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Via U.S. Mail and Email to fleckenstein.ladawna@mail.dc.state.fl.us

LaDawna Fleckenstein, Esq.
Office of the General Counsel
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, FL 32399

Dear Ms. Fleckenstein:

The purpose of this letter is to present comments to the Florida Department of Corrections ("FDOC") regarding the Notice of Development of Rulemaking published on June 18, 2013. That Notice provides the preliminary text of a proposed rule that represents the FDOC's efforts to comply with the federal Prison Rape Elimination Act ("PREA") and the implementing Department of Justice ("DOJ") regulations. This letter is submitted on behalf of the Florida Justice Institute, a nonprofit civil rights law firm that frequently represents inmates in Florida's prison and jails. We appreciate the opportunity to submit comments at this stage, and we look forward to participating in the development of this proposed rule.

As described in greater detail below, we believe many portions of the proposed rule either explicitly conflict with PREA, fail to implement some of PREA's requirements, or suffer from other deficiencies which conflict with PREA's purpose and possibly violate Florida law governing agency rulemaking. We urge the FDOC to make the changes outlined below to ensure that the final rule complies with the letter and spirit of the PREA regulations. Failure to do so may cause the FDOC to be out of compliance when it is subject to a PREA audit, and as a result lose a portion of its federal funding. Our comments are divided into two sections; the first addresses deficiencies appearing in the text of the proposed rule itself, and the second addresses policies and procedures that are required by the PREA regulations but are not addressed by the proposed rule.

Deficiencies In the Text of the Proposed Rule

1. Section 115.51(a)[1] of the PREA regulations requires that there be multiple internal ways for inmates to report sexual abuse. The proposed rule offers only one: a formal grievance. In fact, with the exception of emergency grievances, it must be a formal

[1] The PREA regulations can be found at 28 C.F.R. § 115.5 – 115.501.

grievance (103.006(3)(j)(1)(a))[2]. This appears to be the only subject matter that requires a formal grievance. Although PREA grievances are listed among types of grievances which may be initiated as formal grievances (as opposed to being initiated as informal grievances), see 103.005(1), another section actually requires it (103.006(3)(j)(1)(a)).

2. Section 115.51(c) requires complaints of sexual abuse to be accepted verbally and anonymously. Neither is permitted under the proposed rule. The current rules do not permit grievances to be submitted verbally—all must be in writing on the proper forms. Also, section 103.014(1)(x) of the proposed rule amends the grievance procedure to allow a grievance to be returned without a response if the inmate failed to use his committed name. Aside from conflicting with the PREA requirement of allowing anonymous reporting, this proposed rule imposes an unnecessary burden on inmates and allows staff to return grievances without a response if an inmate fails to use his full, proper name (such as Joe instead of Joseph). There is no reason to do this; an inmate's DC number allows staff to verify who is filing the grievance.

3. Section 103.006(2)(j) of the proposed rule would require inmates complaining of sexual abuse to state on the first line of the grievance that it is a PREA related grievance. There is no reason for this requirement. Inmates may not be familiar with PREA or its requirements, and they should not be required to identify that their grievance is related to a specific law. This is the only type of grievance that would require pre-categorization by the complaining inmate. Staff can easily identify from the content of the grievance whether it is related to sexual abuse and process it accordingly, and the onus to do so should be on FDOC staff, not the inmates. This also creates the danger that inmate sexual abuse will be under-reported during future PREA audits, as only grievances that specifically state they are "related to PREA" may be counted. This requirement would contravene a core purpose of PREA—to accurately document and process reports of sexual abuse, regardless of how the inmate reports it—and as such would likely cause the FDOC to be out of compliance during a PREA audit. It is also unclear what the import of failing to include this line will be. Presumably, grievances complaining of sexual abuse not identified as "PREA related" may be returned without processing, imposing an unnecessary procedural hurdle for inmates seeking justice for sexual assault.

4. The heading of section 103.006(3)(j) of the proposed rule is "Grievances alleging sexual abuse related to the Prison Rape Elimination Act (PREA)." There is currently no definition in the Inmate Grievances section of the Florida Administrative Code of "sexual abuse" or one that clarifies what the scope of a PREA grievance is. Section 115.6 of the PREA regulations contains an extensive definition of the term, which should be incorporated into the FDOC proposed rule. The reference to PREA is unnecessary and creates the potential for staff confusion. The rule should cover all grievances alleging sexual abuse, regardless of whether staff or inmates believe they are "related to PREA." The same change should be made to section 103.011(1)(b)(2) of the proposed rule.

[2] These citations refer to Chapter 33, Florida Administrative Code.

5. Sections 103.006(3)(j)(1)(b) and (d) of the proposed rule both reference "grievances alleging a PREA violation." This is ambiguous terminology. PREA only requires agencies to adopt procedures, document, and investigate sexual abuse. An inmate who has been the victim of a sexual assault will thus not be complaining of a "PREA violation" per se. These references should be changed to "grievances alleging sexual abuse," as long as the term is adequately defined. Again, the reference to PREA should be deleted entirely.

6. The proposed rule would delete section 103.005(4)(d), which currently requires the response to an informal grievance to contain a statement informing the inmate about how to appeal, and the time limits for doing so. There does not appear to be any reason for eliminating this; the statement already appears on the pre-printed form and there is no indication that the FDOC is seeking to amend the form. Although section 103.015(6) requires responses to formal and informal grievances to contain a statement informing the inmate of how to appeal, that section does not require the inmate to be informed of the time limit for appealing. Eliminating the statement about the time limit will likely result in inmates missing the deadline for appealing.

7. Under section 103.006(3)(j)(1)(d) of the proposed rule, third parties will be required to use the formal grievance form to report sexual abuse. Use of the form should not be required; third parties should be permitted to make reports verbally, informally, or through a designated outside entity. Requiring use of the form creates unnecessary procedural hurdles which will deter third parties from reporting sexual abuse. Allowing third party reports to be made in any form will better serve PREA's core purpose of encouraging the reporting of inmate sexual abuse. Moreover, third parties should be able to submit reports anonymously. This will be especially important if the third party is another inmate, as an inmate, fearing retaliation, may be especially hesitant to report the sexual abuse of another inmate.

8. Section 103.006(3)(j)(1)(f) of the proposed rule does not require a third party complainant to be notified of the FDOC's response to the grievance, and does not permit the third party to appeal the FDOC's decision. Although not explicitly required by PREA, allowing third parties to appeal will serve the law's purpose of documenting and preventing sexual abuse, and may assist vulnerable inmates who may be hesitant to follow through with the appeals process. If third parties are not permitted to appeal, they should at least be notified of the FDOC's decision. This should put no extra burden on the agency, as the agency is already required to notify the inmate; a copy can simply be mailed to the third party.

9. Section 103.006(3)(j)(1) of the proposed rule references the Prison Rape Elimination Act (PREA) of 2012. This should be clarified. Although the DOJ's PREA regulations were finalized in 2012, the statute was passed in 2003.

PREA Requirements Not Addressed By the Proposed Rule

There are numerous PREA requirements that are not addressed by the proposed rule. Some of them should be addressed in the rule itself to avoid confusing inmates and staff.

However, we realize that some of them may be addressed by other rules in Chapter 33, or by internal procedures. If the FDOC believes that any of these issues are addressed by other rules or procedures, or plans to promulgate any new rules or procedures to address them, please notify us.

1. Section 115.51(b) requires the FDOC to provide at least one way for inmates to report sexual abuse to an outside agency. The proposed rule does not mention this, and there currently does not appear to be any way for inmates to do this. We note that the DOJ has made clear that the outside agency cannot be an inspector general's office that is an internal entity, even if operationally independent from the agency. *See* 77 FR 37105, 37155-37156.[3]

2. Section 115.22(b) requires the FDOC to have a policy in place to ensure that the entity investigating sexual abuse has legal authority to conduct criminal investigations, and to publish this policy on its website. This policy does not appear to exist.

3. Section 115.73(c) requires the FDOC to inform the inmate of the results of an investigation of staff sexual abuse, including information about whether and where the staff member will be employed, and the results of any criminal prosecution. Although the grievance process requires a response from the FDOC, there is no requirement that all of the above information be communicated to the inmate.

4. Section 115.51(d) requires the FDOC to provide a method for staff to privately report sexual abuse of inmates. The DOJ's responses to comments during the rulemaking process indicate that "privately" means "directly to an investigator, administrator, or other agency entity without the knowledge of the staff member's direct colleagues or immediate supervisor." *See* 77 FR 37105, 37157. There currently does not appear to be a way for staff to do this.

5. Section 115.63 requires the head of a facility who learns of a sexual assault allegation that happened at another facility to notify the head of the facility where the assault occurred, and for such notification to be documented. Such a requirement and process does not currently exist.

6. Section 115.64 contains requirements for first responders to reports of sexual abuse, including separating the victim from the abuser. Although some of these appear to be addressed by internal procedures, not all of them are.

We urge the FDOC to revise the text of the proposed rule to address the issues we've identified to fully comply with the letter and spirit of PREA. We also note that failure to do so, or the imposition of any unnecessary impediments to the reporting of inmate sexual abuse, may cause the FDOC to be out of compliance when subjected to a PREA audit, lose federal funding, or be deemed an invalid exercise of delegated legislative authority. *See* Fla. Stat. §§ 120.52(8) & 120.56(1)(a).

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[3] Available at http://www.gpo.gov/fdsys/pkg/FR-2012-06-20/pdf/2012-12427.pdf.

Please do not hesitate to contact us with any questions or concerns. We look forward to hearing from you.

Sincerely,

s/Dante P. Trevisani
Dante P. Trevisani