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New York City Board of Correction
1 Centre St.
Room 2213
New York, NY 10007

Dear Members of the Board of Correction:

We write to address the City Department of Correction's report on sexual harassment and sexual abuse in the New York City jails ("NYC Department of Correction NYC Board of Correction Sexual Abuse and Sexual Harassment Minimum Standards 5-40 Assessment Report") ("the Report") and to follow up our letter of January 31, 2018.¹

We ask the Board of Correction to hold the Department of Correction accountable for its failures to comply with the Board of Correction Standards for The Elimination of Sexual Abuse and Sexual Harassment in Correctional Facilities ("the Standards"). The Report and the information we have obtained from our clients paint a bleak picture of a jail in which sexual abuse has reached epic proportions, where investigations are a sham, and for which the Department proposes inadequate solutions.

The Report Shows A System Rife with Sexual Abuse.

The numbers of allegations of sexual misconduct in the New York City jails made in 2017 are shocking, far out of proportion to the jail population. The Report indicates that there were 1151 allegations in DOC,² a system with an average daily population of fewer than 9000 persons.³ By contrast, the latest publicly available information from the New York State Department of Corrections and Community supervision reports only 553 allegations⁴ from the more than 50,000 persons confined in their custody.⁵

¹ The Report is available at <https://www1.nyc.gov/assets/doc/downloads/pdf/Annual-Sexual-Abuse-and-Sexual-Harassment-Assessment-Report.pdf>

² See Report at 3.

³ See https://www1.nyc.gov/assets/doc/downloads/pdf/FY17_4th_QUARTER_LL_88_2015.pdf (data re DOC population in the last quarter of 2017).

⁴ Available at

http://www.doccs.ny.gov/Research/Reports/2017/Annual_Report_on_Sexual_Victimization_2015_Report.pdf, at p.4.

⁵ See "Under Custody Report: Report of Under Custody Population as of January 1, 2016, available at http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf at Section One.

Allegations of sexual misconduct by staff have seen the most marked increase, rising exponentially in recent years,⁶ even as the population decreased. In 2015, there were only 131 allegations of staff sexual abuse,⁷ while in 2016, there were 322.⁸ In 2017, the increase continued—with 374 allegations of staff sexual abuse reported.⁹ This means that in the past two years staff sexual abuse allegations—the most serious allegations involving staff—have more than doubled. Likewise staff sexual harassment allegations have risen 86%.¹⁰

DOC attempts to downplay the significance of these numbers, claiming that the overwhelming majority of staff sexual harassment allegations are “non-PREA allegations.”¹¹ This claim should not be credited. First, DOC offers no clear definition of the allegations it labels “non-PREA,” offering a catch-all described as “including, but not limited to” a variety of conduct. Second, even the categories enumerated by the Department may include genuine PREA violations; until the conclusion of a meaningful investigation, there is no way to know whether PREA is implicated. For example, what DOC calls “one time gestures, derogatory comments, profane and obscene language” may well be the first step in a pattern of escalating abuse that may not be obvious from the face of an initial complaint. A call to 311 that describes such behavior may be chronicling propositioning, or the caller may well not be comfortable fully describing the trauma they have experienced in a preliminary phone call.

Similarly the Department dismisses “allegations stemming from a proper pat frisk or safety or security related search.” Yet, whether the pat frisk or search is “proper” can only be determined after an investigation. While the Standards exempt touching related to official duties, abuse related to searches can be extremely serious, as acknowledged by the Second Circuit Court of Appeals, which held that abusive pat frisks can constitute cruel and unusual punishment in violation of the Eighth Amendment. *Crawford v. Cuomo*, 796 F.3d 252 (2d Cir. 2015). A pat frisk or other search is not a license to grope or inappropriately touch or fondle a person in custody, and we have heard of horrific allegations of sodomy taking place as part of a search. Unless meaningful inquiry follows these so-called “non-PREA allegations,” including an interview by a trained investigator to elicit the full scope of the alleged misconduct—which as described below is not occurring and under DOC’s proposal will not occur going forward—the nature of the alleged misconduct will not be uncovered. Without this information, there can be no action against staff, thus circumventing the goal of the Standards to prevent and eliminate sexual abuse and harassment in our jails.

⁶ See data for 2015 and 2016, available at

https://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents.pdf and

https://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents_C_Y16.pdf

⁷ See data for 2015, available at

https://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents.pdf

⁸ Report at 5 (Table 1).

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *Id.* at 3, 11-13. The Department defines this as: “Non-PREA incidents, include, but are not limited to, one time gestures, derogatory comments, profane and obscene language, and allegations stemming from a proper pat frisk or safety or security related search.” Report at n 1.

DOC also minimizes the significance of the rise in numbers of allegations as the expected result of better reporting mechanisms.¹² We are skeptical about this claim. About a month ago, another attorney from The Legal Aid Society attempted to see what would happen if she tried to lodge a confidential complaint on behalf of a client at the Rose M. Singer Center. She first called 311 and asked for the rape hotline number for a woman incarcerated at Rikers Island. The response from the 311 operator was “What hotline? “Shouldn’t she call the police?” The 311 operator then transferred the attorney to 911. When the attorney spoke with the 911 operator, she told the operator that her client did not want to speak to the police, but just wanted to call the confidential hotline. The 911 operator responded, “There’s no hotline, she has to make a police report.” The attorney then called 311 again and asked for a supervisor who told her “It goes to 911 or call Correctional Health Services.” If someone wanting to lodge a complaint actually knows the hotline number (718-204-0378), there is a recording informing the person that they can complain confidentially about sexual abuse, that the call will not be recorded, and that it will not be heard by uniform staff. Even then, however, the recording is only in English, and there is no confidential way to make the call since the phone is not in a private location and an individually assigned PIN number has to be used to place the call from within a facility. In short, the reporting mechanisms are hardly fully functional.

But even if reporting mechanisms have been somewhat improved, this does not negate the significance of the extremely high numbers of reported incidents of abuse that are continuing to occur on a daily basis within DOC. The plain fact remains that the number of allegations are appalling, and too many persons face the horrors of custodial sexual abuse and violence.

The Flawed Investigation Process Violates the Standards.

The Report makes obvious that the Department is violating the Board’s Standards requiring prompt, thorough and objective investigations that do not assess credibility based on a person’s status as an inmate or staff. *See* §§ 5-30-31.

The numbers are scandalous: 739 of 823 (or 90%) of allegations are pending from 2016, and 1112 of 1151 (or 97%) of allegations are pending from 2017.¹³ The failure to conclude investigations means that sanctions, including any administrative action against staff, cannot take place.

Moreover, the investigations that are concluded – an abysmally number -- are clearly biased. Only .36% (or less than 1%) of the allegations from 2016 were substantiated, and .09% (or less than 1%) of the allegations from 2017 have been substantiated.¹⁴

There can be no justification for these numbers. Whatever claims of secondary gain the Department may argue exists for people in custody to make up allegations—a claim we

¹² *Id.* at 3.

¹³ Report at 6, Table 3.

¹⁴ *Id.*

vehemently dispute—the same rationales should apply across the country. Yet, DOC’s rate of substantiation is far below the national average.¹⁵

Unlike the Board we do not have the ability to see completed investigations. But we know that they are wholly inadequate from the Reports of the Independent Monitor in *Nunez v, City of New York*, who in 2017 audited the small number of closed cases regarding 16-18 year olds and found a “failure to interview key witnesses, long delays to witness interviews, and apparent failure to ask key follow-up questions or to collect relevant evidence.” The Monitor found that these inquiries failed to “meet professional standards.”¹⁶

The Department’s failure to comply with the Standards is extremely serious. It means that persons who have been sexually assaulted in the past will never see justice. It also has ramifications for the future, and chills people from reporting sexual assault because complaints are futile. Few people would risk the embarrassment and possible retaliation attached to complaining about sexual abuse if nothing comes of it. This in turn will enable abusers and perpetuate the culture of violence and abuse that pervades the jails.

The Corrective Action Plan is Wholly Inadequate, Particularly As To Investigations.

We welcome the efforts DOC describes in their Corrective Action Plan (“the Plan”), such as increased inmate education, more PREA pamphlets and posters; staff assigned to PREA hotline calls, enhanced communication between the grievance unit and the Investigations Division and the Department of Investigations, staff assigned as PREA ambassadors, PREA training to all recruits, and increased staffing of the PREA Investigations Division (“ID”).¹⁷ However, these are clearly insufficient if the Department is to achieve compliance with the Board’s Standards. The Plan also presents a dangerous solution to address the chaos in investigations.

The Plan Fails to Address Overall Non-Compliance with the Standards.

The Department fails to analyze all trends as suggested by the Standards. *See* § 5-40. For example, the Plan does not address improvements at a facility level, does not assess the demographics of victims (e.g., by gender, LGBT status or disability), and does not look to see if particular staff have been the targets of repeated allegations.

The Department also fails to address its overall lack of compliance with the Standards. For example, while hiring more PREA Compliance Managers is positive, the reality is that DOC continues to violate the Board’s Standard that requires a PREA Compliance Manager designated for each facility. *See* § 5-03(c). Likewise, there are a wide range of Standards about which the Report is silent, many of which—such as the prohibition on housing of

¹⁵ The last publicly reported data from the Bureau of Justice Statistics shows rates of substantiation in jails and prisons ranging as high as ten to twenty per cent in certain categories of abuse. *See* Bureau of Justice Statistics, “Survey of Sexual Violence in Adult Correctional Facilities, 2009-11 Statistical Tables (January, 2014) at Tables 1-6, available at <https://www.bjs.gov/content/pub/pdf/ssvacf0911st.pdf>.

¹⁶ Fourth Report of the Independent Monitor (Oct. 10, 2017) at p. 225.

¹⁷ Report at 9-10.

transgender persons in custody based solely on external genital anatomy—which we know the Department has been violating. For a Corrective Action to be useful, it should assess the Department’s compliance with each of the Standards, in a thoughtful and specific fashion. *See* National Standards, 28 U.S.C. §§ 115,403-115.404 (requiring Audits to assess whether there is compliance with each of the Standards and, if not, then formulate a plan for how compliance will be achieved).

The Plan Fails to Address the Disastrous State of Investigations.

The Plan indicates that there is increased staff in the PREA Investigations Division, and that perhaps there will be further increases. The numbers provided, however, are so opaque as to be meaningless, with the Department describing increases of 57% and then 59% with current staffing levels increased by 214%, while also stating that there are plans to increase staff “by as much as” 400% from its original levels.¹⁸ Nowhere, however, does the Department provide any actual numbers. It is thus impossible to discern how many staff are actually assigned to PREA-ID or whether their assignment is full time or part time or what in practice any of this actually means.

In February, 2018, DOC publicly stated it had assigned 19 investigators to sexual abuse and harassment cases, up from 6 in 2016.¹⁹ Even if that is accurate, the caseload would still be staggering, with as many as sixty open sexual abuse and harassment cases per investigator just from 2017, without even accounting for other backlogged cases or current complaints that presumably need to be prioritized.

The Department’s proposed response to this chaos is even more disastrous, and we believe both circumvents the requirements of the Standards and sets the Department on a course where sexual abuse will continue unabated. It states that it is considering:

“...workload allocation: training facility captains to assist in investigating sexual harassment cases that do not fall within PREA. . . . In addition we are designing and implementing a rapid review process whereby the Department can expedite the closure of cases that are deemed not to be a PREA allegation.”²⁰

Assigning line captains to “assist with investigations” with what the Department characterizes as “non-PREA” cases should not be permitted by the Board, or at least certainly not without clear parameters being set. In our experience, profane and inappropriate comments or touching during searches are often the precursors to much more serious abuse, and often only the initial actions are complained about because they are not as embarrassing to report than the far more grievous misconduct that follows. The Standards explicitly require that trained investigators conduct interviews of sexual abuse

¹⁸ Report at 9.

¹⁹ <https://injusticetoday.com/metoo-in-nycs-jail-system-why-new-department-of-correction-policies-on-sexual-abuse-fall-short-384728f42628>

²⁰ The Department sets out some other proposed changes to how investigations will be conducted which we endorse, including time-triggered supervisory case reviews, streamlining closing reports, and the combining of the Investigation Division with the Trials and Litigation Division so that the Investigation Division will get the benefit of Department attorneys. Report at 10.


victims. Labelling people as “non-PREA” victims without even the critical first interview being conducted by someone with training is bad practice and will virtually guarantee that serious misconduct will not be addressed. The rationale for requiring trained investigators is that they have the expertise and knowledge to draw victims out so that they will describe the trauma they have experienced. Sexual abuse is often experienced as a humiliation, and people will often not fully describe the abuse until they have had the opportunity to gain some trust with the person interviewing them. A trained investigator has the ability to gain that trust. At the same time, a survivor must believe that the person interviewing them hears them, sympathizes with them, and is not biased against them. Captains are seen as members of the uniform staff and so cannot gain the trust needed to enable victims to be fully forthcoming.

As to having a rapid review process to close cases, certainly ID needs to change its abysmally slow investigation process. But neither should cases be closed just for the sake of closing them. Rather, all allegations must be competently, fairly and thoroughly investigated.

Conclusion

Without accountability, staff and inmate violence and abuse will continue unabated. Given the signal importance of investigations to implementation of the Standards, we urge the Board to issue a Notice of Violation for the Department’s failure to comply with its Investigation Standards; to advise the Department that it cannot circumvent the Standards by labelling allegations as “non-PREA” without at least an initial interview being conducted by trained investigative staff; and to hold a public hearing in which staff from the Department, under oath, are required to explain why they have failed to meet these essential obligations and inform the Board of the appropriate steps they intend to take to remedy the problems.

Very truly yours,



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