TESTIMONY

The New York City Board of Correction

Public Hearing on Proposed Rules to

Amend the Minimum Standards

to Detect, Prevent and Respond to

Sexual Abuse and Sexual Harassment

of Persons Incarcerated in the New York City Jails

and other Facilities Operated by

the New York City Department of Correction

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THE PROPOSED RULES SHOULD BE ADOPTED AND STRENGTHENED

The Legal Aid Society endorses the New York City Board of Correction's ("Board") Proposed Rules to curb sexual abuse and sexual harassment of persons incarcerated in the New York City jails. The Proposed Rules are important to ensure that basic steps are taken to prevent custodial sexual abuse. They provide a critical framework for addressing sexual abuse and harassment, issues that for years were ignored. The Proposed Rules create grounds for enforcement that would otherwise not be available and we commend the Board for going beyond the mere requirements of the Prison Rape Elimination Act's National Standards (28 C.F.R. Part 115 (2012) ("National Standards").[1]

In light of the entrenched failure to address sexual abuse in the City jails, and based on our experience from our work pertaining to staff sexual abuse, we believe the Board should clarify and strengthen the Rules as they pertain to the staff sexual abuse of prisoners. Our comments emphasize supervision, investigation and staff discipline and are discussed in greater detail herein.

The Scope of the Problem

The Legal Aid Society ("LAS") has extensive experience advocating for our clients who report sexual abuse while in the custody of the New York City Department of Correction ("DOC" or "the Department"), and in particular, sexual abuse by staff.[2] A little over a year ago we submitted extensive comments on this issue to the Board in response to the Public Advocate's Request for Rulemaking. *See* LAS Letter to the Board, May 11, 2015.[3] There, we described numerous examples of the kinds of abuse experienced by our clients—particularly

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[1] These include:

- Requiring cameras – Cameras can deter sexual abuse, can function as a pivotal investigative tool, and can level the playing field so that a report of sexual abuse by an incarcerated individual may be credited.
- Supervisory rounds – Requiring that supervisory rounds be conducted at "unpredictable and varied times."
- Suspension/Modified Duty/No Inmate Contact – Requiring that DOC consider, immediately following an allegation of abuse, suspending or placing alleged staff abusers on modified duty, or assignment to a no-inmate contact post.
- Reporting Requirements – Requiring reporting to the Board on significant issues so that the implementation of the rules will be transparent including reporting on: staffing levels and summaries of closed investigative reports.

[2] LAS has been counsel in two putative class actions on behalf of women prisoners challenging policies enabling the sexual abuse by male correctional staff in NYS Department of Corrections and Community Supervision custody, and in several other individual cases. *See Amador v. Andrews*, 03-cv-0650 (S.D.N.Y.) (KTD); *Jane Jones 1-6, v. Annucci et al.*, 16-cv-1473 (RA)(AJ) (S.D.N.Y. March 3, 2016). We are also counsel in *Jane Does 1 and 2 v. City of New York and Benny Santiago* ("Jane Does"), 15-cv-3849 (AKH) (S.D.N.Y. May 19, 2015), a challenge to the policies and practices that enable sexual abuse of women prisoners in NYC DOC custody. Much of the knowledge we rely on in this submission is based on our experiences in litigating these cases, but since virtually all discovery we have received was produced under stringent confidentiality protections, we do not rely on that information herein.

[3] This letter is available at:
http://www1.nyc.gov/assets/boc/downloads/pdf/Comment%20Received%20from%20Legal%20Aid%20Society.pdf.

women in custody. We focused on the unique challenges posed by staff sexual abuse, with particular emphasis on the understandable reluctance of all persons, whether incarcerated or not, to report sexual abuse given the humiliation and embarrassment associated with it. We discussed how that reaction is exacerbated by incarceration, including by valid concerns about retaliation and by the belief, correctly held, that complaints are futile since a prisoner's word alone will never be credited. We discussed the fact that because prisoners are often afraid of the repercussions from saying "no" to a staff person's proposition for sexual favors, they may try to make the best of a wretched situation, and accept contraband or go along with the pretense that the relationship is a romantic one. This in turn can be construed as consent, with other staff not taking such abusive relationships seriously, fostering a culture of indifference. *Id*. at 1-6.

Since our May, 2015 letter, we continue to hear horrific examples of sexual abuse of persons in Department custody. We describe below some of the appalling abuse reported to us by transgender women in custody held in the Department's male jails. At the same time, the Department's dysfunction in addressing sexual violence has come even more clearly to light. In June, 2015, The Moss Group's Sexual Safety Assessment Report found entrenched problems, with the Department failing in virtually every area when it came to protecting prisoners from sexual abuse.[4] Virtually none of the allegations of sexual abuse made by persons in DOC custody in 2014 were shared with the police.[5] At a City Council hearing on December 15, 2015, it became obvious that the Department had no idea of the extent of the problem of sexual abuse, with DOC's statistics on reports of abuse inconsistent with those presented by the Department of Health and Mental Health.[6] The ineptitude or bias (or a combination of the two) of DOC investigations into sexual abuse was revealed, with only one out of 201 allegations of staff-on-inmate sexual abuse substantiated in 2015.[7] Nor could the Department even explain what, if any, policy they had with respect to removing staff from guarding prisoners, even during the pendency of an investigation, no matter how credible the complaint.[8] Recently, at a May 26, 2016 City Council hearing it became clear that the same problems continue. 118 reports of sexual abuse had already been received by the Health and Hospitals Corporation this year, with 40 of those complaints involving staff. At the hearing the Department still could provide no assurance that staff about whom allegations of sexual abuse had been made were removed from

[4] This Report was summarized by the Associated Press. *See e.g.,* http://chronicle.northcoastnow.com/2016/06/21/documents-reveal-new-york-city-jails-substandard-response-sexual-abuse-claims/

[5] Transcript of City Council Hearing Minutes (Dec. 15, 2015) at 69, available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2531088&GUID=2A489E28-531B-402F-87CE-9300CFFA172F&Options=&Search.

[6] *Id.* at 67.

[7] This number is up to the date of the December 15, 2015 hearing. *Id.* at 78.

[8] Numerous lawsuits have been filed concerning sexual abuse by prisoners in DOC custody. Some of the press reports concerning them can be found at: http://www.nydailynews.com/new-york/transgender-woman-sues-city-3m-rikers-assaults-article-1.2540247; http://www.nydailynews.com/new-york/nyc-crime/exclusive-female-inmate-accuses-rikers-island-guard-rape-article-1.2478294.

guarding prisoners during the pendency of an investigation, or about how long on average such investigations could take while an officer could continue guarding prisoners.[9]

Summary Of Recommendations

Our most significant recommendations to better prevent sexual abuse in the City jails include:

- Supervisors need to be consistently present in housing and program areas, with a minimum number of rounds explicitly required.

- All allegations of sexual abuse need to be referred to an investigative agency external to DOC so that investigations can be unbiased and thorough, with allegations of similar patterns of abuse by more than one victim of staff given substantial weight in support of meeting the burden of proof.

- All camera footage need routinely to be saved for six months given delays in reporting.

- Discipline of staff needs to be progressive with all reasonable steps taken.

- Should allegations not be substantiated at the investigative level, or discipline not be imposed, so that staff returns to guard prisoners, then it is imperative that supervision of the returning staff person be reviewed and heightened monitoring considered.

- Retaliation cannot just be prohibited by policy; clear steps need to be in place to separate a prisoner from the alleged abuser at least through the investigation and, we believe, often thereafter.

- To encourage reporting of abuse, there needs to be a blanket prohibition on the discipline of prisoners for reporting sexual abuse and for consensual inmate-inmate sexual contact.

- Transgender prisoners need to be housed safely, which we believe means in accordance with their gender identity.

[9] *See* video link at 1:39:21- 1:46:45, available at: http://legistar.council.nyc.gov/MeetingDetail.aspx?ID=486294&GUID=ABAD8DDE-3F38-4BEE-B79D-1A186BE69DA1&Options=&Search=.

LANGUAGE TO IMPLEMENT RECOMMENDATIONS AND STRENGTHEN THE PROPOSED RULES

Throughout this section, proposed additions to the Board's Proposed Rules are in bold and proposed omissions are struck through.

§5-03: Zero Tolerance of Sexual Abuse & Sexual Harassment; PREA Coordinator

One of the more salient omissions from the Proposed Rules and the National Standards is the failure to provide confidentiality for victims of sexual abuse and harassment. We urge the Board to clarify that confidentiality is required for all reports of sexual abuse, both to protect the victims' privacy and to protect them from possibly severe repercussions if it is made known that they have complained. Confidentiality should extend to allegations of retaliation for reporting sexual abuse. Information obtained during screening, reporting and investigations should be shared only as necessary. At the same time we do not want confidentiality to be used against victims to prevent them from getting information about their own report of abuse, as too often has occurred.[10] Therefore, we believe the Proposed Rules should be amended to include:

> §5-03(d): **Reports of sexual abuse, including those obtained during the screening process, and reports of retaliation for filing a complaint of sexual abuse, are to be kept confidential. Information, including but not limited to the identity of the victim, the identity of the person reporting the abuse, the identity of witnesses and the identity of the alleged perpetrator is only to be shared with essential employees involved in reporting, investigation, discipline, the housing of the prisoner and in the treatment process, unless required by law. Nothing in this Rule shall be used to restrict a victim's ability to obtain information concerning his or her own allegation of abuse.**

§5-04: Supervision and Monitoring

Installation of Cameras

As has been widely-reported, a woman alleged enduring horrific staff sexual abuse on a transport vehicle.[11] This is not unique; allegations of abuse on transport vehicles are all too common.[12] Therefore, we propose the following language:

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[10] An example of this unwillingness to provide a victim with information about her own case is described in the Complaint in Jane Does 1 and 2, 15-cv-3849 (AKH) (S.D.N.Y. May 19, 2015) (Dkt.1) at ¶¶ 135-137, available at http://www.legal-aid.org/media/193137/05.18.15_complaint_jane_doe_version.pdf.

[11] *See:* http://www.nydailynews.com/new-york/nyc-crime/rikers-guard-accused-raping-female-inmate-bus-article-1.2442320

[12] For example, we recently heard from transgender prisoners who reported being seated at the front of a transport vehicle while prisoners at the back threatened, spit and made sexually explicit comments towards them, which DOC staff ignored. Also, extensive reports of abuse during transport in vehicles operated by a private van company have recently been cited. *See http://www.nytimes.com/2016/07/07/us/prisoner-transport-vans.html.*

§5-04(e): **The Department shall install video cameras in all transport vehicles. In addition, w**henever necessary, but no less frequently than once each year, for each facility the Department operates……

Maintaining of Videos

The Proposed Rule requires that video be maintained for at least 90 days.[13] This is an important step in the right direction. However, we believe that the Board should require that video be maintained for at least six months given the persistent documented delays in reporting by victims of sexual abuse. Use of force, as addressed by *Nunez* is usually reported by the staff involved whereas staff sexual abuse is never reported by staff but depends on incarcerated persons coming forward, which requires surmounting well-known obstacles including embarrassment, fear of retaliation and a well-founded belief—given how few allegations are substantiated—that complaining will be futile.[14] Video is highly probative in addressing staff sexual abuse: if there is no physical proof of the sexual abuse, then the claim almost always comes to a question of "he said, she said." With video, there is often corroboration of the prisoner's allegation, even if not of the sexual contact, at least of the circumstances surrounding the abuse. For example, even if there is not a camera showing the inside of a closet or other enclosed area, the onus shifts to the staff person to explain why he was alone with a prisoner in that area. It is critical evidence, and it simply does not make sense to use the same standard for maintaining video to address sexual abuse as use of force when the two are made known to the Department via very different means, and often unfold over very different timeframes. We therefore propose the following language:

Insert to §5-04(i): **The Department shall maintain all video for at least six months**.[15] When the Department is notified …

Rounds

The Board not only included all of the National Standards' requirements regarding rounds, but strengthened them, by requiring that supervisory rounds be "varied and unpredictable" (§5-04(j)), and by requiring that the Department have a written policy requiring

[13] It appears that the Board intended to require DOC to maintain video for at least 90 days, which is the requirement in *Nunez v. City of New York*, 11 Civ. 5485 (LTS)(JCF) (S.D.N.Y. Oct. 21, 2015) ("*Nunez*") at §IX.4, and for longer if a report of abuse is received during that period. However, as written the Proposed Rule does not make that clear. As a result, to accomplish what we believe is the Board's intention, we suggest the following: Insert to §5-04(i): **The Department shall maintain all video for at least 90 days**. When the Department is notified …

[14] Sexual abuse is widely acknowledged to be underreported outside of jails and prisons. In custody, it is substantially underreported. *See* DOJ Regulatory Impact Assessment, 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 that, based upon the 2008-2009 BJS survey, between 69 percent and 82 percent of inmates who reported sexual abuse in response to the survey had never reported an incident to corrections staff).

[15] Six months is the minimum that should be required, but given that people remain fearful of retaliation throughout their confinement, a longer requirement makes sense. The Board should ascertain the expense involved in maintaining a digital record for longer and if it is not prohibitive then there is no reason to limit the requirement to only six months.

consideration of additional camera surveillance or alternative measures such as increased monitoring rounds in areas where abuse is repeatedly reported or suspected. (§5-04(k)). However, we believe it imperative that two additional requirements be included.

From discussions with security experts, it is clear that relying solely on one or two brief rounds by supervisors (often lasting no more than a couple of minutes) is not sufficient to prevent sexual abuse. Such brief rounds leave abusive officers virtually completely on their own, enabling them to make a calculated guess when a supervisor will come, and thereby permitting relationships to develop and abuse to occur. The Proposed Rules should require, to the extent possible, that supervisors are present in housing and program areas and a minimum of two rounds per shift take place by a direct supervisor (usually a Captain). The Board should also make explicit that "unpredictable" rounds include rounds that sometimes happen closely together in time. Otherwise, rounds may happen at the beginning and the end of a shift, at only slightly varying times. In addition, the Department should not only prohibit staff calling ahead to alert other staff about rounds by supervisors, but require meaningful efforts at enforcement. We propose the following revisions to incorporate these recommendations:

> §5-04(j): The Department shall implement a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such rounds shall be conducted during night shifts as well as day shifts. **These supervisors 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 frequently if possible.** Rounds shall be conducted at unpredictable and varied times**, with varied entry points if possible, and shall at times include repeated visits close in time to the same areas. Particular scrutiny shall be paid to isolated areas in the jails.** The Department shall have a policy to prohibit staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility. **The Department 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. The disciplinary measures that the Department imposes on correctional officer staff for announcing supervisory rounds shall be sufficiently serious to serve as a deterrent.** The Department shall issue a written directive to staff regarding these monitoring rounds and provide this directive to the Board.

Monitoring of Areas and Staff Where and About Whom Abuse Has Been Alleged

We applaud the Board's inclusion of a requirement that the Department promulgate a policy requiring consideration of the placement of a surveillance camera or the use of additional monitoring in locations where sexual abuse is alleged to have occurred. However, we propose certain salient revisions.

First, it is not enough to say that cameras should be "considered" where "repeated" abuse is alleged to have occurred. The Board should require that if the Department determines that

abuse was not captured on video due to the absence of a camera in an isolated blind spot, then to the extent feasible, cameras should be installed to cover that area within a reasonable period of time.[16]

Second, heightened monitoring should not be limited to areas where abuse is alleged to have occurred, but should also be required for staff about whom credible allegations of abuse have been lodged. It is realistic to assume that, even with the significant improvements required by the Proposed Rules, credible allegations of sexual abuse involving staff will not always lead to that staff person being removed from contact with incarcerated persons. While we hope that the rate of substantiation and discipline increases, the fact is that there will still be cases where the Department will not be able to prove misconduct by a preponderance of the evidence even when there is probable cause. In such a circumstance, it is imperative that the Department consider additional supervision—whether it be through video surveillance or rounds or additional staffing—of staff about whom there have been credible allegations of abuse. Failure to consider the need for such additional supervision constitutes negligent supervision of staff, as has been repeatedly recognized by the courts.[17] The Department should also be required to consider whether re-assigning staff—including away from guarding incarcerated individuals of the same gender identity as the person they were alleged to have abused—would reduce the risk of sexual abuse. We propose the following revisions to the Proposed Rules to address these concerns:

> §5-04(k) **If an incident of sexual abuse is reported but is not caught on camera because of the absence of cameras in that area, cameras shall be installed at the relevant location within a reasonable amount of time. In addition, [t]**he Department shall have a written policy requiring consideration of the feasibility of placement of a surveillance camera ~~in an area where sexual abuse is repeatedly reported or alleged to have occurred~~ or consideration of alternative preventive measures such as increased monitoring rounds or the assignment of additional Department staff in ~~that~~ **an area where sexual abuse is repeatedly reported or alleged to have occurred or to monitor or re-assign staff about whom repeated or credible allegations of sexual abuse have been made.**

[16] This requirement would conform to language from the *Nunez* Consent Decree which requires that if the Monitor or the Department "determines that a Use of Force Incident was not substantially captured on video due to the absence of a wall-mounted surveillance camera in an isolated blind spot, such information shall be documented and provided to the Monitor and, to the extent feasible, a wall-mounted surveillance camera shall be installed to cover that area within a reasonable period of time." *Id*. at §IX 1.d

[17] *See e.g*., *Patterson v. State*, 44 Misc. 3d 1230(A) (Ct. Cl. Aug. 29, 2014) (granting the claimant's motion for summary judgment and finding State liable when an officer sexually assaulted her following repeated complaints of sexual abuse by other prisoners); *Anna O. v. State*, No. 114085, M-80202 (N.Y. Ct. Cl. Aug. 15, 2012) (finding state liable when "Defendant had notice of [Officer's] propensity to pursue unauthorized relationships with inmates and yet left him in the position to continue to pursue the same, which was the proximate cause of the later rape of Claimant by [Officer]."); *Morris v. State*, Cl. No. 100694-A, M-80583 (N.Y. Ct. Cl. Mar. 6, 2012) (finding state liable when Officer had multiple previous unsubstantiated allegations of sexual assault against him, and was permitted to continue supervising inmates, in some cases as a roundsman under "diminished supervision").

§5-06: Limits to cross-gender viewing and searches:

We often hear from incarcerated persons, particularly women confined at the Rose M. Singer Center ("RMSC"), about abusive cross-gender searches, including transfrisker searches where the wand is used as a means of sexual harassment, at times "caressing" the prisoner's body. Women at RMSC also describe strip searches being intentionally conducted by female staff in locations where male staff is in a position to observe the search. To address these concerns, we propose:

> §5-06(a): The Department shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners. **These searches shall be conducted outside the visual observation of staff of the opposite gender.**
>
> §5-06(b): The Department shall not permit cross-gender pat-down searches **or searches by transfrisker** of female inmates, absent exigent circumstances …
>
> §5-06(c): The Department shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches **and transfrisker searches** of female inmates. **This documentation shall include the reason why such a search was necessary.**

§5-08: Hiring and Promotion Decisions

The Proposed Rules contain important requirements for hiring and promotion, but they do not go far enough. Most allegations of staff sexual abuse are not substantiated, yet there still can be probable cause to believe that staff engaged in the misconduct. When misconduct is substantiated, it is often for only for related misconduct (charges less than sexual abuse), such as being out of place or allowing an incarcerated person to be out of place. Even when substantiated by an investigation, administrative discipline might not be imposed by a hearing officer or OATH judge. Thus, addressing hiring and promotion only in the context of persons found to have engaged in sexual abuse will not go far enough in preventing persons from being hired or promoted about whom there are legitimate and reasonable concerns.

For decades, we have believed—and the Department has agreed—that it is important to track allegations of abuse against a particular officer and to consider that officer's record in determining where he should be assigned or whether he should be promoted.[18] Most recently,

[18] *See* now discontinued DOC Directive 5003, Monitoring Uses of Force, which required tracking of uses of force. While in effect, this Directive required the Facility Commander to interview and review the investigative reports for any officer who engaged in three or more uses of force. The review was required to determine whether corrective action, ranging from training to reassignment to transfer should be undertaken in addition to appropriate discipline. *See also Reynolds v. Ward*, 81 Civ. 107 (SDNY) Stipulation of Settlement (Oct. 1, 1990), which barred the assignment to the prison psychiatric wards of officers: 1) who had charges pending alleging unnecessary or excessive use of force or failure to report use or force or failure to accurately report use of force or 2) who, within the three years prior to the officer's proposed assignment, were referred for retraining pursuant to Directive 5003 or its successors, or been found guilty of departmental charges of unnecessary or excessive use of force or failure to report use of force or failure to accurately report use of force.

tracking such information is required by *Nunez*, at §XII.1-3, which requires review of uses of force data prior to promotion and restricts promotions when there are specific disciplinary findings against an officer. While we understand that the Department may not be able fully to ascertain whether a job applicant has a history of credible, albeit unsubstantiated allegations of abuse, we believe the Department should attempt to find out this information and then consider such information in deciding whom to hire. When it comes to promotions, there is no excuse not to fully consider such past allegations of misconduct.[19] We propose the following to improve hiring and promotion decisions:

> §5-08 (b): The Department shall consider **prior allegations of sexual abuse, regardless of whether such allegations were substantiated, and** any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor who may have contact with prisoners.

§5-10: Evidence Protocol & Forensic Medical Examinations

We believe that forensic examinations must be conducted at an outside facility. Such facilities have trained staff and victim advocates. Incarcerated abuse victims should be examined by clinical staff away from the jails and who are not under the purview of Department staff. Therefore, we propose the following changes to the Proposed Rules:

> §5-10 (c): The Department shall offer all victims of sexual abuse access to forensic medical examinations~~, whether on site or~~ at an outside facility ...

The Proposed Rules include specific rules about access to victim advocates and rape crisis counselors (5-10(d)-(f)). We believe this access should be further clarified.

First, meaningful access to a victim advocate cannot be provided over the phone, particularly from a telephone to which the prisoner may have limited access and which may not be confidential. Rather, to the extent possible this access should be in person or via video-conferencing if in-person services are not available. An incarcerated person must also be told that the services of a victim advocate are available. It is unrealistic to expect an incarcerated person to request services unless they know about them. In addition, these vital services should be offered during each examination and investigatory interview. Otherwise, the incarcerated person may not realize that the services are continuing in nature or that they may request to have someone present during repeated investigative interviews. Also, it should be made clear that the victim advocate can be available to the incarcerated person while testifying at an administrative or judicial proceeding. Finally, we believe it important that the Board make clear that victim advocates will not be Department employees since most victims of abuse, particularly if they have been abused by a Department employee, will not perceive a DOC employee as a "victim advocate".[20] We therefore suggest the following:

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[19] The Department seems to agree that allegations of sexual abuse should be considered in deciding assignments and promotions since the recently-promulgated DOC Directive 5011, at §XXVII, states that: "DOC will consult with legal prior to promotion or transfer to determine if any pending or past allegations of sexual abuse…"

[20] The distinction is not clear between the requirements intended by the Board for qualified victim advocates (§5-10(d)) and the protocol that will be required for the "Initiative", which is to provide rape crisis intervention and

§5-10(d): As **offered to and as** requested by the victim, a qualified victim advocate shall accompany and support the victim through the forensic medical examination process, **all** investigatory interviews, **and through the investigative, disciplinary and judicial processes** and shall provide emotional support, crisis intervention, information and referrals. **Such services shall be provided to the inmate in-person to the extent possible, and if in-person access cannot be provided then video-conferencing shall be provided.** For the purposes of this section, a qualified victim advocate is an individual **who is not a Department employee**, who has been screened for appropriateness…..

The trauma inherent in being a victim of sexual abuse necessitates that rape crisis intervention and counseling services be offered immediately. The Board should require such services be in-person or via video-conferencing, and not just over a telephone, and should set a time frame to begin such services in the Board Rules. Therefore, we suggest the following:

5-10(e): Rape crisis intervention and counseling services shall be delivered to inmates in the facility in which they are housed (the "Initiative"). **Such services shall be offered as soon as possible after the report of sexual abuse, but in any event no later than one week after the report was received by the Department.** Such services shall be delivered by …

§5-11: Policies to Ensure Referrals of Allegations for Investigations[21]

To avoid conflict of interest, the Department of Investigation ("DOI") or other law enforcement agencies independent of the Department of Correction should conduct all investigations regarding allegations of staff and inmate sexual abuse.[22] The conflict in allowing the Investigation Division ("ID"), which is part of DOC, to investigate itself is clear and this is not just a theoretical concern. The bias in past investigations is evident in the shockingly low rate of substantiation of sexual abuse complaints.[23]

The Proposed Rules do not contain a requirement that the Department not investigate itself in cases of sexual abuse. The Proposed Rules simply require that an administrative or a criminal investigation be conducted for all allegations of sexual abuse and harassment, and that all such allegations be referred to an agency with the legal authority to conduct criminal investigations, whenever the allegation involves potentially criminal conduct. But a referral to an agency with authority to conduct criminal investigations does not necessarily mean that agency

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counseling (§5-10(e)-(f)). If the Board means to allow a "qualified victim advocate" to include a DOC employee so long as they have been screened for "appropriateness," and have received training, we disagree with this Proposed Rule. The Proposed Rules also contemplate victim advocates being part of the Initiative (*see* §5-10(f)). In this section, it is clear that the Board does not intend "victim advocates" to include DOC employees.

[21] *See also* comment below regarding §5-30.

[22] We specifically limit this proposal to allegations of sexual abuse; we do not think all allegations of sexual harassment require investigation by an external agency. We do, however, consistent with the Proposed Rules, believe they should be referred to an agency with criminal authority for review since there may well be more to the allegation than initially meets the eye.

[23] *See* above, at p. 2.

will then conduct the investigation. For example, the newly promulgated DOC Directive 5011: Elimination of Sexual Abuse and Sexual Harassment (May 2, 2016), provides:

> General Investigation Procedures: ID shall conduct investigation for sexual misconduct that involve inmate on inmate allegations. DOI shall conduct investigations for sexual misconduct that involve staff-on-inmate allegations or allegations that involve alleged rape cases. After a preliminary review of the facts, DOI may elect to have the investigation conducted by ID. Dir. 5011 at §VI.I.1.(a-b).

This essentially allows DOI to kick back to the Department all complaints of staff sexual abuse. As to inmate on inmate sexual abuse, we do not understand why only allegations of rape are referred to DOI, particularly since the term rape is not defined within the Directive.

We believe that all allegations of staff sexual abuse involve a sufficiently serious conflict that they should be referred to (and investigated by) an outside agency, whether DOI or the police. Since we cannot conceive of such an allegation that does not involve potentially criminal misconduct we do not think the Proposed Rule's language exempting referrals for such conduct is necessary. As to inmate on inmate abuse allegations, in our experience while the complaint initially may describe solely abuse by another prisoner, pointed questioning may well lead to a conclusion that staff facilitated the abuse. Therefore, we believe that all inmate on inmate abuse allegations (which, per the Definitions contained in the Proposed Rules will not involve consensual sexual contact between inmates) should likewise be so referred to an outside agency. We believe the language of the Proposed Rule should be revised as follows:

> §5-11(b): The Department shall have in place a policy to ensure that **all** allegations of sexual abuse ~~or sexual harassment~~, **whether involving staff or inmate on inmate sexual abuse,** are ~~referred for investigation to~~ **investigated by** an agency with the legal authority to conduct criminal investigations. ~~, unless the allegation does not involve potentially criminal behavior.~~ **The Department shall further have in place a policy to ensure that allegations of sexual harassment are referred to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior.** The Department shall publish such policy on its website. The Department shall document all such referrals.

These recommendations do not ensure that DOI will not return allegations of abuse back to the Department to investigate itself. In fact, this kick back of allegations is clearly contemplated by the recent DOC Directive. We believe that the Board should work with DOI to develop and set clear guidelines under what circumstances complaints of sexual abuse may be appropriately returned to the Department for internal investigation.

Regardless, it is critical for ID to work side-by-side with law enforcement, and that both entities keep clearly in mind that there are distinct burdens of proof required to prove criminal misconduct as opposed to being able to sustain a burden at a disciplinary hearing. That a prosecutor may ultimately decline to prosecute in no way means that staff should not be subject

to internal Department discipline. Likewise, it is critical that all related misconduct—even if not rising to criminal misconduct or not likely to be prosecuted such as violating the prohibition on staff calling ahead for failing to report—be fully investigated and disciplinary action taken. To ensure that investigations are properly being conducted for the dual purposes of criminal prosecution and administrative discipline, and are being properly coordinated and completed, the Proposed Rule (§5-31(r)), requiring that the Board receive closing summaries of investigative reports, is critical.

§5-12: Employee Training

We heartily endorse the requirement in the Proposed Rules that staff be trained appropriately[24] and that the Board be informed of the training. The importance of training should include more reporting than the Proposed Rules currently require. As currently drafted, the Board will be provided quarterly with the number of staff who completed training. This number alone does not provide the Board with substantive information about whether all staff who require such training or refresher training are receiving it, or whether the training appropriately has addressed the various issues that are required to be covered. Therefore we suggest the following additional language:

> §5-12(e): The Department and CHA shall report to the Board, in writing and on a quarterly basis, **their compliance with the requirements in (b)-(c) of this Rule to ensure that all staff, including those who have been recently reassigned to a facility of another gender, receive initial and refresher training, and** the number of their respective employees who have been trained during that quarter in accordance with this section. **In addition, the Department and CHA shall provide the Board on an annual basis the schedules of the training conducted and a summary of the curriculum and credentials of persons providing such training in accordance with this section.**

§5-18: Use of Screening Information

We have several comments concerning how transgender persons in custody are to be treated, many of which involve the Proposed Rules regarding the use of information obtained during the screening process to determine where prisoners can be safely housed. These comments about transgender persons can be found at the end of our submission. (*See* p. 19).

§5-23: Staff Duty to Report

It must be explicit that all staff are under a duty to report sexual abuse and that all such reports of abuse and of retaliation should be made directly to upper level DOC management. There is no reason that an allegation of sexual abuse should be reported to each person in the chain of command, including the lowest level supervisor, as is contemplated by the Department's

[24] We think more training should be required for staff assigned to work directly in units housing women and girls in men's jails. *See* section on Transgender and Intersex Prisoners, below at p. 19.

recently promulgated Directive regarding sexual abuse.[25] We therefore propose that the Board modify its Proposed Rules as follows:

> §5-23(a): The Department shall require all staff, **whether employed by DOC or another agency, whether a contract employee or a volunteer**, to report immediately….
>
> §5-23(b): Apart from reporting to ~~designated supervisors or officials~~ **upper-level management**, staff shall not reveal any information related to a sexual abuse report **or a report of retaliation for having made such an allegation**…."

§5-30: Criminal and Administrative Investigations

The situations in which the Department is conducting investigations of itself should be severely limited and its role clearly circumscribed (see discussion of §5-11 above). The Proposed Rules should provide additional clarity on such investigations, particularly given the appalling history of unsubstantiated allegations based on investigations conducted by ID. For example, there should be a requirement that all interviews are recorded, as is required by *Nunez*, at §VII.2. We therefore suggest the following additions to the Proposed Rules:

> §5-30(c): Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence; and any available electronic **and videotape monitoring** data; shall interview alleged victims, suspected perpetrators, and witnesses, **shall record such interviews**; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator **to assess all relevant information, and determine whether there are patterns of abuse. 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 support that a staff person engaged in sexual abuse including a 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.**

Protection against Retaliation

The Proposed Rules ask the Department to consider the need for suspension, modified duty or re-assignment of staff members involved in allegations of sexual abuse. These Rules are essential for the protection of victims of sexual abuse. We believe that in all cases the alleged victim and perpetrator should be kept separated, and potentially remain separated even if the allegation is not substantiated. The fact that an allegation is not substantiated does not mean that the abuse did not occur; it simply means that it could not be shown to have occurred by a

[25] *See* Directive 5011 at §VI.B.1a-c (requiring any employee, who receives information from any source concerning sexual abuse or harassment or who observes an incident of abuse or harassment to provide verbal notification through the chain of command to include their "immediate supervisor.")

preponderance of the evidence. The risk of retaliation towards the victim does not disappear; in fact, if anything it may increase. We therefore suggest that the Proposed Rules be modified to incorporate the language used by the Department in its recently-promulgated Directive which requires that steps be taken to separate the prisoner from the alleged abuser immediately after the report of abuse, during the investigation and even potentially thereafter:[26]

> §5-30(l): The Department shall use its best efforts to conduct an initial evaluation as to whether any involved staff member should be suspended, placed on modified duty, re-assigned to a no-inmate contact post or reassigned to a restricted inmate contact post pending investigation within three (3) business days after an alleged incident of sexual abuse or sexual harassment is reported to the Department (the "Referral Date".) In the event sexual abuse is alleged, the Department shall conduct such an evaluation after consulting with DOI unless doing so would pose a threat to the safety and well-being of the complainant. **Following an allegation of abuse, unless such action is not feasible or unless the victim objects to such action in writing, the prisoner who is the purported victim shall be separated from the alleged perpetrator[27] until the investigation is complete, and at the discretion of the high-ranking staff of the Department thereafter. Such separation shall be accomplished by ensuing that the alleged victim is not housed in the same area as an alleged inmate-abuser, or where an employee abuser is assigned. In the case of an allegation involving staff, the staff person shall be separated from the alleged victim, shall not be assigned to work in an area where s/he will come into contact with the complainant, and shall be prohibited from making contact with the victim during the pendency of the investigation other than is allowable in performance of official duties. At the close of the investigation, upper level management shall determine if it is appropriate for employee to return to his/her original workplace but regardless all steps shall be taken to separate the alleged victim from the person about whom the complaint was lodged.**

Publicizing Redacted Investigation Summaries

We agree that it is important that the Board have access to the closing memoranda summarizing investigations (*see* Proposed Rule §5-30(r)) in order to review implementation of the Department's investigative procedures. For example, the requirement that credibility assessments be made on an individual basis and not be determined by the person's status as an

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[26] *See* DOC Directive 5011 at §§VI.B.2a-b; §VI.E.8) (Housing assessment by Tour Commander required before inmate is returned to housing area in inmate-inmate assaults; Separation Order to be issued pending investigation); §VI.E.7 (Prohibited Contact—supervisor must prohibit contact between complainant and employee during investigation); §VI.E1-6(g) (Supervisor may make temporary administrative reassignment of inmate or alleged perpetrator to protect the inmate; separate employee from alleged victim during pendency of investigation); §VI.I.2b-c (To the extent possible respondent shall not be assigned to work in area where s/he will come into contact with complainant pending investigation and is prohibited from making contact with alleged complainant other than is allowable in performance of official duties); §IV.I.2.d (requires Warden or ID Deputy Commissioner or designees to decide if it is appropriate for employee to return to his/her original workplace after investigation is completed.).

[27] *See also* Proposed Rule 5-26(a)(1)which requires separation of the alleged victim and abuser by the first responders.

inmate or staff (Proposed Rule §5-30(e)) is critical, but whether it is being followed cannot be determined in the abstract. By receiving the closing summaries, the Board will be able to substantively review how the Department is making credibility assessments in their investigations. This ability to review substance of the investigations is vital given the staggering rates of allegations that have been deemed not credible in the past. *See* p. 2, above. We also believe making these investigative summaries—in a form that removes all personally identifiable information—available to the public will allow for the transparency needed to ensure adherence to the Proposed Rules and ensure accountability by the Department. Therefore, we believe the Proposed Rules should be amended to include:

> §5-30(r): At the conclusion of an investigation of alleged sexual abuse or sexual harassment, the Department shall prepare a closing memorandum summarizing the findings of the investigation. Within five (5) business days after completion of a closing memorandum, the Department shall provide a copy of it to the Board. **The Board shall publish these memoranda on its website in a redacted form (removing all personally identifiable information) on a quarterly basis.**

§5-31: Evidentiary Standard for Administrative Investigations

We fully endorse the Proposed Rules' requirement that the standard of proof should be no higher than the "preponderance of the evidence." However, in our experience the meaning of the preponderance standard is regularly misunderstood, with physical evidence required and the victim's statement deemed as insufficient to meet the preponderance standard. It must be made explicit that this burden *can* be sustained without physical evidence, and that a victim's word, by itself, *can* be sufficient to meet this burden. Making this explicit does not mean that the standard will always be sustained without physical evidence or based solely on a victim's statement, it requires that all evidence is properly considered and weighed.

The Proposed Rules require that "investigators review prior complaints and reports of sexual abuse involving the suspected perpetrator." Proposed Rule § 5-30(c). We strongly endorse this requirement but believe clearer guidance as to the meaning of this review is needed. A pattern of behavior by a staff person may provide highly relevant probative evidence of the current abuse. In our experience, officers have used the same modus operandi over and over again: for example, always offering the same contraband (fifty dollar bills), using the same language in propositioning a woman, asking for the same specific sexual acts to be performed, even in a certain sequence, or taking different victims to the same location in a facility. Regardless of whether the prior allegations were substantiated, prior bad acts can be considered probative in a variety of circumstances, including to establish motive or identity.[28] Repeated allegations of abuse, even if not directly establishing a clear modus operandi, can themselves be

[28] *See People v. Molineaux*, 168 N.Y. 264 (1901).

probative as has been recognized by the Federal Rules of Evidence.[29] We therefore propose the following:

> § 5-31: The Department shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse or sexual harassment are substantiated. **Physical evidence shall not be required for the standard to be met. A statement by an incarcerated person may be sufficient by itself to meet the standard. Allegations of 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.**

§5-33: Disciplinary Sanctions for Staff

The Proposed Rules regarding staff discipline incorporate important elements but do not take steps to ensure that discipline is appropriately imposed for abuse by staff.

We certainly agree that termination should be the presumptive sanction for sexual abuse. But in many cases, discipline is not sought for the sexual contact itself (e.g., in the absence of DNA) but instead for misconduct related to the abuse, such as over-familiarity or being out of place. It is because of this reality that we think that all misconduct related to sexual abuse that results in a substantiated finding should result in discipline and meaningful sanctions. Also, as is required by *Nunez*, at §VIII.1, we believe approval by high-level supervisors of plea agreements should be required in all cases involving allegations of sexual abuse.

We agree that discipline of staff needs to be commensurate with the nature and circumstances of the acts committed. Likewise discipline needs to take into account a staff member's prior disciplinary history so that, at a certain point, if a staff person is repeatedly found to have been involved in misconduct related to sexual abuse, such as entering a woman's cell without a good explanation or being out of place, termination will be sought. However, the language in the Proposed Rules that call for sanctions to be imposed for comparable offenses by other staff with similar histories, may undercut that requirement. The DOC disciplinary system has not functioned well in the past, looking to sanctions imposed on staff during that past will simply lead to inadequate disciplinary sanctions.

It must be incumbent on the Department to present all reasonable evidence connected with an allegation of staff sexual abuse. This means that expert testimony may need to be offered

[29] Federal Rules of Evidence 413 and 415 provide an exception to the general rule barring propensity evidence by favoring the admission of such evidence at criminal and civil trials, respectively, involving charges of sexual misconduct. These other instances of assault need not have resulted in conviction and may have been either prior or subsequent to the charged offense. *See United States v. Barnason*, 852 F. Supp. 2d 367 (S.D.N.Y. 2012) (permitting admission of evidence regarding a defendant's sex offender status and a prior alleged sexual assault under Rule 415); *Johnson v. Elk Lake Sch. Dist.* 283 F.3d 138 (3d Cir. 2002) (affirming admission of evidence of uncharged sexual assault conduct in a civil sexual assault suit under Rule 415); *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997) (affirming a district court's admission of evidence of a sexual assault that went uncharged, relying on Rule 414); *United States v. Sioux*, 362 F.3d 1241 (9th Cir. 2004) (district court properly allowed government to introduce evidence of defendant's subsequent act of sexual assault.)

to explain why a person did not scream, or call out, or report abuse immediately. Expert testimony may be required to establish why a person interviewed following a rape trauma may be experiencing nightmares, flashbacks, disassociation, and intrusive thoughts and so may not have presented a fully cogent and linear narrative when describing the trauma experienced. Similarly, in the same way that we believe patterns of abuse that staff have engaged in as reflected in prior abuse provides probative evidence in determining whether an investigation should be substantiated, we believe that evidence of patterns of abuse must be presented at disciplinary hearings and the reasons why such evidence is relevant must be argued.

We therefore propose:

> 5-33(c): Disciplinary sanctions for violations of Department and CHA policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, **and** the staff member's disciplinary history. ~~, and the sanctions imposed for comparable offenses by other staff with similar histories.~~
>
> §5-33(e): **All substantiated findings that arise from an investigation into an allegation of sexual abuse by staff shall result in the preparation and service of charges. If it is determined that charges based upon substantiated findings are not warranted, the reasoning for each such decision shall be documented in the investigative case summary and provided to the Board. Any negotiated pleas in these cases shall require approval from upper-level DOC officials.**
>
> §5-33(f): **The Department shall present all reasonable evidence against staff at any administrative hearing that arose from or is connected with an allegation of sexual abuse. Such evidence can include expert testimony on the impact of trauma and evidence of patterns as shown in prior investigations regardless and by prior victims, regardless of whether such investigations were substantiated.**

§5-35**:** Disciplinary Sanctions for Inmates:

We believe that an absolute bar on disciplining incarcerated individuals for coming forward with allegations of sexual abuse is needed. Otherwise, victims of sexual abuse will be chilled from reporting. An exemption for complaints made in "good faith" is not sufficient assurance that permitting punitive sanctions based on reporting will diminish the effort to curb sexual abuse in the City jails by discouraging reporting by victims. Experience shows that DOC staff will be inclined to disbelieve incarcerated persons and to find their statements made in bad faith.

There are already an extremely large number of barriers to incarcerated persons reporting abuse. In addition to those we have described above, if incarcerated persons have accepted contraband from staff or were out of place when meeting with staff, then they are already at risk of discipline from reporting. If they can be disciplined because some official decides their complaint was not made in good faith, the Proposed Rule will have created yet another serious obstacle in their path.

Likewise, we believe that the Board needs to prohibit the Department from disciplining incarcerated persons for being involved in consensual sexual relationships. If people can be disciplined for such a relationship—as DOC makes clear they can be in Directive 5011 (at §II.D)—then no prisoner will want to complain about an abusive relationship for fear it will be construed as consensual, subjecting them to punitive sanctions. Discipline for consensual sexual relations is also bad public health policy. Such a rule means that incarcerated persons will be afraid to ask for a condom for fear they will be punished for engaging in consensual sexual activity. We therefore propose:

> §5-35(e): ~~For the purpose of disciplinary action, a~~ **A** report of sexual abuse ~~made in good faith based upon a reasonable belief that the alleged conduct occurred~~ shall not **be subject to inmate discipline, including** ~~constitute~~ falsely reporting an incident or lying.~~, even if an investigation does not establish evidence sufficient to substantiate an allegation~~.
>
> §5-35(f): The Department may ~~in its discretion, prohibit all sexual activity between inmates and may~~ **not** discipline inmates for ~~such~~ **consensual sexual** activity. The Department may not…..

§5-39: Sexual Abuse Incident Reviews

Sexual Abuse Incident Reviews can be critically important, but only if they involve people with the knowledge and the influence to make the changes necessary to policy and practices to improve performance in response to the findings. Also, DOC staff who are subject to review may well return to guard incarcerated persons following an allegation of abuse that has failed to meet the preponderance burden. This will occur even when there is valid cause to believe the staff poses a risk. In those cases, the Sexual Abuse Incident Review needs to consider the level of supervision to be used in monitoring that staff person upon his or her return to any position with inmate contact or whether the staff should re-assigned. To accomplish these ends we propose:

> §5-39(c): The review team shall include upper-level management officials, **including staff from Central Office**, with input from …
>
> §5-39(d)(6): **As to staff sexual abuse allegations, assess whether re-assignment or 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.**
>
> **§5-39(d)(7):** Prepare a report of its findings …

§5-40: Data Collection and Review:

All of the data required to be collected by the Proposed Rules is important. The data collection in the Proposed Rules would be enhanced by including tracking data that reflects repeated allegations against a particular staff member, and tracking the Department's responses. Such tracking was required in *Nunez*, *see* §§V.14-21, §X, and has been required in cases

involving sexual abuse of incarcerated individuals as well.[30] We propose the following additions to the Proposed Rules:

> **§5-40(b)(17) whether the allegations involved special populations of prisoners, and if so, whether the allegation involved staff or inmate-on-inmate abuse and the numbers of substantiated allegations from each such population;**
>
> **§5-40(b) (18): 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; and**
>
> **§5-40(b) (19): 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.**

Transgender and Intersex Prisoners

We believe the Board's Proposed Rules are critical to helping to protect transgender and intersex[31] prisoners from sexual abuse and harassment.

Transgender persons in custody, particularly incarcerated transgender women, are at an extremely high risk of sexual abuse and harassment in custody.[32] The experiences of transgender women in DOC custody, as reported to this office,[33] reflect a similar experience to the risk transgender women confined in male jails experience nationally. Some of the recent reports of abuse we have received include:

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[30] A similar tracking system has been required in the Settlement Agreement reached between the Department of Justice and the State of Alabama in a case addressing staff sexual abuse at the Julia Tutweiler Prison for Women in Alabama. *See U.S. v. Alabama and Alabama Dept. of Corr.*, 15-cv-00368 (MHT) (M.D. Ala. May 28, 2015) Settlement Agreement at §IV, available at https://www.justice.gov/opa/file/450776/download, *see also id*., Dkt. 10 (Opinion Approving Settlement Agreement), available at https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/tutwiler_order_6-18-15.pdf.

[31] We do not discuss intersex prisoners specifically in these Comments, both because we do not hear from them about their experiences in custody and because there is virtually no data available about them. *See* Hastings, Browne, Kall and diZerega, "Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails," at 15 (compiling statistics concerning the risk of sexual abuse to LGBTI prisoners), available at http://www.vera.org/sites/default/files/resources/downloads/housing-vulnerable-populations-prea-guide-april-final.pdf. We see, however, no rational basis to assume their experiences are different from transgender prisoners and so we believe they should be entitled to the same protections from abuse.

[32] *See* Hastings, Browne, Kall and diZerega, "Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails," at 15 (referencing statistics concerning the risk of sexual abuse to LGBTI prisoners) , available at http://www.vera.org/sites/default/files/resources/downloads/housing-vulnerable-populations-prea-guide-april-final.pdf

[33] By contrast, we almost never hear reports of abuse from prisoners confined in the Transgender Housing Unit.

- Ms. A.A.[34], a transgender woman, reported that in May 2015 a suicide prevention aide at AMKC flashed her, verbally harassed her, and touched her breasts and buttocks when she was leaving the showers. She informed us that on May 16, 2015 she was assaulted by a group of prisoners. She said that on May 19, 2015 another prisoner entered her cell, said "I like you," and "I want to make you mine," then groped her breasts, buttocks and groin. She said that this prisoner refused to stop when she asked him to and finally pushed her against the wall and choked her. Ms. A.A. informed us that between these two assaults she had requested to be placed back in the Department's Transgender Housing Unit ("THU") because she felt unsafe.

- Ms. B.B., a transgender woman, reported multiple instances of sexual harassment while being held in MDC intake from July 9 to July 15, 2015. She said that she was held in intake for these six days without food and water, and that two officers forced her to strip naked in order to receive any food at all. Ms. B.B. advised us that she was subjected to waist-down searches. She also reported that a captain told her "I'll punch you in the face, you fucking faggot," and "don't you cry, you little bitch." She said that a different officer flashed her his penis and that during a medical exam the doctor unnecessarily groped her breasts after having her remove her top.

- Ms. C.C., a transgender woman who was held in MDC intake from July 9 to July 15, 2016 with Ms. B.B., reported the same instances of sexual harassment as Ms. B.B. Ms. C.C. said she was forced to strip in order to get food, she was subjected to waist-down searches, that the same captain verbally assaulted her, and that the same officer flashed her his penis.

- Ms. D.D., a transgender woman, reported that on July 28, 2015 another prisoner forcefully touched her, forced her to perform oral sex on him, and threatened to cut her if she told anybody about it. Ms. D.D. informed us that also on July 28, 2015 the same prisoner pinned her down while she was sleeping, raped her, and again threatened to cut her if she reported the incident. Ms. D.D. reported that by August 4, 2015 she had been cut. Further, Ms. D.D. told us that an officer threatened to have her moved to be closer to dangerous gang members if she did not show him her buttocks and breasts. She said that this same officer had witnessed her sexual assault and chose not to intervene.

- Ms. E.E., a transgender woman, reported that on May 19, 2016, while being held in a holding pen awaiting transfer at AMKC, another prisoner sexually assaulted her. She reported that the other prisoner told the escorting officer he "will do something bad," if placed in the holding pen with Ms. E.E. The officer responded "go for it then." Ms. E.E. reported that the officer then left her alone with this male prisoner, who grabbed and sexually assaulted her. Ms. E.E. reported the incident to an officer after getting transferred to BDC dorm housing. She stated that nothing was done and the resulting fear and anxiety caused her to miss showers and stay awake all night. Ms. E.E. said she was sent to the hospital and then sent back to AMKC against her doctor's recommendations.

[34] We use fictitious initials to protect the identity of sexual abuse victims.

- Ms. F.F., a transgender woman, reported that on June 12, 2016 she was held in the recreation pen of 13B at GRVC for almost 12 hours without food or water. She said that once she was finally removed, the officer dragged her out of the pen, grabbed her breasts, and taunted her, calling her "homo," "faggot" and a "disgrace to humanity."

- Ms. G.G., a transgender woman, reported that on June 13, 2016 she was in her cell at GMDC when a suicide prevention aide approached her, asked "do you give good head?" and said "I know you trannies give good head." She informed us that he then pulled out his penis, said "just lick it," and grabbed her. Ms. G.G. said she was able to push him away and report the incident to an officer. Ms. G.G. said that she received a new housing assignment, but that she was continually called "faggot."

- Ms. H.H., a transgender woman, reported that on June 15, 2016, after being transferred out of the THU at MDC to BDC, officers threatened to mace her when she asked if she could be placed back in the THU. She reported that she felt unsafe and she saw officers throwing around her belongings.

- Ms. I.I., a transgender woman who was moved out of the THU with Ms. H.H., also reported that on June 15, 2016 BDC officers threatened to mace her when she ask to be transferred back to the THU. Ms. I.I. reported that on June 12, 2016, prior to her transfer she was held in her THU cell for over 24 hours without shower access or recreation time.

The Board's Proposed Rules to Protect Transgender Persons in Custody

Given the extreme vulnerability of this population, we applaud the BOC's proposed Rules which:

- End the humiliating harassment caused by repeated searches purportedly to identify gender (§5-06(e));

- require that security staff be trained in how to conduct cross-gender pat down searches and searches of transgender and intersex prisoners in a professional and respectful manner, and in the least intrusive manner consistent with security needs (§5-06(f)); and

- require that transgender and intersex prisoners be permitted to shower separately (§5-18(f)), as a significant proportion of abuse occurs in shower areas.

We also commend the Board for going beyond the National Standards' requirements with respect to searches by:

- requiring that for purposes of searches, the Department make best efforts to treat intersex and transgender inmates in accordance with their gender identity unless exigent circumstances require otherwise. (§5-06(f)). This proposal reflects an understanding that searches are an opportunity for touching, which can escalate into abuse. Also, this requirement (§5-06(b)) should ensure that cross-gender pat frisks will equally be prohibited for transgender women. Even when they do not lead to abuse, cross-gender pat frisks of women can have a deeply traumatic impact on many women, especially for the

extremely high percentage who experienced physical and sexual abuse prior to their incarceration.[35] By this proposed Rule, the Board importantly recognizes that all women are entitled to the same protections from cross-gender pat frisks.

Housing of Transgender and Intersex Prisoners

The Board's Proposed Rules require (as do the National Standards) that a transgender or intersex person's own views with respect to his or her own safety must be given "serious consideration" (§5-18(e)) and that the Department must consider on a case-by-case basis whether a program or housing assignment—including assignment to a male or female facility—would ensure the inmate's health and safety and would present current management or security problems (§5-18(c)).

While these protections are important steps, the Proposed Rules regarding housing do not go far enough. There needs to be a clearer presumption that a person will be housed in a facility in accordance with their gender identity *unless* the Department can articulate a clear and convincing reason why such housing would present a danger to staff or other incarcerated persons. This is necessary for two reasons.

First, allowing transgender and intersex individuals incarcerated in the City jails to be housed based on their gender identity would mean that they would be accorded the same basic human rights ensured to all other persons in New York State and New York City. Both New York State and New York City have made it the law that transgender persons cannot be discriminated against—including in their choices on where to live—based on their gender identity.[36] Only persons in custody—the overwhelming number of whom have not been convicted of any crime and are held in custody only because they are unable to make bail—are, for now, exempted from these fundamental protections.

Second, housing incarcerated transgender people in accordance with their gender identity is essential to protect them from sexual abuse and harassment, and is particularly essential for transgender women who, without question, are at an extraordinarily heightened risk of such abuse when confined in a men's jail.

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[35] *See Jordan v. Gardner*, 986 F.2d 1521, 1526-27 (9th Cir. 1993) (*en banc*) (intrusive pat frisks of female inmates by male staff violate Eighth Amendment, based on evidence that many women inmates had long histories of verbal, physical and sexual abuse by men); *Colman v. Vasquez*, 142 F. Supp. 2d 226, 234-235 (D. Conn. 2001) (challenge by female prisoner in "sexual trauma unit" to pat frisks by male staff stated Fourth and Eighth Amendment claims); *see also* U.S. Dept. of Justice Bureau of Justice Statistics, "Prior Abuse Reported by Inmates and Probationers" at 1 (April 1999) ("BJS Prior Abuse"), http://www.bjs.gov/content/pub/pdf/parip.pdf (57.2 percent of females report abuse before admission to state prison versus 16.1 percent of males. 39.0 percent of female state prison inmates report that they were sexually abused before admission to state prison versus 5.8 percent of males); Browne, A., Miller, B., & Maguin, E., "Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women," International Journal of Law and Psychiatry 22 at 301-322 (1999) (finding higher rate of abuse history than BJS data, with 70% of incarcerated women interviewed in a New York maximum security prison reporting physical violence and nearly 60% reporting sexual abuse).

[36] *See* New York Human Rights Law, Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity and Expression: Local Law No. 3 (2002), N.Y.C. Admin. Code §8-102(23) (guidance issued 12/15/2015); 9 NYCRR (2016) (State Human Rights Law explicitly applies to transgender individuals).

We propose language that will allow DOC the latitude they require to protect incarcerated persons and staff. We believe that the norm should be that all women—whether identified at birth or later on—should be housed in a women's facility. The same criteria for determining where to house that woman safely within a women's facility should be used as is used for all incarcerated women. In other words, if a transgender woman presents a risk to other incarcerated women in a women's facility then that risk should be assessed in the same manner as it would be for all other incarcerated women who present a threat to others.

Because there may be unique and unpredictable situations where this norm cannot be followed, we do not propose a blanket requirement that transgender individuals be housed in a facility in accordance with their gender identity. Rather the Department should have the flexibility to assess whether there are compelling and imminent risks that warrant overriding such a presumption in a particular case.

Even with this presumption we are not naïve enough to believe that all incarcerated individuals will be housed in a male or female facility consistent with their gender identity. To date, virtually without exception, every jail and prison in the United States houses individuals based on their genitalia. This is done in disregard to the overwhelming evidence that transgender women, in particular, are at high risk of sexual assault when housed in men's facilities, in disregard to particularized concerns for any individual's safety, and in disregard to the person's own perceptions of his or her gender identity.[37]

In light of this reality, and given the substantial risk of sexual abuse to transgender women when housed in a male facility, we believe that it is not enough for the Board to be silent on where transgender women should be housed if confined in a men's facility. Rather, we believe the Board should adopt a Rule that requires that women housed in a male facility, unless there are compelling and imminent security concerns, should be housed in a voluntary unit specifically for women, with trained staff and with the same access to programs and services as other persons in custody. These women's units should be available to all women housed in male facilities, regardless of whether they are adult, young adult, adolescents, pre-trial or sentenced.

We understand from our experience and from our meetings with DOC[38] that they do not believe that it would safe to defer fully to the statement of a person that she is transgender, because some incarcerated individuals may feign transgender status in order to have the opportunity to prey on others in such a women's unit. We doubt this occurs other than in the most exceptional of cases, but we believe we have struck an appropriate balance by allowing DOC the discretion to override this rebuttable presumption. Similarly we understand that DOC

[37] Along with other advocates, we met with Faye Yelardy, PREA Coordinator for the New York City Department of Corrections and Wendy Leach, from the Moss Group, on June 8, 2016. At that meeting the DOC PREA Coordinator rebutted our assertion that 100% of prisoners across the United States have been housed according to genitalia by pointing to one transgender prisoner who was confined in DOCCS custody approximately ten years ago in a women's prison. Because we are familiar with this prisoner, we are aware that this housing decision by DOCCS followed years of litigation and a court order requiring such housing, and that this woman had had partial gender reassignment surgery prior to her incarceration. Most significantly, this was the sole exception that could be cited, despite the National Standards' requirements and despite the fact that virtually all prisons and jails that have been audited have been certified as PREA-compliant.

[38] These concerns were raised by DOC at our meeting with them and the Moss Group on June 8, 2016.

has expressed concerns that not every transgender or intersex woman in custody wants to be housed in a women's unit, a belief we share. We believe we have addressed this concern by making this housing voluntary. We also understand from our communications with incarcerated transgender individuals that many women have rejected such housing in the past solely because there are no programs and because staff is not trained to address their needs. Requirements of programming and staff-training will ameliorate those concerns.

We believe the appropriate balance between the rights of incarcerated transgender individuals, particularly women, to safe and appropriate housing, and the legitimate interests of security will be protected if the Board were to adopt the following Rule:

§5-18: Use of Screening Information

§5-18(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 Department 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. **In coming to this decision, the Department shall house all persons in a men's or women's facility in accordance with their gender identity as stated by the person in custody regardless of sex assigned at birth, genital characteristics, or whether or not they have had gender affirming surgery(ies), unless one or more of the below conditions (§5-18(c)(1)-(3)) is met.**

(1) The person in custody objects to such placement;

(2) Security staff in consultation with medical and mental health staff determine based on clear and convincing evidence, which must be documented in writing, that the individual is not transgender and is asserting a gender identity for an improper purpose. The following shall be sufficient, but not necessary, to rebut that gender identity is being asserted for an improper purpose. Instead, affirmative evidence, not merely lack of the following, must be shown to establish improper purpose:

(A) a history of receiving hormone therapy or of undergoing other treatment related to gender transition, regardless of whether supporting medical documentation is available;

(B) a history of accessing programming and services based on their gender identity or transgender status (e.g. social security, shelter services, advocacy initiatives, social service providers, not-for-profit groups);

(C) a history of being known to others as transgender and living in accordance with that gender whether prior to or during any period of incarceration;

(D) having a social security card or identification documents that list a gender different from the gender listed on the booking information;

(3) Security staff in consultation with medical and mental health must articulate a clear and convincing reason why housing a prisoner according to his/her gender identity would pose a present danger to staff or other persons in custody. A person in custody's gender identity, transgender status, genital characteristics or whether or not they have had gender affirming surgery(ies) are not to be considered in assessing potential danger.

§5-18(d)**: The Department of Corrections will provide voluntary housing units for women who are not housed in accordance with gender identity so that any woman or girl who is housed in a facility for men or boys for any of the above reasons shall have access to a voluntary women's unit within the men's jail, unless the jail has shown pursuant to sections (c)(2) and (c)(3), above, that the individual is falsely claiming a female gender identity for an improper purpose or presents a present danger to staff or other persons in custody.**

§5-18(e)**: Housing units for women and girls in the men's facilities shall be staffed by individuals trained in working with LGBT people in custody, in addition to that required by Proposed Rule § 5-12 (a)(9). This training will include:**

(1) instructions on the nature of transgender identity and the cycles of incarceration and violence experienced by transgender people.

(2) instructions on how to understand the psychosocial and safety needs of transgender and gender non-conforming persons in custody;

(3) instructions on how to be alert to signs of situations in which persons in custody-on-persons in custody anti-transgender harassment may potentially occur;

(4) instructions on using gender-affirming and sexual orientation-affirming language when interacting with transgender and gender non-conforming individuals;

(5) instructions on the specific needs of transgender gender non-conforming survivors of sexual abuse; and

(6) up-to-date information about medical and mental health standards for treatment of individuals with gender dysphoria.

The Department shall provide the Board with documentation reflecting that all staff assigned to housing units for women and girls in the men's facilities have received this training. This documentation shall be provided twice per year and shall include the training schedules that were completed and a summary of the curriculum and credentials of persons providing training.

§5-18(f)**: All clinical and programming needs available to general population persons in custody shall be made available to persons in custody housed in a voluntary Women's Unit.**

§5-18(g): The placement of transgender individuals will be tracked and documented so as to ensure that transgender persons in custody are not automatically and involuntarily assigned to particular facilities or placed in isolation solely based on their genital characteristics, whether or not they have had gender affirming surgery(ies), gender identity, gender expression, transgender status or assigned sex at birth. This tracking shall include whether the person in custody requested such housing, all information considered in making the housing determination, and shall clearly articulate the specific reason for the housing determination. This documentation shall be provided to the Board on a quarterly basis.

§5-18(h): Placement and programming assignments for each transgender or intersex inmate …[39]

[39] We have proposed inserting new language to replace §5-18(d)-(f), and propose a new §5-18(g). The language previously found in §5-18 (d)-(f) is now located in §5-18 (h)-(j).