

Docket No. OAG -- 131
Comments on the Department of Justice's Request for Comments
Related to the
"Prison Rape Elimination Act of 2003"

Prepared by
The D.C. Prisoners' Project
Washington Lawyers' Committee for Civil Rights and Urban Affairs
11 Dupont Circle, N.W., Suite 400
Washington, D.C. 20036
(202) 319-1000
May 10, 2009

On behalf of the D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights & Urban Affairs, we present the following comments on the National Prison Rape Elimination Commission ("Commission") report ("Report") and proposed standards which were presented to Attorney General Eric Holder in accordance with the requirements of the "Prison Rape Elimination Act of 2003" ("PREA").

The comments below include our appraisal of the Commission's Report, our response to the three general questions proposed by the Department of Justice in the Federal Register, and our support of three additional recommendations included in the Report that we believe are crucial to effectively eliminate sexual assault in our prisons and jails.

I Introduction

In prisons and jails, even the bathrooms and the broom closets are dangerous. In 2006, the Prisoner's Project filed a suit on behalf of two former female inmates who alleged that two officers at the D.C. Correctional Treatment Facility had raped them in isolated parts of the jail. One inmate was raped in a staff bathroom by an officer escorting her back to her cell after a court hearing. Later, the same correctional officer easily gained access to the inmate by claiming that she needed a new identification badge. The officer took the inmate out of her cell and raped her again. The second inmate was forced to perform oral sex on a correctional officer in a broom closet. Again, the inmate was easily separated from the general population when the correctional officer told a co-worker that he needed to speak with the inmate privately. The correctional officer threatened the inmate with a longer prison stay if she tried to report the incident.

Believing that rape was not part of their punishment, the women informed the facility. Yet, in both cases, the management failed to respond with any substantive action, leaving the inmates stranded at the mercy of their assailants.

After leaving the jail, the inmates experienced panic attacks and other emotional distress. One inmate explained that she was initially hesitant to come forward and file a lawsuit because she did not want to re-live her traumatic experience. Afraid of the stigma that attaches to rape victims, both of the inmates also decided to file the suit anonymously, so that they did not feel ashamed with their spouses, children, and grandchildren. The case eventually settled.

Unfortunately, the plight of these two women is echoed in countless letters sent to the Prisoners' Project and other human rights organizations each year. The inmates describe correctional officers who display a callous indifference to their reports of abuse, as well as the fear, hopelessness, and thoughts of suicide that follow a sexual assault. The letters also explain that even after finishing their sentences, the victims suffer long-term problems such as post traumatic stress disorder, depression, and alcohol and other drug addictions.¹

Congress understood the gravity of the prison rape problem and the pressing need for a solution when it unanimously passed PREA in 2003. According to the Senate report the legislation was intended to "address prison rape in a meaningful way and to bring accountability into America's prisons and jails." The Commission then spent years collecting data, working with experts, holding public hearings, and soliciting input from corrections leaders, survivors of sexual assault in prison, researchers, prisoner's rights advocates, legal experts, and health care providers in order to propose standards, policies, and procedures that will effectively and efficiently prevent rape in our prisons.

The Commission's report provides an initial and crucial step in understanding one of the most rampant and severe problems in America's criminal justice system. Based on extensive hearings and expert working groups, the Commission promulgated a series of standards that will lead to the prevention, detection, and punishment of prison rape. Our twenty-five years of experience, litigating for and advocating on behalf of D.C.'s prisoners, lead us to believe that the proposed standards would create techniques and procedures that will appreciably and cost-effectively prevent sexual assault in prison and jail, and should be immediately adopted by the Department of Justice.

II The Proposed Standards, Policies, and Procedures will not Impose Substantial Additional Costs

The costs of implementing the proposed standards cannot be evaluated in a vacuum. The only costs that should be considered are those over and above the costs of running a facility in compliance with constitutional and common law standards, as those costs must be expended anyway. Unfortunately, the incarceration systems in this country are not perfect, and some facilities may not be meeting their base level obligations. Additionally, the costs of standards above the legal floor are tempered both by the other benefits those standards will provide and the costs that will be saved by facilities in defending lawsuits.

¹ Lovisa Stannow, *The Cost of Prisoner Rape*, Huffington Post, March 12, 2010.

A. Many of the proposed standards are simple recitations of legal minimums that facilities and systems should already be meeting.

Many of the standards proposed in the Report, such as requiring each facility to have a written policy “mandating zero tolerance,”² and screening new prisoners to determine their risk of sexual assault³ are basic constitutional minimums established by case law. Since *Farmer v. Brennan*⁴ was decided in 1994, it should be clear to every single person working in corrections that there can be no excuse for allowing rape to occur inside prison walls. Under this constitutional mandate, prisons and jails must provide sufficient supervision,⁵ communicate effectively with inmates,⁶ not hire or promote staff who exhibit a high risk of violating inmate’s rights,⁷ and screen each inmate for risk of attack or being an attacker.⁸ Costs are certainly associated with meeting these mandates, but they must be met regardless of PREA. The proposed standards simply provide more detailed guidance for facilities and agencies on how to meet their constitutional obligations.

Other standards are recitations of the minimum standards to meet the medical standard of care and avoid medical malpractice claims, let alone constitutional claims. For example, training in how to detect and assess signs of sexual abuse is part of basic medical and nursing school curricula. Additionally, ensuring access to emergency medical care is a basic feature of a system that meets bottom level legal criteria.⁹

² Report at 53.

³ Report at 74-75.

⁴ 511 U.S. 825 (1994).

⁵ Compare “Security staff provides the inmate supervision necessary to protect inmates from sexual abuse,” Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails (“Standards”) at 10, PP-3, with *Tafoya v. Salazar*, 516 F.3d 912 (10th Cir. 2008) (holding failure to monitor areas not covered by security cameras may lead to a jury finding of deliberate indifference).

⁶ Compare “The agency ensures that inmates who are limited English proficient (LEP), deaf, or disabled are able to report sexual abuse to staff directly, through interpretive technology, or through non-inmate interpreters,” Standards at 13, PP-5 with *Pavey v. Conley*, 170 Fed. Appx. 4 (7th Cir. 2006) (holding grievance procedure might be unavailable to a prisoner who couldn’t write and was isolated from anyone who could help him) and 28 C.F.R. Part 35, § 35.160(a) (“A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.”).

⁷ Compare “The agency does not hire or promote anyone who has engaged in sexual abuse in an institutional setting or who has engaged in sexual activity in the community facilitated by force, the threat of force, or coercion,” Standards at 13, PP-6 with *Tafoya v. Salazar*, 516 F.3d 912 (10th Cir. 2008) (holding that hiring of staff with criminal records gives rise to constitutional liability).

⁸ Compare “All inmates are screened during intake, during the initial classification process, and at all subsequent classification reviews to assess their risk of being sexually abused by other inmates or sexually abusive toward other inmates,” Standards at 27, SC-1 with *Farmer*, 511 U.S. at 843 and *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (holding that a transsexual prisoner could recover for assault by a known “predatory inmate” either because leaving her in a unit containing high-security inmates threatened her safety, or because placing that inmate in protective custody created a risk for its occupants generally).

⁹ Compare “Victims of sexual abuse have timely, unimpeded access to emergency medical treatment and crisis intervention services,” Standards at 50, MM-2 with *Mata v. Saiz*, 427 F.3d 745, 756 (10th Cir. 2005) (holding nurse’s failure to perform “gatekeeper” role by referring patient to a practitioner for symptoms of cardiac emergency could be deliberate indifference).

B. Additional benefits will accrue from implementation of the standards.

The costs of other recommendations, such as increased training for employees, performing background checks on applicants and employees being considered for promotion,¹⁰ and attempting to curb over-crowding in facilities are moderated by the fact that the benefits would extend to the entire facility. For example, preventing prisoner rape requires an institutional culture that does not tolerate sexual abuse. This begins with hiring and promoting qualified, well-trained individuals and leads to well-monitored facilities, a better controlled prisoner population, and increased safety for inmates and staff. Safer facilities save costs in fewer lost staff days, in medical treatment for inmates and staff, and in fewer law suits. These savings accrue wholly outside the context of sexual assault, but will accrue if the proposed standards are adopted.

C. Money will be saved with fewer lawsuits and less aftermath.

Those standards that may create some additional costs, such as purchasing additional monitoring equipment, are still relatively minimal when compared to that of addressing sexual abuse after it occurs. In *Farmer v. Brennan* the Supreme Court held that sexual abuse in prison violates a prisoner's Eighth Amendment rights when it is the result of "deliberate indifference" of prison officials.¹¹

As with any lawsuit, after filing both sides may conduct extensive, time consuming, and expensive discovery, such as depositions, medical examinations, record and other document requests, and seeking expert testimony. Lawsuits are as expensive to defend as they are to prosecute. Settlements of sexual abuse claims can reach the hundreds of thousands and even millions of dollars. Cases that proceed to trial can also result in large awards. In July 2009, the State of Michigan agreed to pay \$100 million to settle a class action brought by female prisoners after a jury found in two related cases that prison officials had consistently ignored rape, sexual advances, and groping by staff.¹²

Implementing the standards, policies, and procedures recommended by the Commission would thus save correctional systems thousands if not millions of dollars in litigation costs. Furthermore, although complying with the standards would not offer complete protection from future lawsuits, it would help defend against large monetary awards by providing evidence that the correctional system and facility management view sexual assault as a serious crime and have taken reasonable measures to prevent future incidents. A facility that has taken a comprehensive view toward preventing all sexual abuse would have a very strong argument that it is not, by definition, deliberately indifferent.

¹⁰ Report at 55.

¹¹ 511 U.S. 825, 832-33 (1994).

¹² See Stannow, *supra*, note 1; Jeff Seidal & Dawson Bell, "\$100 million ends prisoner sex-abuse suit" Det. Free Press (July 16, 2009).

Our experience has shown that the cost of sexual abuse in prison is not limited to lawsuits. After rape or another form of sexual abuse, inmates typically require medical and psychological services which must be provided by the facilities. Upon release, these individuals are also more likely and suffer from conditions that may prevent them from obtaining employment and require them to seek government assistance and social services for the rest of their lives. These costs, in addition to the millions spent on lawsuits stemming from sexual abuse, reveal that the standards proposed in the Report will preserve, not deplete corrections budgets, at the federal, state, and local levels.

III Using the Term “Sexual Abuse,” Rather than “Rape” is more Consistent with the Legislative Intent behind PREA and the Goals of the Statute

Restricting the final standard to “rape,” as defined in 42 U.S.C. 15609(9),¹³ rather than the broader “sexual abuse,”¹⁴ as defined in the Report, would undermine many of the benefits of the proposed standards, policies, techniques, and procedures.

¹³ Section 15609(9) defines rape as:

- (A) the carnal knowledge [contact between the penis and the vulva or the penis and the anus, including penetration of any sort, however slight], oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person’s will;
- (B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person’s will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or
- (C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.

¹⁴ According to the glossary that precedes each set of standards, Sexual abuse: encompasses (1) resident-on-resident sexual abuse, (2) resident-on-resident sexual harassment, (3) staff-on-resident sexual abuse, and (4) staff-on-resident sexual harassment.

(1) Resident-on-resident sexual abuse: Encompasses all incidents of resident-on-resident sexually abusive contact and resident-on-resident sexually abusive penetration.

Resident-on-resident sexually abusive contact: Non-penetrative touching (either directly or through the clothing) of the genitalia, anus, groin, breast, inner thigh, or buttocks without penetration by a resident of another resident without the latter’s consent, or of a resident who is coerced into sexual contact by threats of violence, or of a resident who is unable to consent or refuse.

Resident-on-resident sexually abusive penetration: Any sexual penetration by a resident of another resident. The sexual acts included are: Contact between the penis and the vagina or the anus; Contact between the mouth and the penis, vagina, or anus; or Penetration of the anal or genital opening of another person by a hand, finger, or other object.

(2) Resident-on-resident sexual harassment: Repeated and unwelcome sexual advances, requests for sexual favors, verbal comments, or gestures or actions of a derogatory or offensive sexual nature by one resident directed toward another.

(3) Staff-on-resident sexual abuse: Encompasses all occurrences of staff-on-resident sexually abusive contact, staff-on-resident sexually abusive penetration, staff-on-resident

Rape is more likely to occur in environments that permit sexually aggressive behavior such as lewd jokes directed at an inmate or sexual touching.¹⁵ These types of actions, and the sexual atmosphere they create, must be prohibited under the broader definition proposed by the Commission. In addition to preventing rape and other sexual assault, removing all forms of sexual contact between inmates and correctional staff, and limiting sexual encounters and exchanges between inmates will lead to more controlled, and safer facilities. Effectively preventing all forms of sexual abuse also dramatically reduces the number of successful lawsuits which reduces litigation costs, and saves money in correctional budgets. Furthermore, there is no permissible sexual activity in correctional facilities. There is no worry that the standards will accidentally prohibit now legal activity.

It should also be noted that “rape” is not a clearly defined term within the law. It is a term of art. Rape was defined one way in PREA. However, for example, it is defined another under the Uniform Code of Military Justice.¹⁶ Federal criminal law does not use

indecent exposure, and staff-on-resident voyeurism. Staff solicitations of residents to engage in sexual contact or penetration constitute attempted staff-on-resident sexual abuse.

Staff-on-resident sexually abusive contact: Non-penetrative touching (either directly or through the clothing) of the genitalia, anus, groin, breast, inner thigh, or buttocks by a staff member of a resident that is unrelated to official duties.

Staff-on-resident sexually abusive penetration: Penetration by a staff member of a resident. The sexual acts included are: Contact between the penis and the vagina or the anus; Contact between the mouth and the penis, vagina, or anus; or Penetration of the anal or genital opening of another person by a hand, finger, or other object.

Staff-on-resident indecent exposure: The display by a staff member of his or her uncovered genitalia, buttocks, or breast in the presence of a resident.

Staff-on-resident voyeurism: An invasion of a resident’s privacy by staff for reasons unrelated to official duties or when otherwise not necessary for safety and security reasons, such as peering at a resident who is using the toilet in his or her cell/room; requiring a resident to expose his or her buttocks, genitals, or breasts; or taking images of all or part of a resident’ naked body or of a resident performing bodily functions and distributing or publishing them.

(4) Staff-on-resident sexual harassment: Repeated verbal comments or gestures of a sexual nature to a resident by a staff member. Such statements include demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or profane or obscene language or gestures.

¹⁵ See Report, at 56 (discussing a psychiatrists warning about creating a sexual environment).

¹⁶ (a) Rape. Any person subject to this chapter who causes another person of any age to engage in a sexual act by—

- (1) using force against that other person;
- (2) causing grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnaping;
- (4) rendering another person unconscious; or
- (5) administering to another person by force or threat of force, or without the knowledge or

the term “rape,” but rather “sexual abuse.”¹⁷ Any brief comparison of these definitions shows that they each cover slightly different conduct and use very different language.

The clear standard provided by the term “sexual abuse,” as used and defined in the proposed standards reduces confusion across multiple jurisdictions. The Commission’s definition also provides more explicit guidance to what kind of conduct and comments would be considered sexual. In addition to prohibiting sexual acts, the Commission’s definition lists specific areas of the body that should not be touched, the type of comments that create sexual atmosphere, and actions, such as “peering at an inmate” who is using the restroom, that create a sexual atmosphere. The breadth and detail included in the Commission’s definition therefore helps supervisors train

permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct.
10 USCS § 920.

¹⁷ Sexual abuse. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

- (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
- (2) engages in a sexual act with another person if that other person is--
 - (A) incapable of appraising the nature of the conduct; or
 - (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

18 USCS § 2241

Aggravated sexual abuse.

- (a) By force or threat. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act--
 - (1) by using force against that other person; or
 - (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.
- (b) By other means. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly--
 - (1) renders another person unconscious and thereby engages in a sexual act with that other person; or
 - (2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--
 - (A) substantially impairs the ability of that other person to appraise or control conduct; and
 - (B) engages in a sexual act with that other person;or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

18 USCS § 2241.

correctional officers and inmates and provides for a consistent application of the new standards.

IV The Standards Must Not Differentiate Among Sizes of Facilities

The proposed standards are themselves flexible, depending on what is reasonable within a facility. However, they are written to be bottom line standards. There can be no room for allowing sexual assault in any facility of any size.

V Exhaustion of Administrative Remedies Must Be Clarified

From our perspective, one of the most important recommendations in the report would amend the Prison Litigation Reform Act of 1996 (“PLRA”). Currently, under the PLRA, an inmate must exhaust their administrative remedies, also known as the grievance process, before proceeding with the suit. In our experience, the grievance process at most facilities adheres to unrealistic timelines, is overly-complex, and creates situations where human error, both by the inmates and the staff precludes an individual from obtaining relief. Requiring an inmate to complete the grievance process also fails to take into account the emotional trauma that accompanies sexual assaults. As one inmate explained, during the fifteen days after his rape, when he needed to file a grievance, “my only thoughts were about suicide and. . . how to get myself into a safe place. . . so I would not be raped again.”¹⁸ Having missed the deadline, the inmate was barred from filing a claim in Federal court, and therefore “unable to find justice.”¹⁹

Under the proposed standards agencies would have to adopt policies that consider a victim of sexual abuse to have exhausted all of his or her administrative remedies within 90 days after the *report* of the incident, regardless of when the abuse allegedly occurred.²⁰ It would also allow for anonymous reports, which would reduce the threat of retaliation, and in the case of correctional officer assailants, limit the opportunity for interference or delay in the investigations.

Failing to adopt this standard would send a message that technical mistakes can prevent an inmate from seeking justice and that sexual assault in prison is no different than any other staff misconduct. Effectively eliminating rape in our prisons thus hinges on allowing legitimate complaints of sexual assault to be investigated without imposing needless technical hurdles. As detailed in the Report, the PREA’s success requires a culture of safety and zero tolerance which cannot exist when perpetrators operate with impunity, without fear of serious consequences for their behavior, and are free to retaliate against or further victimize their accusers or others.

¹⁸ Report at 94 (citing testimony of Garret Cunningham).

¹⁹ *Id.*

²⁰ *Id.* at 95.

VI Conclusion

Every day men, women, and children are raped or sexually assaulted in our nation's prisons and jails. Unfortunately, the policies, procedures, and techniques, proposed in the Report cannot help the thousands of inmates who have already endured sexual assault while incarcerated. Yet, the comprehensive and effective standards proposed by the Commission can remove sexual assault from being an unspoken element of a prison sentence, and protect inmates from heinous crimes without imposing significant costs to federal, state, and local correctional systems. We urge you stop the pervasive human rights violations occurring in our prisons and jails and adopt the Commission's recommendations without delay.