

# PROTECTING LESBIAN, GAY, BISEXUAL, TRANSGENDER, INTERSEX, AND GENDER NONCONFORMING PEOPLE FROM SEXUAL ABUSE AND HARASSMENT IN CORRECTIONAL SETTINGS

Comments Submitted in Response to  
Docket No. OAG-131; AG Order No. 3244-2011  
National Standards to Prevent, Detect, and Respond to Prison Rape  
April 4, 2011



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Attorney General Eric Holder, Jr.  
C/O Robert Hinchman, Senior Counsel  
U.S. Department of Justice  
Office of Legal Policy  
950 Pennsylvania Avenue NW, Room 4252  
Washington, DC 20530

RE: Docket No. OAG-131; AG Order No. 3244-2011  
National Standards to Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder,

On behalf of the American Civil Liberties Union, the Equity Project, Lambda Legal Defense & Education Fund, the National Center for Transgender Equality, the National Center for Lesbian Rights, the National Juvenile Defender Center, the Sylvia Rivera Law Project, and the Transgender Law Center, we submit these comments on the Department of Justice's Proposed National Standards to Prevent, Detect, and Respond to Prison Rape, Docket No. OAG-131. We appreciate the opportunity to provide these comments to address the specific concerns of youth and adults who are lesbian, gay, bisexual, transgender, or who have intersex conditions (LGBTI people).

While we believe the Department of Justice's (the Department) regulations have the potential to drastically reduce the incidence of sexual abuse and harassment in correctional facilities, we are concerned that the proposed regulations fall short of what is needed to address the crisis of sexual abuse facing those who are incarcerated. Specifically, we urge the Department to make some important changes in order to enhance the regulations' effectiveness in fulfilling the mandate of the Prison Rape Elimination Act (PREA) and in preventing harm to LGBTI people in detention.

LGBTI people make up a significant percentage of those detained in jails, prisons, and juvenile justice facilities.<sup>1</sup> Research on sexual abuse in these settings consistently documents the heightened vulnerability of LGBTI people to sexual victimization at the hands of facility staff and other inmates.<sup>2</sup> The sexual abuse of LGBTI 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 back into the community.

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<sup>1</sup> See e.g., A. Beck, P. Harrison, & P. Guerino, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09* 11 (Bureau of Justice Statistics, Jan. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf> (finding twelve percent of youth in the study reported a sexual orientation other than heterosexual); C. Struckman-Johnson & D. Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. Interpersonal Viol., 1591, 1597 (2006) (finding 11 percent of survey participants in men's facilities identified as gay or bisexual and 28 percent of survey participants in women's prisons identified as lesbian or bisexual).

<sup>2</sup> National Prison Rape Elimination Commission, *Report 73* (June 2009) (hereinafter *Commission Report*); A. Beck et al., *Sexual Victimization in Jails and Prisons Reported by Inmates, 2008-09* 14-15 (Bureau of Justice Statistics, Aug. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>; V. Jenness et al., *Violence in California correctional facilities: An empirical examination of sexual assault* (Center for Evidence-Based Corrections 2009); 167-68; J.M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 167-68 (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), available at [http://endtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf); Beck, Harrison & Guerino, *supra* note 1; Struckman-Johnson & Struckman-Johnson, *supra* note 1.

All of our organizations are committed to policy reforms that protect LGBTI people in jails, prisons, lock-ups, and immigration detention; improve the conditions of confinement for LGBTI youth held in juvenile facilities; and ensure that LGBTI individuals in community corrections facilities are kept safe. For additional information about the work of our organizations see appendix A.

We urge the Department to adopt final regulations that will improve the safety of all people who are detained or incarcerated, including LGBTI people.

## Recommendations to Enhance the Final Regulations

Our comments below follow the order of the regulations, highlighting any concerns we have regarding the draft language, detailing specific revisions we believe are appropriate, and answering any related questions posed by the Department on which we can offer our expertise. After discussing our rationale for each of our proposed revisions, we suggest textual changes to the regulation, with deletions of text ~~struck through~~ and addition of text in **bold**. Given the consistency of language used across the four sets of regulations, our proposed revisions are intended to apply to all sets of regulations unless noted otherwise.<sup>3</sup>

### § 115.5 General definitions.

The terms *transgender* and *intersex* are used throughout the draft regulations, but the regulations do not include definitions for these terms. Without proper definitions, staff will not have a clear understanding of the terms and their meaning. To create an institution that has a strong understanding of its distinct populations, it is imperative that staff understand the meaning of these common terms. As we are also recommending adding the term *gender nonconforming* to some of the regulations, this term should also be defined. We encourage the Department to add definitions for these three terms.

*Proposed revisions to § 115.5:*

***Transgender* – A person whose gender identity is different from the person’s assigned sex at birth.**

***Intersex* – A person whose sexual or reproductive anatomy and/or chromosomal pattern does not seem to fit typical definitions of male or female. *Intersex* medical conditions may also be called *Disorders of Sex Development* (“DSD”).**

***Gender nonconforming* – A person whose gender expression does not conform to traditional societal gender-role expectations.**

### § 115.6 Definitions related to sexual abuse.

We commend the Department’s removal of consensual sexual activity from the definition of “resident-on-resident sexual abuse,” but are concerned that the draft definition of sexual abuse requires facilities to determine the intent of the perpetrator. From a victim’s standpoint, unwanted sexual touching is unwanted

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<sup>3</sup> We use the term “inmate” in the text of many of our proposed revisions to refer to inmates as well as detainees and residents. In cases where there are substantive differences in the regulations for different facilities or where we are proposing different revisions, we have separated the regulations and proposed facility-specific revisions.

sexual touching, regardless of the perpetrator’s motive and the definition of sexual abuse should reflect this reality. In addition, while we understand the Department’s decision to separate the definition of “sexual harassment” from the definition of “sexual abuse” we believe the term “sexual harassment” should be specifically included in many relevant and important regulations where it is now omitted.

*Consideration of intent*

The Department’s definition of “sexual abuse” includes two unnecessary and unworkable distinctions. As written, the definition requires facilities to determine the subjective intent of inmates, detainees, residents, and staff who engage in sexually abusive intentional touching. In defining sexual abuse by another inmate, detainee, or resident, the draft regulation excludes “incidents in which the intent of the sexual contact is solely to harm or debilitate rather than to sexually exploit.” For abuse by staff, contractors, or volunteers, the draft regulation requires those individuals to have “the intent to abuse, arouse or gratify sexual desire.” Under this definition, victims would be deprived protections under the regulations, even if an incident were particularly traumatic for the victim, so long as the perpetrator did not intend to sexually exploit the victim or arouse or gratify sexual desire.

Adding such intent elements to the definition of sexual abuse would also make it much more difficult to prove sexual abuse, requiring agencies to investigate and prove the perpetrator’s state of mind. Because LGBTI individuals are especially vulnerable to sexual abuse and often experience anti-LGBTI bias from staff, the complex and labor-intensive intent inquiries required by the draft regulations will likely deter reporting by LGBTI individuals. Our proposed revisions to the definition remove the overly narrowing intent elements while still excluding conduct that is not sexual abuse from the definition.

*Omission of “sexual harassment”*

The Commission’s proposed standards included sexual harassment within the definition of “sexual abuse.” The Department’s draft regulations however, address sexual harassment as a separate issue. We understand that this change is necessary because some of the actions facilities are required to take to investigate and respond to sexual abuse would not apply to incidents of sexual harassment. However, we believe that a number of draft regulations that should address sexual harassment (in addition to sexual abuse) now fail to do so. We recommend that the Department include sexual harassment in the final regulations addressing: reporting duties and training of staff, guidelines for investigations, timelines for filing grievances, confidentiality requirements, protection against retaliation, and agency data collection.

These changes should be made for all facility types, but they are especially important for juvenile facilities given that the definition of “sexual harassment” included in the Department’s draft regulations includes behavior that most states consider to be child abuse. In order to better protect the safety and well-being of youth, it is critical that staff at juvenile facilities understand what their responsibilities are when responding to sexual harassment.

*Proposed revisions to § 115.6:*

Sexual abuse by another inmate, detainee, or resident includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse:

...

- (4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of any person, **excluding contact incidental to a physical altercation such as a kick in the groin or touching someone’s breasts while pushing**

~~the person away, excluding incidents in which the intent of the sexual contact is solely to harm or debilitate rather than to sexually exploit.~~

...

Sexual touching by a staff member, contractor, or volunteer includes any of the following acts, with or without consent:

...

(4) Any other intentional touching **not required by official duties**, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of any person, ~~with the intent to abuse, arouse or gratify sexual desire.~~

## §§ 115.12, 155.112, 155.212 & 155.312 Contracting with other entities for confinement of inmates.

LGBTI inmates and residents need the full protections of the PREA standards, whether they are housed in public or privately-run facilities. Private agencies may conceal or minimize incidents or risk factors that could subject them to contractual penalties, result in the cancellation or non-renewal of contracts, or have an adverse impact on their stock performance or other contract opportunities. Moreover, as private facilities are often outside of the jurisdiction where detention was imposed, victimized inmates and residents are likely to be especially isolated and conditions in the facility subject to less scrutiny. We urge the Department to require, at a minimum, that private facilities be monitored for compliance with the standards to the same extent as public facilities, in accordance with the audit provision.

*Proposed revisions to §§ 115.12, 115.112, & 155.312:*

- (a) A public agency that contracts for the confinement of its inmates with private agencies or other entities, including other government entities, shall include in any new contracts or contract renewals the entity's obligation to adopt and comply with the PREA standards.
- (b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards, **and shall include enforcement provisions to ensure that the private agencies or entities are in compliance with PREA standards. Such enforcement provisions shall include but not be limited to financial sanctions for non-compliance with the PREA standards, as determined by the contracting public agency.**
- (c) **Private agencies or other entities responsible for confinement of inmates shall be audited by qualified and independent monitoring entities, in accordance with the requirements of § 115.93 and related criteria established by the Department of Justice. The reports and action plans arising from these audits shall be made publicly available.**

*Proposed revisions to §115.212:*

- (a) A public agency that contracts for the confinement of its residents with private agencies or other entities, including other government entities, shall include in any new contracts or contract renewals the entity's obligation to adopt and comply with the PREA standards.
- (b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards, **and shall include enforcement**

**provisions to ensure that the private agencies or entities are in compliance with PREA standards. Such enforcement provisions shall include but not be limited to financial sanctions for non-compliance with the PREA standards, as determined by the contracting public agency.**

**(c) Private agencies or other entities responsible for confinement of residents shall be audited by qualified and independent monitoring entities, in accordance with the requirements of § 115.293 and related criteria established by the Department of Justice. The reports and action plans arising from these audits shall be made publicly available.**

(e) **(d)** Only in emergency circumstances in which all reasonable attempts to find a private agency or other entity in compliance with the PREA standards have failed, may the agency enter into a contract with an entity that fails to comply with these standards. In such a case, the public agency shall document its unsuccessful attempts to find an entity in compliance with the standards.

*Question 3: Should the final rule provide greater guidance as to how agencies should conduct such monitoring? If so, what guidance should be provided?*

Yes, the final rule should include specific guidance regarding how agencies should monitor compliance with the standards in contract facilities. While states and counties generally monitor contracts with private agencies, the scope and expertise involved in these monitoring efforts is dramatically different from the audits required by § 115.93 and the corresponding provisions for other facilities. Unlike the audit requirements, such monitoring is not conducted by an independent entity that is qualified to detect sexual abuse and provide relevant recommendations. It also may not include private communications with inmates and staff, nor result in any publicly available report or recommendations. These forms of review and transparency are as needed in contracted facilities as they are in facilities run by the agency.

In addition, the draft regulations do not explicitly require any enforcement of PREA compliance by private contractors. That is, should private companies that operate detention facilities fail to comply with PREA, there is no enforcement mechanism available. Given the profit incentives underlying private corrections agencies, the final regulation should make clear that agencies should enforce noncompliance with the PREA standards through remedies that include financial sanctions.

### **§ 115.113 Supervision and monitoring. (lockups)**

We are concerned that the draft supervision and monitoring regulation for lockups fails to provide law enforcement any guidance on what characteristics may make someone vulnerable to abuse. While the draft regulation requires lockups to provide heightened supervision for vulnerable detainees, without this guidance LGBTI detainees and others vulnerable to abuse may not receive the protections necessary to keep them safe. We strongly support the requirement that lockups provide heightened protection to vulnerable detainees whenever and however they are identified, but in order to appropriately identify these individuals, law enforcement staff need to know what they are expected to look for when determining whether a particular detainee is in need of heightened supervision. Accordingly, the final regulation should specifically include a list of known indicators of vulnerability. In addition, because most lockups are not be able to conduct full risk screenings for detainees, these facilities should be required, at the very minimum, to ask all detainees about their own perception of vulnerability to sexual abuse and provide heightened supervision to detainees who perceive themselves to be vulnerable.

*Proposed revisions to § 115.113:*

...

(d) Any intake screening or assessment shall include consideration of a detainee's potential vulnerability to sexual abuse.

(e) If vulnerable detainees are identified, law enforcement shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.

(f) If the lockup does not perform intake screenings or assessments, it shall have a policy and practice designed to provide heightened protection to a detainee to prevent sexual abuse whenever a law enforcement staff member observes any physical or behavioral characteristics of a detainee that suggest the detainee may be vulnerable to such abuse.

**(g) Law enforcement staff members shall treat the following as indicators of vulnerability to sexual abuse: mental or physical disability, young age, slight build, nonviolent history, identification as lesbian, gay, bisexual, transgender, or intersex, gender nonconforming appearance, and prior sexual victimization.**

**(h) Law enforcement staff members shall ask all detainees about their own perception of vulnerability to sexual abuse and provide heightened protection to a detainee who perceives him or herself as vulnerable.**

#### **§§ 115.14, 115.114, 115.214 & 115.314 Limits to cross-gender viewing and searches.**

We are very concerned that the draft regulations on searches fail to impose the minimum requirements necessary to prevent pervasive, routine opportunities for sexual abuse. We urge the Department to make the following modifications: First, we strongly urge the Department to include specific guidance on how facilities should apply restrictions on cross-gender searches to transgender and intersex individuals. Second, even when conducted by medical practitioners, touching transgender or intersex individuals' genitals or requiring them to undress solely to determine their genital status is unnecessary and inherently traumatic. We strongly urge the Department to prohibit facilities from engaging in such searches. And third, the Department should prohibit non-exigent cross-gender pat-down searches of inmates and all non-emergency cross-gender viewing of inmates and residents in states of undress.

#### *Guidance on searches of transgender and intersex inmates and residents*

With no formal guidance stating who shall administer routine security and contraband-related searches of transgender and intersex inmates and residents, these individuals are at unnecessary risk of sexual abuse and trauma. The need for clear requirements in this area is highlighted by the Commission's findings that searches present a heightened risk of gender-based abuse, and that transgender and intersex inmates and residents are highly vulnerable to abuse by staff. The Commission heard testimony from two experts who testified that individuals from these groups are frequently targeted for unnecessary, abusive, and traumatic

pat and strip searches, and that these searches can be excuses for and precursors to sexual abuse.<sup>4</sup> This testimony is also supported by reports from human rights organizations.<sup>5</sup>

In order to adequately address protect the safety and dignity of transgender and intersex inmates and residents, we strongly urge the Department to include specific guidance on how facilities of all types should apply the restrictions on cross-gender searches and supervision to transgender and intersex individuals. Transgender and intersex individuals are at high risk of sexual abuse when strip-searched. And for many, the trauma of past sexual abuse is also aggravated by staff members conducting pat-down searches. As is true for all inmates and residents, this risk and trauma can be reduced if the person conducting the search is of the same gender as the individual. But unlike for other inmates and residents, the determination of what is a prohibited cross-gender search for a transgender or intersex person cannot simply depend on whether he or she is housed in a facility for males or females. Instead, just as the regulations require facilities to make individualized housing decisions for transgender and intersex individuals, determinations of the gender of the staff member to search a particular transgender or intersex inmate or resident should also be made on a case-by-case basis after consultation with the individual. As transgender and intersex inmates and residents may have different privacy and safety needs during these searches, facility staff should ask transgender and intersex inmates and residents to state the gender of staff they feel most safe being searched by. Requests by transgender and intersex individuals to be searched by either male or female staff should be accommodated whenever possible, regardless of whether the individual is housed in a facility for males or females. This pragmatic approach is currently used by several agencies, including the DC Metropolitan Police Department, the Cumberland County Sheriff's Department in Maine, and the New York State Office of Children and Family Services in its juvenile facilities. Excerpts of these policies are included in appendix B.<sup>6</sup> A similar approach has recently been adopted by the government of the United Kingdom for both police and correctional searches.<sup>7</sup>

As an alternative approach, we recommend a presumption that all searches of transgender and intersex inmates and residents should be conducted by female facility staff. This is because transgender and intersex people, regardless of their gender identities, are often perceived as female and/or feminine and, in our experience, are at considerably higher risk of being targeted by male staff for sexual violence and harassment.

#### *Prohibit searches to determine genital status*

Strip searching transgender or intersex individuals or physically touching their genitals for the sole purpose of determining their genital status is emotionally and sexually abusive to these individuals. This is true even if the search is called an "examination" and is conducted in private by a medical practitioner.

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<sup>4</sup> *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars*, Hearing Before the National Prison Rape Elimination Commission (Aug. 13, 2005) (testimony of Christopher Daly & Dean Spade).

<sup>5</sup> See, e.g., Sylvia Rivera Law Project, "It's War in Here": A Report on the Treatment of Transgender & Intersex People in New York State Men's Prisons 29-31 (2007), available at: <http://srlp.org/resources/pubs/warinhere>; 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>.

<sup>6</sup> Police departments in several Canadian jurisdictions, including Toronto, Vancouver, and Edmonton, have adopted a similar policy following a 2006 ruling by the Ontario Human Rights Commission. Other jurisdictions, such as the Multnomah County, Oregon Sheriff's Department and Corrections Services of New South Wales, Australia, perform all searches according to the gender identity of the inmate.

<sup>7</sup> Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search (PACE Code A), Annex F (2010), <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-a-2011>; Prison Service Instruction 48/2010, Search of the Person, Annex H (2010), [http://psi.hmprisonservice.gov.uk/psi\\_2010\\_48\\_searching\\_of\\_the\\_person.doc](http://psi.hmprisonservice.gov.uk/psi_2010_48_searching_of_the_person.doc).

Permitting medical practitioners to touch a transgender or intersex resident's genitals or requiring an inmate to undress in front of a medical practitioner solely so the practitioner can look at his or her genitals is an unnecessary and inherently traumatic experience for these individuals. It also presents serious potential for abuse. The proposed regulations rightly recognize that transgender and intersex inmates and residents are at acute risk for sexually abusive searches, and that determining an inmate's genital status is frequently a pretext for abuse. The regulations should prohibit searches or medical examinations of inmates and residents for the sole purpose of determining genital status under all circumstances. In the very limited circumstances where this information is needed by a facility, it can be determined by asking the individual, reviewing his or her medical records or other files, or learning that information incidental to routine intake medical examinations.

#### *Prohibit cross-gender pat searches and viewing*

Facilities should not normalize physical contact with or viewing of inmates' breasts, genitals and buttocks by staff of the opposite gender. Allowing routine cross-gender pat searches of inmates and cross-gender viewing of inmates and residents in states of undress incidental to routine cell inspections encourages a sexualized institutional culture in which there is little respect for individuals' dignity. Data from the Bureau of Justice Statistics document pervasive cross-gender sexual abuse in adult prisons and jails.<sup>8</sup> Moreover, BJS data show that pat-down searches are strongly linked to staff sexual misconduct. More than 36 percent of both male and female victims of staff sexual misconduct reported they experienced sexual touching by staff during a pat-down search.<sup>9</sup> These findings highlight the importance of limiting the physical contact that staff members have with inmates of a different gender.

Contrary to concerns raised by some corrections officials, these requirements can be met with low-cost solutions that conform to employment law and are unlikely to require additional hiring. While pat-down searches are undoubtedly an important security measure, they can usually be limited to areas that serve as potential points of contact with contraband. Focusing staff efforts on conducting thorough searches at appropriate places will encourage confiscation of contraband at its point of entry in the facility, reduce complaints about harassing searches, and free up staff resources for other safety and security measures.

The dangers of cross-gender pat-down searches are not alleviated by the exception for inmates who can demonstrate that they have suffered "documented prior cross-gender sexual abuse while incarcerated." This exception requires inmates to have filed a report of abuse that was substantiated, even though most survivors are too afraid to report and those who are brave enough to do so are rarely believed in the absence of physical evidence. Moreover, this exception ignores the traumatic and devastating impact of these searches on inmates who were sexually victimized in the community and the prevalence of staff sexual misconduct even with inmates who were not previously assaulted in detention.

As the Commission recognized, cross-gender viewing of inmates and residents while they are nude or performing bodily functions can be traumatizing, especially for victims of prior sexual abuse, and in some circumstances is unconstitutional.<sup>10</sup> It also contributes to a sexualized atmosphere overall. Allowing cross-gender viewing of adult inmates and juvenile residents in states of undress "incidental to routine cell checks" eliminates any practical limitation on cross-gender viewing as well as any incentive for agencies to limit this dangerous practice. In many facilities, inmates undress, use the toilet and sometimes wash themselves in their cells. No-cost measures, such as requiring officers of the opposite gender to

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<sup>8</sup> A. Beck et al., *supra* note 2, at 24 (finding 69 percent of staff sexual misconduct in men's facilities, and 72 percent of such misconduct in women's facilities, was cross-gender).

<sup>9</sup> *Id.*

<sup>10</sup> *Commission Report, supra* note 2, at 62-64 (discussing cases).

announce themselves prior to entering the cell block are already in use in many facilities, and can protect a very basic level of bodily privacy more effectively than this all-encompassing exception.

*Proposed revisions to § 115.14:*

(a) The facility shall not conduct cross-gender strip searches or visual body cavity searches except in case of emergency or when performed by medical practitioners.

(b) The facility shall document all such cross-gender searches.

(c) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency, **or** by accident, ~~or when such viewing is incidental to routine cell checks.~~

(d) The facility shall not **search or physically** examine a transgender **or intersex** inmate **for the sole purpose of determining** the inmate's genital status. ~~unless the inmate's genital status is unknown. Such examination shall be conducted by a medical practitioner. If an inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or during routine intake medical examinations that all inmates are required to undergo.~~

(e) **For purposes of determining what constitutes a same-gender search of a transgender or intersex inmate, the facility shall ask the inmate to state whether they would feel safest being searched by male or female staff and shall accommodate such requests except in the case of emergency or other unforeseen circumstance. Searches conducted in accordance with this paragraph shall not be considered cross-gender searches for purposes of the requirements of this section.**

(f) **The agency shall not conduct cross-gender pat-down searches except in the case of emergency or other unforeseen circumstances. Any such search shall be documented and justified.**

~~(e) Following classification, the agency shall implement procedures to exempt from nonemergency cross-gender pat-down searches those inmates who have suffered documented prior cross-gender sexual abuse while incarcerated.~~

(f) (g) The agency shall train security staff in how to conduct cross-gender ~~pat-down~~ searches **when required due to an emergency**, and searches of transgender **and intersex** inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

*Proposed revisions to § 115.114:*

(a) The lockup shall not conduct cross-gender strip searches or visual body cavity searches except in case of emergency or when performed by medical practitioners.

(b) The lockup shall document all such cross-gender searches.

(c) The lockup shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency, **or** by accident, ~~or when such viewing is incidental to routine cell checks.~~

(d) The lockup shall not **search or physically** examine a transgender **or intersex** detainee **for the sole purpose of determining** the detainee's genital status. ~~unless the detainee's genital status is unknown. Such examination shall be conducted by a medical practitioner.~~

(e) **For purposes of determining what constitutes a same-gender search of a transgender or intersex detainee, the lockup shall ask the detainee to state whether they would feel safest being searched by male or female staff and shall accommodate such requests except in the case of emergency or other unforeseen circumstance. Searches conducted in accordance with this paragraph shall not be considered cross-gender searches for purposes of the requirements of this section.**

(f) **The agency shall not conduct cross-gender pat-down searches except in the case of emergency or other unforeseen circumstances. Any such search shall be documented and justified.**

~~(e)~~ (g) The agency shall train law enforcement staff in how to conduct cross-gender ~~pat-down~~ searches **when required due to an emergency**, and searches of transgender **and intersex** detainees, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

*Proposed revisions to § 115.214:*

(a) The facility shall not conduct cross-gender strip searches or visual body cavity searches except in case of emergency or when performed by medical practitioners.

(b) The facility shall document all such cross-gender searches.

(c) The agency shall not conduct cross-gender pat-down searches except in the case of emergency or other unforeseen circumstances. Any such search shall be documented and justified.

~~(e)~~ (d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency, **or** by accident, ~~or when such viewing is incidental to routine cell checks.~~

~~(d)~~ (e) The facility shall not **search or physically** examine a transgender **or intersex** resident **for the sole purpose of determining** the resident's genital status. ~~unless the resident's genital status is unknown. Such examination shall be conducted by a medical practitioner.~~ **If a resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or during routine intake medical examinations that all residents are required to undergo.**

~~(e)~~ (f) **For purposes of determining what constitutes a same-gender search of a transgender or intersex resident, the facility shall ask the resident to state whether they would feel safest being searched by male or female staff and shall accommodate such requests except in the case of emergency or other unforeseen circumstance. Searches conducted in accordance with this paragraph shall not be considered cross-gender searches for purposes of the requirements of this section.**

~~(e)~~ Following classification, the agency shall implement procedures to exempt from nonemergency cross-gender pat-down searches those residents who have suffered documented prior cross-gender sexual abuse while incarcerated.

~~(f)~~ (g) The agency shall train security staff in how to conduct cross-gender ~~pat-down~~ searches **when required by an emergency**, and searches of transgender **and intersex** residents, in a professional and respectful manner, and in the least intrusive manner.

*Proposed revisions to § 115.314:*

(a) The facility shall not conduct cross-gender strip searches or visual body cavity searches except in case of emergency or when performed by medical practitioners.

(b) The facility shall document all such cross-gender searches.

(c) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency, **or by accident, or when such viewing is incidental to routine cell checks.**

(d) The facility shall not **search or physically** examine a transgender **or intersex** resident **for the sole purpose of determining** the resident's genital status ~~unless the resident's genital status is unknown. Such examination shall be conducted by a medical practitioner.~~ **If a resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or during routine intake medical examinations that all residents are required to undergo.**

(e) **For purposes of determining what constitutes a same-gender search of a transgender or intersex resident, facilities shall ask the resident to state whether they would feel safest being searched by male or female staff and shall accommodate such requests except in the case of emergency or other unforeseen circumstance. Searches conducted in accordance with this paragraph shall not be considered cross-gender searches for purposes of the requirements of this section.**

~~(f)~~ (f) The agency shall not conduct cross-gender pat-down searches except in the case of emergency or other unforeseen circumstances. Any such search shall be documented and justified.

~~(f)~~ (g) The agency shall train security staff in how to conduct ~~cross-gender~~ **strip searches, visual cavity searches, and pat-down searches of residents, including transgender and intersex residents,** and searches of transgender residents, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

*Question 16: Should the final rule contain any additional measures regarding oversight and supervision to ensure that pat-down searches, whether cross-gender or same-gender, are conducted professionally?*

As discussed above, we strongly urge that the final regulations prohibit non-exigent cross-gender pat-down searches, as the Commission recommended. At a minimum, we would urge that all cross-gender pat-down searches be documented and justified. Such documentation would assist in incident reviews, investigations, and facility audits, permitting agencies to identify both the staff members involved in specific incidents and any patterns of cross-gender searches that may be cause for concern.

## **§§ 115.15, 115.115, 115.215, & 115.315 Accommodating inmates with special needs.**

The draft regulation does not require agencies to provide limited English proficient (LEP) residents and inmates as well as those with disabilities with accommodations throughout the entire investigation and response process. However, federal law and the Justice Department's own regulations and guidance require that agencies make these accommodations. We encourage the Department to ensure that LEP

residents and inmates as well as those with disabilities receive the same protections under the standards as others throughout the entire investigative and response process.

As written, the draft regulations place LEP and English-speaking residents and inmates on equal footing for learning about sexual misconduct policies and reporting abuse or victimization. However, the draft regulations leave individuals who are LEP, deaf, or have disabilities behind after the reporting phase. The draft regulations do not require agencies to ensure that LEP residents or inmates or those with disabilities are able to communicate during investigations with staff, medical and mental health care, and the provision of other supportive services that might be necessary after an individual is victimized or becomes a witness to an abusive event. Effective communication throughout the investigation and response stages ensures that facilities gather the information necessary to address and prevent sexual misconduct. It also allows inmates and residents to receive the services and support that will help them recover from abuse or victimization. Agencies cannot achieve these important goals without making accommodations during all phases of the investigation and response process.

Further, the draft regulations do not meet Title VI's mandate and fail to comply with the Department's own guidance to recipients of federal funds. Title VI and the Department's guidance for justice systems and courts require that individuals be provided with "meaningful access" to programs and services. The Department's 2002 guidance states that "[t]he more important the activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed."<sup>11</sup> With respect to confinement facilities, the Department emphasized that "[h]ealth care services are obviously extremely important."<sup>12</sup> Given the potentially devastating consequences of sexual abuse and victimization on inmates and residents, we urge the Department to include a requirement that facilities make accommodations during the investigation and response process in the final regulations.

*Proposed revisions to §§ 115.15, 115.115, 115.215, & 115.315:*

- (a) The agency shall ensure that inmates who are limited English proficient, deaf, or ~~disabled~~ **who have disabilities** are able to report sexual abuse and sexual harassment to staff directly or through other established reporting mechanisms, such as abuse hotlines, without relying on resident interpreters, absent exigent circumstances.
- (b) The agency shall make accommodations to convey verbally all written information about sexual abuse policies, including how to report sexual abuse and sexual harassment, to inmates who have limited reading skills or who are visually impaired.
- (c) **The agency shall make accommodations to ensure that inmates who are limited English proficient, deaf, blind or who otherwise have disabilities can communicate with facility staff and supportive service providers throughout the investigative process, when requesting and receiving medical and mental health care, and during other supportive services that may be necessary after an inmate is victimized or witnesses an abusive event. Agencies shall make such accommodations by utilizing bilingual staff, providing translation by qualified interpreters, entering into agreements with community service providers with capabilities in translation or services to inmates with disabilities, or by other means.**

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<sup>11</sup> Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41460 (June 18, 2002).

<sup>12</sup>*Id.* at 41470.

*Question 17: Should the final rule include a requirement that inmates with disabilities and LEP inmates be able to communicate with staff throughout the entire investigation and response process? If such a requirement is included, how should agencies ensure communication throughout the process?*

Under federal law, the answer to the Department’s question is “yes.” Title VI of the Civil Rights Act of 1964 provides that

[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>13</sup>

Because the PREA regulations apply to entities that receive federal financial assistance, the Department must ensure that limited English proficient (LEP) inmates and residents receive the same protections and supports under the regulations as others who do speak English. Federal law requires agencies to make the same accommodations for individuals with disabilities.<sup>14</sup>

Agencies can accommodate LEP inmates’ and residents’ needs in a number of ways, including through direct communication in the individual’s primary language by bilingual staff, translation by qualified interpreters, or agreements with community service providers with a language capability for languages other than English that regularly come up at a facility. Our proposed changes above outline these mechanisms, while recognizing the need for flexibility in making accommodations for LEP individuals.

### **§§ 115.16, 115.116, 115.216, & 115.316 Hiring and promotion decisions.**

Although the draft regulations restrict hiring and promotion of staff based on past involvement with certain types of abuse, the list of abuse does not include domestic violence, stalking, sexual abuse convictions, or protective orders – all of which may provide useful information regarding a staff member’s history of, or propensity to, engage in sexual abuse. In the past few decades, researchers have documented a clear link between domestic violence and child abuse.<sup>15</sup> Some studies find that between 30 percent and 60 percent of men who batter their partners also abuse their children.<sup>16</sup> Additionally, batterers often display personality traits that can make them particularly dangerous in an institutional setting. The Department’s 2000 survey of violence against women concluded that domestic violence “is often accompanied by emotionally abusive and controlling behavior” and that battering “is often part of a systematic pattern of dominance and control.”<sup>17</sup> Furthermore, sexual abuse adjudications of any kind, not just those involving the use of force or coercion, should serve as a clear red flag for agencies. The final regulation should not allow facilities to hire staff for positions with tremendous power over inmates and residents, if those individuals have engaged in behavior that indicates a propensity for victimization of

<sup>13</sup> 42 U.S.C. § 2000(d). The U.S. Supreme Court has held that the failure to make reasonable accommodations for limited English proficient individuals violates Title VI’s ban on national origin discrimination. *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974) (lack of linguistically appropriate accommodations for Chinese students effectively denied students equal educational opportunities under Title VI).

<sup>14</sup> These laws include Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act (IDEA), and Title II of the Americans with Disabilities Act (ADA).

<sup>15</sup> *See generally* J.E. Findlater & S. Kelly, *Child Protective Services and Domestic Violence*, 9 *Future of Children* 84 (1999).

<sup>16</sup> *Id.*

<sup>17</sup> *See generally* U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* iv (2000).

others. Our proposed changes to paragraph (a) ensure that agencies do not hire or promote staff who may be dangerous to the inmates and residents in their care.

In addition, as written, the draft regulation does not equip agencies with the tools necessary to avoid promoting staff who have engaged in sexual misconduct or related abusive behaviors. Specifically, the regulation does not require agencies to conduct criminal background checks for employees who are considered for promotion, requiring only that agencies conduct criminal background checks every five years. Accordingly, a staff member convicted of sexual abuse could be promoted multiple times before the agency uncovered evidence of that misconduct. Thus, the individuals that the regulations aim to prevent from working with inmates and residents could actually take positions of greater authority. Our proposed additions to paragraph (c) address this concern.

*Proposed revisions to §§ 115.16, 115.116, 115.216, & 115.316:*

(a) The agency shall not hire or promote anyone who has engaged in sexual abuse **or sexual harassment** in an institutional setting; who has been convicted of engaging in sexual activity in the community facilitated by force, the threat of force, or coercion; **who has been adjudicated as having engaged in sexual abuse; who has been the subject of a civil protection order or protection from abuse order because of having engaged in such activity; who has been convicted of domestic violence or stalking;** or who has been civilly or administratively adjudicated to have engaged in such activity.

...

(c) The agency shall either conduct criminal background checks of current employees at least every five years or have in place a system for otherwise capturing such information for current employees. **The agency shall conduct criminal background checks of all employees being considered for promotion at the time that they are being considered for advancement.**

### **§§ 115.21, 115.221, & 115.321 Evidence protocol and forensic medical exams.**

While we commend the Department's extension of forensic medical exams to all cases where it is medically or evidentiarily appropriate, the regulations should only allow for "qualified staff" to serve as a victim advocate as a last resort if a victim advocate from the community is not available. Because LGBTI individuals often experience harassment and abuse by staff members, allowing staff members to serve as victim advocates will mean that many will choose not to have this essential support because of fear of retaliation by staff, lack of trust, and legitimate concerns that the staff member will further traumatize them because of anti-LGBTI bias. In addition, allowing staff members to serve in this role will create unnecessary confusion regarding confidentiality. Finally, where qualified staff members must serve as a victim advocate as a last resort, the regulations provide insufficient guidance to agencies on the necessary training and skills for staff members to serve as victim advocates.

#### *Support for this draft regulation*

The requirement that all victims of sexual abuse in confinement be offered a medical forensic exam without financial cost, where evidentiarily or medically appropriate, is critically important. Many instances of sexual abuse may involve forensic evidence, even if penetration did not occur. By including medical forensic exams in all appropriate cases, these provisions more fully protect victims of sexual abuse.

### *Qualified staff members*

Outside victim advocates serve a vital role in the investigation and response process that is significantly weakened when they are replaced by a corrections staff member. Victimized inmates may have legitimate concerns of retaliation and other bases not to trust a staff member advocate – indeed, the designated staff member and/or the staff members’ colleagues may have participated or acquiesced in the assault. Inmates also may not understand what the limits to confidentiality are when speaking with an agency staff member in this capacity.

The draft regulation presents agencies with the option of making a minimally qualified staff member available to victims instead of a victim advocate from a community service organization. Presented as equal alternatives, the option provides little incentive to agencies to enter into agreements with outside organizations that are more capable of providing emotional support services to victims of sexual assault.

Some facilities may be in areas where there are no available rape crisis agencies, and in those locations, having a qualified staff member available to provide support services is better than having no support person available at all. In consideration of this reality, qualified staff members should be allowed to serve in this role as a last resort.

### *Training for qualified staff members*

To the extent that facilities do have to rely on staff members in place of victim advocates from the community, the draft regulation offers insufficient guidance on the training, screening, availability, and support that would qualify a staff member to serve in this role. Training for a staff member to serve as a victim advocate must be more extensive than general education concerning sexual assault. A staff member serving in this role needs to not only be able to identify and respond to the medical and legal needs of individuals who have been sexually assaulted, but also to recognize their mental health and developmental needs, to identify a victim’s primary concerns and develop a safety plan, to respond in a non-judgmental and supportive manner, and to prevent treatment by investigators, medical professionals, staff, and other inmates or residents that has the potential to re-traumatize victims throughout the exam and investigatory processes. To ensure staff members are able to meet their responsibilities in this role, we propose requiring a minimum of 40 hours of training from a victim advocate or sexual assault crisis center focusing on how to respond to the medical, legal, developmental, and mental health needs of sexual assault victims; ensuring that qualified staff members are available around the clock; and providing such staff members with support and opportunities to debrief with experts in the field of victim advocacy. In addition, all staff members considered for this role should demonstrate a nonjudgmental and supportive attitude toward sexual assault victims, including LGBTI individuals.

#### *Proposed revisions to §§ 115.21, 115.221, & 115.321:*

- (c) The agency shall offer all victims of sexual abuse access to forensic medical exams performed by qualified medical practitioners, whether onsite or at an outside facility, without financial cost, where evidentiarily or medically appropriate.
- (d) The agency shall make available to the victim a qualified ~~staff member~~ or a victim advocate from a community-based organization that provides services to sexual abuse victims, **if such services are available in the community. If no such services are available within 50 miles of the facility, the agency shall make available to the victim a similarly qualified staff member.**
- (e) As requested by the victim, the ~~qualified staff member~~ or victim advocate **or qualified staff member** shall accompany and support the victim through the forensic medical exam process and

the investigatory process, **help develop a safety plan where appropriate**, and ~~shall~~ provide emotional support, crisis intervention, information, and referrals.

...

(h) For the purposes of this standard, a qualified staff member shall be an individual who is employed by a facility; ~~and has received education concerning sexual assault and forensic examination issues in general~~ **40 hours of training and certification from a certified victim advocate or sexual assault crisis center focusing on how to respond to the medical, legal, developmental, and mental health needs of sexual assault victims; is provided with support and opportunities to debrief with experts in the field of victim advocacy; and has received education concerning confidentiality rules as they apply to staff members serving in this role. Staff members who serve in this role shall demonstrate a nonjudgmental and supportive attitude toward sexual assault victims.**

### **§§ 115.22, 115.222, & 115.322 Agreements with outside entities.**

We support the Department’s recognition of the importance of providing an outside entity to accept reports of sexual abuse from inmates and residents. To strengthen this regulation and ensure that individuals are not discouraged from reporting incidents of sexual abuse, we recommend that the final regulations require agencies to provide an outside public entity to accept reports of abuse and eliminate the alternative of “an internal entity that is operationally independent from the agency’s chain of command,” except in limited cases where an agency is unable to establish an agreement with an external public entity after attempting to do so.

Victimized inmates and residents often have legitimate reasons for not trusting members of the agency that failed to protect them from sexual abuse, and in cases of staff sexual abuse are especially unlikely to feel safe reporting to officials. Even when deemed operationally independent, internal entities are closely linked to the agency – politically and financially – and lack the neutrality of an external entity. Regardless of how agency officials may view internal entities, inmates are rarely going to understand the distinction between an operationally independent entity and an internal one that is not independent. To effectively encourage reporting of all incidents, the final regulations should require all agencies to attempt to establish an agreement with an external public entity.

*Proposed revisions to §§ 115.22, 115.222, & 115.322:*

(a) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with an outside public entity or office that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials pursuant to § 115.51. **If the agency is unable to enter into an agreement with an outside entity, unless the agency shall** enables inmates to make such reports to an internal entity that is operationally independent from the agency’s chain of command, such as an inspector general or ombudsperson who reports directly to the agency head.

## §§ 115.31 & 115.231 Employee training.

While we are pleased to see the inclusion of paragraph (a)(9), mandating that employee training in prisons and jails, community corrections, and juvenile facilities include “[h]ow to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, or intersex [individuals],” we think that this paragraph would be enhanced by expanding the list to include gender non-conforming inmates. In addition, we urge the Department to add an additional paragraph to this section that requires training on the difference between consensual sexual conduct between inmates and sexual abuse.

### *Support for this draft regulation*

We strongly support § 115.31(a)(9) because training on how to communicate effectively and professionally with inmates and residents, including LGBTI individuals, is key to ensuring that the staff members are equipped to prevent and respond to incidents of sexual abuse affecting all individuals in custody. If staff members do not have the ability to communicate effectively and professionally with LGBTI inmates and residents, these individuals may be afraid to approach staff when they are threatened with abuse or are being abused out of fear staff will mistreat them, blame them for the abuse, or not believe them. Moreover, without this training, staff may not be equipped to detect when LGBTI inmates are at risk of sexual abuse and, thus, will be unable to prevent it. As recognized in the Commission’s report, research documents that individuals who do not identify as heterosexual and transgender and intersex individuals are highly vulnerable to sexual abuse in correctional facilities.<sup>18</sup> Specific training focused on raising competency in this area is critical to ensure the safety of LGBTI inmates and residents and will help decrease the unacceptably high levels of sexual abuse suffered by these individuals.

### *Gender nonconforming inmates*

We believe the proposed regulation would be enhanced by expanding the list in § 115.31(a)(9) to include gender nonconforming inmates and residents. This is because many individuals who do not self-identify as LGBTI but are gender nonconforming in appearance or mannerisms are frequently perceived by others to be LGBTI and are just as likely to be targeted for sexual abuse.

### *Consensual sexual activity between inmates vs. sexual abuse*

We are pleased that the draft regulations make clear that consensual sexual activity between inmates or residents is not treated or punishable as sexual abuse.<sup>19</sup> However, in order to ensure that this does not happen, it is critical to train staff on the difference between consensual sexual activity between inmates that may be prohibited by the facility and sexual abuse as defined by these regulations.

#### *Proposed revisions to §§ 115.31 & 115.231:*

...

(a)(9) How to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, ~~or~~ intersex, **or gender nonconforming** inmates.

**(a)(10) The difference between prohibited consensual sexual activity between inmates and sexual conduct that constitutes sexual abuse under these regulations.**

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<sup>18</sup> *Commission Report, supra* note 2, at 73.

<sup>19</sup> See §§ 115.77, 115.277, and 115.377.

*Question 59: Will the requirements in §§ 115.31, 115.231, and 115.331 that agencies train staff on how to communicate effectively and professionally with lesbian, gay, bisexual, transgender, or intersex inmates lead to additional costs for correctional facilities, over and above the costs of other training requirements in the standards? If so, please provide any data from which a cost estimate can be developed for such training.*

There are no additional costs associated with training staff on how to communicate effectively and professionally with LGBTI inmates and residents, over and above the costs of other training requirements. A cost impact analysis of draft regulation § 115.31 has already concluded that adding this requirement has no cost impact relative to the training standard recommended by the Commission.<sup>20</sup> There is no reason to treat training on this topic differently than any of the other topics on which this regulation requires facilities to conduct trainings. Like all other training topics, training on effective communication with LGBTI inmates and residents will require some curriculum development, training for trainers, and slotted training time. And as with other training topics, facilities will be able to look to government-supported projects for topic-specific staff training curricula and support. For example, training materials on professional and effective communication with LGBTI inmates and residents are or will soon be available through the collaborative project of the National Institute of Corrections and American University Washington College of Law, the Lesbian, Gay, Bisexual, Transgender, and Intersex Guidance Project supported by the National Institute of Corrections, and other initiatives.<sup>21</sup> Even if there were some additional cost related to training staff on how to communicate effectively and professionally with LGBTI individuals, because studies show that such inmates and residents disproportionately experience sexual abuse in confinement, this sort of training will ultimately save money by increasing reporting of abuse and reducing incidents of abuse in the future.

### **§ 115.331 Employee training. (juvenile facilities)**

As discussed above, we strongly support the Department's inclusion of paragraph (a)(9) in the employee training regulation for juvenile facilities and we urge the Department to add communication with gender nonconforming residents to the training requirements. We discuss this regulation separately because we are concerned that it fails to require juvenile facilities to provide sufficient guidance to their staff members on the particular vulnerabilities and needs of young people, and does not take into account the harms associated with sexual abuse of children. We urge the Department to tailor the training requirements in § 115.331 to better reflect the particular vulnerabilities and needs of young people, including LGBTI youth.

#### *Age of consent laws*

Employees should receive training on age of consent laws to ensure that staff members working in juvenile facilities understand the limited circumstances under which voluntary sexual contact between residents constitutes abuse. Without such training, staff members may not realize that many residents of juvenile facilities are old enough to consent to sexual activity with other similarly aged youth. For

<sup>20</sup> See Initial Regulatory Impact Analysis (RIA), Cost Impact of Revised Standards PP4, PP7, PP-2, TR-1, TR-2, TR-3, TR-4, TR-5, MM-3, SC-1, and SC-2, at 5 (prisons), 17 (jails), 29 (community corrections), 40 (juvenile detention), RIN 1105-AB34 (Jan. 24, 2011), available at: [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_nprm\\_iria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm_iria.pdf).

<sup>21</sup> See e.g., National Institute of Corrections and American University Washington College of Law, *Project on Addressing Prison Rape: Preventing the Sexual Abuse of Individuals in Custody*, training materials, available at <http://www.wcl.american.edu/nic/training.cfm>.

example, in most states the age of consent is 16, and in more than half the states, minors 14 or older can consent to sexual contact with others who are close to them in age.<sup>22</sup> If staff members do not know at what age a young person can legally consent, they may assume that no minor can legally consent and improperly treat legally consensual sexual conduct as sexual abuse. As such, the regulations should ensure that employees understand how a jurisdiction's age of consent laws distinguish between voluntary (but not legally consensual) sexual activity, which falls under the purview of these regulations, and legally consensual activity between residents, which a facility may choose to prohibit but should not treat as sexual abuse. Such training will also help prevent facilities from unfairly targeting LGBTI youth for engaging in voluntary sexual contact with similarly aged residents.

### *Adolescent development*

Employees in juvenile facilities should also receive training on adolescent development to better understand the characteristics, limitations, and behaviors of the population with whom they are working. Training on adolescent development will teach employees how teenagers develop their cognitive skills, moral framework, social relations, and identity, as well as how various factors, including brain development, disabilities and the environment of confinement affect youth's behavior and decision making. Such training can also illustrate how adolescence can be an especially complicated time for LGBTI youth who are managing their own developing awareness and understanding of their sexual orientation or gender identity while confronting others' personal bias or rejection.

### *Trauma and abuse*

Because such a large percentage of youth in juvenile facilities have histories of trauma and abuse,<sup>23</sup> it is important that employees receive training on the behavioral manifestations of trauma and how to appropriately respond. Traumatized children often develop a mistrust of others, particularly adults, feel isolated, and do not believe they can turn to adults for help.<sup>24</sup> Employees must be trained on the impact of trauma on youth in order to understand how to most effectively intervene when they are needed to detect or prevent incidents of sexual abuse.

#### *Proposed revisions to § 115.331:*

- (a) The agency shall train all employees who may have contact with residents on:
  - (1) Its zero-tolerance policy for sexual abuse and sexual harassment;

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<sup>22</sup> According to the U.S. Department of Health and Human Services, in 2008 there were only three states where the age of consent for sexual activity was 18, two states where it was 17, and ten states where it was 16. In these 15 states, minors younger than the age of consent can never legally consent to sexual activity. In the remaining 35 states and the District of Columbia, minors younger than the state's age of consent can consent to sexual activity with similarly-aged peers depending on their age and relative age of the parties. In six of these states, minors have to be at least 15 years of age in order to consent to sexual activity with similarly aged youth. In the remaining 29 states and the District of Columbia, the minimum age of consent to sexual activity with a similarly-aged peer varies from 10 to 14 years of age. In addition, the age difference allowed between peers varies greatly by state, with some states only allowing for under-age minors to consent when there is a two year age gap between the parties while other states allow for up to a ten year age gap. See U.S. Department of Health and Human Services, *State Laws on Age Requirements and Sex* (last revised Aug. 6, 2008), available at [http://www.4parents.gov/sexrisky/teen\\_sex/statelaws\\_chart/statelaws\\_chart.html](http://www.4parents.gov/sexrisky/teen_sex/statelaws_chart/statelaws_chart.html).

<sup>23</sup> J.D. Ford, J.F. Chapman, J. Hawke, & D. Albert, *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, National Center for Mental Health and Juvenile Justice, 2 (2007).

<sup>24</sup> J. Woolard, *Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum, Module 1: Adolescent Development*, MacArthur Foundation, Models for Change (2009).

- (2) How to fulfill their responsibilities under agency sexual abuse prevention, detection, reporting, and response policies and procedures;
  - (3) Residents' right to be free from sexual abuse and sexual harassment;
  - (4) The right of residents and employees to be free from retaliation for reporting sexual abuse;
  - (5) Sensitive handling of disclosures of victimization by youth;**
  - (6) The dynamics of sexual abuse in juvenile facilities;
  - (7) Factors that make youth vulnerable to sexual abuse;**
  - (8) Adolescent development for girls and boys, including what is normative sexual behavior for adolescents, how to distinguish between normative adolescent behavior and sexually aggressive and dangerous behaviors, and the ways in which sexual victimization can affect healthy development;**
  - (9) The prevalence of trauma and abuse histories among the youth population in juvenile justice facilities, possible behaviors of youth with trauma and abuse histories, and appropriate ways of responding to those behaviors;**
  - (10) The common reactions of juvenile victims of sexual abuse;
  - (11) How to detect and respond to signs of threatened and actual sexual abuse and how to distinguish between consensual sexual contact and sexual abuse between residents;**
  - (12) How to avoid inappropriate relationships with residents;
  - (13) How to communicate effectively and professionally with residents, including lesbian, gay, bisexual, transgender, ~~or~~ intersex, **or gender nonconforming** residents; and
  - (14) Relevant laws related to mandatory reporting and age of consent.**
- (b) Such training shall be tailored to the unique needs and attributes of residents of juvenile facilities, **including the needs of specific populations of youth (based on gender, race, ethnicity, sexual orientation, gender identity, disability, or limited English proficiency).**

### **§§ 115.34, 115.134, & 115.234 Specialized training: investigations.**

This draft regulation fails to require facilities to provide investigators with training on how to determine whether activity between inmates is sexual abuse or consensual sexual activity that the facility may choose to prohibit but should not treat as sexual abuse. Training investigators on distinguishing between consensual activity between inmates and sexual abuse will also ensure that facilities do not inappropriately penalize consensual same-sex sexual activity. The regulation addressing specialized training of investigators should explicitly include training that makes clear that consensual sexual conduct between inmates does not constitute sexual abuse.

*Proposed revisions to §§ 115.34, 115.134, & 115.234:*

- (a) In addition to the general training provided to all employees pursuant to § 115.31, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, **guidance on determining whether activity between inmates is consensual**, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

### § 115.334 Specialized training: investigations. (juvenile facilities)

Similar to the lack of guidance provided to investigators in adult facilities regarding consensual sexual activity, the draft regulation for juvenile facilities fails to provide proper guidance regarding age of consent laws and their impact on the way facilities should investigate incidents of voluntary sexual contact between residents. Without this guidance facilities are more likely to inappropriately treat LGBTI youth who engage in consensual same-sex sexual activity as sexual abusers.

Investigators in juvenile facilities should receive specialized training on age of consent laws to ensure a proper understanding of the limited circumstances under which juvenile facilities can treat voluntary sexual contact between residents as abuse and to prevent facilities from unfairly targeting LGBTI youth for engaging in voluntary sexual contact with similarly aged residents. The draft regulations require facility staff to report any suspicion of sexual abuse, leaving it to the investigators to determine whether the conduct constitutes sexual abuse for purposes of PREA-mandated responses. Many residents of juvenile facilities are old enough to consent to sexual activity with other residents. As such, the final regulations should ensure that investigators can appropriately apply age of consent laws in distinguishing between sexual abuse and consensual activity between residents, which a facility can choose to prohibit but should not treat as sexual abuse.

#### *Proposed revisions to § 115.334:*

(a) In addition to the general training provided to all employees pursuant to § 115.331, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing juvenile sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, **understanding the relevance of applicable state age of consent laws in investigations of sexual contact between residents, guidance on how to distinguish between sexual abuse and voluntary sexual contact between residents**, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

### §§ 115.35, 115.235, & 115.335 Specialized training: medical and mental health care.

This draft regulation fails to require that medical and mental health care professionals receive the general training provided to all employees pursuant to § 115.31, in addition to the specialized training specified in this section. The basic information provided to all corrections staff, especially training on how to communicate effectively and professionally with inmates and residents is just as important for medical and mental health care practitioners as it is for other facility employees. Given that these employees have such a high degree of contact with inmates and residents who have been sexually abused, it is especially critical that they are competent to communicate appropriately with LGBTI and gender nonconforming inmates and residents who are at elevated risk of being sexually abused.

*Proposed revision to §§ 115.35, 115.235, & 115.335:*

(a) **In addition to the general training provided to all employees pursuant to § 115.31,** the agency shall ensure that all full- and part-time medical and mental health care practitioners who work regularly in its facilities have been trained in:

### **§§ 115.41 & 115.241 Screening for risk of sexual victimization and abusiveness.**

We are pleased that the Department has made important changes to this draft regulation, including requiring facilities to use the same criteria to screen male and female inmates for risk of sexual victimization. In addition, it also prohibits facilities from disciplining inmates for refusing to answer screening questions or for not disclosing complete information, and it calls for rescreening of inmates when warranted due to a referral, request, or incident of sexual victimization. In order for this screening regulation to be an effective tool in preventing sexual abuse, we strongly encourage the Department to shorten the time period during which facilities are permitted to complete the initial classification process, include guidance regarding the information that agencies must gather at an intake screening to inform their temporary housing and placement decisions until the classification process is completed, and include gender nonconforming appearance as a criterion when screening inmates for risk of sexual victimization.

#### *Support for this draft regulation*

We are pleased to see that the Department's draft regulations now require facilities to use the same criteria to screen all inmates for risk of sexual victimization. Many of the factors that make someone especially vulnerable to sexual abuse behind bars are known. While the bulk of research in this area has been conducted in men's prisons, the same characteristics are known to place someone at risk in facilities for women. The Commission found and substantial research shows "[l]esbian and bisexual women also are targeted in women's correctional settings," disproportionately.<sup>25</sup> The Department's application of the key risk factors to all inmates will help facilities better identify vulnerable inmates in women's facilities during the classification process which will help to prevent assaults.

We are also pleased that the draft regulation prohibits facilities from disciplining inmates for refusing to answer particular screening questions or for not disclosing complete information. This is particularly relevant to LGBTI inmates who may not feel safe disclosing information about their identity to corrections staff members. As the Commission explained, "[n]ot all inmates feel comfortable answering questions about their sexual orientation, and employees should respect refusals to answer those questions and not press for answers."<sup>26</sup> Pressuring inmates to answer screening questions related to their identity or past victimization, and then punishing inmates if they refuse to provide such information, would further undermine trust between inmates and corrections staff, making it more difficult for inmates to report abuse. Finally, as not all vulnerable inmates will be identified during classification, it is important that the standards require facilities to rescreen inmates after incidents of sexual victimization and at the request of the inmate.

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<sup>25</sup> *Commission Report, supra* note 2, at 74. For example, one study of sexual coercion in Midwestern prisons found that gay, lesbian, and bisexual inmates were disproportionately represented among the subgroup of sexually victimized inmates with gay and bisexual men making up 26 percent of the men who were victimized and lesbian and bisexual women making up 38 percent of the women. Struckman-Johnson & Struckman-Johnson, *supra* note 1.

<sup>26</sup> National Prison Rape Elimination Commission, *Standards for the Prevention, Detection, Response and Monitoring of Sexual Abuse in Adult Jails and Prisons* 29 (2009) (hereinafter *Commission Standards*), available at <http://www.ncjrs.gov/pdffiles1/226682.pdf>.

### *30-day time period to complete classification process*

We are concerned that by allowing facilities up to 30 days to complete the initial classification process, vulnerable inmates will remain at very high risk of abuse for an unnecessarily long period of time. Studies have found that inmates are at higher risk of abuse shortly after arriving at a facility, making proper screening and classification even more urgent.<sup>27</sup> Until the completion of the classification process, facilities will not have the information they need to make individualized determinations about how to ensure the safety of each inmate (as required under § 115.42(b)). This will also likely result in transgender and intersex inmates spending long periods of time in a facility before there is a case-by-case determination regarding which facility – a men’s or a women’s – would best ensure the inmate’s health and safety (as required under § 115.42(c)). By allowing this 30-day window for completing the classification process, facilities may opt to do little if any screening for risk or abusiveness with inmates who will likely be in the facility for less than 30 days, increasing the risk of abuse for all inmates. The Department instead should require that the classification process be complete within 14 days of an inmate’s confinement and that the intake screening be completed within 48 hours.

### *Intake screenings*

In order to effectively protect the safety of vulnerable inmates, individualized placement determinations should happen as soon as possible after an inmate is confined and should be based on an objective intake screening instrument. While jails and prisons may not have complete inmate records and other potentially relevant materials at the time of intake, the regulations should require facilities to attempt to gather all information related to risk of victimization and risk of abusiveness enumerated in § 115.41(c) and (d) during the intake screening process and make preliminary housing and bed decisions based on the information the agency was able to gather. As it is important for facilities to be able to consider an inmate’s prior institutional history, if any, in making a determination as to risk of abusiveness, the regulations should require agencies to make reasonable efforts to determine whether an inmate has a history of violence or sexual abuse at another institution within seven days of the inmate’s confinement.

### *Gender nonconforming appearance*

Finally, we are concerned that inmates who are vulnerable to sexual abuse because they are perceived to be LGBTI will not be identified in the screening process. Inmates who are gender nonconforming are often targeted for sexual abuse and harassment based solely on the fact that other inmates or staff members perceive them to be LGBTI, even if these inmates are not actually LGBTI. Thus, we recommend that this final regulation explicitly include gender nonconforming appearance as one of the criteria to screen inmates for risk of sexual victimization.

#### *Proposed revisions to §§ 115.41 & 115.241:*

(c) The **intake screening process and the** initial classification process shall consider, at a minimum the following criteria to screen inmates for sexual victimization:

...

(7) Whether the inmate is gay, lesbian, bisexual, transgender, ~~or~~ intersex, **or gender nonconforming.**

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<sup>27</sup> A.J. Beck & P. Guerino, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09* 20-21 (Bureau of Justice Statistics, Jan. 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svraca0708.pdf> (showing the majority of victims in jails were first abused within the first 30 days of confinement, and that 50.6 percent of male victims and 34.7 percent of female victims in prisons were first abused within the first 30 days of confinement).

(d) The **intake screening process and the** initial classification shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the agency, in screening inmates for risk of being sexually abusive. **Agencies shall make all reasonable efforts to review an inmate’s prior institutional records, if any, for history of violence or sexual abuse within seven days of the inmate’s confinement.**

(e) An agency shall **complete the intake screening process within 48 hours of an inmate’s confinement and complete the** initial classification **process** within **14** days of the inmate’s confinement.

*Question 22: Should the final rule provide greater guidance regarding the required scope of the intake screening, and if so, how?*

Yes, the final rule should require agencies to attempt to gather all information related to risk of victimization and risk of abusiveness included in § 115.41(c) and (d) during the intake screening. Without this guidance, facilities will not know what information they should consider at intake to help them separate those who are at high risk of being sexually victimized from those who may be sexually abusive. Agencies need to have as much screening information as possible in order to make housing and bed decisions immediately following intake. These decisions should be based on the information enumerated in the regulation and gathered using an objective screening instrument. Although the agency may not be able to gather all information included in §115.41(c) and (d) during the intake screening process, most of the criteria to screen inmates for risk of victimization and the information to consider in screening inmates for risk of being sexually abusive should be readily available during the intake process. For example, information regarding the build of an inmate, whether the inmate is LGBTI or gender nonconforming, an inmate’s own perception of vulnerability, whether the inmate has a disability, and the relative age of the inmate can be gathered during intake by asking the inmate or looking at the inmate. Other information, such as whether the inmate is confined due to a civil immigration charge, whether he or she has prior convictions for sex offenses or other criminal history (violent or non-violent), and whether the inmate has been incarcerated before, should be available in the inmate’s file during intake. Information such as whether an inmate has previously experienced sexual victimization or has a history of sexual abuse (not resulting in arrest or discipline while in an institution) will be no more difficult to gather during intake than at a later time. The only information that may be unavailable during intake, if an inmate does not disclose this information verbally in screening, is related to prior institutional violence in other jurisdictions. Agencies will likely need additional time to obtain this information, if the prior institutionalization was in a different jurisdiction. As this is important information for the agency to have, an agency should make all reasonable efforts to ascertain these records within seven days of the inmate’s confinement.

### **§ 115.341 Obtaining information from residents. (juvenile facilities)**

We are pleased to see that the Commission’s recommendation that facilities “encourage all residents during intake to tell staff if they fear being abused”<sup>28</sup> is explicitly included in this draft regulation. Knowing this information will help agencies to better identify vulnerable youth, develop an appropriate safety plan, and protect youth who fear for their safety – before they are actually abused. As some LGBTI residents who fear for their safety may be uncomfortable identifying themselves to facility staff as LGBTI, it is important that agencies ask all residents about their own perception of vulnerability during

<sup>28</sup> *Commission Report, supra* note 2, at 18.

the assessment. While we believe this draft regulation will be helpful in identifying LGBTI residents who are at risk for sexual victimization, we are concerned that because the draft regulation does not include gender nonconforming appearance in the assessment and it allows nonmedical staff to ask residents questions about sexual orientation and gender identity, many vulnerable LGBTI and gender nonconforming residents will not be identified and will remain at high risk of abuse.

#### *Gathering sensitive information*

In the standards drafted by the Commission, medical and mental health professionals were responsible for asking youth about sensitive information such as their sexual orientation and history of victimization during the screening process. The draft regulation allows intake and security staff to gather this sensitive information, but these staff may not have the appropriate level of training to do so effectively and respectfully. It is important to have appropriately trained professionals asking residents about sensitive topics, including prior sexual victimization, sexual orientation, and gender identity, in order to both increase the likelihood that residents will share this important information and decrease the likelihood that they will be traumatized in the process. This is particularly relevant for LGBTI youth who may be fearful of disclosing such information to security staff or may be treated disrespectfully when they do. We encourage the Department to adopt the Commission's approach here when facilities have medical or mental health practitioners conduct health assessments during the intake and classification process. However, we agree with the Department's approach for handling conversations about a youth's history of engaging in victimization of others. Medical and mental health professionals should not be in the position of questioning youth about prior crimes early in a youth's stay at a facility.

#### *Gender nonconforming appearance*

Similar to the prisons and jails draft regulation, this regulation fails to include gender nonconforming appearance in the assessment information. Residents who are gender nonconforming are often targeted for sexual abuse and harassment based solely on the fact that other residents or staff members perceive them to be LGBTI, even if these residents are not actually LGBTI. In our experience, gender nonconforming youth who are perceived as LGBTI are at just as high risk of sexual abuse as youth who are LGBTI. We recommend that this regulation explicitly include gathering information about gender nonconforming appearance. Without this addition, many youth who are vulnerable to sexual abuse may not be identified as such during assessment.

#### *Proposed revisions to § 115.341:*

- (a) During the intake process and periodically throughout a resident's confinement, the agency shall obtain and use information about each resident's personal history and behavior to reduce the risk of sexual abuse by or upon a resident.
- (b) Such assessment shall be conducted using an objective screening instrument, blank copies of which shall be made available to the public upon request.
- (c) At a minimum, the agency shall attempt to ascertain information about:
  - (1) Prior sexual victimization or abusiveness;
  - (2) Sexual orientation, transgender, ~~or~~ intersex status, **or gender nonconforming appearance**;
  - ...
- (d) This information shall be ascertained through conversations with residents during the intake process and medical and mental health screenings; during classification assessments; and by reviewing court records, case files, facility behavioral records, and other relevant documentation

from the residents' files. **In facilities where medical and mental health practitioners conduct medical and mental health screenings during the intake process, these practitioners, and not other facility staff, shall ask residents information about their sexual orientation or gender identity, intersex status, prior sexual victimization, or mental health status.**

## §§ 115.42 & 115.242 Use of screening information.

The draft regulations appropriately require individualized classification of inmates, including individualized determinations regarding whether a transgender or intersex inmate should be placed in a male or female facility. However, we are deeply concerned that, contrary to the Commission's recommendation, the draft regulation permits facilities to make placements based solely on an inmate's LGBTI identification or status. We urge the Department to restore this prohibition with appropriate modifications to permit separate protective housing units for gay and transgender inmates in limited circumstances. In addition, the final regulation should provide for separate access to showers for transgender and intersex inmates to prevent sexual abuse by other inmates. Finally, the regulations should make clear that facilities may not adopt harmful prohibitions against gender expression in the name of preventing abuse.

### *Individualized classification decisions for transgender and intersex inmates*

We strongly support the requirement of an individualized assessment to determine whether a transgender or intersex inmate should be housed in a male or female facility.<sup>29</sup> The Commission “strongly urge[d] agencies to give careful thought and consideration to the placement of each transgender [individual] and not to automatically place transgender individuals in male or female housing based on their birth gender or current genital status.”<sup>30</sup> In accordance with this recommendation, the final regulation should expressly prohibit placements based solely on a resident's birth gender or genital status. Based on our experience and observation, these additions are necessary to ensure that placement determinations are truly individualized and appropriately take into account the resident's gender identity and safety needs.

### *Prohibiting placement based on LGBTI identification or status*

For this regulation to be fully effective it should prohibit placement in particular housing, bed or other assignments based solely on LGBTI identification or status. As the Commission recognized, “housing assignments based solely on a person's sexual orientation, gender identity, or genital status ... can lead to labeling that is both demoralizing and dangerous.”<sup>31</sup> The Commission's proposed standard prohibiting placement solely on the basis of sexual orientation or gender identity was based on the experience and advice of many corrections administrators. The potential dangers of such automatic placement on these bases are not hypothetical. Facilities such as the San Francisco County Jail have abandoned the “gay unit” approach in favor of a more comprehensive strategy for protecting vulnerable inmates, in part due to concerns about security and abuse in these units. These concerns are particularly acute for lesbian, bisexual, and transgender inmates in women's facilities, who are at particularly high-risk of sexual abuse

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<sup>29</sup> This type of individualized determination is currently used by several agencies, including the District of Columbia Department of Corrections, the Minnesota Department of Corrections, the King County in Washington, Cumberland County in Maine, and Multnomah County in Oregon, as well as by the United Kingdom's Ministry of Justice (see appendix C). Others agencies, such as Corrections Services of New South Wales, Australia, house all inmates according to their gender identity.

<sup>30</sup> *Commission Standards*, *supra* note 26, at 31.

<sup>31</sup> *Commission Report*, *supra* note 2, at 80.

from staff.<sup>32</sup> At Fluvanna Correctional Institution in Virginia – which the BJS adult inmate survey identified as having the highest rate of inmate-on-inmate abuse for all facilities and the second highest rate of staff sexual misconduct among women’s prisons – the previous warden had established a “butch ward,” where women who identified as or were perceived to be lesbian or gender nonconforming were subject to ongoing harassment and punitive conditions.<sup>33</sup>

The Department cites concern that prohibiting placement solely on these bases might prohibit separate housing units in large institutions such as the Los Angeles County Jail that are designed to protect vulnerable gay and transgender inmates without limiting access to programming and employment. UCLA Law School Professor Sharon Dolovich discussed with us, and details in her comments to the Department, her research which indicates that LA County’s unique program has had significant success in protecting these vulnerable groups. However, Professor Russell Robinson, also of UCLA Law School and also submitting comments to the Department on this issue, relies on other research to argue that the LA County Jail’s K6G unit is under-inclusive, stigmatizing, and marks inmates for potential abuse by staff and for discrimination upon release.<sup>34</sup> BJS statistics show that rates of abuse at LA’s Men’s Central Jail, of which K6G is a part, are near national averages.<sup>35</sup> While the LA County Jail’s approach is undoubtedly well-intentioned, it is unclear whether automatic separate housing as practiced in LA County represents a uniquely effective prevention approach that should be preserved in all respects. We believe that integration of these inmates within a comprehensive and individualized screening and classification system would be equally or more effective than relying on automatic separate housing.

To the extent that the Department determines that local authorities should retain some flexibility to create separate housing for these inmate groups, we are very concerned that the Department has departed much further from the Commission’s approach than is necessary to address this legitimate concern. Professor Dolovich, upon whose previous comments the Department relied in deviating from the Commission’s approach, herself voices strong support for limiting placements based solely on LGBTI identification or status and prohibiting such placements in women’s facilities. We consulted with Professor Dolovich to develop an appropriately tailored exception that would permit programs such as the K6G unit in the Los Angeles County Jail that are designed to protect gay and transgender inmates, while avoiding punitive and dangerous segregation practices. For a separate unit such as this to do more good than harm requires certain circumstances, including a demonstrated need, a sufficient facility size, a basic level of cultural competence, and an institutional commitment to safety and fairness toward these populations. Notably, such separate housing has never been used for protective purposes in women’s facilities. We recommend that placing adult inmates in particular beds, wings or units solely on the basis of LGBTI identification or status be permitted only when – as in LA County – such placement is part of a program of separate, protective housing established in connection with a consent decree, legal settlement, or court judgment. In these limited circumstances, we believe that the creation of a separate unit similar to the K6G unit may be an appropriate approach to use to address a particularly unsafe situation. Absent these circumstances, facilities would retain many other options under the regulation for housing vulnerable detainees safely.

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<sup>32</sup> See, e.g., D.Q. Thomas, *All too familiar: Sexual abuse of women in U.S. State prisons* (Human Rights Watch, 1996); Reporting, *Investigating, and Prosecuting Prison Rape: What Is Needed to Make the Process Work*, Hearing Before the National Prison Rape Elimination Commission (Aug. 3, 2006) (testimony of Dana Ragsdale).

<sup>33</sup> *Va. Women's Prison Segregated Lesbians, Others*, Associated Press (June 11, 2009).

<sup>34</sup> See also Russell Robinson, *Masculinity as Prison: Race, Sexual Identity and Incarceration*, 99 Calif. L. Rev. \_\_\_ (2011) (upcoming).

<sup>35</sup> Beck & Guerino, *supra* note 26, at 58, 66, 74, 82; A.J. Beck & P.M. Harrison, *Sexual Victimization in Local Jails Reported by Inmates*, 2007 19, 25, 29, 33, 37 (Bureau of Justice Statistics, June 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljri07.pdf>.

### *Protection from sexual abuse in showers*

Because transgender and intersex inmates are especially at risk for being sexually abused when forced to shower with other inmates, we urge the Department to require facilities to provide these vulnerable individuals with the opportunity to shower separately from other inmates. Research cited by the Commission found that sexual abuse of transgender inmates frequently occurs in showers (21.6 percent of sexual assaults in transgender sample versus 6.7 percent of sexual assaults in random sample).<sup>36</sup> Other research has identified showers as one of the most feared and dangerous locations for transgender inmates, because they are exposed to unwanted sexual attention from both staff and other inmates.<sup>37</sup> And the Commission identified the shower as a “danger spot” that is often inadequately supervised.<sup>38</sup> This high risk of abuse could be minimized by providing transgender and intersex inmates the opportunity to shower privately, apart from other inmates.

### *Gender expression prohibitions*

We are concerned that correctional agencies have utilized PREA to prohibit certain gender expressions for the alleged purpose of reducing sexual abuse. For example, the Idaho Department of Correction has implemented the following prohibitions on gender expression: “To foster an environment safe from sexual misconduct, offenders are prohibited from dressing or displaying the appearance of the opposite gender. Specifically, male offenders displaying feminine or effeminate appearance and female offenders displaying masculine appearance to include, but not limited to, the following: Hairstyles, Shaping eyebrows, Face makeup, Undergarments, Jewelry, Gender opposite clothing.”<sup>39</sup> By prohibiting transgender and gender nonconforming individuals from expressing their gender in a way that is integral to their identities, these directives punish transgender and gender non-conforming individuals because of the biases of others. There is no support for the use of such victim-blaming, discriminatory, stigmatizing, and punitive practices as a means to prevent abuse.<sup>40</sup> We urge the Department to explicitly prohibit this practice.

*Proposed revisions to §§ 115.42 & 115.242:*

...

**(c) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in particular facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.**

**(d) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems. Such determination shall not be based solely on the inmate’s genital status or birth gender.**

<sup>36</sup> Jenness et al., *supra* note 2, at 35.

<sup>37</sup> See Sylvia Rivera Law Project, *supra* note 5, at 29-31.

<sup>38</sup> *Commission Report*, *supra* note 2, at 60.

<sup>39</sup> “Prison Rape Elimination.” Idaho Department of Correction 325.02.01.001 (4) (Aug. 17, 2004, rev’d May 20, 2009), available at <http://www.idoc.idaho.gov/policy/int3250201001.pdf>. This policy provides for a limited exception to this prohibition for inmates diagnosed with gender identity disorder, in accordance with the inmate’s treatment plan.

<sup>40</sup> Cf. *Fields v. Smith*, 712 F.Supp.2d 830, 868-9 (E.D. Wis. 2010) (citing expert testimony of former corrections official and ACA committee member Eugene Atherton that it was “an incredible stretch” to justify a prohibition on feminizing hormone therapy for inmates on the basis of preventing assaults).

~~(d)~~ (e) Placement and programming assignments for such an inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

~~(e)~~ (f) Such inmate's own views with respect to his or her own safety shall be given serious consideration.

**(g) Transgender and intersex inmates should be provided the opportunity to shower separately from other inmates.**

**(h) The agency shall not adopt prohibitions on gender nonconforming expression or appearance for the purposes of preventing sexual abuse.**

### **§ 115.342 Placement of residents in housing, bed, program, education, and work assignments. (juvenile facilities)**

We are pleased that the Department added paragraph (d) to this draft regulation prohibiting agencies from placing LGBTI residents in particular housing, bed, or other assignments solely on the basis of such identification or status. Without such a prohibition facilities could automatically place all LGBTI residents in segregated housing or in isolation, depriving them of access to rehabilitative programming. While studies indicate that LGBTI residents are at high risk of sexual abuse, the draft regulation fails to state that being LGBTI makes a resident more vulnerable to abuse and not more likely to be abusive. Without such a statement facilities may wrongly treat LGBTI status as an indication of potential sexual abusiveness based on bias or misconceptions. The draft regulation also fails to include gender nonconforming appearance as one of the pieces of information agencies must take into account when determining housing and other assignments. In addition, we are concerned that this section does not provide sufficient guidance to agencies on making determinations for housing transgender or intersex residents and fails to include consideration of the resident's views of his or her own safety. We urge the Department to include this important information in the final regulation. Finally, while the draft regulation states that residents may be isolated only as a last resort, we encourage the Department to include additional limitations on the use of isolation in order to prevent vulnerable residents from being subjected to this unhealthy and often unconstitutional practice.

#### *Support for this draft regulation*

As individualized placement determinations are particularly important for ensuring the physical and emotional safety of LGBTI residents, we are pleased that the Department added paragraph (d) prohibiting agencies from placing LGBTI residents in particular housing, bed, or other assignments solely on the basis of such identification. Unfortunately, many juvenile facilities have segregated or isolated LGBTI youth for their own protection, presumably because it is easier for the facility to keep LGBTI youth in isolation than it would be to address the sexual violence that these youth face in the general population. Other facilities have housed LGBTI residents in special wings, or automatically placed all gay and lesbian residents in sex offender units, based on bias and unfounded stereotypes.<sup>41</sup> Even when purportedly for their own protection, the involuntary segregation of LGBTI residents denies these individuals access to programs, services and an ability to move around the facility in ways that they may otherwise be entitled, and thus amounts to punishment. Punishing residents for their vulnerable status is unjust and harmful, and

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<sup>41</sup> *Best practice guidelines: serving LGBT youth in out-of-home care* 7, 48 (Child Welfare League of America, 2006), available at <http://www.equityproject.org/pdfs/CWLA%20-%20bestpracticeslgbyouth.pdf>; The Equity Project, *Hidden Injustice: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts* 127 (2009), available at: [http://www.equityproject.org/pdfs/hidden\\_injustice.pdf](http://www.equityproject.org/pdfs/hidden_injustice.pdf).

is contrary to the rehabilitative purpose of the juvenile justice system. It also promotes bias against LGBTI residents, and discourages honest responses to screening questions. As the Commission recognized, “[p]reconceived notions, stereotypes, or bias should have no place in the housing decisions made for lesbian, gay, bisexual, transgender, and other gender-nonconforming inmates.”<sup>42</sup> Paragraph (d) of this draft regulation will help to prevent this from happening.

#### *Identify LGBTI residents as vulnerable to abuse*

Unlike the draft regulations for prisons and jails, this regulation fails to state that being LGBTI makes a resident more vulnerable to abuse and not more likely to be abusive. Without a clear statement that LGBTI residents are at high risk of sexual abuse, the final regulations would allow facilities that lack understanding of LGBTI residents to consider LGBTI status an indicator of potential abusiveness. The concern is not misplaced as a 2009 report by The Equity Project found that professionals throughout the juvenile justice system routinely stereotype LGBTI youth as sexual predators, rather than as youth who are vulnerable to sexual abuse.<sup>43</sup> The Commission has identified some characteristics, including being LGBTI, that are often associated with higher vulnerability to sexual abuse for youth.<sup>44</sup> And a 2009 BJS study of sexual victimization reported by youth, released after the publication of the Commission’s standards, clearly highlights this heightened vulnerability for LGBTI youth. The BJS survey found that more than one in five non-heterosexual youth reported sexual victimization involving another youth or facility staff.<sup>45</sup> And non-heterosexual youth were almost ten times as likely as heterosexual youth to have reported abuse by other residents (12.5 percent vs. 1.3 percent).<sup>46</sup> While the BJS survey did not ask about gender identity, the Commission also expressed concern that transgender girls are particularly vulnerable to sexual abuse, especially when housed with boys.<sup>47</sup> This danger is starkly illustrated by the testimony before the Commission of Cyryna Pasion, a transgender girl, who, after being transferred from the girls’ unit to a boys’ unit at the Hawaii Youth Correctional Facility, was sexually harassed, abused, and threatened with rape on an almost daily basis.<sup>48</sup> Accordingly, we recommend that this regulation explicitly state that LGBTI identification is an indicator for heightened risk of victimization and that agencies are not permitted to treat LGBTI status as an indicator of potential abusiveness.

#### *Gender nonconforming appearance*

As discussed above, residents who are gender nonconforming are often targeted for sexual abuse and harassment based solely on the fact that other residents or staff perceive them to be LGBTI, even if these residents are not actually LGBTI. We recommend that this regulation explicitly include taking into account information about gender nonconformity when determining housing and other assignments for residents.

#### *Guidance on housing determinations for transgender and intersex residents*

Transgender and intersex residents are very vulnerable to sexual abuse if their safety needs are not considered in housing determinations. Often facilities are unaware of appropriate housing options for these residents and will solely look to the resident’s genital status. The draft regulation does not provide

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<sup>42</sup> *Commission Standards*, *supra* note 26, at 30.

<sup>43</sup> The Equity Project, *supra* note 41, at 104-106.

<sup>44</sup> *Commission Report*, *supra* note 2, at 148.

<sup>45</sup> A.J. Beck et al., *supra* note 1.

<sup>46</sup> *Id.* Twelve percent of the youth in the study reported a sexual orientation other than heterosexual. *Id.*

<sup>47</sup> *Commission Report*, *supra* note 2, at 18.

<sup>48</sup> *Elimination of Prison Rape: Focus on Juveniles*, Hearing Before the National Prison Rape Elimination Commission (June 1, 2006) (testimony of Cyryna Pasion).

sufficient guidance to agencies on making housing determinations for these residents and fails to include consideration of their perception of their own safety. Because inappropriate placements of transgender and intersex residents greatly increase their risk of victimization, we urge the Department to provide facilities with more explicit direction on how to protect the safety of these vulnerable residents. Consistent with the draft prison and jail regulations, the final regulations for juvenile facilities should provide guidance to agencies on what to consider when making an individualized determination as to whether a transgender or intersex resident should be housed in a boys' or girls' facility or living unit, and should also provide for regular reviews of this placement decision to ensure safety of the resident. In addition, the Commission's report, "strongly urge[s] agencies to give careful thought and consideration to the placement of each transgender [individual] and not to automatically place transgender individuals in male or female housing based on their birth gender or current genital status."<sup>49</sup> The final regulation should expressly prohibit placements based solely on a resident's birth gender or genital status. This best practice is already employed by a number of juvenile justice agencies, including the New York Office of Children and Family Services and the Hawaii Office of Youth Services. Excerpts from these and other policies on this issue are located in appendix C. In addition, a transgender or intersex resident's view as to where he or she will be most safe should be considered in all placement determinations for that resident. Based on our experience and observation, these additions are necessary to ensure that housing determinations are truly individualized and appropriately take into account the resident's gender identity, perception of vulnerability, and safety needs.

### *Isolation*

Under the draft regulation, facilities are permitted to isolate residents in their efforts to eliminate sexual abuse and violence. The Commission observed that "isolation may aggravate symptoms of mental illness and limit access to education, programming, and mental health services," and that the possibility of isolation discourages youth from reporting abuse.<sup>50</sup> 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," since approximately half the suicide victims were on room confinement status at the time of death and died during waking hours (6 a.m. to 9 p.m.).<sup>51</sup> And a review of social science research on the topic characterized isolation as "harmful" and "not evidence-based."<sup>52</sup> 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."<sup>53</sup> Unfortunately, lengthy isolation of LGBTI youth is a common practice.<sup>54</sup> In 2006, a federal court found the practice of isolating LGBT youth at the Hawaii Youth Correctional Facility was a violation of residents' constitutional rights.<sup>55</sup>

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<sup>49</sup> *Commission Report*, *supra* note 2, at 74.

<sup>50</sup> *Id.* at 150.

<sup>51</sup> L.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>.

<sup>52</sup> L.M. Finke, *Use of Seclusion Is Not Evidence-Based Practice*, 14 J. Child & Adolescent Psychiatric Nursing 186 (2007).

<sup>53</sup> 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>.

<sup>54</sup> *Best Practice Guidelines*, *supra* note 41; W. Ware, *Locked Up & Out: Lesbian, Gay, Bisexual & Transgender Youth in Louisiana's Juvenile Justice System* (Juvenile Justice Project of Louisiana, 2006), available at <http://www.equityproject.org/pdfs/Locked-UpOut.pdf>; R. Feinstein et al., *Justice for All?: A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System* (Urban Justice Center, 2001), available at <http://www.equityproject.org/pdfs/justiceforallreport.pdf>.

<sup>55</sup> *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Hawaii 2006).

The final regulation should do more to highlight the dangers associated with isolation and clarify a facility's responsibility to keep children safe without resorting to this practice. The draft regulation permits facilities to use isolation to protect youth, albeit as a last resort. Although § 115.342(d) makes clear that facilities may not adopt blanket policies to manage LGBT youth, the regulations must also be clear that facilities cannot rely on isolation to protect youth who are vulnerable to victimization and abuse, relying on one unconstitutional practice to avoid another. We urge the Department to prohibit isolating residents for longer than 72 hours and to require regular reassessment of a youth's housing assignment to assure that facilities identify alternative means of ensuring resident safety as quickly as possible. We also urge that the final regulation require documentation of the basis for isolating a resident and for rejecting a less restrictive alternative, to ensure that isolation is truly used as a last resort. Finally, the final regulation should ensure that residents in isolation have full access to human contact and programming that is essential to their rehabilitation.

*Protection from sexual abuse in showers; gender nonconforming appearance prohibitions*

As discussed above, we urge the Department to require juvenile facilities to provide transgender and intersex residents with the opportunity to shower separately from other residents and to prohibit rules that prevent transgender and gender nonconforming residents from expressing their gender for the purported purpose of reducing sexual abuse.

*Proposed revisions to § 115.342:*

- (a) The agency shall use all information obtained about the resident during the intake process and subsequently to make placement decisions for each resident based upon the objective screening instrument with the goal of keeping all residents safe and free from sexual abuse.
- (b) When determining housing, bed, program, education and work assignments for residents, the agency must take into account:
  - (1) A resident's age;
  - (2) The nature of his or her offense;
  - (3) Any mental or physical disability or mental illness;
  - (4) Any history of sexual victimization or engaging in sexual abuse;
  - (5) His or her level of emotional and cognitive development;
  - (6) His or her **gender nonconforming appearance or** identification as lesbian, gay, bisexual, transgender, or intersex (**LGBTI**) **and his or her corresponding vulnerability to sexual abuse;** and
  - (7) Any other information obtained about the resident pursuant to § 115.341.
- (c) Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged. **Residents may not be held in isolation conditions for a continuous period longer than 72 hours and must have all of the privileges and opportunities of residents in general population.**
  - (1) **If an agency isolates a resident according to this provision, it shall:**
    - (i) **document the basis for the agency's decision;**

- (ii) document the reason(s) why no alternative, less restrictive measures can be arranged for that particular resident;
- (iii) review whether there is a continuing need for isolation every 24 hours and document the reason for ongoing isolation; and
- (iv) ensure that a mental health professional meets with the resident at least every 24 hours and document that the meetings occurred.

(d) Lesbian, gay, bisexual, transgender, or intersex residents shall not be placed in particular housing, bed, or other assignments solely on the basis of such identification or status, **nor shall agencies consider LGBTI identification or status as an indicator of likelihood of being sexually abusive.**

(e) The agency shall make an individualized determination about whether a transgender or intersex resident should be housed with males or with females. **Such determination shall not be based solely on the resident's genital status or birth gender. In deciding whether to assign a transgender or intersex resident to a facility or unit for male or female residents, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether the placement would ensure the resident's health and safety. Transgender and intersex residents' own views with respect to their own safety shall be given serious consideration.**

(f) Placement and programming assignments for transgender and intersex residents shall be reassessed at least twice each year to review any threats to safety experienced by the resident.

(g) Transgender and intersex residents should be provided the opportunity to shower separately from other inmates.

(h) The agency shall not adopt prohibitions on gender nonconforming expression or appearance for the purpose of preventing sexual abuse.

### **§ 115.43 Protective custody & § 115.66 Post-allegation protective custody. (prisons & jails)**

We support § 115.43's inclusion of restrictive guidelines for the use of involuntary protective custody (IPC) but believe that this section could be improved by providing clearer limitations on involuntary segregated housing and greater protections for individuals held in protective custody. Involuntary segregation, particularly when that segregation severely restricts contact with other inmates and access to programs and privileges, is decidedly not in the best interests of vulnerable individuals. Because LGBTI inmates are frequently placed involuntarily in protective custody, we are particularly concerned about the impact of this section on the LGBTI community. To improve protections for individuals vulnerable to sexual abuse, we recommend establishing the following: (1) concrete limitations on the duration of IPC and appeal opportunities for individuals designated for IPC; (2) guidance on access to programs and privileges for individuals held in protective custody; and (3) guidance for correctional agencies on their responsibilities to respond to requests from vulnerable individuals to be voluntarily placed in protective custody.

#### *Indefinite segregation and due process protections*

We are concerned that the lack of guidance provided to correctional agencies in § 115.43 will permit agencies to hold vulnerable inmates in involuntary segregation indefinitely. This prolonged segregation

will have long-term effects on the mental health of these individuals and will greatly inhibit rehabilitative work. The proposed initial time limit of 90 days is far too long, and we believe that a limit of 10 days is reasonable and far more appropriate.

Correctional agencies frequently place transgender individuals in IPC based on their gender expressions. For example, in California and other states, transgender women who receive medically-necessary hormone treatment are often immediately and automatically placed in IPC. This practice prevents individuals from accessing the care that they need by forcing them to choose between needed medical care and contact with others. Andrea, a transgender woman in a New York State men's prison was involuntarily placed in PC upon her arrival at the prison. The IPC recommendation stated, "Based on the Inmate being transgendered, and his [sic] likeness to a female, the likelihood of him being victimized is great. The inmate both looks and sounds like a female, therefore I recommend his protective custody to prevent any harm based on his looks and transgendered status."<sup>56</sup> This young woman has been in protective custody for over two months and is expected to remain in involuntary protective custody for the duration of her incarceration.<sup>57</sup> She reports feelings of severe anxiety and depression due to her isolation from others against her will.<sup>58</sup> We recommend adding essential due process protections to § 115.43, including an opportunity to be heard and review every 24 hours, to ensure that individuals are not detained indefinitely in punitive isolation based solely on their gender expressions or LGBTI identification.

#### *Access to programs*

Correctional systems are effectively punishing people for being LGBTI by placing them against their will in segregated settings where they do not get the human contact, privileges, or programming that other inmates receive in general population. The use of involuntary protective custody prevents many vulnerable inmates from accessing essential programs and work assignments. The isolation that vulnerable inmates endure, purportedly "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 inmates are routinely prevented from participating in are incredibly important for many reasons. They are usually the only means for inmates to earn 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 inmates who are not permitted to participate in programming are spending more time 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 inmates develop skills that will be critical for them to successfully reintegrate into the community upon release and improve their lives.

#### *Protective custody in response to reports of abuse*

The risk of being isolated and punished creates a strong disincentive for reporting sexual abuse. Prisons often use long-term protective custody in response to reports of sexual abuse. For example, Laura, a transgender woman in a men's prison, was forcibly raped by another inmate. 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 inmates, and far more severe and total restrictions on "privileges" such as group religious worship, recreation, and phone calls than her assailant did. She felt that instead of getting help, she got punished,

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<sup>56</sup> Involuntary Protective Custody Recommendation dated January 25, 2011 (on file with authors).

<sup>57</sup> Client correspondence dated February 11, 2011 (on file with authors).

<sup>58</sup> Client correspondence dated February 11, 2011 (on file with authors).

even more severely than the person who raped her.<sup>59</sup> Section 115.43 suffers from a lack of clarity around the extent to which individuals may be denied access to work and programs while placed in protective custody against their will after reporting sexual abuse. As § 115.66 states that the use of post-allegation protective custody is subject to the requirements of § 115.43, we urge the Department to make the changes below to protect inmates from the punitive use of protective custody after an allegation of sexual abuse.

### *Protective custody requests*

While many individuals are involuntarily segregated, LGBTI individuals who request to be housed in protective custody for their safety are too often denied such placements. Section 115.43 provides no guidance to agencies handling requests to be placed in segregation by vulnerable inmates. It is important that the final regulations also provide guidance on when and how to place individuals who request protective custody when they request it and that such placement should not mean giving up programs, privileges or human contact.

#### *Proposed revisions to § 115.43:*

- (a) Inmates at high risk for sexual victimization may be placed in involuntary segregated housing only after an assessment of all available alternatives has been made, and then only until an alternative means of separation from likely abusers can be arranged.
- (b) Inmates placed in segregated housing for this purpose shall have access to programs, **privileges**, education, and work opportunities ~~to the extent possible~~. **If the agency restricts access to programs, privileges, education or work opportunities, the agency shall document:**
  - (1) the opportunities that have been limited;**
  - (2) the duration of the limitation; and**
  - (3) the reasons for such limitations.**
- (c) The agency shall not ~~ordinarily~~ assign such an inmate to segregated housing involuntarily for a period exceeding ~~90~~ **10** days.
- ~~(d) If an extension is necessary, the agency shall clearly document:~~
  - ~~(1) The basis for the agency's concern for the inmate's safety; and~~
  - ~~(2) The reason why no alternative means of separation can be arranged.~~
- ~~(e) Every 90 days, the agency shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.~~
- (d) Upon placement in protective custody involuntarily, the agency shall document in writing:**
  - (1) the reasons why the individual is at a high risk for sexual victimization;**
  - (2) the efforts made to locate alternatives to involuntary protective custody; and**
  - (3) the plan for creating a safer alternative to involuntary protective custody for the individual in the future.**

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<sup>59</sup> Client interview on November 30, 2007 (notes on file with authors).

(e) Any individual placed in involuntary protective custody for a period exceeding 10 days, must be provided with a hearing to object to their continued placement in segregation on the eleventh day.

(f) An individual's gender expression and/or transgender status cannot provide the sole basis for placement in involuntary protective custody.

(g) When an inmate identified as vulnerable to sexual victimization requests to be placed in protective custody, the agency shall make a decision as to the individual's request within 24 hours. During the 24-hour period in which the agency renders its decision, the individual shall be placed in segregation. Should the agency deny the individual's request, the agency shall document the grounds for the denial and provide for an expedited appeal.

### §§ 115.51, 115.151, 115.251, & 115.351 Inmate reporting.

For the reasons discussed with respect to § 115.22, we recommend that the Department require agencies to attempt to enter into an agreement with an outside public entity to receive and forward reports of sexual abuse and sexual harassment. In addition, it is imperative that the regulations require that such an outside reporting entity be able to accept confidential anonymous reports of sexual abuse. In many circumstances, inmates and residents will only feel safe making a report if they can do so anonymously to someone outside the agency. Even if an anonymous report does not allow for a full investigation, it will provide officials with important information that they would not otherwise know, including information that may help officials track trends of abusive behavior to prevent future incidents of abuse.

In addition, for the reasons discussed with respect to § 115.52, all reports of sexual abuse made to staff should constitute a grievance for all time limits imposed under this title.

#### *Proposed revisions to §§ 115.51, 115.151, 115.251, and 115.351:*

...

(b) Pursuant to § 115.22, the agency shall also make its best efforts to provide at least one way for inmates to report abuse or harassment to an outside governmental entity that is not affiliated with the agency, ~~or that is operationally independent from agency leadership, such as an inspector general or ombudsperson~~ and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials. **If it is not possible to enter into an agreement with such an outside entity, the agency must provide a way for inmates to report abuse or harassment to an internal entity that is operationally independent from agency leadership such as an inspector general or ombudsperson, and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials.**

(c) **The outside entity shall accept anonymous and confidential reports of sexual abuse.**

~~(d)~~ (d) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports. **Such reports shall constitute grievances for all time limits imposed under this title.**

~~(e)~~ (e) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of inmates.

## §§ 115.52, 115.252, & 115.352 Exhaustion of administrative remedies.

We commend the Department's recognition that inmates and residents are often unable to file grievances shortly after experiencing sexual abuse due to the physical and psychological traumatic effects of such abuse. However, we are greatly concerned by the tight exhaustion timelines imposed by the draft regulations. The regulations fail to ensure that victims of sexual abuse can realistically seek relief because: (a) the 20-day timeframe for filing grievances is too short; (b) the qualifications for a 90-day extension are unrealistic, (c) the draft regulations require victims to file a grievance in addition to reporting the abuse, which will result in confusion and missed deadlines, and (d) inmates and residents can be punished for filing an emergency grievance, even in good faith, if officials decide that no emergency exists.

Corrections and detention agencies nationwide have avoided responsibility for sexual abuse and other constitutional violations by establishing unrealistic, arbitrary and hyper-technical requirements for substantive review of inmate and resident grievances for sexual abuse. The fear of retaliation, impact of trauma, and shame that sexual abuse victims often feel makes navigating complex grievance procedures close to impossible. These unrealistic and complicated grievance systems prevent countless sexual abuse victims, including many LGBTI youth and adults, from ever having a judge review their cases. By proposing an exhaustion standard that mirrors the Bureau of Prisons' grievance policy, the Department retains some of the most egregious barriers to judicial review, including short filing deadlines, requirements that victims of sexual abuse file the grievance with a specific entity, and the prospect of being punished even for good faith complaints of an emergency. The Department should remove these restrictions and establish a straightforward standard, ensuring that all complaints of sexual abuse are addressed on their merits, and that no one is punished for filing a complaint in good faith, even if they state it is an emergency and officials disagree.

### *Timelines*

The 20-day deadline for filing a sexual abuse grievance under the draft regulation is shorter than the deadlines currently imposed by 18 state correctional systems.<sup>60</sup> Victimized inmates and residents are likely still to be in acute trauma 20 days after they are sexually abused. Although the draft regulation provides for an opportunity for a 90-day extension, the circumstances that render many victimized inmates and residents unable to file a timely grievance will also prevent them from qualifying for such an extension, making this opportunity meaningless. In addition, the documentation currently required by the draft regulation to qualify for this extension is likely not feasible for inmates and residents to get in many facilities. Notably, sexual abuse grievances often include complaints that timely and appropriate response services were not available – precisely the kind of services that would be needed to secure the proper documentation required for the 90-day extension. We strongly urge the Department to provide a more realistic 180 day timeline for filing grievances, with a possible extension for an additional 120 days.

### *Reports as grievances*

While this draft regulation rightfully requires agencies to provide inmates and residents with multiple reporting options, it does not ensure that these reports will be treated as grievances nor does it make clear that these reports would not serve as a grievance. Failing to allow for all types of reports to trigger the grievance process will add further confusion to the already complex framework of administrative

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<sup>60</sup> Notice of Proposed Rulemaking, 76 Fed. Reg. 6248, 6259 (citing Appendix, Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School As Amicus Curiae in Support of Respondent, *Woodford v. Ngo* (No. 05-416) (2006)).

exhaustion requirements, and send mixed messages regarding how seriously reports of abuse should be taken. The Department should mandate that any sexual abuse report filed with a recognized reporting entity constitute a grievance for the purpose of fulfilling exhaustion requirements.

*Punishments for emergency grievances*

While agencies have legitimate reasons for dissuading false claims of an emergency, paragraph (d)(5) allows for penalties well-beyond these instances. The Department has not defined what would constitute an emergency, and even if it attempted to do so, agency discretion would still be needed to apply that definition to the specific alleged facts. Undoubtedly, agencies will find that some victims' complaints do not give rise to an emergency, even when victimized inmates or residents legitimately have imminent health or safety concerns. Allowing for these inmates to be punished will unconscionably add to their trauma, and will have a substantial chilling effect on the likelihood of inmates and residents filing emergency reports when faced with a dangerous situation needing immediate action. Akin to other grievances, inmates should only be punished for filing emergency grievances when such filings were deemed to be made in bad faith as a means to thwart the system's established review process.

*Proposed revisions to §§ 115.52, 115.252, & 115.352:*

(a)(1) The agency shall provide an inmate a minimum of ~~20~~ **180** days following the occurrence of an alleged incident of sexual abuse **or sexual harassment** to file a grievance regarding such incident.

(2) The agency shall grant an extension of no less than ~~90~~ **120** days from the deadline for filing such a grievance when **it determines, in consultation with the resident and medical and mental health practitioners**, that filing a grievance within the normal time limit was or would likely be impractical, whether due to physical or psychological trauma arising out of an incident of sexual abuse **or sexual harassment**, the inmate having been held for periods of time outside of the facility, or other circumstances indicating impracticality. Such an extension shall be afforded retroactively to an inmate whose grievance is filed subsequent to the normal filing deadline.

(b)(1) The agency shall issue a final agency decision on the merits of a grievance alleging sexual abuse **or sexual harassment**, within ~~90~~ **30** days of the initial filing of the grievance.

(2) Computation of the ~~90~~ **30** day-time period shall not include time consumed by inmates in appealing any adverse ruling.

(3) An agency may claim an extension of time to respond, of up to ~~70~~ **30** days, if the normal time period for response is insufficient to make an appropriate decision.

...

(c)(1) Whenever an agency is notified of an allegation that an inmate has been sexually abused **or sexually harassed**, other than by notification from another inmate, it shall consider such notification as a grievance or request for informal resolution submitted on behalf of the alleged inmate victim for purposes of initiating the agency administrative remedy process. **This includes reports of sexual abuse or sexual harassment made to an authorized reporting agency as defined in § 115.51.**

(2) The agency shall inform the alleged victim that a grievance or request for informal resolution has been submitted on his or her behalf and shall process it under the agency's normal procedures unless the alleged victim expressly requests that it not be processed. The agency shall document any such request.

(3) The agency may require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(4) The agency shall also establish procedures to allow the parent, ~~or~~ legal guardian, **family member, attorney, or other legal advocate** of a juvenile to file a grievance regarding allegations of sexual abuse **or sexual harassment**, including appeals, on behalf of such juvenile.

(d)(1) An agency shall establish procedures for the filing of an emergency grievance where an inmate is subject to a substantial risk of imminent sexual abuse.

...

(5) An agency may **not** discipline an inmate for ~~intentionally~~ filing an emergency grievance where no emergency **is found unless the agency makes a written determination that the emergency grievance was filed: (i) intentionally; (ii) in bad faith; and (iii) with the intent to undermine the established review process.**

### **§ 115.53, § 115.253, & § 115.353 Inmate access to outside support services and legal representation.**

The draft regulation limits the confidentiality of communications with outside victim advocates for emotional support services to only “as confidential as possible, consistent with agency security needs.” This will reduce the effectiveness of this provision and make it more difficult for auditors to measure compliance. We urge the Department to require agencies to allow confidential counseling to the extent available by law.

Confidential counseling is a pillar among best practices in the community, and is the norm among professional and ethical standards for mental health professionals. Allowing for these services to be confidential provides survivors of sexual violence with a safe and trusted way to discuss the abuse that they have experienced, deal with their fears, develop appropriate coping skills, and understand that it was not their fault. Confidentiality can be especially important for LGBTI inmates and residents who may fear being blamed for the abuse, punished, or otherwise retaliated against based on their sexual orientation or gender identity or expression.

Limitations on confidentiality that have been identified and defined by the relevant legislature are the result of deliberation that has balanced the benefits of providing safe services, even for victims who do not want to initiate an investigation, with the value of providing law enforcement with timely information about ongoing crimes. “Agency security needs” in comparison, is a vague and broad measure. Officials may define this need differently from one another, and health care professionals are likely to define it differently than officials. Ultimately, given the proven benefits of confidentiality and the professional ethical obligations of counselors, the legal restrictions on confidentiality should be considered sufficient for agency security needs.

#### *Proposed revisions to §§ 115.53, 115.253, & 115.353:*

(a) In addition to providing onsite mental health care services, the facility shall provide inmates with access to outside victim advocates for emotional support services related to sexual abuse by giving inmates mailing address and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and by enabling

reasonable communication between inmates and these organizations, as confidential as possible, **to the extent allowed by law** ~~consistent with agency needs.~~

### § 115.361 Staff and agency reporting duties. (juvenile facilities)

The draft regulation fails to provide any guidance regarding age of consent laws on the way juvenile facilities should handle incidents of voluntary sexual contact between residents in relation to mandatory reporting. The Department should clearly state that the regulations do not expand facilities' mandatory reporting requirements beyond the state's definition of child abuse. This is necessary because one-third of states do not consider statutory rape<sup>61</sup> between youth to be child abuse, and in the majority of the remaining states there are only limited circumstances, such as very young age (e.g. under 12) or a large age gap between the parties, when mandated reporters are required to report statutory rape that does not involve a person responsible for the care of the minor.<sup>62</sup> Facility staff should only make reports of child abuse in situations involving sexual contact between residents if state law or other professional responsibilities require them to do so. Without additional guidance, agencies that investigate reports of child abuse will have to use their limited resources to investigate allegations that do not meet the definition of abuse in their jurisdiction.

*Proposed revisions to § 115.361:*

(d)(1) Medical and mental health practitioners shall be required to report sexual abuse to designated supervisors and officials pursuant to paragraph (a) of this section, as well as to the designated State or local services agency where required by mandatory reporting laws.

(2) Such practitioners shall be required to inform residents at the initiation of services of their duty to report.

**(3) Such practitioners shall understand the scope of their state's mandatory reporting laws and whether or not voluntary sexual activity between close-in-age residents who cannot legally consent is considered child abuse and must be reported to the proper agency.**

### §§ 115.76, 115.176, 115.276, & 115.376 Disciplinary sanctions for staff.

The draft regulations create a presumptive sanction for some forms of sexual abuse, but not for indecent exposure or voyeurism by a staff member. We strongly urge that a presumption of termination be required for employees found to have committed **any** form of sexual abuse, including indecent exposure and voyeurism. Sexual abuse in any form is serious, harmful, and inexcusable for correctional or detention officers. Moreover, these types of sexual abuse are often precursors to acts of sexually abusive touching or penetration. Retention of employees found to have committed any form of sexual abuse puts inmates

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<sup>61</sup> We use the term "statutory rape" to refer to any voluntary sexual activity between similarly aged youth that solely because of their age or relative ages, is unlawful in that state and therefore falls under the definition of resident-on-resident sexual abuse.

<sup>62</sup> See U.S. Department of Health and Human Services, *Statutory Rape: A Guide to State Laws and Reporting Requirements*, 10-11 (2004), available at: <http://www.4parents.gov/sexrisky/statutoryrapelaws.pdf>. While in many states staff members are not mandated to report every incident of statutory rape between residents, staff members in every state are mandated to report *all* allegations or suspicions of staff-on-resident sexual abuse, including incidents that a resident says was consensual.

and residents at unnecessary risk of further and escalating victimization and does not support the regulations required zero-tolerance approach to sexual abuse

*Proposed revision to §§ 115.76, 115.176, 115.276, & 115.376:*

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual **abuse** ~~touching~~.

### **§§ 115.77, 115.277, & 115.377 Disciplinary sanctions for inmates.**

We strongly support the inclusion of an explicit statement in this draft regulation that consensual sexual activity does not constitute sexual abuse and should not be punished as such. This distinction prevents facilities from using their limited resources to investigate and file reports of abuse for consensual sexual activity between inmates or residents that would not be considered sexual abuse in any other setting. We also support the draft regulation's clarification that good faith reports of sexual abuse that are unsubstantiated do not constitute a false report or lying. However, we are concerned that the draft regulation, in permitting facilities to discipline inmates and residents for sexual contact with a staff member if the staff member did not consent, is too broad and could be used by staff members to threaten an inmate or resident whom they are actually abusing. We urge the Department to require a finding of force or threat of force, in addition to lack of consent, before supporting punishment for inmates and residents.

#### *Support for this draft regulation*

Congress intended PREA to address sexually abusive behavior and not consensual sexual contact. We support the Department's inclusion of paragraph (g) in this regulation which explicitly states that any prohibition of inmate-on-inmate (and resident-on-resident) sexual activity shall not consider consensual sexual activity to constitute sexual abuse. Similarly, we strongly support the Department's removal of consensual sexual conduct from the Commission's definition of resident-on resident sexual penetration. These changes will go a long way in preventing the misuse of these regulations to inappropriately punish LGBTI youth and adults. This clarification is also necessary to distinguish between the serious harms and trauma of sexual abuse that PREA is intended to prevent and a facility's penological interest in preventing sexual activity between inmates or residents.<sup>63</sup> It also ensures that facilities do not further penalize and pathologize consensual same-sex sexual activity.

We also support the inclusion of language prohibiting facilities from treating unsubstantiated good faith allegations of sexual abuse as a false incident report. The fact that an incident could not be proven does not mean that it did not occur. It is often difficult to gather evidence related to reports of sexual abuse due to a facility culture that prevents other residents or inmates from feeling safe to speak out. In addition, even though corrections staff would face discipline under the standards for withholding information related to the sexual abuse of an inmate or resident, corrections staff may still choose to stand by their colleagues regardless of the situation. As inmates and residents may be released or transferred, investigators may be unable to locate important witnesses. Inmates and residents should not be punished for the failure of investigators to locate evidence, in cases where the inmate's allegation was made in good faith. The Commission cited a report by BJS that found that the majority of allegations of sexual

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<sup>63</sup> While some facilities may prefer to treat all sexual conduct as sexual abuse so that facility staff do not have to discern whether or not sexual conduct between inmates was abusive, this concern is misplaced. The regulations require facility staff to report *any* suspicion of sexual abuse, leaving it to trained investigators to determine whether the conduct constituted sexual abuse for purposes of the PREA-mandated responses.

abuse – 55 percent – were “unsubstantiated,” and noted that “[t]here is no reason to believe . . . that extremely low substantiation rates are attributable to a high number of false allegations.”<sup>64</sup>

#### *Discipline for sexual contact with staff*

We are concerned that allowing agencies to discipline an inmate or resident for sexual contact with staff based upon a finding that the staff member did not consent to such conduct will result in inmates and residents receiving discipline when in fact they were the ones who were sexually abused. While sexual assaults against staff members should always be taken seriously, as written, this regulation creates the opportunity for a perpetrating staff member to retaliate against a victimized inmate or resident by claiming that the sexual activity was not consensual. Such risk of retaliation and further punishment will further deter reporting. As the PREA final regulations will not govern investigations related to sexual abuse allegations made by a staff member against an inmate or resident, it is unclear whether facilities have sufficient procedures in place to adequately investigate such allegations made by a staff member. Requiring an additional finding of force or threat of force used against the staff member will help prevent facilities from disciplining inmates and residents in situations where they are actually the victim. It will also make it more difficult for abusive staff members to threaten an inmate or resident with discipline if he or she discloses sexual abuse.

#### *Proposed revisions to §§ 115.77 & 115.277:*

. . .

(e) The agency may discipline an inmate for sexual contact with staff only upon a finding that the staff member did not consent to such contact **and that the inmate used force or threat of force.**

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) Any prohibition on inmate-on-inmate sexual activity shall not consider consensual sexual activity to constitute sexual abuse.

### **§ 115.377 Disciplinary sanctions for residents. (juvenile facilities)**

In addition to the support and concerns discussed above, we remain concerned that without specific guidance on how staff should handle discipline for residents who engage in voluntary sexual conduct with other residents that is not legally consensual, facilities may fail to consider the voluntary nature of this conduct and harshly discipline these residents based on disapproval of same-sex sexual activity or bias.

We continue to be concerned that the inclusion of the words “who is unable to consent or refuse” in the definition of sexual abuse requires juvenile facilities to treat some voluntary sexual activity between residents as sexual abuse because state law criminalizes such behavior based on the age or relative ages of the youth involved. The regulations do not provide any guidance regarding the effect of age of consent laws on the way facilities should handle incidents of voluntary sexual contact between residents that fall under the regulations’ definition of sexual abuse.<sup>65</sup> Without this guidance, we are concerned facilities will

<sup>64</sup> *Commission Report, supra* note 2, at 118.

<sup>65</sup> The inclusion of the words “who is unable to consent or refuse” in the definition of resident-on-resident sexually abusive contact would require juvenile facilities to treat some voluntary sexual activity between residents as sexual abuse solely because of the age or relative ages of the youth involved. We strongly disagree with the treatment of voluntary, non-coercive sexual conduct between similarly aged youth as sexual abuse. However, because state law makes this conduct illegal in certain states, we recognize that this may not be the forum to seek this change.

use the regulations to target LGBTI youth for harsh sanctions, and even prosecutions, for engaging in voluntary sexual contact with similarly aged residents that is technically considered nonconsensual under state law.

When sexual contact between similarly aged youth is voluntary but legally non-consensual due to a state's age of consent laws, the voluntary nature of the contact should be taken into account as a mitigating factor in any disciplinary process. Unfortunately, many facilities have failed to do this. According to a report by the Bureau of Justice Statistics, 35 percent of all substantiated incidents of sexual abuse between residents in juvenile facilities in 2005-06 were technically voluntary sexual contacts.<sup>66</sup> 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).<sup>67</sup> Facilities need additional guidance to prevent them from misapplying the regulations in cases of voluntary sexual contact between similarly aged youth. This regulation should discourage the use of harsh sanctions to punish 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. In addition, interventions for "victims" and "perpetrators" of voluntary sexual contact should not be more punitive than those for sexual contact that is forced, aggressive, or violent.

*Proposed revisions to § 115.377:*

- (a) Residents shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the resident engaged in resident-on-resident sexual abuse or following a criminal finding of guilt for resident-on-resident sexual abuse.
- (b) Sanctions shall be commensurate with the nature and circumstances of the abuse committed, the resident's disciplinary history, and the sanctions imposed for comparable offenses by other residents with similar histories.
- (c) The disciplinary process shall consider whether a resident's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.
- (d) In cases involving residents who engage in voluntary, though legally non-consensual sexual contact with other residents, the disciplinary process shall take into account the voluntary nature of this conduct as a mitigating factor when determining what type of sanction, if any, should be imposed. In addition, interventions for "victims" and "perpetrators" of voluntary sexual contact should not be more punitive than those for sexual contact that is forced, aggressive, or violent.**
- ~~(e)~~ (e) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to require the offending resident to participate in such interventions as a condition of access to programming or other benefits.
- ~~(f)~~ (f) The agency may discipline a resident for sexual contact with staff only upon a finding that the staff member did not consent to such contact **and that the resident used force or threat of force.**

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<sup>66</sup> A.J. Beck et al., *Sexual Violence Reported by Juvenile Correctional Authorities, 2005-06* (Bureau of Justice Statistics, July 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrjca0506.pdf>.

<sup>67</sup> *Id.* at 11.

(f) (g) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) (h) Any prohibition on resident-on-resident sexual activity shall not consider consensual sexual activity to constitute sexual abuse.

### **§ 115.381 Medical and mental health screening; history of sexual abuse. (juvenile facilities)**

The draft regulation no longer requires that qualified medical or mental health staff talk with residents during the reception and intake process to ascertain information regarding sensitive topics such as past victimization and sexual orientation and gender identity. Without this requirement, residents are less likely to disclose information during the intake and classification process that would help a facility to identify a resident as vulnerable to abuse. We believe it is important to have medical and mental health staff asking about these things during the intake process in facilities where medical practitioners complete intake assessments, as residents may feel more comfortable opening up to medical staff and medical staff will be able to provide the resident with supportive services more immediately than other staff. Accordingly, we encourage the Department to include in its final regulation a statement that in facilities where medical and mental health staff conduct assessments during intake, medical or mental health staff and not other staff should talk with residents about these sensitive topics.

We appreciate that the Department did not explicitly include the Commission's recommended requirement that medical and mental health practitioners question youth about their past criminal/offending behavior, since this puts these professionals in the awkward situation of quizzing youth about past criminal acts when they are trying to develop trusting relationships with them, which are necessary for disclosure of important health and mental health information. However, the language that now appears in this draft regulation is unclear because it inserts a requirement that "the facility" question youth about prior sexual abusiveness in a regulation about medical and mental health screening, which may lead facilities to think that medical and mental health staff must ask these questions. It is not necessary for the Department to include a requirement that "the facility" ask about prior sexual abusiveness in this regulation since § 115.342(4) already requires facilities to ascertain this information. Therefore, we recommend that the Department either delete § 115.381(c) or move the text to § 115.342.

#### *Proposed revisions to § 115.381:*

(a) All facilities shall ask residents about prior sexual victimization during the intake process or classification screenings.

**(b) In facilities where medical or mental health practitioners conduct medical and mental health screenings as part of the intake or classification process, these practitioners, not other facility staff, shall ask questions about the resident's sexual orientation, gender identity, prior sexual victimization, mental health status, intersex status, or mental or physical disabilities.**

(b) (c) If a resident discloses prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the resident is offered a follow-up reception with a medical or mental health practitioner within 14 days of the intake screening.

~~(c) Unless such intake or classification screening precedes adjudication, the facility shall also ask residents about prior sexual abusiveness.~~

(d) If a resident discloses prior sexual abusiveness **during the intake or classification process**, whether it occurred in an institutional setting or in the community, staff shall ensure that the resident is offered a follow-up reception with a mental health practitioner within 14 days of the intake screening.

**§§ 115.82, 115.182, 115.282, & 115.382 Access to emergency medical and mental health services.**

We strongly support the Department's inclusion of a requirement that victims of sexual abuse be offered information about and access to pregnancy related medical services and prophylactic treatment for sexually transmitted infections in prisons, jails, community corrections, and juvenile facilities. We urge the Department to include this requirement for lockups too.

*Proposed revisions to § 115.182:*

**(c) Detainee victims of sexual abuse while in lockups shall be offered timely information about and access to all pregnancy-related services that are lawful in the community and sexually transmitted infections prophylaxis, where appropriate.**

**§§ 115.83, 115.283, & 115.383 Ongoing medical and mental health care for sexual abuse victims and abusers.**

The draft regulation requires the administration of medical and mental health evaluation and treatment, but does not explicitly require facilities to offer confidential testing for sexually transmitted infections. We urge the Department to provide testing for HIV and other STIs to victims of sexual abuse, as well as counseling regarding transmission and treatment of HIV and other STIs. Prior to the administration of testing, inmates and residents must be provided with pre-test counseling and informed written consent must be obtained from the inmate. In addition, post-test counseling must be provided to each inmate to whom such a test is administered. Finally, victims should not be required to have such testing and should not be punished for choosing not to do so.

*Proposed revisions to §§ 115.83, 115.283, & 115.383:*

...

**(e) All inmate victims of sexual abuse while incarcerated shall be offered access to confidential testing for sexually transmitted infections (STIs). Appropriate pre- and post-test counseling shall be provided and informed written consent must be obtained from the inmate.**

~~(e)~~ **(f)** Inmate victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.

~~(f)~~ **(g)** If pregnancy results, such victims shall receive timely information about and access to all pregnancy-related medical services that are lawful in the community.

**(h) Facilities shall not punish inmate victims who refuse testing for HIV or other STIs.**

## §§ 115.86, 115.186, 115.286, & 115.386 Sexual abuse incident reviews.

We support the requirement that incident reviews address whether an incident of abuse was motivated by characteristics of the victim, including sexual orientation (we recommend expanding this to include lesbian, gay, bisexual, transgender or intersex identification or status), or motivated or otherwise caused by other group dynamics at the facility. However, we have some concerns about other parts of this proposed regulation. First, we are concerned that the regulation also includes characteristics of the perpetrator as possible motivating factors for the abuse. We question how an inmate's sexual orientation or race or ethnicity could motivate or cause him or her to engage in sexual abuse. And we worry that this language will cause confusion among staff in cases of LGBTI perpetrators, leading them to erroneously report that these perpetrators' gay or lesbian sexual orientation, for example, motivated or caused the abuse. Similarly, staff who have ethnic or racial prejudices might erroneously report that it was the perpetrator's own ethnicity or race that motivated or caused him or her to abuse another inmate. We therefore recommend removing the reference to the perpetrator's race, ethnicity, or sexual orientation. We also are concerned about the reference to incidents being "caused by" the victim's race, ethnicity or sexual orientation. This language could be understood to suggest that such characteristics of the victim are to blame for the abuse that occurred and, thus, such abuse is to be expected and cannot be prevented. We would therefore recommend removing it.

*Proposed revisions to §§ 115.86, 115.186, 115.286, & 115.386:*

(2) Consider whether the incident or allegation was motivated ~~or otherwise caused by the perpetrator or~~ victim's race; ethnicity; ~~sexual orientation,~~ **lesbian, gay, bisexual, transgender, or intersex identification or status;** or gang affiliation; or **was motivated or otherwise caused by** other group dynamics at the facility.

## §§ 115.93, 115.193, 115.293, & 115.393 Audits of standards.

Monitoring compliance with the PREA regulations is vital to ensuring that they are taken seriously. The pervasive bias and disregard with which many facilities currently treat LGBTI individuals underscores the need for systematic monitoring. Conditions within a system can vary dramatically from one facility to the next. Only by visiting each facility can the monitor ensure that dangerous conditions do not exist. We urge the Department to ensure that every facility is visited by an outside monitor at least once during the triennial audit period. At the very least, the Department should require that (1) every facility has its policies, data, staffing plans and other documents assessed for compliance with the standards, (2) monitors visit a select number of facilities – chosen for cause and randomly – and have full all access to all areas of each facility, and (3) inmates are able to communicate confidentially with outside monitors.

The Department's definition of "independent" – which allows the audits to be conducted by an entity that reports to the agency head or the agency's governing board – is too broad and compromises the integrity of the auditing process. We urge that the final regulation require all reviews and visits to be performed by an entity that is structurally external to the corrections agency being audited, and by individuals who have no recent relationship with the agency. The auditing team must have a victim-centered approach with expertise in both corrections and sexual violence.

*Proposed revisions to §§ 115.93, 115.193, 115.293, & 115.393:*

(a) An audit shall be considered independent if it is conducted by:

(1) A correctional monitoring body that is not part of the agency but that is part of, or authorized by, the relevant State or local government; **or**

~~(2) An auditing entity that is within the agency but separate from its normal chain of command, such as an inspector general or ombudsperson who reports directly to the agency head or to the agency's governing board; or~~

~~(3) Other outside individuals with relevant experience.~~

...

(e) The Department of Justice shall prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of facilities, review of documents, and interviews of staff and inmates. The Department of Justice also shall prescribe the minimum qualifications for auditors **that incorporate sufficient training and/or expertise in corrections, the dynamics of sexual violence among inmates, and interviewing traumatized inmates.**

(f) The agency shall enable the auditor to **make unannounced visits;** enter and tour **all areas of any facility ies, including contract facilities;** review documents; **review the sufficiency, feasibility of and compliance with the agency's supervision and monitoring plans developed under § 115.13; review the sufficiency and use of agency- and facility-level PREA coordinators under § 115.11;** and **conduct private, confidential** interviews with staff and inmates, **as deemed appropriate by the auditor** to conduct a comprehensive audit. **The auditor must have access to all documents and any staff member or inmate, including inmates held in protective custody or solitary confinement.**

(g) **During each triennial auditing cycle, every facility shall be visited and have its policies, records, data and other documents assessed for compliance with the standards. All facilities must ensure that staff and inmates are aware of the audit process and have a reasonable means to contact the auditor confidentially, regardless of whether there will be a facility visit.**

~~(h)~~ (h) The agency shall ensure that the auditor's final report is **provided to the Department of Justice, made available to staff, inmates, and parents/guardians of juveniles,** and published on the agency's website if it has one or is otherwise made readily available to the public.

## Application to immigration detention

The Department's exclusion of immigration detention from its proposed standards is inexcusable. The hundreds of thousands of men, women, and children held each year by the Department of Homeland Security and the Office of Refugee Resettlement are among the most vulnerable to abuse and are often exceptionally isolated. Unaccompanied minors are at particularly grave risk for sexual abuse. Histories of abuse in their home countries and/or during their journeys to the U.S. make unaccompanied minors especially vulnerable; many are victims of human trafficking, brought to the U.S. for sexual exploitation or forced labor.<sup>68</sup>

<sup>68</sup> *Commission Report, supra* note 2, at 178 (quoting Sergio Medina, Field Coordinator with Lutheran Immigration and Refugee Service).

US Immigration and Customs Enforcement's (ICE) own detention standards are incomplete, are subject to modification by collective bargaining, are not uniformly applied across ICE facilities, and lack the force of law. ICE's current standards lack the critical protections for LGBTI detainees included in the PREA regulations, and also lack key provisions on reporting, investigations, and response services related to sexual abuse.

PREA's legislative history clearly reflects Congress' intent for the law's application to both criminal and civil detention, particularly in the immigration context.<sup>69</sup> Consistent with the law's intent, federal entities charged with implementing PREA included immigration detention in their mandate. Moreover, the exclusion of immigration facilities from the regulations would lead to anomalous and unjustifiable results; an immigration detainee in a local jail would be protected from sexual abuse by PREA but would lose that protection if transferred to an ICE facility. It is inconceivable that Congress intended PREA protections for immigration detainees to depend on the facility that confines them. The final regulations should apply in full to all facilities that house immigration detainees.

*Proposed revision:*

General definitions (§ 115.5) should be revised appropriately to ensure that the final rules apply to all facilities that house immigration detainees.

## **Removal of juveniles from adult facilities**

We strongly support the Department's general recognition that youth are different from adults, and therefore need specific protections. Because of adolescents' stage of development and cognitive and social immaturity, youth have characteristics that make them particularly vulnerable to abuse. In fact, the Commission's report found that youth in adult facilities are at the highest risk of sexual assault of all inmates. Adult facilities housing children and adolescents 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. Neither option is safe or appropriate for youth, nor is either a good practice for corrections agencies ill-equipped to address the unique needs of minors. We believe the Department should prohibit the placement of youth in adult jails and prisons in the final regulations as a way to reduce the sexual abuse of youth.

## **Conclusion**

The sexual abuse of LGBTI people in prisons, jails, lockups, community corrections facilities, and juvenile facilities must stop. Sexual violence in U.S. detention facilities has reached crisis proportions and strong regulations are desperately needed to protect all inmates and residents from the devastation of

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<sup>69</sup> U.S. House Committee on the Judiciary, *Report on the Prison Rape Reduction Act of 2003*, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., H. Rept. 108-219, 14, 115 (2003) available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr219.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr219.108.pdf). Senator Kennedy, a lead cosponsor of PREA, noted his intent for the law to protect immigration detainees in his remarks at the first hearing of the National Prison Rape Elimination Commission. See *The Cost of Victimization: Why Our Nation Must Confront Prison Rape*, Hearing Before the National Prison Rape Elimination Commission (June 14, 2005), available at [http://www.cybercemetery.unt.edu/archive/nprec/20090820160727/http://nprec.us/docs/SenatorEdwardKennedyRemarks\\_Vol\\_1.pdf](http://www.cybercemetery.unt.edu/archive/nprec/20090820160727/http://nprec.us/docs/SenatorEdwardKennedyRemarks_Vol_1.pdf).

sexual abuse. The Department's draft regulations go a long way in making clear that no court sentence, regardless of the offense, should ever include sexual victimization. We strongly urge the Department to strengthen the noted regulations to ensure that all people in detention receive the basic protections from sexual abuse contemplated under PREA.

Please contact us if you have questions about our recommendations or other concerns regarding LGBTI inmates or residents. Thank you for your consideration.

Sincerely,

Sarah Bergen  
Staff Attorney  
National Juvenile Defender Center & the Equity Project

M. Dru Levasseur  
Transgender Rights Attorney  
Lambda Legal Education & Defense Fund

Jody Marksamer  
Staff Attorney & Youth Project Director  
National Center for Lesbian Rights

Laura W. Murphy  
Director, Washington Legislative Office  
American Civil Liberties Union

Chase Strangio  
Staff Attorney & Equal Justice Works Fellow  
Sylvia Rivera Law Project

Harper Jean Tobin  
Policy Counsel  
National Center for Transgender Equality

Kristina Wertz  
Legal Director  
Transgender Law Center

## Appendix A: Organization Descriptions and Contact Information

All of our organizations are committed to policy reforms that protect LGBTI people in jails, prisons, lock-ups, and immigration detention; improve the conditions of confinement for LGBTI youth held in juvenile facilities; and ensure that LGBTI individuals in community corrections facilities are kept safe. Many of our organizations have extensive experience working to improve conditions of confinement for LGBTI adults and youth in correctional facilities. Please feel free to contact us if you have questions about our recommendations or other concerns relating to LGBTI people.

- The **American Civil Liberties Union (ACLU)**, founded in 1920, is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to protecting the constitutional rights and individual liberties of all Americans. The ACLU has long advocated on behalf of individuals in detention, primarily through its National Prison Project. Margaret Winter, Associate Director of the National Prison Project, testified before the Commission and served on its Standards Development Expert Committee. And the ACLU's Lesbian, Gay, Bisexual, Transgender and AIDS Project leads the organization's work to end discrimination on the basis of sexual orientation, gender identity and HIV-status.  
*Staff Contact:* Laura W. Murphy, Director, Washington Legislative Office, (202) 675-2304, [lmurphy@dcaclu.org](mailto:lmurphy@dcaclu.org)
- **The Equity Project** is an initiative to ensure LGBT youth in juvenile delinquency courts are treated with dignity, respect, and fairness. The Equity Project examines issues that impact LGBT youth during the entire delinquency process, ranging from arrest through post-disposition, including detention. Core activities of The Equity Project include: gathering information from stakeholders about LGBT youth in juvenile delinquency courts and detention, identifying obstacles to fair treatment, reporting findings, and crafting recommendations for juvenile justice professionals. Partners of The Equity Project include Legal Services for Children, National Center for Lesbian Rights, and the National Juvenile Defender Center.  
*Staff Contact:* Sarah Bergen, Staff Attorney, (202) 452-0010, [SBergen@njdc.info](mailto:SBergen@njdc.info)
- **Lambda Legal Defense & Education Fund, Inc. (Lambda Legal)** is a not-for-profit civil rights organization dedicated to advancing the legal rights of lesbian, gay, bisexual and transgender individuals and those with HIV through impact litigation and public education.  
*Staff Contact:* M. Dru Levasseur, Transgender Rights Attorney, (212) 809-8585 ext. 224, [DLevasseur@lambdalegal.org](mailto:DLevasseur@lambdalegal.org)
- Founded in 1977, **the National Center for Lesbian Rights (NCLR)** is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. NCLR serves more than 5,000 people each year, in all fifty states, including hundreds of LGBT individuals who are incarcerated. NCLR has also engaged in precedent-setting litigation on behalf of transgender women in state and federal prisons and has drafted legislation and policies addressing conditions of confinement for LGBTI youth and adults in numerous jurisdictions. In August 2005, NCLR Youth Project Director, Jody Marksamer, testified in front of the Commission about sexual abuse perpetrated against LGBT youth and adults in detention.  
*Staff Contact:* Jody Marksamer, Youth Project Director and Staff Attorney, (415) 365-1308, [jmarksamer@nclrights.org](mailto:jmarksamer@nclrights.org)
- The **National Center for Transgender Equality** is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy

on national issues of importance to transgender people. By empowering transgender people and our allies to educate and influence policymakers and others, NCTE facilitates a strong and clear voice for transgender equality in our nation's capital and around the country.

*Staff Contact:* Harper Jean Tobin, Policy Counsel, (202) 903-0112, [hjtobin@transequality.org](mailto:hjtobin@transequality.org)

- The **National Juvenile Defender Center (NJDC)** was created in 1999 to respond to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. In 2005, the NJDC separated from the American Bar Association to become an independent organization. NJDC's mission is to ensure excellence in juvenile defense and promote justice for all children, as all children are entitled to legal representation that is: client-centered; individualized; developmentally and age appropriate and free of bias. NJDC gives juvenile defense attorneys a more permanent capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile crime. NJDC provides support to public defenders, appointed counsel, law school clinical programs and non-profit law centers to ensure quality representation in urban, suburban, rural and tribal areas. NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination. Since 2005, NJDC has been deeply engaged in policy work related to LGBTI youth in the justice system as an Equity Project partner.  
*Staff Contact:* Sarah Bergen, Staff Attorney, (202) 452-0010, [SBergen@njdc.info](mailto:SBergen@njdc.info)
- The **Sylvia Rivera Law Project (SRLP)** 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 tied to racial, social and economic justice. We provide free civil legal services to low-income people and people of color who are transgender, gender non-conforming and intersex, 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. 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. SRLP have served well over 1200 clients since we opened in 2002, nearly 450 of whom have received our assistance in relation to police misconduct issues and/or mistreatment in an institutional setting, and has provided advice and referrals to hundreds of additional people who have contacted us from jails, prisons, and other forms of detention around the country.  
*Staff Contact:* Chase Strangio, Staff Attorney & Equal Justice Works Fellow, (212) 337-8550 ext. 302, [chase@srlp.org](mailto:chase@srlp.org)
- The **Transgender Law Center (TLC)** is a multidisciplinary civil rights organization advocating for transgender communities in California. Since 2002, TLC has used direct legal services, public policy advocacy, education and community building strategies to improve the lives of transgender people. TLC serves over 1,300 people per year and is regularly contacted by transgender people in jails, prisons, and other detention facilities. In 2005, TLC founder Chris Daley testified in front of the Commission about sexual abuse of incarcerated transgender people.  
*Staff Contact:* Kristina M. Wertz, Legal Director, (415) 865-0176 ext. 302, [kristina@transgenderlawcenter.org](mailto:kristina@transgenderlawcenter.org)

## Appendix B

### Examples of Policies for Management of Transgender Inmates and Residents:

#### SEARCHES OF TRANSGENDER INMATES AND RESIDENTS

##### New York Office of Children and Family Services PPM 3442.00 LGBTQ Youth – March 17, 2008

###### SECTION XVII: SEARCH ISSUES

A. All youth will be searched as provided by OCFS policy and procedure. Per OCFS policy, all employees conducting the search must assure its thoroughness while maintaining the dignity of the resident being searched.

B. Transgender youth may request that male or female staff conduct a strip search when such search is required. This request will be accommodated, whenever possible, considering staffing and safety needs.

##### District of Columbia Metropolitan Police Department General Order PCA 501-02 – October 16, 2007

###### Searching of Transgender Arrestees

Generally speaking, all arrestees, including transgender arrestees, will be searched on several different occasions by MPD personnel from the time of their arrest to the time they are released or transferred to the custody of the US Marshal's Service for presentment in court. The first search of a transgender arrestee will take place at the scene of the arrest before the person is transported to a MPD facility to be processed. MPD personnel who are involved with searching a transgender arrestee shall adhere to the following procedures:

a. When an arresting officer has reason to believe that the arrestee is a transgender individual, before searching that individual prior to transport to the station, the officer shall:

(1) Specifically inform the arrestee that he/she must, **and will be**, searched before being placed in a transport vehicle;

(2) Ask the arrestee if he/she has any objections to being searched by a male or female officer;  
and

(3) If the prisoner does object, inquire as to the nature of the objection.

b. If the arrestee states an objection to either the male or female gender, then, absent exigent circumstances, the arresting officer shall:

(1) Ask an officer who is of the gender requested by the arrestee to conduct the search; and

(2) Document the arrestee's objection (either by writing it in his or her notebook or by advising the dispatcher over the radio), indicating that he/she requested to be searched by a male/female officer (specifically indicating the stated preference).

- c. No MPD member shall refuse to search a transgender arrestee.
- d. In instances where the arrestee is uncooperative, or makes a claim with regard to his/her gender that is not credible:
  - (1) The arresting officer shall notify an official prior to searching the arrestee; and
  - (2) The official shall assess the situation and decide whether it shall be a sworn male or female MPD officer who conducts the search to facilitate the transportation of the arrestee.

**Cumberland County, Maine Sherriff's Office**  
Policy D-243A Transgender Inmates – December 2009

**Searches of Transgender Inmates**

1. Prior to searching a transgender inmate, when possible complete the Statement of Preference form C-120C to determine the sex of the staff member who will be conducting the search. All searches of the transgender inmate's person will be done by an officer of the gender requested by the transgender inmate. If the inmate does not specify a preference, then the search will be done an officer of the same gender as the transgender inmate's gender presentation (e.g. a female-to-male inmate expressing no preference should be searched by a male officer).

**United Kingdom Home Office**  
Police and Criminal Evidence Act Code A, Annex F – February 2011

- (a) If there is no doubt as to the sex of a person, or there is no reason to suspect that the person is not the sex that they appear to be, they should be dealt with as that sex.
- (b) A person who possesses a gender recognition certificate<sup>70</sup> must be treated as their acquired gender.
- (c) If the police are not satisfied that the person possesses a gender recognition certificate and there is doubt as to a person's gender, the person should be asked what gender they consider themselves to be. If the person expresses a preference to be dealt with as a particular gender, they should be asked to sign the search record, the officer's notebook or, if applicable, their custody record, to indicate and confirm their preference. If appropriate, the person should be treated as being that gender.
- (d) If a person is unwilling to make such an election, efforts should be made to determine the predominant lifestyle of the person. For example, if they appear to live predominantly as a woman, they should be treated as such.
- (e) If there is still doubt, the person should be dealt with according to the sex that they were born.

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<sup>70</sup> In order to qualify for a Gender Recognition Certificate in the UK, a person must have lived at least two years in his or her acquired gender. There are no additional medical or surgical requirements to qualify for this certificate. After receiving a Gender Recognition Certificate, the law will recognize individuals as having all the rights and responsibilities appropriate to a person of their acquired gender. UK police policy treats all people with a Gender Recognition Certificate according to their acquired gender and provides for individualized determinations regarding searches of transgender people without a Gender Recognition Certificate. For more information about Gender Recognition Certificates in the UK visit <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/gender-recognition-panel/things-to-consider.htm>

## Appendix C

### Examples of Policies for Management of Transgender Inmates and Residents:

#### HOUSING OF TRANSGENDER INMATES AND RESIDENTS

**New York Office of Children and Family Services**  
PPM 3442.00 LGBTQ Youth – March 17, 2008

##### SECTION IV: LGBTQ DECISION-MAKING COMMITTEE

Certain issues that require consideration of individual circumstances are to be referred to the LGBTQ Decision-making Committee (Decision-making Committee) for determination.

**A.** The issues to be referred to the Decision-making Committee include placement of youth in or transfer to a facility based upon sexual orientation, gender identity or gender expression, and the wearing of a uniform (other than undergarments) that is consistent with a youth's identified gender.

**B.** When facility staff receive a request from a youth concerning either of these issues, the request should be referred immediately to the Bureau of Behavioral Health Services, along with all relevant reports and facility records. The Bureau of Behavioral Health Services will acknowledge the request and initiate an assessment within one week. The youth will receive a response to his or her or request within two weeks.

**C.** The Decision-making Committee is comprised of staff from the Office of the Ombudsman, the Division of Legal Affairs (DLA), and the Division of Juvenile Justice and Opportunities for Youth (DJJOY), including administrative, behavioral health, medical services personnel, and designated facility staff, with assistance from LGBTQ consultants.

**D.** An LGBTQ Appellate Review Committee, comprised of the Executive Assistant to the Commissioner, the Deputy Commissioner for DJJOY, and the Deputy Commissioner for DLA and General Counsel, is available, upon request, to review the decision of the Decision-making Committee. The LGBTQ Appellate Review Committee will respond to a youth's appeal from the decision of the Decision-making Committee within one week.

**District of Columbia Department of Corrections**  
Program Statement No. 4020.3 – February 20, 2009

##### HOUSING

a. After completion of the initial intake process, an inmate identified as transgender or intersex shall be housed as a protective custody inmate in a single cell in the intake housing unit consistent with the gender identified at intake for no more than seventy-two (72) hours, excluding weekends, holidays and emergencies, until classification and housing needs can be assessed by the Transgender Committee.

In accordance with *PS 4090.3C Classification and Reclassification*, all transgender and intersex inmates will be classified and assigned housing based on their safety/security needs, housing availability, gender identity and genitalia. Intake staff shall assess the transgender and intersex inmates for potential vulnerability in the general population and refer them to the Transgender Committee.

b. As part of the housing assessment for vulnerability, the Transgender Committee shall determine the transgender inmate's housing assignment after review of all of the inmate's records and assessments and an interview with the inmate. The Committee shall ask the inmate his or her own opinion of his or her vulnerability in the general jail population of the male or female units. This information shall be taken into consideration in determining the proper housing assignment. The Committee will attempt to reach consensus, ultimately relying on majority vote when needed. A written decision by the Transgender Committee shall be maintained in the inmate's medical record.

c. The Housing assessment shall determine if the inmate will be housed in the general population or in a protective custody unit of the gender consistent with their gender identity or genitalia. If the housing assignment differs from the Transgender Committee's written recommendation, the Warden shall justify the assignment in writing to the Director. Transgender and intersex inmates have the same right to appeal housing assignments as all inmates consistent with PS 4090.3C Classification.\

## **Cumberland County, Maine Sherriff's Office**

### **Policy D-243A Transgender Inmates – December 2009**

#### **Housing Assignment**

1. After the completion of intake and the inmate has been identified as transgender or intersex, they shall be housed in one of the intake side cells on protective custody status consistent with the inmate's gender declaration for no more than 72 hours, excluding weekends and holidays until the Transgender Review Committee can arrange for their housing needs.

2. All transgender and intersex inmates shall be classified based on security and safety needs, housing availability and gender identity.

3. The Transgender Review Committee shall determine if the inmate is to be housed in general population or in protective custody. The review committee will be comprised of the Jail Administrator or designee, a management member of the Medical Unit, a Classification Technician and a member of the security staff. The Transgender Review Committee will meet to decide appropriate housing within 72 hours of arrest not including weekends or holidays. The Transgender Review Committee will consider the following including but not limited to:

A. Institutional history (discipline, predator or prey behavior);

B. Charges;

C. Length of stay;

D. Inmate's identity preference;

E. Medical input/plan

F. Inmate has marked or severe symptoms of a mental or physical illness that may require special housing.

4. The Transgender Review Committee shall avoid blanket housing policies, such as automatically putting all transgender inmates in segregation or automatically housing transgender inmates in the general population by gender identity.

5. While housed at the Cumberland County Jail transgender, intersex and transsexual inmates shall not be discriminated against and shall not be subject to verbal or physical harassment or a hostile environment.

6. Inmates shall have the right to submit in writing to the Captain of Security/designee when in disagreement with assigned housing.

## United Kingdom Ministry of Justice

PSI 07/2011 Care and Management of Transsexual Prisoners – March 2, 2011

### 1. Location within the estate

- 1.1. Prison Rule 12(1) provides that women prisoners should normally be kept separate from male prisoners.
- 1.2. In most cases prisoners must be located according to their gender as recognised under UK law. Where there are issues to be resolved, a case conference must be convened and a multi-disciplinary risk assessment should be completed to determine how best to manage a transsexual prisoner's location. See Annex D for more details.
- 1.3. A male to female transsexual person with a gender recognition certificate<sup>71</sup> may be refused location in the female estate only on security grounds – in other words, only when it can be demonstrated that other women with an equivalent security profile would also be held in the male estate. In such circumstances she will be considered a female prisoner in the male estate and must be managed according to PSO 4800 Women Prisoners.
- 1.4. A female to male transsexual person with a gender recognition certificate may not be refused location in the male estate. This is because there are no security grounds that can prevent location in the male estate.
- 1.5. If a prisoner requests location in the estate opposite to the gender which is recognised under UK law, a case conference must be convened to consider the matter. The case conference will consider all relevant factors and make a recommendation to a relevant senior manager above establishment level who will make the final decision. If there is any doubt, it is advisable to seek legal advice from the Offender Management Team in the Ministry of Justice Legal Directorate.
- 1.6. Before a prisoner is placed in custody, attempts must be made to determine which gender is recognised under UK law. This is a legal issue rather than an anatomical one, and under no circumstances should a physical search or examination be conducted for this purpose. If attempts are unsuccessful, the prisoner should be placed according to the best evidence available and the prisoner's gender status must be determined as soon as possible. If it emerges that a prisoner has been placed in the estate opposite to the legally recognised gender, a transfer must be arranged as soon as possible unless the prisoner requests location in this estate.

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<sup>71</sup> In order to qualify for a Gender Recognition Certificate in the UK, a person must have lived at least two years in his or her acquired gender. There are no additional medical or surgical requirements to qualify for this certificate. After receiving a Gender Recognition Certificate, the law will recognize individuals as having all the rights and responsibilities appropriate to a person of their acquired gender and their acquired gender becomes their legal gender under UK law. UK prisons treat all people with a Gender Recognition Certificate according to their acquired gender and provide for individualized determinations regarding housing for transgender prisoners who request placement in an estate opposite to their gender recognized under UK law. For prisoners whose legal gender is unclear, attempts must be made immediately to determine the individual's legal gender which is unrelated to their genital status. For more information about Gender Recognition Certificates in the UK visit <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/gender-recognition-panel/things-to-consider.htm>