

May 10, 2010

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Office of Legal Policy
Department of Justice
950 Pennsylvania Ave., 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 Attorney General Holder,

On behalf of the Sylvia Rivera Law Project (SRLP), we submit these comments concerning the recommended national standards for the prevention, detection, response, and monitoring of sexual abuse developed by the National Prison Rape Elimination Commission (“the Commission”). We support the adoption of the proposed Standards if certain essential amendments are made. While we strongly support many aspects of the proposed Standards, we are concerned that certain provisions as currently drafted will exacerbate the vulnerability of transgender, gender nonconforming and intersex individuals held in detention settings to sexual abuse.

The Sylvia Rivera Law Project works to guarantee that all people are free to self-determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination or violence. SRLP is a collective organization founded on the understanding that gender self-determination is inextricably intertwined with racial, social and economic justice. We provide free civil legal services to low-income people and people of color who are transgender,¹ intersex,² or gender nonconforming³ in New York State on issues such as prisoners’ rights, immigration, name changes, identity documents, discrimination, and public benefits. We also engage in policy work, impact litigation, public education, and support of community organizing to advance the rights of our communities.

¹ Transgender refers to people who have a gender identity or expression that is different from what is traditionally associated with the sex they were assigned at birth. Transgender men are people who were assigned female at birth who now identify as men. Transgender women are people who were assigned male at birth who now identify as women. Not all transgender people identify as women or men.

² Intersex refers to people who were born with an intersex condition or disorder of sex differentiation, which are physical conditions that make people’s bodies not seem typical for male or female.

³ Gender nonconforming refers to people who are seen as not matching gender norms in some significant way, but who may not necessarily identify as transgender or have an intersex condition.

Because of the over-representation of our community members in various forms of detention and the severe abuse that they experience in these settings, prisoner issues have been a major focus of our work since SRLP was founded. We have served well over 1100 clients since we opened in 2002, nearly 400 of whom have received our assistance in relation to police misconduct issues and/or mistreatment in an institutional setting. We have provided advice and referrals to hundreds of additional people who have contacted us from jails, prisons, and other forms of detention around the country. We also released a first of its kind report, *“It’s War in Here”: A Report on the Treatment of Transgender and Intersex Prisoners in New York State Prisons.*⁴

Our work at SRLP is informed by guidance from our Prisoner Advisory Committee (PAC), which is a group of around fifty people who are currently incarcerated, mostly in New York State prisons, and who volunteer their time and expertise to SRLP. Most PAC members are transgender, intersex, or gender nonconforming and survivors of violence. These comments are informed by input from PAC members as well as by other experiences and opinions that current and former clients and community members have shared with us over the years. Several PAC members have also submitted comments separately. All of the names that we use to discuss particular incidents in detention are assumed, and in certain cases we have also made minor changes to other details to protect the identities of the people involved.

Two members of SRLP testified before the Commission in 2003. We respectfully refer the Department to the testimony of Dean Spade and Z Gabriel Arkles before the Commission, to the *It’s War in Here* report, to SRLP’s 2008 comment on the proposed standards, and to the 2008 comments of PAC members Kira Gonzalez and Synthia China Blast for further information regarding the important issues confronting transgender, intersex, and gender nonconforming people in detention.

Background on transgender, intersex, and gender nonconforming people in the criminal legal system

Transgender and gender nonconforming people face pervasive discrimination in employment, housing, education, health care, and social services. These factors, often combined with a loss of family support at a young age, lead to disproportionate poverty among transgender and gender nonconforming communities. The already inadequate support systems that are supposed to be available to poor people are often not accessible to transgender and gender nonconforming people, who meet discrimination and violence everywhere from homeless shelters and welfare offices to public hospitals and job training programs. Many transgender and gender nonconforming people experience sexual and

⁴ See Sylvia Rivera Law Project, *“It’s War in Here”: A Report on the Experiences of Transgender and Intersex People in NYS Men’s Prisons*, (2007).

other violence during their lives. Some transgender and gender nonconforming people become involved in criminalized work because of a lack of any other options for survival; however, even those who do not are still likely to be arrested and held in detention settings. Living on the street, transgender and gender nonconforming people face more exposure to police, who often harass and falsely arrest them, relying on stereotypes that all transgender people are criminals and sex workers. This police profiling is particularly intense for transgender people of color, who are frequently arrested for nothing more than walking down the street. Transgender and gender nonconforming people are also likely to experience particularly high barriers to obtaining lawful immigration status in the U.S. because of employment discrimination, lack of support from biological family members, lack of official recognition of chosen family members, and bias of immigration officials.

People with intersex conditions, or disorders of sex differentiation, are likely to experience medical abuse from a young age. This abuse can take the form of public stripping and degrading display of the bodies of intersex people to medical students and professionals. Medical professionals also sometimes surround discussions of these conditions with shame and secrecy and withhold medical records from their intersex patients. Some children with intersex conditions are operated on at a very early age to “normalize” their bodies. These surgeries are only rarely necessary for any medical reason and can lead to serious future complications, in terms of sexual and urinary function as well as in other areas. While intersex people generally have different experiences and issues than transgender and gender nonconforming people throughout their lives, within the criminal legal system, intersex, transgender and gender nonconforming people also face many similar issues and are all targeted for gender-motivated sexual violence, particularly if their condition is visible or known.

After transgender and gender nonconforming people are arrested, bias on the part of judges, juries, prosecutors, and even defense attorneys can increase the likelihood of conviction and longer sentences. Alternatives to incarceration are often not open to transgender people. Some forms of alternatives to incarceration require “valid ID,” which many transgender people do not possess because of conflicting and inaccessible requirements for changing name and gender on ID and/or because of barriers to acquiring ID related to income or other factors. Many sex-segregated programs, such as certain residential drug treatment facilities, will not admit transgender residents or treat transgender residents so poorly that these residents cannot access the support necessary to complete recovery.

Being targeted for sexual violence also creates barriers to successful completion of alternatives to incarceration for many transgender, intersex, and gender nonconforming people. One of our clients, a man with an intersex condition, fled a court-mandated drug treatment program after another resident raped him. In another case, a man sexually assaulted a transgender woman by grabbing and squeezing her breasts in a court-mandated drug treatment program. She slapped him in the face and was expelled from the program for

fighting. Not only did sexual assault lead to these people losing a program that could have benefited them and society immensely in terms of recovery from addiction, but also it led to their receiving sentences for several years in prison because of “failure to comply” with the program.

Once incarcerated, the violence, discrimination, and profiling that our clients face on the streets only intensifies. They are frequently denied the medically necessary healthcare that they need related to their gender such as hormones and sex reassignment surgeries, as well as other forms of healthcare, such as access to appropriate treatment for HIV or cancer. They are also often forced to comply with rigid gender norms that are not consistent with their gender identities and disciplined for behavior that is deemed “too feminine” or “too masculine.” The police profiling and false arrest of transgender people on the streets becomes profiling and false disciplinary reports of transgender people in detention. Many of our clients and community members have attempted suicide in detention.

Transgender, intersex, and gender nonconforming people are also targeted for physical violence by both staff and other prisoners, including beatings, slashings, and other forms of assault. Sexual violence in particular is extraordinarily widespread. Transgender women are commonly placed in male facilities where they are likely to be targeted for sexual abuse and unwanted sexual attention from other prisoners and staff. While sexual violence perpetrated by other prisoners against transgender, intersex, and gender nonconforming people, particularly in male facilities, is disturbingly common, sexual violence is even more often perpetrated or coordinated by staff. In some cases, one or more staff members take their victim aside, beat, and forcibly rape her or him. In other cases, they will coerce sexual acts from their victim with explicit or implied promises of gifts, protection, and special privileges and threats of discipline, violence, and deprivations. Sexually abusive searches of transgender, intersex, and gender nonconforming prisoners can be a daily occurrence for some people. Staff members also sometimes “give” transgender women to male prisoners to rape; threaten transgender, intersex, and gender nonconforming prisoners with allowing them to be raped; tell prisoners that it is their fault that they were raped; and/or choose to take no action when they see one of these prisoners being sexually abused. Finally, transgender, intersex, and gender nonconforming people are sometimes placed against their will in highly isolating and restrictive settings that not only fail to keep them safe, particularly from staff-perpetrated sexual abuse, but that also damage their health and reduce their chances of early release.

Comments on the Standards

As a result of the extensive input from a wide range of experts, the Commission’s standards overall reflect pragmatic solutions to the grave problem of sexual abuse. We are especially pleased to see that all four sets of standards recognize the well-documented vulnerabilities of transgender, gender nonconforming and intersex individuals to sexual

abuse. Among the strengths of the Commission’s standards that we strongly urge the Department to include in the final rules are the following:

Training and Education (TR) will help employees, volunteers, contractors, and prisoners know how to prevent, detect, and respond to incidents of sexual abuse. Comprehensive and well-crafted training is critical to fostering a better understanding of, and correcting the misconceptions about, transgender, gender nonconforming and intersex persons, and assisting staff and prisoners with strategies to keep vulnerable prisoners safe. We strongly support **TR-1’s** requirement that staff training include strategies for communicating effectively and professionally with all prisoners.

Reporting (RE) and Official Response (OR) standards respond directly to three of the most common reasons given by people in detention for why they fail to report sexual abuse: they do not believe their reports “will be taken seriously, kept confidential, and/or result in any tangible positive consequences.”⁵ These concerns are especially true for transgender, gender nonconforming and intersex individuals, who are often wrongly presumed to have instigated sexual abuse and whose reports of assault often are not credited.

Medical and Mental Health Care (MM) standards recognize the critical role that medical and mental health staff play in identifying a prisoner’s risk for victimization (**MM-1**), protect survivors from undue financial disincentives and burdens by ensuring they have access to emergency and ongoing medical and mental health care free of charge (**MM-2**), and require that responsive services for survivors of sexual abuse achieve the level of care they would receive in the community (**MM-3**). People in detention may feel more comfortable disclosing abuse, or fear of abuse, to medical or mental health staff and need access to the basic level of care provided to survivors of sexual abuse in the community.

Oversight and Accountability: Because of the transphobia, homophobia, and sexism that pervades corrections culture, outside review is vital to protecting transgender, gender nonconforming and intersex prisoners. Sound oversight, conducted by a qualified independent entity, can identify systemic problems while offering effective solutions. Standard **AU-1** 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 detention system. Outside

⁵ Jenness et al., *supra* note 11, at 62. See also Sylvia Rivera Law Project, *supra* note 4, at 24 (finding that incidences of harassment or abuse by fellow prisoners “were never without either the implicit permission or active participation of correctional officials.”)

monitoring will also help make systems accountable when they do not meet the standards' requirements.

Judicial oversight is equally important. When officials fail to protect transgender, gender nonconforming and intersex prisoners from sexual abuse, victims need access to legal redress free of the barriers of unrealistic and arbitrary procedural requirements. Standard **RE-2** recognizes that the harsh technical rules of many prison grievance systems – such as filing deadlines as short as two days – cannot realistically be met by prison sexual abuse survivors. Similarly, some institutions' requirement that prisoners report complaints to a specific officer – who may have been involved or complicit in the prisoner's abuse or close to the alleged perpetrator – would wholly undermine whatever measures facilities have put in place to address sexual abuse. Rather than encourage frivolous lawsuits, this standard will increase the efficiency with which prison sexual abuse cases can proceed, by allowing courts to focus on the substantive claims of the survivors instead of litigating their compliance with technicalities.

Recommendations to Enhance the Standards

Although we strongly support much of the Commission's standards, below are some changes we believe are necessary to fulfill the mandate of PREA and prevent serious harm to transgender, gender nonconforming and intersex people in detention.

Limits on Cross-Gender Viewing and Searches PP-4

We are deeply concerned about the current statement that “[m]edical practitioners conduct examinations of transgender individuals to determine their genital status only in private settings and only when an individual's genital status is unknown.” This language is a dramatic departure from the original proposed language in the Standards, which would have prohibited these “searches” or “examinations” altogether. A standard on this topic is vitally important; however, we urge a return to a complete prohibition on this human rights violation targeting transgender, gender nonconforming and intersex people.

Searches to determine the “genital status” of transgender people are a form of sexual assault, whether conducted in private by a doctor one time or in public by a guard repeatedly. This language would, for the first time, authorize a special form of strip search or strip frisk and non-consensual medical exam targeted only at individuals who do not meet gender stereotypes. It would violate governing Constitutional law, which supports searches to find contraband but not for the sole purpose of looking at or touching people's genitals, as well as state and federal law regarding battery, assault, sexual assault, medical privacy, and informed consent. While we are pleased that the Commission acknowledges to some extent the problematic nature of these practices, we believe that a provision limiting rather than prohibiting them does not go far enough.

These types of “searches” or “examinations” are a common form of sexual abuse targeted at transgender people. In one case, officers heard a rumor that a woman in police lock-up on misdemeanor charges was transgender. In response, three of them pulled her from her cell, pinned her to the ground, forcibly pulled her pants down, and put their hands on her genitals to “find out what she really was.” She was then put back in the same cell. While transgender people are the most frequent victims of these attacks, anyone who does not match an officer’s subjective understanding of gender stereotypes—or who is accused by another prisoner of being transgender—can be targeted.

Making doctors or nurses perpetrate this abuse does not change its violating and abusive nature. In another case, a woman of transgender experience was brought to a jail. Staff at the jail knew she was transgender because she had openly identified as transgender during past periods of detention. They wanted to do a “genital check” and told her to strip. When she refused, they sent her to a clinic and demanded that a doctor or nurse perform the search. The first few practitioners refused to comply. They expressed concerns that it was not a part of their job because there was no medical need for such an exam and that it would be unethical and illegal, since the patient was not consenting to an exam, had not consented to a release of private medical information to the officers, and was obviously highly distressed. This individual had been diagnosed with Post Traumatic Stress Disorder due to past sexual assaults and was experiencing flashbacks under the threat of this “exam.” The officers continued to demand that a doctor do as they asked. Eventually, a doctor reached under the woman’s pants and underwear and felt between her legs against her will. He squeezed her genitals while she wept and begged him to stop. He then told the officers that he thought she had a penis and they took her back to the jail.

Sexual assault remains traumatic when perpetrated by a doctor rather than an officer. Medical and mental health professionals who have training and experience in transgender issues can provide incredibly important information about the medical and mental health needs of transgender people they have been working with, which can be relevant to consider in various custodial decisions. However, this proposed Standard does not contemplate seeking such relevant information, with the consent of the individual, from appropriately qualified professionals. Rather, it seeks to authorize medical providers to sexually assault a transgender, gender non-conforming or intersex person for no legitimate reason.

Similarly, moving these assaults into a private setting does not eliminate their violating, traumatic, and unlawful nature. While voyeuristic abuses do frequently accompany these “examinations,” where groups of staff members gather to watch and ridicule the transgender person whose genitals are being exposed and groped, eliminating the additional onlookers does not make the assault acceptable or lawful. A private setting is vital for strip searches that are lawful, necessary and appropriate good faith attempts to locate and eliminate contraband. For such lawful searches, privacy should be mandated. Where a “search” is simply about touching and looking at a person’s genitals, however, “a private setting” does not improve the incident any more than it would improve a forcible rape to be

in a private setting rather than in front of an audience. Consistent with congressional intent, these standards must seek to *stop* sexual abuse in detention, not engage in some misguided attempt to make it *nicer*.

This provision of the Standards must be changed back to its original outright prohibition of “searches” or “examinations” of transgender people for the purpose of determining “genital status.” We also strongly urge the Department to include in the standards a clear requirement that strip and visual body cavity searches of any prisoner be conducted in private and only for legitimate, contraband-related purposes.

Reports from human rights organizations and testimony before the Commission show that transgender, intersex, and gender nonconforming people are frequently targeted for unnecessary and traumatic frisks and strip searches, and that these searches can be precursors to and excuses for sexual abuse.⁶ The provisions on cross-gender searches leave agencies with a dangerous lack of guidance on how to comply with these standards with regard to transgender people.

As a best practice, transgender and intersex prisoners should be asked to specify the gender of staff they feel can most safely search them. This pragmatic approach is currently used by the District of Columbia Police Department, the New York State Office of Children and Family Services, and numerous jurisdictions in Canada and the United Kingdom. If there must be a general presumption about searches and viewing of transgender and intersex prisoners, we recommend that these duties be performed by women facility staff, except in the case of emergency.

Consensual Sexual Activity between Prisoners

Congress only intended PREA to address sexually abusive behavior and not consensual sexual contact. We urge the Department to distinguish clearly between sexual abuse, which should always fall under the purview of these standards, and consensual sexual activities between prisoners, which should never be treated as sexual abuse. Specifically, all four sets of standards should explicitly state that consensual sexual or affectionate activity between prisoners should not be prohibited and that prisoners should never be disciplined for consensual sex with other prisoners, for consensual affectionate contact (such as hand-holding, kissing, or hugging) with other prisoners, or for private masturbation. At a minimum, the standards should state that they are designed to prevent and respond to sexually abusive conduct only, and that facilities should not use the standards to address consensual sexual conduct between prisoners. This statement would help to distinguish between the serious harms and trauma of sexual abuse that PREA was intended to address

⁶ See Sylvia Rivera Law Project, “*It’s War in Here*”: A Report on the Experiences of Transgender and Intersex People in NYS Men’s Prisons, (2007) at 29-31; Amnesty International USA, *Stonewalled: Police abuse and misconduct against lesbian, gay, bisexual and transgender people in the US* 54-58 (2005), available at: <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>.

and harmless consensual sexual activity or affectionate contact between prisoners. The prohibition of consensual sexual activity between prisoners, and particularly the conflation of consensual activity with sexual abuse, undermines the goals of PREA and contributes to the stigmatizing, victimizing, and pathologizing of transgender, intersex, and gender nonconforming people in prison.

A conflation of sexual abuse with sexual contact, and the association of sexual contact with transgender, intersex, and gender nonconforming prisoners, as well as lesbian, gay, and bisexual prisoners, is exceedingly dangerous. It would be an irony and a tragedy if PREA is misinterpreted and misused to actually worsen conditions for some of the people who are most likely to experience sexual abuse in detention. Currently, consensual sexual conduct between prisoners can be punished as harshly as rape. Imposing discipline for harmless consensual sex between prisoners contributes to profound confusion on the part of staff and prisoners about what the real problem is: sex or sexual abuse. This confusion interferes with the ability of agencies to send a strong, clear, and convincing message of zero tolerance for sexual abuse and endangers transgender, intersex, and gender non-conforming prisoners, including prisoners who are or perceived to be gay, lesbian or bisexual.

Prohibiting consensual sexual conduct discourages individuals from coming forward about sexual abuse perpetrated against them. If investigators do not believe that the sexual contact the prisoner described was forced or coerced, the survivor of sexual abuse could be disciplined for “sexual contact.” In one case we worked on, a transgender woman who had requested protective custody was nonetheless placed in general population, where she was repeatedly raped by another prisoner. When she reported the abuse, she was disciplined for engaging in sexual conduct with another prisoner. She attempted suicide while the disciplinary hearing was pending.

The prohibition on sexual or affectionate contact also makes it impossible for facility staff or volunteers to engage meaningfully with prisoners about the relationships that they have or to help them develop healthy relationship skills. Prisoners are less likely to come to staff for help when they experience abuse in their intimate relationships if they expect that they will be punished for admitting that they have the relationship in the first place.

The prohibition on consensual sex harms transgender, intersex, gender nonconforming, gay, lesbian, and bisexual prisoners in particular, by contributing to stigma and unjustified punishment. A transgender prisoner named Tina once commented to us in the course of a conversation, “There’s zero tolerance for us [gay and trans prisoners] anymore, on account of PREA.” We were taken aback, because it was the first time a prisoner had spontaneously brought up PREA to us and of course our hope has been that PREA would greatly benefit transgender people. When we asked her to elaborate, she explained that staff made an announcement about PREA and about instituting a zero tolerance policy for sex. Because gay and trans prisoners are commonly assumed to be having sex, whether or not they are, staff seemed to feel entitled to increase their harassment, abuse, intimidation, and unfounded and excessive discipline of transgender and gay prisoners in the name of PREA.

Transgender, intersex, and gender nonconforming prisoners are often punished disproportionately for sexual contact. For example, in one instance a transgender woman prisoner was caught having entirely consensual sex with a male prisoner. The transgender woman was punished with 6 months of segregation. The man, by comparison, was punished with 60 days, a third of the time the woman received. We have also received reports of masculine people in women's prisons being punished for "sexual contact" with other prisoners simply for spending time with, waving to, or hugging friends, because officers assume that because of their masculine presentation they must be lesbians, and because they were lesbians, they must be having sex with their more feminine friends. The resulting disciplinary records and interference with programming leads to longer overall time spent in prison.

Certain systems also prohibit affectionate contact between prisoners such as holding hands or kissing. Real safety is created through positive and caring relationships and communities. Punishing signs of innocent affection between prisoners is completely contrary to the goal of promoting safety. Prisons should be concerned with preventing violence, not with preventing prisoners from giving one another hugs.

The punishment of private masturbation common in many correctional systems not only punishes an entirely innocent and harmless form of sexual release, but it also creates another a tool that staff members can manipulate to sexually abuse prisoners. For example, a correctional officer came upon Sarah when she was masturbating in her cell at night. He ordered her to continue masturbating while he watched and threatened to write her up for it if she did not do as he said.

Even with the current prohibitions on consensual sex between prisoners, it is undeniable that intimate relationships develop between people in prison and sometimes lead to consensual sex. To avoid the spread of HIV and other sexually transmitted diseases between prisoners (many of whom will later be released into the broader community), condoms, "female" condoms, and other safer sex supplies such as gloves and dental dams should be made readily available to people in prison. In addition, without the availability of safer sex supplies, any prisoner who is sexually assaulted is at higher risk of exposure to HIV and other sexually transmitted diseases than he or she would be if these items were available. During the August 19, 2005 NPREC hearing in San Francisco, San Francisco County Sheriff Michael Hennessey testified that their facility had been providing condoms for 16 years without incident. "Condoms... provide a form of AIDS education for prisoners who are coming back to our communities, for the most part, and it also will provide protected sex if there is consensual sex. And we do know that consensual sex does take place in jails and prisons."

Human beings do not lose their sexuality when they are confined to prisons, jails, or other forms of detention. The state simply has no legitimate interest in prohibiting consensual sexual relationships or affectionate contact between adult prisoners or in prohibiting solitary expressions of sexuality. Ensuring that agencies are not punishing this

conduct will help them to address the real problem plaguing our prisons and jails—sexual abuse.

Voluntary Sexual Activity between Residents in Juvenile Facilities⁷

Because the majority of residents in juvenile facilities are minors, we urge the Department to specify the limited circumstances under which juvenile facilities can treat voluntary sexual contact between residents as abuse. In most states, the age of consent is 16, and in all but a handful of states minors 14 years or older can consent to sexual contact with others who are close to them in age. In addition, many juvenile facilities house youth over the age of 18. Considering that many residents of juvenile facilities are old enough to consent to sexual activity with other similarly-aged youth, we recommend that the Department make the following changes.

Currently, the definition of **resident-on-resident sexually abusive penetration** requires all facilities to treat any sexual penetration between residents as sexual abuse, regardless of whether the activity is voluntary and regardless of whether the residents involved are legally able to consent. This definition conflicts with PREA’s purpose. It would also undermine the effectiveness of the standards, since facilities would have to use their limited resources investigating and filing reports for sexual activity that would not be considered sexual abuse in any other setting. Defining sexual abuse in this way would require these institutions to treat all residents involved in substantiated reports of non-abusive sexual penetration the same as they treat residents found to be perpetrators of actual sexual abuse. In addition to the tangible negative consequences these youth would face, inappropriately labeling them as sexual abusers for engaging in consensual sexual activity would cause them lasting emotional harm. The brunt of those harms would fall disproportionately on LGBTI youth. The Adult, Lock-Up, and Community Corrections standards define sexually abusive penetration to include only *nonconsensual* sexual penetration and penetration involving a prisoner who is unable to consent or refuse. We strongly urge the Department to use the same definition for the Juvenile standards.

The inclusion of the words “**who is unable to consent or refuse**” in the definition of resident-on-resident sexually abusive contact requires juvenile facilities to treat some voluntary sexual activity between residents as sexual abuse based on the age or relative ages of the youth involved. Because the standards do not provide any guidance regarding how to handle these incidents, we are concerned that LGBTI youth will be targeted for harsh sanctions and even prosecutions for voluntary sexual contact with similarly aged residents. A report by the Bureau of Justice Statistics found that 35 percent of all substantiated incidents

⁷ “Voluntary sexual contact” does not include sexual contact between residents involving force; threat of force; pressure or coercion; offers of money, favors, special protection, or special treatment; or that for some other reason is unwilling.

of sexual violence between residents in juvenile facilities in 2005-06 were voluntary sexual contacts.⁸ The findings of this report indicate that youth designated as perpetrators of these *voluntary* sexual contacts often received harsher sanctions than those found to be perpetrators of *abusive* sexual contacts. For example, “perpetrators” of *voluntary* sexual contact were more than twice as likely to be placed in solitary confinement (25 percent) or be referred for prosecution (27 percent), compared to perpetrators of *abusive* sexual contact (12 percent and 13 percent respectively).⁹

We urge the Department to take the following steps to prevent facilities from misapplying the standards to cases of voluntary sexual contact between similarly aged youth. First, we urge the Department to specify that the standards do not trump states’ age of consent laws and therefore, they do not apply to voluntary sexual contact between minors who, under the laws of that state, can legally consent to engage in such contact. Second, standard **OR-1** should state explicitly that it does not expand facilities’ mandatory reporting requirements beyond a state’s definition of child abuse, as most states do not consider statutory rape between youth to be child abuse. Third, standard **DI-2** should discourage the use of harsh sanctions to punish similarly-aged youth who engage in voluntary, but legally non-consensual, sexual contact. Specifically, facilities should not treat these youth as sexually aggressive, violent, or deviant, or attempt to change their sexual orientation, gender identity, or gender expression. In addition, interventions for “victims” and “perpetrators” of voluntary sexual contact should not be punitive. To the extent they are punitive at all, interventions should be less punitive than those for sexual contact that is forced, coerced, or violent. Finally, we urge the Department to require in standard **TR-1** that facilities provide training for employees that covers the topics in the three previous recommendations.

Screening for Risk of Sexual Victimization and Abusiveness

We strongly support the Commission’s recognition that vulnerable prisoners must be housed safely in the least-restrictive setting possible. While we agree with the language in SC-2 regarding the use of Screening Information, we urge the Commission to mandate that vulnerable prisoners have access to the same privileges and programs as prisoners housed in general population. As it stands under the current draft, “[t]o the extent possible, risk of sexual victimization should not limit access to programs, education, and work opportunities.” This language leaves it open that an assessed risk of sexual victimization could greatly limit access to necessary programs, education and work opportunities. We recommend a modification to this Standard such that “Risk of sexual victimization *must not* limit access to programs, education, and work opportunities.” It is also important that prisoners recognized

⁸ A. Beck, D. Adams, and P. Guerino, *Sexual Violence Reported by Juvenile Correctional Authorities, 2005-06* 5. (Bureau of Justice Statistics Jul. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrjca0506.pdf>.

⁹ *Id.* at 11.

as vulnerable to victimization only be placed in segregated housing temporarily until alternative housing is found *and* only in cases where they either request such housing or agree to it after receiving accurate information about the housing and other available options. No one should be punished with forced segregation based on the victimization assessment designed to increase safety.

The isolation that vulnerable prisoners endure, supposedly “for their own good,” can destroy their mental health and ability to function, with consequences that will continue to affect them for the rest of their lives. In addition, the programs that vulnerable prisoners are routinely prevented from participating in are incredibly important for many reasons. They are usually the only means for prisoners to earn any amount of money, which can allow them to buy basics like shampoo and to pay debts that they owe as a result of their convictions. Without successful completion of programs, it is also difficult or impossible to obtain parole or conditional release, meaning that vulnerable prisoners who are not permitted to participate in programming are spending more years in prison than people who are not vulnerable. Programs also interrupt the deadening boredom of incarceration by providing some level of meaningful activity. Finally, they can help prisoners develop skills that will be critical for them to successfully reintegrate into the community upon release and improve their lives.

Too often, prisoners are effectively punished for being transgender, gender nonconforming or intersex by being placed against their will in segregated settings where they do not get the human contact, privileges, or programming that other prisoners receive. Automatic and unnecessarily restrictive and isolating segregation of vulnerable prisoners creates another strong disincentive for reporting sexual assault. Laura, a transgender woman in a men’s prison, was forcibly raped by another prisoner. When she reported the attack, she and her rapist were both placed in segregation. She was placed in a different form of segregation than he was, where she actually had far *less* time out of her cell, less contact with other prisoners, and far more severe and total restrictions on “privileges” such as group religious worship, recreation, and phone calls than he did. She felt that instead of getting help, she got punished, even more severely than the man who raped her.

Automatic segregation, particularly when that segregation severely restricts contact with other prisoners and access to programs and privileges, is decidedly not in the best interests of most transgender, intersex, or gender nonconforming prisoners. Transgender, intersex, gender nonconforming and other vulnerable prisoners can and must be kept safe without being punished for their vulnerability. Transgender, intersex, and gender nonconforming prisoners who request housing that will provide them with heightened protection should always receive it, but that housing should not mean giving up programs, privileges, or human contact.

In accordance with the above recommendations, item (e) in the SC-2 Assessment Checklist should read:

- “Are inmates at high risk of sexual victimization placed in segregated housing only as a last resort until other means of separation are arranged and only when requested by the inmate?”

We also strongly support the acknowledgment that lesbian, gay, bisexual, and transgender prisoners are particularly likely to be vulnerable to sexual abuse and that classification decisions with regard to transgender prisoners must be made taking into account their safety needs. However, we believe that SC-2 suffers from a lack of clarity with regard to placement of transgender prisoners in male or female facilities. The current language ambiguously refers to placement without providing meaningful guidance: “Lesbian, gay, bisexual, transgender, or other gender-nonconforming prisoners are not placed in particular facilities, units, or wings solely on the basis of their sexual orientation, genital status, or gender identity.” As written, this Standard provides little guidance as to the placement of vulnerable transgender and gender non-conforming individuals. We support the underlying premise that no person shall be placed in segregation or in a particular facility against their will solely on the basis of their gender identity, sexual orientation, or genital status as determined by a person other than the prisoner himself or herself. We believe, however, that the standards should explicitly state that placement in female facilities must be considered as an option to promote the safety of transgender, gender non-conforming and intersex prisoners.

The discussion section presently includes the following language: “the Commission also strongly urges agencies to give careful thought and consideration to the placement of each transgender prisoner and not to automatically place transgender individuals in male or female housing based on their birth gender or current genital status.” We propose a modification of this language in the Standard itself such that “Agencies must consider the placement of each transgender prisoner based on what provides the safest environment and in consultation with the prisoner him or herself. Agencies are not to automatically place transgender individuals in male or female housing based on their birth gender or current genital status. Placement in female facilities must be considered as an option for transgender, intersex and gender non-conforming prisoners where such placement would be the safest option as identified by the prisoner.” Though not all transgender, gender non-conforming and intersex individuals held in confinement feel safest in female facilities, for many individuals it could greatly increase both physical and emotional safety and reduce the overall incidence of sexual abuse.

We strongly support the proposed items in the SC-1 and SC-2 assessment checklists that indicate that heightened protection must be provided for transgender prisoners and that the safety concerns of transgender prisoners must be taken into account in providing this protection. The standards should be revised to make it more clear that these decisions must be made based on the safety needs of transgender prisoners and that women’s facilities should be considered a possibility for placement of transgender, intersex, and gender nonconforming people. Accordingly, we recommend that section (c) be amended to read:

“Does the facility ensure that lesbian, gay, bisexual, transgender, or other gender-nonconforming prisoners are not placed in segregation or isolation solely on the basis of their sexual orientation, genital status, or gender identity?” We also recommend the following addition to the SC-2 Assessment checklist:

- Does the agency have established criteria for determining when placement in a female facility is the safest option for transgender, gender nonconforming and intersex individuals?

We also recommend abolishing the sex-based differentiations currently included in SC-1. Under the proposed standards, “[e]mployees *must* conduct [the risk of sexual victimization and abusiveness screening] using a written screening tailored to the gender of the population being screened.” (emphasis added). Staff are likely to be confused about how to assess the gender of transgender, gender nonconforming and intersex people during the assessment/screening process. Of additional concern is the fact that SC-1 includes different vulnerability criteria for men and women. At a minimum we recommend including the same criteria for both male and female risk assessments. There is no basis for excluding “mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity)” from the criteria making female prisoners vulnerable to sexual victimization. We recommend that the screening process be standardized across sex. This would prevent staff at intake from making decisions about who is male and who is female for purposes of conducting the victimization assessment and would ensure at least formal equity during the assessment process. If the sex-based differentiation is not eliminated, we recommend adding the missing criteria included in the screening tool for male prisoners to the list of factors making female prisoners vulnerable to sexual abuse. While it is less pervasive than in men’s prisons, there is substantial evidence that transgender, lesbian, and bisexual people in women’s prisons are also targeted for abuse.¹⁰ We have received reports of transgender men and transgender women being targeted for sexual assault by other people in women’s prisons.

Official Response Following and Inmate Report (OR)

We strongly support the Commission’s recognition of the importance that staff takes seriously reports of sexual abuse in detention settings. We are concerned, however, that the language in OR-3 leaves open the possibility that a victim could be punished for failing to

¹⁰ See, e.g., Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 178 (2006); C. Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J SEX RES. 217-227 (2002).

preserve physical evidence. As it currently stands, staff are advised to “instruct the victim not to take any actions that could destroy physical evidence, including washing, brushing his or her teeth, changing his or her clothes, urinating, defecating, smoking, drinking, or eating. If the first staff responder is a non-security staff member, he or she is required to instruct the victim not to take any actions that could destroy physical evidence and then notify security staff.” This instruction seems advisable provided that failing to preserve evidence cannot be used as a basis for any kind of punishment against a victim of sexual abuse. It would be an absurd and inhumane result for a victim of sexual assault to face punishment for failure to follow a direct order if she or he had to urinate or eat before physical evidence could be collected. We recommend that an additional sentence be added to OR-3 requiring that, “Actions taken by a victim that destroy physical evidence following a reported sexual assault cannot serve as the basis for any disciplinary action by staff.” The following question should be added to the Assessment checklist to ensure compliance with this addition:

- Has the facility notified security and non-security staff that failure to preserve evidence cannot be used as a basis for discipline?

Protection of Victims and Witnesses

We also strongly support proposed Standard ID-9 regarding protection of victims and witnesses of sexual abuse held in Immigration Detention and recommend expanding that standard and implementing an analogous provision for persons held in other forms of detention. Under ID-9, “ICE considers releasing detainees who are victims of or witnesses to abuse and monitoring them in the community to protect them from retaliation or further abuse during the course of the investigation.” We recommend expanding this Standard to include detainees identified as being vulnerable to sexual abuse pursuant to SC-1 while held in confinement. We further propose an addition to SC-2 that advises the agency to consider releasing individuals who have reported sexual abuse, who have witnessed sexual abuse or who have been identified as being vulnerable to sexual abuse while confined.

As acknowledged in the discussion to ID-9, it can be difficult to ensure the safety of detainees. Adult prisons and jails, like ICE facilities, are often contracted to private entities and individuals who have reported or are vulnerable to sexual abuse are rarely able to be adequately protected. In some cases, consideration for early release may serve important penological and sexual abuse prevention goals. For example, where possibilities such as community supervision, compassionate release, conditional release, parole, medical parole, an alternative to incarceration, or similar programs exist, we recommend that agencies and facilities be advised to consider those possibilities where individuals are vulnerable to sexual abuse, victims of sexual abuse or witnesses to sexual abuse while incarcerated. We recommend that SC-2 include a concluding sentence instructing that “Agencies consider releasing inmates who are victims of or witnesses to abuse while incarcerated or who have been identified as vulnerable to victimization through the screening assessment conducted

pursuant to SC-1.” Where full release is not an option because of pending criminal cases, agencies should be advised to consider various drug treatment and anti-violence programmatic options that would serve both to protect vulnerable prisoners without isolation as well as rehabilitative goals.

In accordance with the above recommendation, we suggest the following addition to the SC-2 assessment checklist:

- Has the facility or agency established objective criteria for determining when protecting the safety of a vulnerable prisoner, victim or witness requires release from custody and community monitoring or entry into a supportive alternative to incarceration program?

Response 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?*

We encourage the Department to use the term “sexual abuse” rather than “rape” in promulgating its national standards because the term “sexual abuse” is more commonly understood to encompass the range of victimizing behaviors Congress intended to address in PREA. In order to establish a zero-tolerance culture to prevent prison rape, PREA recognizes that prison systems must address a broad range of sexually abusive acts, which Congress included in its definition of “rape.” However, the term “rape” is commonly understood in the context of its use in criminal law. The criteria for criminal rape vary by state, but are generally defined narrowly as acts of forcible sexual intercourse. Because this common understanding does not include all the sexually abusive acts included in PREA’s definition of rape, practitioners responsible for implementing PREA might misunderstand PREA’s intent and work just on preventing forcible sexual intercourse, and fail to respond to the full range of conduct Congress intended to address. The term “sexual abuse” is the more commonly understood “umbrella” term that includes the broad range of sexually abusive acts covered by PREA.¹¹

The Department is not required to use the exact language of a statute when promulgating regulations. Regulations elaborate on the broad language of a statute to guide its application, so an agency must often include more detail in order to effectuate the statute’s intent. The Department’s use of the term “sexual abuse” instead of “rape” is well within its purview; doing so provides the necessary detail to help juvenile and criminal justice professionals and immigration officials who are implementing PREA to fully understand its scope and fulfill Congress’ goal.

¹¹ Use of the term “sexual abuse” would also be consistent with the federal criminal definition of sexual abuse, 18 U.S.C. § 2242.

In addition, in order to carry out Congress’ intent to make prevention of sexual abuse a top priority in every prison system, we believe the Department should adopt the Commission’s comprehensive definition of sexual abuse. The Commission’s definition of sexual abuse adds important elements that serve Congress’s intent in its passage of PREA: staff-on-resident voyeurism, staff-on-resident indecent exposure, and sexual harassment (resident-on-resident and staff-on-resident). These behaviors constitute sexually abusive conduct that is unlawful in most states. In addition, victims of voyeurism, indecent exposure, and sexual harassment can also experience post traumatic stress disorder, depression, suicide, and the exacerbation of existing mental health issues. These outcomes will increase mental health care expenditures both inside and outside of facilities. In addition to having many of the same lasting and serious harms as other types of sexual abuse, voyeurism, indecent exposure, and sexual harassment in detention and correctional settings are known precursors to the types of sexually abusive conduct that are explicitly included in the definition of rape in PREA. Preventing, detecting and reducing the occurrences of these behaviors will enable officials to better prevent the sexually abusive conduct that Congress explicitly included in its use of the term “rape.” We urge the Department to adopt the Commission’s definition of sexual abuse and to use it in its final standards. One important exception is that the definition of sexual abuse in the juvenile standards must be amended as described in our comment abuse; consensual and voluntary sexual contact is clearly outside the scope of PREA and fall far afield of the meaning of the term “rape” as intended by Congress.

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

PREA received bipartisan support and passed unanimously in both the House and Senate. Its legislative history shows that Congress intended that an examination of “substantial additional costs” meant *net costs* calculated by taking into consideration the savings to facilities as well as the reduction in government spending outside of prison on health care, violent crime, and recidivism. Congress found that prison rape undermines the public health by contributing to the spread of HIV/AIDS, tuberculosis, hepatitis B and C, and other diseases; “endangers the public safety by making brutalized prisoners more likely to commit crimes when they are released”; increases violence and the risk of violence in prisons, contributes to unemployment and homelessness; increases health and mental health expenditures, both inside and outside of prison systems; and increases recidivism.¹² The Commission’s investigation led it to the same conclusion – that there are far-reaching social and economic consequences of prison sexual abuse.¹³

¹² 42 U.S.C. § 15601(7), (8), (10), (11), (14)(C), (14)(D), (14)(E).

¹³ COMMISSION REPORT, 47-48.

The Rehabilitation Act of 1973, 29 U.S.C. § 794(a), like PREA, conditions the receipt of federal funds on compliance with specific remedial standards. Also like PREA, its requirement that governments make accommodations to public facilities has a cost limitation which limits required accommodations to those that do not cause an “undue hardship.”¹⁴ In addition, both costs and benefits are considered in determining whether an accommodation imposes an undue burden.¹⁵ The cost limitation in PREA should be read consistently with the way costs have been analyzed under the Rehabilitation Act, by weighing them against the vast benefits of ending prison sexual abuse.

The Office of Management and Budget will eventually require the Department to conduct a cost-benefit analysis of the standards. An examination of facility administrators’ estimates of costs alone will not meet this requirement. We urge the Department to examine the full range of cost savings that will come from implementing the recommended standards by specifically examining the impact these standards will have on adults and children. We believe that a full analysis will reveal that in the aggregate the cost savings are likely to outweigh any costs.

We agree that it is an important goal to minimize the already staggering costs of prisons as much as possible. We believe that many if not all of the recommendations for changes we have made above will decrease costs. Provision of safer sex supplies will dramatically decrease the costs of treatment of HIV and numerous other sexually transmitted infections, more than offsetting the costs of the supplies. An outright prohibition on unlawful and abusive “searches” or “examinations” of transgender people will save on costs of litigation and on mental or medical health treatment for the victims of these assaults. Clear language prohibiting inappropriate discipline of prisoners for consensual sexual conduct or of victims taking actions that may destroy physical evidence will save the costs of disciplinary hearings, litigation of appeals, and longer periods of incarceration and confinement in disciplinary segregation that may result from wrongful punishment. Consideration of victims and witnesses of sexual assault, as well as those identified as vulnerable to sexual assault, for early release and/or alternative to detention programs again could decrease the burden of costs on state, local, and federal governments.

¹⁴ See 34 C.F.R. § 104.12; 45 C.F.R. § 84.12. See also 42 U.S.C. § 12111(10)(A) (“‘undue hardship’ means an action requiring *significant* difficulty or *expense*”) (emphasis added) (29 U.S.C. § 794(d) adopts the standards of the Americans with Disabilities Act for employment discrimination complaints).

¹⁵ *Nelson v. Thornburgh*, 567 F. Supp. 369, 379 (D.C. Pa. 1983) (the Rehabilitation Act and Americans with Disabilities Act regulations “reflect a conscious effort at balancing the needs of the handicapped with the budgetary realities of programs receiving federal funds.”). See also *New Mexico Ass’n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 854 (10th Cir. 1982) (remanding Rehabilitation Act challenge to the adequacy of state’s educational programs for disabled students to weigh the cost of modifying existing programs against the benefit based, in part, on the number of children who would benefit from the changes).

- 3. Should the Department consider differentiating within any of the four categories of facilities for which the Commission proposed standards (i.e. adult prisons and jails; juvenile facilities; community corrections facilities; and lockups) with compliance requirements dependent on size, personnel or resource limitations, or any other factors?*

Every facility is responsible for upholding the Eighth and the Fourteenth Amendments of the United States Constitution, which forbid cruel and unusual punishment of incarcerated persons and include a responsibility to protect incarcerated individuals from harm. These constitutional requirements do not vary with facility size, personnel, or other resource constraints.

The Commission's standards represent basic measures that all facilities must put in place to meet their constitutional obligations to protect residents from abuse. Varying compliance requirements based on factors such as the size and resources of a facility will needlessly complicate the otherwise straightforward expectations set forth in the Commission's standards. Facilities across the country have different architectural hazards; use varied methods of supervision of residents and prisoners (e.g., the preferred method of direct supervision protects against abuse more than linear surveillance methods or reliance on monitoring technologies); employ different staffing patterns across units; operate different housing arrangements across units (e.g., large dormitories with bunk beds versus single cells); and frequently operate in overcrowded conditions compromising the ability to keep residents and prisoners safe. Therefore, every facility, large and small, rural and urban, will have some areas in the facility that are at heightened risk for sexual abuse to occur. The standards were drafted to be flexible enough to accommodate these differences.

Attempts to modify the standards to respond to facility-by-facility differences would not aid in the prevention of sexual abuse. The Department would have to establish arbitrary cut-off points, creating a bright line rule for when facilities can shirk their duty to protect youth and adults, and these cut-off points will inevitably be challenged by facilities on the margins. Even once those distinctions are defined, the dynamic nature of detention facilities 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. Facilities often have fluctuating populations which can vary by day of week and even season, thus creating unnecessary confusion if standards were based on facility population. It would be likely that a facility would need to follow one set of standards on certain days, but a different set of standards on other days. This confusion is unnecessary because the standards were drafted with an understanding of the multiple types and constraints of facilities. Furthermore, facilities of every size should be able to take a comprehensive approach to preventing sexual abuse, which is the framework that is proposed by the Commission's standards.

Conclusion

Sexual violence in U.S. prisons and jails has reached crisis proportions. Strong standards are urgently needed to protect prisoners from this devastating, but all too common abuse. Every day that these critically important measures are not in place, people of all ages and genders will continue to be sexually assaulted while in custody. We strongly urge you to modify the Standards in accordance with our recommendations and implement these urgently needed provisions as soon as possible.

Thank you for your consideration.

Respectfully,

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