional essential provisions in the Assembly version of GIRDS are absent from the proposed Article VII legislation.

⁹ https://www.nyclu.org/sites/default/files/field_documents/2020-07-22_faith_final_settlement_agreement_redacted.pdf.

¹⁰ See Press Release, New York Civil Liberties Union, Agreement Follows Lawsuit on Behalf of Woman Subjected to Harassment and Discrimination in Steuben County, N.Y. Jail (Aug. 5, 2020), *available at* <https://www.nyclu.org/en/press-releases/landmark-settlement-yields-one-nations-strongest-jail-policies-protecting-transgender>.

¹¹ 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.

¹² Cal. Penal Code §§ 2605-06.

¹³ *E.g.* Conn. Gen. Stat. § 18-81ii; M.G.L.A. ch.127 § 32A.

- Due Process Protections. Currently, in DOCCS, people wait for months and sometimes years for a written response to requests for gender-aligned housing and those responses provide little to no reasoning justifying a denial. GIRDS requires a written determination in two days with a detailed explanation for the decision. In contrast, the proposed legislation requires only a written determination – something DOCCS already provides – without any time limitation and without any appeals process. The bill only appears to contemplate procedural protections for people who wish to leave a facility housing people of their gender identity, and not those whose requests for gender-aligned housing are denied.
- Reporting obligations. GIRDS provides for annual reporting on compliance with the bill’s provisions to ensure correctional agencies are held accountable. In contrast, the proposed legislation does not require any reporting.
- Intersex inclusion. The GIRDS coalition worked closely with intersex advocates to ensure the bill was inclusive of the needs of the intersex community and responsive to the specific discrimination they face in prisons and jails. While the proposed legislation includes intersex people within its scope, it does not address the specific harms they currently experience in these settings.
- Transfer as Form of Discipline. In NYC DOC, TGNCNBI people have been transferred from women’s housing to men’s housing as a form of discipline. To end this cruel and inhumane practice, GIRDS prohibits denying placement based on gender identity or transferring someone out of gender-aligned housing as a form of discipline.
- Involuntary Protective Custody. Many TGNCNBI people are placed in involuntary protective custody when they report an assault or other threat to their safety.¹⁴ Involuntary protective custody is solitary confinement, a form of torture.¹⁵ For these reasons, GIRDS limits the use of involuntary protective custody to 14 days. In contrast, the proposed legislation provides no such limitations.

¹⁴ See *It’s Still War in Here*, *supra* note 2, at 27-29.

¹⁵ United Nations Standard Minimum Rules for the Treatment of Prisoners, Rules 44-45 (2015).

For all of these reasons, we urge you to oppose Part B of the Governor's PPGG proposal and join our efforts to enact GIRDS, a bill that will advance the goal of treating TGNCNBI people with greater dignity and respect in prisons and jails.

Sincerely,

Adirondack North Country Gender Alliance
BKForge
Black & Pink NYC
Cardozo School of Law Defense Clinic
Center for Community Alternatives
CK Life
College & Community Fellowship
Decriminalize Sex Work
Destination Tomorrow: The Bronx LGBT Center
Empire Justice Center
Equality NY
Exponents, Inc.
Five Boro Defenders
Gender Equality New York, Inc.
Grassroots Action NY
Lambda Legal
Legal Action Center
LI Social Justice Action Network
Neighborhood Defender Service
New Alternatives for Homeless LGBT Youth
New Hour for Women & Children – LI
New Pride Agenda
New York Civil Liberties Union
NYC Anti-Violence Project
Osborne Association
Pride Center for the Capital Region
Princess Janae Place
Sands' House, Inc.
Stonewall Community Foundation
Sylvia Rivera Law Project
The Albany Damien Center
The Bronx Defenders
The Fortune Society
The Legal Aid Society
The Lesbian, Gay, Bisexual & Transgender Community Center

The LGBTQ+ Caucus of ALAA, UAW Local 2325
The National Trans Bar Association
Transgender Law Center
Transgender Legal Defense & Education Fund
Youth Represent

cc: Members of the New York Legislature

Experiences of TGNCNB People in New York prisons and jails¹

Experiences of Ms. A: Ms. A has been in DOCCS custody for over twenty years, always in a men's prison. During that time, DOCCS has delayed and at times denied access to gender-affirming care and failed to protect her from repeated instances of sexual abuse and harassment. Around 2014, Ms. A started asking for hormone therapy; it took more than a year and repeated requests for DOCCS to send her for an evaluation and even longer to provide her with treatment. Ms. A asked for gender-affirming surgery, but after more than a year, she still has not received it.

Ms. A has a long history of sexual abuse and victimization during her incarceration, including a gang rape by other persons in custody. She tells us she requested housing in a women's prison in accordance with the DOCCS policy but her request was denied with no reason given. Although DOCCS has placed her in a number of purportedly "trans-friendly" prisons, she has continued to experience serious abuse, including abusive searches, too frequently conducted by male officers, who have grabbed her breasts or genitals and made derogatory comments. Other prisoners have "hit on her," exposed themselves to her, and have touched her without her consent. When she has resisted their advances, her property has been taken and she has been assaulted. While her situation has at times improved when she has been transferred to prisons where there are with a number of other transgender women, this improvement has often been short-lived as other women are transferred, released, or even die by suicide.

In other words, Ms. A has faced continuing abuse as a result of her gender identity and the refusal of DOCCS to house her safely.

Experiences of Ms. B: Ms. B was released from DOCCS in the summer of 2019. She is in her fifties and is a woman. This incarceration was her first. When she was arrested in summer 2017, she had government issued identification that identified her as female. She was first taken to intake in the NYC Department of Correction (DOC) in the women's jail where she was kept isolated from others for approximately three days. When she revealed to a doctor that she was a transgender woman and needed female hormone medications, she was forced to move to a male facility. She was terrified and dumbfounded; she did not understand why she could not remain in the women's jail, particularly since the government had acknowledged her gender identity as female. She was moved to the Transgender Housing Unit (THU), which although located in a men's jail, felt safer than being housed with men in a general population unit. When the THU was moved to the women's jail, ironically she felt less safe because the THU then offered only dormitory housing. She could not retreat to a safe space if there were fights or if officers, as too frequently occurred, used pepper spray, aggravating her asthma and making it extremely difficult for her to breathe. She therefore asked to be moved to individual cell housing with solid doors. Instead, she was moved to a cell with bars in a men's jail where she experienced two horrific attempted sexual assaults, including one involving an incarcerated man pulling her hair through the bars of her cell to force his penis into her mouth. Only then was she moved to cell housing with a solid door in a different male jail, but even there she was subject to unrelenting sexual harassment.

¹ These client experiences are also included in The Legal Aid Society's Memorandum of Support for the Gender Identity Respect, Dignity, and Safety Act. The clients have chosen to share their experiences anonymously.

When she was sentenced to DOCCS she was put in general population at reception, despite our notifying DOCCS of her serious risk in custody. She tells us this period in population was the most frightening experience of her life, with other people in custody masturbating in front of her and demanding sexual favors. Officers varied from indifferent to hostile, saying things like “are you trying to make yourself pretty?” when she pulled her hair back in an effort to comply with their rules. She was then placed in protective custody.

After our intervention, she was moved to a “trans-friendly” prison where she told us she was safe while she remained on the unit, and where she was housed with other transgender women, some gay men, and some older persons. However, she also told us that she was terrified to leave the unit for medical care or programs or for any other reason, because of the substantial risk she faced from the men at the prison who would continually harass her. She also told us that officers would on occasion harass her due to her gender identity, telling her to take a certain route that was in fact not allowed or asking her if she performed massages. During her incarceration in DOCCS she was not provided with a bra that fit or with any female underpants. When she needed an evaluation for her hormone treatment, she was sent in handcuffs attached to a waist chain and ankle shackles for an appointment that lasted two minutes, even though the onerous and humiliating process took all day involving transport on a bus without seatbelts. Although there was a bathroom stop on the trip, the restraints were not loosened or removed so that she could use the bathroom. She was informed that if she refused the trip, she would receive a disciplinary infraction.

DOCCS and the Institutional Parole Officer had no idea how to help her find housing for women upon her release, because to their understanding they only worked with men since it was a men’s prison. As a result, she was released to a men’s shelter. Thankfully, she was able to find transitional housing for women immediately because of the efforts of advocates, but not because of any steps taken by DOCCS or the Division of Parole.

Experiences of Ms. C: Ms. C was housed in a women’s jail at Rikers Island from the summer of 2018 until spring 2020, and then in both a men’s prison and a women’s prison in NYS DOCCS custody until her release in early 2021. From virtually the moment she arrived in custody, she asked both NYC DOC and NYS DOCCS for gender affirming surgeries. Neither provided it. NYC DOC told us for months that they were trying to arrange it, but during this time she was never even referred for an evaluation. While in NYS DOCCS, because Ms. C suffered from a bilateral testicular cyst, she was provided with a bilateral orchiectomy, but DOCCS refused to provide her with the additional requested treatment, a vaginoplasty, even though she had spoken with her surgeon about it and he expressed willingness to perform the procedure.

Although Ms. C was housed in a women's jail safely in NYC DOC custody, when she was released on her own recognizance because of the risks facing her due to the pandemic, a warrant fell and DOCCS took custody of her. Instead of housing her in a women's prison, she was taken to Sing Sing, where she faced harassment and abuse. Only after our advocacy was she moved to a women's prison in DOCCS.

Experiences of Ms. D: Ms. D is a 62-year-old transgender woman who was just released from DOCCS custody at the end of 2020. Ms. D has lived as a woman for more than 40 years, since

she moved to the United States. Despite spending much of her life in custody, she has never been convicted or disciplined for any act of violence; she has been sentenced to prison for what amounts to repeated shoplifting charges. She was housed in men's prisons and jails for years, where she was harassed and threatened: objects were thrown at her, transphobic comments made, and attempts were made to touch her including while she showered. She lived in constant fear.

Following Legal Aid's demand, the NYC DOC housed her in its THU, first when it was located in one of the city's jails for men. It was not until the THU was moved to the women's jail that she felt safe, could fully program, and could obtain the basic necessities that she needed. Following our demand to NYS DOCCS that she be housed safely and respectfully, she was housed in a women's prison where she studied cosmetology, took business classes, and completed ASAT (Alcohol and Substance Abuse courses). She stayed calm, including during the pandemic, by knitting in her cell. She showered separately and met no hostility from staff or other incarcerated individuals (except for one time when a female officer refused to search her saying she didn't feel "comfortable" around transgender people).

In the fall of 2020, Ms. D was released from DOCCS custody. She is now living in her own apartment, is pursuing vocational training, and is successfully transitioning to her life in the community. As she now describes her experiences:

Being acknowledged by DOCCS as a woman, after years of having this denied, has meant the world to me. It helped immeasurably with my gaining the strength and self-respect I needed to transition to the community.

For too many years, I had suffered years of abuse and indignities while housed with men in jails and prisons. Officers would often call me "it." Or, for example, when I was housed in a dorm with almost 50 men in Rikers Island in the summer of 2017, I was repeatedly verbally and physically harassed. I never felt safe; it was almost impossible to sleep. At no other time in my life have I experienced the deep hurt and pain I felt while housed with men in jail and prison.

Because of advocacy by LAS I was finally housed with women, both in NYC DOC and NY DOCCS custody.

When I arrived in Bedford Hills in [] 2019, I was told by DOCCS that I was the only transgender woman housed in a women's prison. When I was released [at the end of] 2020, I was still one of only a handful of people housed by DOCCS consistent with their gender identity. Yet throughout--other than a small number of staff who initially did not want to search me--I was treated with respect and dignity by everyone I dealt with, including all other staff and other incarcerated people.

I was the exception; it is time that housing people in all jails and prisons consistently with their lived experience and gender identity becomes the norm. I pray to God no other transgender woman ever has to go through what I have experienced.