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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 National Organization of Women, Combating Racism Committee, I am submitting these comments in support of the recommended national standards developed by the National Prison Rape Elimination Commission. These standards represent a compromise, balancing the fiscal and security interests of corrections administrators with the basic right 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.

Response to the questions in the ANPR

1. *What would be the implications of referring to “sexual abuse” as opposed to “rape” in the Department’s consideration of the Commission’s proposed national standards?*

Truly establishing a zero-tolerance standard for prison rape requires addressing the full spectrum of sexual violence. The national standards should take an expansive approach and incorporate all staff sexual misconduct and all coercive sexual activity between inmates. The term “rape,” however, is often understood to have a narrow definition in accordance with its use in criminal law. Using the widely recognized terminology of “sexual abuse” in the standards will minimize confusion with the criminal standard for rape -- which varies by state -- and will conform to the expectations and intent of PREA.

PREA’s definition of rape includes all of the conduct within the Commission’s definition of sexual abuse except for sexual harassment (inmate-on-inmate and staff-on-inmate), staff-on-inmate voyeurism, and staff-on-inmate indecent exposure. Beyond constituting abusive conduct that should not be tolerated, harassment, voyeurism, and indecent exposure are known precursors to assaultive sexual abuse. Addressing these forms of sexual misconduct will enable officials to prevent rapes from occurring.

While the full spectrum of sexual abuse must be addressed as part of a comprehensive response to prison rape, consensual sexual activity between inmates should not be incorporated into the definition of sexual abuse. Corrections agencies remain free to establish disciplinary rules and regulations as they see fit, but conflating consensual sexual activity between inmates with the crime of rape serves no legitimate purpose and thwarts many of PREA’s goals. On the contrary, doing so will force survivors of sexual abuse to suffer in silence, as fear that sexual abuse will be misconstrued as prohibited consensual sexual activity and that they will face punishment will prevent survivors from reporting their abuse or seeking medical assistance. This disincentive to reporting will

allow sexual violence to flourish – and will increase the vulnerability of many inmates, such as those who are gay or transgender, who are known to be at especially high risk for abuse but are often mistakenly assumed to have consented to any sexual activity.

2. *Would any of the Commission’s proposed standards impose “substantial additional costs”?*

Relative to the billions of dollars spent on corrections every year, the costs for implementing these standards, even for the least prepared jurisdiction, will be small. Moreover, prisons and jails that have basic policies and practices in place to protect people in their charge, as they are legally required to do regardless of PREA, can meet the standards’ requirements through low and no-cost options, such as repurposing staff and incorporating information about sexual abuse into existing training and orientation materials.

Any considerations of the cost of protecting inmates from sexual abuse must be understood in light of the dramatic benefits of doing so – for the agency, the individual, and society at large. For the agency, implementing the standards’ provisions will promote safety and efficiency, resulting in net savings in areas such as staffing, investigations, and inmate health care. Litigation costs will also be dramatically reduced. Moreover, preventing sexual abuse and providing victimized inmates with appropriate follow-up care minimizes the likelihood that inmates will suffer the long-term emotional trauma that often prevents prison rape survivors from becoming self-sufficient members of society upon release.

Beyond the economic impact, the moral costs of allowing sexual violence to continue must also be considered. Every person has the right to be free from sexual abuse, regardless of custody status and criminal history. When the government removes someone’s liberty, it has the absolute responsibility to protect that person from abuse.

Ultimately, the Office of Management and Budget will require the Department to conduct a cost-benefit analysis of the standards. An examination of costs alone, such as the cost projection study currently being conducted by Booz Allen Hamilton, will not meet this requirement. We urge you to begin the required analysis by examining the full range of benefits that will come from implementing the recommended standards.

3. *Should the Department consider differentiating within any of the four categories of facilities for which the Commission proposed standards ...?*

The standards represent basic measures that all facilities must put in place to meet their constitutional obligation to protect inmates from abuse. Varying compliance requirements based on factors such as the size and resources of a facility will undermine the standards and will needlessly complicate their otherwise straightforward expectations.

In their final recommended standards, the Commission took pains to ensure that each provision was sufficiently flexible to account for the distinctions between facilities and

the variance in available resources. For example, in Standard PP-3 (inmate supervision) rather than requiring that cameras or other monitoring technology be installed, the recommended standards merely require that upper management assess whether such technology is needed, given the unique factors of that facility's environment. Likewise, Standards RP-2 through RP-4 (agreements with outside entities, law enforcement agencies and the prosecuting authority) only require that the agency attempt to enter into memoranda of understanding (MOU), recognizing that these services may not be available everywhere.

Creating distinctions for the level of compliance required will send a dangerous message that certain types of facilities do not need to put in place the measures necessary to protect inmates from sexual abuse. Failing to address the known risk of sexual violence is a constitutional violation, regardless of facility size, personnel, resource limitations or other factors.

Establishing tiers of compliance will also result in a morass of problems, which are bound to culminate in litigation. To create these distinctions, the Department would have to establish arbitrary cut-off points, creating a bright line rule for when facilities can shirk their duty to protect inmates, and these cut-off points will inevitably be challenged by facilities on the margins. Even once those distinctions are defined, the dynamic nature of corrections institutions will inevitably result in changes in these factors at specific institutions, thereby creating a question about where a facility with changed circumstances would fit within the compliance hierarchy.

Comments on the Standards

If implemented, the Commission's standards have the potential to dramatically improve safety in corrections facilities nationwide – for officers and inmates alike. They are the result of extensive input from corrections practitioners, advocates, academics, prisoner rape survivors, and other stakeholders. Corrections officials were engaged throughout the process and, as advocates, we have accepted significant concessions to help solidify the middle ground that was identified by the Commission. Full implementation of these standards will reduce not only sexual abuse, but other forms of physical violence, including gang-related activity.

The base requirements in the Commission's standards are urgently needed to improve safety in corrections facilities nationwide. As recent studies from the Bureau of Justice Statistics have made clear, sexual violence is a serious problem across the country. Rather than being an inevitable part of incarceration, however, these abuses are often the result of mismanagement, deficient policies, and dangerous practices. The Commission's recommended standards provide the best tool to date to address these serious safety issues.

Prevention and Response Planning

Proper planning, through the development of sound policies and the collaboration with outside resources, is essential to improving safety. It is also indicative of the strong

leadership needed to effectively address sexual violence in detention. The provisions in this section reflect the innovations and concerns raised by corrections leaders throughout the process. In fact, a comparison of the Commission's recommended standards with a draft version released for public comment in 2008 illustrates the significant deference provided to officials.

For example, Standard PP-3 (inmate supervision) requires corrections officials to provide "the inmate supervision necessary to protect inmates from sexual abuse." In comparison, the 2008 draft standard required "continuous sight and sound supervision of inmates." The final recommended version of the standard permits officials to utilize discretion in assessing the level of supervision adequate to maintaining inmate safety. While upper management is required to review critical incidents and monitor technology needs, there is no requirement that such technology be purchased or installed.

Likewise, Standard PP-7 (assessment and use of monitoring technology) calls for the use of appropriate, cost-effective technology, but this provision was amended from its draft version to allow officials to meet its requirements through a feasibility assessment and plan that accounts for financial limitations. As a result, any significant expense that could have been imposed from these standards has already been eliminated.

Standard PP-4 (limits to cross-gender viewing and searches) has also been revised to substantially reduce its requirements, despite findings in each of the BJS' inmate surveys that a significant percentage of sexual abuse in all types of corrections facilities is perpetrated by staff members of the opposite sex. Rather than limiting cross-gender supervision in any areas where inmates disrobe or perform bodily functions – which, consistent with international human rights standards, is the norm in most other western countries – the final recommended standard only prohibits *actually viewing* inmates of the opposite gender who are nude or performing bodily functions.

Many agencies already comply with PP-4's preclusion of routine cross-gender viewing and searches in their women's facilities. In light of the BJS data, which showed high percentages of abuse by female staff of male inmates, these protections are clearly needed in all facilities.

While some of PREA's opponents claim that this standard would require substantial costs in hiring staff and/or for facility construction, other agencies have shown that it can be met with low-cost solutions. For example, requiring officers of the opposite gender to announce themselves before entering a dormitory area, and providing screens or towels for shower and toileting privacy, would go a long way toward meeting the inmate supervision requirements at little cost. Pat searches can be conducted only at locations near points of contact with potential contraband, allowing for more thorough searches at the most appropriate times and freeing up staff resources for other critical job functions.

Prevention

Preventing sexual abuse is at the heart of all PREA-related initiatives, and the training and classification provisions in the standards represent well-established means of doing

so. Rather than imposing stringent curricula, Standards TR-1 through TR-5 (training and education) include basic information that can be incorporated into pre-existing staff training sessions and inmate orientations workshops. Policies aimed at eliminating sexual abuse in detention become meaningful only if corrections staff, contractors, and volunteers are appropriately trained to take action to prevent and address incidents of sexual violence. Similarly, inmates must be aware of their absolute right to be free from sexual abuse, and that the facility will not tolerate sexually predatory treatment of inmates.

Proper classification is critical to ensuring that potential predators and potential victims are not housed together. It can also help break the insidious and common corrections practice of automatically placing the victim in protective custody following an incident of sexual abuse. This practice is punitive by default as it results in a loss of services and programs, and leaves the victim isolated. Standards SC-1 (screening for risk of victimization and abusiveness) and SC-2 (use of screening information) address these concerns, relying on the BJS data and other academic research that have identified certain populations that are especially vulnerable to abuse.

Detection and Response

In the aftermath of a sexual assault, inmates need safe, effective reporting options that are responded to swiftly and thoroughly. The ability to contact any trusted staff member and the creation of hotlines to outside entities have proven to be important mechanisms for encouraging reports. However, it is still far too common that officials fail to respond to reports of sexual abuse appropriately, such as by failing to initiate an investigation, refusing to provide protective measures, or by directly facilitating or participating in retaliatory behavior.

When officials fail to protect inmates from sexual abuse, victims need access to legal redress that is not hindered by unrealistic and arbitrary procedural requirements. Standard RE-2 (exhaustion of administrative remedies) recognizes that the harsh procedural requirements of many prison grievance systems – such as filing deadlines as short as two days – cannot realistically be met by prison rape survivors. Similarly, the practice by some agencies of requiring that inmates report complaints to a specific officer -- who may have been involved or complicit in the abuse – wholly undermines whatever policies or other efforts facilities have in place to address sexual abuse. Rather than encourage frivolous lawsuits, this standard will increase the efficiency with which prison rape cases proceed, by allowing courts to focus on the substantive claims of rape survivors instead of litigating their compliance with technicalities.

Monitoring

External scrutiny is vitally important to the strength of any public institution – and corrections facilities are no exception. Sound oversight, conducted by a qualified independent entity, can identify systemic problems while offering effective solutions.

Standard AU-1 (audit requirement) mandates the essential components of independent oversight in a cost-efficient manner. Done properly, this outside monitoring will provide a credible, objective assessment of a facility's safety, identifying problems that may be more readily apparent to an independent monitor than to an official working within a corrections system. It will also help hold systems accountable when they do not meet the requirements of the standards.

Some jurisdictions already have an oversight entity in place, such as an inspector general or ombudsman's office, which can be empowered to conduct these reviews at minimal expense to the corrections agency. While facilities that are not currently overseen by any independent entity may have to incur some financial expense in order to arrange for independent audits, the tremendous benefits to this outside perspective will significantly outweigh the costs, in terms of financial impact as well as safety. By identifying areas of noncompliance and addressing potential hazards proactively, inefficient and dangerous practices will be reformed, resulting in fiscal savings and other benefits.

Conclusion

Sexual violence in U.S. prisons and jails has reached crisis proportions. Strong standards are urgently needed to protect inmates from this devastating, but all too common abuse. I strongly urge you to promulgate the Commission's standards without delay. Every day that these critically important measures are not in place, men, women, and children will continue to be raped while in custody.

Thank you for your consideration.

Respectfully,

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