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Dear Members of the Board of Correction:

The Prisoners' Rights Project of the Legal Aid Society strongly urges the Board of Correction ("Board" or "BOC") to deny the request for a variance from the Standards to Eliminate Sexual Abuse and Sexual Harassment in Correctional Facilities ("Standards") submitted by the New York City Department of Correction ("Department" or "DOC") on September 8, 2017.

The Department seeks a variance from two related Standards. The first, § 5-17(f)-(g), requires the Department to reassess a person in custody's risk of victimization or for abusiveness within thirty days of admission to a facility or following an incident. The second, Standard § 5-18, requires the Department to use screening information in making housing, bed, work, education and program assignments. But very importantly, this standard also requires the Department to make individualized decisions on how to ensure the safety of each inmate, using the information obtained at screening and giving serious consideration to a person's own views on where he or she can safely be housed. Further, it explicitly prohibits the Department from assigning a transgender or intersex inmate to a men's or women's facility based solely on their external genital anatomy. Notably, the Department's variance request completely ignores any reference to these latter requirements, apart from quoting their text in a footnote,

The Department's stated need to move from a paper to a computer-based screening program in no manner justifies their request to violate these Standards. These standards are critical to the protection of individuals from sexual abuse and can—and must—be readily implemented.

Compliance with These Standards Is Pivotal to Ensuring People's Safety

The foundation for preventing rape and sexual assault in custody is meaningful use of screening data to house incarcerated people based on their risk of sexual assault, and for their potential for abusiveness. The Standards require that screening be conducted at intake and again within thirty days of a person's arrival at a facility, and following an incident of abuse. Standard § 5-17. They further obligate the Department to give serious consideration

to a transgender or intersex person's own belief about where they can be safely housed, and prohibit the Department from relying solely on their external genitalia in coming to a housing decision. Standard § 5-18. In promulgating Standard § 5-18 the Board carefully crafted a balanced approach to safety in housing, requiring a case-by-case assessment of whether the placement would insure the transgender or intersex inmate's health and safety balanced against whether such a placement would present a management or security problem.

The Department attempts to justify its failures to comply with the Standards, and request for a variance, by saying it needs to build a so-called "centralized, automated and system solution" to complete the thirty-day review. Even if it were true that the Department could *not* conduct the 30-day screenings in any other way—and we see no evidence of that—it does not explain the Department's failure to conduct meaningful intake screenings or to make individualized assessments regarding housing for the small number of transgender and intersex people in custody, neither of which are occurring.

A stark example is the plight of a transgender woman we reported on at the last BOC meeting. She is almost 60 years old, petite in stature, and presents in a traditionally feminine manner. She has long hair that she wears in a ponytail and is demure and soft spoken. She has lived as a woman for approximately forty years and her court papers and rap sheet identify her as female. She has never been charged with, let alone been convicted of a crime of violence, and has no history of disciplinary infractions when in custody for the larcenies she has committed to support her addiction. She is the paradigm of a person at risk of sexual abuse, as screening would identify, and needs to be housed and programmed appropriately to ensure her safety. But no such screening occurred when she was admitted to DOC custody, despite the requirements of Standard § 5-17. Instead, although DOC staff initially intended to send her to the Rose M. Singer Center ("RMSC"), when they found out she was a transgender woman, she was not allowed to go there. Based solely on an external examination of her genital anatomy by medical staff, she was sent to a male jail and placed in general population where she was harassed, threatened, stared at and was at imminent risk of assault. But for our administrative intervention which resulted in her being moved to the Transgender Housing Unit ("THU"), horrific consequences would likely have resulted.

The purpose of both the admission and follow-up screening of Standard § 5-17 (f) is to ensure that DOC identifies such people who, like this person, are suffering a continued risk of sexual harassment and abuse. Their safety should not depend upon the fortuity of them finding Legal Aid or other advocates to catch DOC's mistakes. If initial screening per Standard § 5-17(a)-(e) had been conducted—which requires an assessment of age, size, history of non-violence, history of victimization among other criteria—there is no rational way that this person would have been assigned to a general population dormitory with men. And had there been compliance with Standard § 5-18's requirements regarding an individualized housing assessment, from which DOC also seeks a variance, this individual would have said that she believed she would be safer at RMSC, and absolutely nothing in her background would have indicated that she presented a management or security problem. Instead these Standards were ignored and based solely on her external anatomy she was

forced to endure humiliation and harassment while housed in a men's facility in general population.

This person is not alone, but she is lucky in that she was not assaulted before she was moved to the THU. We hear from far too many people, including many transgender individuals not housed in the THU, who allege they were sexually abused by staff or other incarcerated people. And DOC knows these allegations too. According to the statistics released by the Department, the numbers of allegations of sexual abuse and harassment have increased a shocking amount. In CY 2015 there were 57 allegations of inmate-inmate abuse, and 131 allegations of staff sexual abuse. In CY 2016 the numbers had dramatically increased with 155 allegations of inmate-inmate abuse and 321 allegations of staff sexual abuse.¹ It would be complete folly to respond to this crisis by suspending the very standards that, if followed, would prevent such violence.

DOC Has Had More than Enough Time to Comply With These Standards

In their variance request, DOC says that they need additional time so that they can optimize compliance, and we certainly want DOC to implement an effective screening tool. But the fact is that DOC has been on notice for years that they were expected to comply with these requirements. The language in Standards §§ 5-17(f)-(g) and 5-18 is essentially the same as that contained in the National PREA Standards promulgated in 2012. *See* 28 C.F.R. Part 115.² And when the Public Advocate requested the institution of rulemaking in 2015, she made proposals that are almost identical with the Standards the Department now says it needs more time to meet. Since there is no bona fide operational reason for delay, we believe the Board should not grant a variance and allow the Department any further delay before requiring compliance with its Standards, and certainly not a delay of six months.

The Board Should Condemn DOC's Reluctance to Protect Transgender and Intersex Persons in Its Custody

To be blunt, we believe that DOC's explanation for its lack of compliance with Standard § 5-18 is pure pretext. We think that it is an open question whether the Department's reluctance to comply with the Standard's requirements regarding the housing of transgender and intersex inmates is based on discriminatory animus.

¹Available at:

http://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents_CY_16.pdfhttp://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents.pdf

² While the National PREA Standards do not contain the explicit prohibition on housing based on external genital anatomy, they do require that serious consideration be given to a person's own belief on where he or she can be safely housed, 28 C.F.R. § 115.42 and guidance issued by DOJ makes clear that an agency cannot house 100% of its transgender and intersex population based on genitalia. *See* PREA Resource Center, Frequently Asked Questions available at <https://www.prearesourcecenter.org/frequently-asked-questions>.

As BOC knows, DOC has repeatedly threatened to shut down the THU, one of the few safe and successful special units they run. The Department's purported justification for this proposal is that the THU violates the National PREA Standards. We disagree, since placement in the Unit is voluntary. Regardless, we have not heard a viable explanation for why the Department is in such a rush to close it. It is obvious, as made evident by DOC's request for a variance, that DOC is nowhere near approaching PREA compliance. Yet the Department has virtually been obsessed with shutting down the THU.³ Now, DOC wants to be excused from compliance with the Standards regarding housing transgender prisoners purportedly because of problems with their rollout of electronic assessments. But this is just one in a series of misrepresentations and excuses for not complying with this Standard. First they said at a meeting with advocates that they were complying with this Standard and had housed a transgender woman at the Rose M. Singer Center. Then at a meeting at which BOC staff were present they reluctantly admitted that this was not true. Then they said that they could not house transgender women in a women's facility because of State law. When we probed, it became obvious that there is no such law. Then they said there is a regulation that forbids compliance with this Standard. When advocates stated that we could not find such a regulation and asked to be pointed to it, we were told by DOC that they were going to look for it and get back to us. They never got back to us. Instead now they claim that problems in rolling out electronic assessments are the issue, but in six months they will comply.

There is simply no reason to believe that in six months there will not be yet another excuse since there is no reason why a need to switch from paper to computers means that DOC cannot conduct an individualized case-by-case assessment of where a transgender or intersex inmate can be housed that is not based solely on external genital anatomy. DOC apparently just does not want to comply with the Board's Standards. That is willful noncompliance and BOC should not countenance it.

DOC Is Disregarding Other BOC Standards Intended To Prevent Sexual Abuse

DOC did not seek a variance from other Standards it has yet to meet. Most notably, the Department is in violation of Standard § 5-40(i), which requires the public posting on the Department's website of data pertaining to its compliance with many of the other Standards, the Department's corrective actions, and an assessment by the Department of its progress in addressing sexual abuse and harassment. The first of these semiannual assessments was to be completed by August 1, 2017, yet no report is posted.

A similar report as well as detailed information on compliance efforts was to be provided to BOC on August 1, 2017. We ask the Board to advise the public whether it has received the information required to be provided by Standard § 5-40.

³DOC first told the advocates of their plans to close the THU and replace it with special population units over a year ago, and announced these plans at a public BOC meeting in March. It is impossible to tell from DOC's variance request whether this is still their plan.

Without DOC providing this information it is impossible to state with certainty how widespread DOC's non-compliance is. But given the appalling statistics DOC posted on July 1, 2017, for CY 2016—which indicated that of 321 allegations of staff sexual abuse, zero were substantiated, and that of 155 allegations of inmate-inmate sexual abuse only one was substantiated⁴—it is obvious that the Board's requirements for investigations are being disregarded, including the timeframes within which investigations are to be completed.⁵

Conclusion

The Board should not tolerate DOC's willful disregard of its Standards, including both the Standards set out in the Department's request for a variance but also the Standards regarding reporting. The Board should deny this variance request, hold a public hearing, and demand compliance from the Department.

Very truly yours,



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Supervising Attorney

⁴ Available at:

http://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents_CY_16.pdfhttp://www1.nyc.gov/assets/doc/downloads/pdf/Report_Regarding_Sexual_Abuse_Allegations_Incidents.pdf

⁵ Of the hundreds of allegations of abuse lodged in 2016, only about 5% were investigated to any conclusion, with the rest still “pending” according to information posted on the Board's website after the June 13, 2017 meeting. *See* “Background on PREA Investigations, June 2017 Board of Correction”.