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October 5, 2018

Board of Correction
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Dear Members of the Board of Correction:

The Legal Aid Society Prisoners' Rights Project writes in anticipation of the next meeting of the Board of Correction ("BOC" or "the Board"), at which time we understand the Board will review compliance with Board standards on sexual abuse and sexual harassment. The Board has recently issued two public reports which demonstrate that the Department of Correction ("DOC" or "the Department") is flagrantly out of compliance with the Standards requiring Reporting and Investigations. The Department's response to the BOC audit only highlights their noncompliance. We therefore call on the Board to issue Notices of Violation concerning Standards § 5-18 (Training of Investigators), §§ 5-30(a)-(f), 5-31 and 5-32 (Investigations, Evidentiary Standards, and Reporting to Inmates), and § 5-40 (Reporting). We believe that there are likely other standards relating to sexual abuse and sexual harassment with which the Department is failing to comply, such as § 5-04 (Supervision and Monitoring) and § 5-08 (Hiring and Promotion Decisions), but we do not have access to the documents that would show deficiencies. The Board does have such access—or it should—and we therefore also ask the Board, as quickly as possible, to make a public assessment of the Department's level of compliance with all its PREA Standards.

There is no question that sexual abuse in our City's jails is a horrific problem. As the Board recently noted, the number of reports of sexual misconduct grew by 40% between 2016 and 2017.¹ DOC has utterly failed to take the steps necessary to hold perpetrators accountable. We detailed this in our testimony last month to the City Council hearing on Sexual Abuse and Harassment in City Jails conducted on September 6, 2018, which we attach.²

The Department's Failure to Comply with the Board's Investigations Standards

Fair and complete investigations are a critical first step to detecting and preventing sexual misconduct. When an investigation is merely a sham, perpetrators are never held accountable. Yet the Board's recent Audit Report confirms that there are massive failures in the Department's investigations into allegations of sexual abuse. The Department's

¹ See BOC Audit Report on PREA Closing Reports, available at <https://www1.nyc.gov/assets/boc/downloads/pdf/prea-closing-reports-20180914.pdf>

² This testimony pre-dated the BOC Audit Report, so does not address the audit results or DOC's response.

response to the Board audit reveals that these investigations and their purported outcomes are unreliable and meaningless. *See* NYC DOC Response to Audit Report.³

The Board's PREA Audit shows a failure to meet even minimal levels of competency.⁴ The BOC Audit Report raises a troubling lack of information in over half the sampled cases as to why key witnesses (including the perpetrator) were not interviewed, why physical evidence, such as video, was not obtained, whether and how credibility assessments were made, whether prior reports of abuse by the perpetrator were considered, and why the investigator decided not to substantiate. These blatant defects in DOC PREA Closing Reports alone provide a basis for the issuance of a Notice of Violation.

The Department justifies these deficiencies in basic investigation competency by lamenting insufficient information from potential victims.⁵ But the Department failed to demonstrate that victim interviews are conducted in private and confidential settings, outside the person's housing unit, a failure which interferes with the integrity of the victim interview and the information that flows from it. The Board Audit Report indicates that only 25% of the sample cases indicated the location of the alleged victim interview, and that the majority of those interviews took place within the housing unit.⁶ In the few cases in which DOC knows the interview locations, descriptions include "housing unit pantries" and "housing day rooms."⁷

The importance of the location of the initial victim interview cannot be overstated. These interviews provide crucial guidance for thorough investigations. Victims are often the only source for identifications of witnesses and locations of physical evidence. If alleged victims refuse or report to be unable to provide basic details of incidents, as DOC suggests, there is a clear risk that they are unwilling to be forthcoming because of a lack of security in the interview. In addition to posing a clear violation of the Board's Minimum Standard § 5-30(q) regarding requirements for the locations of victim interviews and requests for statements, this DOC interview practice calls into question the integrity of the investigations themselves.

Even more troubling still is the Department's failure to demonstrate minimal competency in the review of available evidence and supervisory oversight. Only a startling 26% of cases reviewed by the Board indicate a review of all available evidence, and the response from the Department states a need to "retrain staff on evidentiary analysis."⁸ Furthermore, there is no indication from the Board Audit Report or the Department Response that supervisory review identifies and corrects the significant gaps in the DOC investigations. As the Audit Report reflects, 33% of cases were missing the required supervisor signatures and 65% of

³ Available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/NYC%20Department%20of%20Correction%20-%20Response%20to%20BOC%20Audit%20of%20PREA%20Investigations%20%2009.12.18.pdf>

⁴ *See* BOC Audit Report.

⁵ *See* NYC DOC Response to Audit Report, 3-5.

⁶ BOC Audit Report, 8-9.

⁷ *Id.*

⁸ NYC DOC Response to Audit Report at 5.

Closing Reports that did have signatures were signed by supervisors on the same day that they were signed by investigators.⁹ An immediate signature from a supervisor does not indicate the oversight and accountability required to cure the investigatory omissions rampant in the audited cases. These deficiencies in evidence review and supervisory scrutiny do not represent a Board finding that, as the Department writes in its Response, “cases are thoroughly investigated within the first 72 hours of an allegation.”¹⁰

There is no dispute that in 74% of audited cases, DOC cannot demonstrate that investigators reviewed all the evidence. There is no dispute that in 50% of audited cases, DOC cannot demonstrate how credibility and substantiation determinations were made. There is no dispute that in 90% of audited cases, DOC cannot demonstrate whether investigators considered the alleged perpetrator’s prior history of allegations. There is no dispute that in 75% of audited cases, DOC cannot account for the locations of potential victim interviews.¹¹ Of the 42 investigations audited, 41 were found to be unsubstantiated so no action was taken. Given the investigation failures outlined above, it is impossible to have confidence in such outrageously low rates of substantiation.

The Department must be held publicly accountable, and Notices of Violation should issue for these and any other flagrant violations of the Board’s investigations standards documented in the PREA Audit Report.¹² The Board should then require much more meaningful and comprehensive Corrective Action Plans from the Department, instead of the brief sketches that constitute their PREA investigations corrective action plan and the DOC Response to the Board Audit Report.¹³ Nothing in those plans describe sufficiently how the Department intends to rectify its dismal failure to comply with the Board’s investigation standards to ensure a minimal level of professionalism and as a result conduct fair and unbiased investigations.

The Department’s Failure to Comply with the Board’s Reporting Standards

The Department is flagrantly ignoring the Board of Correction’s reporting requirements, including by failing to provide necessary information about whether and how sexual abuse investigators are trained.¹⁴ The Department has not reported to the Board the training schedule, curriculum or credentials of their investigators. *See* DOC PREA Reporting Status

⁹ BOC Audit Report at 17.

¹⁰ NYC DOC Response to Audit Report at 2. The Board did not conclude that DOC had conducted thorough investigations of cases within 72 hours; rather, the Board acknowledged only that 86% of potential victims were interviewed within the 72-hour period. *See* Board Audit Report at 4.

¹¹ BOC Audit Report at 8, 11-12.

¹² These are not the only violations of the Board’s PREA Standards. *Compare* Standard § 5-15 (requiring trained investigators) *with* DOC Directive 6500R at III.B.1-2 (requiring captains to investigate all incidents of inmate-inmate sexual abuse, regardless of severity of the allegation).

¹³ DOC Corrective Action Plan available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2018/June-12-2018/PREA%20Public%20Corrective%20Action%20Plan.pdf>

¹⁴ *See* Minimum Standard § 5-40.

for 2017 and 2018.¹⁵ The Department also failed to provide any information about whether or how incarcerated persons are educated about PREA policies and the rights and protections afforded to them thereunder.¹⁶

The lack of information about investigator training and the education of incarcerated persons is made even more critical given the disturbing trends of insufficient evidence review and improper victim interviews. In light of the numbers of reports of abuse in our jails and the Department's failure to ensure the safety of people in its custody, the Department needs to fully provide this information to the Board. Without access to the required information, the Board cannot perform its pivotal accountability function. We therefore urge the Board to issue a Notice of Violation to the Department for its failure to provide all required documents to the Board, and then to demand a meaningful corrective action plan from the Department which includes a date certain by which it will provide the Board with all of the required documents. The Board should then issue a public assessment of its findings.

Very truly yours,

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Enc: City Council submission

¹⁵ Available at https://www1.nyc.gov/assets/boc/downloads/pdf/doc_prea_reporting_status_for_2017_and_2018_updated_9_11_18.pdf

¹⁶ *Id.*



TESTIMONY

The New York City Council

Committee on Fire and Criminal Justice, jointly with
Committee on Justice System
Committee on Women

Public Hearing on

Oversight - Sexual Abuse and Harassment in City Jails

And In Support of:

Proposed Legislation: Int. No.1090
In Relation To: Requiring the Department of Correction
To Report on the Sexual Abuse of Visitors

September 6, 2018
New York, New York

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INTRODUCTION

Thank you for the opportunity to testify about the need for oversight to address sexual abuse and harassment in the New York City jails, and in support of Proposed Legislation, Int. No.1090: In relation to requiring the Department of Correction to report on the sexual abuse of visitors.

We submit this testimony on behalf of The Legal Aid Society, and thank Chairs Keith Powers, Chairperson of the Committees on Criminal Justice; Rory Laneman, Chairperson of the Committee on Justice System; and Helen Rosenthal, Committee on Women for the opportunity to share our thoughts on this important subject.

The Prisoners' Rights Project of The Legal Aid Society has substantial experience in crafting measures to prevent and deter the scourge of custodial sexual abuse that plagues our jails and prisons, including the jails run by the New York Department of Correction ("the Department" or "DOC"). We have participated as members of the National Prison Rape Elimination Commission's Standards Development Expert Committee, testified before a sub-committee of the U.S. House Judiciary Committee relating to the Commission's recommended standards, and advocated extensively before the New York City Board of Correction (the "Board") about Standards to Eliminate Sexual Abuse and Sexual Harassment In Correctional Facilities ("the Board's Standards"), 40 RCNY Chapter 5 (2016). Our advocacy is rooted in our extensive experience advocating for our clients who report sexual abuse while in the Department's custody and our substantial litigation involving sexual abuse by staff.¹

We applaud the Council for working to improve oversight of our City's jails to redress the sexual abuse and harassment of persons confined in DOC custody. It has become apparent that the National Prison Rape Elimination Act Standards ("PREA Standards"), 28 C.F.R. Part 115 (2012), as incorporated into the Board's Standards, are not enough.

SUMMARY OF RECOMMENDATIONS

- 1) There is no accountability without timely, unbiased and thorough investigations, since no disciplinary action against staff will be taken without a finding that the allegation is substantiated. The DOC investigatory process, however, is thoroughly broken and has proven itself to be so for years. **An investigative entity independent of the Department is needed.**
- 2) Cameras are essential for both the deterrence and investigation of sexual abuse. **Body cameras should be required whenever staff is alone with a person outside the view of fixed cameras.**

¹ The Legal Aid Society has been counsel in two putative class actions on behalf of incarcerated women challenging policies enabling sexual abuse by male correctional staff in the New York state prisons, and in several other individual cases. See *Amador v. Andrews*, 03-cv-0650 (S.D.N.Y.) (KTD); *Jane Jones 1-6, v. Annucci et al.*, 16-cv-1473 (RA)(AJ) (S.D.N.Y. March 3, 2016). We are also counsel in *Jane Does 1 and 2 v. City of New York and Benny Santiago* ("Jane Does"), 15-cv-3849 (AKH) (S.D.N.Y. May 19, 2015), a challenge to the sexual abuse of incarcerated women by staff in NYC DOC and has recently filed *Doe v. City of New York, Jose Cosme and Leonard McNeil*, 1:18-cv-07889 (S.D.N.Y. Aug. 29, 2018), a case on behalf of a woman alleging repeated abuse at the Rose M. Singer Center.

- 3) **Safe housing for vulnerable populations with sufficient trained and well-supervised staff must be provided.**
- 4) The Department has proven itself incapable of meaningfully self-auditing to address sexual abuse. Its self-assessments and Corrective Action Plans have been narrow in scope, unreliable and inadequate. The Board of Correction is being asked to function as a PREA auditor, without the requisite resources or expertise. **Either the Board should be given the resources needed to fully and meaningfully monitor the PREA Standards or an independent review board should be created to monitor sexual abuse in our jails, with their findings and recommendations made public.**
- 5) **Greater transparency is needed**, including making public, subject to redaction for personally identifiable information 1) all data required to be provided by DOC to BOC pursuant to 40 RCNY §5-40(d); 2) a random sample of investigations conducted into staff sexual abuse, including any prior investigations involving the same staff person; and 3) data concerning the sexual abuse and harassment of visitors as contained in Proposed Legislation Int. No, Int. No.1090: In relation to requiring the Department of Correction to report on the sexual abuse of visitors.

Sexual Abuse and Harassment Is Pervasive In Our Jails.

Persons subjected to sexual abuse are understandably reluctant to come forward, given the humiliation and embarrassment associated with this abuse. This reaction is intensified when the abuse occurs in a carceral setting, where the survivor fears retaliation and knows, correctly, that complaints are futile since a prisoner's word alone will never be credited. Because incarcerated persons are often afraid of the repercussions from saying "no" to a staff person's demand for sexual activity, they may try to make the best of a wretched situation, and accept contraband or go along with the pretense that the relationship is a romantic one. This in turn can be construed as consent, with other staff not taking such abusive relationships seriously, fostering a culture of indifference.

This context is crucial for understanding reports of abuse and harassment by people in DOC custody. For years—and we see no reason to believe that the situation has changed—sexual abuse in custody has been widely underreported.² Given that reported allegations represent only the tip of the iceberg, the data provided by the Department of Correction in its August 2018 Standards 5-40 Assessment Report ("DOC August 2018 Report") is alarming. Even if, as the Department states, allegations decreased in the first half of 2018 to 229 reports of sexual

² Sexual abuse is widely acknowledged to be underreported outside of jails and prisons. In custody, it is substantially underreported. See DOJ Regulatory Impact Assessment, United States Dep't of Justice, "Regulatory Impact Assessment for PREA Final Rule" at 17-18 (May 17, 2012), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf (concluding that, based upon the 2008-2009 BJS survey, between 69 percent and 82 percent of inmates who reported sexual abuse in response to the survey had never reported an incident to corrections staff).

misconduct,³ this is merely a correction to a peak reached by years of a surging number of complaints.⁴ An astonishing 135 of the reports involve abuse by staff.⁵ Even now, allegations of abuse by other incarcerated people are increasing.⁶

The Department will likely proffer a litany of reasons to discount these numbers. Their rationales have changed over time: sometimes they say that the rise in allegations is not because there is more abuse but because reporting mechanisms have improved (which would not explain why numbers are now purportedly decreasing); sometimes they claim people complain to achieve some secondary gain, such as being moved away from staff they do not like (ignoring that incarcerated people have no assurance they will be moved, or to where, and that reporting sexual abuse is embarrassing and painful); and sometimes they say that a small number of people file a significant number of complaints, implying that alone proves these complaints false (ignoring the fact that the vast majority of complaints are not from these same people, and that some people are indeed repeatedly targeted for abuse).

The rationale this time is different: the Department tries to minimize the significance of the reports of staff abuse by saying that the majority occur during a use of force, strip search, pat frisk, contraband retrieval or escort.⁷ We are not sure of the Department's point in emphasizing this, since such interactions between staff and incarcerated people are an obvious flashpoint, and serious abuses can occur during these events; for example, we are aware of degrading incidents of sodomy that have occurred during searches. Furthermore, the percentage of staff misconduct during these events has gone down as compared to the last six months of 2017.⁸ And the fact remains that a significant number of incidents do not occur during these events—acts that constitute crimes under the New York Penal Law or that involve inappropriate touching or voyeurism--yet the Department provide us with no information about the scope or type of these assaults or rapes.

In other words, it is impossible to know what to make of the information provided by the Department in its August 2018 Report, other than to recognize that serious abuse continues to be reported. We are on track for the Department to receive more than 450 allegations of sexual misconduct this year. That number is too high. Immediate steps need to be taken to foster the safety of some of the most vulnerable New Yorkers. While there are many failings in the treatment of persons who have been subjected to sexual abuse—from inadequate reporting mechanisms⁹ to a lack of access to adequate crisis support following trauma—we focus on issues

³ See NYC Department of Correction: NYC Board of Correction Sexual Abuse and Sexual Harassment Minimum Standards 5-40 Assessment Report-August 14, 2018 (“DOC August 2018 Report”) at 6-7, available at https://www1.nyc.gov/assets/doc/downloads/pdf/Bi-Annual_August_2018.pdf

⁴ See data from 2015, 2016 and 2017, respectively, available at https://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents.pdf; https://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents_CY16.pdf and https://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_CY2017.pdf.

⁵ See DOC August 2018 Report at 6.

⁶ *Id.* at 5-6.

⁷ *Id.* at 7.

⁸ *Id.* 6.

⁹ A review of the DOC website fails to show any mechanisms available for family and friends to report sexual abuse of persons in custody. Even Alabama does a better job. See <http://www.doc.state.al.us/facility?loc=21> (“The agency shall ensure that all allegations of sexual abuse and sexual harassment are referred for an administrative or criminal investigation. Submit an Investigative Request or send an email to DOC.PREA@doc.alabama.gov to report an allegation of sexual abuse or sexual harassment.”)

pertaining to accountability of staff who engage in abuse, and safe housing for all.

The Department's System for Investigations Is Wholly Broken

Effective investigations are the foundation of accountability, since staff are not disciplined until an allegation of sexual misconduct is substantiated. There is no assurance that timely, competent and professional investigations of sexual misconduct are occurring. Rather, the investigative process of sexual misconduct seems largely a black hole, one where complaints go to die.

Two City agencies have primary responsibilities for investigating sexual abuse in the City jails. DOC's Investigation Division investigates complaints of sexual assaults and harassment allegedly committed by incarcerated people.¹⁰ The Department of Investigation (DOI) is charged with investigating complaints against staff and allegations of rape.¹¹ However, after preliminary review of a case, DOI can decide to send a case back to DOC for investigation.¹² In addition, DOC is required to report allegations of sexual assault and harassment to local law enforcement to conduct a criminal investigation.¹³

We have virtually no information about DOI's efforts: we do not know which cases are referred back to DOC for investigation or how many. We do not know how DOI decides. We do not even know what role, if any, DOI plays before returning an investigation to DOC, or even whether physical proof is promptly obtained in all cases where it should be.

We do know some basic information about DOC's investigations. First, we know that the investigative process has been compromised by substantial delays. DOC's policy requires investigations conducted by the Investigation Division to be completed within sixty days of the complaint¹⁴ while the Board's Standards allow ninety days.¹⁵ The truth gets buried when investigations are delayed: physical and video evidence becomes unavailable and memories blur. Yet DOC's investigations into sexual abuse languish, often for years: according to the Department's statistics issued in 2018, 739 of 823 (or 90%) of allegations were pending from 2016, and 1112 of 1151 (or 97%) of allegations were pending from 2017.¹⁶ The federal monitor in *Nunez v. City of New York* has detailed similar delays, finding in his most recent Report that "The lack of timely case closure *severely compromises* the integrity of the Department's response to allegations of sexual assault."¹⁷

Second, the DOC Investigation Division has proven for years that it is *unable* to competently and fairly investigate staff misconduct. The federal monitor in *Nunez* has repeatedly found the

¹⁰ See DOC Directive 5011, *Elimination of Sexual Abuse and Sexual Harassment*, 31 (December 31, 2008), available at https://www1.nyc.gov/assets/doc/downloads/directives/5011_R_A_Sexual_Harassment_n.pdf.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 32.

¹⁴ *Id.* at 31.

¹⁵ See 40 R.C.N.Y § 5-30(m).

¹⁶ See DOC August 2018 Report, at Table 3, available at, https://www1.nyc.gov/assets/doc/downloads/pdf/Bi-Annual_August_2018.pdf.

¹⁷ See *Nunez v. City of New York*, 11 Civ. 5485 (LTS)(JCF) (S.D.N.Y. Oct. 21, 2015) Fifth Report of the Nunez Independent Monitor, (filed 4/18/2018) at 161-162, available at https://www1.nyc.gov/assets/doc/downloads/pdf/Fifth_Monitor_Report.pdf (emphasis supplied).

investigative process for sexual abuse allegations involving adolescents to “continue[s] to evidence significant structural problems such as the failure to interview key witnesses, long delays to witness interviews, and apparent failure to ask effective follow-up questions or to collect relevant evidence.”¹⁸ It is thus no surprise that the Department almost never substantiates any allegations of abuse: in all of 2017 the Department substantiated only one of 367 reports of staff sexual abuse and only one of 143 reports of inmate-inmate sexual abuse.¹⁹ To our knowledge virtually no staff has been disciplined for sexual misconduct since the Board Standards were promulgated.

The Department maintains that they will turn things around by hiring more investigators,²⁰ by revising a form used to close investigations²¹ and by using Captains to conduct certain investigations.²² In its most recent Report, DOC details the efforts it has made, indicating that the ID PREA Team has increased since May, 2016 from one supervisor to four supervisors and from six investigators to twenty-four, with a goal of having thirty investigators and two Deputy Directors (instead of one) by the beginning of 2019.²³ This is commendable, but it does not answer the core problems in how DOC conducts investigations.

We are skeptical that these are solutions. First, it is not clear what the Department’s net gain has been, with staff often leaving almost as quickly as new investigators are hired. We are concerned that ID fills many vacancies with Temporary Duty officers—correctional staff who are likely to return to working in the jails after their stint at ID.²⁴ These officers know that any day they might be transferred back to working side-by-side with the very people they are now investigating, inhibiting their independence and neutrality. Having captains conduct investigations likewise defeats the purpose of having trained and objective investigators conduct investigations. Both serve only to reinforce the lack of trust people in custody legitimately feel about the bias inherent in an agency investigating itself.

Nor is it clear that this number of investigators is sufficient to address the number of allegations of sexual misconduct the Department has received. While DOC reports that from April-July, 2018, they closed 111 cases,²⁵ from July 2017-June 2018 they were only able to close 179 cases total.²⁶ While certainly on the right trajectory, at this rate the Department cannot investigate all of its current and backlogged cases.

Needless to say, the quality of investigations is a concern, and it would be no gain for the Department to gain speed at the expense of accuracy. Yet they seem now to be coming to

¹⁸ *Id.*, at 162.

¹⁹ See e.g., Sexual Abuse Allegations and Incidents, CY 2017, https://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_CY2017.pdf ()

²⁰ See PREA Investigations Corrective Action Plan, NY Department of Correction (June 2018), available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2018/June-12-2018/PREA%20Public%20Corrective%20Action%20Plan.pdf>

²¹ *Id.*

²² See DOC August 2018 Report at 10.

²³ See DOC August 2018 Report at 13.

²⁴ See Fourth Report of the Nunez Monitor, at 139-140, available at https://www1.nyc.gov/assets/doc/downloads/pdf/Fourth_Report_Nunez_Independent_Monitor_10.10.17.pdf.

²⁵ See DOC August 2018 Report at 11,.

²⁶ *Id.* at 10.

immediate, and biased, conclusions. They have come to “preliminary findings” on virtually every allegation they have received since July 2017.²⁷ The problem is that they appear to be rushing to judgment²⁸ and concluding that that virtually every allegation is either unsubstantiated or unfounded. According to the Department’s most recent data, the Department has found only three allegations—even preliminarily—to be substantiated.²⁹

Conducting sexual abuse investigations is not simply a matter of checking boxes or streamlining a form and calling a case closed. Closing investigations for the sake of closing them helps no one: allegations must be competently, fairly and thoroughly investigated. The Department has not understood this fundamental obligation, and so we believe that they should not be entrusted with the duty to investigate themselves.

Body Cameras Are Essential

From our experience cameras are the single most important tool in addressing custodial sexual abuse. They deter misconduct. They provide an objective lens through which investigators can view complaints, both helping to vindicate persons who are falsely accused and to ensure that corroboration exists when credible allegations are made.³⁰

While the fixed cameras required by the *Nunez* Consent Judgement must continue to be maintained after the Judgment terminates, *see* 40 RCNY § 5-04((h)-(i)), more is needed to deter sexual abuse.³¹ Sexual abuse tends to occur in small enclosed areas where incarcerated people are not expected to be—storage closets, laundry rooms, and slop sink areas. To the extent that fixed cameras are not installed throughout all locations in the jails, we believe staff persons should be required to use body cameras if they are alone with an incarcerated person in an area outside the view of the fixed cameras. Given the breadth of the *Nunez* requirements, this should rarely happen. The failure to wear such a camera, regardless of what the camera shows, should be a basis for discipline.

Safe Housing for Vulnerable Populations Is Needed

Although Board Standards require screening for vulnerability to sexual abuse, *see* 40 RCNY § 5-18, DOC utterly fails to provide safe housing to vulnerable people in its custody. Every month

²⁷ *Id.* at 10.

²⁸ In their PREA Investigations Corrective Action Plan, the Department claimed that they were completing all investigations within 72 hours of receipt of the complaint. They provided no explanation for the steps they were taking to “complete” the investigation but it is hard to imagine that they were complying with the requirements for a professional investigation (*see* 40 RCNY §§ 5-30(a)-(e), 5-31) in that period of time.

²⁹ *See* DOC August 2018 Report at 10.

³⁰ *See, e.g.*, “Spying on Attica: How Nearly 2,000 Cameras Tamed America’s Most Notorious Prison” (April 9, 2018), available at <https://www.themarshallproject.org/2018/04/09/spying-on-attica>. Cameras are not, however, a panacea. If there is a culture of impunity, staff will continue to engage in misconduct. Cameras work as an investigative tool if people report, and people in custody are understandably reluctant to report staff misconduct given the power disparity and risk of retaliation. But when someone feels safe enough to report, then cameras can play a dispositive role. *See e.g. Patterson v. State of New York*, 44 Misc. 3d 1230(A) (Ct. Cl. Aug. 29, 2014). (officer tipped his hat at the video camera after sexually assaulting a women in custody; she only complained after she was transferred away from him).

³¹ Because of the obstacles to reporting sexual abuse in custody, we believe footage should be required to be maintained for longer than the ninety days required by the Board Standards. *See* 40 RCNY §5-04(j).

we hear from people in custody, particularly transgender and gender nonconforming persons, who tell us that they have been subjected to harassment and abuse, including on occasion even forcible rape. These incidents can occur even in protective custody. Sometimes people who complain are moved, but if so, it is usually to intake cells with no bed and no place to sleep, and where the provision of medical and mental health services is severely compromised, often at the time the incarcerated person most desperately is in need of care. After a stay in intake that can last for days, the person is moved to another unit, and then when problems recur, to another intake cell. The cycle continues again and again and again.

We applaud the Department and the Human Rights Commission for finally recognizing its obligations to house people based presumptively on gender identity³² and for moving the Transgender Housing Unit to the Rose M. Singer Center, the women's jail. This has been an extraordinary success for the women lucky enough to be housed in it. But many are still left out in the cold. For all those people—who the Department has chosen not to admit to the THU or who the Department has admitted only to be removed if they have any kind of problem--there is no safe housing.³³

This lack of safe housing extends not just to transgender women, although they are most vulnerable; it includes other vulnerable populations including gender non-conforming, intersex, gay, and queer persons. It is a particular conundrum for those people who are sexually vulnerable but who the Department has decided also pose a risk.³⁴

DOC is operating a shell game when it comes to housing, one with serious repercussions. Intake cells are inhumane: people should never have to stay in them for longer than twenty-four hours. Repeated sexual abuse continues with DOC hoping that simply changing someone's housing area, without more, will somehow miraculously protect vulnerable people.

We believe DOC should be required to create vulnerable population units, with substantially more staff and protection than offered in current protective custody housing units. This is not a new concept to the Department: indeed, when the Department first threatened to close the THU, they talked about creating vulnerable persons units in its place. We opposed this proposal because, first, they are not a substitute for the THU, which is important and should remain open; and second, because DOC's proposal was horribly ill-defined and ill-conceived. There was no actual plan for these units; DOC had no idea who would staff them, how many staff would be assigned, how staff would be trained, how frequently supervisors would be present, or what

³² See "Mayor de Blasio announces Department of Correction will house incarcerated individuals according to gender identity" (April 18, 2018), available at <https://www1.nyc.gov/office-of-the-mayor/news/193-18/mayor-de-blasio-department-correction-will-house-incarcerated-individuals-according-to>

³³ See Board of Correction Report "An Assessment of the Transgender Housing Unit," (February, 2018) available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/THU%20FINAL%20Feb%202018.pdf>.

³⁴ The Department labels people as SV (for sexually vulnerable) or SA (for sexually aggressive), a remarkably unsophisticated categorization of people. See Corrective Action Plan to Comply with Minimum Standards § 5-17 and § 5-18 (October 24, 2017), available at, https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/DOC-Reports/PREA_SCREENINGTOOL/2017-10-25-Corrective-Action-Plan.pdf. To those of us observing, it is impossible to understand how this categorization works, or how it fits with the Department's classification system, which according to public reports the Department spent millions of taxpayer dollars on hiring McKinsey, a private consulting firm. See e.g., <https://nypost.com/2017/02/27/rikers-anti-violence-consultants-bill-balloons-despite-spike-in-assaults/>

programming would be offered.³⁵ Most critically, the Department was suggesting that they would mix various “vulnerable” populations with no thought behind whether the comingling made any sense.³⁶ For example, DOC proposed housing transgender women with men who were small in stature or of limited English proficiency with no other criteria articulated. In other words, a Spanish-speaking transphobic gang member charged with repeated sexual assaults could be housed with a transgender woman, simply because he did not speak English well. That plan was patently inadequate and dangerous. But a properly conceived and implemented plan is essential. The need to for these units is obvious and urgent: it is time for all vulnerable persons in need of protection from sexual abuse to finally be housed safely while in DOC custody.

Sufficient Oversight and Public Accountability Needs To Be Provided

The Board of Correction has repeatedly publicly acknowledged that the Department is not in compliance with the Standards to eliminate sexual abuse. But to date, the Board has issued only one Notice of Violation.³⁷ The Board has not issued any detailed or comprehensive report about the state of the Department’s compliance.

We appreciate the extraordinary dedication, skill and hard work of the Board and its staff. We understand that further information is likely forthcoming. While this is welcome, we remain concerned that the Board lacks the institutional resources and expertise to conduct all of the oversight work that is required, in the timeframe that is needed.

The fact is that meaningful monitoring and enforcement of the Board’s Standards have been absent. For example, one of the core Standards requires DOC to supervise its staff. *See* 40 RCNY§ 5-04(k). Incarcerated persons tell us that high-ranking supervisors rarely are on the units, at most conducting perfunctory twice-per-shift rounds which, despite the Board’s requirements to the contrary, do not take place at “varied and unpredictable” times. The public has no ability to confirm this by reviewing logbooks in order to assess DOC’s supervision efforts; we are dependent on the Board to do so. But such monitoring has not taken place. This kind of monitoring is labor intensive; it requires much more than glancing at a log book to see if a “PREA round” is noted twice per shift or even if rounds are conducted at slightly different times each day. Rather, it requires calculating whether there are windows of time when rounds never take place, so that staff can be confident that no higher-ranking supervisor will come and find them in a compromising position. In our experience, the lack of these rounds plays a central role in allowing abuse to take place: staff know when there is a period when no round is likely to

³⁵ The Department announced this plan at a meeting of the Board of Correction on March 30, 2017. NYC Bd. Of Corr., *2017 03 30 NYC Board of Correction meeting*, YouTube, March 30, 2017, 11:15-28:42, <https://youtu.be/jmaHN4aLWrl> (statement of Faye Yelardy, Assistant Commissioner for Sexual Abuse and Sexual Harassment Prevention.).

³⁶ *Id.*

³⁷ On August 17, 2018 the Department requested a variance from the requirement that it implement a pilot project of cameras in transport vehicles, something it was obligated to begin and report on over a year ago. *See* Letter from DOC to BOC requesting a limited variance from Standard § 5-04(g), available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2018/September-14-2018/NYC%20Department%20of%20Correction-BOC%20Sexual%20Abuse%20and%20Sexual%20Harassment%20Minimum%20Standards%20-%205-04%20-%20Transport%20Vehicle%20Camera%20Pilot%20and%20Report.pdf>. None of our clients had reported ever seeing a camera in a transport vehicle. BOC had never issued a public report on the state of this pilot project so until this variance request was submitted the public had no way of knowing if the pilot ever really started; if it did, if it consisted of more than one cameras in one bus; or what the Board would require a genuine “pilot” to consist of.

be conducted. The Standard also prohibits staff from calling ahead to inform other staff that rounds are being conducted. These “trip calls” were routine in the City jails. We have no idea if the practice continues. To monitor compliance the Board needs to talk to staff and to incarcerated persons, and it needs to review housing unit phone logs.

Meaningful oversight of compliance with sexual abuse standards requires not just sufficient resources, but also certain expertise. Investigations of sexual harassment and abuse are one of the most crucial areas requiring oversight. The Board has played an important role in clarifying that investigations languish and that almost no allegations are ever substantiated.³⁸ But further monitoring of the Standards is required, *see* 40 RCNY §§ 5-5-15, 5-30(a)-(e), 5-31. A compliance assessment would consider, among other things:

- Are all investigators trained?
- Are they properly trained?
- Is all video and physical evidence that could be obtained timely obtained?
- Are the victim and alleged perpetrator talked to, and are all witnesses questioned? Within what timeframe? In what sequence?
- And most crucially, when they are interviewed, what questions are asked—are they designed to get at the truth?
- Are credibility assessments made, and on what basis?
- If a person’s status as incarcerated or as staff is not forming the basis for credibility assessments, then what is?
- Are prior allegations involving the alleged perpetrator being reviewed? If so, to what purpose?
- Do all investigators know the standard of proof required to substantiate an allegation (the preponderance of the evidence)?
- If so, are they appropriately and reasonably applying this standard?

Monitoring these Standards requires reviewing actual investigations by someone expert in professional investigations. It is concerning that such an evaluation has not been completed in the two years since the Board standards were promulgated.

As written, the Board Standards do not contemplate the Board conducting external compliance audits. Indeed, the Department had retained the services of the Moss Group, purportedly to help them prepare for external PREA audits as required by the National Standards. *See* 28 C.F.R. §§

³⁸ See BOC “Background on PREA Investigations” (June, 2017), available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2017/June-13-2017/2017.06.13%20-%20PREA%20data%20to%20share.pdf>.

114.401-.405 To our knowledge, however, these audits have not occurred and the Moss Group is gone. We have no idea if the Department intends to be so audited, or when.

Nor can the Department be counted on to monitor itself: its Assessments Reports routinely have been inadequate. Its first Report describing data from 2016-2017 was extremely limited in scope, did not discuss all of the relevant trends (e.g., if transgender persons were most at risk), focused primarily on investigations, and was internally inconsistent, making its data entirely suspect.³⁹ The Department's August 2018 Report is not much better; it continues to minimize the severity of the problems. It does not discuss the core substantive failings in how investigations are conducted.⁴⁰ It does not describe meaningfully how safe housing is provided for vulnerable persons; instead it simply describes that people are labelled either as sexually aggressive or sexually vulnerable⁴¹ and then utterly fails to discuss how housing and program decisions are made. It goes on to say that there are housing areas for persons who are labelled as vulnerable where they can be housed with persons without a label, and that sexually vulnerable and sexually aggressive persons are housed separately unless they are housed on specialized units in which case efforts will be made not to house them in close proximity and to watch them more closely.⁴² But no information is provided as to what units are being referred to, where they are, if they are any different from regular protective custody units, if all vulnerable persons are housed on them, or perhaps most significantly how persons who present as both vulnerable and potentially aggressive are to be kept safe. The only reference to supervision is a statement that blind spots are searched several times a day in addition to standard welfare security checks.⁴³ That does not provide comfort that there are any additional staff assigned, that any additional supervisors are present or that these units are any different from regular housing or even protective custody units

We believe that either the Board needs to be provided with the resources required, or an independent review board needs to be created to monitor sexual abuse in our jails. As part of this process, greater public transparency needs to be provided. The public is entitled to know what is going on in its jails.

In addition, all of the data that is to be provided by the Department to the Board, *see* § 5-40(d), needs to be made public. This is not confidential or personally identifiable information. It simply describes each victim's demographics (e.g., the person's gender, LGBTI status, whether the incident was captured on video, or whether DOI or ID conducted the investigation). We understand that the Board is working towards making at least some of this information public, but there is no reason that the Department should not be required to make all of this information public immediately. We therefore believe Local Law 33-2016 (NYC Admin. Code § 9-130) should be expanded to require DOC to post this information publicly on at least an annual basis. We suggest that this data should not only be provided cumulatively about all reports received but

³⁹ A comparison of Tables 3 and 3A illustrate the unreliability of the data: Table 3 says that in 2016 there were 3 substantiated allegations; while Table 3A says there were 8. *See* DOC 2016-2017 5-40 Assessment Report, available at, [https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/DOC-Reports/2018.03.15%20-%20Annual%20Sexual%20Abuse%20and%20Sexual%20Harassment%20Assessment%20Report%20\(PREA\).pdf](https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/DOC-Reports/2018.03.15%20-%20Annual%20Sexual%20Abuse%20and%20Sexual%20Harassment%20Assessment%20Report%20(PREA).pdf)

⁴⁰ See DOC August 2018 Report at 12-13, available at https://www1.nyc.gov/assets/doc/downloads/pdf/Bi-Annual_August_2018.pdf

⁴¹ *Id.* at 14.

⁴² *Id.* at 14.

⁴³ *Id.* at 14.

should also be provided so that it is possible to track the results for each investigation. In other words, the Department should be required to post information not only that there were XX number of reports of sexual misconduct received from transgender incarcerated persons, but the public should be able to know whether each of those reports involved a staff person or another person in custody, the nature of the allegation, whether it was videotaped, who conducted the investigation and its results. Both sets of data points are critical for the public to have any understanding of what is taking place.

Given the deep-seated failures in DOC's Investigation Division's impartiality and performance, we believe DOC should also be required to make public each year a random sample of the staff sexual abuse investigations that it conducts. Right now, such investigations are shrouded in secrecy; the only information we know is the result of the *Nunez* litigation. To our knowledge, no staff is being disciplined for sexual misconduct, or even for related misconduct (failing to report, unauthorized relationships). Incarcerated persons and the public at large will continue to have no faith that the Department is adequately policing itself. Nor, given the evidence to date should they unless they can see for themselves what DOC is doing. We recognize that substantial redactions will be required, which is why we suggest that only a random sample be made public. As part of this sample, we believe the public should be able to see any prior allegations (and investigations) involving the staff person, since the Department's consideration of such prior allegations in determining whether to substantiate a current allegation is telling. Suh prior allegations can be probative of a pattern of abuse as recognized in criminal proceedings in our State, *see People v. Molineux*, 168 N.Y. 264 (1901) or even to show propensity in civil and criminal proceedings in federal court, as recognized by the Federal Rules of Evidence, Rule 415.

Finally, one omission from any data that is currently even nominally being collected is information about the sexual harassment or abuse of visitors.⁴⁴ It is important that the true scope of the problem be ascertained so that appropriate action can be taken. We therefore urge the Council to enact Proposed Legislation Intr. No. 1090: In relation to requiring the Department of Correction to report on the sexual abuse of visitors.

Respectfully submitted,

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⁴⁴ See "It Makes Me Want to Cry: A Report on Visiting by the Jails Action Coalition, January 8, 2018, available at <http://nycjac.org/wp-content/uploads/2018/01/VISITING-RIKERS-ISLAND-JAILS-ACTION-COALITION-1.9.18.pdf>.