NYCLU
NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

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Mr. Bennett Stein
Special Assistant to the Executive Director
NYC Board of Correction
1 Centre Street, Room 2213
New York, New York 10007

Sent via email to bstein@boc.nyc.gov

RE: Comments from the New York Civil Liberties Union on the Addition of Chapter 5 to Title 40 of the Rules of the City of New York Relating to the Implementation of the Prison Rape Elimination Act

Dear Mr. Stein:

The New York City Board of Correction (the "Board" or "BOC") has proposed rules designed to detect, prevent and respond to sexual abuse and sexual harassment of persons incarcerated in facilities operated by the New York City Department of Correction (the "Department" or "DOC"). The New York Civil Liberties Union ("NYCLU") strongly supports BOC's proposal to take measures to implement the standards promulgated by the United States Department of Justice ("DOJ") pursuant to the Prison Rape Elimination Act of 2003 ("PREA"), 42 U.S.C. §§ 15601, et. seq. BOC's adoption of these regulations is an important first step toward protecting people in the New York City jail system from sexual violence and harassment.

While we support adoption of the rules, we urge the Board to strengthen them in several essential respects. In broad terms, our recommendations include:

- Creating additional protections to ensure the safety of incarcerated people under the age of 18, including adoption of certain PREA regulations addressing juvenile facilities (Comments to §§ 5.05, 5.12);

- Strengthening the protections for LGBT, gender non-conforming and intersex individuals, including retention of the Transgender Housing Unit (Comments to §§ 5.01, 5.06, 5.16, 5.18);

- Ensuring the investigatory process is objective and independent (Comments to § 5.11);

- Adding necessary safeguards to protect against sexual abuse before it happens (Comments to §§ 5.04, 5.08, and Section XIII);

- Increasing confidential avenues for reporting and lessening the potential for retaliation against reporters (Comments to §§ 5.20, 5.21, 5.32, and Section XVII); and

- Improving the reporting and audit rules to ensure that data on sexual abuse is publicly disclosed for independent review and analysis and sufficiently comprehensive to design and implement corrective action (Comments to §§ 5.40, 5.41).

We urge the Board to recognize that the PREA regulations set a national baseline, but the BOC's Final Rules should be designed and implemented to reflect the particular structure of DOC facilities, the ways that staff and inmates interact within those facilities, existing policies and procedures, and the possibility that the population held in DOC facilities may change in the future. Our recommendations are based upon our knowledge of DOC facilities and particular problems that should be addressed above and beyond what the PREA regulations specifically require. Such considerations include, for instance, the continued presence of 16- and 17-year-olds on Rikers, the transient nature of the confined population, and the relatively high numbers of LGBT and gender non-conforming people. Moving forward, BOC should remain actively involved in reviewing and independently evaluating data reported by DOC to ensure that the Final Rules are implemented and effective.

I. The Importance of Adopting Regulations to Combat Sexual Violence in DOC Facilities

The current available data on the rate of sexual violence in DOC facilities demonstrates the need for immediate corrective action. While 3.2% of jail inmates across the nation reported sexual victimization in 2011 and 2012, people jailed in DOC facilities reported significantly higher rates: 5.6% at the Anna M. Kross Center, 5.3% at the George Motchan Detention Center, 6.2% at the Otis Bantum Correctional Center, 3.4% at the Robert N. Davoren Complex, and a troubling 8.6% at the Rose M. Singer Center.[1] Yet according to a recent report by DOC, there were almost 200 allegations of sexual abuse in 2015, but only a single instance was deemed substantiated.[2] This report suggests that the current lack of objective, independent investigation of sexual abuse allegations may hinder effective responses to the problem.

BOC's adoption of regulations implementing the Prison Rape Elimination Act ("PREA") is necessary and urgent. In recognition of the staggering incidence of rape and sexual violence in confinement settings, Congress passed PREA unanimously and President George Bush signed it

[1] Allen Beck, Marcus Berzofsky, Rachel Caspar & Christopher Krebs, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12: National Inmate Survey, 2011-12 (U.S. Department of Justice, Bureau of Justice Statistics, May 2013) (hereinafter "BJS 2011-2012 Report").

[2] New York City Department of Correction, Report Pursuant to Local Law 33: CY 2015, available at http://www1.nyc.gov/assets/doc/downloads/pdf/ReportRegardingSexualAbuseAllegationsIncidents.pdf.

into law in 2003. PREA required the DOJ to gather data on sexual violence in prison and jails and created the National Prison Rape Elimination Commission to study the problem and recommend regulations. After nine years of study and commentary by experts, the DOJ promulgated a comprehensive set of regulations implementing the Act in May 2012 that set baseline requirements for all confinement facilities across the country. These regulations require agencies that run confinement facilities, including DOC, to adopt written policies mandating zero tolerance toward all forms of sexual abuse and harassment and outlining the approach to prevent, detect, and respond to such conduct.

Beyond the requirements of PREA, government agencies are bound by the United States Constitution to protect prisoners from sexual violence and abuse whether perpetrated by their own staff or by other prisoners. The Supreme Court firmly established this duty in Farmer v. Brennan, 511 U.S. 825 (1994), holding that deliberate indifference to a substantial risk of sexual assault violates prisoners' rights under the cruel and unusual punishment clause of the Eighth Amendment. The duty to protect against sexual assault also applies to pre-trial detainees. See e.g., Cash v. County of Erie, 654 F.3d 324 (2d Cir. 2011). Explicit in the Supreme Court's jurisprudence is the recognition that sexual violence is an affront to human dignity and leads to severe psychological and physical effects for the people it impacts.

Adoption of a written policy aimed at combating sexual abuse and harassment is required by federal law and the United States Constitution in light of the prevalence of sexual violence. The NYCLU applauds BOC for proposing a zero tolerance policy and urges the below amendments and clarifications to strengthen the Final Rules. NYCLU's recommendations, set forth below, proceed through the Proposed Rules sequentially. Proposed additions are bold and proposed omissions are struck through.

II. § 5-01: General Definitions

The NYCLU urges additional guidance on what constitutes "exigent circumstances." Several requirements in the Proposed Rules are excused in the case of exigent circumstances, including, for instance, the prohibition of cross-gender searches (Proposed Rule § 5-06(a) and (b)) and cross-gender viewing of private body parts and functions (Proposed Rule § 5-06(d)) and the rule that transgender and intersex inmates are searched in accordance with their gender identity (Proposed Rule § 5-06(f)). While departure from these requirements may be appropriate in certain extraordinary circumstances, such as a natural disaster or unforeseen riot, such exceptions are frequently misunderstood or abused by correctional staff. To prevent the overuse of this exception and to limit the inappropriate use of officer discretion in these circumstances, we propose that BOC provide examples of what does and does not constitute "exigent circumstances" and require detailed documentation whenever correctional staff claim this exception. Specifically, we recommend the following:

> § 5-01: Exigent Circumstances means 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. **For example, inadequate staffing levels as the result of an employee calling in sick does not constitute exigent circumstances. Should exigent circumstances arise justifying departure from any rule herein, Department staff are**

required to detail in writing and submit to the PREA Coordinator the nature of the exigent circumstances requiring such departure.

In order to provide proper guidance on frequently used terms throughout Chapter 5, we also recommend adding the following definitions:

§ 5-01: Sexual Orientation refers to a person's romantic and physical attraction. A continuum of sexual orientation exists.

§ 5-01: Gender Identity refers to a person's deeply felt inner sense of being male, female, or along the spectrum between male and female. Gender identity is independent of sexual orientation.

§ 5-01: Gender expression refers to the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice or mannerisms. Gender expression is independent of sexual orientation.

III. § 5-04: Supervision and Monitoring

The NYCLU recommends that BOC provide additional guidance to ensure that supervisor rounds are varied and unpredictable, require the installation of video cameras in transport vehicles, and prohibit deletion of any video surveillance footage for a minimum of six months.

The NYCLU applauds the additional protections proposed by BOC beyond those set by the PREA standards relating to unannounced supervisor rounds, specifically that these rounds be varied and unpredictable. See Proposed Rule § 5-04(j). However, additional guidance is needed to ensure that staff cannot predict the timing and frequency of supervisor rounds and they take the prohibition against alerting other staff seriously. For these reasons, we support the additions suggested by the Legal Aid Society Prisoners' Rights Project ("LAS") to Proposed Rule § 5-04(j):

§ 5-04(j): The Department shall implement a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such rounds shall be conducted during night shifts as well as day shifts. **These supervisors shall make frequent rounds, with each Captain making rounds to each area that is under his or her supervision at least twice per shift unless prevented by legitimate security concerns, and more frequently if possible.** Rounds shall be conducted at unpredictable and varied times**, with varied entry points if possible, and shall at times include repeated visits close in time to the same areas. Particular scrutiny shall be paid to isolated areas in the jails.** The Department shall have a policy to prohibit staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility. **The Department shall monitor whether this rule is being followed, and shall discipline staff for insubordination if they determine that staff are ignoring or have violated this rule. The disciplinary**

measures that the Department imposes on correctional staff for announcing supervisory rounds shall be sufficiently serious to serve as a deterrent. The Department shall issue a written directive to staff regarding these monitoring rounds and provide this directive to the Board.

The NYCLU also urges BOC to explicitly require the installation of video cameras in all transportation vehicles and any other location where sexual abuse is frequently reported. As detailed by the Sylvia Rivera Law Project ("SRLP") and LAS, there have been numerous reports of sexual abuse and harassment in DOC transportation vehicles and private vans contracted for DOC purposes, as well as in other areas where there is customarily little supervision. The installation of video cameras in transport vehicles is particularly necessary for DOC because most people confined by DOC are pre-trial detainees and have numerous court dates, necessitating frequent travel to courts that are located a significant distance from DOC's jails. Consistent with the recommendation of SRLP, we recommend the following:

> § 5-04(k): The Department shall **require** ~~have a written policy requiring consideration of the feasibility of~~ placement of a surveillance camera in an area where sexual abuse is repeatedly reported or alleged to have occurred or consideration of alternative preventive measures such as increased monitoring rounds or the assignment of additional Department staff in that area. **The Department shall require placement and operation of surveillance cameras in transportation vehicles.**

Finally, the NYCLU urges BOC to require the long-term storage of video footage. As currently written, Proposed Rule § 5-04(i) only provides for video retention in the event a report is made within 90 days of the sexual abuse. If a confined individual makes a later report, there is a strong likelihood that key evidence will no longer be available, greatly hindering an investigation and corrective action. We recommend the following:

> § 5-04(i): **The Department will preserve all videos from surveillance cameras for at least six (6) months.** 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 proceedings prior to four years (4) after the incident.

IV. § 5-05: Youthful Inmates

The NYCLU strongly supports the adoption of Proposed Rule § 5-05(b), which requires the sight and sound separation of inmates under the age of 18 and those 18 and older in areas outside housing units unless there is "direct staff supervision." However, we disagree with the BOC's decision to omit PREA Regulation 115.14(c), which ensures that inmates under the age of 18 are not placed in isolation in order to meet the sight and sound separation requirements.

As the Board is aware, New York is one of only two states in the country that prosecute 16- and 17-year-olds in the adult justice system, regardless of the severity of the offense. This

practice puts young confined individuals at risk. The PREA Commission found that youth who are incarcerated with adults are at the highest risk of sexual abuse of any other group of incarcerated people, with youth under the age of 18 constituting 7.7% of all victims of substantiated instances of violence perpetrated by prisoners in adult facilities.[3] While the NYCLU strongly supports the removal of 16-and 17-year-olds from the adult correctional system altogether, it is imperative that the BOC Rules are designed with particular sensitivity to this population while the practice continues.

The NYCLU urges BOC to include the PREA regulation prohibiting the use of isolation to comply with the requirements of Proposed Rule § 5-05(a) and (b).[4] Adopting this regulation will help protect against the use of protective custody in the event of exceptional or changed circumstances relating to the housing of 16- and 17-year-olds. It also will form an additional layer of protection against placing transgender youth in isolation (including protective custody or administrative segregation) because they cannot be housed in adult housing for vulnerable populations due to the sight and sound separation requirements, but who may also be particularly at risk in the regular youth housing units.[5] Finally, although DOC currently houses 16- and 17-year-olds separately from adults, the two populations occasionally lack sight and sound separation outside the housing units, for example, in the medical clinic in RNDC. The language in PREA Regulation 115.14(c) should also be included to ensure that the Department does not place limitations on access to exercise, programming, or work opportunities for inmates under the age of 18 in order to comply with the sight and sound separation requirements.

We recommend the following additions to the Rules:

§ 5-05(c) The Department shall avoid placing inmates under the age of 18 in isolation to comply with this provision. Absent exigent circumstances, agencies shall not deny inmates under the age of 18 daily large-muscle exercise and any legally required special education services to comply with this provision. Inmates under the age of 18 shall also have access to other programs and work opportunities to the extent possible. Should exigent circumstances be found they must be detailed in writing and submitted to the PREA Coordinator.

V. § 5-06: Limits to Cross-Gender Viewing and Searches

The NYCLU recommends additional clarifications regarding the scope and reporting requirements of Proposed Rule § 5-06, a rule we believe is of particular importance for

[3] National Prison Rape Elimination Commission Report 18-19 (June 2009), available at ww.ncjrs.gov.

[4] While the Mayor's Office has recently announced a plan to move 16- and 17-year-olds from Rikers, this relocation will likely take several years, and will not change the fact that they are being held as adults in DOC custody; immediate steps to protect this population should be taken until such time this population is no longer held in adult facilities.

[5] NYCLU's recommendations on maintaining the THU and housing transgender people based on their gender identity are in the comments to Proposed Rule § 5-18, infra. Proposed Rule § 5-19 provides some protection against the use of isolation for people deemed to be at high risk of sexual abuse.

respecting and protecting the rights of transgender people. The NYCLU works regularly with and on behalf of transgender people housed in jails and prisons across New York State. This is a population that is particularly vulnerable in confinement settings. Countless studies, as well as our own experience as advocates, have confirmed that transgender and gender non-conforming people, in particular transgender women of color, as well as LGB people more generally, experience harassment and violence in jails and prisons at much higher rates than others.[6]

We recommend revisions to the current Proposed Rule on cross-gender viewing and searches to address common problems, specifically the cross-gender viewing provision and the frequent request that transgender women remove their bras in situations where cisgender women are not required to do so. In addition, we propose clarifying search requirements to respect inmates' self-identification of gender identity and—particularly for transgender men—potential safety and privacy concerns. Finally, the Rule should eventually prohibit all cross-gender pat-down searches. The issue of female staff abuse of male inmates in confinement settings is often ignored or misunderstood due to gender stereotypes and deeply embedded cultural conceptions about what constitutes sexual abuse or harassment.[7] Prohibiting all cross-gender searches is an important step towards addressing this problem and is consistent with principles of equality and privacy. We understand that implementing this prohibition will take time. The Department will need to make changes to existing policies and procedures and ensure that implementation will comply with existing prohibitions against sex discrimination in employment. We have proposed a process by which the Department will first develop a plan to implement this new rule and then submit the plan for public comment. However, even if the Board does not decide to implement a ban on cross-gender pat-down searches, the prohibition should apply to people under the age of 18 consistent with the PREA regulations on juvenile facilities. See 28 C.F.R. § 115.315(b).

We recommend the following additions and clarifications:

§5-06(a) The Department shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners. **These searches shall**

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[6] See Alison Hastings, Angela Browne, Kaitlin Kall & Margaret diZerega, Keeping Vulnerable Populations Safe Under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails at 15-16 (Vera Institute of Justice, April 2015) (citing studies showing while 3.5 percent of straight male inmates reported being sexually victimized by an inmate, by contrast 39 percent of gay men and 34 percent of bisexual men reported such victimization; lesbian- and bisexual-identified women reported twice the rate of sexual abuse by staff as straight women; and a study in California found that transgender women housed in a men's facility were 13 times more likely to have been sexually abused by other inmates than non-transgender people). See also BJS 2011-2012 Report, supra note 1, at 7, 18, 23, 27, 30 (reporting that inmates who identify as gay, lesbian, and bisexual were among those with the highest rates of sexual victimization in 2011-2012).

[7] See generally Testimony of Professor Brenda V. Smith for the Review Panel on Prison Rape Hearings on Sexual Victimization in U.S. Prisons, Jails, and Juvenile Correctional Facilities (Jan. 9, 2014), available at http://ojp.gov/reviewpanel/pdfs/Written TestimonyofBrendaSmith.pdf; Brenda V. Smith, Uncomfortable Places, Close Spaces: Female Correctional Workers' Sexual Interactions with Men and Boys in Custody, Digital Commons: Articles in Law Reviews and Other Academic Journals (2012), available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1258&context=facsch_lawrev; Brenda V. Smith, After Dothard: Female Correctional Workers and the Challenge to Employment Law, 8 FIU L. Rev. 469 (2013).

be conducted outside the visual observation of staff of the opposite gender. Should exigent circumstances be found they must be detailed in writing and submitted to the PREA Coordinator pursuant to § 5-06(d).

§5-06(b) The Department shall not conduct cross-gender pat-down searches of any inmates under the age of 18 except in exigent circumstances.

§5-06~~(b)~~**(c)** The Department shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. **Should exigent circumstances be found they must be detailed in writing and submitted to the PREA Coordinator pursuant to § 5-06(d).** 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. **No later than August 31, 2017, the Department shall develop a plan to prohibit cross-gender pat-down searches of male inmates, absent exigent circumstances, which shall not restrict male inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision. The Department shall provide the plan to the Board and the plan will be submitted for public comment.**

§5-06~~(c)~~**(d)** 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**, and cross-gender pat-down searches of all inmates under the age of 18, and submit these reports in writing to the PREA Coordinator.**

§5-06~~(d)~~**(e)** The Department shall implement policies…

§5-06~~(e)~~**(f)** The Department shall not search or physically examine a transgender or intersex…

§5-06~~(f)~~**(g)** 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~~.~~**, as affirmed by the inmate themself, or to conduct searches using staff of the gender requested by the inmate if the inmate is transgender or intersex, or expresses safety or privacy concerns regarding being treated in accordance with their gender identity. Should exigent circumstances be found they must be detailed in writing and submitted to the PREA Coordinator pursuant to § 5-06(d).**

§5-06~~(g)~~**(h)** The Department shall issue a directive…

§5-06(i) For the purpose of any strip search, any person with a medical or other permit to wear undergarments consistent with their gender identity shall not be required to remove any of those undergarments during searches where individuals

are only required to strip to their underwear, nor shall they be forced to strip to their underwear in front of other inmates or staff beyond those needed to comply with search requirements. For instance, a transgender woman should not be forced to remove her bra during such a strip search.

VI. § 5-08: Hiring and Promotion Decisions

The NYCLU recommends that BOC strengthen the rules on hiring and promotion to require DOC to consider whether an employee or future employee has been the subject of sexual abuse allegations. This modification is necessary because not all credible allegations of sexual abuse are substantiated nor do substantiated complaints always lead to disciplinary action. We also recommend clarifying that the term "incident" in the rule refers to allegations of sexual harassment that have been substantiated.

We recommend the following addition:

§ 5-08(b): The Department shall consider **any prior allegation of sexual abuse, regardless of whether such allegation was substantiated, and** any **substantiated** 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.

VII. § 5-11: Policies to Ensure Referrals of Allegations for Investigations

The NYCLU strongly urges BOC to amend the Proposed Rules to ensure that the Department of Investigation or other law enforcement agencies independent of DOC conduct all investigations regarding allegations of staff and inmate sexual abuse. We echo LAS's position that permitting DOC to investigate any allegation of sexual abuse is a serious and insurmountable conflict of interest.[8] Furthermore, allegations of sexual abuse by definition involve potentially criminal behavior, rendering unnecessary the proposed distinction between allegations that involve criminal activity and those that do not.

We recommend the following additions and clarifications:

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

[8] See Testimony by the Legal Aid Society Prisoners' Rights Project at 10-12 (July 26, 2016) (describing the problematic language in DOC Directive 5011 permitting DOC to investigate allegations of sexual misconduct amongst incarcerated individuals and permitting the Department of Investigation to elect to have DOC investigate allegations involving staff "after a preliminary review of the facts").

publish its policy on its website. The Department shall document all such **investigations and** referrals.

VIII. § 5-12: Employee Training

Because DOC facilities confine individuals under the age of 18, the NYCLU recommends that BOC amend Proposed Rule § 5-12 to align with the PREA regulations on training for staff in juvenile facilities located at 22 C.F.R. § 115.331. § 5-12 as proposed omits three training requirements specified in that regulation.

First, it does not require training on how to distinguish between consensual sexual contact and sexual abuse between incarcerated individuals. This requirement is not only necessary for youthful inmates, who may engage in consensual sexual activity with each other as part of healthy adolescent development and behavior, but also for individuals 18 and older. If individuals run the risk of being disciplined for consensual activity with other incarcerated individuals, they are less likely to report non-consensual activity at the risk it will be construed as consensual and they will be subject to discipline.

Second, it omits training on the applicable age of consent under New York law.

Third, the training of all employees that have contact with incarcerated individuals under 18 should be tailored to the unique needs of young people.

We propose the following additions:

§ 5-12(a)(7): How to detect and respond to signs of threatened and actual sexual abuse **and how to distinguish between consensual sexual contact and sexual abuse between inmates.**

§ 5-12(a)(11): Relevant laws regarding the applicable age of consent.

§ 5-12(b): Such training shall be tailored to the gender of the inmates at the employee's facility **and, if the employee has contact with inmates under the age of 18, to the unique needs and attributes of juvenile inmates**. The employee shall receive additional training if the employee is reassigned from the facility that houses only female inmates, or vice versa**, or if the employee is reassigned to a facility or unit where the employee will have contact with inmates under the age of 18.**

In addition, we recommend moving the deadline for fulfilling the training requirements from December 31, 2018, to December 31, 2017. As the data and the stories of survivors expressed at the public hearing on July 26, 2016, make clear, the need for action is urgent. There are many resources available to conduct the required training; numerous federal, state, and local confinement agencies have trained their staff since the PREA regulations were released in 2012.[9] Indeed, based on the Department's testimony on the Proposed Rule, this training has already

[9] See generally the National PREA Resource Center at www.prearesourcecenter.org.

been developed and is underway. In the event BOC does not change the deadline for training implementation, we strongly recommend, at a minimum, setting an earlier date by which trainings must commence and requiring increasing percentages of staff to be trained at regular intervals between the commencement date and December 31, 2018.

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

The NYCLU recommends that health care practitioners working in DOC facilities receive training on the specific needs of LGBT, gender non-conforming, and intersex people. As noted earlier, these populations are at particularly high risk of sexual abuse in confinement settings and have specific mental and physical health needs.[10] Treatment by a health care practitioner who is not sensitive to LGBTI identities may exacerbate trauma in the aftermath of sexual assault. Adding this provision complements the general training requirements on communication with LGBT, gender non-conforming and intersex individuals (see Proposed Rule § 5-12(a)(9)), but clarifies that medical staff must also receive relevant medical and mental health training.

In addition, the Proposed Rules exclude, without explanation, the PREA regulation requiring that medical staff who conduct forensic examinations receive appropriate training.[11] Unless staff in DOC facilities do not conduct such examinations under any circumstances, this regulation is necessary to ensure that examinations are respectful and follow evidentiary protocols for use during an investigation.

We propose the following additions:

§ 5-16(a)(5): How to address the specific needs of LGBT, gender non-conforming, and intersex people, including the provision of culturally competent care, how to be gender-affirming and sexual orientation-affirming, and basic understandings of gender dysphoria and intersex conditions.

(b): If medical staff working in Department facilities conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

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

The NYCLU recommends that the language of Rule § 5-17 recognize that people in confinement settings may be at risk for abuse from staff, contractors, and volunteers in addition to other confined individuals. As currently worded, the Rule suggests that screening is only applicable to risk from other confined individuals. We propose the following:

[10] For instance, bisexual women are more likely than both straight women and lesbians to experience sexual abuse over the course of their lifetime. See www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

[11] This provision may have been omitted accidentally, as the Proposed Rule goes directly from part (a) to (c). If so, the omission should be corrected.

§ 5-17(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~~ **anyone with whom they come in contact** or sexually abusive towards other inmates.

In addition, we want to emphasize the importance of the objective screening instrument that the Department is required to develop and provide to the Board pursuant to Proposed Rule § 5-17(c). Given the importance of this instrument for protecting people in DOC custody, we urge the Board to ensure that the instrument adopted by the Department is consistent with best practices and existing guidance. Given the nature of the information gathered to assess risk of victimization and abusiveness, it is essential that staff ask questions with the appropriate terminology and sensitivity. Best practices on how to design and use such an instrument is not static; additional resources are becoming available as different agencies develop and review their screening processes and there are a growing number of professionals with expertise in this area. BOC should refer to the numerous resources on the PREA Resource Center website and engage in a periodic review of the Department's instrument, especially those resources pertaining to the LGBTI and gender non-conforming communities.[12]

XI. § 5-18: Use of Screening Information

The NYCLU believes that the Proposed Rules are inadequate for ensuring that transgender and intersex people are housed in a safe and appropriate manner. The issue of safe housing is fundamental to fair and just treatment during confinement and has been repeatedly highlighted by transgender people currently or formerly incarcerated at Rikers and advocates in public comments and in meetings with the Department. Yet the current Proposed Rules do not sufficiently ensure that 1) people be presumptively housed in accordance with their gender identity, and 2) in those rare cases in which an exception needs to be made, a safe and effective unit exists to house transgender women who are placed in a men's facility.

A rule promising that DOC will determine on a "case-to-case basis" how to house a transgender or intersex person is insufficient when there is a longstanding, embedded practice of housing people based solely on their anatomy. To date, neither the NYCLU nor any other advocates are aware of the Department ever purposely housing a transgender person consistent with their gender identity rather than their genitalia. While the practice should be to house people in accordance with their gender identity absent safety concerns expressed by the individual person, we recognize that there is likely to be an extended transition period while the practice shifts. Under these circumstances, it is particularly vital that the only alternative for transgender women housed in a men's facility—the Transgender Housing Unit ("THU")—continue to exist, and that it be improved to address the needs of its population. While improvement is necessary, BOC should recognize that the THU is currently by far the best option available to a transgender women housed by DOC in a men's facility, and that THU residents are generally able to avoid harassment and violence with much more success than those in the general population. SRLP, an

[12] For instance, see the presentations on Understanding LGBTI Inmates and Residents, available at www.prearesourcecenter.org/training-and-technical-assistance/webinars/2670/understanding-lgbti-inmates-and-residents, and Asking Adults and Juveniles About Their Sexual Orientation, available at www.prearesourcecenter.org/sites/default/files/content/asking_adults_and_juveniles_about_their_sexual_orientation.pdf.

organization that works closely with transgender inmates at Rikers, reports that no THU resident reported sexual violence while in the THU, in sharp contrast to transgender people housed in general population.[13]

Despite the need for the THU, it is our understanding, based on recent meetings and correspondence with the Department, that plans are in place to effectively close the THU by "expanding" it to serve a wide array of vulnerable populations—including inmates who may be considered vulnerable based on age, sexual orientation, disability, or other factors. These plans have been framed as a means of maintaining the existence of a safer unit that transgender women can access while conforming to the requirements of PREA Standard 115.42(g), which states that agencies "shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status." DOC has also suggested that this unit will be an improvement to the current THU because it will include expanded supervision, training, increased rounds, and a steady staff. Finally, DOC has referenced the relatively small number of inmates interested in occupying the current THU as a reason for eliminating it.

These purported justifications for effectively closing the THU are unpersuasive; the positive impact of the THU should not be ignored in light of an overly restrictive interpretation of the PREA regulations. By removing the one feature that has allowed the THU to be successful as an option for transgender women who wish to be housed there safely—the absence of male inmates and the creation of a gender-affirming environment—DOC's proposed "expansion" will significantly limit its usefulness. Adding unrelated "potentially vulnerable" populations of men to a women's unit will expose these women to the same harassment, violence, and discrimination that the THU was established to protect them from. And while DOC's suggestion that the new unit will benefit from increased supervision, rounds, training, and dedicated staff is laudable, those are measures that could (and should) be taken to improve the current THU. With such improvements, and with the addition of programming opportunities that have been generally denied the residents of the current unit, it is likely that the number of people requesting placement there will rise.[14]

We urge BOC to 1) require the maintenance and improvement of the THU and 2) take the position that PREA does not prohibit DOC from maintaining a voluntary dedicated women's unit for those transgender women whom DOC has placed in a men's facility. Transgender women are women, and the current unit is a women's unit for any women who are placed by DOC in a facility otherwise reserved for men. To be acknowledged and categorized in a manner consistent with one's gender identity is a fundamental, overwhelmingly important tenet of fair treatment for transgender people in all contexts. Indeed, the City has loudly championed its enforcement of these principles in countless areas of public life—particularly recently—in clearer and clearer statements regarding the laws, rules, and regulations that protect all transgender New Yorkers.[15] These protections cannot be interpreted to end at the jailhouse gate.

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[13] Testimony of the Sylvia Rivera Law Project at 7 (July 26, 2016).

[14] The NYCLU understands that approximately 10-15 people generally occupy a space with room for 30.

[15] See, e.g., 9 N.Y.C.R.R. 466.13 (setting forth regulations prohibiting discrimination on the basis of gender identity); New York City Exec. Order 16 (Mar. 7, 2016) (for all city services and buildings, ensuring access to

Our specific proposed revisions to Proposed Rule § 5-18 are below. First, we propose a clearer and more protective rule establishing a presumption that a person will be housed in a facility in accordance with their gender identity, as identified by themselves, unless that person objects based on safety concerns (as is often the case for transgender men considering the dangers of a men's facility).[16] Very limited exceptions should only be allowed if DOC can articulate a clear and convincing reason why such housing assignment would present a clear and imminent danger to staff or other incarcerated persons. Any exception to the established presumption must be justified and documented, and must not rely on stereotypes about transgender women. For example, general "safety concerns" should not be sufficient to prevent a transgender woman from being housed in a women's facility; rather, specific compelling and imminent risks should be evaluated as they would be with any woman considered a potential safety risk.

For those limited cases in which a transgender woman must be housed in a men's facility, the Board's rule should explicitly address the ways in which a voluntary dedicated women's unit within a men's facility will work. These women's units should be available to all women housed in male facilities, regardless of whether they are adult, young adult, adolescents, pre-trial or

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single-sex facilities (including "living spaces") consistent with one's gender identity); New York City Commission on Human Rights, Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression (Dec. 21, 2015) (interpreting N.Y.C. Admin. Code § 8-102(23)); *see also* NYC Department of Homeless Services, Division of Adult Services, Transgender/Intersex Clients, Procedure 06-1-31 (2006) (DHS NYC determines housing based on a client's gender identity in accordance with its policy of respect and non-discrimination).

[16] While our comments go into the most detail on issues relating to transgender women in DOC facilities—both because of the particularly acute discrimination that they face and because many of the amendments we suggest to the Proposed Rules are designed to address issues specific to their experience, most notably the THU—we also note that other LGBTQI populations, particularly transgender men, will be greatly affected by new efforts to enforce PREA in DOC facilities. In the context of housing, though, because transgender men and boys are currently generally housed by DOC in women's facilities, and because such housing is often consistent with the wishes of those transgender men and boys due to legitimate concerns about their safety in a men's facility, our proposed revisions address these concerns in less detail. In this context we note, however, the importance of enforcing existing language in the Proposed Rules stating that "[a] transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration" for placement purposes. See § 5-18(e).

In addition, regarding LGB people housed in DOC facilities, we note that mistreatment based on sexual orientation is and remains a persistent problem, and our relative lack of recommendations that are LGB-specific reflects a hope that the current provisions of the Proposed Rules requiring increased training, competency, and sexual orientation-affirming behavior by staff and DOC officials will be vigorously enforced. Particularly in the context of lesbian and gender non-conforming women and girls, especially women and girls of color, the rate of incarceration and mistreatment is uniquely high and in need of increased and sustained attention. See generally Unjust: How the Broken Criminal Justice System Fails LGBT People (Center for American Progress & Movement Advancement Project, Feb. 2016); Angela Irvine & Aisha Canfield, The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Non-conforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population, 24 J. Gender Soc. Pol'y & L. 242 (2016) (reporting results of study showing that 39.9% of girls in the juvenile justice system identify as LBQ or gender non-conforming). It is essential that BOC review data regarding sexual abuse and harassment perpetrated against LGB individuals to ensure this hope is borne out.

sentenced.[17] In light of DOC's concerns regarding "fraud" or improper attempts by non-transgender individuals to gain admission to the unit, a review process is included in this proposed rule. However, the intake process should give presumptive weight to a person's own self-identification and stated safety concerns.

We propose the following additions:

§5-18(c): In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the Department shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems. **In coming to this decision, the Department shall house all inmates in a men's or women's facility in accordance with their gender identity as stated by the inmate regardless of sex assigned at birth, genital characteristics, or whether or not they have had gender affirming surgery(ies), unless one or more of the below conditions (§ 5-18(c)(1)-(3)) is met.**

1) **The inmate objects to such placement;**

2) **Security staff in consultation with medical and mental health staff determine based on clear and convincing evidence, which must be documented in writing, that the inmate is asserting a gender identity for an improper purpose. The following shall be sufficient, but not necessary, to rebut that gender identity is being asserted for an improper purpose:**
    - **A. a history of receiving hormone therapy or of undergoing other treatment related to gender transition, regardless of whether supporting medical documentation is available;**
    - **B. a history of accessing programming and services based on their gender identity or transgender status (e.g. social security, shelter services, advocacy initiatives, social service providers, non-for-profit groups);**
    - **C. a history of being known to others as transgender or intersex, and living in accordance with their self-identified gender whether prior to or during any period of incarceration;**
    - **D. having a social security card of identification documents that list a gender different from the gender listed on the booking information.**

    The Department cannot show there is an improper purpose solely by showing a lack of (A) through (D).

[17] As articulated by the Children's Defense Fund and the Juvenile Justice Coalition LGBTQ Workgroup, it is essential that these protections be available as well to transgender youth under the age of 18 that are housed in facilities or units with other minors.

3.) Security staff in consultation with medical and mental health staff articulate a clear and convincing reason why housing an inmate according to their gender identity would pose a clear and imminent danger to staff or other inmates. An inmate's gender identity, including their transgender or intersex status, genital characteristics or whether or not they have had gender-affirming surgery(ies) may not be considered in assessing clear and imminent danger.

§5-18(d): **The Department will provide voluntary housing units for transgender and intersex inmates who are not housed in accordance with their gender identity, unless the Department has shown pursuant to sections (c)(2) and (c)(3), above, that the inmate is falsely claiming a female gender identity for an improper purpose or presents a clear and imminent danger to staff or other inmates.**

§5-18(e): **Housing units for transgender and intersex inmates who are not housed in accordance with their gender identity shall be staffed by individuals trained in working with transgender and intersex people in custody, in addition to the training required by Rule § 5-12(a)(9). This training will include:**

1) **instructions on the nature of transgender identity and the cycles of incarceration and violence experienced by transgender people;**
2) **instructions on the nature of physical sexual development, variations in sexual development, and the equitable treatment of intersex people;**
3) **instructions on how to understand the psychosocial and safety needs of transgender, intersex and gender non-conforming individuals;**
4) **instructions on how to be alert to signs of anti-transgender harassment;**
5) **instructions on using gender-affirming language when interacting with transgender, intersex and gender non-conforming individuals;**
6) **instructions on the specific needs of transgender, intersex and gender non-conforming survivors of sexual abuse; and**
7) **up-to-date information about medical and mental health standards for treatment of individuals with gender dysphoria.**

The Department shall provide the Board with documentation reflecting that all staff assigned to housing units for transgender and intersex inmates who are not housed in accordance with their gender identity have received this training. This documentation shall be provided twice per year and shall include the training schedules that were completed and a summary of the curriculum and credentials of persons providing training.

§5-18(f): **All clinical and programming needs available to inmates in general population shall be made available to the housing units provided pursuant to Rule § 5-18(d).**

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

The NYCLU also recommends that BOC explicitly prohibit the Department from considering an individual's identification as LGBT or intersex as an indicator that the individual will be sexually abusive. There is a common stereotype that people who identify in this manner are less in control of sexual urges and more prone to sexually abuse others, a stereotype that is often exacerbated in confinement settings. PREA Regulation § 115.342(c), which applies to juvenile facilities, explicitly prohibits the use of this myth during screening and DOJ has confirmed that this standard should also apply to adults. We also recommend prohibiting the Department from using gender non-conforming status as an indicator of being abusive for the same reasons. For these reasons, we propose that BOC add the following to § 5-18:

§ 5-18(j): The Department shall not consider lesbian, gay, bisexual, transgender, gender non-conforming, or intersex identification or status as an indicator of likelihood of being sexually abusive.

XII. § 5-20: Inmate Reporting

The NYCLU recommends that BOC clarify that inmates must be able to report sexual abuse without incurring financial charges. In Proposed Rule § 5-20(b), the Department is required to provide a way for confined individuals to report abuse to a public or private entity that is separate from the Department and to permit them to do so anonymously. In order to ease communication and to decrease any financial limitations that may dissuade reporting, we recommend that BOC specify that DOC provide a toll-free phone number for the public or private entity appointed pursuant to § 5-20(b).

It is also important to clarify that inmates must be able to make reports both anonymously and confidentially. While anonymity permits an individual to make a report without providing his or her name to the appointed entity, the Department will still know the identity of the reporter as well as the substance of the report through its regular monitoring of non-legal phone calls. The Department monitors all non-legal calls with confined individuals, as set forth in the Inmate Handbook:

> All calls, except for calls with your attorney or other privileged calls, may be monitored and/or recorded by the Department for security purposes. In order for your attorney and other privileged calls not to be monitored you must provide the Department with the phone numbers to which calls should not be monitored, and the Department will check that those numbers belong to attorneys or other persons with privileged contact with you. Your use of the telephone in a Department facility constitutes your implied consent to such monitoring.[19]

[18] We have proposed inserting new language to replace §5-18(d)-(f). The language previously found in § 5-18(e)-(f) is now located in §5-18 (h)-(i)).

[19] New York City Department of Correction Inmate Handbook at 43 (revised 12/07).

BOC should require that calls to the numbers of outside agencies appointed to receive sexual abuse reports are not monitored and that DOC is not able to identify individuals who have placed such calls. The Inmate Handbook and any other DOC notices listing the toll-free number should clearly indicate that such calls will be confidential and not monitored.

We recommend the following addition:

> § 5-20(b): The Department shall 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. **At minimum, the Department shall provide an unmonitored, toll-free number to the independent public or private entity or office by which inmates can make confidential reports. The Department shall clearly indicate on all notices and posting of the toll-free number that it is not monitored by the Department.**

XIII. §5-20A: Exhaustion of Administrative Remedies

The proposed rules omit PREA Regulation § 115.52 relating to the exhaustion of administrative remedies. Although no reason is given for the omission, we assume that the Board has concluded the Department is exempt because DOC policies explicitly state that complaints of sexual abuse and harassment are not subject to any administrative grievance procedure. See 28 C.F.R. § 115.52(a) (exempting agencies who do not have administrative procedures for sexual abuse and assault); DOC Directive 3376 at p. 5 (effective Sept. 10, 2012) ("Inmate allegations of physical or sexual assault or harassment by either staff or inmates are not subject to the [Inmate Grievance and Request Program] process."); DOC Directive 5011 at p. 22 (effective May 2, 2016) ("There are no administrative procedures to address or investigate inmate sexual abuse allegations through the grievance process."). In the event the Department does adopt an administrative process for claims of sexual abuse or decides that such claims are subject to the existing grievance procedures, the Board should promptly ensure that the rules relating to administrative exhaustion in PREA Regulation § 115.52 are adopted. Those rules are important to ensure that grievances related to sexual abuse are handled promptly, are not subject to time limitations, and may be made by third parties.

However, we recommend that the Board adopt the provision in § 115.52 relating to procedures for handling grievances of people who believe they are subject to a substantial risk of imminent sexual abuse. While existing DOC Directive 5011 indicates that the Department will establish such procedures, we were unable to locate any such procedures. As advocates working in New York State prison and jails, we are aware that confined people often have no avenue for requesting protection where their concerns are taken seriously and responded to quickly. For these reasons, we propose adding the following rule, adapted from § 115.52(f):

> **§ 5-20A(1): The Department shall establish procedures for the filing of an emergency grievance alleging that an inmate is subject to a substantial risk of imminent sexual abuse.**

§ 5-20A(2): After receiving an emergency grievance alleging that an inmate is subject to a substantial risk of imminent sexual abuse or any other notification of the existence of a substantial risk, the Department shall immediately forward the grievance (or any portion thereof that alleges the substantial risk of imminent sexual abuse) or other notification to a level of review at which immediate corrective action may be taken, shall provide an initial response within 48 hours, and shall issue a final agency decision within 5 calendar days. The initial response and agency decision shall document the agency's determination whether the inmate is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

XIV. § 5-21: Inmate Access to Outside Confidential Support Services

The NYCLU recommends that BOC provide greater access to confidential outside support services. This will enable those people who have been sexually abused to get assistance even if they do not feel safe enough to make a formal report. These services can provide much needed support to someone who is struggling with the aftermath of a physical and emotional ordeal while remaining confined in an environment in which the person does not feel safe. Much of the value of these services derives from their confidential and/or anonymous nature. As written, Proposed Rule § 5-21(a) and (b) provide insufficient clarity regarding whether and to what degree these services are available confidentially.

We propose the following additions and clarifications:

§ 5-21(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 **at a minimum three** toll-free hotline numbers ~~where available~~, of local, State, or national victim advocacy or rape crisis organizations. The Department shall enable **confidential and unmonitored communications with at least three organizations and clearly indicate to inmates which numbers and mailing addresses are unmonitored, consistent with the treatment of inmate communications with attorneys** ~~reasonable communication between inmates and these organizations and agencies, in as confidential a manner as possible~~.

§ 5-21(b): **For those numbers that cannot be accessed confidentially**, ~~T~~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.

XV. § 5-23: Staff and Agency Reporting Duties

The NYCLU recommends that BOC clarify that all DOC staff, including all people who work in DOC facilities, whether they are employed by DOC or another agency or whether they are a contractor or a volunteer, must report sexual abuse directly to upper-level management or to the PREA Coordinator or facility compliance manager. Making reports

directly to the highest levels of management, rather than through every level of command, will help ensure that sensitive information is kept confidential and decrease the risk of retaliation by staff associated with a reporting individual's facility or unit. DOC staff and other employees reporting sexual abuse should also be required to keep information relating to a report of retaliation confidential.

We propose the following additions and clarifications:

§ 5-23(a): The Department shall require all staff**, whether employed by DOC or another agency, whether a contract employee or a volunteer,** to report immediately . .

§ 5-23(b): Apart from reporting to ~~designated supervisors or officials~~ **upper-level management or the PREA Coordinator or the PREA compliance manager for the facility**, staff shall not reveal any information related to a sexual abuse report **or a report of retaliation for having made such an allegation,** to anyone other than to the extent necessary . . . .

XVI. § 5-25: Reporting to Other Confinement Facilities

The NYCLU recommends that BOC include the omitted language from PREA Regulation § 115.63 regarding notification to the "appropriate office of the agency" where the alleged abuse occurred when a person alleges they were sexually abused at another facility. The omitted language ensures that an appropriate office is notified even if there is not an identified facility or a "head of the facility." We propose the following additions:

§ 5-25(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 **or appropriate office of the agency** where the alleged abuse occurred.

§ 5-25(d): The facility **or agency office** that receives such notification shall ensure that the allegation is investigated in accordance with these standards.

XVII. PREA Regulation § 115.66: Preservation of Ability to Protect Inmates from Contact with Abusers

The NYCLU urges BOC to incorporate PREA Regulation § 115.66, which prohibits the use of collective bargaining agreements to limit the ability of the Department to remove staff alleged to have engaged in sexual abuse from contact with inmates. The Proposed Rules omit this provision without explanation, but it is essential for ensuring that action can be taken to protect incarcerated individuals from contact with their alleged abusers. The omission potentially vitiates the protections provided by Proposed Rule § 5-28, which is designed to ensure that survivors of sexual abuse are not retaliated against or otherwise subjected to additional emotional trauma by their abusers.

We recommend the following additions:

§ 5-27-A(a): Neither the Department nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with any inmates pending the outcome of an investigation or of a determination of whether or to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of § 5-31 or § 5-33.

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

XVIII. § 5-32: Reporting to Inmates

While the NYCLU agrees on the importance of the reporting requirements set forth in Proposed Rule § 5-32, it is essential that this reporting occurs in a timely fashion. The physical and emotional trauma experienced by a survivor is often exacerbated while that individual waits for the results of an investigation or believes that an alleged abuser may have an opportunity to repeat the abuse or retaliate. Basic principles of due process and fairness require prompt notification under these circumstances. It is reasonable to expect notification to the individual no later than five days after completion of the investigation.[20]

In addition, the NYCLU recommends that BOC require the Department to report to a survivor if an alleged inmate abuser has been transferred to another facility. Similar to the rationale for reporting when an alleged staff abuser is no longer working within a unit or facility, this practice would allay concerns by an individual that he or she may be subject to additional abuse or retaliation.

We propose the following additions:

§ 5-32(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. **This notification shall occur no later than 5 days after completion of the investigation.**

(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 **no later than 5 days after completion of the investigation**.

[20] Pursuant to Rule § 5-30(m), investigations must be completed within 90 days of an allegation.

(c): Following an inmate's allegation that the 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) **within 5 days** whenever: . . .

(d): Following an inmate's allegations that he or she has been sexually abused by another inmate, the Department shall subsequently inform the alleged victim **within 5 days** 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; **or**

(3) **The alleged abuser has been transferred to another facility.**

XIX. § 5-35: Disciplinary Sanctions for Inmates

The NYCLU recommends that BOC clarify that PREA cannot be used to punish incarcerated people for engaging in consensual sexual activity. Through communications with confined people throughout the State, we are aware that some facilities have used PREA implementation to subject people to increased discipline. This type of enforcement inhibits reports of sexual abuse for fear it will be construed as consensual, subjecting the reporter to discipline. BOC should prohibit this use of PREA because it seriously undermines the multiple PREA regulations aimed at ensuring individuals are protected when they come forward with allegations.

We propose the following changes:

§ 5-35(f): The Department may~~, in its discretion, prohibit all sexual activity between inmates and may~~ **not** discipline inmates for ~~such~~ **consensual sexual** activity. ~~The Department may not, however, deem such activity to constitute sexual abuse if it determines the activity is not coerced.~~

XX. § 5-38: Ongoing Medical and Mental Health Care for Sexual Abuse Victims

The NYCLU recommends that BOC make some provision for treatment services for individuals who have sexually abused other incarcerated individuals. PREA includes such treatment services in its provisions relating to ongoing medical and mental health care for sexual abuse victims. See 28 C.F.R. § 115.83(h). While that regulation is specific to prisons, its underlying rationale – to address the mental health needs of perpetrators of sexual abuse and try to avoid its reoccurrence – applies equally to jails that confine people for extended periods of time. As BOC is aware, numerous reports indicate that individuals may be held by DOC for a

year or more before going to trial; additional time may be served in DOC facilities post-conviction. Under these circumstances, the provision of treatment services in appropriate circumstances should be made available not only to survivors of sexual abuse, but also to its perpetrators.

We recommend the following addition:

§ 5-38(h): The Department shall attempt to conduct a mental health evaluation of all known inmate-on-inmate abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

XXI. § 5-40: Data Collection and Review

The NYCLU strongly supports Proposed Rule § 5-40, which requires semi-annual reporting on allegations of sexual abuse by both staff and confined persons, the aggregation of specific types of information, and the public availability of that reporting on DOC's website. However, we strongly urge that BOC clarify, as required by the PREA regulations, that DOC must publicly disclose both DOC's reports and the underlying aggregated data on its website. BOC should also require the collection and analysis of several additional categories of information to ensure a full picture of the effectiveness of the DOC's efforts to prevent, detect, and respond to sexual abuse in its facilities, taking into account specific categories where data has traditionally been under-inclusive, and provide important guidelines regarding how the data is collected. Finally, BOC should remove language in the Proposed Rule that gives the Department unfettered discretion to redact information from its reports.

First, BOC should clarify that DOC must publicly disclose the data that underlies the semiannual reports required under § 5-40(e). While § 5-40(e) explicitly requires that the reports are made public on the DOC website, it is not clear whether the data that forms the basis for the report, specified in § 5-40(b), must also be disclosed. It is essential that this data be provided to the public so that DOC's conclusions can be independently and objectively verified.

Second, there are a number of categories of information that should be added to the reporting, along with necessary guidelines to ensure that information is collected accurately and uniformly.

- In addition to gender, which is already included in § 5-40(b)(4), BOC should add race, ethnicity, gender identity, gender expression, age, disability, citizenship status, and sexual orientation. DOC is already required to consider whether an allegation of sexual abuse was motivated by race, ethnicity, gender identity, or LGBT or intersex status as part of the Sexual Abuse Incident Reviews required under Proposed Rule § 5-39(d)(2).[21] These categories of identity are also standard information that is likely already part of the intake process or will be upon adoption of an objective screening instrument to evaluate the vulnerability of a person to sexual assault in DOC facilities, see § 5-17(c) and (d). For instance, a determination of whether someone is gender non-conforming in their gender expression is explicitly required in the screening process. See § 5-17(d)(7). This

[21] Proposed Rule § 5-39 incorporates PREA Standard § 115.86.

information should be collected and reviewed on an aggregated basis as well to ensure the safety of the most vulnerable populations.

- Data relating to the number of substantiated, unsubstantiated, or unfounded allegations, required by § 5-40(b)(3), should be disaggregated by the categories of identity listed in § 5-40(b)(4).

- DOC should disclose data on the number of staff who have reported observing sexual abuse and the number of staff who have been disciplined for failing to make such reports. This will help ensure that staff training on reporting sexual abuse is implemented, effective, and taken seriously.

- DOC should be required to report on the number of staff who are alleged to have engaged in sexual abuse and the number of staff who have been the subject of one or more sexual abuse allegations. This reporting is essential to help identify officers requiring discipline.

- DOC should also collect and report whether an alleged perpetrator is a volunteer.

- BOC should include additional standards set forth in PREA Regulation § 115.87 that ensure that the data collected by the Department is accurate and uniform. This is essential for the data to be useful in any broader analysis. The Department must also collect data that, at a minimum, permits it to answer all the questions from the most recent version of the Survey of Sexual Victimization conducted by the Department of Justice, as required by the omitted PREA Regulation § 115.87(c). Because the information collected by the survey is revised on an annual basis, this requirement should be specifically included.

Finally, Proposed Rule § 5-40(g) adds additional justifications for redacting material from the semiannual reports that are not included in PREA, specifically "privacy or other legal justifications." This language is overbroad and may lead to the withholding of information that is essential to combating sexual abuse at Rikers, including material relating to staff-perpetrated abuse. There are existing protections for personal information in the Rules, such as Proposed Rule § 5-40(h), which requires the removal of all personal identifiers. These protections render the overboard and vague language in §5-40(g) unnecessary.

We propose the following additions and clarifications:

§ 5-40(a): The Department shall provide semiannually a written report to the Board setting forth data regarding allegations of sexual abuse. **The Department shall collect accurate, uniform data for every allegation of sexual abuse at its facilities using a standardized instrument and set of definitions. The Department shall maintain, review, and collect data as needed from all available incident-based documents, including reports, investigation files, and sexual abuse incident reviews. The incident-based data shall include, at a minimum, the data necessary to answer the questions from the most recent version of the Survey of Sexual Victimization conducted by the Department of Justice.**

§ 5-40(b): The semiannual report shall include the total number of allegations of sexual abuse of inmates ~~by staff~~ aggregated by:

(1) Staff-on-inmate;
(2) Inmate-on-inmate;
(3) Number of allegations substantiated, unsubstantiated or unfounded;
(4) Victim's ~~gender and perpetrator's gender~~ **and perpetrator's gender, gender identity, gender expression, race, ethnicity, age, disability, citizenship status, and sexual orientation**;
(5) The number of substantiated, unsubstantiated or unfounded allegations based on the victim's gender, gender identity, gender expression, race, ethnicity, age, disability, citizenship status, and sexual orientation;
(6) If the alleged perpetrator is a staff member, whether the alleged perpetrator is an employee of the Department, CHA, ~~or~~ a contractor**, or a volunteer**;

. . .

(18) The number of staff who have reported observing sexual abuse and the number of staff disciplined for failing to make such reports;
(19) The number of staff about whom reports of abuse have been made, the number of such staff about whom prior allegations of abuse have been lodged, the number of such staff who have remained employed at DOC, and the number of such staff remaining employed at DOC about whom additional supervision has been directed.

§ 5-40(e): Such semiannual reports**, including the underlying aggregated data,** shall be approved by the Commissioner of the Department, submitted to the Board, and made readily available on the Department's website within fifteen (15) days after the end of the six (6) month period which is the subject of the report.

§ 5-40(g): The Department may redact specific material from semiannual reports when publication would present a clear and specific threat to the safety and security of a facility, ~~privacy, or other legal considerations,~~ but must indicate the nature of the material redacted.

In addition, Proposed Rule § 5-40 repeatedly uses the term semiannual to refer to the frequency of the report, except in § 5-40(c)(3) where the term "bi-annual" is used. For clarity and consistency, we recommend the following:

§ 5-40(c)(3): Including in its ~~bi-annual~~ **semiannual** report its findings and corrective actions for each facility, as well as the Department as a whole.

XXII. § 5-41: Audits

The NYCLU recommends that BOC provide additional guidance to ensure that audits occur regularly and in a timely fashion and serve the ultimate purpose of the audit: to create corrective action plans as necessary to address identified problem areas. As currently drafted,

Proposed Rule § 5-41 is designed only to ensure that the Department provide BOC with all audit reports and related materials. While this is essential to ensure proper oversight, BOC should explicitly adopt PREA's additional regulations on frequency, scope, auditor qualifications, and corrective action. This approach is consistent with the BOC's direct incorporation of PREA regulations in all other respects.

We propose the following clarifications and additions:

§ 5-41: 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~~ **as required by § 5-43**. The Department shall provide such material to the Board within two (2) business days after its submission to the auditors.

§ 5-42: Frequency and Scope of Audits

(a) During every three-year period starting on the effective date of this Section 5, and during each three-year period thereafter, the Department shall ensure that each facility operated by the Department, or by a private organization on behalf of the Department, is audited at least once.

(b) During each one-year period starting on the effective date of this Section 5, the Department shall ensure that at least one-third of each facility type operated by the Department, or by a private organization on behalf of the Department, is audited.

(c) The Department shall bear the burden of demonstrating compliance with the standards.

(d) The auditor shall review all relevant agency-wide policies, procedures, reports, internal and external audits, and accreditations for each facility type.

(e) The audits shall review, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period.

(f) The auditor shall have access to, and shall observe, all areas of the audited facilities.

(g) The auditor shall be permitted to request and receive copies of any relevant documents (including electronically stored information).

(h) The auditor shall retain and preserve all documentation (including, e.g., video tapes and interview notes) relied upon in making audit determinations. Such documentation shall be provided to the Department of Justice upon request.

(i) The auditor shall interview a representative sample of inmates and detainees, and of staff, supervisors, and administrators.

(j) The auditor shall review a sampling of any available videotapes and other electronically available data (e.g., Watchtour) that may be relevant to the provisions being audited.

(k) The auditor shall be permitted to conduct private interviews with inmates and detainees.

(l) Inmates and detainees shall be permitted to send confidential information or correspondence to the auditor in the same manner as if they were communicating with legal counsel.

(m) Auditors shall attempt to communicate with community-based or victim advocates who may have insight into relevant conditions in the facility.

§ 5-43: Auditor Qualifications

(a) An audit shall be conducted by:
- **(1) A member of a correctional monitoring body that is not part of, or under the authority of, the Department (but may be part of, or authorized by, New York State);**
- **(2) A member of an auditing entity such as an inspector general's or ombudsperson's office that is external to the Department; or**
- **(3) Other outside individuals with relevant experience.**

(b) All auditors shall be certified by the Department of Justice.

(c) No audit may be conducted by an auditor who has received financial compensation from the Department (except for compensation received for conducting prior audits pursuant to § 5) within the three years prior to the Department's retention of the auditor.

(d) The Department shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the Department's retention of the auditor, with the exception of contracting for subsequent audits under § 5.

§ 5-44: Audit Content and Findings

(a) Each audit shall include a certification by the auditor that no conflict of interest exists with respect to his or her ability to conduct an audit of the Department.

(b) Audit reports shall state whether Department-wide policies and procedures comply with relevant PREA standards.

(c) For each PREA standard, the auditor shall determine whether the audited facility reaches one of the following findings: Exceeds Standard (substantially exceeds requirement of standard); Meets Standard (substantial compliance; complies in all material ways with the standard for the relevant review period); Does Not Meet Standard (requires corrective action). The audit summary shall indicate, among other things, the number of provisions the facility has achieved at each grade level.

(d) Audit reports shall describe the methodology, sampling sizes, and basis for the auditor's conclusions with regard to each standard provision for each audited facility, and shall include recommendations for any required corrective action.

(e) Auditors shall redact any personally identifiable inmate or staff information from their reports, but shall provide such information to the Department upon request, and may provide such information to the Department of Justice.

(f) The Department shall ensure that all final reports from any audit are published on the Department's website.

§ 5-45: Audit Corrective Action Plan

(a) A finding by the auditor of "Does Not Meet Standard" with one or more standards shall trigger a 180-day corrective action period.

(b) The auditor and the Department shall jointly develop a corrective action plan to achieve compliance.

(c) The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of the facility.

(d) After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action.

(e) If the Department does not achieve compliance with each standard as determined by the auditor after the 180-day corrective action period, it may (at its discretion and cost) request a subsequent audit once it believes that it has achieved compliance.

§ 5-46: Audit Appeals

(a) The Department may lodge an appeal with the Department of Justice regarding any specific audit finding that it believes to be incorrect. Such appeal must be lodged within 90 days of the auditor's final determination.

(b) If the Department of Justice determines that the Department has stated good cause for a re-evaluation, the Department may commission a re-audit by an auditor mutually agreed upon by the Department of Justice and the Department. The Department shall bear the costs of the audit.

(c) The findings of the re-audit shall be considered final.

XXIII. Civil Immigration Detainees

The NYCLU recommends that BOC amend the final rules to include protections for individuals detained solely for civil immigration purposes. While we understand that the Department currently does not hold people solely for this purpose, the best practice would be to adopt these regulations to ensure the necessary protections are already in place in the event the Department's practice changes. The relevant PREA regulations are located at 28 C.F.R. § 115.41(d)(10) (requiring consideration of whether an inmate is detained solely for civil immigration purposes during screening for risk of sexual victimization); 28 C.F.R. § 115.51(b) (requiring that inmates detained solely for immigration purposes be provided information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security), and 28 C.F.R. § 115.53(a) (requiring the Department to provide access to immigrant services agencies).

Thank you for your consideration of these comments.

Respectfully submitted,

Erin Beth Harrist
Senior Staff Attorney

Robert Hodgson
Staff Attorney

Bernadette Brown
Deputy Legislative Director

Ruthie Epstein
Deputy Advocacy Director