



**Redefining
public
defense**

**New York State Senate
Senate Standing Committee on Crime Victims, Crime, and Corrections
Senate Standing Committee on Ethics and Internal Governance
Hearing on Sexual Assault in the Prison System
March 3rd, 2022
Testimony of The Bronx Defenders
By Deborah Lolai, Supervising Attorney of LGBTQ Defense Project**

Introduction

My name is Deborah Lolai and I am the supervising attorney of the LGBTQ Defense Project at The Bronx Defenders. Thank you for the opportunity to testify before you today on this important matter.

This testimony will focus on one of the most pressing and harmful issues our TGNCINB clients consistently face: the abuse of incarcerated TGNCINB people and how the Gender Identity Respect, Dignity, and Safety Act (GIRDS) will prevent continued sexual assault against TGNCINB people who are incarcerated in New York State (NYS).

The Bronx Defenders is a public defender non-profit that is transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

The LGBTQ Defense Project at The Bronx Defenders is a team of advocates who represent lesbian, gay, bisexual, transgender, and queer (LGBTQ) people in legal matters. The majority of our clients are transgender, gender non-conforming, intersex, and non-binary (TGNCINB) people of color. Examples of our legal and social services include criminal defense, prisoners rights representation, family defense, immigration defense, and referrals to culturally competent services across New York City (NYC).¹ The creation of a specialized practice at a public defender office that supports LGBTQ people was driven by the disproportionate systematic oppression, criminalization and mistreatment of LGBTQ people by law enforcement both nationally and locally in NYC.

The Current Processes and Lack of Safety for Incarcerated TGNCINB People

One of the major components of our work in the LGBTQ Defense Project is working with incarcerated TGNCINB people on conditions of confinement issues. We have represented hundreds of TGNCINB people, many of whom were incarcerated. One hundred percent of the TGNCINB people we have represented who have been incarcerated in a jail or prison inconsistent with their gender identity have experienced some form of sexual abuse or harrasment. While the majority of our clients have been incarcerated in the NYC Department of Corrections (DOC), we remain in touch with many of our TGNCINB clients who have been or are currently being incarcerated in the NYS Department of Corrections and Community Supervision (DOCCS).

While there has been some improvement within DOC on housing of transgender people, the situation remains far from acceptable. Currently, less than half of all TGNCINB people in DOC custody are housed consistently with their gender identity. Most TGNCINB people continue to be housed incorrectly, against their will. That is in NYC. With regard to DOCCS, **not a single one** of our TGNCINB clients has ever been housed consistently with their gender identity while in DOCCS custody after being sentenced to prison time. The Bronx Defenders currently has multiple clients in DOCCS custody who are transgender women and are being forced to serve their prison sentences in men's prisons.

TGNCINB people's vulnerability to sexual abuse has been widely acknowledged and extensively documented. As the National Institute of Corrections has noted, while incarcerated, "transgender individuals, and people with intersex conditions were highly vulnerable to sexual abuse."² The Department of Justice's Bureau of Justice Statistics ("BJS"), charged with

¹ Description of LGBTQ Defense Project on The Bronx Defenders' website:
<https://www.bronxdefenders.org/programs/lgbtq-defense-project/>.

² Brenda V. Smith, et al., National Institute of Corrections, Policy Review and Development Guide, *Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings*, (August 2013),
<https://s3.amazonaws.com/static.nicic.gov/Library/027507.pdf>

collecting, analyzing, and publishing data related to crime in the United States, produced the National Former Prisoner Survey, estimated that transgender prisoners held in United States prisons are about ten times more likely to have been sexually assaulted, as compared to the general prison population (at least 39% of transgender prisoners, as compared to 4% of the general prison population)³. In California, a study of state prisons designated for men found that the rate of sexual assault for transgender women in those prisons was 13 times higher than for men in the same prisons⁴. And in New York according to data collected by the Sylvia Rivera Law Project in 2017, 91% of transgender and gender non-conforming people survived at least one form of physical assault in prison. Seventy five percent, or three out of every four respondents, reported at least one instance of sexual violence by a corrections officer.

DOCCS' Inadequate Processes to Ensure the Safety of Incarcerated TGNCINB People

Based on our clients' experiences and national data, we know that when a transgender person is housed inconsistently with their gender identity while incarcerated, the likelihood of them being sexually assaulted is much higher than if they were to be housed in the correct facility. Currently, the process by which housing is determined for a transgender person entering DOCCS custody is on a case-by-case basis by an individualized assessment.⁵ This process has failed to keep most TGNCINB people safe and housed consistently with their gender identity. Out of the thousands of TGNCINB people who have been incarcerated at DOCCS facilities, only a small handful of those individuals have been granted their request for gender affirming housing, and I have never personally seen it happen. Some of my fellow advocates at The Legal Aid Society have represented a very few number of TGNCINB people who were granted their request for gender affirming housing, however, the factors which allowed those few individuals to be safely housed were extremely problematic and transphobic.

First, we have observed that DOCCS will only entertain the idea for individuals who “pass” as their gender identity. This practice puts an emphasis on appearance, and reinforces the false notion that in order to be viewed as the gender one identifies with, that individual must abide by strict gender norms and have undergone an extensive medical transition. This is problematic because not all transgender people choose to transition in the same manner. Some transgender people are not interested in surgically modifying their bodies through invasive surgeries that require extensive aftercare. The fact that they don't want to undergo such an

³ Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011-12 – Supplemental Tables (Dec. 2014), http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf; see also Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011-2012, 10 (2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>

⁴ See Valerie Jenness, et al., *Transgender Inmates in California's Prisons: An Empirical Study of a Vulnerable Population* (Apr. 2009), <https://ucicorrections.seweb.uci.edu/files/2013/06/Transgender-Inmates-in-CAs-Prisons-An-Empirical-Study-of-a-Vulnerable-Population.pdf>

⁵ DOCCS Directives No. 4021. Can be found at <https://doccs.ny.gov/system/files/documents/2020/11/4021.pdf>

invasive procedure does not make them any less trans, or undeserving of being housed in the safest and most affirming facility during their incarceration. It should not be a reason for anyone to be involuntarily housed inconsistently with their gender identity and subject to sexual assault and harassment. Notably, being that the vast majority of incarcerated TGNCINB people were living in extreme poverty and often homeless prior to being incarcerated, many TGNCINB people did not have access to the necessary resources and affirming healthcare required for one to transition in certain ways.

A second factor that DOCCS places a strong emphasis on in their housing determination process is whether they have any violent convictions, disciplinary records or infractions from former periods of incarceration. This practice is problematic because of the unique and extreme way TGNCINB people are criminalized in society and penalized for their survival while incarcerated. The discrimination to incarceration pipeline⁶ for TGNCINB people is a powerful force. Transgender people experience discrimination in housing, employment, healthcare, and public space at an alarming rate. This discrimination often forces them into criminalized circumstances and economies, such as homelessness and sex work, and more frequent contact with law enforcement, by whom TGNCINB people disproportionately experience even more violence and discrimination. The culmination of all these things results in their involvement with the criminal legal system and their incarceration, where TGNCINB people, once again, are faced with violence.

TGNCINB people are routinely criminalized for defending themselves against transphobic violence. For example, CeCe McDonald, a transgender woman, was incarcerated in a men's prison for 41 months after she defended herself from a transphobic attack on her life.⁷ CeCe McDonald's case is a well-known one that is commonly referenced, but there are many more transgender people in NY jails and prison with similar stories, stories that aren't being told. Once in jail or prison, this cycle continues for TGNCINB people, when they are forced to defend themselves from sexual violence and abuse by other incarcerated people and Correction Officers. As a result of defending themselves, TGNCINB people are routinely penalized with infractions and disciplinary measures that are reflected in their records, and considered in the housing determination process. The mere survival of TGNCINB people is used as a weapon against them in the current housing determination process.

⁶ This phrase refers to the ways in which discrimination against a certain population of people - such as, housing discrimination, employment discrimination, discrimination in public spaces, and discrimination by law enforcement - leads to a disproportionate number of people from that population being incarcerated.

⁷ Kira Brekke, "CeCe McDonald Shares the Struggles of Being a Trans Woman In A Male Prison Facility" *The Huffington Post* (May 21, 2014) Found at: https://www.huffpost.com/entry/cece-mcdonald-prison_n_5366778

The Gender Identity Dignity, Respect, and Safety Act

GIRDS would help keep TGNCINB people in NY jails and prisons safe by requiring that jails and prisons presumptively house people consistently with their gender identity. It lists reasons that cannot be used as a basis for a denial, and ensures that TGNCINB peoples' identities are respected at the most basic levels, such as correct name and pronoun usage, being provided gender affirming care, clothing, toiletries, and grooming standards. Access to these things offers incarcerated TGNCINB people the most basic dignity. Unfortunately, this dignity is usually not afforded to incarcerated TGNCINB people. For years, DOC and DOCCS have attempted to implement directives about the housing of TGNCINB people, however, their directives are not enforced, and they are simply not enough. DOC and DOCCS are failing to keep TGNCINB people safe by evidence of the current state of mistreatment and abuse of incarcerated TGNCINB New Yorkers. As mentioned above, the majority of incarcerated TGNCINB people are involuntarily housed inconsistently with their gender identity across jails and prisons in NY.

For years, the GIRDS coalition has been working on improving the language in GIRDS, and the Assembly has adopted the language we have proposed. The adoption of our proposed language is the only way GIRDS can ensure the safety and well-being of incarcerated TGNCINB people. Our proposed amendments, which were incorporated by the Assembly, include:

- Due Process protections requiring a written housing determination following a request for gender affirming housing in two days with an explanation of the decision;
- Reporting obligations requiring annual reporting on compliance to ensure accountability;
- Intersex inclusion in the bill, addressing specific harms this community faces;
- Prohibition of the use of housing transfers and denials of safe housing as a form of punishment; and
- Limiting the use of involuntary protective custody, which is essentially equivalent to solitary confinement, to 14 days.

We thank Assemblymember Rozic and Senator Salazar for their leadership on this bill, and we urge the Senate to adopt the language in Assembly Bill A7001B as well.

Currently, Part B of Governor Hochul's FY 2022-2023 Public Protection and General Government (PPGG) proposal codifies what jails and prisons in NY are already doing: making case-by-case assessments to determine placement of TGNCINB people, which leaves room for prejudice, transphobia, and discrimination to be a part of that decision-making. That is why it is not working. The Governor's proposal would codify a process that is inadequate and discriminatory. We urge the Committees to do everything in its power to ensure that the Governor's proposal is removed from the final budget and to advance GIRDS instead.

Conclusion and Recommendations

When the criminal legal system sentences people to prison time as a form of punishment, it is the time they are forced to spend behind bars that is the punishment. For most TGNCINB people, being sentenced to prison time does not merely mean spending a certain number of years behind bars; it means spending those years in a facility not aligned with your gender identity, being repeatedly sexually assaulted and harassed, denied medical care, and spending a large portion of your sentence enduring the torture of solitary confinement “for your own protection.”

In order to truly protect TGNCINB people, decarceration should be prioritized, but in the meantime we ask that:

- Your Committees do everything in its power to ensure that the Governor’s Budget Proposal is removed from the final budget, and instead advance GIRDS;
- The NYS Senate adopt the advocates’ proposed amendments to S6677; and
- You urge the NYS Legislature to pass the GIRDS bill with the adoption of our language.

Thank you for your time and attention to this important matter, and for holding this groundbreaking hearing for the public to bring forth their concerns.