



**TESTIMONY OF:**

**Kelsey De Avila, LMSW**  
***BROOKLYN DEFENDER SERVICES***

**Presented before**

**The New York City Council Committee on Criminal Justice**

**Oversight Hearing on the Experience of Transgender and Gender Non-Conforming  
Individuals in New York City Jails**

**And**

**Intro 1513-2019, Intro 1514-2019, Intro 1530-2019, Intro 1532-2019, Intro 1535-2019,  
Res. 0143-2018, Res. 0829-2019**

**May 1, 2019**

My name is Kelsey De Avila and I am the Project Director of Jail Services at Brooklyn Defender Services. BDS provides comprehensive public defense services to nearly 30,000 people each year, thousands of whom are detained or incarcerated in the City jail system either while fighting their cases or upon conviction of a misdemeanor and a sentence of one year or less. Thank you for the opportunity to address the Council on an issue of profound importance. Our testimony below is guided by the stories of our transgender clients, with a heavy focus on safe housing for transgender individuals and the need for transparency to ensure safety and accountability in our city jails.

Although our testimony focuses primarily on transgender women, the Council must address and hold the Department accountable for safely housing and providing services for all transgender, gender non-conforming, non-binary and intersex (TGNCI) people incarcerated in our city jails. Far too often we hear harrowing stories from our incarcerated clients ranging from the Department of Correction's ("DOC" or "Department") misuse of gender pronouns, lack of information about housing alternatives for transgender people, to inhumane conditions where people experience physical and sexual abuse.

Last week, the NYC Board of Correction (“BOC” or “Board”) held a dedicated hearing on the Elimination of Sexual Abuse and Sexual Harassment Minimum Standards. During that hearing, the Department provided Board Members with inaccurate descriptions of our clients’ experiences. The City Council, and the Board, deserves more. We share our clients’ experiences in order to educate the Council. In turn, we ask that the Council hold the Department responsible and in order to do so, this Council must enhance accountability, clarity, and enforcement as it relates to transgender and gender non-conforming individuals in our city jails.

### **DOC Staff Discouraging Programs**

Despite the Board’s mandate and the Department’s policies, people in DOC facilities face often-insurmountable hurdles accessing information and services targeted toward the transgender community. All too often, the very DOC staff responsible for providing these services are the ones who hinder their effectiveness. This problem is particularly pervasive when our clients seek access about specialty housing units including the Transgender Housing Unit (“THU”).

#### **Ms. A**

Like all other people entering DOC custody, Ms. A, a 25-year-old transgender woman, answered extensive, confidential, and sensitive questions during the intake process. Although it presented an emotional burden, Ms. A shared her gender identity, history of sexual abuse, and extensive personal trauma on the PREA intake form. After completing the process, Ms. A expected that the information she provided would be used to provide services and determine the most appropriate housing. However, neither the intake officer nor PREA staff followed up with Ms. A about the housing options or provided information about the THU. When DOC placed Ms. A in general population in a male facility, despite the fact that she is a transgender woman, she faced relentless harassment from incarcerated males and DOC staff. Shortly thereafter, without explanation, Ms. A was moved to the New Admission House, in a male facility, where she continued to be the target of harassment. In that house, Ms. A encountered a constant flow of new people coming into the unit, making the already traumatic experience even more distressing with Ms. A in a position of constantly navigating people’s preconceived notions and her safety.

In the New Admission House she met four other transgender women. They informed Ms. A of the THU at the women’s facility and other options beyond her current house. After considering her options, Ms. A requested an application for the THU. Not long after she expressed interest, she met with a PREA Compliance Manager. When Ms. A asked if the THU would be a better experience, the Compliance Manager responded, “No, it will be worse.”

Our office has grave concerns with how DOC staff, charged with providing accurate information so people in custody can make informed decisions, dissuade individuals from even filling out the THU application. Ms. A took the official’s word and decided to stay in the male New Admission House. Shortly after, Ms. A was physically assaulted in the bathroom where she sustained multiple serious injuries.

Situations like the one Ms. A was in should not exist, but they do with regularity. It has been our overwhelming experience that DOC staff regularly fail to inform incarcerated individuals about

the existence of the THU and frequently ignore requests for information or application forms from incarcerated individuals who know that the THU exists. When people learn of the THU through word-of-mouth, Department of Correction staff discourages individuals from even attempting to apply. These interactions are not only ethically problematic; they put lives in serious danger.

### **Lack of Available Information about THU Criteria and Eligibility**

It is important for directly impacted people and the advocacy community that supports them to understand DOC's eligibility criteria for placing someone in THU. Incarcerated individuals often do not receive any response to their requests for placement in THU, or are provided with informal verbal decisions from DOC staff without explanation as to the basis of the decisions. In the cases when DOC does issue written decisions, they rarely issue within the timeframe prescribed by Directive 4498, sometimes providing decisions months after the incarcerated individual first requested to be placed in the THU.

DOC has an informal practice of reviewing THU placement requests in a manner that is inconsistent with its own directive. Though an Evaluation Committee and Advisory Committee are supposedly in place to decide an individual's placement in THU, Assistant Commissioner for Sexual Abuse and Harassment Prevention Faye Yelardy is primarily responsible for making THU placement determinations and has stated that she keeps no written documentation of her reasoning for determining placement.<sup>1</sup> When a client requests THU through our office, BDS contacts Assistant Commissioner Yelardy directly requesting staff to follow up with the individual for THU placement.

#### **Ms. B**

Although Ms. B identified herself as a transgender woman, she wasn't immediately placed into THU upon admission into DOC custody because the Department claimed they needed to conduct an assessment before Ms. B could be moved into the THU. She was subjected to physical abuse from incarcerated men in a male housing unit until she was ultimately accepted and transferred to the THU at MDC. Although the THU at MDC did not allow her the same access to programming that she would have had in general population, Ms. B felt safer in THU. Not long after she was in THU, she was sentenced to jail on her criminal case. When she returned to her housing unit from court, she was ordered to pack up her things because she would be moving, but with no explanation. She was briefly able to contact our Jail Services team to say she was moving, but she did not know where she was being transferred or why. She pleaded with the THU staff to let her stay, but to no avail.

Our office met with Ms. B the following morning at EMTC, the sentenced male facility. She hadn't slept; she couldn't stop crying and didn't know what she did to deserve the transfer. Our office reached out to Assistant Commissioner Yelardy asking for an explanation for the transfer and requesting that DOC immediately move Ms. B back to THU. Assistant Commissioner

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<sup>1</sup> Assistant Commissioner of Sexual Abuse and Harassment Prevention Faye Yelardy made these comments during a meeting with advocates and Board of Correction in May 2017 at the Bulova Building in Queens.

Yelardy responded to our request days later and said that THU does not accept women who are sentenced. The purported policy prohibiting sentenced transgender women from accessing the THU was not written anywhere. BDS and other defender organizations are aware of sentenced women who are housed in THU. However, the Department indicated that Ms. B's "sentenced" status was the sole reason she was taken out of a unit where she was doing exceptionally well and moved to a male facility where she was harassed and later physically assaulted. Nowhere in the DOC Transgender Housing Unit Directive or the Board of Correction Minimum Standards does it prohibit sentenced individuals from accessing the Transgender Housing Unit, yet this was the only rational DOC provided in Ms. B's case.

It is our understanding that the THU at the women's jail is accepting sentenced women. Contrary to its stated policy and Ms. B's case, the DOC practice of allowing sentenced women in THU in most cases is appropriate. We need to ensure that arbitrary decision making like the one in Ms. B's case does not repeat itself. There needs to be meaningful oversight and transparency in how these decisions are made.

### Ms. C

Ms. C is a young woman who was sent to a male facility on Rikers Island. She requested THU during intake, not because she was informed by DOC staff but because she was made aware of the unit through formerly incarcerated individuals prior to her arrest. Her request for THU went unanswered for approximately three months before our office got involved.

During a meeting with Ms. C at OBCC, a male facility, she had remnants of a bruised eye and cut lip. She had been in multiple fights defending herself from transphobic men after learning a transgender woman would be sleeping near them in the same house. They physically and sexually harassed her, tried pulling down her pants, all while DOC officers watched and misgendered her.

Our office advocated for an immediate transfer and reached out to Assistant Commissioner Yelardy for an explanation why DOC delayed providing Ms. C with a decision for her THU request. DOC responded that Ms. C was denied the THU due to her "behavior" while in custody. Nonetheless, DOC did not provide specifics or explain the actual basis for denying Ms. C. Worse, DOC never provided the explanation to Ms. C, only to our office. Although our office delivered the message to Ms. C, DOC demonstrated a total disregard for her health and safety. Had DOC, and the PREA staff, responded to Ms. C's initial application to the THU, she would not have been subjected to a male facility for the length of time she experienced. She would not have been forced to physically defend herself against adult men who were beating and harassing her daily. Had DOC asked the initial questions during intake and provided Ms. C with the appropriate information on housing options, Ms. C likely would never have been subjected to the horrendous abuse she experienced.

We advocated for Ms. C to appeal the decision. We also advocated with DOC in an effort to educate the Department that the allegedly problematic "behavior" used as grounds for denial was the result of DOC's actions. Ms. C would never have been forced to defend herself if DOC had adjudicated her application promptly rather than housing her in a male facility for a prolonged

period of time. Our pleas went unanswered, and no PREA staff member ever met Ms. C. The trauma became too much for Ms. C to endure. She decided to take a plea on her criminal case specifically knowing that by doing so, she would be given time served and released from DOC custody. DOC's inactions and inability to comply with their own policies and the Board's minimum standards dictated the outcome of Ms. C's criminal case.

### Ms. D

Ms. D is a transgender woman who was placed in a male facility. DOC claimed that she was only eligible to transfer to the THU at MDC after she completely detoxed. Though she was accepted to the THU and expected to move after detox, DOC did not provide adequate justification for why she had to endure additional days in a male facility rather than continuing her treatment in the THU or Rose M. Singer Center, the women's facility on Rikers Island. Due to her history of abuse, our client suffered severe PTSD and verbal harassment while she awaited her transfer to the THU. DOC did not explain why Corrections and medical staff were unable to coordinate her treatment in a safer location where our client did not have to be housed with other incarcerated males.<sup>2</sup>

We applaud the Department's decision to move the THU to the women's facility on Rikers Island, but it's unclear to directly impacted individuals and advocates how accessing treatment can differ, if at all, now that the THU has been relocated.<sup>3</sup> We urge the City Council to ensure treatment is not denied or that people are not forced to choose between their physical and medical safety. Treatment should never be barred simply based on location or be contingent on constant misgendering.

### **Housing Based on Gender Identity**

The Department must address the need for both gender identity and safety to exist in tandem. We cannot, and should not, separate these critical needs when assessing the dynamics and added risks for people who are housed in facilities inconsistent with their gender identity. We applaud the City and the Department for keeping the THU open and for moving the unit to the women's jail on Rikers Island. We believe this to be the most appropriate decision on behalf of our incarcerated transgender women clients.

### Ms. E

Ms. E is a transgender woman, and DOC records correctly reflect her sex as Female. Ms. E suffers from mental health issues and substance use issues, and while in the THU at the Rose M. Singer Center, she was doing fairly well and participating in programming.

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<sup>2</sup> To the extent that methadone maintenance is not available in the THU, this presents potential violations of our clients' rights as they may be forced to decide between medically-necessary treatment (methadone maintenance) and safety and services offered in the THU. Further, even if DOC does not provide methadone maintenance in the THU, Ms. D should have been offered those services in a female facility – specifically RMSC, where it is already available to other incarcerated women – rather than being transferred to a male facility.

<sup>3</sup> The NYC Department of Correction moved the Transgender Housing Unit from Manhattan Detention Complex to the Rose M. Singer Center in the summer of 2018.

Despite doing well, Ms. E had a physical altercation with another woman in her unit and, understandably, the two women were separated from each other. Unfortunately, Ms. E was not just moved out of THU, but moved to a male facility with no written notice, no explanation, and no rationale for why she was not placed in a non-THU unit within RMSC.<sup>4</sup> The Department moved our client into a protective custody unit within a male facility, where she was the target of endless harassment, physical and sexual threats and constant misgendering by both incarcerated males and DOC staff.

During searches by the Special Search Team, she is forced to strip search in front of male officers, despite repeatedly identifying herself as a woman and despite requests for a female officer to conduct the search.

We respect the need for the two women to be separated, but Ms. E should have been placed in another housing unit within RMSC before she was moved to a male facility. It's essential that additional THUs for women are created in order to provide housing flexibility for the Department. Additionally, transgender women should be afforded the same right as cisgender women to be housed in general population within the women's facility.

The Department's actions to move Ms. E to a male facility for "behavior" is a transgender specific punishment, one that we would never – nor should be – imposed on cisgender women.

### **Intro 1513**

**Our office supports Intro. 1513, which would** amend the Administrative Code of the City of New York, in relation to mental health treatment for transgender, gender nonconforming, non-binary, and intersex individuals, **and asks for the City to go further.** Based on the testimonies of our clients, several incarcerated TGNCI hesitate to access mental health treatment services in our jails due to clinician's lack of understanding or expertise in working with transgender, gender non-conforming, non-binary and intersex people. Everyone in our City jails should be able to access competent, affirming health and mental health. Correctional Health Services must employ clinicians with training, expertise, and experience in working with transgender, gender non-conforming, non-binary and intersex folks, and who can be sensitive and understand the range of specific needs and experiences.

### **Intro 1514**

**Our office supports Intro. 1514, which would require access to substance abuse treatment for transgender, gender non-conforming, non-binary, and intersex individuals.** As stated earlier in our testimony, we support equal access to all treatment services for all transgender people in our jails. Transgender people should, with their consent, be housed in facilities consistent with their gender identity and should not be forced to choose between safer housing and specialty treatment, including substance use treatment. The Department must do everything in their ability to ensure this is priority at time of intake. This will greatly counter potential harm for those needing to access services in facilities inconsistent with their gender identity.

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<sup>4</sup> We understand there is only one women's facility in DOC but Ms. E's safety would be equally satisfied with a different women's facility if that's ever an option.

**Intro 1530**

**Our office supports Intro. 1530, which would require the DOC to report on the appeals process for the THU. We also request that the Council require the Department to report these additional categories of information:** the number of applications denied and DOC's reasoning for the denial; length of time between the date person applied for the THU to the date person received a decision to their application; additionally, length of time between the date person appealed DOC's THU decision to the date person received a response to their appeal. These data points will better equip the City, the Board, directly impacted people and advocates to effectively advocate for transgender persons in DOC custody.

**Intro 1532**

**Our office cannot support Intro 1532 as it is currently written.** We do support requiring the DOC to create a comprehensive appeals process for transgender, gender non-conforming, intersex, and non-binary individuals and requiring the BOC to establish an independent advisory committee to inform the process, all of which is necessary and willfully disregarded by the Department. Unfortunately, our office has deep concerns over the screening criteria, and we would appreciate the opportunity to work with the Council to ensure necessary changes are made to prevent the profiling of immigrants and to better assess safety concerns. We look forward to working together to pass this essential legislation on behalf of all our TGNCI clients.

**Intro 1535**

**Our office supports Intro 1535 which would convene a taskforce related to the treatment of TGNCI people in DOC custody, but with reservations. We feel strongly that formerly and currently incarcerated people should be appropriately compensated for their time and expertise on this task force.** Incorporating these voices into the discussion is critical, but far too often we take for granted that people with lived experiences are willing to share their trauma when requested. For those who are willing to come forward and be part of a government initiative, we must do better. We must respect these individuals' knowledge and experience and compensate them for using their time to build a humane alternative. The bill is well intentioned, and the benefits of having a yearly review will not only confirm the hundreds of stories already told, but will hopefully help expand the Council's understanding of the harsh treatment this City imposes on transgender people in our City jails.

We urge the Council to expand the language to include formerly and currently incarcerated people who identify as transgender, and not just those who have been housed in the THU. Many transgender women are denied access to the THU, but their experience in DOC custody are equally important to inform the process of improving the experience for transgender people. Additionally, people who do not seek admission to THU for various reasons also need to be heard and their concerns taken seriously. Lastly, the Council should work closely with the Board to ensure that the Board has the staff and resources to thoughtfully convene such a task force. If the Board is unable to allocate the resources, the Council should coordinate the task force under their own charge.

**Res. 0143: Humane Alternatives to Long-Term Solitary Confinement (HALT) Act**

**Our office supports Res. 0143 calling on the New York State Legislature to pass and the Governor to sign the HALT Act, and so must the Committee.** Solitary confinement, or by any

other name, has devastating psychological and physical implications for people who experience it firsthand. Public defenders and social work staff have a unique perspective on solitary confinement, as we see our clients in isolation decompensate in successive meetings and court appearances, losing the ability to participate in their own defense. At the very least, the extreme anguish only increases the pressure to plead guilty that is inherent to pre-trial detention, regardless of guilt or innocence.

Corrections officials across the country are recognizing what incarcerated people and their families have said for decades: Solitary confinement does not make us safer.<sup>5</sup> It does not address the root causes of any problematic behavior and often exacerbates them, particularly for those with mental health issues. Moreover, because it is most often used for minor, non-violent infractions, time in solitary confinement can create violent behaviors where none previously existed. Crucially, reductions in solitary elsewhere have a direct impact on reducing violence. For example, Mississippi, working with the National Institute of Corrections, reduced its solitary population by more than 75%, resulting in a 50% reduction in prison violence.<sup>6</sup> The President of the correction officers' union chapter in Huntsville, Texas told the New York Times that solitary confinement is ineffective, saying, "We really need to focus a lot more on behavior modification and giving officers more tools to manage these prison populations. When you take everything away from prisoners, you have nothing to manage them with. And they can become very dangerous when they have nothing to lose."<sup>7</sup> Certainly, there are individuals who might need to be separated for a time, but that does not require them to be tortured, and that separation must have a reasonable expiration.

The HALT Solitary Confinement Act would address the racially discriminatory disciplinary system documented by the New York Times, end the torture of long-term solitary confinement beyond 15 days for all people, and create more humane and effective alternatives. HALT would require that any person separated from the general prison population for more than 15 consecutive days be placed in an alternative secure rehabilitative and therapeutic unit. HALT also restricts the criteria that can result in isolation, bars vulnerable populations from being placed in isolation for any period, enhances staff training, and provides for procedural protections and outside oversight. New York has the opportunity to become a model for humane and effective change, while making our prisons, jails, and communities safer. For all of these reasons, **Brooklyn Defender Services urges you to support Resolution 0143 and support the HALT Solitary Confinement Act.**

**Res. 0829: Reform revocation presumptive release, parole, conditional release, and post-release supervision (Less is More Act, S.1343B/A.5493)**

We thank City Council for this resolution; the Less is More Act would help reduce unnecessary incarceration and begin to address the revolving door of incarceration. Though the New York City jail population declined over the years, one population has increased: people held for technical parole violations. From 2014 to June of 2018, there was a 26% increase of the number

<sup>5</sup> E.g., Rick Raemisch, My Night in Solitary, N.Y. TIMES, Feb. 20, 2014

<sup>6</sup> U.S. Senator Dick Durbin, Durbin Statement on Federal Bureau of Prisons Assessment of Its Solitary Confinement Practices (2013).

<sup>7</sup> Jacey Fortin, Report Compares Texas' Solitary Confinement Policies To Torture, N.Y. TIMES, April 26, 2017.

of people incarcerated on parole violations in New York City jails.<sup>8</sup> Individuals on parole must comply with supervisory requirements such as reporting to a parole officer, having unannounced inspections of their home or place of employment, curfews, no encounters with police, and refraining from contact with people with criminal records, etc. Failure to comply with any of the conditions can result in re-incarceration, even for missing a visit or possessing low levels of marijuana (an offense that results in a summons for most and is on its way to being legalized).

We support the Less is More Act; however, we hope that NYS Legislature would consider removing a provision that excludes people who have been given a maximum term of life imprisonment from receiving earned time credits. In our experience, those who will be most impacted by this carve-out are elders who have had numerous demoralizing encounters with the Parole Board before being released. As we work to pass other parole justice legislation such as Fair and Timely Parole (S487/A4346) and Elder Parole (S2144/A4319), both bills would create mechanisms for people 55 years and older (many of which have a maximum sentence of life imprisonment) to appear before the parole board, we want to make sure that we do not unintentional hinder complete reintegration for certain groups of people.

## **Conclusion**

The Department must account for the increased vulnerability of transgender people in our penal system. The Department's decision to move the Transgender Housing Unit to the Rose M. Singer Center, the sole women's facility on Rikers Island, earlier this year is a positive step. Nonetheless, implementation of this change presents serious concerns. It is vital that the Department recognizes transgender women as women – nothing less. All incarcerated women, including transgender women, should be held in a women's facility, regardless of their disciplinary history or treatment needs. When our clients are housed in a facility inconsistent with their gender identity, they face daily abuses ranging from inappropriate pronoun use and offensive name calling, to physical and sexual assault.

There is more work to be done. We need to ensure that the Department's leadership is not compromised by any personal biases relating to transgender and gender non-conforming people. We need to be mindful of how the Department creates and enacts policies meant to protect and safely house transgender and gender non-conforming people.

We request that the City Council hold the Department accountable for their failure to protect transgender and gender non-conforming people in their custody. We urge the Committee to continue visiting the jails, without giving prior notice to the Department. Speak not only to people in the THU, but throughout the jails to hear firsthand the experiences of people incarcerated under DOC custody.

Thank you for your time and consideration of my comments. If you have any questions, please feel free to reach out me at 718-254-0700 ext. 208 or [kdeavila@bds.org](mailto:kdeavila@bds.org).

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<sup>8</sup> New York City Mayor's Office of Criminal Justice, available at: <http://www.closerikers.org/wp-content/uploads/2018/07/MOCJ-Path-to-5K.pdf>.