

A photograph of a prison cell. At the top center, there is a small window with vertical metal bars. The walls are made of rough, brownish stone or concrete. The floor is paved with dark, irregular cobblestones. A bright light source from the window casts a long, rectangular shadow of the bars onto the floor, creating a pattern of light and dark stripes.

Transgender Rights in New Jersey Detention Murkier than the Passaic River

By Adalgiza Núñez

Johan Hernandez¹ was arrested in 2011. Although assigned female at birth by the time of his arrest, Johan was publicly identifying as male. He describes his 2011 look as that of a teenage boy. After a routine traffic stop, Johan was arrested by local police in Long Island, New York.² He was then transferred to immigration authorities in New York who took him to the immigration detention facility in Elizabeth.

From the moment of his arrest, Johan describes being “humiliated and mistreated.” At the local station he was asked to remove his pants and bend over in front of both a male and a female agent because according to Johan, “they claimed not to know what [he] was.” Once in immigration custody, Johan was kept in the women’s side of the detention center but prohibited from talking to the female detainees. He was told it was for the safety of the detainees. But inconsistently, he was made to shower with the women. Johan still remembers the feeling of shame because his “mind tells [him that he is] a man and getting undressed in front of women embarrasses [him].” Johan’s only consolation came from the support of female detainees who turned their backs to him so he could shower with some privacy.

The officers, on the other hand, were a completely different story. Per Johan's account, the officers at the Elizabeth Detention Center taunted him, mocked him, and laughed at him. He was kept isolated, leading to depression and weight loss. He was forced to undergo a genital exam which he believes was to determine his biological sex. When he complained, he was physically and verbally abused. Johan eventually wrote a letter to the FBI because he knew of no one else to whom he could voice his complaints. In retaliation, he was held without water for a day even as he begged for a drink and other detainees pleaded on his behalf. Eventually, Johan was transferred to a facility in Louisiana where the same treatment continued.

Johan's experiences occurred in Long Island and at immigration centers, but his experience is not unique and, apparently, prevalent in New Jersey jails and prisons. In March 2018, Sonia Doe entered the custody of the New Jersey Department of Corrections.³ Her New Jersey driver's license listed her typically female name and her sex as female. Doe had been undergoing hormone therapy for several years. But the NJDOC decided to house her with male inmates, matching the sex assigned to her at birth. For approximately the next 17 months, Doe says male prisoners and corrections officers subjected her to daily verbal and sexual harassment as well as physical abuse.

Doe, represented by the American Civil Liberties Union of New Jersey and Robyn Beth Gigl, a private attorney, filed a complaint in the Superior Court of New Jersey.⁴ The complaint alleged violations of the Law Against Discrimination and the New Jersey Constitution, due to discrimination "on the basis of [Doe's] gender identity or expression and on the basis of her sex." The matter is still pending in Mercer County and the state has been granted multiple extensions to file an answer or motion.

According to Doe's complaint, policies were in place controlling the treatment of transgender individuals at NJDOC facilities but were ignored when she was housed at several facilities for men.⁵ New Jersey Department of Corrections Internal Management Procedure Number PCS.001.006, the policy in place in 2018 and early 2019, had a process by which transgender inmates were to be placed in housing assignment which included the inmate's gender expression.⁶ But the complaint insists that despite its formal policy, the NJDOC's practice was to "house prisoners according to their genitalia only."⁷ In addition, the policy called for inmates to "be respected by addressing transgender intersex inmates in

gender neutral terms" but Doe certified that she was called "he" even after she protested to the use of that pronoun.

After Doe's attorneys filed the complaint, the NJDOC agreed to transfer Doe to a facility for women.⁸ That placement was quickly challenged by the Policemen's Benevolent Association Local 105, New Jersey's corrections officers union, and New Jersey Law Enforcement Supervisors Association. They argued that the NJDOC did not have a clear policy regarding transgender inmates.⁹ The unions also claimed workplace rights concerns regarding female officers strip-searching transgender inmates.¹⁰

A few months after the filing of Doe's complaint, the Office of the Attorney General of New Jersey issued Directive 2019-3 which attempts to address police interactions with transgender individuals.¹¹ The directive includes general anti-harassment requirements as well as instructions for respectful communication, conducting searches, transportation, detention in police stations, and training.¹² Law enforcement officers are to address individuals by their chosen names and pronouns.¹³ Non-exigent custodial strip searches are to be conducted by an officer of the same gender.¹⁴ An individual detained in a police station, is to be housed "in line with their gender identity or expression, regardless of the gender that individual was assigned at birth...unless they request otherwise" as outlined in a separate section.¹⁵ All state, county, and local law enforcement agencies are expected to revise their policies and practices to be consistent with this directive.¹⁶

The directive, while a step forward, still leaves a gaping hole in policies concerning the treatment of transgender people who find themselves trapped within the criminal justice system. While it covers initial interactions with police, it does nothing to protect individuals once they are



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New Jersey Attorney General Directive 2019-3, while a step forward, still leaves a gaping hole in policies concerning the treatment of transgender people who find themselves trapped within the criminal justice system. While it covers initial interactions with police, it does nothing to protect individuals once they are in the custody of county jails and state prisons. That is because the standards for not only state correctional facilities but also for adult county correctional facilities are established by the Commissioner of the Department of Corrections.

in the custody of county jails and state prisons. That is because the standards for not only state correctional facilities but also for adult county correctional facilities are established by the Commissioner of the Department of Corrections.¹⁷ Further, as the directive clarifies, federal law establishes rules for the housing of transgender individuals in adult correctional facilities, juvenile facilities (under the Juvenile Justice Commission), and lockups (facilities used for the temporary confinement of those who have been recently arrested and/or are awaiting final disposition).¹⁸ These facilities are looking to the federal government for guidance, not the New Jersey Attorney General. That leaves people like Johan Hernandez and Sonia Doe unprotected by the New Jersey Attorney General and subject to the regulations of the federal government and/or the policies of the NJDOC, which govern New Jersey state prisons.

The NJDOC's current policy, updated on Dec. 15, 2019, states that it addresses "the needs of transgender, intersex, and gender non-conforming inmates in a manner consistent with federal Prison Rape Elimination Act (PREA) standards and the New Jersey Law Against Discrimination (NJLAD)."¹⁹ The document presumes "that the inmate will be

housed in line with their gender identity" but allows the PREA Accommodation Committee to "deviate from the presumptive placement after an individualized determination ... that the placement would jeopardize the inmate's health and safety or would jeopardize secure operation of the facility." In accordance with the policy, inmates are to be searched by staff of the same gender except under emergent conditions. Unfortunately, Doe's complaint points to a lack of compliance by corrections officers of the NJDOC's own internal policies and procedures.²⁰

The use of the federal government as a guide post is causing more concern since it has withdrawn some of the protections previously afforded to transgender prisoners under federal law. In 2003, the PREA created the National Prison Rape Elimination Commission (NPREC) to study the incidences of prison rape and make recommendations to the Department of Justice regarding national standards.²¹ 2012 regulations implementing the PREA required that gender identity be considered when housing inmates.²² But even with those regulations in place, agencies continued to house inmates based on their genitalia.²³ Seeking to remedy the harm caused by those blanket policies, in 2016, the

United States Department of Justice issued guidelines prohibiting housing assignment based solely on birth anatomy.²⁴ In 2018, the Federal Bureau of Prisons changed its policy from "housing by gender identity when appropriate" to "a case by case basis."²⁵ The bureau's guidelines revert to using biological sex as an initial determinant for housing assignment and use identified gender identity only "in rare cases."²⁶ Self-identified gender assignment will determine assignment of facility only when "there has been significant progress towards transition as demonstrated by medical and mental health history."²⁷

This creates a significant problem for inmates in New Jersey. A survey of county jails demonstrates that polices are guided by the PREA and in turn, the federal government. Likewise, the NJDOC bases its policy on the PREA and the NJLAD. Neither the county jail websites nor the NJDOC policy mention the directive, leading one to believe that they are not looking to the New Jersey Attorney General for policy and procedure guidance. This is problematic considering that the PREA has been in place since 2012 and the NJLAD since much earlier, yet the New Jersey Task Force on Transgender Equality recently reported that "[i]n New Jersey, two-thirds (66%)

of transgender people cited mistreatment by law enforcement.”²⁸ Further the NJDOC’s policies are vague, leaving many decisions to individual discretion and, according to Doe, are frequently ignored.

So while the Attorney General’s directive is a welcome recognition that changes are necessary, it only addresses the short time when a person is detained and while they are in holding which is very small compared to the length of the full criminal justice process. Policies across the spectrum need to be more consistent at a minimum and offer a higher level of protection to this vulnerable population. Further, even the best written policies and procedures are useless if not implemented. New Jersey needs comprehensive reform that will ensure the dignity and safety of transgender individuals at every level of law enforcement interaction, detention, and incarceration and at every facility. As Johan stated what any individual wants is to be “treated with dignity and respect, just like any other person.”

Endnotes

1. His real name per his request.
2. Johan’s history is written as was told to the writer by Johan Hernandez. Hernandez is an immigrant from Honduras who was detained and held in the custody of multiple law enforcement agencies in New York and New Jersey. He was represented in his immigration proceedings by Carmen Carrillo of Newark.
3. Sonia Doe Cert. MER-L-001586, Aug. 14, 2019.
4. Sonia Doe v. New Jersey Department of Corrections, et al, MER-L-1586-19 Compl., Aug. 14, 2019.
5. Sonia Doe v. New Jersey Department of Corrections, et al, MER-L-1586-19 Compl., Aug. 14, 2019.
6. The policy also included other factors considered irrelevant by the complainant, such as “sentencing information, criminal history, institutional disciplinary history, medical and dental needs...and likelihood of perpetrating sexual abuse.”
7. Sonia Doe v. New Jersey Department of Corrections, et al, MER-L-1586-19 Compl., Aug. 14, 2019 (quoting New Jersey Department of Corrections Internal Management Procedure Number PCS.001.006).
8. S.P. Sullivan, “N.J. agreed to put transgender inmate in women’s prison. Not so fast, say officers’ unions.” NJ Advance Media for NJ.com, Sept. 11, 2019.
9. Id.
10. Id.
11. Attorney General Law Enforcement Directive No. 2019-3 found at nj.gov/oag/dcj/agguide/directives/ag-directive-2019-3.pdf, Nov. 20, 2019.
12. Id.
13. Id. at Section I(B).
14. Id. at Section II(A).
15. Id. at Section II(C).
16. Id. at Section V(A).
17. New Jersey Administrative Code 10A:1-1.1 and 10A:31-1.5.
18. Attorney General Law Enforcement Directive No. 2019-3 at Section II(C).
19. New Jersey Department of Corrections Internal Management Procedure Number PCS.001.TGI.01, provided by the NJDOC after an OPRA request.
20. Like the December 2019 policy, the policy in place in 2018 required housing assignment to take into consideration the inmate’s gender expression. MER-L-1586-19 Compl., Aug. 14, 2019.
21. Prison Rape Elimination Act of 2003 (PL 108-79), codified at 42 U.S.C. §§ 15601 et. seq.; End the Abuse – Protecting LGBTI Prisoners from Sexual Assault Advocacy Guide, The American Civil Liberties Union, found at aclu.org/sites/default/files/assets/012714-prea-combined.pdf.
22. Maria L. La Ganga, US prohibits imprisoning transgender inmates in cells based on birth anatomy, The Guardian, Mar. 24, 2016.
23. Id.
24. Id.
25. Jenny Gathright, “The Guidelines for Protection of Transgender Prisoners Just Got Rewritten,” NPR, May 12, 2018.
26. Id.
27. Id.
28. New Jersey Transgender Equality Task Force Report and Recommendations, Addressing Discrimination Against Transgender New Jerseyans, November 20, 2019 (quoting 2015 U.S. Transgender Survey: New Jersey State Report. (2017). Washington, DC: National Center for Transgender Equality, p. 1.).