

July 8, 2020

Via email to [Pascal.Herzer@kingcounty.gov](mailto:Pascal.Herzer@kingcounty.gov)

King County Department of Adult and Juvenile Detention  
Director's Office  
King County Courthouse  
516 3rd Ave  
Room E-245  
Seattle, WA 98104

RE: Policy and Treatment Concerning Transgender and Nonbinary People in Custody

Every year, dozens of transgender and nonbinary individuals incarcerated in King County's Department of Adult and Juvenile Detention (DAJD) facilities routinely experience treatment that jeopardizes their physical safety, medical well-being, and mental health. We, the undersigned community and legal organizations, demand DAJD leadership take specific immediate measures to stop current harmful practices and comply with its own policies. We also request a group of stakeholders be convened to undertake comprehensive policy changes to address the unacceptable conditions transgender and nonbinary people have long faced while in the custody of your agency and to comply with the law.

This letter is organized in three parts. First, we demonstrate how DAJD has harmed transgender and nonbinary individuals in the following areas: booking, classification and housing determinations, safety, staff misconduct, medical care, and programming. These allegations are supported by reports from individuals who experienced these issues firsthand, as well as records reviewed by Disability Rights Washington's Trans in Prison Justice Project in the course of a series of limited investigations. This section also lays out the legal framework that applies to transgender and nonbinary individuals in jails and argues that DAJD's actions likely violate several laws. Second, we request DAJD take a series of immediate actions to minimize harm to transgender and nonbinary individuals incarcerated in DAJD facilities. Last, we request to work collaboratively with DAJD to comprehensively review and revise its policies related to transgender and nonbinary individuals.

**1. DAJD's Policies and Practices Harm Transgender and Nonbinary People and Violate their Legal Rights**

Transgender and nonbinary individuals have reached out to the undersigned community and legal organizations for years and described harmful experiences while incarcerated in DAJD facilities. Recently, the Trans in Prison Justice Project has conducted investigations into many of these allegations and has

found damaging practices related to booking, classification and housing determinations, safety, staff misconduct, medical care, and programming. As explained below, DAJD's conditions of confinement and its current policy (DAJD 6.03.007) governing the treatment of transgender and nonbinary individuals in its custody fail to meet the requirements of the U.S. Constitution, federal, and state law.

### **A. Booking**

DAJD routinely books transgender individuals under the wrong name and/or gender marker. In some instances, at the time of booking, DAJD has possessed individuals' current government-issued identification documents reflecting their current legal name and gender marker, yet has booked these individuals under previous legal names and incorrect gender markers despite individuals advocating otherwise. Processes related to when and whether to book a transgender person under their birth name or legally changed name must be clarified for consistency. During the booking process, transgender individuals report being asked questions about their medical history and genital anatomy by non-medical staff. The relevance of some of these inquiries to assessing classification needs is unclear, invasive, and discriminatory. These booking practices violate the Equal Protection Clause of the Fourteenth Amendment and also expose individuals to long lasting harms, as some jail records can disclose their former legal names in publicly available forums.

### **B. Classification and Housing Determinations**

For years, transgender and nonbinary individuals have consistently reported to community organizations, the Department of Public Defense, private defense counsel, and civil legal aid organizations that they have experienced segregation in DAJD custody and an inability to receive gender-affirming placement in general population because of their transgender status.<sup>1</sup> Records support the discriminatory use of segregation for transgender and nonbinary individuals in DAJD facilities in violation of the Eighth and Fourteenth Amendments.

Records indicate that transgender individuals are placed in segregation simply because they identify as transgender. Investigations of multiple individual's experiences have failed to produce any documentation of DAJD staff performing an analysis of the objective criteria included in the rule or whether less restrictive alternative housing placements were appropriate. Not only is such a practice discriminatory and harmful,

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<sup>1</sup> Individuals consistently reported to community and legal organizations about their long-term confinement in administrative segregation for many years following the adoption of DAJD policy 6.03.007; in more recent years, reports shifted to complaints of being held in a segregated "trans pod" on 9NUA. Although DAJD denied the existence of a "trans pod," DAJD records indicate that staff at all levels, including members of the Transgender Review Committee (TRC), referenced 9NUA as the "trans pod" or "transgender group unit." Records also indicate that the TRC had a practice of housing transgender individuals in the protective custody 9NUA unit even after individuals identified gender-affirming general population housing as their preferred and safest placement, *and* after TRC found them eligible for such placement. It appears that DAJD started to shift this practice in March 2019 in response to an investigation by Disability Rights Washington's Trans in Prison Justice Project, but distrust in the community remains given DAJD's history of segregating transgender individuals. The Trans in Prison Justice Project's monitoring and communication with transgender individuals suggests the TRC is now consistently placing transgender people in gender-affirming, general population when appropriate, and we recognize this important improvement in DAJD's practices.

but it fails to comply with the DAJD's Restrictive Housing policy, 6.03.001.<sup>2</sup> For example, in fall 2019, a transgender woman was booked into custody at KCCF for a non-violent probation violation with a current Washington State identification card and Social Security card that were associated with her gender-affirming legal name and gender marker. Staff were told of her social and medical transition, as well as her preference to be housed in general population for women. This woman's transgender status appears to be the only reason she was placed into administrative segregation in contrast to the stated policy, where she was housed with men. Classification records offer no individualized justification for placing transgender and nonbinary individuals such as this woman into restrictive housing settings, let alone into restrictive housing settings that do not align with their gender identity. Instead, records cite the reason for the decision as "Per DAJD policy: Due to your reporting of being Transgender, you must be placed in isolation housing..." or cite general concerns like "Due to possibility of being threatened or harassed in general population, due to being a transgender inmate, you will be place [sic] in restrictive housing at this time." Generalized security concerns, however, are insufficient to meet the burden placed on government actors to justify sex-based classifications.<sup>3</sup> Additionally, transgender individuals have been automatically placed into restrictive housing pending review by the TRC even when DAJD has received electronic notification that medical staff have identified contraindications to restrictive housing during intake screening, such as a PTSD diagnosis, moderate to severe depression, and/or a history of self-harm and parasuicidal behavior. The practice of routinely placing transgender people in men's restrictive housing pending review by the TRC often exposes transgender women to sexual harassment and threats of violence.<sup>4</sup>

Reports from transgender individuals in DAJD facilities indicate they often fear they will be held in restrictive housing for long periods of time because DAJD staff fail to inform them that the TRC will convene to determine their placement within 72 hours (not including weekends or holidays). The "Notice of Administrative Segregation" paperwork provided to individuals does not explain the TRC review timeline as outlined in policy, and only cites an individual's right to appeal the placement in segregation "at the time of your 7 day review." Thus, individuals are placed in administrative segregation under the impression the placement is indefinite and that they have no potential recourse until at least seven days have passed. The failure to clearly communicate the housing review process to individuals as they are booked exacerbates the emotional and psychological harm that many experience from their placement in segregation; with no timeline, information about how to immediately raise concerns with staff, or easy access to grievance paperwork while in segregation, it is understandable that many individuals have reported feelings of increased anxiety, hopelessness, and suicidality.

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<sup>2</sup> King County Department of Adult and Juvenile Detention, Adult Divisions, General Policy Manual 6.03.001 (B, 2, b) Restrictive Housing (2017).

<sup>3</sup> See *Doe v. Massachusetts Dep't of Corr.*, No. CV 17-12255-RGS, 2018 U.S. Dist. LEXIS 99925, 2018 WL 2994403, at \*10 (D. Mass. June 14, 2018) (citing *United States v. Virginia*, 518 U.S. 515, 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)); 28 C.F.R. § 115.42(c), (e); 28 C.F.R. § 115.43(a).

<sup>4</sup> The practice of mechanically assigning transgender and nonbinary individuals to administrative segregation is not only discriminatory and unsafe, but unnecessary to achieve correctional management objectives. The nearby South Correctional Entity regional jail (SCORE) also regularly books transgender and nonbinary individuals into their custody, yet their classification procedures do not entail automatically subjecting such individuals to temporary restrictive housing.

The TRC relies on booking staff's assessment of individuals' gender expression, as outlined in the problematic "Transgender Interview Guideline" and "Transgender Process" documents, and the failure to apply the same objective factors to transgender individuals as are applied to cisgender individuals during the classification process raises serious constitutional concerns about discriminatory treatment. Also of concern is the regular TRC meeting practice of discussing individuals' medical history and protected health information with non-medical staff who are assigned to the TRC, such as captains and Corrections Programs Administrators. Incarcerated individuals have no direct communication with the TRC decision-making team and are unable to review or correct any potential misinformation that the TRC relies upon; a review of records suggests the TRC sometimes makes its decisions based on incomplete and/or inaccurate information that could be corrected if individuals were able to directly communicate with decision-makers. For example, in 2019, a transgender woman was transferred to KCCF after being housed long-term in general population with women at SCORE. Upon her transfer to KCCF, she was held in restrictive housing. When she returned to KCCF custody again a couple months later, the TRC records incorrectly indicated that she had no correctional history of assignment to female housing despite her communicating this history to DAJD staff members repeatedly while again requesting housing in women's general population. The TRC then denied her request to be housed in women's general population even after noting she presented no behavior management or medical issues.

Staff often communicate ineffectively with transgender individuals about the review process and do not provide individuals with information about the basis for housing decisions, nor how to appeal. Even if DAJD did provide information about the appeals process, the fact that the TRC does not clearly document or communicate the basis for its decisions means individuals do not have the ability to articulate a specific and meaningful appeal.

### **C. Safety**

Transgender and nonbinary people are particularly vulnerable to physical and sexual violence and harassment while incarcerated.<sup>5</sup> Transgender individuals in DAJD custody experience unsafe and demeaning treatment when staff disregard DAJD policies meant to protect them. A number of individual reports indicate that DAJD staff have been unresponsive to emergency call buttons and verbal complaints. DAJD staff have also failed to properly initiate PREA investigations in response to complaints of sexual harassment and violence directed at transgender individuals, in violation of both DAJD policies and PREA Standards.<sup>6</sup> A transgender woman recently reported that while she was housed in a men's administrative segregation unit pending review by the TRC, she experienced sexual harassment from multiple people and an individual housed across from her exposed his genitals to her, then banged incessantly on her cell while sexually harassing her during his time out of cell. Throughout the day, staff were unresponsive to her use of the emergency call button, as well as her attempts to ask for help and report the harassment to staff as they walked by her cell. When she broke down sobbing about the harassment in front of nurses and a female corrections officer later, the officer said she would report the issue to supervising unit staff. No

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<sup>5</sup> *Farmer v. Brennan*, 511 U.S. 825 (1994); see also Bureau of Justice Statistics, PREA Data Collection Activities, 2015, NCJ 248824, <https://www.bjs.gov/content/pub/pdf/pdca15.pdf> (2015).

<sup>6</sup> See 28 C.F.R. § 115.43(a); 28 C.F.R. § 115.61.

written documentation of the woman's experience was noted in her medical or jail records, however, and no PREA investigation opened in response, as should have been per policy.

#### **D. Staff Misconduct**

DAJD's Transgender Inmate policy includes a list of prohibited behavior by DAJD staff including ridiculing transgender inmates. In addition to those basic prohibitions, it would be helpful to include a robust list of best practices around appropriate care for and interaction with transgender individuals. We have received reports that DAJD staff routinely misgender transgender individuals and have sometimes failed to protect the privacy of their health information, including improperly disclosing individual's transgender identity in front of others. In one recent instance we are aware of, a staff member made harassing comments about an individual's anatomy and transgender status in front of others. In another, DAJD staff asked a transgender man for a pregnancy test in front of his male peers more than once.

#### **E. Medical Care**

Failure to provide individualized and appropriate medical care for gender dysphoria violates the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>7</sup> In addition to settled case law, the National Commission on Correctional Health Care (NCCHC) and National Institute of Corrections have likewise taken the position that gender-related medical and surgical care should be available to incarcerated people, based on individualized needs, and some baseline guidance has been made available.<sup>8</sup>

However, individuals in DAJD custody have reported challenges accessing appropriate medical care for gender dysphoria. Some individuals spend prolonged periods of time incarcerated in DAJD facilities pending the resolution of their criminal case, and multiple individuals have reported an inability to initiate hormone therapy or access mental health for gender dysphoria. Individuals who have received hormone therapy prior to incarceration often experience interruptions in their medications even though discontinuing these medications precipitously places individuals at serious risk of physical and psychological harm, and some have reported longer term difficulties continuing their hormone therapy regimes.<sup>9</sup> One individual sued a New York jail over similar treatment related to hormone therapy and settled for \$800,000.<sup>10</sup>

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<sup>7</sup> *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>8</sup> National Commission on Correctional Healthcare, *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings (2015)* ("NCCH Trans Healthcare Policy"), <https://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care>.

<sup>9</sup> *See id.*; World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th Version, 21-51 (2011); Center of Excellence for Transgender Health, University of California, San Francisco, *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People*, 2nd Edition (2016); *Diamond v. Owens*, 131 F. Supp. 3d 1346 (M.D. Ga. 2015); *Phillips v. Mich. Dep't of Corr.*, 731 F. Supp. 792 (W.D. Mich. 1990); *Wolfe v. Horn*, 130 F. Supp. 2d 648 (E.D. Pa. 2001); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

<sup>10</sup> John Leland, *How a Trans Soldier Took on the Jail that Denied Her Medication, and Won*, N.Y. Times (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/nyregion/transgender-jail-hormone-therapy.html>.

Transgender and non-binary individuals in DAJD custody are also categorically denied access to a variety of accepted treatments for gender dysphoria, including necessary social transition items. For example, transmasculine individuals are denied, without any individualized determination, access to chest binders, despite the fact that chest binders are safely issued in local correctional settings such as Washington State prisons for the treatment of gender dysphoria. The denial of such necessary social transition items has exacerbated individuals' gender dysphoria and deteriorating mental states.

Individuals have also had difficulty accessing other kinds of medical treatment, such as mental health medication, due to the way DAJD staff interact with the transgender population. In one incident we are aware of, DAJD denied a transgender individual access to their mental health medication because the individual would not say their dead name (name given at birth, which in this instance, was no longer the individual's legal name) aloud on the unit within earshot of other incarcerated individuals. Transgender individuals in DAJD custody report a general lack of access to gender dysphoria treatment, including initiation of hormone therapy, mental health therapy, and necessary treatment items such as compression undergarments.

The TRC itself also raises legal issues. Non-treating physicians and custody staff with no expertise in transgender health are tasked with making decisions about the health and safety of individuals whom they have never met and for whom they have no medical expertise, and protected health information is shared with custody staff during TRC meetings. Because medical providers have not been responsive to individuals' requests for a variety of forms of gender dysphoria treatment, it is unclear if DAJD would utilize the TRC to make decisions about such care in the future. Transgender and nonbinary individuals should have access to qualified providers with specialized knowledge in transgender health care, and treating physicians should be responsible for determining the necessity of treatment options. DAJD should cease any current or planned practice to utilize the TRC to make medical decisions regarding gender dysphoria treatment given these concerns, which have also been the basis for injunctive relief and judicial attention in other jurisdictions that have utilized analogous review committees.<sup>11</sup>

#### **F. Programming**

When transgender and nonbinary individuals have been housed in administrative segregation or protective custody against their will, they often lack access to the programming afforded to their cisgender counterparts of the same security level. Record reviews for select individuals have not produced any documentation of staff analysis as to the programming opportunities that have been limited and reasons for such, even after requests by individuals for access to 12-step or educational programming, which suggests a failure to follow DAJD policy<sup>12</sup> and PREA standard § 115.43(b).

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<sup>11</sup> See *Monroe v. Baldwin*, 424 F. Supp. 3d 526, 546 (S.D. Ill. 2019), on reconsideration in part sub nom. *Monroe v. Meeks*, 18-CV-00156-NJR, 2020 WL 1048770 (S.D. Ill. Mar. 4, 2020). See also *Edmo v. Corizon, Inc.*, 935 F.3d 757, 779 (9th Cir. 2019).

<sup>12</sup> King County Department of Adult and Juvenile Detention, Adult Divisions, General Policy Manual 6.03.001 (B, 2, c), 6.03.007 (D, 9) Transgender Inmates (2006).

Many of these problems are well known. In addition to grievances and complaints being made over the years, the Seattle Office for Civil Rights also published a report in October 2018 summarizing many of these concerns: “The [Seattle Reentry] Workgroup members include those who have experienced incarceration inside King County’s downtown jail. These experiences shed light on unacceptable conditions, individuals not getting access to their medication, transgender individuals routinely being placed in solitary and/or segregation contrary to the jail’s own policy, retaliation when trying to make complaints or request assistance, and individuals rarely receiving reentry or release support upon release.”<sup>13</sup> DAJD’s policies and practices pertaining to the treatment of transgender and nonbinary individuals in custody are long overdue for systemic changes.

## **2. Immediate Action Requested**

While DAJD must make extensive changes to both policy and practice, immediate action must be taken to minimize the harm transgender and nonbinary people face while in the agency’s custody. The following are steps that can and should be taken as soon as possible:

- Book individuals under their current legal name and gender marker when staff have notice of such (e.g., current driver’s license, ID card, or passport).
- During the booking process, clearly communicate to transgender and non-binary people what housing options exist within the jail prior to asking which housing setting they believe would be safest for them. Staff should describe shower and restroom accommodations, time out of cell, access to programming, and answer questions individuals may have in order to be able to make an informed decision about where they would prefer to be housed initially. If an individual identifies administrative segregation as a preferred housing placement, staff should explicitly ask - and document - whether the individual would prefer to be housed on a men’s or women’s unit.
- Screen all transgender and non-binary people for less restrictive housing placements prior to placement in restrictive housing pending review by the TRC (e.g., general population, protective custody). If it is determined necessary to house an individual in restrictive housing pending review by the TRC, the Correctional Program Specialist should document the basis for the decision per PREA Standard §115.43, as well as why the male or female unit was chosen. If an individual is placed in restrictive housing pending review by the TRC, staff should clearly communicate that the TRC will convene within 72 hours, not including weekends or holidays.

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<sup>13</sup> Seattle Office of Civil Rights, Seattle Reentry Workgroup Final Report at 41 (2018).

- Cease the practice of mechanically housing transgender women in men’s restrictive housing prior to their review by the TRC. There is no legitimate penological purpose in doing so.
- If it is determined necessary to house a transgender or non-binary person in restrictive housing pending review by the TRC, they should be given the explicit choice of whether they want to go to a men’s or women’s restrictive housing unit.
- Allow transgender and non-binary people who are placed in restrictive housing pending classification review to have access to the phones at least once daily during regular business hours.
- Direct medical staff to dispense medications to transgender and nonbinary individuals who can confirm their identity by birthdate and initials. Because DAJD has previously, and continues to presently, house transgender and nonbinary individuals without recognizing their current legal and/or chosen name, it is a matter of safety, mental health, and basic human dignity to not compel individuals to disclose their former names aloud on a unit in order to receive their medication.
- Allow transgender and nonbinary individuals the opportunity to provide a statement about their housing preferences and safety concerns for consideration by the TRC. Individuals should be given the opportunity to write the statement or, if they prefer, dictate the statement to a mental health professional. The statement should be appended to the individual’s records.
- Provide a written response and assurances as to each of the above demands.

### 3. **Policy Change**

Given the above-identified systemic issues concerning the treatment of transgender and nonbinary people in DAJD custody, we strongly believe that comprehensive policy change is necessary. Such policy change must be made in close consultation with community members who have personally experienced incarceration at DAJD facilities, as well as leaders within the local community whose professional and lived experiences offer expertise to this subject matter. We are willing to convene stakeholders and experts to assist DAJD in undertaking these policy reforms, but need assurances that the agency is committed to collaboration and change.

Please respond in writing to [dannyw@dr-wa.org](mailto:dannyw@dr-wa.org) within thirty days to outline the progress the agency has made in implementing the immediate changes we have requested above, as well as to indicate your willingness to engage with stakeholders in a policy change process. We are eager to arrange a meeting with


you to discuss how we can best work together to ensure these issues are addressed and to create a policy grounded in best practices, which we insist our community deserves and you are fully capable of implementing.

Signed,



**Black & Pink**  
Seattle Tacoma chapter

A family of LGBTQIAA2S+ prisoners and "free world" allies who support each other



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