THE
LEGAL AID
SOCIETY
CRIMINAL
DEFENSE

Prisoners' Rights Project
199 Water Street
New York, NY 10038
T (212) 577-3530
www.legal-aid.org

Blaine (Fin) V. Fogg
President

Janet E. Sabel
Attorney-in-Chief
Chief Executive Officer

Mary Lynne Werlwas
Director
Prisoners' Rights Project

March 26, 2019

Members of the Board of the Correction
1 Centre Street
Room 2213
New York, N.Y. 10007

Re: PREA Standards Compliance

Dear Members of the Board of Correction:

We write in anticipation of the New York City Board of Correction ("Board" or "BOC") meeting to be held on April 23, 2019 devoted to New York City Department of Correction's ("DOC") compliance with the Board's Standards to Eliminate Sexual Abuse and Sexual Harassment in Correctional Facilities ("PREA Standards"), Rules of the City of New York, Chapter 5 (2016).

We commend the Board for focusing its attention on this topic. On virtually a daily basis we hear from some person in custody that staff or other incarcerated persons have touched them, groped them, or debased them verbally. Staff frequently look the other way; prevention is virtually non-existent, and accountability even rarer.

This hearing is an opportunity for the Board to demand answers from DOC—and from other City officials—about why this abuse persists, and what concrete steps they will take to prevent it.. Because the response to sexual harassment and abuse involves partnership of many City entities, it is essential that representatives from the New York City Department of Investigation ("DOI") and other law enforcement officials, including from the Bronx District Attorney's office, attend. Below, we set forth a range of questions these entities should answer about the performance of their duties in enforcing the Standards.

Sexual abuse is deeply personal. We therefore ground our discussion of compliance with the Standards in one individual's experience in the City jails. Our colleagues from Cleary, Gottlieb, Stein and Hamilton, LLP ("Cleary"), who successfully represented this man in federal court, will also present to the Board. We believe this individual's experience—and the documents contained in

the public record about it[1] —provide a rare window into the broken system for preventing and addressing abuse.

A Case Study

J.G. was sexually assaulted by an officer approximately fifteen times in one month while housed in a protective custody unit at the Anna M. Kross Center ("AMKC") in fall 2015. He was subjected to repeated intimate contact, touching and fondling, including being masturbated by this officer, and was forced to touch the officer's penis and buttocks through his clothes. He reported the abuse about two months after it ended, when he was afraid he was about to be returned to the officer's charge in AMKC.

We found J.G.'s allegations to be entirely credible. He did not exaggerate and he did not vary in his description of what occurred. The lack of corroborating video was not an obstacle: sexual contact happens in private locations, and in 2015, most cameras had not yet been installed. Likewise, we were not surprised by the lack of DNA evidence: in our experience, it rarely exists. It is easy for staff to avoid leaving physical proof: all they have to do is wear a condom or, like in J.G.'s case, wear a latex glove. J.G.'s hesitation to report is also typical of many sexual abuse victims, who do not report immediately due to feelings of shame, embarrassment, a belief they are complicit, the knowledge that they will most likely not be believed, and a legitimate fear of retaliation.

This is a summary of the most salient information.

- J.G. was at obvious risk. He is a gay and gender nonconforming man who was placed in a protective custody unit purportedly for his own protection.

- There was nothing "protective" about protective custody: staffing and supervision were no different there than on any other unit where J.G. had been housed.

- Lax supervision and thin staffing allowed the officer to abuse J.G. multiple times over a period of a month. Supervisory rounds were made only twice per shift by Captains; once those rounds were completed, the officer knew he essentially had free reign to do whatever he wanted for the remainder of the shift.

- There were no video cameras on the unit.

- J.G. believed he was not this officer's only victim. He observed the officer groom other gay and transgender persons on the unit. Just as he had with J.G., the officer complimented these

[1] The information we provide about J.G are based on conversations with him, the Complaint filed in federal court, the closed Department of Investigation report provided to Cleary under the Freedom of Information Law, and conversations that Cleary tells us they have had with the Bronx District Attorney's office. In an abundance of caution, and given the retaliation he has already experienced, we do not use this individual's name since he remains in custody, albeit not in the custody of DOC.

other individuals, flirted with them, offered them small gifts, and stayed by their cells or in isolated locations with them for prolonged periods. No staff person ever intervened.

- J.G was subjected to repeated retaliation. The protective custody unit included other incarcerated people J.G. knew were gang members. When J.G. tried to end the abuse, the officer punished him by instigating a fight with these incarcerated people and then falsely charging J.G. with starting the fight. J.G. was disciplined and placed in punitive segregation. Later, after he reported the abuse, DOC failed to protect him from further retaliation: he was beaten and placed in a high classification non-protective custody unit, while the officers made clear they were punishing him for reporting the officer, telling him that "next time you better get some DNA." The retaliation continued, resulting in J.G. spending much of his incarceration in DOC custody in isolated confinement.

- DOI substantiated J.G.'s allegations of abuse on October 6, 2016 and found that the officer engaged in unlawful sexual contact. DOI interviewed twenty-two incarcerated witnesses who had been on the unit, some of whom corroborated J.G.'s allegations and some of whom told the investigator that they too had been the victim of abuse by this officer. DOI referred the matter to the Bronx District Attorney's Office for criminal prosecution and referred it to DOC for administrative action against the officer. DOI took about nine months to complete its investigation.

- It is now two and a half years since DOI substantiated J.G.'s allegations, and as far as we know, the Bronx District Attorney's office still has taken no action. Nor has any administrative action been taken against this officer, who has remained on modified duty at full salary with no contact with incarcerated persons since January 2016.

- J.G. suffered PTSD and depression from the abuse, and was not treated appropriately. He was repeatedly placed in isolated confinement, given only medication for treatment, and was told by mental health staff that they could not provide him with more appropriate treatment because "jail was no place for treatment of PTSD."

DOI and District Attorneys Should Attend the Meeting and Answer About their Role in the Enforcement Scheme

The three-plus year delay in J.G.'s case is a disgrace, and highlights why it is not enough to ask DOC to explain the actions they are taking to address sexual abuse when other important entities also play pivotal roles. The Board should ask the District Attorney's offices and DOI to attend the meeting and answer questions about their performance in meeting their obligations to enforce the prohibitions set forth in the Standards.

The Board's Standard § 5-11 requires that DOC promulgate a policy describing the responsibilities of DOC and other investigating entities. This Standard has not been met: DOC's policies provide no

clarity whatsoever on this subject. DOC Directive 5011[2] (at § VI.I 1 a-b.) states only that 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." This provides no criteria and no guidance about the various responsibilities of each of these entities. It fails to clarify when DOI is expected to conduct investigations, and when they return them to DOC's Investigation's Division.

Since DOC cannot answer for DOI or the District Attorney's office, the Board needs to ask the following of DOC, DOI and of law enforcement:

- What role does DOI play in investigating sexual abuse by DOC staff? Does DOI investigate *all* allegations of staff *rape*? Of staff sexual *abuse*? Of staff sexual *harassment*? If not, under what circumstances does DOI retain the investigation?

- If DOI retains an investigation, what role, if any, does DOC play in the investigation?

- What is the typical time frame within which DOI completes an investigation into an allegation of staff sexual abuse?

- What is the typical time frame between a decision by DOI to substantiate an allegation of staff sexual abuse and referral to a district attorney's office, and a decision by a district attorney's office on whether to seek an indictment? Does it vary depending on the district attorney's office? If so, please give time frames for the Bronx, Manhattan, Brooklyn, and Queens, respectively.

- If DOI investigates and concludes that an allegation of staff sexual abuse is substantiated, as in J.G.'s case, must DOC initiate disciplinary action? If not, how does DOC decide what to do?

- Does DOC wait until a district attorney's office decides whether to bring criminal charges before initiating disciplinary action against staff? In all cases? If so, what are the practical consequences of waiting? In J.G.'s case more than three and a half years have elapsed since the abuse; memories fade and witnesses disappear. If DOC waits for a district attorney to decide whether to prosecute before taking disciplinary action against staff, this effectively prevents DOC from proving misconduct about which it would otherwise be able to take disciplinary action against a staff member. How often has this happened?

- Does DOC also have to wait until a criminal prosecution is *completed* before deciding whether to take disciplinary action against staff? If so, has this additional delay hindered DOC's ability to discipline its staff? Have any staff been found not guilty in a criminal prosecution but DOC has nonetheless brought disciplinary charges? What has the result been?

[2] Available at https://www1.nyc.gov/assets/doc/downloads/directives/5011_R_A_Sexual_Harassment_n.pdf

- What standard of proof does DOI use in deciding whether to substantiate an allegation of staff sexual abuse? What are the rates of substantiation for DOI?

- If DOI fails to substantiate an allegation, will DOC still conduct its own investigation or seek disciplinary sanctions against staff? In what percentage of cases do either of these occur, and what are the criteria for that decision-making process? We assume that there can be different resolutions since the standard of proof for a criminal case is higher than an administrative disciplinary finding. In other words, even if DOI does not believe a referral to the district attorney is appropriate, it may still be appropriate for DOC to seek disciplinary sanctions against staff, including termination.

- What standard of proof do the district attorney's offices use in deciding whether to bring a case? Can each office provide the Board with data comparing prosecution rates for allegations made in the community versus those made by persons in custody?

- Directive 5011 states that "DOI shall conduct investigations for sexual misconduct that involve staff-on-inmate allegations *or* allegations that involve alleged rape cases." (Emphasis added). (At § VI.I 1 b). What is the Department intending to convey by this language? Is the suggestion that the Department expects DOI to maintain investigations of all rape cases? If so, does DOI indeed investigate all allegations of "rape" and not refer them back to the Department? If so, we would like to know DOI's definition of "rape".

- Does DOC refer allegations of abuse of one incarcerated person by another—including "rape" to DOI or to any law enforcement entity? Which entity? Under what circumstances?

- If an allegation of abuse of one incarcerated person by another is referred to law enforcement, will ID continue to investigate it? Under what circumstances? In what percentage of cases?

- Under Standard § 5-40,[3] how is a case like J.G.'s characterized in the statistics provided by DOC? In other words, does DOC consider J.G.'s case—which has been substantiated by DOI—a substantiated case, a pending case, or does DOC omit it entirely from reporting?

Screening and Use of Screening Information for Risk of Sexual Victimization and Abusiveness (Standards §§ 5-17 and 5-18)

J.G.'s case illustrates the need for safe housing for vulnerable persons in DOC custody. Protection begins with identifying vulnerable people. The Board improved the screening form used by DOC when it issued a Notice of Violation in the fall of 2017.

---

[3] Standard § 5-40 requires DOC to provide the Board with information about each incident of sexual abuse that has been investigated, including whether DOI assumed the investigation and if so, its status; and whether the investigation has been referred to a DA's office and its status, including whether the DA's office declined to prosecute. *Id.* at § 5-40(d)(18)-(19). It also requires the Department to provide public semiannual assessment reports of this data to the public. *Id.* at § 5-40(g).

But improving the screening form is only the first step. The information obtained on the form then has to be *used* to house people safely. This means housing people with other people who are similarly at risk, and in areas with sufficient staffing and supervision to deter abuse. This does not seem to be occurring, with protective custody units being particularly dangerous.

J.G.'s experience in protective custody is illustrative. When he tried to end the officer's abuse, the officer instigated an attack by other people on the protective custody unit. Some of these attackers were known gang members who were offended by J.G.'s presentation as a gender nonconforming individual.

J.G.'s experiences are not unique. Last spring the Board heard heart-wrenching testimony about a transgender woman who was raped twice within days on a protective custody unit at AMKC. Last fall we reported to DOC on behalf of a transgender woman who on more than one occasion was almost forced to perform oral sex on an individual while confined in protective custody at the Brooklyn House of Detention. We hear a litany of complaints about actual and attempted abuse and harassment on protective custody units. Gay and bisexual men tell us they are housed with gang members threatening them for what they describe as their "alternative lifestyle."

The Board needs to find out the following from the Department:

- How does DOC decide who to place in protective custody?
- How does DOC decide how to provide safe housing to someone who presents as both vulnerable (e.g., gay or bisexual) and with a history of gang affiliation?
- How does DOC where to house someone who presents as both at risk and yet may pose some risk of aggressive behavior (apart from gang affiliation)?
- Are there any limitations on who can be housed together in a protective custody unit?
- Does DOC house people who are sexually vulnerable on the same protective custody unit as people who are at risk because they have enemies due to their history of assaultive behavior?
- How many protective custody units are there? How does DOC decide the number needed? Is there a list?
- Are all protective custody units cell housing? Does DOC consider the physical layout of the unit in deciding whether to designate a particular area as a protective custody unit?

Screening and Housing of Transgender Persons in Custody

The City and DOC deserve credit for the significant progress they have made in in housing transgender women, both by deciding to maintain the Transgender Housing Unit ("THU") and by moving it to the women's jail. However, many questions remain, and it is imperative that the Board not abdicate responsibility for compliance with its Standards regarding the screening and housing of

transgender persons to the New York City Human Rights Commission. Respecting gender identity and providing safe housing to people in custody need to go hand in hand. To that end, the Board needs to find out:

- How many THUs are there? How does DOC decide which THU someone will be housed in? Can sentenced and pre-trial persons be housed together in a THU? If someone is removed from a THU because of conflicts with someone on the unit, can they be moved to another THU?

- What are the criteria for DOC making a decision on whether someone can be accepted into the THU? Are the criteria in writing? If yes, where?

- Are there any written materials advising people in custody how to apply to the THU, how to appeal a denial of a request to be housed in the THU, or requiring DOC to give people a written decision if they are denied admission to the THU. If not, why not?

- How does DOC determine whether someone is transgender so that they can be housed in the THU? We have heard reports that DOC is not accepting a person's stated gender identity, even when there is no evidence that the person is claiming their identity for a dangerous or illicit purpose. We believe that safety is paramount, but that does not give DOC license to dismiss a person's gender identity as invalid without clear and convincing evidence.

- Apart from gender identity, what factors does DOC consider in determining whether to house a person in the THU?

    - Specifically, how does DOC assess the impact of a history of assaultive behavior? Of sexually aggressive behavior? How recently does the behavior have to have occurred? How serious does the behavior have to have been? If the assaultive behavior took place in custody, does the person have to have been found guilty of a disciplinary infraction? If it occurred in the community, does the person have to have been convicted of the assaultive conduct? Does it have to have been a felony conviction?

    - Is there a distinction between how DOC considers the relevance of someone's past assaultive behavior more generally as compared to behavior that had a sexual component? If so, how does DOC consider them?

- If DOC determines that a person who identifies as transgender cannot be housed in the THU, where does DOC house them? Are they always placed in protective custody? What factors are considered in this decision?

To our understanding, DOC does not house most transgender women with cisgender women. We do not accept the predicate that a transgender woman, even with a history of assaultive behavior, cannot be safely managed in the same manner as cisgender women, some of whom are

dangerous or violent themselves. But more to the point given the BOC Standards, there are clearly transgender women in DOC custody who, by any rational criteria, pose no threat to others at all. We have met with two such women, 50 and 60 years old respectively, both small in stature, both feminine in presentation, both with no history of violence (one convicted of fraud and the other of burglary involving returning to a store where she had been directed not to return), and both with impeccable disciplinary records. Neither of them have been housed in general population at Rose M. Singer Center ("RMSC"). We have to wonder why.

To find out more about DOC's rationale and any plans for change, we suggest the Board ask:

- Are any transgender women (who have not had gender reassignment surgery) housed in RMSC outside of the THU? If so, how many have been so housed in the last six months and how is it decided whether a transgender woman will be permitted to live with cisgender women at RMSC? If not, why not?

- Are there any written standards or criteria or process setting out under what circumstances a transgender woman may be housed in RMSC? If not, why not?

- If DOC determines that a person who identifies as transgender, gender nonconforming or intersex cannot be housed in the facility of the gender with which they most closely identify, where does DOC house them? Are they always placed in protective custody? How is that decided?

- Are there any written materials advising transgender, gender nonconforming or intersex persons how they can request to be housed in a facility that is gender congruent, the appeals process if they are denied, and whether they will be given reasons for the denial in writing? If not, why not?

- If a transgender woman housed in RMSC is remanded to DOCCS custody, is she treated differently from cisgender women? Does DOC send her to Bedford Hills Correctional Facility for reception or to a men's prison? How is it decided which prison she will be sent to?

Supervision and Monitoring (Standard § 5-04)

In our experience, staff most often engage in abusive behavior because they believe they can get away with it, either because no one is watching or no one cares, or both. The Standards seek to change this by requiring the Department to implement specific measures that deter abuse. They require supervisors to conduct unannounced and unpredictable rounds at varied times in order to identify and deter sexual abuse. Staff are not supposed to call ahead to alert officers on a unit that supervisors are coming. § 5-04(k). They require the Department to develop staffing plans based on a variety of factors, including the composition of the population and the numbers of incidents reported in given areas. § 5(04)(a).

J.G.'s abuse was able to happen because of the failures in staffing and supervision that the Standards are supposed to change. According to J.G. two officers were assigned to his unit of 25 or more men: one officer was the perpetrator, and the other largely stayed in the bubble, literally and metaphorically, where he could not hear what was taking place and could only see what was occurring down the corridor if he stood and left his desk. A gate further divided the area, obstructing the officer's view down the corridor toward J.G.'s cell. There were no cameras on the unit. At most, a Captain conducted only two rounds per shift; he came to the unit and usually signed the log book and left without talking to incarcerated people. Because only two rounds per shift were conducted, the abusive officer could be confident that no supervisors would come into the unit once the second round was concluded. And while J.G. was not in a position fully to assess it, he observed that there were predictable periods of time when supervisors would not conduct rounds, and that when they did come, other staff called ahead to alert officers that rounds were about to take place. The kinds of sexual abuse experienced by others on protective custody units that we describe above likewise were able to occur because staff were either unable to observe what was occurring, were preoccupied with other legitimate tasks, or simply did not care and so failed to intervene.

BOC needs to ask:

- What are the staffing levels in protective custody units? Is there a higher ratio of staff on protective custody units than on general population or other units? What are the relative ratios?
- Is direct supervision required in protective custody units? If not, why not? If so, what directive states this?
- Have there been revisions to staffing plans based on the prevalence of incidents of sexual abuse in a particular area, or on a particular shift? Have there been revisions to staffing plans based on changes in inmate composition? Describe the most recent changes to staffing plans.
- Have there been revisions to staffing plans for protective custody units?
- How many rounds are routinely conducted by Captains each shift? Are additional rounds ever conducted?
- What is a round expected to consist of? What efforts does DOC make to ensure that staff do not just sign a log book and leave?
- Does DOC monitor rounding to ensure 1) that staff are not calling ahead to alert officers on units that supervisors are coming or 2) that there are not predictable periods (e.g. during count, shift change, after the second round is completed) when rounds will not take place?

The Board also needs to audit thoroughly the Department's compliance with the Supervision Standards, like it did with the Investigations Standards. Much of the information about compliance

is totally shielded from public view. For example, supervisory rounds should be observed by Board staff to see whether all areas are looked at and whether incarcerated people are actually talked to, and if so, how they are selected. Phone records should be reviewed to assess whether "trip calls" (calling ahead to alert officers that a supervisor is coming) are taking place. Log books should be reviewed to assess the frequency of rounds, the length of time rounds typically take, and whether there are predictable periods when they do or (equally importantly) do not take place. Staffing plans, particularly as to protective custody units, need to be analyzed for adequacy particularly in light of the numbers of allegations of abuse arising in each of the units. Results need to be made publicly available.

Meaningful supervision also means not accepting toxic and traumatic occurrences as business as usual. Women at the Rose M. Singer Center tell us that they are subjected to strip searches several times per week as part of area searches. In addition, they are always searched before going on visits, which they say impacts them emotionally during their visits with family, friends, and loved ones. The Department will no doubt say that these searches are conducted as part of an attempt to prevent the spread of contraband, although it is hard to imagine that this level of frequency is legitimately needed. The searches are also conducted in a manner that is unnecessarily traumatizing. Despite the Standards' limits on cross-gender viewing and supervision (§ 5-06) and the prohibition on sexual harassment, women tell us they are subjected to virtually unrelenting body shaming comments. Women describe being told their breasts are too small, their breasts are too big, their nipples are too dark or are too light, or their menstrual flow is disgusting. Women describe being forced to clean blood from the floor if they are forced to undress when they have their period. Male officers may not conduct the searches, but they are present and can observe women in the nude. Privacy screens are never provided. And our clients tells us that all of this takes place in front of, and often with the participation of, supervisory staff. The Board needs to ask:

- How often are men subjected to strip searches as part of an area search in a typical week on a general population unit in a male jail? By contrast, how often are women subjected to such searches?

- Has DOC received complaints about voyeurism and sexually harassing comments during area strip searches? From women in custody? With what frequency? What action has been taken in response?

- What efforts are made to ensure that women in custody do not have to undress in front of male staff or in front of other women during strip searches, given that bathroom stalls do not provide full protection?

- Women report that other incarcerated women are allowed to work in the strip search area and can see them undressing or naked. If correct, why is this permitted?

- Men report that the area where they pick up their packages at AMKC is by a two-way mirror where anyone, including female staff and other incarcerated persons, can look into the area where the men are undressing or naked. If correct, why is this is the case?

- Are strip searches that are conducted as part of cell or area searches videotaped? Are other strip searches videotaped and if so, under what circumstances? Who has the ability to watch those videotapes? Are the cameras regularly monitored?

- When are hand held cameras used to film a strip search?

- If the camera footage is not regularly monitored, when, if at all, are they reviewed (apart from during an investigation) and by whom?

Investigations (Standards §§ 5-11, 5-15, 5-30)

DOI's investigation into J.G.'s allegations of abuse illustrates how an investigation into sexual abuse should be conducted, although it took far too long. DOC should emulate this model.

The investigation into J.G.'s allegations was thorough and unbiased: twenty-two people in custody were interviewed. Investigators did not dismiss an incarcerated person's statement simply because of his status as a prisoner. Credibility was assessed based on a variety of factors, and was not dependent on whether there was physical proof of the assault. Instead, the investigation considered that witness statements corroborated the kinds of grooming behavior described by J.G., that there was evidence of the events surrounding the abuse (such as documentation about a fight that took place when the officer set up J.G. to be viewed in the nude by another person in custody), and that there were patterns of abusive behavior described by J.G. and others, such as the officer offering people in custody small gifts or requesting similar types of sexual favors.

J.G. told us he was interviewed confidentially, with DOI making efforts to speak to him away from the view of corrections staff. For example, he was interviewed in the courthouse when appearing on his criminal case. Even though DOC now maintains that they no longer interview people on the housing area where the abuse allegedly occurred in plain view of the alleged perpetrator or his colleagues—which is certainly a step in the right direction—that is not the same as interviewing people confidentially. J.G. also was interviewed several times during the course of the investigation, and the investigator made himself available to J.G. and counsel, so that J.G. had at least some reason to trust DOI and be open with them. DOC needs to consistently implement this kind of approach because approaching a person in a hostile or skeptical way will serve only to chill people from being candid and open. If victims do not feel that they can be forthcoming, investigations will fail.

The Board's Audit of Closing Reports in Sexual Abuse and Sexual Harassment Investigations (September 2018) confirmed what we had long suspected: that DOC's investigations clearly violate the Board's Standards. It confirmed that in virtually all cases there was no indication whether prior allegations involving staff had been reviewed, let alone properly considered to see if patterns of abuse could be found as corroborative evidence. BOC indicated that in half the cases the investigator did not properly explain how credibility assessments were made or their reasoning for

coming to their conclusion in the case—especially significant when 41 of 42 cases were determined to be unsubstantiated or unfounded.[4]

Because DOC investigations are not public, we and the public have to rely solely on the Board's assessments of the adequacy of DOC's compliance, including whether a case has properly been substantiated or not. Given this, going forward we believe it critical that the Board provide more than a one-sentence cryptic statement about why it found the Department's determinations acceptable,[5] particularly in light of the Department's wholesale rejection (in 41 of 42 cases) of the incarcerated person's allegations as unfounded or unsubstantiated.

The conclusion to substantiate in J.G.'s case should not have stunned us, but it did. For far too long, as is evidenced by the miniscule number of allegations of staff sexual abuse that DOC has substantiated, video or physical corroboration of the abuse have been prerequisites to an allegation being substantiated. But as in J.G.'s case, video and physical evidence should not be required in determining whether an allegation of abuse should be substantiated.

If BOC cannot assess whether DOC's conclusion to substantiate an allegation, or more likely to find it unsubstantiated, is reasonable based solely on closing summaries, then as permitted under Standard § 5-40(c) the Board should reassess whether it needs additional documents to be provided from DOC, including the actual investigations themselves.

The Board should ask detailed questions about the improvements that DOC claims to have made to its investigations, including:

- What specifically did DOC change on its closing summary forms to improve the thoroughness of investigations?

---

[4] The Department's most recent Report to BOC on its status of compliance with the Standards does nothing to assuage our concerns. *See* NYC Department of Correction NYC Board of Correction Sexual Abuse and Sexual Harassment Minimum Standards 5-40 Assessment Report – February 15, 2019. The numbers of allegations of abuse have largely increased or remained the same. *Id.* at 2-3, 6-9, 15. Rates of substantiation remain pathetic: of the allegations reported, investigated and closed in 2018 only 1 case was substantiated, while 5 were preliminarily substantiated. *Id.* at 10. Despite claiming this information provides an incomplete picture, nowhere does the Department provide any information indicating that any additional allegations have been substantiated. Rather, the Department provides information only on the rates of allegations it deems unfounded (6.27%) or informs us that the "vast majority" of allegations have been deemed unsubstantiated. *Id.* at 13, fns. 2-4.

[5] In full the Board said "In half of the cases, the investigator adequately described their reasoning of what is substantiated. In 21 cases (50%) the report included a clear indication of how the investigator has decided on what is substantiated. In the other 50% there is no specific explanation of what elements of the allegation have been verified or disproved." Similarly the explanation for accepting credibility assessment was equally barebones, with the Board stating "Credibility assessments were deemed adequate if they included a discussion of the consistency and plausibility of the account provided by the individual and whether objective evidence corroborated the account." We also have to wonder how the Board could come to these conclusions in even half the cases it reviewed given the Department's failure to interview all witnesses and review all physical evidence, which would seem to us prerequisites in coming to a reasoned decision about whether a case should be found to be substantiated or not.

- Where are "confidential" interviews now conducted? What efforts have been made to ensure that these locations have not now become known in the jails as the locations where PREA interviews take place? What efforts are made to ensure that interviews are conducted in a confidential manner and in a safer location than on the housing unit?

- How do investigators evaluate credibility?

- Apart from physical evidence, what efforts do DOC investigators make to find other corroborating evidence? How often do they report finding that evidence?

- Has DOC substantiated an allegation of staff sexual abuse without video or DNA corroboration?

The Interplay Between the Disciplinary Process and Investigations

Directive 5011 requires that ID conduct investigations of sexual misconduct involving one incarcerated person abusing or harassing another. At the same time, Directive 6500R-E (Disciplinary Due Process) provides confusing guidance on the interplay between investigations and discipline that leaves open a myriad of questions:

- Does ID conduct all investigations of allegations of abuse or harassment of one incarcerated person by another? If not, why not? If not, under what circumstances does it not conduct such an investigation?

- While Directive 6500R-E (at III.B.2) calls for "staff on inmate sexual abuse allegations" to be reported to the Central Operations Desk for investigation by DOI or by the Department's Investigations Division, no similar requirement is contained for allegations of abuse of one incarcerated person by another. Why not?.

- Directive 6500R-E (at III.B.3.c) requires staff to initiate the infraction process with respect to allegations of sexual abuse of one incarcerated person by another in accordance with Department policy. It then calls for the adjudication of the infraction to be suspended until completion of the investigation process. How is that accomplished given the length of time that sexual abuse investigations have been taking?

- Directive 6500R-E says that *"if"* ID or DOI are pursuing the matter and conducting the investigation, supervisors shall consult with the assigned investigator or designee prior to interviewing any witnesses for an investigation at the facility. The supervisor conducting the investigation shall otherwise interview the inmate(s) involved." *Id.* at III.C.4-5. Why wouldn't ID or DOI be conducting such an investigation? Does this mean that in some cases of sexual misconduct of one incarcerated person by another that the investigation is conducted at the facility level, by a captain, for purposes of determining whether to discipline one of the incarcerated persons? If so, in what percentage of cases? What criteria are used? How does this conform with the requirement in Standard § 5-11 that requires an

administrative or criminal investigation be completed for all allegations of sexual abuse and sexual harassment? And how does it conform with the requirement that all allegations of sexual abuse and harassment must be investigated by investigators must have specialized training as required by Standard § 5-15.

- Directive 6500R-E (at III.D.38) states, consistent with BOC Standard § 5-35(e), that an incarcerated persons cannot be disciplined for making a good faith report of abuse based upon a reasonable belief that the alleged conduct occurred." How many incarcerated persons have nonetheless been disciplined for lying or making a false report?

- Directive 6500R-E (at III.D.39) states, consistent with BOC Standard 5-35(f) that the Department can discipline incarcerated persons for sexual activity, even if consensual, although it cannot be considered sexual abuse unless evidence shows that the activity was consensual and not coerced. Has the Department disciplined persons for consensual sexual activity? In how many cases?

- In what percentage of cases where an incarcerated person has been disciplined for sexual misconduct of another incarcerated person has ID also substantiated the allegation of misconduct? Of those cases, in what percentage of cases has the case been referred to law enforcement?

- If ID substantiates an allegation of sexual abuse of one incarcerated person by another, is it always referred to law enforcement for prosecution? In turn, how many of them are prosecuted?

- What is the typical time frame within which ID completes an investigation of sexual abuse of one incarcerated person by another?

Sexual Abuse Incident Reviews (Standard § 5-39)

Sexual abuse incident reviews should be one of the most important mechanisms available to prevent the recurrence of sexual abuse. However, as members of the public, we have no way of knowing whether DOC conducts reviews at all,[6] let alone whether the reviews have integrity. For example, J.G.'s abuse should have led to changes in staffing levels and supervision in the protective custody at AMKC where he was abused. But has it? Has the sexual abuse incident review of his abuse even been conducted yet?

[6] All we know is that according to the DOC PREA Reporting Status for 2018 (Updated 1/7/2019), the Department failed to provide the Board with the Sexual Abuse Incident Reviews as required by Standard § 5-39 for virtually a year, and that the last Review provided was for an allegation from 2016. *Id*. at 4. Available at https://www1.nyc.gov/assets/boc/downloads/pdf/DOC-PREA-Reporting-Status_1_7_19.pdf.

The Board should find out:

- In a case like J.G., where the case has been substantiated by DOI but not yet by DOC, has a sexual abuse incident review taken place?

- How have Sexual Abuse Incident Reviews led to:

    - Changes in staffing levels in particular areas?

    - Changes in the supervision in particular areas, such as increased rounds?

    - Changes in supervision of particular staff?

    - The placement of cameras or the deployment of additional cameras in particular areas?

    - The use of body cameras?

    - Retraining of specific investigators or investigation supervisors?

    - Any policy changes whatsoever?

Like with supervision, we believe the Board needs to conduct an audit of compliance with this Standard, since we are skeptical that any meaningful reviews are being conducted.

Disciplinary Sanctions for Staff, and Accountability (Standard § 5-33)

The Board's Standard requiring termination as the presumptive sanction for staff who have engaged in sexual abuse is meaningless if no sanction is ever sought, as we understand is the situation in J.G.'s case. It is bad enough that investigations result in virtually no substantiated findings. But is outrageous that even when an allegation of sexual abuse by staff is substantiated, nothing happens and staff are not held to account.

Conclusion

The Board admirably performs essential duties with limited staff. Unfortunately, the PREA Compliance person's job has been vacant for months. And in two important cases we only found out about the Department's non-compliance with the Standards when DOC itself asked for variances.[7]

---

[7] *See* DOC Letters to BOC dated September 8, 2017 (requesting variance from Standards §§ 5-17(f)-(g), 5-18), available at https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2017/Sep-12-2017/doc-six-month-lvr-sexual-abuse-sexual-harassment-minimium-standards-20170908.pdf and August 17, 2018 (requesting variance from Standard § 5-04(g), available at . https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2018/September-14-2018/NYC%20Department%20of%20Correction-BOC%20Sexual%20Abuse%20and%20Sexual%20Harassment%20Minimum%20Standards%20-%205-04%20-%20Transport%20Vehicle%20Camera%20Pilot%20and%20Report.pdf

As is set forth above, the Board needs to take a more proactive role and conduct substantive reviews of compliance with the Standards pertaining to Supervision and to Sexual Abuse Incident Reviews and to continue and expand its audit of compliance with the Investigation Standards. This hearing is an important step, but ensuring that DOC complies with the sexual abuse standards will require significant and continued external accountability.

The efforts by the Board to monitor compliance with its Standards are the public's only way of knowing what steps are actually being taken by the Department to eliminate sexual abuse and harassment in our jails. Once the Board evaluates the Department's level of compliance with these Standards, we predict it will find rampant non-compliance. If we are correct, then at that point the Board needs to issues Notices of Violation and demand comprehensive corrective action plans with specific dates for implementation.

But for now, we urge the Board to hold the Department to answer fully the questions it asks at the April meeting about what it is doing to comply with the PREA Standards.

Very truly yours,

/s/

DORI A. LEWIS
Supervising Attorney