

**The Bronx
Defenders**

**Redefining
public
defense**

**New York City Council
Committee on Women and Gender Equity
Oversight Hearing on the Gender Equity in NYC: Access, Resources, and Support for
Transgender and Gender Non-Conforming New Yorkers.**

November 27, 2019

**Testimony of The Bronx Defenders
By Deborah Lolai, Supervising Attorney of LGBTQ Defense Practice**

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.

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 and gender non-conforming (TGNC) people. Examples of our legal and social services include criminal defense, prisoners rights representation, family defense, immigration defense, and referrals to culturally competent services across the city.¹

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

The creation of a specialized practice at a public defender office that supports LGBTQ people was driven by the disproportionate criminalization of LGBTQ people both nationally and locally in New York City (NYC), especially TGNC people of color. This testimony will focus on the most pressing and harmful issues our TGNC client population consistently faces, including:

- NYPD misconduct;
- Mistreatment of TGNC people in the custody of the Department of Correction;
- Limited access to alternatives to incarceration, residential treatment programs, and court-mandated gender-specific programming; and
- Limited access to safe shelter and housing.

These issue areas are closely tied to access to support and resources in NYC, and should be addressed to ensure the safety and well-being of TGNC New Yorkers.

I. NYPD Misconduct

Throughout its history, the NYPD has abused, harassed, profiled, and discriminated against TGNC people. Many officers continue to engage in this conduct every day.² In response to the mistreatment of TGNC people, in 2012, the NYPD revised the Patrol Guide to include protections for TGNC arrestees.³ At the time these changes were made to the NYPD Patrol Guide — which governs the conduct and procedures for NYPD officers in making arrests — TGNC advocates applauded this major step in ensuring respectful treatment of TGNC people in NYPD custody. The 2012 revisions included protections such as:

- Prohibiting the use of discourteous or disrespectful remarks regarding a person's sexual orientation or gender identity/expression;
- Instructing police officers to refer to transgender New Yorkers by names, honorifics and pronouns that reflect their gender identity (even if it does not match the information on their ID documents) and amending forms so that people's "preferred name" can be recorded and used while they are in police custody;
- Prohibiting police officers from conducting any search for the purpose of determining a person's gender;

² Chestnut, Shelby. June 27, 2019. *NY Times*. "Stonewall Hasn't Ended: The Police Still Abuse LGBTQ New Yorkers and We Will Fight Back" <https://www.nytimes.com/2019/06/27/opinion/stonewall-police-pride.html>

³ New York Civil Liberties Union (NYCLU) press release: <https://www.nyclu.org/en/press-releases/nypd-patrol-guide-changes-respect-rights-transgender-new-yorkers>.

- Defining "gender" to include gender identity and expression, consistent with the city's Human Rights Law. This means that when the NYPD have to take into account someone's gender, it is their gender identity that matters, if even if one's gender identity differs from their sex assigned at birth;
- Requiring individuals in NYPD custody be held in sex segregated police facilities according to their gender identity, even if it differs from their sex assigned at birth unless there is a concern for the person's safety, in which case they will be considered "special category prisoners" and placed accordingly;
- Requiring that "special category prisoners," including transgender people, not be cuffed to rails, bars or chairs for unreasonable periods of time; and
- Prohibiting the use of derogatory language targeting a transgender person's gender identity to harass them.⁴

In the seven years since the inclusion of these protections, however, the NYPD has failed to live up to its commitment to improve treatment of TGNC people. The experiences of our clients make clear that the NYPD has done little to implement the changes and that police officers rarely, if ever, actually adhere to the Patrol Guide's mandate. Indeed, in 2017, the Department of Investigation's (DOI) Office of the Inspector General for the NYPD published the findings of an investigation into the NYPD's adherence to the 2012 revisions concerning TGNC people.⁵ DOI "found clear gaps in NYPD's implementation and training on the revisions as well as inadequacies in how the Department tracks LGBTQ-related complaints alleging police misconduct."⁶ Little has changed.

The DOI report is consistent with the experiences of our TGNC clients who have been arrested by the NYPD. The LGBTQ Defense Projects data shows that the NYPD almost never complies with the 2012 revisions. Some of the most common violations of the Patrol Guide include, but are not limited to: misgendering TGNC people orally and in police paperwork; using deadnames⁷ to refer to TGNC people orally and in police paperwork; placing TGNC people in holding cells inconsistent with their gender identity, exposing them to a heightened risk of violence, or in a solitary cell; using derogatory language targeting TGNC people's gender identity and sexual orientation during the arrest and booking process; and physically and sexually assaulting TGNC people and then charging them with "resisting arrest" in an attempt to cover up violence and misconduct. For example, our client, Kimberly, begged officers not to be placed in a holding cell with men, and was only removed after she tried to

⁴ *Id.* Language adopted directly from NYCLU press release.

⁵ DOI Investigation Report. November 21, 2017.

https://www1.nyc.gov/assets/doi/press-releases/2017/nov/31_LGBTQ_ReportRelease_112117.pdf

⁶ *Id.* at 5.

⁷ The word "deadname" refers to the name that a transgender person was given at birth and no longer uses upon transitioning. <https://www.merriam-webster.com/dictionary/deadname>

hang herself. Our client, Diamond, was so severely injured by officers who were calling her derogatory names targeting her gender identity and sexual orientation while assaulting her, that she had to be sent to the hospital to get stitches before seeing a judge.⁸

In order for the treatment of TGNC people in NYPD custody to improve, the NYPD must be monitored to ensure that they are in compliance with the 2012 revisions. It has been demonstrated that unless further action is taken to ensure that TGNC people are treated with dignity and respect by the NYPD, the Department will continue to perpetuate violence against TGNC arrestees.

II. Mistreatment of TGNC People in the Custody of the Department of Correction

Over the past several years, much attention has been paid to the abuse of TGNC people who are incarcerated and in the custody of the Department of Correction (DOC), and many improvements have been made in the past year. For example, *some* transgender women are now being housed consistently with their gender identity; DOC hired a Director of LGBTQ Programs, who has been working diligently to repair the harm caused to TGNC incarcerated people and reforming internal operations; the City Council passed Local Law 2019/145 requiring the Board of Correction (BOC) to convene a task force that addresses these issues; and DOC released a new directive addressing the needs of LGBTQ incarcerated people.

While DOC has made significant improvements in the treatment of some TGNC people in their custody, there are many TGNC incarcerated people whose needs continue to be unmet, and whose safety is compromised. For example:

- Many transgender women continue to be housed in men's jails against their will;
- The factors that DOC considers to determine permanent placement are problematic and often use past incidents where transgender people were defending themselves as a reason to deny them housing consistently with their gender identity;
- DOC continues to suggest that some transgender people who don't fit stereotypical gender norms are "pretending to be transgender," a statement which is inherently transphobic and sexist;
- All transgender men are housed in women's facilities because a safe alternative does not exist for them, resulting in constant misgendering and harassment by correctional officers;

⁸Lolai, Deborah. February 8, 2019. *NY Law Journal*. "Treatment of Transgender People In Custody Must Improve." <https://www.law.com/newyorklawjournal/2019/02/08/treatment-of-transgender-people-in-custody-must-improve/>

- The use of punitive segregation continues to disproportionately impact TGNC people; and
- There is a lack of access to meaningful and culturally competent programming and healthcare.

These examples are practices that continue to place transgender people at risk, and they need to end.

Again, we recognize the significant improvements that DOC has made, in large part due to the efforts of many people and agencies at this hearing, including TGNC advocates, prisoner rights attorneys, City Council members, the BOC, and the New York City Commission on Human Rights (CCHR). The City Council, BOC, and CCHR have provided necessary support during times when our most vulnerable TGNC clients were facing unspeakable violence in the custody of DOC, and we thank you for that. We look forward to our work with the newly convened Task Force pursuant to Local Law 2019/145. However, we would like to acknowledge that much work remains to be done to ensure the safety of all TGNC people in the custody of DOC.

III. Limited Access to Alternatives to Incarceration, Residential Treatment Programs, and Court Mandated Gender-Specific Programming

In some cases, judges and prosecutors agree to treatment programs as alternatives to incarceration (ATI). Many of these programs are mandated by the courts as part of a sentence, or a condition of a plea deal. Treatment program models broadly impose gender divisions on our clients, and most if not all residential programs/ATIs are gender-specific. As a result, programs often house transgender people inconsistent with their gender identity. Transgender people are often forced to provide urine samples in the presence of staff who do not share their gender identity — i.e., transgender women being forced to urinate in the presence of male staff — subjecting them to ridicule and harassment. Transgender people are regularly targeted by other residents or staff. This harassment and violence creates unsafe and hostile environment for TGNC people, which often results in them leaving the program to avoid further harm or being involved in an altercation that results in them being involuntarily discharged from the program.

The consequences of our clients leaving or facing involuntary discharge from mandated programs can be devastating. It often results in a violation of the plea agreement, causing judges to impose the jail alternative sentence. We have represented clients who have been sentenced to several years of upstate prison time because of their inability to complete a program where they were subject to transphobic violence and discrimination. Many TGNC clients who are offered residential ATI have already been through the experience described above, and opt to take a

prison sentence over an ATI because they can predict the outcome and would prefer to complete the prison sentence sooner rather than later. This problem certainly contributes to the disproportionate representation of TGNC people in jails and prisons.

This problem is a regular occurrence in the family court context as well. BxD represents parents in child protection cases, and all of the related family court proceedings that arise out of an abuse or neglect case, including custody, visitation, family offenses, and termination of parental rights. Most of our family defense clients are required to complete some type of programming as a condition of their children remaining in their care, or returning to their care. Many of these programs are gender-specific: they are targeted towards “mothers” or “fathers.” Sometimes our clients are ordered to complete residential programming, as well, which is always gender-specific. These gendered programs often create inaccessible spaces for TGNC parents who don’t feel welcome in spaces designated to either gender within the binary. Parents who are non-binary are faced with another predicament of being forced to identify within the binary to qualify for programming. This makes programming inaccessible to TGNC parents, which in turn, delays their family reunification or completion of the case, in addition to impacting their mental health and preventing TGNC people from receiving the services they may in fact need.

Family court can be an extremely unaffirming space for TGNC parents. The language that is regularly used in family court proceedings as “mom,” “dad,” “bio mom,” or “bio dad” with little to no consideration to the pronouns and titles used by TGNC parents. Administration for Child Services (ACS), family court judges, and court officers routinely misgender our clients in court. Therefore, when TGNC parents are not afforded safe and affirming programming, that is often compounded by the constant misgendering throughout their proceedings, which takes a toll on their overall well-being.

In these situations, one option is for clients to file a complaint within the program or an external agency such as CCHR. However, the power dynamic between our clients and ATI programs is incredibly unbalanced, which makes it extremely difficult, if not impossible, to file complaints. It is imperative for our clients to remain on friendly terms with the staff at the programs because their relationship with the staff members usually determines whether the program will report positive progress to the court. These reports are often in the form of a letter provided by the program at every court date. When a client complains to higher level staff at the program, or to an outside agency triggering an investigation of the program, the client is often penalized for doing that by receiving negative progress reports, or even worse, being discharged from the program for a fabricated reason. As explained above, this could have devastating consequences, such as a jail alternative sentence being imposed, or a delay in family reunification, and sometimes even termination of parental rights. Therefore, filing complaints in response to experiencing harassment and discrimination is often not a realistic or wise option for

many of our clients, allowing for the programs to continue their problematic practices without any accountability.

Because neither we nor our clients are in a position to safely hold these organizations accountable without potential retaliation, we are asking that this Committee investigate these discriminatory practices in an effort to identify an appropriate means of accountability.

IV. Limited Access to Safe Shelter and Housing

One of the most pervasive issues facing the TGNC community is a lack of safe shelter and housing options. As this Committee is aware, approximately 40% of homeless youth both nationally and locally identify as LGBTQ.⁹ In response to this epidemic, NYC has established shelter options for LGBTQ youth -- beyond what is available in other cities across the country, although, sometimes even in NYC TGNC youth are turned away from shelters because there aren't enough beds.

While there remains a deficit in safe housing options for TGNC youth, the lack of safe housing for TGNC adults in NYC is staggering. Often times other service providers will reach out to us because they are searching for a safe shelter for their TGNC adult client, and we are usually unable to provide them with many options because they simply don't exist or the limited options that do exist are not safe.

While the Department of Homeless Services (DHS) has made a significant effort to ensure that TGNC homeless adults can seek shelter in the general DHS shelter system free from discrimination and harassment, that is typically not the experience of our TGNC clients. DHS' policy requires that DHS refrain from engaging in discriminatory practices against TGNC people.¹⁰ Examples of practices prohibited by DHS staff include but are not limited to: misgendering TGNC people; placing TGNC people in shelters inconsistent with their gender identity against their will; forcing TGNC people to use restrooms inconsistent with their gender identity; and harassment of TGNC people. Sadly, these are all regular experiences for our clients.

⁹ Human Rights Campaign Report. November 15, 2017.

<https://www.hrc.org/blog/new-report-on-youth-homeless-affirms-that-lgbtq-youth-disproportionately-ex>;
<https://www.aliforneycenter.org/about-us/lgbtq-youth-crisis/>

¹⁰ DHS Directive. July 15, 2019:

https://www1.nyc.gov/assets/dhs/downloads/pdf/dhs_policy_on_serving_transgender_non_binary_and_intersex_clients.pdf; HRA/DHS LGBTQ Policy. April 20, 2017.

<https://www1.nyc.gov/assets/hra/downloads/pdf/services/lgbtqi/LGBTQI%20Policy.pdf>; DHS Policy on Transgender and Intersex residents. January 31, 2006.

<https://www.coalitionforthehomeless.org/wp-content/uploads/2014/07/transgender-intersex-clients-DHS-policy-06-1-31.pdf>

Additionally, DHS police officers and security are often hostile and transphobic towards our TGNC clients in similar ways described above in the “NYPD Misconduct” section.

As a result of the mistreatment experienced by TGNC adults in the DHS system and unsafe living conditions, our TGNC adult clients often prefer to sleep on the street or subways than be in a shelter, making them vulnerable to violence. We ask that this Committee make efforts in creating safer TGNC specific shelter options for adults in the same way the city has prioritized expanding the number of LGBTQ specific youth shelters.

V. Conclusion

BxD appreciates the Committee’s attention to the specific struggles and barriers faced by TGNC people in NYC. We ask that the above mentioned issues of police misconduct towards TGNC people in their custody, mistreatment of TGNC people in DOC custody, and discrimination and harrasment against TGNC people in ATIs, residential programs, and gender-specific court mandated programs be investigated and efforts be made to remedy these serious problems. BxD would be happy to assist the Committee in these efforts moving forward.

Thank you,

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