

Physicians for
Human Rights

May 10, 2010

Robert Hinchman, Senior Counsel
Office of Legal Policy
Department of Justice
950 Pennsylvania Avenue, NW, Room 4252
Washington, DC 20530

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

Dear Mr. Hinchman and Attorney General Holder:

Physicians for Human Rights submits these comments in support of the recommended national standards developed by the National Prison Rape Elimination Commission, with an emphasis on their vital importance for immigration detention.

Physicians for Human Rights (PHR) is a nonprofit organization that mobilizes health professionals across the United States to advance health, dignity and justice. Harnessing the specialized skills, rigor, and passions of doctors, nurses, public health specialists, and scientists, PHR investigates and exposes human rights violations in the US and internationally. Health professional members of PHR have evaluated the mental and physical health of detained and non-detained asylum seekers and torture survivors since 1992.

Sexual abuse and assault are grave human rights violations. The UN Convention Against Torture Committee recognizes sexual abuse as a form of torture within its mandate to work to prevent. Torture, including sexual violence, is prohibited by multiple international agreements that bind the US, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

In recognition of the common-sense measures proposed by the Commission to stop this particularly widespread human rights violation, recent revisions to Immigration and Customs Enforcement's performance based national detention standards (PBNDS) incorporate many of the Commission's recommended standards. However, the PBNDS are not codified in statute or regulation and therefore are not legally enforceable. Application of the PREA standards to facilities with immigration detainees will ensure that, at a

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minimum, immigration detainees receive the same basic protections from the terror of sexual abuse as prison and jail inmates.

Such protections are urgently needed for immigration detainees, whether they are housed in a facility run by Immigration and Customs Enforcement (ICE), an institution with which ICE contracts, a short-term setting run by Customs and Border Control, or a juvenile setting while under the care and custody of the Office of Refugee Resettlement. In addition to the dangers faced by other inmates, immigration detainees are especially vulnerable to abuse. Language and cultural barriers and a fear that reporting abuse will result in retribution or deportation increase the likelihood that a non-citizen will be sexually abused while in immigration detention and not feel safe reporting it.

The experience of sexual violence in confinement that one feels powerless to stop has a particularly devastating impact on immigration detainees, whom our research has shown suffer from poor and worsening mental and physical health while incarcerated. A significant number of detainees are survivors of trauma who are both particularly susceptible to victimization, and acutely harmed by further abuse. For example, one female detainee who was a survivor of rape reported to PHR, as described in our study *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (pgs.66-67), that, “Since being in detention, I think more and more about the rape...Here, I am locked up, and every day is the same. And I’m thinking about what happened to me...I keep seeing those people and what happened to me.” A male rape survivor-detainee told PHR, “when I first came here I thought it’s where they protect people, but that’s not what it’s like...I’m worried about my mental health...I cannot cry in here. My feelings are dead.” The terrible impact that further abuse would have on vulnerable individuals like these two is clear, particularly in light of the retraumatization that merely being incarcerated provoked in both.

Although immigration detainees ostensibly receive necessary medical and mental health care, in practice this system of care is oriented to responding to emergencies and ensuring merely that individuals are alive and well enough to take part in proceedings and be deported. Advocates have repeatedly documented failures in the system to provide detainees with even minimal and basic counseling and health care services that health professionals have deemed essential. Moreover, unlike criminal defendants, immigration detainees are not represented by government-provided counsel, and in recent years approximately 84% of them have not been able to find or pay for attorneys. This lack of medical and legal support makes it especially crucial

that immigration detainees receive culturally appropriate information in their own language about their right to be free from sexual abuse and who they can contact if they are sexually assaulted (Standards TR-3, ID-3, ID-4). Access to outside organizations that provide counseling, medical and mental health support services, and advocacy for immigrant victims of violence is likewise critical (Standards RP-2, ID-1).

The different sets of standards and the supplemental standards for facilities with immigration detainees provide common-sense measures that are needed to improve safety. They represent a compromise, balancing the fiscal and security interests of detention administrators with the basic right of all people, regardless of citizenship and custody status, 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 detainees. 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 detainees should not be incorporated into the definition of sexual abuse.

Detention agencies remain free to establish disciplinary rules and regulations as they see fit, but conflating consensual sexual activity between detainees 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 detainees, 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 immigration detention every year, the costs for implementing these standards in facilities run by or contracted with ICE, Border and Customs Enforcement, and the Office of Refugee Resettlement will be small. Facilities 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 detainees from sexual abuse must be understood in light of the dramatic benefits of doing so. For example, implementing the standards' provisions will promote safety and efficiency, resulting in net savings in areas such as staffing, investigations, and detainee health care. 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 and citizenship status.

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.

ICE contracts with facilities of different sizes and different staffing levels throughout the U.S. Creating distinctions for the level of compliance required will make it especially difficult for ICE to assess whether each contracted facility is conforming to the requirements applicable to it. It will also send a dangerous message that certain types of facilities do not need to put in place the measures necessary to protect vulnerable immigration detainees from sexual abuse.

Comments on Supplemental Standards for Facilities with Immigration Detainees

PHR applauds the Commission's efforts to address the particularized needs and concerns of immigration detainees. The Supplemental Standards for Facilities with Immigration Detainees contain well-considered and essential guidelines for preventing and responding to abuse involving noncitizens. In addition to strongly supporting the ratification of these standards into regulations, we advocate strengthening the protections they provide in the following important ways:

1. *ID-5: Supplement to SC-1: Screening for risk of victimization and abusiveness*

Standard ID-5 calls for efforts to be made to obtain detainees' institutional and criminal records, and for screening to be done on that basis for detainees who are vulnerable to abuse or likely to be abusers. To minimize the dissemination of sensitive personal information, PHR recommends that detention facility authorities draw on risk assessments completed by DHS personnel upon entry of individuals into ICE's custody to identify and appropriately house detainees with propensity to be victims or abusers. Any determination that an individual has either propensity should be made only by personnel with training and professional expertise in that area, including social workers, psychiatrists, and psychologists.

2. *ID-7: Supplement to RE-1: Inmate reporting*

Standard ID-7 aims to enable detainees to report abuse directly to the ICE Office of Civil Rights and Civil Liberties and the DHS Office of the Inspector General. In order to be effective, this measure must provide for the same private, confidential, and privileged use of phones contemplated by standard ID-8, regarding access to outside victim advocates. These Standards consistently recognize the particular cultural sensitivities of detainees to sexual abuse, and the difficulties many detainees will have talking about incidents that do occur. To work around these barriers, the Standards must guarantee to the maximum extent possible that detainees are able to report sexual abuse in private, beyond earshot of other detainees and facility personnel. Facilities may guarantee this right at minimal cost by making a free phone line available in a quiet, closed area outside everyday housing “pods”, and informing immigration detainees that they may request to use this phone for the specific purpose of calling either of the named offices.

Conclusion

Immigration detainees are at especially high risk for sexual violence and have clear disincentives to reporting when such abuse does occur. Strong standards are urgently needed to protect detainees from this devastating but all too common abuse. PHR strongly urges 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 subject to harrowing abuse and rape while in custody.

Thank you for your consideration.

Respectfully,



John Bradshaw
Chief National Policy Officer/Washington Director