

The Correctional Association of New York

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RE: Docket No. OAG-131; AG Order No. 3143-2010
National Standards to Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder,

On behalf of the Correctional Association of New York and pursuant to Advanced Notice of Proposed Rulemaking, we submit these comments in support of the recommended national standards for enhancing the prevention, detection and response to sexual abuse in confinement that were developed by the National Prison Rape Elimination Commission.

The Correctional Association of New York (CA) is one of only two independent organizations in the United States that have legislative authority to visit prisons and report on conditions of confinement. Since 1846, the CA has carried out this special legislative mandate to keep policymakers and the public informed about conditions of confinement that affect both inmates and corrections staff. One of the CA's central goals is to be an instrument for systemic change within the prisons by monitoring correctional policies and practices, developing proposals to make conditions more humane, educating the public, and pressing prison administration, state executive and legislative officials, and the public to take action. Because we critique what is happening inside prisons and reveal deficiencies or problems, we act as the public's eyes and conscience with regard to prison issues in our state.

The Correctional Association of New York's Prison Visiting Project¹ (PVP) is the project that monitors conditions within the male prisons in New York. PVP's work includes: (a) visiting state correctional facilities on a regular basis and issuing detailed reports of findings and recommendations to state corrections officials and state legislators; (b) preparing and distributing in-depth studies on critical corrections topics that include findings and practical recommendations for improvements; (c) advocating for reform at public hearings, in meetings with state legislators, at conferences and in discussions with the media; and (d) helping raise the visibility of corrections-related issues through publishing research reports and gaining media attention, posting fact sheets and prison reports on our

¹ The CA's Women in Prison Project performs a similar function for the five female state prisons.

website, and making presentations at academic and professional conferences. As part of its monitoring activities, the Prison Visiting Project mails in standardized surveys to inmates met during a prison visit. All correspondence between our office and inmates is deemed privileged mail, meaning that correction officials cannot read the correspondence. The data presented in the following public comments is taken from the more than 3,400 surveys we have received from inmates in 23 state prisons during the past four years.

Based upon the information we have obtained during these prison visits and the survey responses from inmates, it is clear that sexual abuse is a problem within New York prisons. When asked how often they hear about sexual abuse by staff occurring in their prisons, 10% of survey participants who responded to the question said it was frequently, and an additional 29% reported that it occurs occasionally. Ten percent of the survey respondents also reported that sexual abuse by staff was common within their prison. But getting information about this sensitive topic is difficult. Twenty-nine percent of the inmates responding to our survey did not answer the question about the presence of sexual abuse in the prison, whereas only 2% of these same individuals refused to answer an identical question about verbal harassment by staff.

During an earlier survey focused exclusively on violence and abuse in the prisons conducted by the CA in 2005 and 2006, 27% of the respondents reported that they were personally subjected to some form of sexual abuse by staff, which, in that survey was defined as physical sexual abuse, verbal sexual harassment, or inappropriate touching in a sexual manner by staff during a pat frisk or other contact. Sixty-three percent of the survey respondents who reported sexual abuse said it was limited to abusive pat frisks, but the remainder of the group said that they experienced other actions of sexual abuse by staff. Again, many of the inmates were reluctant to answer the questions about their personal experience with sexual abuse by prison staff, even though the surveys were confidential.

This data illustrates both that a problem exists and that it is difficult to assess, even by independent agencies not affiliated with the state or the corrections department. Clearly the new standards are needed to better understand the problem and to ensure that sexual abuse is prevented to the extent possible, that such abuse is identified when it occurs and that officials adequately respond to abuse once it is reported.

The standards developed by the National Prison Rape Elimination Commission represent a compromise, balancing the fiscal and security interests of corrections administrators with the basic rights of all people, including inmates, to be free from sexual abuse. Swift ratification of these provisions will spare thousands of men, women and children the devastation of sexual abuse behind bars.

Comments on the Standards

Inmate Supervision

Many of the prisons in New York State and the United States were not primarily constructed as prisons. They were schools, reformatories, mental health hospitals, sanatoriums, etc. and were often not built with security issues as a focus. The newer prisons recently constructed allow for greater security for both staff and inmates by ensuring that most areas are visible and increasing the staff's ability for continuous supervision. As many of the older prisons have various areas that are more isolated and difficult to supervise, we frequently receive reports from inmates at these facilities that

staff take advantage of these desolate areas within the prison to assert their power either through verbal, physical or sexual abuse.

In accordance with the Standard PP-3, it is imperative that prison officials provide the supervision necessary to protect inmates from all abuse, including sexual abuse. At older facilities where supervision may be more challenging, the administration should develop plans and policies to guarantee that no areas within a facility can be used by staff to further inmate abuse. This should include, but not be limited to, installation of video cameras in housing areas and other locations where sexual abuse has occurred or is likely to occur. Officials should closely monitor *ALL* reports of sexual abuse, whether founded or not, to determine if there are certain areas within a facility where abuse appears to be occurring with greater frequency.

Cross Gender Searches and Supervision

Incarcerated individuals often report feeling completely powerless. They are told what to do at every step and when/how to do it. This level of structure and discipline may be an element of the current incarceration model in the United States, but should never include an individual feeling physically or sexually threatened. In many facilities, particularly maximum security facilities, individuals are locked in a cell including a bed, desk, toilet and sink. The cells generally face an open hallway patrolled regularly by security staff assigned to the unit, whether male or female. The result of this situation is that inmates are denied all privacy and are forced to use the bathroom and disrobe knowing that an officer may at any point in time walk by, seeing them in an extremely vulnerable position. This situation is made worse, when the patrolling officer is of the opposite sex of the inmates. Not only do inmates report feeling violated and exposed when this happens, but they are simultaneously placed in another risky situation. If an officer of the opposite sex walks by the cell of an individual while they are undressing or using the toilet, that officer may choose to interpret the situation as an 'indecent exposure' and the inmate is then subject to disciplinary sanctions.

Policies should be clearly developed that allow inmates to be protected from actual viewing by the opposite gender when nude or performing other bodily functions and we enthusiastically endorse proposed Standard PP-4. If facilities are unable to reduce or eliminate cross-gender supervision, then efforts should be made to, at the very least, announce in the housing area that an officer of the opposite gender is preparing to make rounds.

Particular attention must be paid to personal searches of incarcerated individuals. Twenty-four percent of CA survey respondents reported that they frequently were subjected to abusive pat frisks and an additional 35% said that this occurred occasionally. Forty-eight percent of survey respondents said abusive pat frisks occurred frequently throughout the prison. Even though the vast majority of pat frisks in our state are performed by staff of the same sex as the inmate, many inmates reported that the abusive pat frisks included an element of sexual abuse. Clearly that element is increased when the search is performed by staff of the opposite sex and therefore, such searches or observations of searches by cross gender staff must be curtailed.

Specialized Training

The Correctional Association of New York strongly endorses the PREA standard regarding incorporating training on sexual abuse and harassment into pre-existing staff training sessions and inmate orientation workshops. The development and implementation of such specialized training can

help reduce incidents of sexual abuse within prisons as well as improve relationships between staff and inmates. We have observed the positive affects of specialized security staff training in some of the substance abuse treatment programs in New York State. Treatment programs where security staff had received substance abuse treatment training not only improved the overall effectiveness of the program, but also led to higher satisfaction rates among both staff and treatment participants. Similarly, we have found that when security staff working in facilities that serve a high number of individuals with mental illness receive specialized mental health training, disciplinary responses decreased as safety for both inmates and staff increased. Security officers were better armed with the knowledge of alternative ways to de-escalate tense situations and had a better understanding of the population and how they may view certain incidents or communication as threatening, and inmates also reported feeling much safer.

In order to effectively reduce incidents of sexual abuse within prisons, it is integral that staff are informed of the various types of situations (verbal or physical) that constitute sexual abuse as well as the repercussions they will face for engaging in such behavior and/or allowing other staff to do so by not reporting suspicious or other threatening staff behavior. Inmates must also be made clearly aware of their rights to be free from such abuse while incarcerated, the steps they should take to report such incidents, and the various mechanisms in place to ensure their protection from retaliation for reporting such behavior. For these reasons, the CA strongly supports Standard TR-1.

Detection of Sexual Abuse and Response by the Correctional Department

When sexual abuse occurs within a prison system, inmates need safe, effective reporting options that are responded to swiftly and thoroughly. The ability of inmates to contact a prison staff member who the inmate can be confident will both receive the complaint and respond appropriately while maintaining necessary confidentiality and avoiding retaliation is crucial if a prison's administrative response system is to be effective. Similarly, it is also necessary to have an option for access to an outside entity when the prison-based reporting system is not functioning properly or inmates are reluctant to rely on it for reporting this very sensitive data. We believe the standards on detection and response are essential if inmates are going to have meaningful access to redress abuse and the correctional systems are going to be held accountable for the sexual abuse that inevitably occurs in state prisons.

The requirement (Standard RE-1) for multiple internal mechanisms and an external entity for reporting sexual abuse is crucial. In many facilities, the existing procedures for filing complaints, such as prison grievance systems, are often inadequate to ensure confidentiality for the complainants and frequently result in retaliation once a complaint is submitted. The CA has surveyed inmates throughout New York prisons concerning their assessment of the state's grievance system. Based upon survey responses from more than 3,400 inmates in 23 state prisons, we found that inmates had very little confidence in the grievance system and that retaliation for filling complaints was commonplace. Specifically, 75% of the survey respondents rated the grievance system as poor and 56% of those survey participants who had filed grievances reported that they had experienced retaliation for filing a complaint about prison conditions or practices. Seventy percent of survey respondents said that retaliation for filing complaints was common at the prisons. Given the seriousness of sexual abuse and the great risks a complainant faces when he or she initiates a claim of abuse, it is clear that the usual prison mechanism are inadequate and new standards are needed to ensure confidentiality and to protect this vulnerable population.

Given the difficulties in prison administrative responses to sexual abuse, it is essential that victims of sexual violence have prompt access to legal redress that is not hindered by unrealistic and arbitrary procedural requirements. We strongly endorse Standard RE-2 (exhaustion of administrative remedies) that alters the current practices in most correctional system requiring very short filing deadlines, lengthy administrative appeal processes and cumbersome reporting mechanisms that often result in exposing complainants to further abuse as a result of breaches in confidentiality while delaying meaningful responses to serious complaints of mistreatment. Victims of sexual abuse must be able to expeditiously pursue legal action to protect themselves, and the courts should not be prohibited from hearing these serious allegations due to artificial procedural barriers that tend to insulate prison systems from meaningful judicial oversight.

Monitoring of Sexual Abuse

Standard AU-1 mandating audits of the standards recognizes that independent oversight is integral to developing and maintaining sound and effective public institutions. This type of monitoring is particularly important in correctional systems that, due to the very nature of prisons, are closed to the public and lacking in transparency. The CA's independence from government, allows us to fairly and aggressively report our observations and advocate for best practices. This independence is key to effective oversight.

Below is a limited list of essential components of an effective outside monitor. They include: organization mission; organization independence; access to information; publication of findings and recommendations; interactions between the prison system and the organization; and advocacy by the monitoring organization.

- **Mission of the Monitoring Organization:** It is very important that one of the first steps in establish outside, independent oversight is to clearly define the role of the outside monitoring organization or person. Some questions to consider include: What are the responsibilities of the individual/organization? Who do they report to? Do they solely look at systemic issues, individual complaints, or both? What happens with the information the monitoring individual or organization gathers? What is the monitors/organizations responsibility for following up on recommendations? How is the monitor/organization held accountable?
- **Independence of the Monitor or Monitoring Organization:** A monitoring organization or individual should have nearly total autonomy and should not be subject to significant limitations by any corrections facility or state/federal entity. This independence allows the monitor/organization to determine what it considers to be best practices and to advocate for reforms it believes are advisable and feasible.
- **Access to Information and Transparency of Prison Policies and Practices:** In order to effectively assess a correctional system, it is important for an outside monitoring organization to gain comprehensive and reliable information about the policies and practices within the prisons. This can be a difficult task because prisons are generally closed institutions that few can penetrate. The unique access of the CA allows us to go anywhere in the prison and speak to inmates and staff where they live and work, including inmates who have not necessarily contacted advocates to raise complaints on their own. This differs from litigators and other advocates who often obtain a somewhat biased view of a prison because they are primarily dealing with individuals who are motivated and capable of reaching outside the prison walls

to raise complaints and advocate for themselves. Since silence does not necessarily indicate a lack of problems, it is important that a reviewing organization be able to determine the experiences of this silent inmate majority.

We have found that in obtaining information from inmates, standardized survey instruments have been useful in assessing conditions and practices. These allow us to compare information from different facilities and to assess whether inmates' reports are systemic or anecdotal. Access to additional information, particularly corrections facility's data and departmental records and documents, is also necessary to assess whether systemic deficiencies exist and to place any individual observations made during visits in the context of the entire system. To overcome obstacles to accessing departmental records and information, regulations pertaining to access by an outside monitor should include the unfettered right of access to all departmental records, logs and data. Privacy concerns can be addressed by limiting the publication of identifying data in the monitor's reports.

- **Publication of Findings and Recommendations:** There is no political power, institutional pressure or natural public constituency to advocate for improvement in prison conditions when they are needed. Given this dearth of power, it is crucial that outside monitoring agencies publish and publicly promote their findings and recommendations. Increased resources are frequently necessary to address prison problems. In order to obtain these enhanced resources, a clear record of need must be developed to justify these additional expenditures. The voices of inmates should always be included, as should the views and opinions of staff and prison executives. The credibility of the monitor will always be tested, and it is critical that the organization or monitor can fully support its conclusions and demonstrate that it is equally prepared to listen to, and present, the staff's views.
- **Corrections Department Accountability and Interaction between the Department and a Monitoring Organization:** Reporting is only the first step in the corrective process. Ideally, the corrections departments will review the findings and recommendations of the monitor and initiate a process to address the monitor's concerns, permitting the corrections department the opportunity to determine how best to remedy the situation. The optimal process for communication and cooperation between the monitor and the corrections departments should have the following components: a dialogue between the monitor and the corrections department in which the monitor's preliminary findings and recommendations are discussed; an investigation by the corrections department of facts the department contends are in dispute, and the development of a written corrective plan to address deficiencies or improve practices, which is shared with the monitor; and a re-evaluation process by the monitor after the department has had an opportunity to address the problems to determine whether they have implemented their corrective plan and to assess whether the plan adequately addresses the concerns raised in the initial report.

Many corrections departments will not voluntarily undertake the steps outlined above. Therefore, it is crucial that the PREA standard AU-1 be adopted, which includes many, but not all, of the above specified elements. We commend the standards for requiring that the findings and corrective plans are made public.

In monitoring sexual misconduct in prison, an outside agency faces even greater challenges than it does in investigating many other prison activities. It is crucial that the transmission of information

about sexual activities in prison be conveyed in a confidential manner. Often, the very fact that an inmate is speaking to, or corresponding with, someone from outside about sexual issues can cause retaliation from staff or at least heightened scrutiny from security staff and/or prison administrators. To assess sexual activities within prison, an outside monitoring agency should design a protocol to investigate these issues that would minimize the barriers that exist in getting an accurate appraisal of this conduct. Speaking to many inmates, including those not directly involved in abuse, can give some measure of confidentiality to those who have been abused but do not want to disclose their situation. In addition, disclosure of information about sexual activities within prison requires the development of trust between an inmate and an employee of an outside monitoring agency. Sometimes inmates may feel more secure in revealing such information in a confidential survey.

It is difficult for an outside monitor to ensure that inmates who disclose information about sexual activities will be adequately protected if this information is revealed to correction officials. Once a monitoring agency learns about sexual abuse, it will inevitably face the situation whether to advise the inmate to pursue the matter with corrections and/or law enforcement officials and to what extent the agency should act as an advocate for that person with these officials. The outside agency should have a clear policy on what they are going to say to inmates who allege that they have been abused by another inmate or staff and what role, if any, the agency will play with the corrections department if an inmate files an allegation of sexual abuse. As previously mentioned, it is also often difficult to obtain department documents and records concerning incidents of sexual misconduct. Most corrections departments will resist disclosing specific data about inmate's or staff discipline. Finally, staff from an outside agency investigating sexual activities in prison must be adequately trained to perform such inquiries in a manner that is sensitive to the trauma some of these individuals have experienced and to be vigilant in assessing whether the discussion of these issues has or may trigger adverse reactions in the inmate involved in the incident.

It is essential that these barriers be addressed in implementing any monitoring program and that the corrections departments fully cooperate with these audits and appropriately respond to the findings and recommendations of the auditors.

Conclusion

We urge the Attorney General to adopt ALL the recommended national standards developed by the National Prison Rape Elimination Commission. They represent meaningful progress but also are a compromise that responds to the concerns voiced by some correctional officials and the limitations imposed by the legislation to develop recommendations that avoid substantial additional costs. We also recognize that these standards are only a starting point to address the serious and longstanding problem of sexual abuse in our country's prisons. Although a good beginning, we fully anticipate that further regulations will be needed to ensure that the progress anticipated by the new standards will be realized and that the sexual abuse in our correctional facilities will be reduced avoiding the significant harm that inmates frequently experience in our prisons. We can and must do better, and these standards represent the first step to meaningful reform.