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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

**Re: Comments and Objections to Proposed PREA Rule and Request for Public Hearing**

Dear Ms. Fleckenstein:

This letter is regarding the Notice of Proposed Rule published on August 12, 2013, which seeks to amend portions of the Florida Department of Corrections' ("FDOC") inmate grievance procedure to comply with the federal Prison Rape Elimination Act ("PREA").[1] The Florida Justice Institute ("FJI") hereby requests a public hearing pursuant to Florida Statute § 120.54(3)(c) to present evidence and argument concerning the proposed rule. FJI commends the FDOC for making certain positive changes to the rule since it was first proposed; however, portions of the rule still fail to properly implement the requirements of PREA, and therefore the FDOC risks losing a portion of its federal financial assistance. We urge the FDOC to amend portions of the proposed rule to fully comply with the letter and spirit of PREA, which is to ensure avenues for reporting, documenting, and investigating sexual abuse in prisons, and ultimately to reduce the incidence of sexual abuse.

FJI is a non-profit, public interest law firm that frequently represents inmates housed in FDOC facilities. We represent inmates in cases involving excessive force, conditions of confinement, failure to protect from harm, and others. Some of these cases inevitably stem from sexual abuse committed by other inmates or FDOC staff. We also engage in advocacy to assert and defend the constitutional, statutory, and regulatory rights of inmates and their families. Thus, FJI will be substantially affected by the FDOC's noncompliance with PREA, which will result in a loss of corrections funding for the FDOC and frustrate FJI's mission.

As described in greater detail below, several portions of the proposed rule still fail to fully comply with the requirements of PREA. Our comments and objections are divided into two sections; the first addresses deficiencies appearing in the text of the proposed rule itself, and the

[1] *See* 28 C.F.R. § 115.5 – 115.501.

second addresses policies and procedures that are required by the PREA regulations but are not addressed by the proposed rule. All legal arguments are not necessarily included here; and the ones that are included are merely summarized.

**Deficiencies In the Text of the Proposed Rule**

1. Section 115.51(a) of the PREA regulations requires that there be multiple internal ways for inmates to report sexual abuse. Although the proposed rule does not necessarily require that inmates use the grievance system to report sexual abuse, the other methods of reporting should be spelled out, or at least referenced, in the text of this rule. Otherwise, inmates will not know how to access those other methods. The other methods that are required by the PREA will not be effective unless the inmates know about them.

2. 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. 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. Thus, this requirement merely provides another unnecessary method—in any context, not simply sexual abuse—by which a grievance can be returned without processing. This portion of the proposed rule is arbitrary and capricious and is therefore an invalid exercise of delegated legislative authority. *See* Fla. Stat. § 120.52(8)(e).

   Further, Section 115.51(c) of the PREA regulations requires complaints of sexual abuse to be accepted verbally and anonymously. Neither is permitted under the proposed rule. It is not sufficient that a grievance may not theoretically be the only method available for reporting sexual abuse. Inmates are consistently told from the moment they enter the FDOC that any complaint must be made through the official grievance system. Thus, they will assume that complaints of sexual abuse must be made through the grievance system as well, and will assume that they are forbidden from reporting the abuse verbally or anonymously. Rather than create a separate track for anonymously reporting sexual abuse (which would have its own problems), the FDOC should simply allow sexual abuse grievances to be made anonymously, and the proposed rule should reflect that. Otherwise, the rule contravenes the requirements of PREA. *See* Fla. Stat. § 120.52(8)(c).

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 related to sexual abuse. While FJI applauds the FDOC for not requiring the inmates to use the phrase "PREA related" and for adopting PREA's definition of sexual abuse, the proposed rule would still require inmates to state on the first line that the grievance is related to sexual abuse. There is still no reason for this requirement. If the inmate complains of anything that falls within the definition of sexual abuse, it should be treated as a grievance related to sexual abuse. 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. Providing yet another way for grievances to be rejected without processing contravenes 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. This requirement of the proposed rule is vague, arbitrary, capricious, and contravenes the requirements of PREA. It is therefore an invalid exercise of delegated legislative authority. *See* Fla. Stat. § 120.52(8).

4. 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. Again, it is not sufficient that the grievance system may not theoretically be the only method available for reporting sexual abuse. Third parties will not be aware of any other options, as the proposed rule states, "Third parties must use the official Form DC1-303." Moreover, a staff member reading the rule may advise a third party that sexual abuse must be reported through the official form. For other options to truly be available to third parties, the rule should be clarified to reflect this. And, even if a third party could write to the Warden, there are no rules in place governing how the Warden must document, investigate, and respond to the complaint, as PREA requires. Thus, this requirement of the proposed rule is arbitrary, capricious, and contravenes the requirements of PREA. It is therefore an invalid exercise of delegated legislative authority. *See* Fla. Stat. § 120.52(8).

5. 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.[2] This procedure should be located within the grievance rule, so that inmates are aware of that option. If it is located in another rule, inmates may still think they have to report sexual abuse through the grievance system, or to someone within the FDOC.

6. 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. Because a response is already required, the grievance rule should be amended to require the inclusion of that information.

**PREA Requirements Not Addressed By the Proposed Rule**

There are numerous PREA requirements that are not addressed by the proposed rule. If

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

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. Some of the necessary PREA requirements are as follows:

1. 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.

2. 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.

3. 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.

4. 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.

In sum, we urge the FDOC to revise the text of the proposed rule to address the above issues to ensure that the FDOC is in full compliance with the letter and spirit of PREA. Failing to correct these deficiencies may be deemed an invalid exercise of delegated legislative authority. *See* Fla. Stat. §§ 120.52(8) & 120.56(1)(a). In addition, these deficiencies may cause the FDOC to be out of compliance when subjected to a PREA audit, lose federal funding, and frustrate FJI's mission as a result.

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

Sincerely,

*s/Dante P. Trevisani*
Dante P. Trevisani

Cc:
Ken Plante, Coordinator
Joint Administrative Procedure Committee

Eric Columbus
U.S. Department of Justice