

## **NEW YORK CITY BOARD OF CORRECTION**

### **Notice of Adoption of Rules**

**Notice is hereby given in accordance with section 1043(f) of the New York City Charter that the Board of Correction is adopting rules relating to the detection, prevention and response to sexual abuse and sexual harassment of persons incarcerated in jails and other facilities operated by the Department of Correction.**

These rules are promulgated pursuant to sections 1043 and 626 of the New York City Charter.

On July 26, 2016, the Board of Correction held a public hearing on these rules at 125 Worth Street, New York, New York. On November 15, 2016, the Board of Correction approved these rules at a public meeting also held at 125 Worth St.

### **Statement of Basis and Purpose of the Rules**

Under § 626(e) of the New York City Charter, the Board of Correction (“Board”) is authorized to establish minimum standards “for the care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of” the New York City Department of Correction (“Department”). Pursuant to this authority, the Board has created a new chapter of its rules containing Minimum Standards that are designed to detect, prevent and respond to sexual abuse and sexual harassment of persons incarcerated in jails and other facilities operated by the Department.

In April 2015, the New York City Public Advocate Letitia James petitioned the Board to adopt rules consistent with national standards that the Department of Justice (“DOJ”) had promulgated pursuant to the Prison Rape Elimination Act of 2003 (“PREA”), 42 U.S.C. § 15601, *et seq.*, in response to the epidemic of sexual violence in the nation’s prisons and jails.<sup>1</sup> The Board accepted the petition at its June 9, 2015 meeting, and after several months of fact-finding by the Board’s *ad hoc* PREA Committee, developed proposed rules which incorporate in whole or in part many elements of the national standards (“PREA Standards”).

The Board received written comments on the proposed rules from over 60 organizations, and over 60 individuals, and two New York City Council Members. In addition, 31 people spoke at the July 26, 2016 public hearing, including representatives of the Public Advocate and the Department. Thereafter the Board’s *ad hoc* PREA Committee reviewed all of the comments and made some revisions to the rules.

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<sup>1</sup> The standards are codified in 28 C.F.R. Part 115 and are available at: <http://www.prearesourcecenter.org/sites/default/files/content/prisonsandjailsfinalstandards.pdf>.

In recognition of the unique characteristics of individual correctional agencies, facilities and inmate populations nationwide, the PREA Standards afford discretion and flexibility to agencies in combating sexual violence. Consistent with this approach, the rules require action that is specifically tailored to detecting, preventing and responding to sexual abuse and sexual harassment in the New York City jails, including specific provisions proposed by the Public Advocate and other stakeholders. The rules do not incorporate certain sections of the PREA Standards that the Board concluded were not applicable to the Department or, in several instances noted below, not appropriate to apply to the Department.

The rules also contain provisions that will enable the Board to assess the Department's compliance with them. These provisions require, for example, that the Department provide the Board with written directives or policies effectuating certain elements of the rules, periodic progress reports — particularly with respect to provisions that require an extended period of time to implement — and semiannual reporting of incident data that will allow the Board to track sexual abuse allegations and outcomes.

The rules are embodied in a new chapter of the Board's Minimum Standards, which is divided into subchapters that correspond to the subject matter categories into which the PREA Standards are grouped. Additionally, each rule that is modeled on a PREA Standard is denoted by the name of the PREA Standard section heading on which it is based.

Following is a descriptive summary of the rules, including revisions that were made following the public hearing on July 26, 2016.<sup>2</sup>

## **The Rules**

### **Subchapter A: Definitions §§ 5-01 and 5-02**

Rule § 5-01 (“General Definitions”) sets forth definitions of terms used throughout Chapter 5 and is derived in part from PREA Standard § 115.5.

Rule § 5-02 (“Definitions related to sexual abuse”) adopts the definitions of “sexual abuse” and “sexual harassment” in PREA Standard § 115.6.

### **Subchapter B: Prevention Planning §§ 5-03 – 5-09**

Prevention planning is key to eliminating or reducing sexual violence in correctional settings. Subchapter B of the rules, which incorporates PREA Standards § 115.11 and §§ 115.13 - 115.18, mandates implementation of the prevention measures described below.

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<sup>2</sup> Unless otherwise noted, all of the PREA Standards referenced in this Statement are incorporated in the rules essentially in full, except for non-substantive revisions (e.g., substitution of “Department” for “agency”), or excision of provisions that the Board considered inapplicable to the Department or inappropriate for these rules.

### Zero Tolerance Policy; Appointment of PREA Coordinator (§ 5-03)

Rule § 5-03 requires the Department to have a written policy mandating “zero tolerance toward all forms of sexual abuse and sexual harassment,” and requires the Department to designate a PREA coordinator and each facility to designate a PREA compliance manager with sufficient time and authority to coordinate compliance efforts. This rule incorporates PREA Standard § 115.11.

### Staffing Plans (§ 5-04(a)-(f))

Rule § 5-04 requires, among other things, each Department facility to develop and document a staffing plan, taking into account a set of specified factors, that provides for adequate levels of staffing, and video monitoring where applicable, to protect inmates against sexual abuse. The rule also requires all facilities to annually assess, determine, and document whether adjustments are needed to the staffing levels or deployment of monitoring technologies. Rule § 5-04 further requires that the Department ensure that each of its facilities develops, documents and makes its best efforts to comply with a staffing plan by January 31, 2018 (§ 5-04(a)). During the period of time leading up to this implementation date, § 5-04(c) requires the Department to provide semiannual written reports to the Board of its progress toward ensuring system-wide implementation of this rule.<sup>3</sup>

Rule 5-04 incorporates PREA Standard § 115.13, but also adds reporting requirements so that the Board can track the Department’s progress in the development and implementation of facility staffing plans, including any deviations or adjustments thereto (§ 5-04(c), (d) and (f)).

### Video Surveillance (§ 5-04 (g), (h), (i) and (l))

Rule § 5-04 also addresses the vital importance of video camera surveillance in preventing and responding to sexual abuse. In response to comments on the proposed rule, a new subdivision (g) has been added to the rule, which provides that by July 31, 2017, the Department shall institute a one-year pilot program to install video surveillance cameras in Department vehicles used to transport inmates. By September 1, 2018, the Department shall provide a written report to the Board evaluating the results of the pilot, including any benefits or challenges associated with the installation of cameras in inmate transport vehicles (§ 5-04(g)).

Subdivisions (h) and (i) of the rule require the Department to address the potential need for additional camera installation after the *Nunez* Agreement ends.<sup>4</sup> Section 5-04(h) provides that

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<sup>3</sup> Whereas dates for implementation of various proposed rules were listed in uncodified § 3 of the proposed rules, these dates are now set forth in the sections and subdivisions of the rules to which they apply (see, e.g., § 5-04 (c), (d) and (f)) and also in uncodified § 3 of this rule.

<sup>4</sup> The *Nunez* Agreement refers to the Consent Judgment in *Nunez v. City of New York*, 11 Civ. 05845 (SDNY), a class action brought on behalf of current and future inmates confined in Department facilities. The lawsuit, in which DOJ intervened, alleged that the Department had engaged in a pattern and practice

after termination of the Agreement, the Department must provide the Board with the Department's surveillance camera installation protocol, which must be designed to ensure that, to the extent necessary and feasible, additional surveillance cameras will be installed. For assessment purposes, the Department must also provide annually a written report to the Board of actions taken pursuant to this protocol.

After the *Nunez* Agreement terminates, section 5-04(i) requires the Department to provide the Board with its surveillance camera maintenance protocol, which must be designed to ensure that all surveillance cameras are maintained to function properly and any required repairs are timely made. The Department must provide annually a written report to the Board of action taken pursuant to this protocol.

To ensure that video footage of sexual abuse incidents is preserved for investigative and prosecutorial purposes, § 5-04(j) provides that when the Department is notified of a sexual abuse incident within 90 days of the incident, video capturing the incident will be preserved until the longer of two specified time periods has elapsed.

#### Monitoring Rounds (§ 5-04 (k) and (l))

Rule § 5-04(k), which incorporates PREA Standard § 115.13(d), requires that supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Certain language was added to subdivision (k) of the proposed rule; namely, that monitoring rounds must be conducted at "unpredictable and varied times," and the Department must issue a written directive to staff regarding these rounds and provide this directive to the Board.

A subdivision (l) was added to the proposed rule, which states that the Department must have a written policy requiring it to consider whether it is feasible to place a surveillance camera in an area where sexual abuse is repeatedly alleged to have occurred or to consider alternative preventive measures, such as increased monitoring rounds or the assignment of additional Department staff in that area.

#### Youthful Inmates (§ 5-05)

Rule § 5-05, which incorporates PREA Standard § 115.14, prohibits placement of adolescent inmates (under the age of 18) with adult inmates (ages 18 or older) in housing units in which the adolescents would have "sight, sound or physical contact" with adult inmates through use of a shared common space, shower area or sleeping quarters (§ 5-05(a)).

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of using unnecessary and excessive force against the plaintiff class. The *Nunez* Agreement includes provisions for surveillance camera installation, maintenance and video preservation.

Section 5-05 also requires “sight and sound separation” between adolescents and adults in areas outside of housing units unless there is “direct staff supervision”<sup>5</sup> (§ 5-05(b)).<sup>6</sup>

#### Limits to cross-gender viewing and searches (§ 5-06)

Rule § 5-06 incorporates PREA Standard § 115.15. In addition, text was added to § 5-06(f), as was a subdivision (h), before the proposed rules were published.

Subdivisions 5-06(a) and (b) generally prohibit cross-gender strip searches (and pat-down searches of female inmates by male officers), except in exigent circumstances. Subdivision (d) of the rule requires implementation of policies and procedures to protect inmates from being viewed by correctional staff of the opposite gender when showering, performing bodily functions or changing clothing.

Subdivision (e) prohibits the Department from searching or physically examining a transgender or intersex inmate solely to determine the inmate’s genital status, while subdivision (f) requires the Department to train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible consistent with security needs.

In recognition of the fact that transgender individuals are among those with the highest rates of sexual victimization while incarcerated,<sup>7</sup> the Board added a provision to proposed § 5-06(f) requiring the Department, when conducting searches of transgender and intersex inmates, to “make its best efforts to treat transgender and intersex inmates in accordance with their gender identity” unless exigent circumstances require otherwise.

The Board also added a requirement to the proposed rule that the Department issue a directive to staff incorporating the provisions of § 5-06 and provide this directive to the Board (§ 5-06(g)).

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<sup>5</sup> Section 5-01 defines direct staff supervision as when correction staff “is in the same room with, and within reasonable hearing distance of, the inmate.”

<sup>6</sup> Rule § 5-05 does not incorporate PREA Standard § 115.14(c), which states that agencies shall make best efforts to avoid placing adolescent inmates in isolation to comply with this provision, shall not deny them large-muscle exercise and any legally required special education services to comply with this provision, and shall provide them with access to other programs and work opportunities to the extent possible. This is not incorporated because the Department places all adolescent inmates together in separate housing units where they are not comingled with adults.

<sup>7</sup>Research on sexual abuse in correctional facilities consistently documents the vulnerability of transgender individuals. *National Prison Rape Elimination Commission Report*, p. 12 (2009) (“NPREC Report”), <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

### Inmates with Disabilities and Inmates Who Are Limited English Proficient (§ 5-07)

Rule § 5-07, which incorporates PREA Standard § 115.16, requires the Department to take appropriate steps to ensure that inmates with disabilities or other limitations or who are limited English proficient have an equal opportunity to participate in or benefit from all of the Department's efforts to prevent, detect and respond to sexual abuse and sexual harassment.

### Hiring and Promotion Decisions (§ 5-08)

Rule § 5-08 incorporates PREA Standard § 115.17 for the Department, and for CHA<sup>8</sup> where legally permissible. This section:

- Prohibits the Department from hiring or promoting anyone who may have contact with inmates who has engaged in sexual abuse in an institutional setting, has been convicted of engaging in sexual activity in the community facilitated by force, the threat of force, or coercion, or who has been civilly or administratively adjudicated to have engaged in such activity (§ 5-08(a); PREA Standard § 115.17(a)(1)-(3)).
- Requires the Department to consider any incidents of sexual harassment in determining whether to hire or promote anyone who may have contact with inmates (§ 5-08(b); PREA Standard § 115.17(b)).<sup>9</sup>
- Requires the Department to either conduct criminal background records checks at least every five years of current employees, contractors and volunteers who may have contact with inmates or have in place a system for otherwise capturing such information for current employees (§ 5-08(d) and (e); PREA Standard § 115.17(d) and (e)). Section 5-08(e) also makes CHA subject to this requirement.
- Requires that the Department and CHA, unless they are prohibited by law, provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work (§ 5-08(i); PREA Standard § 115.17(c)(2)).

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<sup>8</sup> Rule §5-01 defines "CHA" as "the Correctional Health Authority designated by New York City as the agency responsible for health and mental health services for inmates in the care and custody of the Department, including CHA contractor staff or volunteers."

<sup>9</sup> DOJ interprets PREA Standard § 115.17 as not operating as a complete bar to hiring or contracting with an individual who would otherwise be prevented from such employment or contracting if the agency head or designee determines that the individual does not pose a safety threat based upon consideration of various factors, considers the individual to be important to the success of a specialized inmate rehabilitative program, and does not permit the individual to have contact with inmates without staff supervision. This interpretative guidance is available at: <https://www.prearesourcecenter.org/frequently-asked-questions#ec-faq>.

### Upgrades to Facilities and Technologies (§ 5-09)

Rule § 5-09, which incorporates PREA Standard § 115.18, requires the Department to take into account the effect of any changes on efforts to combat sexual abuse when designing or expanding facilities and when installing or updating video monitoring systems or other monitoring technology.

### **Subchapter C: Responsive Planning §§ 5-10 and 5-11**

Subchapter C includes rules designed to ensure that any physical evidence of sexual abuse is immediately preserved and collected and that victims are afforded rape crisis counseling.

### Evidence Protocol and Forensic Medical Examinations (§ 5-10)

Rule § 5-10(a)-(c), which incorporates PREA Standard § 115.21(a)-(c), requires the Department to, among other things:

- Follow a uniform evidence protocol that “maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions” (§ 5-10(a), (b)); and
- Offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners or Sexual Assault Nurse Examiners where possible (§ 5-10(c)).

In crafting the final version of PREA Standard § 115.21, DOJ recognized the unique role of rape crisis center advocates in supporting victims throughout the forensic medical examination and investigatory interviews, especially given that inmate victims may be reluctant to confide in correctional agency staff due to real or perceived bias and fear of retaliation.<sup>10</sup> For this reason, § 115.21(d) requires correctional agencies to attempt to make available to victims a victim advocate from a rape crisis center.

The consensus among the Public Advocate and other stakeholders with whom the PREA Committee discussed this issue is that the delivery of rape crisis intervention and counseling services to inmates in the facilities in which they are housed (referred to below as the “Initiative”) is the most effective way of ensuring that victims of sexual abuse obtain the emotional support they need to proceed with forensic examinations and investigatory interviews that are key to successful criminal prosecutions and/or administrative proceedings. These services are also essential in helping inmates overcome the trauma of having been sexually abused.

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<sup>10</sup> U.S. Dep’t of Justice, *Final PREA Rule* (“Final PREA Rule”), p. 71 (2012); available at: [http://ojp.gov/programs/pdfs/prea\\_final\\_rule.pdf](http://ojp.gov/programs/pdfs/prea_final_rule.pdf).

In response to comments received on proposed § 5-10, the rule has been revised to state that these services shall be “offered and delivered to inmates in the facility in which they are housed, and “CHA shall be responsible for the delivery of such services by qualified victim advocates” (§ 5-10(d)). Thus, Department employees will not be involved in providing these services. In addition, in response to comments on the proposed rule, a new subdivision (g) has been added, which provides that such services shall be offered as soon as possible after an incident of alleged sexual abuse is reported, but in no event later than one week after the report is received by the Department or CHA.

Rule § 5-10’s other requirements include:

- Subject to the requirements of § 5-21(d), victim advocates shall assure inmates who request these services that all communications will be kept confidential (§ 5-10(f)).
- As requested by the victim, a victim advocate must accompany and support the victim through the forensic medical examination process and investigatory interviews, and to provide emotional support, crisis intervention, information and referrals (§ 5-10(e); PREA Standard §115.21(e)).
- Prior to implementation of this Initiative, CHA must provide the Board with a written plan describing, among other things, the services to be provided; the credentials of the victim advocates, privacy and confidentiality of in-person, written and telephone communications between inmates and advocates; and communications to inmates about these services (§ 5-10(h)).
- Given that it will take a period of time to plan and implement this Initiative, CHA must provide the Board with a quarterly report of its progress toward implementation (§ 5-10(i)).
- After the Initiative is implemented, CHA shall provide annually to the Board a written report assessing the Initiative’s effectiveness, which shall include the number of inmates who received such services during the reporting year (§ 5-10(j)).<sup>11</sup>

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<sup>11</sup> Rule § 5-10 does not incorporate PREA Standard § 115.21(g), which states that to the extent an agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (e) of the federal PREA Standard. This does not apply to DOC because DOC’s Investigation Division (“ID”) investigates all allegations of inmate-on-inmate sexual abuse. While DOC refers allegations of staff-on-inmate sexual abuse to the NYC Department of Investigation (“DOI”), DOI has the discretion to refer back such allegations to ID for investigation.

## Policies to Ensure Referrals of Allegations for Investigations (§ 5-11)

Rule § 5-11, which incorporates subdivisions (a), (b) and (c) of PREA Standard § 115.22, requires, among other things, that the Department ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.<sup>12</sup>

### **Subchapter D: Training and Education §§ 5-12 – 5-16**

The rules in Subchapter D require training on key topics related to preventing, detecting and responding to sexual abuse (§ 5-12 on employee training; § 5-13 on volunteer and contractor training), and special training of investigators (§ 5-15) and medical and mental health care practitioners (§ 5-16)). These rules incorporate PREA Standards §§ 115.31, 115.32, 115.34 and 115.35.

Since system-wide employee training must be conducted on a schedule that ensures adequate Department and CHA staff coverage at all times, such training may need to be conducted over an extended period of time. In response to the Department's concerns about the deadline for completion of all employee training in the proposed rules, and the simultaneous deadlines for completion of training required under the *Nunez* Agreement, a new subdivision (f) of section 5-12 now requires that specific percentages of employees be completed by specified dates. In order to review progress toward this goal, § 5-12(g) requires the Department and CHA to give a quarterly written report to the Board of the number of their respective employees who have been trained in accordance with this rule.

In response to comments received after the proposed rules were published, a new subdivision (h) was added to § 5-12. This subdivision requires that the training of Department and CHA staff on working with inmates who are transgender or intersex include the psychosocial and safety needs of such persons in custody and instructions on communicating with them in a manner that is respectful of their gender identity.

Also in response to comments on proposed §5-12, a new subdivision (i) has been added, which requires the Department and CHA to provide the Board on an annual basis the training schedules, training curriculum and credentials of the persons providing such training.<sup>13</sup>

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<sup>12</sup> Rule § 5-11 does not incorporate PREA Standard § 115.22(d) and (e), which provide that any State entity or Department of Justice component responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in prison or jails must have in place a policy governing the conduct of such investigations. The rules do not include this provision because the Board does not have the legal authority to require a state or federal agency to adopt this policy or any other policies.

<sup>13</sup> New subdivisions have also been added to §§ 5-13 ("Volunteer and Contractor Training"), 5-15 ("Specialized Training: Investigations"), and 5-16 ("Specialized Training: Medical and Mental Health Care"), which require that training materials in connection with these rules be annually provided to the Board (§§ 5-13(f), 5-15(e), and 5-16(e)).

Rule § 5-14 (“Inmate education”), which incorporates PREA Standard § 115.33(a), requires the Department to explain its zero-tolerance policy to inmates during the intake process and to educate inmates on how to report incidents of sexual abuse and sexual harassment (§ 5-14(a)).<sup>14</sup>

Rule § 5-14(b), which incorporates PREA Standard § 115.33(b), requires that, within 30 days of intake, the Department provide “comprehensive education” to inmates either in person or through video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding Department policies and procedures for responding to such incidents. Following publication of the proposed rules, a new subdivision (g) was added, which provides that the Department shall annually provide to the Board the inmate education schedules, education curriculum, and the credentials of the persons providing such education to inmates.

### **Subchapter E: Screening for Risk of Victimization and Abusiveness** **§§ 5-17, 5-18, and 5-19**

Rules §§ 5-17 and 5-18, which incorporate PREA Standards §§ 115.41 and 115.42, require the Department to screen inmates for their risk of being sexually abused or sexually abusive (§ 5-17), and to use that screening information to inform housing, bed, work, education and program assignments (§ 5-18). The goal is to keep inmates at high risk of victimization away from inmates at high risk of committing abuse.<sup>15</sup>

In response to comments about the proposed rule, two provisions have been added to § 5-18. A new subdivision (d) provides that the Department shall not assign a transgender or intersex inmate to a men’s or women’s facility based solely on the inmate’s external genital anatomy.<sup>16</sup>

A new subdivision (h) was also added in response to comments on proposed § 5-18. This subdivision provides that the Department shall notify the Board, in writing, of each placement of a transgender or intersex inmate, all information considered in making, and the reasons for, its housing determination. The Department shall provide the Board with such information after the housing determination is made.

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<sup>14</sup> Rule § 5-14 does not incorporate PREA Standard § 115.33(c) (which states that current inmates who have not received such education shall receive such education upon transfer to a different facility to the extent the policies and procedures of the inmate’s new facility differ from those of the previous facilities) because all Department facilities will provide this education.

<sup>15</sup> Rule § 5-18 does not incorporate PREA Standard § 115.42(g), which places limits on the establishment of a dedicated transgender or similar housing unit, out of a concern that this provision might be read to limit the Department’s ability to allow individuals to be housed voluntarily in a transgender or similar housing unit. This excision was recommended by advocates.

<sup>16</sup> Subdivision (g) adopts interpretative guidance that the DOJ provided with respect to PREA Standard § 115.42(c) upon which Rule § 5-18 is based: <https://www.prearesourcecenter.org/node/3927>.

Rule § 5-19(a)-(e) (protective custody), which incorporates PREA Standard § 115.43, prohibits the placement of inmates at risk of sexual victimization in segregated housing for that reason against their will, unless certain conditions are met. These conditions include placement in involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged; and that such assignment may not ordinarily exceed 30 days.

Subdivision (f) of § 5-19 requires the Department to issue a written directive to staff incorporating the provisions of this rule and provide this directive to the Board. To enable the Board to ascertain and assess the involuntary placement of at-risk inmates in segregated housing, subdivision (h) requires the Department to provide the Board with a quarterly report detailing the basis for such placements and why no alternative means of separation could be arranged, and the number of inmates who remain in involuntary segregated housing for more than 30 days.

### **Subchapter F: Reporting §§ 5-20, 5-21 and 5-22**

Sexual abuse in the nation's prisons and jails is significantly underreported.<sup>17</sup> The rules in Subchapter F, which incorporate PREA Standards §§ 115.51, 115.53 and 115.54 (with certain additions), seek to expand the reporting of incidents of sexual abuse and sexual harassment.

#### Inmate Reporting (§ 5-20)

Rule § 5-20 requires the Department to:

- Provide at least two internal methods for inmates to first report sexual abuse, sexual harassment and retaliation (§ 5-20(a); see PREA Standard § 115.51(a)).
- Provide at least one way for inmates to report abuse to an entity that is not part of the Department and that allows inmates to remain anonymous upon request (§ 5-20(b); see PREA Standard § 115.51(b)).
- Requires the Department staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal report (§ 5-20(c); PREA Standard § 115.51(c)).
- Include all the ways inmates can report such information on posters in all housing units, intake and program areas, clinics and mess halls, in the Inmate Handbook and Visitors Handbook, and on the Department's website (§ 5-20(d)).

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<sup>17</sup> U.S. Dep't of Justice, *Prison Rape Elimination Act Regulatory Impact Assessment: United States Department of Justice Final Rule*, pp. 17-18 (May 17, 2012), [http://ojp.gov/programs/pdfs/prea\\_ria.pdf](http://ojp.gov/programs/pdfs/prea_ria.pdf) (concluding, based upon a Bureau of Justice Statistics' survey *Sexual Victimization in Prisons and Jails Reported by Inmates* 2008-09, that between 69% and 82% of inmates who reported sexual abuse in response to the survey stated that they had never reported an incident to correction staff).

- Provide a method for staff to privately report sexual abuse and sexual harassment (§ 5-20(e); see PREA Standard § 115.51(d)) and issue a written directive to all staff explaining how staff can privately report such information and all the ways inmates can do so, and provide this directive to the Board (§ 5-20(f)).

#### Inmate Access to Outside Confidential Support Services (§ 5-21)

Rule § 5-21(a), which incorporates PREA Standard § 115.53, requires the Department to provide inmates with access to outside victim advocacy organizations for confidential emotional support services related to sexual abuse as confidentially as possible. Subdivision (b) requires the Department to inform inmates, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws. Subdivision (c) provides that the Department shall maintain or attempt to enter into agreements with community service providers to provide these services.

#### Third Party Reporting (§ 5-22)

Rule § 5-22, which incorporates PREA Standard § 115.54, requires that the Department establish a way to receive third-party reports of sexual abuse and that it distribute information on how to report sexual abuse on behalf of an inmate (§ 5-22(a); see PREA Standard §115.54). Subdivision (b) of § 5-22 requires the Department to include in its Visitors Handbook and post on its website how third parties can report sexual abuse and sexual harassment on behalf of an inmate.

### **Subchapter G: Official Response Following an Inmate Report §§ 5-23 – 5-29**

The rules in Subchapter G require the Department and CHA staff to respond quickly, effectively, and in a coordinated fashion to a report of sexual abuse to ensure that physical evidence is preserved and collected, the privacy of the victim is maintained, and the victim is protected from the alleged abuser and from retaliation. Sections 5-23 through 5-29 incorporate PREA Standards §§ 115.61-115-65, 115.67 and 115.68 (with the additions noted below).

#### Staff and Agency Reporting Duties (§ 5-23)

Rule § 5-23 (modeled on PREA Standard § 115.61) requires, among other things, that the Department report immediately any “knowledge, suspicion or information” regarding an incident of sexual abuse or sexual harassment, retaliation against inmates or staff who report such an incident, or any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation (§ 5-23(a); compare to PREA Standard § 115.61(a)). The rule also requires that, unless otherwise precluded by federal, state or local law, medical and mental health practitioners must report sexual abuse and must inform inmates of the practitioner’s duty to report and the limitations of confidentiality (§ 5-23(c) and (d)).

#### Agency Protection Duties (§ 5-24)

Rule § 5-24 incorporates PREA Standard § 115.62, requiring the Department to act immediately to protect an inmate whenever it learns that the inmate faces a substantial risk of imminent sexual abuse.

#### Reporting to Other Confinement Facilities (§ 5-25)

Rule § 5-25 incorporates PREA Standard § 115.63, and requires a facility that receives an allegation that one of its inmates was sexually abused while confined at another facility to so inform the other facility within 72 hours. The facility receiving such notification must investigate the incident.

#### Staff First Responder Duties (§ 5-26)

Rule § 5-26, which incorporates PREA Standard § 115.64, sets forth first responder responsibilities, in recognition of the fact “that staff must be able to adequately counsel victims while maintaining security and control over the crime scene so that any physical evidence is preserved until the investigator arrives.”<sup>18</sup>

Specifically, § 5-26(a) requires that the first security staff member to respond to the report separate the abuser and victim, preserve any crime scene, and request that the victim and ensure that the abuser not take any actions that could destroy physical evidence.

Section § 5-26(b) requires that where the first staff responder is not a security staff member, the responder must request that the victim not take any actions that could destroy physical evidence, and then must notify security staff.

#### Coordinated Response (§ 5-27)

In response to comments received on proposed rule § 5-27, which incorporates PREA Standard § 115.65, the rule was revised. Instead of requiring the Department to develop individual facility plans, the rule now requires development of a system-wide written plan to coordinate responses to an incident of sexual abuse among staff first responders, medical and mental health practitioners, DOI, or investigators in DOC’s Investigation Division (“ID”), and facility leadership.

#### Protection against Retaliation and Post-Allegation Protective Custody (§§ 5-28 and 5-29)

Retaliation for reporting incidents of sexual abuse and cooperating with sexual abuse investigations is a serious concern in correctional facilities.<sup>19</sup> Thus, rules §§ 5-28 and 5-29, which incorporate PREA Standards §§ 115.67 and 115.68, require the Department to take certain preventive and remedial actions, including:

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<sup>18</sup> Final PREA Rule, p. 121.

<sup>19</sup> *Id.* at p. 126.

- Establishing a policy to protect all inmates and staff who report sexual abuse or sexual harassment, or cooperate with investigations of such incidents, from retaliation by other inmates or staff and issuing a written directive to all staff embodying this policy (§ 5-28(a); see PREA Standard § 115.67(a)).
- Employing multiple protection measures, such as housing changes or transfers for inmate victims or abusers, removal of staff or inmate abusers from contact with victims, and emotional support services for inmates or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations (§ 5-28(b); see PREA Standard § 115.67(b)).
- For at least 90 days following a report of sexual abuse, monitoring the conduct and treatment of inmates or staff who reported the sexual abuse and of inmates who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by inmates or staff, and acting promptly to remedy any such retaliation (§ 5-28(c); see PREA Standard § 115.67(c)).

Finally, rule § 5-29, which incorporates PREA Standard § 115.68, requires that any use of segregated housing to protect a victim of sexual abuse be subject to § 5-19, discussed above.

### **Subchapter H: Investigations §§ 5-30, 5-31 and 5-32**

The purpose of the rules in Subchapter H is to ensure that all investigations of allegations of sexual abuse and sexual harassment are conducted “promptly, thoroughly, and objectively” (§ 5-30(a)). In the words of the National Prison Rape Elimination Commission: “Unless investigations produce compelling evidence, corrections administrators cannot impose discipline, prosecutors will not indict, and juries will not convict abusers.”<sup>20</sup>

The focus of the PREA Committee’s key findings was the quality of the Department’s investigations of staff-on-inmate sexual abuse and harassment. The Committee concluded that these investigations were deficient in terms of timeliness, thoroughness and objectivity. This is borne out by the fact that over a three-year period (2013-2015), only five (5) out of 294 allegations of staff-on-inmate sexual abuse were substantiated. Thus, the rules incorporate PREA Standards §§ 115.71, 115.72 and 115.73 which address this issue, and add certain provisions designed to address specific deficiencies identified by the Board in its evaluation of Department investigations of sexual abuse and sexual harassment.

#### **Criminal and Administrative Agency Investigations (§ 5-30)**

Rules that incorporate PREA Standards on investigations include:

- The Department must investigate all allegations of sexual abuse and sexual harassment, including third-party and anonymous reports, and must do so “promptly, thoroughly, and objectively” (§ 5-30(a); see PREA Standard § 115.71(a)).

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<sup>20</sup> NPREC Report, p. 12.

- Where sexual abuse is alleged, the Department must use investigators who have received special training in sexual abuse investigations pursuant to rule § 5-15 (§ 5-30 (b); see PREA Standard § 115.71(b)).
- Investigators must gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; must interview alleged victims, suspected perpetrators, and witnesses; and must review prior complaints and reports of sexual abuse involving the suspected perpetrator (§ 5-30(c); see PREA Standard § 115.71(c)).
- The credibility of an alleged victim, suspect, or witness must be assessed on an individual basis and cannot be determined by the person's status as an inmate or as staff. (§ 5-30(e); see PREA Standard § 115.71(e)).
- All investigations must include an effort to determine whether staff actions or failures to act contributed to the abuse, and must be documented in written reports that include a description of the physical, testimonial and documentary evidence, the reasoning behind credibility assessments, and investigative facts and findings (§ 5-30(f); see PREA Standard § 115.71(f)(1) and (2)).
- Substantiated allegations of conduct that appears to be criminal must be referred for prosecution (§ 5-30(h); see PREA Standard § 115.71(h)).
- The departure of the alleged abuser or victim from the employment or control of the Department or CHA cannot provide a basis for terminating an investigation (§ 5-30(j); see PREA Standard § 115.71(j)).
- When outside agencies investigate sexual abuse, the Department must cooperate with outside investigators and endeavor to remain informed about the progress of the investigation (§ 5-30(k); see PREA Standard § 115.71(k)).

Rules that were added by the Board to the PREA Standards include:

- The Department must 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 business days after it receives a report of an alleged incident of sexual abuse or sexual harassment ("Referral Date"). If sexual abuse is alleged, the Department must conduct such an evaluation after consulting with DOI unless doing so would pose a threat to the safety and well-being of the victim (§ 5-30(l)).
- The Department must complete all investigations of sexual abuse and sexual harassment allegations no later than 90 days from the Referral Date, absent extenuating circumstances outside the Department's control (which must be documented) (§ 5-30(m)).

- Inmates subject to alleged sexual abuse or sexual harassment must be interviewed within 72 hours of the Referral Date, absent unusual circumstances (which must be documented) (§ 5-30(o)).
- All interviews of staff allegedly involved in a sexual abuse or sexual harassment incident must be completed within 30 days of any immunity grants, absent unusual circumstances (which must be documented) (§ 5-30(p)).
- Requests for statements or interviews of inmates must be made off the living unit and cannot be made within sight or hearing of other inmates or of staff involved in the incident. Inmate interviews must be conducted in a private and confidential setting (§ 5-30(q)).
- At the conclusion of an investigation of alleged sexual abuse or sexual harassment, the Department must prepare a closing memorandum summarizing the findings of the investigation. The Department must also provide a copy of the closing memo to the Board (§ 5-30(r)).

The Department must issue a written directive to all ID staff that incorporates the provisions of § 5-30 and provide this directive to the Board (§ 5-30(t)). Additional related procedural protections that the Department has included in its PREA directive, but which are not specified in these rules, include:

- Efforts to obtain inmate statements must be documented in the investigation file, as must inmate refusals to provide a statement;
- Interviews of inmates must be recorded and a written summary of each interview must be prepared and included in the investigation file; and
- The Department must take reasonable steps to obtain relevant medical records in connection with allegations of sexual abuse in a timely manner.

#### Evidentiary Standard for Administrative Investigations (§ 5-31)

Rule § 5-31, which incorporates PREA Standard § 115.72, provides that the Department will impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse or sexual harassment are substantiated.

#### Reporting to Inmates (§ 5-32)

Rule § 5-32, which incorporates PREA Standard § 115.73(a)-(e), requires, among other things, that:

- Upon completion of an investigation of alleged sexual abuse, the Department must inform the inmate whether the allegation was deemed substantiated, unsubstantiated or unfounded (§ 5-32(a); compare PREA Standard § 115.73(a)).
- If the Department did not conduct the investigation, it must request the relevant information from the investigating entity in order to inform the inmate (§ 5-32(b); compare PREA Standard § 115.73(b)).
- If an inmate alleges that a staff member committed sexual abuse against the inmate, the Department must inform the inmate (unless the Department has determined that the allegation is unfounded) whenever the staff member is (1) no longer posted in the inmate's unit or facility, or (2) no longer employed at the facility; and whenever the Department learns that the staff member has been indicted on a charge related to the reported conduct or has been convicted on a charge related to sexual abuse within the facility (§ 5-32(c)(1)-(4); PREA Standard § 115.73(c)(1)-(4)).
- If an inmate alleges that another inmate committed sexual abuse against the inmate, the Department must inform the inmate whenever the Department learns that the abuser was indicted or convicted of a charge related to sexual abuse in the facility (§ 5-32(d); PREA Standard § 115.73(d)).

### **Subchapter I: Discipline (§§ 5-33, 5-34 and 5-35)**

One of the primary goals of the PREA Standards, and of these rules, is to ensure that abusers and perpetrators of sexual harassment are punished. This, in turn, will deter others from engaging in sexual abuse and sexual harassment, and encourage the reporting of such incidents. The rules in Subchapter I set guidelines for imposing disciplinary sanctions on staff, contractors, volunteers and inmates who engage in sexual abuse or sexual harassment, and incorporate PREA Standards §§ 115.76, 115.77, and 115.78.

Rule § 5-33(a) provides that Department and CHA staff must be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies. Moreover, § 5-33(b) states that termination must be the "presumptive disciplinary sanction" for Department and CHA staff who have engaged in sexual abuse.

Rule § 5-34(a) provides that any contractor or volunteer who engages in sexual abuse must be prohibited from contact with inmates and must be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies. Subdivision (b) requires the Department to take appropriate remedial measures and consider whether to prohibit further contact with inmates in the case of any other violation of sexual abuse or sexual harassment policies by a contractor or volunteer.

Rule § 5-35 enumerates disciplinary sanctions for inmates who sexually abuse other inmates. The rule states, among other things, that (1) the Department's disciplinary process must consider whether an inmate's mental illness contributed to his or her behavior in determining

what type of sanction, if any, should be imposed (§ 5-35(c)); (2) the Department may discipline an inmate for sexual misconduct with staff only upon a finding that the staff member did not consent to such contact (§ 5-35 (d)); and (3) for the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation (§ 5-35 (f)).<sup>21</sup>

### **Subchapter J: Medical and Mental Care §§ 5-36, 5-37 and 5-38**

Rule § 5-36 (“Medical and mental health screenings; history of sexual abuse”), which incorporates PREA Standards §115.81(c), (d) and (e), provides, among other things, that if the intake screening pursuant to rule § 5-17 indicates that an inmate has experienced prior sexual victimization (in an institutional setting or in the community), Department staff must ensure that the inmate is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.<sup>22</sup>

Rule § 5-37 (“Access to emergency medical and mental health services”), which incorporates PREA Standard § 115.82, provides that inmate victims of sexual abuse (1) must be provided with timely and unimpeded access to free emergency medical treatment and crisis intervention services, and (2) must be offered timely information about and timely access to free emergency contraception and sexually transmitted infections prophylaxis where medically appropriate.

Rule § 5-38 (“Ongoing medical and mental health care for sexual abuse victims”), which incorporates PREA Standard § 115.83(a)-(g), provides that victims of sexual abuse must receive, without financial cost, medical and mental health evaluation and treatment, including follow-up services, treatment plans and referrals for continued care following their transfer to or placement in other facilities, or their release from custody.

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<sup>21</sup> Rule § 5-35 does not incorporate PREA Standard § 115.78(d), which states that if an agency offers therapy, counseling or other interventions designed to address and correct underlying reasons for motivations or abuse, the Department shall consider whether to require the offending inmate to participate in such interventions as a condition of access to programming other benefits. The Department does not provide such services to inmates.

<sup>22</sup> Rule § 5-36 does not incorporate PREA Standards §§ 115.81(a) and (b), which state that if the screening pursuant to PREA Standard § 115.41 (“Screening for risk of victimization and abusiveness”) indicates that a “prison” inmate has experienced prior sexual victimization or has previously perpetrated sexual abuse, staff shall ensure that the inmate is offered a follow-up meeting with a medical/mental health practitioner within 14 days of the intake screening. Subdivision (a) of PREA Standard § 115.81 was omitted because it references “prison” inmates whereas subdivision (c) was included because it is identical to subdivision (a) but references “jail” inmates. Subdivision (b) was omitted because it provides for the provision of follow-up mental health services to a “prison” inmate abuser and, in any event, the Department does not provide such services to inmate abusers.

## **Subchapter K: Data Collection and Review: Audits §§ 5-39, 5-40 and 5-41**

One of the PREA Committee's key findings was that the Department lacks a comprehensive, coherent and transparent process for collecting data concerning allegations of sexual abuse. This significantly impedes efforts to adjust policies, practices and strategies designed to prevent, detect and respond to sexual violence based on meaningful data review and analysis. Moreover, in the absence of an effective data collection process, the Board is unable to track, assess and monitor the Department's compliance with its rules.

The rules in subchapter K are designed to obtain incident-specific and aggregate data about sexual abuse and sexual harassment allegations and the outcomes of resulting investigations that will (1) identify possible patterns of sexual abuse and sexual harassment, and help prevent future misconduct; and (2) enable the Board to assess improvement in the quality of the Department's investigation of sexual abuse and sexual harassment allegations.

Some of the rules incorporate certain provisions of PREA Standards §§ 115.86, 115.87, 115.88 and 115.89 regarding data collection and include additional provisions that are designed to make the data tracking and the Board's review of such data more robust and informative.

### **Sexual Abuse Incident Reviews (§ 5-39)**

Rule § 5-39, which incorporates PREA Standard § 115.86, sets forth requirements for sexual abuse incident reviews at the conclusion of every sexual abuse investigation where the allegations have been deemed substantiated or unsubstantiated. Unlike a sexual abuse investigation, which is intended to determine whether the abuse occurred, a sexual abuse incident review is intended to evaluate whether the Department's policies and procedures need to be changed in light of the alleged incident. The rule requires that specific factors be considered as part of this evaluation, including whether (1) race, ethnicity, sexual orientation, gang affiliation, or group dynamics in the facility played a role, (2) physical barriers in the facility contributed to the incident, (3) staffing levels need to be changed, and (4) more video monitoring is required (§ 5-39(d)(1)-(5); PREA Standard § 115.86(d)(1)-(5)).

Section 5-39 further provides that such reviews must "ordinarily occur within 30 days of the conclusion of the investigation" (§ 5-39(b)); the review team must prepare a report of its findings and submit the report to the facility head and PREA compliance manager (§ 5-39 (d)(6)); and the facility must implement the recommendations for improvement, or must document its reasons for not doing so (§ 5-39 (e)).

Finally, § 5-39(f) requires the Department to provide the Board with all sexual abuse incident reviews on a quarterly basis.

### **Data Collection and Review (§ 5-40)**

Rule § 5-40 requires the Department to, among other things, provide the Board on a semiannual basis with data concerning each incident of alleged sexual abuse. Section 5-40 differs from

PREA Standard § 115.87 (“Data collection”) in that the rule specifies each data point to be reviewed and collected (§ 5-40(d)). In addition, unlike the proposed rule, which called for reporting these data points on an aggregate basis, the rule now requires that these data points be collected and reported to the Board with respect to each incident of alleged sexual abuse (§ 5-40(d)). This change was made to simplify and streamline the data collection and reporting process.<sup>23</sup>

Subdivision (d) of rule § 5-40 specifies the incident-related data to be collected, including, for example:

- The date, time and location of the incident and the type of alleged sexual abuse (d)(1);
- Whether the alleged abuse was staff-on-inmate or inmate-on-inmate ((d)(2)).
- The type of alleged abuse ((d)(3));
- Certain demographic information such as the sex of the alleged perpetrator and the alleged victim and whether the alleged victim was known by the Department to be transgender or intersex (d)(4);
- Who reported the incident and the method of reporting ((d)(5) and (6)).
- Whether the incident occurred in an area subject to video camera surveillance ((d)(7)).
- Whether the victim was administered or declined a rape kit ((d)(10)).
- When the investigation was opened and closed ((d)(11) and (12)).
- Whether the alleged incident was deemed substantiated, unsubstantiated or unfounded ((d)(13)).
- If the alleged perpetrator was a staff person, whether previous allegations of sexual abuse or sexual harassment had been lodged against him/her ((d)(16)).
- Whether investigation of the allegation was assumed by DOI and, if so, the status of the investigation ((d)(18)).
- Whether the allegation was referred to a DA’s Office and if so, the outcome ((d)(20)).
- Whether the allegation was referred for Department disciplinary action and, if so, the outcome ((d)(21)).

Subdivision (g) of the rule requires the Department to review this incident data in order to assess and improve the effectiveness of its sexual abuse and sexual harassment prevention, detection, and response policies, practices, and training, including by (1) identifying the problem areas and trends, (2) taking corrective action, and (3) including in a semiannual assessment report to the Board its findings and corrective action for each facility, as well as the Department as a whole.

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<sup>23</sup> A new subdivision (c) was added after public issuance of the proposed rules, which states that within two years of the Effective Date of these rules, the Board will reassess whether the data enumerated in § 5-40 are adequate to ensure effective monitoring of the Department’s and CHA’s compliance with the rules.

Section 5-40(i) requires the Department to make its semiannual assessment reports readily available to the public by posting them on the Department's website. Subdivision (j) permits the Department to redact specific material from these reports when publication would, for example, present a clear and present danger to the safety and security of the facility.<sup>24</sup>

#### Audits (§ 5-41)

Rule § 5-41 requires the Department to provide the Board with a copy of all audit reports, responses to audit reports, audit correction action plans, appeals of audit findings and decisions on appeal, which relate to audits of Department facilities or the Department as a whole pursuant to PREA Standards § 115.93 and §§115.401 through 115.405.

#### **Subchapter L: Variances § 5-42**

After publication of the proposed rules, a new rule § 5-42 was added, which permits the Department and CHA to apply for a variance from a specific subdivision or section of these rules in accordance with § 1-15 of Chapter 1 of the Board's Minimum Standards.

#### **Effective Date and Implementation Dates (Uncodified Rule §§ 2 and 3)**

Section 2 of the rule states that the rules in Chapter 5 will become effective on January 2, 2017.

Certain of the rules, such as those requiring staff training, drafting of directives and policies, or preparation of reports, will not be implemented on the effective date. The implementation dates for these rules are specified therein and are also listed in a chart in uncodified § 3.

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<sup>24</sup> Subdivision (j) contains additional bases for redaction, e.g., where the information would present a threat to privacy.

## The Rules

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of the Board of Correction, unless otherwise specified or unless the context clearly indicates otherwise.

New material is underlined. [Deleted material is in brackets.]

Section 1. Title 40 of the Rules of the City of New York is amended by adding a new chapter 5 to read as follows:

### Chapter 5: Elimination of Sexual Abuse and Sexual Harassment in Correctional Facilities

#### Subchapter A: Definitions

##### § 5-01 General Definitions.

As used in this chapter:

**Board** means the New York City Board of Correction.

**CHA** means the Correctional Health Authority designated by the City of New York as the agency responsible for health and mental health services for inmates in the care and custody of the Department, including CHA contractor staff or volunteers.

**CHA employee or staff** means an employee who works directly for CHA.

**Contractor** means a person who provides services on a recurring basis pursuant to a contractual agreement with the Department or CHA.

**DA** means a District Attorney’s Office.

**Department** means the New York City Department of Correction.

**Department employee or staff** means an employee who works directly for the Department.

**Direct staff supervision** means that Department security staff are in the same room with, and within reasonable hearing distance of, the inmate.

**DOI** means the New York City Department of Investigation.

**Exigent circumstances** mean any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility.

**Facility** means a place, institution, building (or part thereof), set of buildings, structure, or area (whether or not enclosing a building or set of buildings) used by the Department for the confinement of individuals.

**Gender nonconforming** means a person whose appearance or manner does not conform to traditional societal gender expectations.

**ID staff** means any employee or staff who works directly for the Department in the Department's Investigation Division.

**Inmate** means any person incarcerated or detained in a facility.

**Intersex** means a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.

**Medical practitioner** means a health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A "qualified medical practitioner" means such a professional who has also successfully completed specialized training for treating sexual abuse victims.

**Mental health practitioner** means a mental health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A "qualified mental health practitioner" means such a professional who has also successfully completed specialized training for treating sexual abuse victims.

**Nunez Agreement** means the Consent Judgment in *Nunez v. City of New York*, 11 Civ. 05845 (SDNY).

**Pat-down search** means a running of the hands over the clothed body of an inmate by an employee to determine whether the individual possesses contraband.

**Security staff** means Department employees primarily responsible for the supervision and control of inmates, detainees, or residents in housing units, recreational areas, dining areas, and other program areas of the facility.

**Strip search** means a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person's breasts, buttocks, or genitalia.

**Transgender** means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person's assigned sex at birth.

**Substantiated allegation** means an allegation that was investigated and determined to have occurred.

**Unfounded allegation** means an allegation that was investigated and determined not to have occurred.

**Unsubstantiated allegation** means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred.

**Volunteer** means an individual who donates time and effort on a recurring basis to enhance the activities or programs of the Department or CHA.

**§ 5-02 Definitions Related to Sexual Abuse.**

For purposes of this chapter, the term—

(a) Sexual abuse includes:

(1) Sexual abuse of an inmate by another inmate; and

(2) Sexual abuse of an inmate by a staff member, contractor, or volunteer.

(b) Sexual abuse of an inmate by another inmate includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse:

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

(3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and

(4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation.

(c) Sexual abuse of an inmate by a staff member, contractor, or volunteer includes any of the following acts, with or without consent of the inmate:

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

- (3) Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (6) Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in paragraphs (1)-(5) of this section;
- (7) Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, and
- (8) Voyeurism by a staff member, contractor, or volunteer.

(d) Voyeurism by a staff member, contractor, or volunteer means an invasion of privacy of an inmate by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions.

(e) Sexual harassment includes—

(1) Repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate directed toward another; and

(2) Repeated verbal comments or gestures of a sexual nature to an inmate by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.

## **Subchapter B: Prevention Planning**

### **§ 5-03 Zero Tolerance of Sexual Abuse and Sexual Harassment; PREA Coordinator.**

(a) The Department shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the Department's approach to preventing, detecting, and responding to such conduct.

(b) The Department shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee Department efforts to comply with this Chapter in all facilities.

(c) Each facility shall designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

#### **§ 5-04 Supervision and Monitoring.**

(a) The Department shall ensure that by January 31, 2018, each facility it operates develops, documents, and makes its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities shall take into consideration:

- (1) Generally accepted detention and correctional practices;
- (2) Any judicial findings of inadequacy;
- (3) Any findings of inadequacy from Federal investigative agencies;
- (4) Any findings of inadequacy from internal or external oversight bodies;
- (5) All components of the facility's physical plant (including "blind-spots" or areas where staff or inmates may be isolated);
- (6) The composition of the inmate population;
- (7) The number and placement of supervisory staff;
- (8) Institution programs occurring on a particular shift;
- (9) Any applicable State or local laws, regulations, or standards;
- (10) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and
- (11) Any other relevant factors.

(b) In circumstances where the staffing plan is not complied with, the facility shall document and justify all deviations from the plan.

(c) By February 1, 2018, the Department shall provide the Board with each facility's staffing plan required to be developed pursuant to subdivision (a) of this section.

(d) The Department shall provide a written report to the Board of the progress toward developing and implementing facility staffing plans by July 15, 2017.

(e) Whenever necessary, but no less frequently than once each year, for each facility the Department operates, in consultation with the PREA coordinator required by § 5-03 of this Chapter, the Department shall assess, determine, and document whether adjustments are needed to:

(1) The staffing plan established pursuant to subdivision (a) of this section;

(2) The facility's deployment of video monitoring systems and other monitoring technologies; and

(3) The resources the facility has available to commit to ensure adherence to the staffing plan.

(f) The Department shall provide annually to the Board, in writing, all deviations or adjustments to such plans that the Department is required to document pursuant to subdivisions (b) and (e) of this section. The Department shall provide this information to the Board by the first business day of March starting in 2019 (regarding deviations or adjustments that occurred in 2018) and by each first business day of March thereafter.

(g) By July 31, 2017, the Department shall institute a one-year pilot program to install video surveillance cameras in Department vehicles used to transport inmates. By September 1, 2018, the Department shall provide a written report to the Board evaluating the results of this pilot program, including any benefits or challenges associated with the installation of video surveillance cameras in inmate transport vehicles.

(h) After termination of the *Nunez* Agreement, the Department shall provide to the Board a detailed description of the criteria the Department shall consider in determining whether a surveillance camera should be installed in a particular area of a facility ("installation protocol"). The purpose of the installation protocol shall be to ensure that, to the extent necessary and feasible, additional surveillance cameras shall be installed. The Department shall provide annually a written report to the Board on action taken pursuant to this protocol.

(i) After termination of the *Nunez* Agreement, the Department shall provide the Board with a detailed description of the process it will follow to determine whether all surveillance cameras are functioning properly and, if not, the procedures for replacing or repairing such cameras ("maintenance protocol"). The purpose of the maintenance protocol shall be to ensure that all surveillance cameras are maintained to function properly and, if repairs are required, they are timely made. The Department shall provide annually a written report to the Board on action taken pursuant to this protocol.

(j) When the Department is notified of a sexual abuse incident within 90 days of the date of the incident, the Department will preserve any video capturing the incident until the later of: (i) four (4) years after the incident, or (ii) 90 days following the conclusion of an investigation into the sexual abuse incident, or of any disciplinary, civil, or criminal proceedings relating to the incident, provided the Department was on notice of any such investigation or proceeding prior to four years (4) after the incident.

(k) 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. Rounds shall be conducted at unpredictable and varied times. 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 issue a written directive to staff regarding these monitoring rounds and provide this directive to the Board.

(l) The Department shall have a written policy requiring consideration of the feasibility of placing 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 area.

#### **§ 5-05 Youthful Inmates.**

(a) Any inmate under the age of 18 shall not be placed in a housing unit in which the inmate under the age of 18 will have sight, sound, or physical contact with any inmate 18 years old or more through use of a shared dayroom or other common space, shower area, or sleeping quarters.

(b) In areas outside of housing units, the Department shall either:

(1) Maintain sight and sound separation between any inmate under the age of 18 and any inmate 18 years old or more, or

(2) Provide direct staff supervision when any inmate under the age of 18 and any inmate 18 years old or more have sight, sound, or physical contact.

#### **§ 5-06 Limits to Cross-Gender Viewing and Searches.**

(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.

(b) The Department shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. The Department shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.

(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 of female inmates.

(d) The Department shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite

gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit.

(e) The Department shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(f) The Department shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible consistent with security needs. For purposes of these searches, unless exigent circumstances require otherwise, the Department shall make its best efforts to treat intersex and transgender inmates in accordance with their gender identity. The Department shall conduct this training in accordance with the timelines set forth in § 5-12(f) of this Chapter.

(g) The Department shall issue a written directive to all staff incorporating the provisions of this section and provide this directive to the Board by June 1, 2017.

#### **§ 5-07 Inmates with Disabilities and Inmates Who Are Limited English Proficient.**

(a) The Department shall take appropriate steps to ensure that inmates with disabilities (including, for example, inmates who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the Department's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with inmates who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the Department shall ensure that written materials are provided in formats or through methods that ensure effective communication with inmates with disabilities, including inmates who have intellectual disabilities, limited reading skills, or who are blind or have low vision. The Department is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated pursuant to title II of the Americans With Disabilities Act, 28 C.F.R. § 35.164.

(b) The Department shall take reasonable steps to ensure meaningful access to all aspects of the Department's efforts to prevent, detect, and respond to sexual abuse and sexual harassment for inmates who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The Department shall not rely on inmate interpreters, inmate readers, or other types of inmate assistants except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the inmate's safety, the performance of first-response duties under § 5-26 of this Chapter, or the investigation of the inmate's allegations.

**§ 5-08 Hiring and Promotion Decisions.**

(a) The Department shall not hire or promote anyone who may have contact with inmates, and shall not enlist the services of any contractor who may have contact with inmates, who—

- (1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. § 1997);
- (2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or
- (3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The Department shall consider 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 inmates.

(c) Before hiring new employees who may have contact with inmates, the Department shall:

- (1) Perform a criminal background records check; and
- (2) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The Department shall also perform a criminal background records check before enlisting the services of any contractor or volunteer who may have contact with inmates.

(e) The Department and CHA shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with inmates or have in place a system for otherwise capturing such information for current employees.

(f) The Department shall ask all applicants and employees who may have contact with inmates directly about previous misconduct described in subdivision (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The Department shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

(h) Unless prohibited by law and upon the written consent of a Department employee pursuant to New York Civil Rights Law § 50-a, the Department shall provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

(i) Unless prohibited by law, CHA shall provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

#### **§ 5-09 Upgrades to Facilities and Technologies.**

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of existing facilities, the Department shall consider the effect of the design, acquisition, expansion, or modification upon the Department's ability to protect inmates from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the Department shall consider how such technology may enhance the Department's ability to protect inmates from sexual abuse.

#### **Subchapter C: Responsive Planning**

#### **§ 5-10 Evidence Protocol and Forensic Medical Examinations.**

(a) The Department shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be developmentally appropriate for youth where applicable, and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," or similarly comprehensive and authoritative protocols developed after 2011.

(c) The Department shall offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without financial cost, where evidentiarily

or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The Department shall document its efforts to provide SAFEs or SANEs.

(d) Rape crisis intervention and counseling services shall be offered and delivered to inmates in the facility in which they are housed (the "Initiative"). CHA shall be responsible for the delivery of such services by qualified victim advocates. For the purposes of this section, a qualified victim advocate is an individual who has been screened for appropriateness to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

(e) As requested by the victim, a qualified victim advocate shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.

(f) Qualified victim advocates shall assure inmates who request these services that all communications between counselors and inmates shall be kept confidential. Consistent with § 5-21(b) of this Chapter, advocates shall also inform inmates, prior to providing services, of the extent to which their communications with inmates will be monitored and the extent to which reports of sexual abuse will be forwarded to authorities in accordance with mandatory reporting laws.

(g) Services pursuant to this Initiative shall be offered as soon as possible after an incident of alleged sexual abuse is reported, but in no event later than one week after the report is received by the Department or CHA.

(h) CHA shall implement this Initiative by June 1, 2018. By June 1, 2017, CHA shall provide the Board with a written plan describing:

- (1) The services to be provided;
- (2) The credentials of the qualified victim advocates who will provide these services;
- (3) Inmates' access to qualified victim advocates;
- (4) Privacy and confidentiality of in-person, written, and telephone communications between inmates and qualified victim advocates; and
- (5) Communication to inmates about these services.

(i) CHA shall provide the Board with a quarterly report of the steps taken toward implementation of this Initiative. CHA shall provide the first quarterly report to the Board on July 5, 2017 with respect to the previous three (3) months (i.e., April 1, 2017 through June 30, 2017)

and on the third business day of the month following the end of each quarter thereafter. CHA shall provide such reports to the Board until the Initiative is fully implemented.

(i) After implementation of this Initiative, CHA shall provide annually a written report to the Board assessing the Initiative's effectiveness, which shall include the number of inmates who received such services during the year that is the subject of the report. CHA shall provide its first annual report to the Board on July 2, 2019 with respect to the preceding year (i.e., June 1, 2018 through June 1, 2019) and within 30 days of the end of each year thereafter.

#### **§ 5-11 Policies to Ensure Referrals of Allegations for Investigations.**

(a) The Department shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) The Department shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are referred for investigation 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.

(c) If a separate entity is responsible for conducting criminal investigations, such publication shall describe the responsibilities of both the Department and the investigating entity.

#### **Subchapter D: Training and Education**

##### **§ 5-12 Employee Training.**

(a) The Department and CHA shall train all of their employees who may have contact with inmates on:

- (1) The zero-tolerance policy for sexual abuse and sexual harassment;
- (2) How to fulfill their responsibilities under Department and CHA sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures;
- (3) Inmates' right to be free from sexual abuse and sexual harassment;
- (4) The right of inmates and employees to be free from retaliation for reporting sexual abuse and sexual harassment;
- (5) The dynamics of sexual abuse and sexual harassment in confinement;
- (6) The common reactions of sexual abuse and sexual harassment victims;

- (7) How to detect and respond to signs of threatened and actual sexual abuse;
- (8) How to avoid inappropriate relationships with inmates;
- (9) How to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming inmates; and
- (10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

(b) Such training shall be tailored to the gender of the inmates at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male inmates to a facility that houses only female inmates, or vice versa.

(c) All current employees who have not received such training shall be trained. The Department and CHA shall provide each of their employees with refresher training every two years to ensure that all employees know the Department's and CHA's current sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the Department and CHA shall provide refresher information on current sexual abuse and sexual harassment policies.

(d) The Department and CHA shall document, through employee signature or electronic verification, that their employees understand the training they have received.

(e) All CHA employees shall be trained by December 31, 2018.

(f) All Department employees shall be trained by December 31, 2021.

(1) At least 20% of all Department employees shall be trained by December 31, 2017.

(2) At least 40% of all Department employees shall be trained by December 31, 2018.

(3) At least 60% of all Department employees shall be trained by December 31, 2019.

(4) At least 80% of all Department employees shall be trained by December 31, 2020.

(g) The Department and CHA shall report to the Board, in writing and on a quarterly basis, the number of their respective employees who have been trained during that quarter in accordance with this section. The Department and CHA shall provide their first quarterly report

to the Board on May 1, 2017 with respect to the previous three months (i.e., January 1, 2017 through March 31, 2017) and within 30 days of the end of each quarter thereafter, until such training has been completed.

(h) The training of Department and CHA staff on working with inmates who are transgender or intersex shall include the psychosocial and safety needs of such persons in custody and instruction on communicating in a manner that is respectful of their gender identity. The Department and CHA shall complete such training by January 2, 2018.

(i) The Department and CHA shall provide to the Board on an annual basis the training schedules, training curriculum and credentials of the trainers, in accordance with this section, starting on March 1, 2017 for the previous year and on the first business day of March following the end of each year thereafter.

#### **§ 5-13 Volunteer and Contractor Training.**

(a) The Department and CHA shall ensure that each of their volunteers and contractors who have contact with inmates have been trained on their responsibilities under the Department's and CHA's sexual abuse and sexual harassment prevention, detection, and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with inmates, but all volunteers and contractors who have contact with inmates shall be notified of the Department's and CHA's zero-tolerance policy regarding sexual abuse and sexual harassment and informed of how to report such incidents.

(c) The Department and CHA shall maintain documentation confirming that their volunteers and contractors understand the training they have received.

(d) The Department and CHA shall complete the training of volunteers by July 31, 2017.

(e) The Department and CHA shall complete the training of contractors by July 31, 2019.

(f) The Department and CHA shall provide to the Board on an annual basis the training schedules, training curriculum and credentials of the trainers, in accordance with this section, starting on March 1, 2017 for the previous year and on the first business day of March following the end of each year thereafter.

#### **§ 5-14 Inmate Education.**

(a) During the intake process, inmates shall receive information explaining the Department's zero-tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.

(b) Within 30 days of intake, the Department shall provide comprehensive education to inmates either in person or through video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding Department policies and procedures for responding to such incidents.

(c) The Department shall provide inmate education in formats accessible to all inmates, including those who are limited English proficient, deaf, visually impaired, or otherwise disabled, as well as to inmates who have limited reading skills.

(d) The Department shall maintain documentation of inmate participation in these education sessions.

(e) In addition to providing such education, the Department shall ensure that key information is continuously and readily available or visible to inmates through posters, inmate handbooks, or other written formats.

(f) The Department shall commence providing inmate education described in subdivisions (a) through (e) of this section on April 3, 2017 provided the Department has sufficient resources and necessary staffing.

(g) The Department shall provide to the Board on an annual basis the inmate education schedules, education curriculum and the credentials of the persons providing such education to inmates, in accordance with this section, starting on March 1, 2018 for the preceding year and on the first business day of March following the end of each year thereafter.

#### **§ 5-15 Specialized Training: Investigations.**

(a) In addition to the general training provided to all employees pursuant to § 5-12 of this Chapter, the Department shall ensure that its investigators have received training in conducting sexual abuse investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of Miranda and Garrity warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

(c) The Department shall maintain documentation that Department investigators have completed the required specialized training in conducting sexual abuse investigations.

(d) The Department shall complete specialized training of its investigators by April 3, 2017.

(e) The Department shall provide to the Board on an annual basis the training schedules, training curriculum and credentials of the trainers, in accordance with this section, starting on March 1, 2017 for the previous year and on the first business day of March following the end of each year thereafter.

**§ 5-16 Specialized Training: Medical and Mental Health Care.**

(a) CHA shall ensure that all full- and part-time medical and mental health care practitioners who work regularly in facilities have been trained in:

- (1) How to detect and assess signs of sexual abuse and sexual harassment;
- (2) How to preserve physical evidence of sexual abuse;
- (3) How to respond effectively and professionally to victims of sexual abuse and sexual harassment; and
- (4) How and to whom to report allegations or suspicions of sexual abuse and sexual harassment.

(b) The CHA shall maintain documentation that medical and mental health practitioners have received the training referenced in this section either from the CHA or elsewhere.

(c) Medical and mental health care practitioners shall also receive the training mandated for employees under § 5-12 or for contractors and volunteers under § 5-13 of this Chapter, depending upon the practitioner's status at CHA.

(d) The specialized training of CHA's full- and part-time medical and mental health practitioner staff shall be completed by April 3, 2017.

(e) CHA shall provide to the Board on an annual basis the training schedules, training curriculum and credentials of the trainers, in accordance with this section, starting on March 1, 2017 for the previous year and on the first business day of March following the end of each year thereafter.

**Subchapter E: Screening for Risk of Sexual Victimization and Abusiveness**

**§ 5-17 Screening for Risk of Victimization and Abusiveness.**

(a) All inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.

(b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

(c) Such assessments shall be conducted using an objective screening instrument. Such screening instrument shall be provided to the Board.

(d) The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:

- (1) Whether the inmate has a mental, physical, or developmental disability;
- (2) The age of the inmate;
- (3) The physical build of the inmate;
- (4) Whether the inmate has previously been incarcerated;
- (5) Whether the inmate's criminal history is exclusively nonviolent;
- (6) Whether the inmate has prior convictions for sex offenses against an adult or child;
- (7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
- (8) Whether the inmate has previously experienced sexual victimization; and
- (9) The inmate's own perception of vulnerability.

(e) The initial screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the Department, in assessing inmates for risk of being sexually abusive.

(f) Within a set time period, not to exceed 30 days from the inmate's arrival at the facility, the Department will reassess the inmate's risk of victimization or abusiveness based upon any additional, relevant information received by the Department since the intake screening.

(g) An inmate's risk level shall be reassessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the inmate's risk of sexual victimization or abusiveness.

(h) Inmates may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(1), (d)(7), (d)(8), or (d)(9) of this section.

(i) The Department shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this section in order to ensure that sensitive information is not exploited to the inmate's detriment by staff or other inmates.

#### **§ 5-18 Use of Screening Information.**

(a) The Department shall use information from the risk screening required by § 5-17 of this Chapter to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

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

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the 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.

(d) The Department shall not assign a transgender or intersex inmate to a men's or women's facility based solely on the inmate's external genital anatomy.

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

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

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

(h) The Department shall notify the Board, in writing, of each placement of a transgender or intersex inmate, all information considered in making the determination and the reasons for the housing determination. The Department shall provide the Board with such information commencing on January 5, 2017 (with respect to the previous two-week period, i.e., December 19, 2016-December 31, 2016) and within two (2) business days following the end of each two-week period thereafter.

(i) The Department shall implement this section by the effective date of this rule provided the Department has sufficient resources and necessary staffing.

#### **§ 5-19 Protective Custody.**

(a) Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If the Department cannot conduct such an assessment immediately, the Department may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment.

(b) Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the Department restricts access to programs, privileges, education, or work opportunities, the facility shall document:

- (1) The opportunities that have been limited;
- (2) The duration of the limitation; and
- (3) The reasons for such limitations.

Documentation in accordance with subdivision (b) of this section shall commence on July 1, 2017.

(c) The Department shall assign such inmates to involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

(d) If an involuntary segregated housing assignment is made pursuant to subdivision (a) of this standard, the Department shall clearly document:

- (1) The basis for the Department's concern for the inmate's safety; and
- (2) The reason why no alternative means of separation can be arranged.

Documentation in accordance with subdivision (d) of this section shall commence on July 1, 2017.

(e) Every 30 days, the Department shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

(f) The Department shall issue a written directive to staff incorporating subdivisions (a), (b), (c), (d), and (e) of this section and provide this directive to the Board by July 1, 2017.

(g) The Department shall provide the Board with a quarterly report detailing:

- (1) The basis for its placement of any inmate at high risk of sexual victimization in involuntary segregated housing and the reasons why no alternative means of separation could be arranged; and
- (2) The number of such inmates who remain in involuntary segregated housing for more than 30 days.

(h) Commencing on November 1, 2017, the Department shall provide its first quarterly report to the Board with the respect to the previous three months (i.e., July 1, 2017 through September 30, 2017) and within 30 days of the end of each quarter thereafter.

## **Subchapter F: Reporting**

### **§ 5-20 Inmate Reporting.**

(a) The Department shall provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.

(b) The Department shall also provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the Department and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to Department officials, allowing the inmate to remain anonymous upon request.

(c) Department staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.

(d) The Department shall include all the ways inmates can report sexual abuse and sexual harassment on posters in all housing units, intake and program areas, clinics and mess halls, the Inmate Handbook and Visitors Handbook, and on the Department's public website.

(e) The Department shall provide a method for staff to privately report sexual abuse and sexual harassment of inmates.

(f) The Department shall issue a written directive to all staff stating the method for staff to privately report sexual abuse and sexual harassment of inmates and all the ways inmates can report incidents of sexual abuse and sexual harassment. The Department shall provide this directive to the Board.

(g) The Department shall comply with this section by April 3, 2017, except that the Department's Inmate Handbook and Visitor's Handbook shall be updated by December 31, 2017.

### **§ 5-21 Inmate Access to Outside Confidential Support Services.**

(a) The Department shall provide inmates with access to outside victim advocates for emotional support services related to sexual abuse by giving inmates mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations. The Department shall enable reasonable communication between inmates and these organizations and agencies, in as confidential a manner as possible.

(b) The Department shall inform inmates, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

(c) The Department shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide inmates with confidential emotional support services related to sexual abuse. The Department shall maintain copies of agreements or documentation showing attempts to enter into such agreements.

(d) The Department shall comply with this section by April 3, 2017.

#### **§ 5-22 Third-Party Reporting.**

(a) The Department shall establish a method to receive third-party reports of sexual abuse and sexual harassment and shall distribute publicly information on how to report sexual abuse and sexual harassment on behalf of an inmate.

(b) The Department shall include in its Visitors Handbook, and post on its website, how third parties can report sexual abuse and sexual harassment on behalf of an inmate.

#### **Subchapter G: Official Response Following an Inmate Report**

#### **§ 5-23 Staff and Agency Reporting Duties.**

(a) The Department shall require all staff to report immediately and according to Department policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility; retaliation against inmates or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

(b) Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary, as specified in Department policy, to make treatment, investigation, and other security and management decisions.

(c) Unless otherwise precluded by Federal, State, or local law, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA), New York Mental Hygiene Law § 33.13(10) and New York Public Health Law § 18, medical and mental health practitioners shall be required to report sexual abuse pursuant to subdivision (a) of this section and to inform inmates of the practitioner's duty to report, and the limitations of confidentiality, at the initiation of services.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the Department and CHA shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

(e) The Department shall report all allegations of sexual abuse and sexual harassment, including third-party and anonymous reports, to the investigators designated to investigate these allegations.

**§ 5-24 Agency Protection Duties.**

When the Department learns that an inmate is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the inmate.

**§ 5-25 Reporting to Other Confinement Facilities.**

(a) Upon receiving an allegation that an inmate was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility where the alleged abuse occurred.

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The facility initially receiving such allegation shall document that it has provided such notification.

(d) The facility head that receives such notification shall ensure that the allegation is investigated in accordance with these rules.

**§ 5-26 Staff First Responder Duties.**

(a) Upon learning of an allegation that an inmate was sexually abused, the first security staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence, and then notify security staff.

**§ 5-27 Coordinated Response.**

By April 3, 2017, the Department shall develop a written plan to coordinate actions taken in response to an incident of sexual abuse among staff first responders, medical and mental health practitioners, DOI or ID investigators, and facility leadership.

**§ 5-28 Agency Protection against Retaliation.**

(a) The Department shall establish a policy to protect all inmates and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other inmates or staff, and shall designate which staff members or departments are charged with monitoring retaliation.

(b) The Department shall employ multiple protection measures, such as housing changes or transfers for inmate victims or abusers, removal of alleged staff or inmate abusers from contact with victims, and emotional support services for inmates or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) For at least 90 days following a report of sexual abuse, the Department shall monitor the conduct and treatment of inmates or staff who reported the sexual abuse and of inmates who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by inmates or staff, and shall act promptly to remedy any such retaliation. Items the Department should monitor include any inmate disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. The Department shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need. No later than December 31, 2017, the Department shall commence such monitoring of inmates and staff who report incidents of sexual abuse.

(d) In the case of inmates, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the Department shall take appropriate measures to protect that individual against retaliation.

(f) The Department's obligation to monitor shall terminate if the Department determines that the allegation is unfounded.

(g) By April 3, 2017, the Department shall issue a written directive to all staff incorporating the provisions of this section and provide this directive to the Board.

**§ 5-29 Post-Allegation Protective Custody.**

Any use of segregated housing to protect an inmate who is alleged to have suffered sexual abuse shall be subject to the requirements of § 5-19 of this Chapter.

## **Subchapter H: Investigations**

### **§ 5-30 Criminal and Administrative Agency Investigations.**

(a) When the Department conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the Department shall use investigators who have received special training in sexual abuse investigations pursuant to § 5-15.

(c) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(d) When the quality of evidence appears to support criminal prosecution, the Department shall conduct compelled interviews only after consulting with DOI and/or prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(e) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as inmate or staff. The Department shall not require an inmate who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(f) All investigations:

(1) Shall include an effort to determine whether staff actions or failures to act contributed to the abuse; and

(2) Shall be documented in written reports that include a description of the physical, testimonial, and documentary evidence, the reasoning behind credibility assessments, and investigative facts and findings.

(g) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(h) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(i) The Department shall retain all written reports referenced in this section for as long as the alleged abuser is incarcerated or employed by the Department or CHA, plus five years.

(j) The departure of the alleged abuser or victim from the employment or control of the Department or the employment of CHA shall not provide a basis for terminating an investigation.

(k) When outside agencies investigate sexual abuse, the Department shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

(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.

(m) The Department shall complete all investigations of sexual abuse and sexual harassment allegations no later than 90 days from the Referral Date, absent extenuating circumstances outside the Department's control that warrant an extension of this deadline (which shall be documented). The Department shall implement this subsection by the effective date of this rule provided that the Department has sufficient resources and necessary staffing.

(n) If an incident of alleged sexual abuse is referred to DOI or the DA for investigation or a decision on immunity, the time for completion of the sexual abuse investigation shall be tolled while the other agency is investigating the matter or making a decision on immunity.

(o) Inmates subject to alleged sexual abuse or sexual harassment shall be interviewed within 72 hours of the Referral Date, absent unusual circumstances (which shall be documented).

(p) All interviews of staff involved in a sexual abuse or sexual harassment incident shall be completed within 30 days of any immunity grants, absent unusual circumstances (which shall be documented).

(q) When requesting an inmate's statement or interview, the inmate shall be assured that the inmate will not be subject to any form of retaliation for providing information in connection with the investigation of alleged sexual abuse or sexual harassment. Requests for statements or interviews shall be made off the living unit and shall not be made within sight or

hearing of other inmates or staff involved in the incident. Inmate interviews shall be conducted in a private and confidential setting.

(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.

(s) All closing memoranda shall be retained for as long as the alleged perpetrator of sexual abuse or sexual harassment is incarcerated or employed by the Department or CHA, plus five years.

(t) The Department shall issue a written directive to all ID staff incorporating the provisions of this section and provide this directive to the Board.

#### **§ 5-31 Evidentiary Standard for Administrative Investigations.**

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.

#### **§ 5-32 Reporting to Inmates.**

(a) Following an investigation into an inmate's allegation that he or she suffered sexual abuse in a facility, the Department shall inform the inmate as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.

(b) If the Department did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the inmate.

(c) Following an inmate's allegation that a Department or CHA staff member has committed sexual abuse against the inmate, the Department shall subsequently inform the inmate (unless the Department has determined that the allegation is unfounded) whenever:

- (1) The staff member is no longer posted within the inmate's unit;
- (2) The staff member is no longer employed at the facility;
- (3) The Department learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or
- (4) The Department learns that the staff member has been convicted on a charge related to sexual abuse within the facility.

(d) Following an inmate's allegation that he or she has been sexually abused by another inmate, the Department shall subsequently inform the alleged victim whenever:

(1) The Department learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or

(2) The Department learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.

(e) All such notifications or attempted notifications shall be documented.

## **Subchapter I: Discipline**

### **§ 5-33 Disciplinary Sanctions for Staff.**

(a) Department and CHA staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for Department and CHA staff who have engaged in sexual abuse.

(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, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of Department and CHA sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

### **§ 5-34 Corrective Action for Contractors and Volunteers.**

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with inmates and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The Department shall take appropriate remedial measures, and shall consider whether to prohibit further contact with inmates, in the case of any other violation of Department sexual abuse or sexual harassment policies by a contractor or volunteer.

### **§ 5-35 Disciplinary Sanctions for Inmates.**

(a) Inmates shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the inmate engaged in inmate-on-inmate sexual abuse or following a criminal finding of guilt for inmate-on-inmate sexual abuse.

(b) Sanctions shall be commensurate with the nature and circumstances of the abuse committed, the inmate's disciplinary history, and the sanctions imposed for comparable offenses by other inmates with similar histories.

(c) The disciplinary process shall consider whether an inmate's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(d) The Department may discipline an inmate for sexual contact with staff only upon a finding that the staff member did not consent to such contact.

(e) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(f) The Department may, in its discretion, prohibit all sexual activity between inmates and may discipline inmates for such activity. The Department may not, however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

#### **Subchapter J: Medical and Mental Care**

##### **§ 5-36 Medical and Mental Health Screenings; History of Sexual Abuse.**

(a) If the screening pursuant to § 5-17 of this Chapter indicates that an inmate has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, the Department shall ensure that the inmate is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.

(b) Any information related to sexual victimization or abusiveness that occurred in an institutional setting shall be strictly limited to medical and mental health practitioners and other staff, as necessary, to inform treatment plans and security and management decisions, including housing, bed, work, education, and program assignments, or as otherwise required by Federal, State, or local law.

(c) Medical and mental health practitioners shall obtain informed consent from inmates before reporting information about prior sexual victimization that did not occur in an institutional setting, unless the inmate is under the age of 18.

##### **§ 5-37 Access to Emergency Medical and Mental Health Services.**

(a) Inmate victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment.

(b) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders shall take preliminary steps to protect the victim pursuant to § 5-24 of this Chapter and shall immediately notify the appropriate medical and mental health practitioners.

(c) Inmate victims of sexual abuse while incarcerated shall be offered timely information about and timely access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where medically appropriate.

(d) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

#### **§ 5-38 Ongoing Medical and Mental Health Care for Sexual Abuse Victims.**

(a) CHA shall offer medical and mental health evaluation and, as appropriate, treatment to all inmates who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.

(b) The evaluation and treatment of such victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) CHA shall provide such victims with medical and mental health services consistent with the community level of care.

(d) Inmate victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.

(e) If pregnancy results from the conduct described in subdivision (d) of this section, such victims shall receive timely and comprehensive information about and timely access to all lawful pregnancy-related medical services.

(f) Inmate victims of sexual abuse while incarcerated shall be offered tests for sexually transmitted infections as medically appropriate.

(g) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

## **Subchapter K: Data Collection and Review; Audits**

### **§ 5-39 Sexual Abuse Incident Reviews.**

(a) The Department shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

(c) The review team shall include upper-level management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(d) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;

(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff;

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1)-(d)(5) of this standard, and any recommendations for improvement and submit such report to the facility head and PREA compliance manager.

(e) The Department shall implement the recommendations for improvement, or shall document its reasons for not doing so.

(f) The Department shall provide the Board with all sexual abuse incident review reports on a quarterly basis.

**§ 5-40 Data Collection and Review.**

(a) The Department shall collect accurate, uniform data for each alleged incident of sexual abuse at facilities (and in transport vehicles used to transport inmates) using a standardized instrument and definitions. For this purpose, the Department shall use the definitions of and related to inmate-on-inmate and staff-on-inmate sexual abuse set forth in subdivisions (a), (b), (c) and (d) of § 5-02. The Department shall provide the Board with such standardized instrument for its review at least 30 days before first providing the Board with the incident data specified in subdivision (d) of this section.

(b) The Department shall maintain, review and collect data pursuant to subdivisions (a), (d), (f) and (g) of this section from all incident-based documents and databases, including reports, investigation files, and sexual abuse incident reviews.

(c) Within two (2) years of the Effective Date of these rules, the Board will reassess whether the data enumerated in this section is adequate to ensure effective monitoring of the Department's and CHA's compliance with the rules embodied in this Chapter.

(d) The Department shall provide the Board with the following data regarding each alleged incident of sexual abuse:

- (1) Date, time and location of alleged incident;
- (2) Nature of alleged sexual abuse (e.g., officer-on-inmate; CHA staff-on-inmate; contractor- or volunteer-on-inmate; inmate-on-inmate, etc.);
- (3) Type of alleged sexual abuse (as defined in subdivisions (a), (b), (c) and (d) of § 5-02);
- (4) Demographics
  - (i) Gender of alleged victim (i.e., male or female);
  - (ii) Gender of alleged perpetrator (i.e., male or female);
  - (iii) Age of alleged victim (i.e., under age 18, 18-21, or over 21);
  - (iv) Age of alleged perpetrator (if an inmate) (i.e., under age 18, 18-21, or over 21);
  - (v) Race/ethnic origin of alleged victim (i.e., White-not of Hispanic origin; Black-not of Hispanic origin; Hispanic or Latino; other);
  - (vi) Whether the alleged victim is known to be transgender or intersex;
  - (vii) Whether the alleged victim is known to be lesbian, gay, or bisexual;
  - (viii) Whether the alleged victim is known to have any mental, physical or developmental disabilities;
- (5) Who reported the incident, if known (e.g., alleged victim; victim's family member, inmate other than victim; Department or CHA staff, etc.);
- (6) Method of reporting (e.g., via hotline, verbally or in writing, 311, etc.);
- (7) Video camera surveillance available (yes/no);
- (8) DNA evidence available (yes/no);
- (9) Other physical evidence available (yes/no);
- (10) Rape kit administered, declined or not applicable;

- (11) Date investigation was opened;
- (12) Date investigation was closed (e.g., by filing a closing memorandum or otherwise);
- (13) Whether the incident was substantiated, unsubstantiated or unfounded;
- (14) Whether the alleged perpetrator and alleged victim were separated during the investigation;
- (15) If the alleged perpetrator is a staff person, whether during the investigation, or after it was closed, the staff person was suspended, placed on modified duty, assigned to a no-inmate contact post, assigned to a restricted-inmate contact post, or placed on administrative leave;
- (16) If the alleged perpetrator is a staff person, whether previous allegations of sexual abuse or sexual harassment were lodged against that person;
- (17) If the alleged perpetrator is a staff person, whether the person declined an offer of use immunity pursuant to Mayor's Executive Order No. 16 and, if so, whether that person was subject to discipline as a result;
- (18) Whether DOI assumed the investigation, and if so, the status of the investigation (e.g., pending; referral made to a DA's Office, referred back to the Department, etc.);
- (19) Whether the allegation of staff-on-inmate or inmate-on-inmate sexual abuse was referred to a DA's Office, including whether that DA's Office declined to prosecute, and if the staff perpetrator was prosecuted, the outcome;
- (20) Whether the allegation was referred for disciplinary action, including (a) whether the Department's Trials & Litigation Division declined to file disciplinary charges, or if disciplinary charges were filed, the outcome; and (b) whether the alleged staff-member perpetrator resigned in lieu of charges or as part of a negotiated plea.

(e) Unless otherwise precluded by law, CHA will assist the Department in collecting the data enumerated in subdivision (d) of this section.

(f) The Department shall provide to Board the data enumerated in subdivision (d) of this section semiannually, commencing on August 1, 2017 (for the period January 1, 2017-June 30, 2017) and within 45 days of the end of each six-month period thereafter. The Department shall continue to update data in these reports regarding each alleged incident pending its final outcome.

(g) The Department shall review this incident data in order to assess and improve the effectiveness of its sexual abuse and sexual harassment prevention, detection, and response policies, practices, and training, including by:

- (1) Identifying problem areas and trends;
- (2) Taking corrective action on an ongoing basis; and

(3) Including in a semiannual assessment report to the Board its findings and corrective actions for each facility, as well as the Department as a whole.

(h) Such semiannual assessment report shall also include a comparison of the current six (6) months' data and corrective actions with those from the prior six (6) months and shall provide an assessment of the Department's progress in addressing sexual abuse and sexual harassment.

(i) Such semiannual assessment reports shall be approved by the Commissioner of the Department, submitted to the Board, and made readily available on the Department's website.

(j) The Department may redact specific material from semiannual assessment reports when publication would present a clear and specific threat to the safety and security of a facility, or would present privacy or other legal considerations, but must indicate the nature of the material redacted.

(k) The Department shall provide its first semiannual assessment report to the Board on August 1, 2017 (for the period January 1, 2017-June 30, 2017) and within 45 days of the end of each six-month period thereafter.

(l) The Department shall ensure that all data collected pursuant to this section is securely retained.

(m) Before making data collected pursuant to this section publicly available, the Department shall remove all personal identifiers.

(n) The Department shall maintain all data collected pursuant to this section for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

#### **§ 5-41 Audits**

The Department shall provide the Board with a copy of all audit reports, responses to audit reports, audit correction action plans, appeals of audit findings, and decisions on appeal, submitted to PREA-certified auditors pursuant to PREA Standard § 115.93 and PREA Standards §§ 115.401 through 115.405. The Department shall provide such material to the Board within two (2) business days after its submission to the auditors.

#### **Subchapter L: Variances**

##### **§ 5-42 Variances**

The Department or CHA may apply for a variance from a specific subdivision or section of these Chapter 5 rules in accordance with the procedures and criteria set forth in § 1-15 of Chapter 1 of these Minimum Standards.

§ 2. Effective Date. This rule shall take effect January 2, 2017.

§ 3. Implementation Dates. The policies, procedures, criteria, programs, plans, reports and forms required by the various sections of these rules shall be developed, approved and implemented by the dates specified therein. These time periods are also specified below. Unless otherwise stated therein and below, all time periods are computed from the effective date of these rules.

<u>Section</u>	<u>Implementation</u>
<u>5-04(a) (Supervision and Monitoring) (Department shall ensure that each of its facilities develops, documents, and make its best efforts to comply with a staffing plan)</u>	<u>By January 31, 2018</u>
<u>5-04(c) (Supervision and Monitoring) (Department shall provide the Board with facility staffing plans)</u>	<u>By February 1, 2018</u>
<u>5-04(d) (Supervision and Monitoring) (Department shall provide a written report to the Board of the progress toward developing and implementing facility staffing plans)</u>	<u>By July 15, 2017</u>
<u>5-04(f) (Supervision and Monitoring) (Department shall provide annually to the Board a written report of all deviations and adjustments to facility staffing plans)</u>	<u>Commencing on the first business day of March, 2019</u>
<u>5-04(g) (Supervision and Monitoring) (Department shall institute a one-year pilot program to install video surveillance cameras on Department vehicles used to transport inmates and provide the Board with a written report re same)</u>	<u>By July 31, 2017 (institute pilot program)</u> <u>By September 1, 2018 (written report)</u>

<u>Section</u>	<u>Implementation</u>
<p><u>5-06 (f) (Limits to Cross-Gender Viewing and Searches)</u>  <u>(Department shall train security staff in how to conduct cross-gender pat-down searches and searches of transgender and intersex inmates, and make its best efforts to treat intersex and transgender inmates in accordance with their gender identity)</u></p>	<p><u>All Department employees shall be trained by December 31, 2021.</u></p> <p><u>At least 20% of all Department employees shall be trained by December 31, 2017.</u></p> <p><u>At least 40% of all Department employees shall be trained by December 31, 2018.</u></p> <p><u>At least 60% of all Department employees shall be trained by December 31, 2019.</u></p> <p><u>At least 80% of all Department employees shall be trained by December 31, 2020.</u></p>
<p><u>5-06 (g) (Limits to Cross-Gender Viewing and Searching)</u>  <u>(Department shall issue directive to all staff and provide this directive to the Board)</u></p>	<p><u>By June 1, 2017</u></p>
<p><u>5-10(h) (Evidence Protocol and Forensic Medical Examinations)</u>  <u>(Rape crisis intervention and counseling services “Initiative” delivered to inmates in the facility in which they are housed)</u></p>	<p><u>By June 1, 2018</u></p>
<p><u>5-10(h)(1)-(5) (Evidence Protocol and Forensic Medical Examinations)</u>  <u>(CHA shall provide a written plan to the Board describing the Initiative)</u></p>	<p><u>By June 1, 2017</u></p>
<p><u>5-10(i) (Evidence Protocol and Forensic Medical Examinations)</u>  <u>(CHA shall provide a quarterly report to the Board of the steps</u></p>	<p><u>By July 5, 2017 until the Initiative is fully implemented</u></p>

<u>Section</u>	<u>Implementation</u>
<u>taken toward implementing the Initiative)</u>	
<u>5-10(j) (Evidence Protocol and Forensic Medical Examinations) (CHA shall provide annually a written report to the Board assessing the Initiative's effectiveness, etc.)</u>	<u>Commencing on July 2, 2019</u>
<u>5-12(e) (Employee Training) (CHA shall complete training of all of its employees)</u>	<u>By December 31, 2018</u>
<u>5-12(f) (Employee Training) (Department employees shall be trained)</u>	<u>All Department employees shall be trained by December 31, 2021.</u>  <u>At least 20% of all Department employees shall be trained by December 31, 2017.</u>  <u>At least 40% of all Department employees shall be trained by December 31, 2018.</u>  <u>At least 60% of all Department employees shall be trained by December 31, 2019.</u>  <u>At least 80% of all Department employees shall be trained by December 31, 2020.</u>
<u>5-12(g) (Employee Training) (Department and CHA shall report to the Board the number of their respective employees who have been trained in accordance with this section)</u>	<u>Commencing on May 1, 2017</u>
<u>5-12(h) (Employee Training) (Training of Department and CHA</u>	<u>By January 2, 2018</u>

<u>Section</u>	<u>Implementation</u>
<u>staff on working with inmates who are transgender or intersex)</u>	
<u>5-12(i) (Employee Training) (Department and CHA shall provide to the Board annually the training schedules, training curriculum and credentials of the trainers</u>	<u>Commencing on March 1, 2017</u>
<u>5-13(d) and (e) (Volunteer and Contractor Training)</u>	<u>By July 31, 2017 (training of volunteers)</u> <u>By July 31, 2019 (training of contractors)</u>
<u>5-13(f) (Volunteer and Contractor Training) (Department and/or CHA shall provide to the Board training information)</u>	<u>Commencing on March 1, 2017</u>
<u>5-14(f) (Inmate education)</u>	<u>Commence by April 3, 2017 provided the Department has sufficient resources and necessary staffing</u>
<u>5-14(g) (Inmate Education) (Department shall provide the Board on an annual basis with the inmate education schedules, education curriculum and credentials of the persons providing such training</u>	<u>Commencing on March 1, 2018</u>
<u>5-15(d) (Specialized Training; Investigations)</u>	<u>By April 3, 2017</u>
<u>5-15(e) (Specialized Training; Investigations) (Department shall provide the Board with training materials)</u>	<u>Commencing on March 1, 2017</u>
<u>5-16(d) (Specialized Training; Medical and Mental Health Care)</u>	<u>By April 3, 2017</u>
<u>5-16(e) (Specialized Training; Medical and Mental Health Care)</u>	<u>Commencing on March 1, 2017</u>

<u>Section</u>	<u>Implementation</u>
<u>(CHA shall provide the Board training materials)</u>	
<u>5-18 (h) (Use of Screening Information) (Department shall provide the Board each placement of a transgender or intersex inmate, all information considered in making the housing determination and the reasons therefor)</u>	<u>Commencing on January 5, 2017</u>
<u>5-19(b) (Protective Custody) (Documentation in accordance with subdivision (b) of this section)</u>	<u>Commencing on July 1, 2017</u>
<u>5-19(d) (Protective Custody) (Documentation in accordance with subdivision (d) of this section)</u>	<u>Commencing on July 1, 2017</u>
<u>5-19(f) (Protective Custody) (Department shall issue a written directive to staff incorporating that section)</u>	<u>By July 1, 2017</u>
<u>5-19(h) (Protective Custody) (Department to provide a quarterly report to the Board)</u>	<u>Commencing on November 1, 2017</u>
<u>5-20(g) (Inmate Reporting)</u>	<u>By April 3, 2017, except that the Department's Inmate Handbook and Visitor's Handbook shall be updated by December 31, 2017.</u>
<u>5-21 (Inmate Access to Outside Confidential Support Services)</u>	<u>By April 3, 2017</u>
<u>5-27 (Coordinated Response)</u>	<u>By April 3, 2017</u>
<u>5-28(c) and (d) (Agency Protection against Retaliation) (For at least 90 days, following a report of sexual abuse, the Department will monitor the conduct and treatment of</u>	<u>Commence December 31, 2017</u>

<u>Section</u>	<u>Implementation</u>
<u>inmates or staff who reported the sexual abuse and of inmates reported to have suffered sexual abuse</u>	
<u>5-28(g) (Agency Protection against Retaliation) (Department shall issue a written directive to all staff incorporating the provisions of this section and provide this directive to the Board)</u>	<u>By April 3, 2017</u>
<u>5-40(f) (Data Collection and Review) (Department shall provide the Board semiannually with data)</u>	<u>Starting on August 1, 2017</u>
<u>5-40 (k) (Data Collection and Review) (Department shall provide the Board with semiannual assessment reports in accordance with this section)</u>	<u>Commencing August 1, 2017</u>



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Stanley Brezenoff, Chair  
New York City Board of Correction

Re: Final Rule Regarding Prevention, Detection and Response to Sexual Abuse  
and Sexual Harassment of Incarcerated Persons

No. 2016 RG 055

Dear Chair Brezenoff:

Pursuant to New York City Charter § 1043 subd. c, the above-referenced rule has been reviewed and determined to be within the authority delegated by law to your agency.

Sincerely,

A handwritten signature in blue ink that reads "Steven L. Goulden".

STEVEN GOULDEN  
Senior Counsel  
Division of Legal Counsel

cc: Martha King (BOC)