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BY E-MAIL

Richard T. Wolf, Executive Director
Members of the New York City Board of Correction

John Boston
Project Director
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Re: Public Advocate's Petition for Rulemaking

Dear Mr. Wolf and Members:

We write to endorse the Petition of the Public Advocate, Hon. Letitia James, to the NYC Board of Correction ("Board") for Rulemaking Pursuant to the City Administrative Procedure Act Concerning Sexual Abuse and Sexual Harassment in New York City Jails ("Petition") and join in asking the Board to exercise its authority to regulate our jails in this area. The Rules are needed for the Board to fulfill its mandate to regulate and monitor conditions in the jails; without these Rules, no enforcement mechanism exists to ensure that needed steps are taken to prevent custodial sexual abuse.¹ We urge the Board not only to adopt the Rules proposed by the Public Advocate but also to clarify and strengthen them, particularly as they pertain to staff sexual abuse of prisoners.

The Legal Aid Society communicates daily with individuals confined in New York City Department of Corrections ("DOC") custody about a wide range of issues including sexual abuse. Staff from the Legal Aid Society Prisoners' Rights Project ("PRP") served on the National Prison Rape Elimination Commission's Standards Development Expert Committee, and submitted congressional testimony concerning the proposed Prison Rape Elimination Act Standards. Because of our longstanding involvement in trying to reduce the substantial risk of staff sexual abuse,² we focus our comments on the problem of sexual abuse by staff of prisoners, and the steps needed to stop or at least substantially limit this abuse. The Criminal Defense Practice is the primary provider of indigent defense services in New York City and the largest public defender in the country. Our attorneys, in the

¹ The National Standards for the Detection, Prevention, Reduction and Punishment of Prison Rape for Adult Prisons and Jails, ("National Standards"), 28 C.F.R. Part 115 (2012) require audits of compliance and certification of compliance by the Governor with their requirements concerning prisons, but not with respect to local jails. *See* Petition 17-20. If certification is not provided, prisons can lose a portion of their federal funding. No comparable sanction applies to local jails, such as DOC.

² PRP has been counsel for over a decade to a putative class of women prisoners challenging policies and practices enabling the sexual abuse by male correctional staff in NYS Department of Corrections and Community Supervision custody in Amador v. Andrews, 03-CV-0650 (S.D.N.Y.) (KTD).

course of their criminal defense work, commonly learn of and seek to assist with their clients' experiences of mistreatment in jail, including sexual abuse.

Sexual violence is at record proportions within DOC, part of the unprecedented levels of violence in DOC documented by the Board in its recent report on stabbing and slashing incidents.³ Sexual violence both helps drive, and is a product of, the long-standing problems in DOC recognized by the Mayor⁴ and the “deep-seated culture of violence” identified by the United States Department of Justice.⁵ The reports of sexual violence cited in the Petition rely on reports issued by the Bureau of Justice Statistics. Petition at 20-22. Our own discussions with clients confirm the extent of this horrific abuse, and make clear the urgent need for the Board to adopt the Rules proposed by the Public Advocate. What follows are our recommendations and arguments for adopting amendments to the Petition.

Our Clients Report a Pervasive Risk of Sexual Abuse in DOC Custody.

Women held in DOC custody have reported a systemic culture of sexual abuse at the women’s jail, Rose M. Singer Center (“RMSC). The culture of sexual abuse at RMSC is perceived by many of the women that we have interviewed as an “open secret” within the facility. Women have reported abuse that ranges from non-consensual sexual acts to sexually abusive touching, and sexual verbal harassment. The power dynamic is often based upon a series of threats and incentives to deter women from reporting the abuse. Further, women who report the abuse are treated as adversaries, rather than as the victims of abuse, by DOC staff, and often times are subject to retaliation by other inmates and staff for reporting. Moreover, many of the women who have filed official complaints are never informed by the investigative agency as to the status of their complaints.

It is common for women to report that female inmates at RMSC are seen sitting on the laps of male correction officers and “passed around” among the officers in the various housing areas. It is also a common occurrence that correction officers will grope and grab women’s breasts, buttocks, or vaginal areas at will. Unwarranted verbal sexual harassment is commonplace as well.

³ The Board documented a 335.4% increase in the rate of slashing and stabbing incidents from 2009 to 2014. The number of slashing and stabbing incidents increased 260.0% from 25 in 2009 to 90 in 2014, during a period when the average daily population of the jails dropped 17.3%, from 13,194 inmates in 2009 to 10,909 inmates in 2014. Board of Correction Report “Violence in New York City Jails, Slashing and Stabbing Incidents,” at p. 1, April 27, 2015, available at: http://www.nyc.gov/html/boc/downloads/pdf/reports/Slashings_stabbings_CRP_2015_04_27_FINAL.pdf.

⁴ “The problems at Rikers have literally been decades in the making. Things that have come out in the last year or two didn’t just happen recently – they were the results of policies and choices and realities that went on for decades.” Transcript of December 17, 2014 press conference available at: <http://www1.nyc.gov/office-of-the-mayor/news/567-14/transcript-mayor-de-blasio-commissioner-ponte-end-punitive-segregation-adolescent>.

⁵ See Department of Justice “CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island,” at p. 3 (August 4, 2014), available at <http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf>.

For example, women have reported the following to us:

- A mentally ill teenager detained at RMSC reported to us that she was groped during a suicide attempt. A male correction officer who had been verbally sexually harassing her discovered her while she attempted suicide and entered the cell and tore down the sheet which she had used to try to hang herself from and then proceeded to fondle her breasts.
- Several women have described incidents where male correctional officers have entered their cells without notice and began to openly masturbate. And several women have reported male correction officers making sexual advances and remarks and then proceeding to masturbate in common areas such as dayrooms or the control center when they thought only they and the female inmate were present.
- Several women have reported correction officers entering their shower areas and watching them shower while sexually verbally abusing them.
- A woman reported that in exchange for coveted posts on the outside work-detail unit at RMSC, she and other women were required to perform oral sex on male correction officers to keep their inmate work assignments where they picked up cigarette butts left outside of the facility.
- Several women have reported a culture where women are “passed around” among male correction officers’ laps in their housing areas. The expectation is that the male officers are entitled to abusively fondle and touch the women on their breasts, buttocks and vaginal areas, apparently as a source of amusement. Women who refused were shunned by the officer and often denied basic entitlements such as hygiene items, out of cell lock out time, and in some cases even food.
- Several women have reported seeing correction officers take women into private areas out of view to sexually assault and abuse them. One woman reported that while she was detained at RMSC, a correction officer would choose a different woman each night to sexually abuse when he was on post in the housing area. The correction officer would take a woman out of her cell and then lead her to a closet out of view where he would sexually abuse her. The woman who reported this feared that one night he would pick her. This was an open secret in the housing area and women feared retaliation if they filed any complaints.
- Several women have reported a practice known as “show me for show me.” These women reported that correction officers shine lights with their flashlights into their cell windows in the evening hours or enter their cells and demand that the women expose themselves to the officers. In exchange, the correction officers will expose themselves and in some cases masturbate. Sometimes a token of contraband will be given in exchange for the woman’s silence.

- One woman reported that she became pregnant while detained at RMSC for over a year. She was repeatedly raped and sexually abused by more than one correction officer. She miscarried while in custody. She was eventually sent back to RMSC where she received constant threats and mistreatment by DOC staff because she reported the abuse. The mistreatment and stress became so deplorable she attempted suicide and was hospitalized for mental health treatment several times during her detention. She was eventually moved out of DOC custody.

Ending Custodial Sexual Abuse Presents a Unique Challenge.

Several features of custodial sexual abuse make it a unique problem within jails and one that requires a particularized response.

First, almost without exception, sexual abuse takes place in private, outside of the view of witnesses and cameras. This fact makes it particularly hard to prove and means that there must be vigilance in preventing sexual abuse.

Second, as a group, women in custody are particularly vulnerable to staff sexual abuse. More than 80% of women in custody experienced sexual or physical assault before incarceration.⁶ Social science researchers have found that people are more likely to be abused if they experienced prior abuse.⁷ Because childhood abuse is often perpetrated by a loved friend or family member, many individuals in custody, particularly women who are incarcerated, experience intense confusion about abusive treatment. As a result, they may have problems setting appropriate boundaries and are more vulnerable to abuse, particularly by men in authority.

Third, staff sexual abuse in detention is a vastly underreported crime⁸ for a number of complex and related reasons. Just as in the community, one reason it is rarely reported is the trauma and stigma associated with sexual assault. This fear and trauma are exacerbated for the majority of women in custody who have a history of prior abuse; their apprehension

⁶ See, e.g., Angela Browne et al., Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women, 22 INT'L J.L. & PSYCHIATRY, 301, 310-322 (1999) (study of women in New York State's Bedford Hills Correctional Facility finding that 94% of the women studied had experienced physical or sexual abuse in their lifetime, 82% had been severely physically or sexually abused during childhood, and 75% had suffered serious physical violence by an intimate partner during adulthood.)

⁷ See, e.g., Cindy L. Rich et al., Child Sexual Abuse and Adult Sexual Revictimization, in FROM CHILD SEXUAL ABUSE TO ADULT SEXUAL RISK: TRAUMA, REVICTIMIZATION, AND INTERVENTION 49 (Linda J. Koenig et al. eds., 2003) (review of nine studies investigating the relationship between childhood sexual abuse and subsequent sexual assault revealed consistent support for phenomenon of revictimization, with each study finding women with a history of childhood abuse two to three times more likely to experience adult sexual abuse compare with women who did not experience earlier abuse.)

⁸ United States Dep't of Justice, Regulatory Impact Assessment for PREA Final Rule, at 17-18 (May 17, 2012), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf (concluding, based upon the Bureau of Justice Statistics' survey, Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09, that between 69 percent and 82 percent of inmates who reported sexual abuse in response to the survey stated that they had never reported an incident to corrections staff.)

about reporting sexual assault is heightened because their prior reports may have been ignored, or worse, caused the destruction of their families.

Furthermore, people in custody and are more likely to be reluctant to complain if they feel complicit in the current sexual abuse. For example, a prisoner may have engaged in sexual conduct with an officer in exchange for protection, or some other *quid pro quo*. She may feel ashamed or embarrassed about her participation. A prisoner has no practical way of saying “no” in the coercive prison environment, potentially recreating her vulnerability as a child who experienced abuse. Whatever her initial response to the abuse, she has no way of stopping it: she is an abuse victim with no way out of the relationship, with no safe haven to retreat to.

Victims of abuse in custody also rarely come forward because they think that they will not be believed. They are, unfortunately, correct.⁹ Without physical proof the reality is that the word of a correction officer will always be credited over that of the incarcerated person. Unless the prisoner has physical proof of the abuse, the officer is permitted to continue guarding prisoners. Yet physical proof is difficult to obtain. Not all sexual contact results in physical evidence, and use of a condom may prevent physical evidence from being left. Our experience shows that repeated credible complaints lodged against an officer and other indicia of misconduct are ignored without physical proof (DNA or sperm). The officer maintains his position, and may even be allowed to continue to guard prisoners alone and at night.

The dynamic of victims of sexual abuse being reluctant to report because they fear that they will not be believed is further complicated by the fact that victims may experience a wide range of painful, traumatic symptoms that negatively affect their ability to report. As a result, victims who do come forward may not be able adequately to explain what happened. For example, reports may be delayed and victims may not be able to recount the events of abuse in a linear narrative fashion.

People in custody are also deterred from reporting sexual abuse because they fear they will be punished or retaliated against for reporting. Victims of sexual abuse have to worry that they will be placed in some form of isolated confinement once the abuse is reported, even though this is nominally done to protect them. They are afraid of being disciplined for admitting to the sexual contact, or for lying about it if they are not believed. Retaliation is a risk for all incarcerated individuals who complain about their treatment, but the likelihood of retaliation or intimidation is especially great in response to complaints about staff sexual abuse since sexual abuse complaints can result in staff being criminally charged and their family life disrupted.

⁹ Survey of Sexual Violence in Adult Correctional Facilities, 2009–11 - Statistical Tables, <http://www.bjs.gov/content/pub/pdf/ssvacf0911st.pdf> at 7-8. In 2011 New York State, with a population of approximately 55,000, had 184 allegations of staff sexual misconduct and substantiated four. *Id.* As to staff sexual harassment (which is defined as verbal harassment), New York State had 24 allegations and substantiated two. With respect to inmate-on inmate sexual abuse, five out of 60 allegations of nonconsensual sexual acts were substantiated, while three of fourteen allegations of abusive sexual contact were substantiated.

In addition to the many reasons why victims of abuse are unlikely to report it, correctional staff also rarely report sexual misconduct by other staff, claiming that without witnessing an actual sexual act they cannot be sure that something untoward occurred or is occurring. This failure to report may be for the purpose of protecting other staff or from a belief that the abuse is not serious, *i.e.*, that the individual purportedly wants it to happen, or is “damaged goods” so there is no serious harm resulting from another incident of abuse.

Preventing Custodial Sexual Abuse Through Supervision and Investigatory Practices.

As the Rules proposed by the Public Advocate demonstrate, there are steps that correction officials can take to reduce custodial sexual abuse, even if the trauma and stigma associated with sexual abuse cannot be avoided. Correction officials control how they supervise staff and investigate reports of sexual abuse within their facilities. Within the areas of both supervision and investigation, there are policies and practices that correction officials can institute to better prevent and deter custodial sexual abuse.

For example, with respect to investigations of sexual abuse, staff must be required to report warning signs of abuse that they observe, and correction officials must promptly act on indicia of sexual abuse. In addition, clear rules are required that mandate that a person’s statement not be disregarded because she is in custody and the alleged perpetrator is a staff person. It is also critical that investigators and supervisory staff communicate about allegations and evidence of abuse, even when sufficient proof cannot be found to substantiate an allegation.

Above all, supervision is essential for deterrence. Extensive camera coverage within the facility is needed both to prevent acts of abuse and to provide corroboration of the fact that the abuse could have happened as reported by the individual. Supervisors must be able to provide additional supervision of staff when there are credible complaints of abuse. And finally, special populations, such as women and LGBTI prisoners, deserve special attention to protect them from harm.

We therefore urge the Board to adopt the Rules proposed by the Public Advocate with the following clarifications and additions:¹⁰

RECOMMENDATIONS

1. System-Wide PREA Coordinator Requirement.

DOC has established a position for a system-wide PREA coordinator and BOC should incorporate this position as a requirement in their Petition. Such a position is necessary so that there is one person with central authority for implementing these rules

¹⁰ Some of our additions and modifications come directly from the National Standards, while some come from our own experience in trying to address the problem of prison sexual abuse.

across the system, who can function as a point person for victims and advocates to contact. We recommend adding the language of the National Standards to the Petition.¹¹

Chapter 1 of Title 40 at (k) should be amended to include:

DOC must appoint an upper level, DOC-wide PREA Coordinator. This person must have sufficient time and authority to develop, implement and oversee a plan to comply with these rules in all of its facilities.

2. Background Checks: Hiring and Promotion.

The Petition tracks the National Standards in requiring screening of staff before hiring. (Petition at 7-8.) This screening is essential in light of the serious shortcomings in DOC hiring practices identified by the Department of Investigation.¹²

The Petition prohibits hiring and promotion of staff if they have “engaged” in sexual abuse. (Chapter 1, Title 40 1-18, (b)(1)(i)). The Petition also requires DOC and DOHMH to “consider any incidents of sexual harassment” in making these decisions. (*Id.* at (b)(2)). We recommend making it explicit that both terms include “allegations” of sexual abuse and/or harassment. In addition, our recommendation provides for supervision of individuals who may be hired despite evidence that raises concerns about past sexual abuse and/or harassment by those individuals.

Chapter 1, Title 40 at § 1-18 (b) should be amended to include:

If the screening assessments result in indicia of reasonable suspicion that the applicant has psychological problems or may engage in sexual abuse and/or sexual harassment, or if the applicant is initially rejected by DOC for employment and is only hired after an appeal of that decision, the indicia shall be provided by DOC to its Wardens. DOC shall develop policies and procedures to monitor such applicants closely.

Chapter 1, Title 40 at § 1-18 (b)(1), which bars hiring of persons who present a risk of engaging in sexual abuse, should be amended to include (supplemental language in bold):

- (i) has engaged in sexual abuse and/or sexual harassment in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution;
- (ii) has been convicted of engaging in or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent;

¹¹ See 28 C.F.R. § 115.11.

¹² New York City Department of Investigation Report on the Recruiting and Hiring Process for New York City Correction Officers, January, 2015 available at: http://www.nyc.gov/html/doi/downloads/pdf/2015/jan15/pr01rikers_au_011515.pdf

- (iii) **has been the subject of a final order of protection issued by a criminal court or family court related to domestic violence, stalking, or harassment;**
- (iv) has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (i) or (ii) of this section; or
- (iv) **has been the subject of credible complaints of having engaged in the activity described in paragraph (i) or (ii) of this section.**

3. Supervision and Video Camera Coverage.

The Petition requires DOC to develop, document and make best efforts to comply with a staffing plan and placement of cameras to protect inmates from sexual abuse. (Petition at 8-9.) We endorse the proposed rules set forth in Rule § 1-18(c) and recommend that they be supplemented to include more detail with respect to four topics: (a) staffing plans; (b) supervisory rounds; (c) the use of cameras and the maintenance of digital videos; and (d) searches of staff.

a. **Staffing Plans.**

The Petition calls for DOC and DOHMH to “develop, document and make its best efforts to comply on a regular basis with a staff plan that provides for adequate levels of staffing...to protect inmates against sexual abuse,” and details factors that the agencies must consider. (Petition at 8-9). We recommend the Petition be supplemented to include language like that of the National Standards, which requires that such plans be developed, and updated on an annual basis.¹³

Chapter 1 of Title 40, §1-18(c)(1) should be amended as follows (supplemental language in bold):

The Department of Correction and Department of Health and Mental Hygiene shall ensure that each facility it operates shall develop, document and make its best efforts to comply on a regular basis with **an annual** staffing plan that provides for adequate levels of staffing, and the Department of Correction shall provide video monitoring to protect inmates against sexual abuse.

b. **Supervisory Rounds.**

In addition to the rules it proposes with respect to supervision, the Petition should require frequent and unpredictable supervisory rounds and prohibit staff from alerting other staff in advance of supervisory rounds, so that supervision will serve to deter, prevent, and identify sexual abuse. Frequent, unannounced, and unpredictable rounds serve as a critical deterrent to staff sexual abuse. We therefore recommend the Petition be supplemented to include language on this topic from the National Standards concerning supervision.¹⁴

¹³ See 28 U.S.C. § 115.13.

¹⁴ See 28 U.S.C. § 115.13.

Chapter 1 of Title 40, §1-18 at (c) should be amended to include as §1-18(c)(3):

DOC must have a policy and practice of upper-level supervisors conducting and documenting unannounced rounds during both day and night shifts to identify and deter staff sexual abuse and sexual harassment. The policy must prohibit staff from alerting other staff that supervisory rounds are occurring by telephone or other means (this practice is sometimes known as a “trip call” or a “call-ahead”), unless the communication is related to legitimate operational functions of the facility.

To avoid any ambiguity as to what this provision requires, we further propose the following rules, either as subparagraphs to paragraph §1-18(c)(3) *or* as appropriate recommendations to DOC for inclusion in its policies, if they are too specific for the purposes of the Board’s Rules:

- (i) DOC supervisory staff shall make frequent rounds, with each Captain making rounds to each area that is under his or her supervision at least twice per shift unless prevented by legitimate security concerns, and more if possible. Rounds shall be conducted at unpredictable and varied times, with varied entry points if possible, and shall include repeated visits close in time to the same areas. Scrutiny shall be paid to isolated areas in the jails.**
- (ii) DOC supervisory staff shall instruct all correction officer staff that alerting fellow officers of supervisory rounds is not permitted; shall monitor whether this rule is being followed; and shall discipline staff for insubordination if they determine that staff are ignoring or have violated this rule.**
- (iii) The disciplinary measures that DOC imposes on correctional officer staff for announcing supervisory rounds shall be sufficiently serious to serve as a deterrent.**
- (iv) Both during an investigation or upon the completion of an investigation, if there is a reasonable and credible basis upon which to believe that an officer is engaging in sexual abuse, particularly where there have been repeated allegations concerning the same officer, DOC shall monitor the officer’s behavior closely by conducting additional unannounced rounds of the officer’s post, by targeted monitoring of the officer’s behavior through the use of cameras to review his interactions with prisoners on a repeated and frequent basis including through real-time review. (A “reasonable and credible basis” includes allegations that are found to be “substantiated” or “unsubstantiated” but not allegations that are found to be “unfounded.”)**
- (v) Notwithstanding privacy concerns, if DOC receives serious, credible, and repeated complaints that sexual abuse is occurring in an area without cameras, DOC shall immediately install cameras and monitor in that location.**

c. Cameras and Maintenance of Digital Video.

The Petition requires that the DOC provide video monitoring to protect inmates against sexual abuse. (Petition at 8). Cameras provide important corroboration that, for example, an individual was taken out of her cell during the middle of the night. They also can show when an individual and staff member are in an isolated location, permitting DOC to put the onus on staff to justify the interaction.

We recommend the Petition be amended to include language that requires DOC to take into account repeated allegations of sexual abuse involving a particular staff member or location within the facility when making decisions about camera placement. Furthermore, because of the reluctance to report sexual abuse, and with the advent of inexpensive digital storage, we believe it critical that the proposed Rules contain a provision requiring that tapes be maintained for at least six months and longer in the case of a report of sexual assault.

Chapter 1 of Title 40, §1-18 at (c) should be amended to include as §1-18(c)(4):

Digital video and sound recording cameras shall be installed and be operational in every DOC jail and transport vehicle. They shall be installed in every housing area, program area, and mess hall. Cameras shall be installed in isolated locations where sexual abuse is likely to occur (e.g., storage closets, laundry rooms, slop sink areas, and loading docks) or in areas in which sexual abuse is repeatedly reported to have occurred. Cameras shall be installed to monitor the area(s) to which staff members against whom repeated complaints of sexual abuse are made are assigned. Cameras shall have the capacity for live-action review.

Chapter 1 of Title 40, §1-18 at (c) should be amended to include as §1-18(c)(5):

Digital video from all cameras shall be maintained for no less than six months. If a report of sexual abuse is made, video from all cameras monitoring the location(s) in which the sexual abuse is alleged to have taken place shall be maintained for five years.

d. Searches of Staff.

Because sexual abuse by staff may include providing vulnerable prisoners with basic items to which they might not otherwise have access, and searches of staff coming to Rikers have been extremely lax,¹⁵ we recommend the Petition be amended to include language regarding these searches.

¹⁵ See New York City Department of Investigation Report on Security Failures at City Department of Correction Facilities, November 2014, available at <http://s3.documentcloud.org/documents/1354724/d-o-i-report-on-security-failures-at-correction.pdf>

Chapter 1 of Title 40, §1-18 at (c) should be amended to include as §1-18(c)(5):

DOC shall conduct reasonable searches of all correction staff on entry to a jail, and as needed, to deter entry of (i) condoms, (ii) contraband, and (iii) other materials used by staff to facilitate the sexual abuse of incarcerated individuals.

4. Screening for Sexual Abuse and Threat During the Intake Process.

Corrections officials often see the only viable means for protection to place prisoners in some form of “protective” or “administrative” custody in order to protect them after an allegation of abuse. While this may be necessary, the use of segregated confinement should be minimized to the extent possible. As a result, we urge that the language of the National Standards¹⁶ be incorporated into the Proposed Rules.

Chapter 1 of Title 40, Proposed Section 1-18 at (f) should be amended to include:

- (8) Inmates at high risk for sexual victimization must not be placed in involuntary segregated housing, unless there are no other available alternative means of separating the inmate from likely abusers. If an assessment of available alternatives cannot be made immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while the facility completes the assessment. Inmates must be assigned to segregated housing only until an alternative means of separation is arranged. This period must not exceed 30 days.**
- (9) If there are no alternative means, the facility must clearly document the basis of the facility’s concern for the inmate’s safety and the reason why no alternative means can be arranged. The facility must review the housing assignment every 30 days to determine whether continued separation is necessary.**
- (10) If an inmate is placed in segregated housing for this purpose, the inmate must have access to programs, privileges, education, and work opportunities to the extent possible. If access to any of these opportunities is restricted, the facility must document which opportunities have been limited, the duration of the limitation, and the reason for the limitation.**

5. Sexual Abuse Response and Investigation.

a. Prisoners Should Not Be Disciplined for Reporting Abuse.

The Petition proposes that the Department take a number of steps to facilitate confidential reporting of staff sexual abuse and sexual harassment (Petition at 12). We endorse these recommendations, and, in light of prisoners’ reluctance to report sexual abuse as described above, we believe a limitation on disciplining prisoners for reporting sexual abuse and harassment similar to that contained in the National Standards¹⁷ should also be included.

¹⁶ See 28 U.S.C. §115.43.

¹⁷ See 28 U.S.C. § ____.

Chapter 1 of Title 40 at §1-19(a)(1)(iv) shall be supplemented as follows:

(iv) Inmates shall not be punished for filing a complaint related to alleged sexual abuse or sexual harassment.

b. Limits Should be Placed on the Use of Segregated Confinement Following a Report of Abuse.

The Petition proposes that the Department take steps to protect inmates who are subject to an imminent risk of sexual abuse and to protect them from retaliation following abuse (Petition at 13). We endorse these recommendations, but in light of the devastating consequences of isolated confinement, the same restrictions on the use of involuntary segregated confinement that we suggest above should likewise apply following a report of abuse as is required by the National Standards.¹⁸

Chapter 1 of Title 40 at §1-19(e)(1) should be amended to include:

The provisions of Chapter 1 of Title 40, Proposed Section 1-18 at (f)(8)-(10) shall apply following a report of sexual abuse.

c. Staff's Duty to Report Warning Signs of Abuse Must Be Made Explicit.

It is a critical first step, as proposed in the Petition, that staff be required to report "any knowledge, suspicion or information regarding an incident of sexual abuse or sexual harassment..." (Petition at 12-13). However, we suggest that this is not enough. It is important that there be a clear requirement that staff also be required to report "warning signs consistent with sexual abuse" that they observe. They need to understand that they need to report staff engaging in favoritism, spending significant amounts of time with a prisoner, engaging in horseplay with a prisoner, or repeatedly asking a prisoner to come early or leave late from programs. While such conduct may be innocent, staff should have to report it so that supervisors can take appropriate steps to deter and prevent any escalation of misconduct.

Chapter 1 of Title 40 Section §1-19 should be amended at (a)(2) to include (supplemental language in bold):

The Department of Correction and Department of Health and Mental Hygiene shall require all staff to report immediately and according to Department policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the Department, **including any warning signs or red flags consistent with such abuse**; retaliation against inmates or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

¹⁸ 28 C.F.R. §115.68.

6. Investigations.

Many factors make it difficult for victims of sexual abuse to report abuse. One of those factors is that when they do report sexual abuse, particularly with allegations of staff sexual abuse, their reports are rarely credited.¹⁹ The Petition (at 14-15) requires that credibility be assessed and not judged solely on the basis of a person's status as an incarcerated individual or staff member. This requirement is essential to ensure that the claim of an incarcerated victim may be considered sufficient to substantiate an allegation against staff. To provide additional guidance and clarity to overcome the fundamental bias inherent in jail investigations, we recommend an evidentiary standard should be established. The evidentiary standard must be set out clearly and at a minimum must track the National Standards and require no higher than a "preponderance of the evidence."²⁰

In addition, it is not enough to require that repeated prior allegations of abuse be "reviewed." Prior reports of allegations of abuse involving the same alleged staff perpetrator should be considered substantive evidence of propensity, as is permitted by the Federal Rules of Evidence, Rule 415.

Chapter 1 of Title 40 at § 1-19 at (f) should be amended to include:

(10) The evidentiary standard for administrative investigations of staff sexual abuse must be no higher than a preponderance of the evidence.

(11) Physical evidence shall not be required for a determination of whether the standard of proof is met in investigations of staff sexual abuse

(12) A statement by an incarcerated person may be sufficient by itself to meet the standard of proof to show that a staff person engaged in sexual abuse.

(13) All prior allegations of sexual abuse involving the alleged perpetrator or allegations revealed in the course of the investigation of sexual assault, including similar patterns of abuse, shall be considered.²¹ DOC investigative staff shall maintain information about prior sexual abuse allegations in an easily retrievable manner and shall review all prior allegations involving the same correction staff when undertaking each new investigation. Allegations of

¹⁹ For example, in New York State, only about 2 percent of staff sexual abuse allegations lead to substantiated findings. Survey of Sexual Violence in Adult Correctional Facilities, 2009–11 - Statistical Tables, <http://www.bjs.gov/content/pub/pdf/ssvacf0911st.pdf> at 7-12 (In 2011 New York State, with a population of approximately 55,000, had 184 allegations of staff sexual misconduct and substantiated four. As to staff sexual harassment (which is defined as verbal harassment) New York had 24 allegations and substantiated two.

²⁰ See 28 U.S.C. § 115.71-72.

²¹ See *People v. Molineaux*, 168 N.Y. 264 (1901); Fed. R. Evid. 415.

similar patterns of abuse by more than one alleged victim shall be given substantial weight in support of meeting the burden of proof. Repeated similar allegations of sexual abuse shall be given substantial weight in support of a finding of credibility on the part of the alleged victim.

(14) Unless prevented by legitimate security concerns, all available and practicable investigative tools shall be used in assessing whether the standard of proof is met to believe that a staff person engaged in sexual abuse. These tools shall include: review of materials from cameras (i.e., video and audio); fingerprinting in all cases where it could be probative; the placement of hidden cameras where they could reasonably be believed to lead to corroborative evidence; and, as appropriate and in conjunction with trained law enforcement staff, covert surveillance techniques.

7. Discipline for Staff.

The Petition does not provide for rules regarding disciplinary hearings. Because DOC is involved in the disciplinary process, we recommend amendments that permit DOC to proffer evidence of patterns of sexual misconduct, as is permitted in New York State criminal prosecutions and by the Federal Rules of Evidence. *See People v. Molineaux*, 168 N.Y. 264 (1901); Fed. R. Evid. 415. In addition, staff who preside over, and make decisions in, disciplinary hearings need specialized training to evaluate reports of abuse, which may be delayed or otherwise affected by the trauma experienced by the victim. They should be trained to recognize the unique challenges faced by persons coming forward after experiencing severe trauma.

Chapter 1 of Title 40 § 1-19 at (h) should be amended to include:

(5) The standard of proof at hearings for discipline of staff shall be preponderance of the evidence.

(6) Evidence of prior allegations of abuse involving the alleged perpetrator, or allegations revealed in the course of the investigation of the sexual assault, including similar patterns of abuse, shall be offered as evidence at the administrative hearings where disciplinary charges against staff are considered.

(7) Arbitrators and prosecutors at administrative hearings where disciplinary charges against correction staff are considered will receive training on the impact of sexual abuse on the reporting of such complaints.

8. Sexual Abuse Incident Reviews Must Be Conducted.

Sexual abuse is underreported and that will be difficult to change. In addition, it will be difficult to alter the long-standing bias against crediting complaints made by incarcerated individuals against correction staff and the reluctance of staff to report one another for misconduct. We are optimistic that the rules proposed in the Petition and in this document will begin to create these needed changes, at least in part by creating a means of enforcement of the PREA standards.

Requiring sexual abuse incident reviews, in which high-ranking DOC staff review and consider the appropriate response to allegations of sexual abuse, is an additional reform that we believe is critical to the process of change. Supervisors must be involved in considering whether additional supervision of a particular staff person, or area, is required, and in documenting the reasons for the decision. Likewise, supervisors must be involved in the review of policies to determine whether they have contributed to sexual assaults by DOC staff. We recommend the Petition be supplemented to include language like that in the National Standards, which require the involvement of high-ranking staff in the review of allegations of sexual abuse.²²

Chapter 1 of Title 40 should be amended to include:

DOC must conduct a sexual abuse incident review within 30 days of the conclusion of every sexual abuse investigation where allegations were found to be either substantiated or unsubstantiated. Reviews do not need to be conducted for allegations that were determined to be unfounded. Upper-level management officials should conduct these reviews, with input from line supervisors, investigators, and medical or mental health practitioners.

(a) The review team should consider a need for policy or practice change and whether the incident was motivated by race,

²² See 28 U.S.C. § 115.86.

ethnicity, gender identity, LGBTI identification/status/perceived status, gang affiliation, or other group dynamics.

(b) The team should also examine the area where the incident allegedly occurred to assess whether physical barriers to observation in the area (by either cameras or supervisory staff) enable abuse. Further, the team should assess staffing levels and whether monitoring technology should be deployed or improved. As to staff sexual abuse allegations, the team should also examine whether additional supervision of the accused staff is needed by either increased rounds or additional video monitoring and, in assessing this need, the team shall consider whether repeated credible complaints of abuse have been alleged.

(c) The team should prepare a report of its findings. The report should include determinations of considerations and recommendations for improvements. These reports should be submitted to the facility head and the PREA compliance manager. If the facility does not implement the recommended improvements, they must document their reasons.

9. Special Populations Require Specific Rules.

As repeated studies and reports have made clear, particular populations of prisoners are at substantially higher risk of sexual assault than others. These include women prisoners,²³ youthful inmates,²⁴ LGBTI persons in custody,²⁵ and prisoners with disabilities and with limited English proficiency. For that reason, clear rules for their treatment are required, as recognized by the Petition and by the National Standards. 28 U.S.C. §§ 115.5, 115.14-16, 115.33, 115.42, 115.82.

Below we focus on the proposed Rules contained in the Petition which we believe require strengthening or clarification.

²³ See Bureau of Justice Statistics Report: Sexual Victimization Reported by Adult Correctional Facilities, 2009-2011, <http://www.bjs.gov/content/pub/pdf/svraca0911.pdf> at 1 (Note) (women prisoners have a higher rate of reported sexual abuse although smaller portion of inmate population); see also Angela Browne, et al., "KEEPING VULNERABLE POPULATIONS SAFE UNDER PREA: ALTERNATIVE STRATEGIES TO THE USE OF SESEGREGATION IN PRISONS AND JAILS," at 11-13 (identifying risk factors for women prisoners).

²⁴ See Angela Browne, et al., "KEEPING VULNERABLE POPULATIONS SAFE UNDER PREA: ALTERNATIVE STRATEGIES TO THE USE OF SESEGREGATION IN PRISONS AND JAILS," at 13-14 (identifying risk factors and strategies for youthful prisoners).

²⁵ See also Angela Browne, et al., "KEEPING VULNERABLE POPULATIONS SAFE UNDER PREA: ALTERNATIVE STRATEGIES TO THE USE OF SESEGREGATION IN PRISONS AND JAILS," at 15-16 (citing studies showing while 3.5 percent of heterosexual male inmates reported being sexually victimized by an inmate, by contrast 39 percent of gay men and 34 percent of bisexual men reported such victimization; lesbians and bisexuals reported twice the rate of sexual abuse by staff as heterosexual women, and a study in California found that transgender women housed in a men's facility were 13 times more likely to have been sexually abused by other inmates than non-transgender people).

a. Searches of LGBTI Prisoners.

The Petition (at 9) seeks adoption of the language from the National Standards requiring training of “staff in how to conduct...searches of transgender and intersex inmates, in a professional respectful manner, and in the least intrusive manner consistent with security needs.” While we certainly agree with this recommendation, we do not believe it goes far enough. Instead, we believe that unless there are exigent circumstances a transgender or intersex prisoner’s request for staff of a certain gender to conduct the search should be honored. Accordingly, we propose the following amendment.

Chapter 1 of Title 40 §1-18(d)(6) should be amended to include (supplemental language in bold):

The Department shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible consistent with security. **Unless exigent circumstances require an immediate search, the Department shall make best efforts to conduct the search by staff of the gender requested by the prisoner.**

b. Housing of LGBTI Prisoners.

In the Summary submitted by the Public Advocate, she clearly intends that the proposed rules make clear that “housing assignment cannot be based solely on anatomy.” Petition at 2. Yet the proposed Rules (Petition at 12) do not make this explicit, and many agencies have interpreted the National Standards to require something less. To avoid any ambiguity in this area, we suggest that this be made explicit as indicated below.

The Department has also set up a voluntary housing area for transgender female prisoners confined in a male facility (“THU”). This is an important component of any continuum of safe housing for these individuals, so long as any transgender female prisoners continue to be so confined. As a result we urge the amendments to § 1-18(g)(4) identified below.

Chapter 1 of Title 40 §1-18(g) should be amended to include (supplemental language in bold):

Housing Transgender and Intersex Inmates. **Placement in a male or female jail shall not be based solely on a prisoner’s assigned sex at birth.** In deciding whether to assign....

Chapter 1 of Title 40 § 1-18 at (g)(4) should be amended to include:

The Department shall maintain a housing program for female transgender prisoners who they have determined cannot be safely housed in a women’s jail. Assignment to such housing shall be voluntary. Prisoners in such housing shall have reasonable access to the same programs as other inmates in that jail.

10. Data Collection.

A longstanding issue in addressing custodial sexual abuse is the lack of transparency and knowledge about the scope and severity of the problem, particularly as experienced by special populations (including women, LGBTI prisoners, and the disabled). In addition, a recurring problem has been that staff sexual abuse is that staff about whom repeated credible complaints have been lodged are nonetheless allowed to return to employment with no additional supervision. We therefore support the following additions to the data to be collected by the Department and to be provided to the Board.

Chapter 1 of Title 40 §1-19(i)(1) should be amended to include the following (supplemental language in bold):

(1) The Department shall collect accurate, uniform data for every allegation of sexual abuse at facilities under its direct control using a standardized instrument and set of definitions. **The data the Department shall collect includes the number of allegations of sexual abuse by special populations of prisoners, the numbers of substantiated allegations from each such population, the number of staff who have reported observing sexual abuse, or warning signs of sexual abuse and the number of staff disciplined for failing to make such reports, the number of staff about whom reports of abuse have been made, the number of such staff about whom prior allegations of abuse have been lodged, the number of such staff who have remained employed at DOC, and the number of such staff remaining employed at DOC about whom additional supervision has been directed.**

Respectfully submitted,

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