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May 10, 2010

Eric H. Holder, Jr.
Attorney General
Department of Justice,
950 Pennsylvania Ave. NW
Washington, DC 20530

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 Disability Rights Network, and the 57 Protection and Advocacy Systems we represent nationwide, we thank you for the opportunity to submit these comments in support of the recommended national standards developed by the National Prison Rape Elimination Commission (the "Commission"). These standards represent a compromise that balances the fiscal and security interests of corrections administrators with the basic right of all people, including prisoners – youth and adults --, to be free from sexual victimization. Swift ratification of these provisions will spare thousands of men, women, and children the devastation of sexual abuse behind bars.

The [National Disability Rights Network](#) is the membership organization for the Protection and Advocacy (P&A) Systems, a nationwide network of congressionally mandated, legally-based disability rights agencies operating independent in every state and territory in the United States. P&A agencies have the authority to provide legal representation and advocacy services to all persons with disabilities in any type of facility or community setting -- including prisons, jails, and juvenile justice facilities. The [federal authorizing statutes](#) for the P&A Systems authorize them to monitor facilities, investigate complaints of abuse and neglect, and provide advocacy, training and technical assistance to facilities to address deficiencies.

The standards recommended by the National Prison Rape Commission (the "Standards") will help provide needed protections for highly vulnerable populations of individuals with disabilities in correctional environments. These Standards require corrections facilities to recognize mental, cognitive and physical disabilities as a risk factor in their screening instruments (SC-1). Medical and mental health staff must further screen inmates for sexual abuse (RP-1 & MM-1), and account for relevant information that is not relayed to or credited by corrections staff. This information must then be used to inform classification determinations in ways that minimize limitations on access to work, education

and program opportunities and that impose segregated housing only as a last resort (SC-2). Even when intended to provide extra protection to vulnerable prisoners, protective custody and other forms of isolation may amount to punishment and can be especially harmful to prisoners with mental illness or cognitive impairments.

Survivors of sexual victimization, and in particular those who are young or otherwise vulnerable, often are reluctant to report abuse. Incarcerated survivors with disabilities face additional reporting barriers. Providing multiple reporting options (RE-1) and accepting third party reports (RE-4) will ensure that prisoners who may not be able to navigate complex grievance procedures have their abuse addressed. The Standards also ensure that those who are limited English proficient (LEP), deaf, visually impaired or disabled receive information about sexual victimization policies and have access to non-inmate interpreters or interpretive technology in order to be able to report sexual victimization to staff directly (PP-5).

NDRN further supports the requirements in the Standards that prisoners who have suffered sexual abuse have access to emergency medical and mental health services free of charge (MM-2), along with appropriate follow up care (MM-3), a victim advocate to accompany them throughout the forensic medical exam process (RP-1), and outside confidential support services (RE-3, RP-2, MM-3).

RESPONSES TO 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?

The definition of “rape” in the Prison Rape Elimination Act of 2003 (the “Act”, or the “PREA”) is sufficiently broad to address sexual victimization against a person’s will including when the person is forced to participate due to fear, coercion, intimidation and when a person’s participation is the result of exploitation of a vulnerability (e.g., a cognitive impairment). In addition, the definition appropriately does not cover consensual sexual activity. This is an important distinction and promotes the effective use of limited corrections resources by focusing on victimization rather than any and all sexual activity.

However, the Act’s “rape” definition does have two limitations. First, it fails to cover the “grooming activities” – harassment, voyeurism, indecent exposure, verbal sexual innuendo, etc. - that predators (prisoners and staff) use as precursors to non-consensual sexual victimization. Not covering precursor behaviors is inconsistent with the PREA’s prevention mandates. Early identification of precursor grooming behaviors (including verbal communications) not only promotes the prevention of prison “rape” but it also sends an important message consistent with the PREA’s Zero Tolerance mandates.

Secondly, the vernacular or colloquial use of “rape” is more narrow than the definition in the Act. Not only does the “rape” definition fail to interdict sexual victimization behavior at the earliest possible opportunity, using “rape” has the potential of further limiting staff and inmate understanding of what is prohibited. Many predators justify their precursor/grooming behaviors as “innocent” and outside what is prohibited because it does not involve penetration. In order to fully implement the spirit and intent of the Act, it’s important to use terminology that communicates its breadth. “Sexual abuse” or “sexual victimization is more effective in accomplishing that goal. Not only does “sexual abuse” on its face broadly cover all abusive sexual conduct and communication, the definition of “sexual abuse” in the Standards clearly covers precursor behaviors (harassment, voyeurism, etc.).

Unfortunately, however, the definition of “sexual abuse” is deficient in one critical regard – in addition to a broad range of sexual victimization behaviors, it suffers from over breadth by including consensual sexual activity between adult prisoners (there is no such thing as consensual sexual activity with staff, however, given the power disparities). While prohibiting all incidents of sexual penetration between residents who are juveniles under the age of 18 might be appropriate (see discussion about differentiating between types of facilities, below), using such a broad definition with regard to adult inmates unnecessarily stretches the resources of the system. Because the PREA seeks to focus system resources in the most economical manner possible, it is appropriate for the standards (at least initially) to limit its emphasis to sexual victimization. Including non-victimizing, consensual sexual activity within the scope of the standards is inconsistent with the spirit and purpose of the Act, and unnecessarily dilutes system resources rather than focusing them on the devastating consequences of victimization.

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

Sexual victimization is already prohibited in correctional facilities because it is inconsistent with accepted penological goals and Constitutional guarantees of safe living environments. The PREA confronts the systemic failure of correctional facilities to comply with existing mandates, and establishes a framework of best practices for addressing this epidemic and national health issue.

Providing prisoners (juvenile and adult) with safe environments has the potential of reducing distracting and expensive litigation while increasing morale among staff and prisoners in correctional facilities. Traumatized prisoners are more likely to engage in disruptive behaviors as a result of being sexually victimized or in fear of being victimized. Improving safety from sexual victimization in correctional facilities not only has the potential for improving prisoner behavior but also for improving working conditions for staff (which is likely to reduce staff turnover and use of sick leave).

There is much that can be done without undue financial cost to improve the culture in correctional facilities to create safer conditions for those who live and work in them. A culture of Zero Tolerance for sexual victimization within facilities needs to permeate every aspect of prison management, including hiring and promotion practices, staff training, supervisory practices, and oversight mechanisms. Much of the infrastructure already exists to incorporate the best practices for abuse prevention and reduction reflected in the Standards, such as: staff training academies, grievance systems, health care professionals to document physical evidence of abuse, and internal and external mechanisms for investigating sentient incidents. Significant reduction in sexual victimization can be achieved by inculcating the values and attitudes reflected in the Standards throughout existing infrastructures.

Furthermore, the costs of implementing the PREA Standards at the state and local levels can be minimized by initiatives at the national level to provide resources via grants, demonstration projects, and contracts to create generic informational materials, curricula, train the trainer modules, best practices toolkits, mentoring, implementation technical assistance, etc. Moreover, one of the most effective ways to reduce the costs of implementing the PREA is to ensure that correctional systems are maximizing opportunities to divert youth and adults from incarceration to community-based alternatives proven to be consistent with holding offenders accountable while protecting public safety.

Additional information about cost-effective approaches to implementation of the Standards and compliance monitoring are provided in “Additional Comments” below.

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

Yes, the Department should consider differentiating some of the standards for the four types of facilities for which the Commission has proposed standards.

For example, there is ample reason to differentiate facilities that confine juveniles (including juveniles in adult facilities) due to the developmental stage in which they are as they continue maturing well into adulthood. Because children and youth are developmentally different from adults, they need enhanced protections as well as age appropriate responses when they engage in behaviors inconsistent with the Zero Tolerance mandates of the Act. Hence, while consensual sexual activity might not merit the expense to respond to it in the adult system, there are good reasons to prohibit and respond age-appropriately to consensual sexual activity between incarcerated minors.

Juvenile justice facilities and jails have a disproportionate number of special needs inmates/residents, including individuals with psychiatric, physical, sensory, cognitive, intellectual, learning, and other disabilities. The prevalence of disabilities in some juvenile facilities runs as high as 80 percent to 90 percent, while nationally the prevalence rate is estimated to be around 60 to 70 percent. These types of demographic and vulnerability differences justify different and greater investments in protections against sexual victimization in juvenile justice facilities.

It also is appropriate to differentiate between facilities that predominantly house persons who have only been accused of crimes and who are still presumed to be innocent. Their status requires greater protections from victimization while confined (freedom from being housed in unsafe facilities where one is vulnerable to sexual and physical victimization is a recognizable liberty interest). This includes lock ups, jails, and juvenile detention centers. Furthermore, these types of facilities are more likely to house persons with psychiatric and other disabilities, which is well documented. These types of differences need to be considered with regard to best practices to prevent and effectively respond to sexual victimization behaviors. Similarly gender, trauma histories, and age (youth as well as elderly) need to be appropriately considered in addressing these issues.

ADDITIONAL COMMENTS ON THE PROPOSED STANDARDS

If implemented, the Standards recommended by the Commission have the potential to dramatically improve safety in corrections facilities nationwide – for both staff and prisoners. 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 victimization, but other forms of physical violence, including gang-related activity.

The base requirements in the recommended 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. These Standards provide the best tool to date to address these serious safety issues.

1. The definition of the term “inmate” fails to protect all youth confined in JJ facilities.

The recommended Standards for juvenile justice facilities define “inmate” to refer only to persons accused, convicted or sentenced for delinquency acts, criminal offenses, and violations of supervisory or diversionary programs. Unfortunately, this excludes children and youth who are placed in juvenile facilities for other reasons. For example, many jurisdictions hold in secure juvenile facilities children who are waiting for mental health services (until bed space opens in residential facilities) who are not accused of delinquent or criminal acts. Two thirds of detention facilities have reported holding children, sometimes as young as seven, who are there just waiting for a mental health placement. A 2004 report to Congress documented that about 7 percent of youth in detention were being held simply awaiting an appropriate treatment placement. [See: United States Congress (2004). “Incarceration of youth who are waiting for community mental health services in the United States.” Washington, DC: House of Representatives Committee on Governmental Reform, available at: <http://www.senate.gov/~govt-aff/ files/040707juvenilereport.pdf>.]

Another example are children and youth with severe emotional disorders who are placed in custody by their parents out of desperation as a means to accessing services for them. A 1999 survey by NAMI found that 36% of their respondents reported having to place their children in the juvenile justice system in order to access mental health services that were otherwise unavailable to them (NAMI, 1999). A study conducted by the U.S. General Accounting Office found that in 2001, parents placed over 12,700 children into the child welfare or juvenile justice systems in order to access mental health services. [See: General Accounting Office (2003), “Child Welfare and Juvenile Justice: Federal Agencies Could Play a Stronger Role in Helping States Reduce the Number of Children Placed Solely to obtain Mental Health Services Washington, D.C.: General Accounting Office, available at: <http://www.gao.gov/new.items/d03397.pdf>.]

The recommended Standards for juvenile facilities need to be amended to cover any child or youth residing in them. There is no rational basis for excluding from the protections of the PREA anyone who is incarcerated in a juvenile facility.

2. Monitoring corrections facilities for compliance with the PREA Standards.

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 non-compliance issues while offering effective solutions. Done properly, outside monitoring will provide a credible, independent 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 sexual victimization 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.

The nationwide network of Protection and Advocacy Systems is an existing resource that can be tapped for compliance monitoring. This network provides a well-established P&A infrastructure in every state, the District of Columbia, and United States territories that is already authorized by Congress to investigate and monitor for abuse and neglect in facilities where persons with

disabilities reside – which includes state and local jails, prisons, lock-ups, and juvenile justice facilities. For over 30 years P&As have been monitoring conditions and investigating abuse allegations in secure facilities, documenting abusive policies, practices and conditions, and providing training and technical assistance to promote compliance with state and federal laws. P&A Systems also scrutinize existing oversight and investigatory entities and systems to ensure they are providing reliable and accurate accountability. With some additional financial support, P&A systems can expand their existing oversight advocacy to include compliance with the PREA Standards after they are been finalized.¹

In addition, P&A Systems have an intake unit for receiving reports of alleged or suspected abuse from victims and others with knowledge that abuse might have occurred. P&As accept reports made verbally, in writing, anonymously, and from third parties. P&A Systems have the capacity to support the Standards' requirement for facilities to provide multiple ways for prisoners to privately report: sexual victimization, retaliation for reporting sexual abuse, and staff neglect or violation of their responsibilities that may have contributed to sexual abuse (RE-1).

Another standard function of P&A systems is providing education to residents and staff in institutional settings about their rights and responsibilities, as well as training and technical assistance to facilities regarding systemic problems and individual implementation issues. Thus P&As can further the Standard's requirements regarding education (TR-3) and training for facility staff, volunteers and contractors (TR-1 & TR-2).

3. The need for additional data collection about disabilities in JJ facilities

Collecting, tracking, and analyzing relevant data is critical to ensuring effective responses to systemic issues as pervasive as sexual victimization in corrections facilities. To better understand the full nature and scope of sexual victimization issues in juvenile corrections facilities, and the most appropriate responses, it is important for disability status to be included in the data collected, tracked, and analyzed.

The Commission's Final Report (June 2009) notes the role of physical and developmental disabilities and mental illnesses in an individual's ability to function and remain safe in a correctional facility:

Individuals with severe developmental disabilities are at especially high risk of being sexually abused. Their naivety, tendency to misinterpret social cues, and desire to fit in make many developmentally disabled individuals vulnerable to manipulation and control by others. If they've previously lived in group homes or other institutions, they may have been conditioned to follow directions from others without regard to their best interests or safety and may have a history of mistreatment and abuse by the time they enter a correctional facility.

NPRE Commission, Final Report (June 2009), at p. 72.

In light of the substantial overrepresentation of youth with disabilities in juvenile corrections facilities, failing to include disability related information in the data collection would contribute to faulty decision-making and flawed approaches to sexual victimization interdiction.

4. The need for a national abuse registry for substantiated abuse in institutional settings.

¹ See, e.g., related information about [Including a National Juvenile Justice Protection and Advocacy Program in the JJDPA Reauthorization Act](#).

The Standards require criminal background checks in the hiring process for staff in corrections facilities (PP-6). However, not all substantiated incidents of sexual victimization by staff based on a preponderance of the evidence (IN-3) will result in a criminal prosecution due to the higher standard of proof in criminal cases (i.e., beyond a reasonable doubt).

Experience has shown that institutional staff who have been terminated for having engaged in abuse or neglect of residents often are able to find employment in other institutional settings. To prevent abusive caretakers from “career hopping” from one kind of institutional setting to another (e.g., from nursing homes to jails), it is imperative for states to maintain abuse registries that can be checked by institutional employers and service providers to identify prospective employees who have histories of abusing others. Moreover, because abusers can easily seek employment in other states, there is a need for a national abuse registry that centralizes information from state abuse registries in order to provide a centralized method for checking state abuse registries.

Conclusion

Sexual violence in U.S. corrections facilities has reached crisis proportions. Strong standards are urgently needed to protect prisoners (youth and adults) from this devastating but all too common abuse. I strongly urge you to promulgate the Commission’s recommended 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.

Adoption of the standards recommended by the Commission will represent a tremendous and unprecedented step forward in efforts to ensure that prisoners with mental illness and cognitive disabilities are spared the horrific trauma of sexual victimization while incarcerated. I strongly urge you to take these comments into consideration and promulgate the Commission’s Standards without delay.

Thank you for your consideration of these comments. If our office can be of any assistance in providing further information, please do not hesitate to contact me or NDRN’s staff attorney for juvenile and criminal justice issues, Judith Storandt (202-567-3518, judith.storandt@ndrn.org).

Respectfully,



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Resources:

[The National P&A/CAP System at a Glance](#) (Nov. 2008)

[Federal Grant Programs Supporting the National P&A/CAP System](#)

[The Protection and Advocacy System: History](#) (Aug. 2007)

[Prevalence of Youth with Disabilities in the Juvenile Justice System](#)

[Sexual Assaults in Juvenile Justice Facilities:](#) The Need for a National JJ Protection & Advocacy Program (Jan 2009)