



THE REBECCA PROJECT FOR HUMAN RIGHTS

Health Safety and Dignity for Vulnerable Families

May 10, 2010

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 **Rebecca Project for Human Rights**, a national policy and advocacy organization dedicated to reforming the criminal justice system, we the undersigned are 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.

Specific Recommendations for Juvenile Facilities

Every day in America, state and local courts and governments place over 100,000 youth in out-of-home placements and supervise several hundred thousand youth on probation.¹ The majority of youth in out-of-home care are incarcerated in juvenile detention facilities or long-term youth correctional facilities; however, thousands of youth are placed in non-secure community corrections settings such as group homes or shelters, thousands are held temporarily in lockups, and thousands more are incarcerated in adult jails and prisons. Therefore, all of the four sets of standards proposed by the NPREC, not just the Juvenile Standards, have a role to play in the prevention of the sexual abuse of children. These comments address the need for all four sets of standards to account for the unique needs and vulnerabilities of youth.

Until the passage of the Prison Rape Elimination Act (PREA) in 2003, federal law did not clearly recognize that children in detention and correctional settings were particularly at risk of sexual abuse. Yet findings from the most recent Bureau of Justice Statistics (BJS) survey of youth in juvenile facilities, data collection mandated by PREA, demonstrate the extent to which youth are at risk of sexual victimization. According to the BJS data, twelve percent of youth in juvenile facilities reported sexual abuse in 2008 and 2009 – 10.3% reported an incident involving a staff member and 2.6% reported an incident involving another youth.² We know from other studies that youth are at an even higher risk of abuse when placed in adult facilities.³ Each day that passes without these critically important standards in place means that youth continue to experience a substantial risk of harm. We urge you to promulgate the Commission's standards without delay.

The Commission's standards go a long way in making clear that no court sentence, regardless of the offense, should ever include sexual victimization. The sexual abuse of young people violates their basic human rights, violates the government's constitutional obligation to provide safe and humane conditions of confinement, and impedes the likelihood of a successful transition to adulthood. The examples of sexual abuse of youth below demonstrate just how vulnerable youth are in all correctional environments.

- A male security guard raped and repeatedly harassed A.S., a 15-year-old girl, at a Department of Youth Services (DYS) facility in Alabama. She ultimately became suicidal and required in-patient care. Among the allegations in litigation about this abuse were that DYS officials received notices about the sexual abuse, but disregarded them because girls were "presumed to be liars and troublemakers."⁴

¹ The terms children, youth, and young people are used interchangeably to refer to: (1) persons under the age of 18; and (2) young people through the age of 25 who are under the jurisdiction of the juvenile court or are detained in juvenile detention or correctional facilities.

² Beck, Allen, Harrison, and Guerino. (January, 2010). *Sexual Victimization in Juvenile Facilities Reported by Youth*. Bureau of Justice Statistics. Available online at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf>.

³ Campaign for Youth Justice. (November, 2007). *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*. Available online at http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

⁴ The National Prison Rape Elimination Commission Report. (June 2009). Available online at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

- Robert, a 15-year-old boy with severe mental disabilities and an IQ of only 32, was raped by another resident at a juvenile facility in Florida. The perpetrator of the abuse was a 17-year-old sex offender who had been delegated the duties of bathing and changing Robert's diaper.⁵
- Facility officials transferred Cyryna Pasion, a transgender girl, from the girls' unit to a boys' unit at the Hawaii Youth Correctional Facility against the advice of medical staff, while the facility underwent repairs. Boys on the unit sexually harassed her, abused her, and threatened her with rape on an almost daily basis. In the common area, boys rubbed her legs and sometimes pulled out their erect penises and threatened to assault her. On several occasions, boys masturbated in front of her. Other times they grabbed her by the waist and rubbed their bodies against hers. Staff members were present, but never did anything to help and sometimes laughed or encouraged the boys.⁶

If implemented, the Commission's standards have the potential to dramatically improve the safety of children involved in the justice system. We ask that the attorney general adopt standards that will prevent the kinds of abuse suffered by youth in the stories previously mentioned.

The NPREC consulted with individuals with a broad range of correctional expertise during the drafting of the standards. As a result of the extensive input from corrections practitioners, including juvenile facility conditions experts and facility administrators, the Commission's standards reflect pragmatic solutions to a complicated problem. We are pleased to see that all four sets of standards reflect a comprehensive approach that encompasses the critical areas necessary to prevent abuse. Among the strengths of the NPREC standards are the following:

- **Prevention Planning (PP) and Response Planning (RP)** standards make clear to officials that their facilities must have a zero tolerance approach toward all forms of sexual abuse with clear protocols in place to ensure that if sexual violence occurs they can respond effectively. Hiring and retaining qualified employees is one of the significant challenges facing corrections officials. Standard PP-6 (and PP-7 for Lock-ups) will help prevent adults who prey on children from being hired or promoted if they have a history of prior abuse against children. Juvenile Standard RP-1 will ensure that forensic medical examiners are trained in the unique psychological and emotional conditions of younger victims of sexual abuse so that they can conduct reliable and sensitive examinations where youth are involved. Standards RP-2 through RP-4 ensure that facilities coordinate with appropriate outside entities to support the reporting, investigation and prosecution of sexual abuse of children.
- **Training and Education (TR)** of employees, volunteers, contractors, and residents in facilities will help them know how to prevent, detect, and respond to incidents. We are especially pleased to see the requirement of specialized training for those completing sexual abuse investigations and for medical and mental health providers so they will know how to respond effectively without creating further trauma for youth victims. Staff training and supervision are crucial; staff need to understand the harmful nature of sexual abuse involving children and its potential consequences. We think it is valuable that Adult, Juvenile, and Community Corrections Standard TR-3 will also ensure that educational materials targeted to the inmate/resident/defendant/offender will be in accessible formats appropriate for the age and level of cognitive and emotional development, including persons who have limited English proficiency, are deaf, visually impaired, or otherwise have a disability.

⁵ Miller, C. M. (2005, October 20). Herald watchdog: Juvenile justice: State put disabled boy in sex offender's care. *Miami Herald*.

⁶ *Elimination of Prison Rape: Focus on Juveniles*, Hearing Before the National Prison Rape Elimination Commission (June 1, 2006) (testimony of Cyryna Pasion). Available on-line at http://www.cybercemetery.unt.edu/archive/nprec/20090820160300/http://nprec.us/docs/boston_survivor testimony_pasion.pdf.

- **Screening for Risk of Sexual Victimization and Abusiveness (SC) in the Adult Standards and Assessment and Placement of Residents (AP) standards in the Juvenile Standards** will help ensure that placement or classification decisions about where to house a person will take into account each individual's particular risk of victimization. We commend the NPREC for recognizing the harms isolation can cause, especially for young people, and are glad to see the limits on isolation in the standard requiring that youth at high risk of sexual victimization will only be placed in segregated housing as a last resort, and then only until an alternative means of separation from likely abusers can be arranged. We believe that the standard should go even further to prevent unnecessary use of isolation, as discussed below. The Adult and Community Corrections Standard SC-2 is crucial to ensuring that lesbian, gay, bisexual, transgender (LGBT), or other gender-nonconforming inmates are not placed in segregated units or given particular housing assignments solely on the basis of their sexual orientation, genital status, or gender identity. We also believe this provision should be included in Juvenile AP-2.
- Standards related to **Reporting (RE) and the Official Response Following an Inmate Report (OR)** will ensure that incidents of sexual abuse can be easily reported, and clear policies and procedures will ensure that staff and agency leadership provide a coordinated response (OR-4) and prevent retaliation for reporting abuse (OR-5). We strongly support the requirement in Standard OR-1 that all staff members report abuse immediately, and that they must not reveal any information related to a sexual abuse report to anyone other than those who need to know. In particular, we support Juvenile Standard OR-1's enhanced responsibilities to inform the juvenile court, the victim's parents or legal guardians and/or victim's caseworker, and agree with the flexibility not to inform parents or legal guardians when the situation warrants that response (e.g., situations where parental rights have been terminated or reporting to the victim's family may place the victim in danger or otherwise interfere with treatment). We support the exhaustion provisions outlined in Standard RE-2, which will improve youths' opportunity to seek legal relief for sexual abuse and misconduct within the unfortunate constraints of the exhaustion requirements of the Prison Litigation Reform Act of 1996 (PLRA).
- **Investigations (IN) and Discipline (DI)** standards will ensure that all allegations of abuse, including third-party and anonymous reports, will be fully investigated, and substantiated allegations will be properly handled by facilities in administrative processes or by additional court proceedings. Failure to investigate allegations sends a message to staff and residents that speaking out may put the victim at risk but has no consequences for the abuser, so we applaud these requirements. We also commend NPREC for recognizing that intervention decisions for residents who engage in sexual abuse must take into account the social, sexual, emotional, and cognitive development of the resident and the resident's mental health status (Juvenile Standard DI-2).
- **Medical and Mental Health Care (MM)** standards recognize the critical role that medical and mental health staff play in identifying a resident's risk for victimization (MM-1), protecting residents from inappropriate financial burdens by ensuring that access to emergency and treatment services are available free of charge (MM-2), and requiring a proper level of responsive services for victims that matches the level of care one would receive in the community (MM-3).
- **Data Collection and Review (DC) and Audits (AU)** standards properly require agencies to collect data and review the information, including both incident-based and aggregate data, to improve the effectiveness of prevention, detection, and response policies, practices, and training. These basic quality assurance practices help agencies learn from past problems and prevent them in the future. In addition, AU-1 will strengthen the independent oversight of facilities and ensure transparency.

We understand that some corrections officials have challenged specific NPREC standards regarding the topics below. We offer our thoughts on these topics as they relate to the needs of children:

- Direct Supervision:** In any facility where youth are held, they need appropriate supervision. The recommended Standard PP-3 merely requires the “supervision necessary to protect residents from sexual abuse.” Responsible, professional adults trained in the behaviors and developmental needs of the adolescent population should be supervising young residents in correctional settings. We believe that this protection is best accomplished through continuous, direct supervision, because staff will be more likely to identify signs of developing problems among youth when they interact with them regularly. We encourage you to strengthen Standard PP-3 to require direct, continuous supervision of youth. In addition, we understand that there has been concern among the correctional community about the standards’ encouraged use of surveillance technology. We believe strongly that cameras can never be sufficient substitutes for direct supervision, and that facilities must be careful not to over rely on technology, since it further separates residents and staff. The recommended standards neither require, nor should they encourage, the overreliance on cameras. Standard PP-7 (PP-8 for Lockups) asks jurisdictions to supplement their sexual abuse prevention plans with video monitoring and other technology, and to conduct an annual study to determine need for and feasibility of incorporating new technology. We think this is a balanced approach to the use of video and other technology, acknowledging its potential contributions while deferring to local expertise and analysis. The flexible approach of Standard PP-7 (PP-8 for Lockups) would therefore impose no significant expenses.
- Cross-Gender Supervision:** We urge you to adopt Standard PP-4 (PP-5 for Lockups). Each of the BJS’ inmate surveys has found that a significant percentage of sexual abuse 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. It also minimizes the physical contact that staff have with youth of the opposite sex, by restricting cross-gender frisks to emergency situations. These basic privacy measures are especially important for youth, who are still developing physically and emotionally. This is a reasonable compromise and accommodation of the hiring and promotion challenges faced by correctional administrators seeking to provide equal employment opportunities, while still protecting youth from harmful cross-gender viewing and touching.
- Exhaustion provisions:** Standard RE-2 will improve youths’ opportunity to seek legal relief for sexual abuse and misconduct within the unfortunate constraints of the exhaustion requirements of the Prison Litigation Reform Act of 1996 (PLRA). Youth in secure facilities are particularly vulnerable to abuse. However, they are also ill-equipped to navigate complex administrative rules and comply with short deadlines, given that they generally lack meaningful access to counsel and other legal resources while detained or incarcerated. Although we believe that youth should not fall within the scope of the PLRA, we recognize that such changes were beyond the scope of the Commission’s work. The framework outlined in Standard RE-2, when applied in conjunction with the reporting requirements outlined in Standard RE-1, strikes an adequate balance between an agency’s legitimate interest in the opportunity to meaningfully respond to a report of sexual abuse or misconduct and a youth’s interest in securing any legal relief to which he or she is entitled.
- Oversight:** Without proper oversight, the standards cannot truly fulfill PREA’s mandate. The recent sex abuse scandals in Texas and Indiana, where officials ignored complaints of widespread staff sexual misconduct and/or retaliation, highlight the importance of external scrutiny. Standard AU-1 mandates the essential components of independent oversight in a cost-efficient manner. In addition to providing needed accountability, this outside monitoring can provide a credible, objective assessment of a facility’s safety, identifying problems that may be more readily apparent to an independent auditor than to officials working within a system. Existing oversight entities, such as an inspector general, a protection and advocacy organization or an ombudsman’s office, could be empowered to conduct these

reviews. The costs that may be incurred by the agency will be outweighed by the tremendous benefits to this outside perspective, 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 the reduction of child sexual abuse.

We believe that full implementation of the NPREC standards will not only reduce sexual abuse, but will also help reduce other forms of physical abuse or gang violence that make detention and correctional settings dangerous to staff and residents. Although we strongly support the standards, below are some important changes we believe are necessary to enhance the standards' capacity to fulfill the mandate of the Prison Rape Elimination Act and prevent harm to youth.

1. **Employee, Volunteer and Contractor Training:** We applaud the Commission's recognition in Standards TR-1 and TR-2 of the importance of training all adults working with youth in facilities about the dynamics of sexual abuse in confinement and residents' right to be free from abuse and retaliation for reporting. However, we believe that this provision should be tailored more to reflect the particular vulnerabilities of young people and the harms associated with sexual abuse of children. Therefore, we encourage you to add to the list of topics to be covered in these trainings in all facilities that house young people: 1) adolescent development, including what is normal and acceptable behavior of adolescents in the facility, and the ways in which sexual victimization can affect healthy development; and 2) the prevalence of trauma and abuse histories among the youth population in juvenile/criminal justice facilities, possible behaviors of youth with trauma and abuse histories, and appropriate ways of responding to those behaviors. In addition, the training standards should make clear that these trainings also must include the agency's zero tolerance policy and the employee's duty to report misconduct, that failure to report will be investigated along with any allegations of sexual abuse, and that staff who failed to report will be disciplined.
2. **Medical Care:** While we are pleased to see the inclusion of medical and mental health providers in screening and response in the standards, we suggest some important adjustments. First, in Standards AP-1 and MM-1, medical and mental health professionals are assigned the responsibility for asking youth about sensitive information such as their sexual orientation and history of victimization. We agree with the choice to have trained professionals ask such sensitive questions, but urge you to omit from the list the questioning of youth about their history of engaging in sexual abuse. Asking a health care professional to question a youth about prior offending behavior disrupts the caretaking relationship that health care professionals are seeking to foster with youth. Such information can be gathered without poisoning this important relationship from the first time youth and health care staff meet. Second, these standards should make clear that if medical and mental health professionals provide the information they gather to staff to use for housing, work and programming decisions, they must inform youth of those purposes before eliciting information. Such informed consent is important because the use of this information is outside the normal bounds of provider-patient confidentiality. Finally, medical and mental health programs generally engage in quality assurance activities. Whether in the MM standards or the DC standards, we believe that the standards should require facility-based health care programs to include compliance with these standards in their quality assurance activities.
3. **Individual Safety Plans:** Although Juvenile Standard AP-2 calls for all placement decisions to be made on an "individualized basis with the goal of keeping all residents safe and free from sexual abuse," we believe the Juvenile Standards do not provide sufficient guidance on how to do this, especially for youth identified in the screening process as vulnerable to sexual abuse. Specifically:
 - a. We urge the Department to require facilities to use information gained during the assessment process about potential vulnerability to sexual abuse to develop an individualized safety plan for each resident who is identified as likely to be vulnerable to sexual abuse.

- b. We believe that the Commission’s recommendation in its report that facilities, “encourage all residents during intake to tell staff if they fear being abused,”⁷ should be explicitly included in Juvenile Standard AP-1. Knowing this information will help facilities to better identify vulnerable youth, develop an appropriate safety plan, and protect youth who fear for their safety before they are actually abused. This is especially important because there are no validated instruments to screen for a youth’s vulnerability to sexual abuse, so a youth’s assessment of his or her own vulnerability is especially important to consider.
 - c. The Commission also rightly recognized that juvenile status offenders “are particularly vulnerable to abuse or coercion by more experienced, sophisticated, and violent residents.”⁸ Standard AP-2 should make clear that, “individuals who are placed in a facility because of status offenses, or a violation of a court order where the underlying offense is a status offense, should be housed separately from other residents.”
 - d. To ensure appropriate individualized determinations for lesbian, gay, bisexual, and transgender (LGBT) youth, Standard AP-2 should explicitly prohibit housing, bed, and other assignments based solely on sexual orientation, gender identity, birth gender, or genital status. This prohibition is included in the Adult Standards and is as necessary, if not more necessary, in the juvenile context in order to ensure that LGBT youth, and other gender-nonconforming residents are not placed in segregated units or in isolation, or worse, in sex offender units as sometimes occurs. Similarly, Standard AP-2 should include in its discussion that facilities should not have blanket rules about how to handle LGBT youth. Given the history of facilities using isolation as a "housing solution" for LGBT youth and the harms of isolation described below, this guidance should be included in the Standards.
4. **Consensual Sexual Activity between Residents:** We urge the Department to distinguish between sexual abuse, which should always fall under the purview of these standards, and voluntary consensual sexual activities between residents, which a facility may prohibit, but should not treat as sexual abuse. Specifically, the standards should explicitly state that they are designed to prevent and respond to sexually abusive conduct only and that it is not appropriate to use the standards to address consensual sexual conduct between residents who are able to consent. The Adult, Lock-Up, and Community Corrections Standards define sexually abusive penetration only to include nonconsensual sexual penetration and penetration involving an inmate who is unable to consent or refuse. We strongly urge the Department to use this definition for the Juvenile Standards.
5. **Isolation:** Under the current standards, facilities may isolate youth in their efforts to eliminate sexual abuse and violence. However, the standards should not permit jurisdictions to expand the use of isolation and rely on one dangerous practice when working to eliminate another. We recommend two sets of modifications to prevent such a response:
- a. First, the standards must do more to highlight the dangers associated with isolation and clarify a facility’s responsibility to keep children safe without resorting to that practice. Recent research captures the serious dangers associated with isolation: a February 2009 report from the Office of Juvenile Justice and Delinquency Prevention described a “strong relationship between juvenile suicide and room confinement,”⁹ and a review of social science research on the topic

⁷ The National Prison Rape Elimination Commission Report. (June 2009). Available online at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

⁸ The National Prison Rape Elimination Commission Report. (June 2009). Available online at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

⁹ Lindsay M. Hayes, National Center on Institutions and Alternatives, *Juvenile Suicide in Confinement: A National Survey* (Office of Juvenile Justice and Delinquency Prevention Report February 2009), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf>.

characterized isolation as “harmful.”¹⁰ Additionally, the American Psychiatric Association has stated that “[c]hildren should not be subjected to isolation, which is a form of punishment that is likely to produce lasting psychiatric symptoms.”¹¹ However, the current standard on resident placement in juvenile facilities (AP-2) does not explicitly mention those dangers, nor does it stress alternative ways of protecting youth who may be particularly vulnerable to victimization. We encourage you to include a much clearer statement that the use of isolation endangers youth through an increased risk of suicide, and that facilities must identify ways of meeting their constitutional obligation to protect the youth in their care without resorting to that practice.

- b. Second, the standards should bar the use of extended periods of isolation as punishment for residents who engage in sexual abuse, given the dangers that are associated with the practice. The discussion that accompanies Juvenile Standard DI-2 (Interventions for Residents Who Engage in Sexual Abuse) recognizes that “isolation as a disciplinary sanction is harmful for all residents, especially residents with mental illness.” Yet the standard itself does not include language prohibiting that practice, and the discussion only “strongly discourage[s]” the use of extended isolation as a form of punishment. To be sure, isolation can and does have a legitimate, short-term purpose in juvenile facilities: managing an imminent threat to the physical safety of youth and/or staff. However, the standard should not expand isolation beyond that limited role, but should explicitly state that “no resident should be subject to prolonged disciplinary isolation.”

6. **Youth in Adult Facilities:** Similar to the concerns about isolation raised above, we believe that adult facilities housing children face a dangerous dilemma with respect to choosing between housing youth in the general adult population where they are at substantial risk of sexual abuse, or housing youth in segregated settings which cause or exacerbate mental health problems. We believe the Commission did not go far enough to address the hazards of housing youth in adult facilities. Allowing youth to be kept in the general population is contrary to all available evidence confirming the severe risk of sexual abuse that youth face while incarcerated in adult facilities. According to BJS statistics, 21% and 13% of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005 and 2006 respectively, were youth under the age of 18 (surprisingly high since only 1% of jail inmates are juveniles).¹² However, keeping youth isolated leads to increased suicide. In fact, youth are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.¹³ The situation for youth held in adult prisons is no less dire; Deborah LaBelle, an attorney working with over 400 youth serving sentences of life without possibility of parole found that 80% of the youth had been sexually assaulted within the first year of their incarceration.¹⁴

We believe the Adult standards should be modified to be consistent with existing federal laws and policy used by the Federal Bureau of Prisons to prohibit the placement of youth in adult jails and prisons.¹⁵ This response would also be consistent with the recent Department of Justice views letter submitted in support of Senate Bill 678, which would extend protections of the Juvenile Justice and

¹⁰ Linda M. Finke, *Use of Seclusion Is Not Evidence-Based Practice*, 14 J. Child & Adolescent Psychiatric Nursing 186 (2007).

¹¹ Press Release, American Psychiatric Association, *Incarcerated Juveniles Belong in Juvenile Facilities* (Feb. 27, 2009), available at <http://www.psych.org/MainMenu/Newsroom/NewsReleases/2009NewsReleases/IncarceratedJuveniles.aspx>.

¹² Beck, A.J., Harrison, P.M., Adams, D.B. (2007, August). *Sexual Violence Reported by Correctional Authorities, 2006*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. Beck, A. J., Harrison, P.M., Adams, D.B. (2007, August). *Sexual Violence Reported by Correctional Authorities, 2005*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

¹³ McGowan, A., Hahn, R., et.al., *Effects on Violence and Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review*. *American Journal of Preventative Medicine*, 32 (4S), S7-S28.

¹⁴ Testimony of LaBelle, D. (2005, August 19). *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars* (p. 33). San Francisco: National Prison Rape Elimination Commission Public Hearing.

¹⁵ See, e.g., Federal Bureau of Prison Program Statement 5216.05 and Title 18 U.S.C. § 5039.

Delinquency Prevention Act (JJDP A) to youth in the adult criminal justice system.¹⁶ We recommend that the standards make clear that youth are not to be held in adult jails or prisons, except under the six-hour hold or rural exceptions of the current JJDP A that allow youth to be held in jails under these limited circumstances.¹⁷ The Adult and Lock-up Standards should clearly reference the prohibition and the specific exceptions to ensure that youth are not housed in adult jails, prisons, or lock-ups outside of the narrow allowable circumstances. Finally, while children should never be held in adult facilities, to the extent that they are, the child-specific protections that are evident in the other standards should be incorporated equally into the adult standards.

- 7. Limited English Proficient (LEP) Children:** Children who do not speak English should receive the same protections and supports under the standards as children who do speak English. The current standards do include some provisions that address the needs of residents who are limited English proficient. Specifically, Standard PP-5 (Accommodating Residents with Special Needs) requires facilities to ensure that LEP residents understand sexual misconduct policies and can directly report abuse or victimization. However, the standards do not explicitly require facilities to ensure that LEP residents are able to communicate with staff during other important phases, including investigation, medical and mental health care, and other supportive services that might be necessary after a youth is victimized. Given that the standards recognize that this process can be “a particularly invasive and traumatizing experience” for youth,¹⁸ it is critical that LEP youth are able to communicate with those around them during these times. We encourage you to add language to the standards on Response Planning that would require jurisdictions to ensure that victim advocates are able to communicate with LEP residents at all stages of the process (RP-1) and that would require that agencies maintain or attempt to enter into agreements with community service providers with a language capability for any language that comes up regularly at a facility other than English (RP-2). Additionally, we would encourage you to broaden the term “cultural competence” to include linguistic competence, and include that term in the standards relating to resident education (TR-3), medical and mental health intake screenings and ongoing care (MM-1 and MM-3), and the provision of services to youth victims and their families through a facility’s coordinated response to an incident of sexual abuse (OR-4).

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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Executive Director

K. Shakira Washington
Associate Policy Director

¹⁶ Letter from Assistant Attorney General Ronald Weich to Senate Judiciary Committee Chairman Patrick J. Leahy, dated April 15, 2010, available at: <http://judiciary.senate.gov/resources/documents/111thCongress/upload/041510DOJViewsLetterJJDP A.pdf>.

¹⁷ See 42 U.S.C. 5633(a)(13)

¹⁸ See Standard RP-1 (Evidence Protocol and Forensic Medical Exams).