

Docket No. F04JV32912660A

SUPERIOR COURT

JUDICIAL DISTRICT

OF FAIRFIELD

IN RE: [REDACTED]

FOR JUVENILE MATTERS

May 6, 2014

SUPERIOR COURT
JUVENILE MATTERS
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BRIDGEPORT

MEMORANDUM OF DECISION

Memorandum of decision on Motion to Transfer to Manson Youth Institution filed by the Commissioner of Children and Families (DCF) pursuant to §17a-12(a) of the Conn. General Statutes.

This matter was heard by the court on February 11, 2014 thereafter evidence was heard on February 25, March 4, March 12, March 19, March 20, March 26, and arguments heard on April 3. On briefs due on April 2. On March 20 a Motion to Dismiss was argued. That motion was denied by the court.

[REDACTED] was represented by counsel and the Office of the Attorney General represented DCF.

The court has heard all the evidence, reviewed the transcripts, and all the exhibits including the video. The court makes the following decision by a preponderance of the evidence.

FACTS

The respondent, [REDACTED], also known as [REDACTED], is a transgender female juvenile, over the age of sixteen, who has a history of violence.¹ She has consistently asserted that her gender

¹ The respondent is a transgender girl. She was born male, but identifies herself as female. See U.S. Department of Justice, National Institute of Corrections, "Policy Review and Development Guide: Lesbian, Gay,

identity is female, although she was born male. The Department of Children and Families (DCF) has moved, pursuant to General Statutes § 17a-12, to transfer the respondent to the Manson Youth Institution, an institution for young male offenders tried as adults run by the Department of Correction (DOC). The court held evidentiary hearings on this motion and makes the following findings of fact by a fair preponderance of the evidence.

The respondent has an extensive history of involvement with DCF. Starting when she was nine, [REDACTED] was placed at Boys and Girls Village then transferred to Yale New Haven Hospital, then back to Boys and Girls Village. Rosenbeck Testimony, February 25, 2014 Transcript, p. 79-80. She was subsequently placed at Riverview Hospital, Connecticut Children's Place, Bridgeport Detention, and most recently at the Meadowridge Academy in Swansea, Massachusetts, then finally transferred to the Connecticut Juvenile Training School (CJTS). *Id.* During this lengthy history, she has exhibited a history of assaultive behavior while in placement facilities. *Id.* The director of CJTS testified that there were eleven occasions in which police were called to either a facility or a program regarding an incident with the respondent. *Id.* In these incidents the police interviewed staff, filed a complaint against the respondent, and subsequently he went to court. *Id.* He stated these incidents occurred at ages nine, ten, eleven, twelve, fourteen, and sixteen. *Id.* A supervisor from the juvenile detention center in Bridgeport stated that the respondent has exhibited assaultive behaviors towards staff members, other juveniles, peers, and females, as well as threatening behaviors towards staff

Bisexual, Transgender and Intersex Persons in Custodial Settings," p. 49 (August, 2013), available at <https://s3.amazonaws.com/static.nicic.gov/Library/027507.pdf>; *Shaw v. District of Columbia*, 944 F. Supp. 2d 43, 48 n.2 (D.D.C., 2013), see also *Guzman-Martinez v. Corrections Corp. of America*, United States District Court, Docket No. 11-02390-PHX-NW (D. Ariz., July 13, 2012); 125 Am. Jur. 2d, Trials, § 247: Sexual Orientation and Gender Identity Discrimination in Employment. The parties have been inconsistent in their references to her, either as [REDACTED] or [REDACTED] and either as he or she. The court will refer to her as [REDACTED] in order to preserve the clarity of the record, and as she in accordance with her gender identity. In doing so, the court makes no comment as to the proper facility in which she should be housed.

members. Lindo Testimony, February 25, 2014 Transcript, p. 65. The supervisor also stated that her behavior was more severe than other residents. Id.

The CJTS director noted specific behaviors that made the respondent especially dangerous and difficult to secure: an inability to de-escalate, targeting of female staff, and smearing of feces. Rosenbeck Testimony, February 25, 2014 Transcript, p. 80-81. He stated that the incidents became steadily more aggressive and intense as the respondent increased in size and strength. Id. Finally, he stated that he had not seen the same level of behavior in any other juveniles at the training school. Id., 83. Rosenbeck stated that CJTS staff are often assaulted, but that this is in the course of an intervention, when they are trying to break up a fight between residents. Id. The respondent, in contrast, specifically targets staff members. Id.

On November 21, 2013, the respondent pleaded guilty to assault on an officer and was committed delinquent to DCF for a period not to exceed eighteen months. She was then placed at the Meadowridge Academy, a therapeutic boarding school that provides specialized trauma-informed treatment services, in the girl's dormitory. Perotto Testimony, February 25, 2014 Transcript, p. 10, 19. During her two month placement at Meadowridge, she committed multiple assaults, first pulling the hair and spitting on one staff member, kicking another, and attacking another student, pulling her hair and scratching and punching her. Id., p. 18-19. Then, on January 28, 2014, the respondent attacked a member of the Meadowridge staff and was discharged from Meadowridge and placed at the Connecticut Juvenile Training School (CJTS) on January 31, 2014. Id., p. 17-18.

The Meadowridge staff member, a resident counselor, whom the respondent assaulted on January 28, 2014, testified at length about her relationship with the respondent. Powers Testimony, February 25, 2014 Transcript, p. 31-34. They had a close relationship prior to the

incident, going on outings together and talking regularly. Id. They had a brief falling out when the staff member had to search the respondent's room, but their relationship improved again prior to the assault. Id. The assault occurred after the respondent was agitated and the assaulted staff member and another staff member were trying to calm her down. Id., 36-40. The respondent made threats that she would punch or cut the two staff members. Id. The other staff member grabbed the respondent. Id. She pulled an arm free, which the assaulted staff member tried to hold down. Id. The respondent then ripped at her hair and bit her, leaving puncture wounds. Id. All three fell to the ground, after which the respondent, wearing army boots, kicked the assaulted staff member in the head, arm, face, and ear. Id. The assaulted staff member believes she was kicked six times. Id. She estimated that the respondent weighed approximately 180 pounds and stood five feet eight inches, compared to her own 135 pounds and five feet five inches. Id., 37.

On February 4, 2014, DCF moved, pursuant to § 17a-12, to transfer the respondent to the Manson Youth Institution, an institution run by DOC for young male offenders over the age of 14 usually with adult charges pending or sentenced. There are juveniles housed at Manson or Niantic, who were transferred to adult court but have not yet been convicted or sentenced. While at CJTS, [REDACTED] was initially kept in an eighteen bed unit by herself with two full time staff around the clock. Her attorney filed and was granted a temporary injunction preventing CJTS from housing her with the general population of the school based on her statement that she was scared to enter the general population of the school. Various CJTS staff tried to provide her with educational and recreational activities on a one-to-one basis. Rosenbeck Testimony, February 25, 2014 Transcript, p. 86. She initially refused to participate in any of the individualized programing, but later began to participate in the individualized programming provided.

Rosenbeck Testimony, February 25, 2014 Transcript, p. 85-87. The CJTS staff member in charge of the respondent's compliance with the behavioral level system implemented at CJTS stated that the respondent was "on level," but also stated that she did not have to meet any requirements to stay on level because she did not participate in the programs that were offered in the general population units. Gaunichaux Testimony, March 19, 2014 Transcript, p. 64, 65. CJTS eventually moved one male student who was recovering from a broken jaw into the unit with her. Rosenbeck Testimony, March 12, 2014 Transcript, p. 35. They are on opposite ends of the unit, which is structured as a semicircle lined with individual rooms for each resident. Id., 36-37. A common area separates the respondent and the male resident and two staff members are present at all times. Id. Various testimony indicated that there have been no incidents at the training school, but the respondent has not been incorporated into the school's general population and programming.

DISCUSSION

General Statutes § 17a-12, "Transfer of child or youth to other program, agency, organization or facility," provides in pertinent part that when "a person fourteen years of age or older is dangerous to himself or herself or others or cannot be safely held at the Connecticut Juvenile Training School, if a male, or at any other facility within the state available to the Commissioner of Children and Families, the commissioner, or the commissioner's designee, may request an immediate hearing before the Superior Court on the docket for juvenile matters where such person was originally committed to determine whether such person shall be transferred to the John R. Manson Youth Institution, Cheshire, if a male, or the Connecticut Correctional Institution, Niantic, if a female."² The Supreme Court discussed the trial court's role in § 17a-12

² General Statutes § 17a-12, "Transfer of child or youth to other program, agency, organization or facility," provides that "(a) When the commissioner, or the commissioner's designee, determines that a change of program is

in *In re Steven M.*, 264 Conn. 747, 756-57, 826 A.2d 156 (2003). The court stated that "§ 17a-12 (a) requires that the trial court consider whether a transfer is in the best interests of the child. We further conclude, however, that the juvenile's best interest is not dispositive. Rather, § 17a-12 (a) also requires that the trial court determine whether the juvenile is a danger to himself or herself or others or cannot safely be maintained by the department. If such a danger exists, the juvenile may be transferred pursuant to that statute." The court further stated that "we conclude that, taken as a whole, § 17a-12 (a) requires that the trial court, in determining whether to transfer an allegedly dangerous juvenile to the custody of the department of correction, must consider both the best interest of the juvenile posing a safety concern and the danger posed by that juvenile to other juveniles with whom the subject juvenile is or will be situated." *Id.*, 759. When considering the issues posed by a potentially incompetent juvenile, the court stated that

in the best interest of any child or youth committed or transferred to the department, the commissioner or the commissioner's designee, may transfer such person to any appropriate resource or program administered by or available to the department, to any other state department or agency, or to any private agency or organization within or without the state under contract with the department; provided no child or youth voluntarily admitted to the department under section 17a-11 shall be placed or subsequently transferred to the Connecticut Juvenile Training School; and further provided no transfer shall be made to any institution, hospital or facility under the jurisdiction of the Department of Correction, except as authorized by section 18-87, unless it is so ordered by the Superior Court after a hearing. When, in the opinion of the commissioner, or the commissioner's designee, a person fourteen years of age or older is dangerous to himself or herself or others or cannot be safely held at the Connecticut Juvenile Training School, if a male, or at any other facility within the state available to the Commissioner of Children and Families, the commissioner, or the commissioner's designee, may request an immediate hearing before the Superior Court on the docket for juvenile matters where such person was originally committed to determine whether such person shall be transferred to the John R. Manson Youth Institution, Cheshire, if a male, or the Connecticut Correctional Institution, Niantic, if a female. The court shall, within three days of the hearing, make such determination. If the court orders such transfer, the transfer shall be reviewed by the court every six months thereafter to determine whether it should be continued or terminated, unless the commissioner has already exercised the powers granted to the commissioner under section 17a-13 by removing such person from the John R. Manson Youth Institution, Cheshire or the Connecticut Correctional Institution, Niantic. Such transfer shall terminate upon the expiration of the commitment in such juvenile matter.

"(b) Unless ordered by the Superior Court at the time of commitment, no child or youth committed to the commissioner shall be placed in or transferred to a state-operated residential mental health facility under the jurisdiction of the commissioner without a hearing before the commissioner or the commissioner's designee. Such hearing shall be conducted in accordance with the provisions of chapter 54.

"(c) Notwithstanding the provisions of subsection (b) of this section, (1) any delinquent child, if a male, may be placed at any time in the Connecticut Juvenile Training School, and (2) the commissioner may transfer any child or youth committed to the commissioner to any institution, hospital or facility for mentally ill children under the commissioner's jurisdiction for a period not to exceed fifteen days if the need for such emergency treatment is certified by a psychiatrist licensed to practice medicine by the state."

"[t]he trial court was under no obligation to consider a utopian third possibility of ordering the department to keep the juvenile at the school under 'appropriate services' The department sought to transfer the juvenile precisely because it did not have an appropriate program for this juvenile. Moreover, the record before this court reflects that the department was making an effort to establish an appropriate program for this juvenile and sought the transfer to ensure his safety and the safety of the other juveniles in its care until such a program could be implemented." (Footnote omitted.) Id., 760-61. The court did not discuss the provision regarding the gender of the juvenile, as it was not an issue.

It is important to note that both the court and DCF maintain a supervisory role over the juvenile while the juvenile is in the custody of DOC. Section 17a-12 (a) concludes with the statements that "[i]f the court orders such transfer, the transfer shall be reviewed by the court every six months thereafter to determine whether it should be continued or terminated, unless the commissioner has already exercised the powers granted to the commissioner under section 17a-13 by removing such person from the John R. Manson Youth Institution, Cheshire or the Connecticut Correctional Institution, Niantic. Such transfer shall terminate upon the expiration of the commitment in such juvenile matter." In addition, General Statutes § 17a-13 provides that "[a]ny person committed to the Department of Children and Families who is transferred to the John R. Manson Youth Institution, Cheshire, or the Connecticut Correctional Institution, Niantic, pursuant to section 17a-12, shall be deemed, while so transferred, to be under the jurisdiction of the Department of Correction except that the Commissioner of Children and Families shall retain his powers to remove such person and to place him in another facility or in the community or to terminate the commitment. The jurisdiction of the Department of Correction shall terminate upon the expiration of the commitment as provided in subsection (a) of section 17a-8."

A

Finding of Dangerousness

The director of CJTS testified that the respondent is the most dangerous resident they have had at CJTS. Rosenbeck Testimony, February 25, 2014 Transcript, p. 85. He stated that her history of specifically targeting female staff members for physical assaults and her previously spreading feces on herself separated her from the other residents in terms of dangerousness. Id.; Rosenbeck Testimony, March 4, 2014 Transcript, p. 15-16. The respondent attempted to highlight other cases where residents had committed assaults, but largely failed to specify the nature of these assaults, which could be much less violent than the conduct attributed to the respondent. General Statutes § 53a-167c, assault on an officer, includes a wide variety of conduct which is much less severe than the respondent's conduct, and which could occur, as the CJTS director testified, when staff are breaking up fights. The respondent elicited testimony as to one resident who threw urine and one who assaulted five staff members in a month, but did not disclose whether these assaults were serious or not or whether they occurred as part of an intervention or were targeted at the staff member. Rosenbeck Testimony, March 12, 2014 Transcript, p. 13-14, 25, 26, 30. The respondent did elicit testimony regarding several attacks which led to the perpetrator being sent to Manson. See Brone Testimony, March 19, 2014 Transcript p. 39-41; Cimino Testimony, March 19, 2014 Transcript, p. 29-30, 34-35.

The respondent also elicited testimony from an attorney who formerly worked with Steven M., the subject of the previously cited Supreme Court decision. This testimony painted a picture which was eerily similar to the respondent: unprovoked attacks on staff, unpredictable behavior. Foren Testimony, March 19, 2014 Transcript, p. 74-77. Like ██████████ Steven M.

committed assaults at Riverview and was eventually kept in near isolation at the predecessor to CJTS. Id., 75, 79.

1

Change the Age

The respondent elicited examples of juveniles who were tried as adults, sent to Manson, then returned to CJTS. Rosenbeck Testimony, March 12, 2014 Transcript, p. 19, 26, 30; Brone Testimony, March 19, 2014 Transcript p. 39-41; Cimino Testimony, March 19, 2014 Transcript, p. 29-30, 34-35. She also asserted multiple times that the use of § 17a-12 was an extraordinary remedy which had only been used once in the past. The history of the “Change the Age” legislation informs both of these statements. Public Act 07-4 changed the definition of child in General Statutes § 46b-120 from an individual under sixteen years to an individual under eighteen years, effective January 1, 2010. Public Act 09-7 then changed the age to seventeen effective January 1, 2010, and to eighteen effective January 1, 2012. Prior to this change, § 17a-12 would have been utilized less frequently, because juveniles over sixteen who committed assaults or other violent acts would be treated as adults and sent directly to adult courts, where they would be sentenced as adults. Many of the examples cited by the respondent illustrate this point. Several juveniles committed assaults at the juvenile training school and were then tried and sentenced as adults and sent to the Manson Youth Institution.

Many of the juveniles cited by the respondent would have been subject to transfer under § 46b-127. That section makes transfer of juveniles over the age of sixteen who commit a capital felony or a class A or B felony automatic, and allows for a discretionary transfer of juveniles who commit class C or D felonies. In the past, the discretionary transfer merely required the court to conduct an ex parte review and determine that there was probable cause that the child

had committed the felony charged. However, Public Act 12-1 amended the discretionary transfer section to require the judge to consider “the best interests of the child and the public” and removed the ex parte hearing. See General Statutes § 46b-127. In the petitioner’s case the assault which cemented her dangerousness in the opinion of DCF was committed out of state, making trying her for that assault in Connecticut as an adult impossible (Massachusetts decided not to prosecute). In addition, the change to § 46b-127 demonstrates why § 17a-12 would have been rarely used in the past; effecting a transfer to DOC based on § 46b-127 would have been easier.

2

Best Interest

Pursuant to *Steven M.*, the court should also consider whether the transfer is in the respondent’s best interest. The respondent challenged the transfer on the best interest grounds in several ways, by implying that DOC would confine the respondent to her cell for twenty-three hours a day, by questioning whether DOC has appropriate programing for the respondent, and by asserting that due to her gender the respondent should not be placed with males.

The respondent questioned the director of CJTS regarding whether the DOC would be preferable to DCF, in terms of providing for her therapeutic or clinical needs, educational needs, and safety. Rosenbeck Testimony, March 4, 2014, p. 22. Regarding safety, the director stated that DOC would be able to house the respondent on an appropriate security level, to which the respondent responded that this could mean housing in isolation twenty-three hours a day. *Id.*, 24-25. Regarding education, he stated that he was aware of educational programs in both the men’s and women’s DOC facility, although he was unable to give specific examples of how these programs would suit the respondent. *Id.*, 30-32. He also stated that the superior security

available in DOC would permit the respondent to obtain a better education than she could at CJTS. *Id.*, 40-41. When asked whether placement in DOC was in the respondent's best interest given her trauma history, the director returned again to the dangerousness issue, stating that the respondent needed to be transferred to DOC due to her dangerousness, even though that would not necessarily be best for anyone who had experienced trauma. *Id.*, 41-41.

The court, having considered the safety concerns posed by the respondent and the respondent's best interest, determines that the respondent is clearly too dangerous to be held at CJTS or any facility run by DCF. The new women's juvenile facility, Solnit South, which opened after the start of this hearing, would also be poorly suited to the respondent. It has ten beds and two emergency beds. It was designed for thirty to sixty day stays, with a maximum stay of six months. Its staff is mostly female and the respondent commits her assaults on female staff and other female residents, making her equally dangerous in the women's juvenile facility. The remaining issue to be determined is in which DOC facility she should be housed. The present case presents the court with two general options. It could consider the statute's imperative that if male, the juvenile will go to Manson and if female, to Niantic, as a requirement that the court make the assignment based solely on biological sex.³ On the other hand, the court could take a more holistic approach, in keeping with the best interest's analysis which is applied to the rest of the section, and consider whether placement in a male or female setting would be more appropriate. Recent Connecticut and Federal law suggests that the second course will be appropriate in years to come, but it is not clear that the court is mandated to follow it at this point.

³It bears noting that while, in this case, the juvenile's biological sex is clear, in the case of an intersex juvenile, the juvenile's sex would be indeterminate.

B

Proper Location for Housing of Transgender Inmate

General Statutes § 17a-12 states that the hearing before the Superior Court is for the purpose of determining, in addition to the respondent's age and whether she is dangerous, "whether such person shall be transferred to the John R. Manson Youth Institution, Cheshire, if a male, or the Connecticut Correctional Institution, Niantic, if a female." The primary thrust of the statute is to determine whether the respondent should be housed by DCF or DOC. However, unlike most other statutes, it requires the court to determine where she should be initially placed. Subsequent to this initial placement, she is in the custody of DOC and may be transferred as DOC sees fit. General Statutes § 17a-13. In light of the respondent's status as a transgender girl, the initial housing determination is difficult. The statute was first passed in 1971, and has been changed in minor ways over the years. When the statute was first passed, male and female were likely considered immutable characteristics. Recent legislative enactments on both the state and federal level suggest to the court that the directive if male, to Manson, if female, to Niantic, is better understood as referring to an individual's gender identity when the individual has established a gender identity different from her biological sex.

1

Connecticut Nondiscrimination Statute

In 2011, the Connecticut legislature enacted Public Act 11-55, an act aimed at combatting discrimination against transgendered individuals. The act added "gender identity or expression" to a variety of statutes barring discriminatory practices against specific groups. It added a definition of "Gender identity or expression" to General Statutes § 46a-51: "(21) Gender identity or expression means a person's gender-related identity, appearance or behavior, whether or not

that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person's core identity or not being asserted for an improper purpose." It did not alter the juvenile or department of corrections statutes, but it did alter General Statutes § 46a-71 to state that "(a) All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, mental retardation, mental disability, learning disability or physical disability, including, but not limited to, blindness."

DCF Policy Manual 30-9 provides that DCF shall not discriminate against Lesbian, Gay, Bisexual, Transgender, Questioning and Intersex individuals. It includes provisions for providing support groups for LGBTQI youth and sensitivity training. Prior to the transfer to CJTS DCF had always treated the respondent as a female. Throughout the course of the present proceedings, it referred to her as she.

2

Prison Rape Elimination Act

The federal government passed the Prison Rape Elimination Act (PREA), 42 U.S.C. § 15601 et seq. (2003), in 2003. This act created a National Prison Rape Elimination Commission (Commission), tasked with providing a report and recommendation to "the Attorney General and the Secretary of Health and Human Services with recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape." 42 U.S.C. §

15606 (e) (2003). The Commission's Report (Commission Report) and the national standards subsequently enacted by the Department of Justice (DOJ Regulations) contain further guidance regarding treatment of incarcerated transgender individuals.

The Connecticut legislature has demonstrated an intent to follow the PREA and Commission Report. General Statutes § 18-81cc, "Prevention, detection and monitoring of, and response to, sexual abuse in correctional facilities," provides that "[a]ny agency of the state or any political subdivision of the state that incarcerates or detains adult offenders, including persons detained for immigration violations, shall, within available appropriations, adopt and comply with the applicable standards recommended by the National Prison Rape Elimination Commission for the prevention, detection and monitoring of, and response to, sexual abuse in adult prisons and jails, community correction facilities and lockups." This statute was enacted on October 1, 2012. There is no Connecticut statute or regulation specifically referencing the DOJ Regulations. It should be noted that, while § 18-81cc does not mention juveniles, it applies to any agency that detains adults, which DOC does. In addition, the Department of Corrections maintains a PREA Unit, headquartered at 954 Highland Ave, Cheshire, CT.

The Commission's report lists various standards for juvenile facilities, one of which states: "Placement of residents in housing, bed, program, education, and work assignments. Employees use all information obtained about the resident at intake and subsequently to make placement decisions for each resident on an individualized basis with the goal of keeping all residents safe and free from sexual abuse. When determining housing, bed, program, education and work assignments for residents, employees must take into account a resident's age; the nature of his or her offense; any mental or physical disability or mental illness; any history of sexual victimization or engaging in sexual abuse; his or her level of emotional and cognitive

development; his or her identification as lesbian, gay, bisexual, or transgender; and any other information obtained about the resident (AP-1). Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged.”

Commission Report, p. 226.

The Report also provides more general statements as to the dangers faced by transgender females in particular: “Transgender girls are especially vulnerable. Despite their feminine gender and appearance, they are almost always placed in boys’ facilities, where they are expected to shower and sleep with boys.” Commission Report, p. 148. The Commission recounts a specific case: “Cyryna Pasion told the Commission about the sexual abuse she faced as a transgender girl in the Hawaii Youth Correctional Facility in 2004 and 2005. Placed in a boys’ unit against the advice of medical staff and counselors, Cyryna suffered sexual harassment, unwanted touching, taunting, and threats of violence and rape. ‘I felt tortured and alone,’ she told the Commission. ‘The boys threatened to beat me up if I wrote a complaint. . . .’” Id.

PREA further provides that the standards contained in the Commission Report, once promulgated by the Attorney General, must be adopted by state agencies: “For each fiscal year, any amount that a State would otherwise receive for prison purposes for that fiscal year under a grant program covered by this subsection shall be reduced by 5 percent, unless the chief executive of the State submits to the Attorney General-- (A) a certification that the State has adopted, and is in full compliance with, the national standards described in subsection (a) of this section; or (B) an assurance that not less than 5 percent of such amount shall be used only for the purpose of enabling the State to adopt, and achieve full compliance with, those national standards, so as to ensure that a certification under subparagraph (A) may be submitted in future

years." 42 U.S.C.A. § 15607 (e) (2). This provision is effective on "grants for the second fiscal year beginning after the date on which the national standards under subsection (a) are finalized."

After the commission submitted its report, the Department of Justice finalized a set of national standards on August 20, 2012, 28 C.F.R. Part 115, 77 Fed. Reg. 37106-01, which included requirements for dealing with transgendered inmates and transgendered juveniles. These requirements therefore apply to grants for the federal fiscal year which began on October 1, 2013. The governor's options are therefore to choose not to enforce the DOJ Regulations and forfeit the five percent of funding, to refrain from fully enforcing the regulations but dedicate the five percent of funding to bringing Connecticut into compliance, or to bring Connecticut into full compliance.⁴

The DOJ Regulations provide more detail regarding housing of transgender juveniles. The executive summary to the DOJ Regulations states that "[i]n deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, an agency may not simply assign the inmate to a facility based on genital status. Rather, the agency must consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems, giving serious consideration to the inmate's own views regarding his or her own safety. In addition, transgender and intersex inmates must be

⁴See OLR Research Report, 2012-R-0423, November 19, 2012 ("[i]n the future, DOC must comply with rules the U.S. Department of Justice (DOJ) issued in May 2012 based on the commission's recommendations or risk losing 5% of the grant funds it would otherwise receive from DOJ for prisons. The state will not lose the funds if the governor certifies that the state will use the funds that would be lost to enable future compliance. States do not face the loss of funding until the federal fiscal year beginning October 1, 2013. Since compliance with the federal rules is not yet required, we do not compare DOC's policies to the rules. In some instances, the federal rules may differ from the commission's recommendations. Thus, if there is a conflict between the two, DOC may not be able to comply with both.")

given the opportunity to shower separately from other inmates.”⁵ 77 Fed. Reg. 37105. The regulations also contain further guidance providing limits to cross-gender viewing and searching, 28 CFR § 115.315.

⁵ The regulations sections themselves, regarding obtaining information from residents and use of such information, provide:

“§ 115.341 Obtaining information from residents.

“(a) Within 72 hours of the resident’s arrival at the facility and periodically throughout a resident’s confinement, the agency shall obtain and use information about each resident’s personal history and behavior to reduce the risk of sexual abuse by or upon a resident.

“(b) Such assessments shall be conducted using an objective screening instrument.

“(c) At a minimum, the agency shall attempt to ascertain information about:

“(1) Prior sexual victimization or abusiveness;

“(2) Any gender nonconforming appearance or manner or identification as lesbian, gay, bisexual, transgender, or intersex, and whether the resident may therefore be vulnerable to sexual abuse;

“(3) Current charges and offense history;

“(4) Age;

“(5) Level of emotional and cognitive development;

“(6) Physical size and stature;

“(7) Mental illness or mental disabilities;

“(8) Intellectual or developmental disabilities;

“(9) Physical disabilities;

“(10) The resident’s own perception of vulnerability; and

“(11) Any other specific information about individual residents that may indicate heightened needs for supervision, additional safety precautions, or separation from certain other residents.

“(d) This information shall be ascertained through conversations with the resident during the intake process and medical and mental health screenings; during classification assessments; and by reviewing court records, case files, facility behavioral records, and other relevant documentation from the resident’s files.

“(e) The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the resident’s detriment by staff or other residents.”

“§ 115.342, Use of screening information.

“(a) The agency shall use information from the risk screening required by § 115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

“(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

“(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems.

“(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

“(e) A transgender or intersex inmate’s own views with respect to his or her own safety shall be given serious consideration.

“(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

“(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.”

The Commission Report, which DOC is bound to follow, states that generally gay, lesbian, or transgender status is a factor in determining placement of juveniles, but it does not explicitly state that a transgender juvenile may be sent to either a male or female facility. The DOJ Regulations state that a transgender juvenile may be sent to either, dependent on the juvenile's health and safety, management and security concerns, and the juvenile's own belief regarding her safety.

C

Determination Regarding Placement

Both parties presented testimony regarding how the respondent's placement would be determined. Despite PREA and its associated enactments, the warden of Manson testified that the DOC classifies inmates strictly by "biological gender." Alves Testimony, March 20, 2014 Transcript, p. 42. The Deputy Commissioner of DOC then presented conflicting testimony that while classifying according to biology is the default, DOC might, in the case of the respondent, utilize a case by case analysis of the type suggested by the PREA regulations. Semple Testimony, March 26, 2014 Transcript, p. 49-51. He also stated that the PREA regulations provided useful guidance, but that DOC was not yet in full compliance with PREA. *Id.*, 51-52. Finally, he stated that there were transgender individuals incarcerated by DOC, but he was unaware of how many there were or of how they had been classified. *Id.*, 53.

The CJTS director stated that, utilizing an LGBTQI policy guide, presumably the Policy Review and Development Guide for Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings promulgated by the National Institute of Corrections, he determined that a transgender girl could be placed in either a male or female facility, and decided, in concert with others, to first place the respondent in CJTS, after the incident in Massachusetts, then to move

for her transfer to the Manson Youth Institution even though she had previously been housed in female facilities. Rosenbeck Testimony, March 4, 2014 Transcript, p. 9-10. In contrast, the petitioner elicited testimony from an expert on the issues facing transgender individuals in confinement that such a transfer would be the worst thing possible for a transgender girl. Marksamer Testimony, March 26, 2014 Transcript, p. 30. The expert, an attorney, stated that many courts have found that transgender women and girls are especially vulnerable in male confinement settings, and cited his own research.⁶ Id., p. 27.

The director of CJTS offered some testimony as to why DCF had decided to request the respondent be housed in a male facility. Rosenbeck Testimony, Transcript, March 4, 2014, p. 9-10. In responding why the respondent was not appropriate for the newly opened girls' juvenile facility, he stated that female facilities were more likely to be staffed by women and that the respondent had a history of attacking female staff and residents, therefore the women's juvenile facility would not be appropriate. Id., 21-22. The respondent elicited testimony regarding a radio broadcast and a legislative hearing in which the Commissioner of DCF described some of the behaviors of the respondent as indicating that DCF needed a secure facility for "extremely assaultive" girls, and submitted a recording of the Commissioner's testimony before the legislature into evidence. Id., 12-21, 38. The respondent argues that the Commissioner was

⁶ See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 829-830, 114 S.Ct. 1970, 1975 (1994) (holding that prison officials could have been aware that a female transgender prisoner was at heightened risk of rape, and therefore refusing to dismiss her claim under the Eighth Amendment that the guards were deliberately indifferent to the risk she was placed in); *Shaw v. District of Columbia*, 944 F.Supp.2d 43, 48 (D.D.C., 2013) (classifying search of a post-operative transgender woman by male guards as cross-gender search and denying motion to dismiss her Fourth and Fifth Amendment claims based on qualified immunity); *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1141 (D. Hawai'i, 2006) (granting preliminary injunction on due process grounds to transgender juvenile and two other LGBT juveniles who alleged they were subjected to significant harassment in male juvenile facility); *Guzman-Martinez v. Corrections Corp. of America*, United States District Court, Docket No. CV-11-02390-PHX-NVW (D. Ariz., July 13, 2012) (finding that housing transgender women with male inmates could violate their Fourteenth Amendment rights, but those rights had not yet been sufficiently defined, therefore qualified immunity applied); *Giraldo v. California Dept. of Corrections and Rehabilitation*, 168 Cal. App. 4th 231, 250, 85 Cal. Rptr.3d 371, 388 (Cal. App. 1 Dist., 2008) (holding that California prison officials had a duty to protect a male-female transgender prisoner from rape in the male prison).

identifying her as an appropriate individual for placement in the new facility. DCF responds that the Commissioner was describing behaviors which demonstrated the need for the new facility, not identifying the respondent as appropriate for the new facility. The court, having viewed the Commissioner's testimony on disc (Respondent's Exhibit 5), credits DCF's explanation.

. The court finds that the respondent is too dangerous to be housed at either of the facilities operated by DCF. In addition, it is clear that being housed in solitude or near solitude, as the respondent is currently, is not in the respondent's best interest. As stated above, the court did not credit the respondent's suggestion that the DCF commissioner previously identified her as an appropriate candidate for the girl's facility. Rather, as DCF contends, the commissioner discussed various actions committed by the defendant as demonstrating that there are dangerous juvenile girls within the system. The evidence submitted indicates that housing the respondent at the DCF girl's facility would be just as difficult as housing her at the training school. There is ample evidence that she is dangerous around female staff and other female juveniles residents.

All of the evidence demonstrates that the respondent should be transferred to the custody of DOC. Where she should be placed is a secondary placement issue. The original motion is confusing and contradictory since a female cannot be transferred or housed at Manson which is a male facility. The motion was never amended nor was there ever an objection filed. The petitioner asks for a transfer to the Commissioner of Correction in its trial brief leaving placement to the court. The respondent wants to be transferred to the new female juvenile facility Solnit South. Since everyone has treated the respondent as a transgendered female the court will give that designation serious consideration in the decision on the evidence.

As discussed earlier, the court also believes that given the growing understanding of gender identity in the law, it should make a determination as to whether the respondent should be

initially transferred to the women's DOC facility in Niantic or the Manson facility. The respondent was previously classified as female by DCF, the Court Support Services Division, and the Massachusetts placement. She attends the GUIPPE Program at Connecticut Children's Medical Center, which deals with issues faced by transgendered youth. Given this prior classification, the court is inclined to send her initially to the women's DOC facility in Niantic for assessment. The decision as to whether a transgender girl should be treated as male or female requires a complex assessment. There is insufficient evidence that DCF performed an evaluation before reversing its policy of treating the respondent as female. The court recognizes that determination of her long-term placement will be best left to DOC's expertise. It also recognizes that DCF maintains the ability to recall the respondent from DOC custody at any time. Once the respondent is transferred to Niantic, DOC may perform whatever evaluations it deems necessary in keeping with state and federal law to determine where the respondent should be housed.

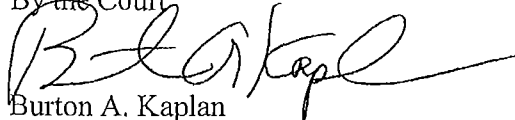
The court notes that in these proceedings, the respondent did not testify and no psychiatric or psychological reports of the respondent were presented to the court.

ORDER

The Motion to Transfer [REDACTED] to the Commissioner of Correction is GRANTED. She is ordered transferred to Niantic as a transgendered female. She is to be held in isolation for no more than 72 hours. She is to be examined, evaluated and classified under the appropriate State and Federal statutes, guidelines, rules and procedures. This transfer be reviewed by the court every 6 months to determine whether it should be continued or terminated, unless the Commissioner of DCF has already exercised the powers granted said Commissioner under §17a-13 by removing such person from the John R. Manson Youth Institution, Cheshire or the Connecticut Correctional Institution, Niantic. Such transfer shall terminate upon the expiration of

the commitment in such juvenile matter.

By the Court

A handwritten signature in black ink, appearing to read "B. Kaplan", written over the printed name.

Burton A. Kaplan

Senior Judge of the Superior Court