

PREVENTING THE SEXUAL ABUSE OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX PEOPLE IN CORRECTIONAL SETTINGS

Comments Submitted in Response to
Docket No. OAG-131; AG Order No. 3143-2010
National Standards to Prevent, Detect, and Respond to Prison Rape

May 10, 2010



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Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

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

Dear Attorney General Holder,

On behalf of the National Center for Transgender Equality, the National Center for Lesbian Rights, the American Civil Liberties Union, the Transgender Law Center, and Lambda Legal Defense & Education Fund, we submit these comments in support of the recommended national standards for the prevention, detection, response, and monitoring of sexual abuse developed by the National Prison Rape Elimination Commission (“the Commission”). Individuals who are – or are perceived to be – lesbian, gay, bisexual, or transgender, or who have intersex conditions (LGBTI people) make up a significant percentage of those currently under the jurisdiction of the juvenile justice, criminal justice, and immigration detention systems.¹ 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.² Indeed, *Farmer v. Brennan*, 511 U.S. 825 (1994), upon which Congress relied in its findings supporting the Prison Rape Elimination Act, 42 U.S.C.A. § 15601 (13), concerned the failure of prison authorities to protect a transgender inmate from rape. Each day that passes without these critically important standards leaves LGBTI people in the care and custody of federal, state, and local governments at substantial risk of harm.

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. Since 2003, NCTE has been engaged in educating legislators, policymakers and the public, and advocating for laws and policies that promote the health, safety and equality of transgender people. NCTE provides

¹ See e.g., A. Beck, P. Harrison, and P. Guerino, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09* 11 (Bureau of Justice Statistics (Jan., 2010) (hereinafter *Sexual Victimization in Juvenile Facilities*), 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., 15911597 (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).

² See *infra* notes 4-13 and accompanying text.

informational referrals and other resources to thousands of transgender people every year, including many individuals in prisons, jails and civil detention settings.

Founded in 1977, the National Center for Lesbian Rights 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 incarcerated LGBT individuals. In August 2005, NCLR staff attorney Jody Marksamer, testified in front of the Commission about sexual abuse perpetrated against LGBT youth and adults in detention.

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.

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.

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.

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 under community supervision are kept safe.

In addition to urging the Department of Justice ("the Department") to promulgate the Commission's standards without delay, these comments speak to the need for all four sets of standards to account for the vulnerabilities of LGBTI individuals in detention. First, we discuss the heightened risk of sexual abuse faced by LGBTI people in correctional settings. Next, we express our support for the specific standards that we believe are especially important to the

prevention of the sexual abuse of LGBTI inmates.³ Then we highlight areas of concern in the Commission's standards and make recommendations that will enhance the overall capacity of the standards to protect LGBTI people from sexual abuse. Finally, we respond to the three questions posed in the Advance Notice of Proposed Rulemaking (ANPR).

I. LGBTI People in Detention are Particularly at Risk of Sexual Abuse.

Research on sexual abuse in correctional facilities consistently documents that men and women with non-heterosexual orientations, transgender individuals, and people with intersex conditions are highly vulnerable to sexual abuse.⁴ 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.⁵ Other studies that also have shown greater victimization rates for lesbian, gay, and bisexual inmates.⁶

In addition, research released by the Bureau of Justice Statistics (BJS) supports the Commission's concern that certain characteristics, including sexual orientation and gender identity, may be associated with higher vulnerability to sexual abuse. The BJS survey of youth in juvenile facilities found that more than one in five non-heterosexual youth reported sexual victimization involving another youth or facility staff.⁷ And non-heterosexual youth were almost ten times as likely as heterosexual youth to have reported they had been sexually abused by other youth while in custody (12.5 percent vs. 1.3 percent).⁸ In a similar study with adult inmates in county jails, having a sexual orientation other than heterosexual likewise resulted in significantly higher rates of sexual victimization.⁹

³ We use the term "inmate" as it is defined in PREA to mean, "any person incarcerated or detained in any facility who is accused or, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary programs."

⁴ NATIONAL PRISON RAPE ELIMINATION COMMISSION, *REPORT 73* (June 2009) (hereinafter *COMMISSION REPORT*) (citing W. S. WOODEN & J. PARKER, *MEN BEHIND BARS* (1982); V. Jenness et al., *Violence in California correctional facilities: An empirical examination of sexual assault*, (Center for Evidence-Based Corrections 2009); Struckman-Johnson & Struckman-Johnson, *supra* note 1). See also 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* (2007), available at: <http://srlp.org/files/warinhere.pdf>.

⁵ Struckman-Johnson & Struckman-Johnson, *supra* note 1, at 1597.

⁶ See, e.g. C. Hensley, R. Tewksbury, & T. Castle, *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 J. INTERPERSONAL VIOL. 595 (2003); C. D. Man, & J. P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop For "Deliberate Indifference,"* J. CRIM. L. AND CRIMINOL. 92 (2001/2002).

⁷ Beck et al., *Sexual Victimization in Juvenile Facilities*, *supra* note 1, at 11. In comparison, 11.1 percent of heterosexual youth reported such abuse.

⁸ *Id.*

⁹ A. Beck and P. Harrison, *Sexual Victimization in Local Jails, Reported by Inmates, 2007* 6 (Bureau of Justice Statistics June, 2008) (hereinafter *Sexual Victimization in Local Jails*), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljri07.pdf> (estimating that 2.7 percent of heterosexual inmates alleged

Other data starkly illustrate that transgender women and girls are highly vulnerable to sexual abuse, especially when housed in facilities for men or boys.¹⁰ For example, the University of California's Center for Evidence-Based Corrections found in 2007 that "Sexual assault is 13 times more prevalent among transgender inmates, with 59 percent reporting being sexually assaulted."¹¹ In this study, transgender victims were also far more likely than other victims to have been sexually assaulted on multiple occasions.¹² Such findings make clear that "[e]ven when compared to other relatively vulnerable populations, transgender people are perilously situated."¹³ Because of this concern, the American Psychological Association and the National Commission on Correctional Health Care have both issued statements recognizing that transgender inmates are at especially high risk of abuse and calling for their protection.¹⁴

The examples of sexual abuse of LGBT people below demonstrate just how vulnerable LGBT people are in all detention environments.

- Keith DeBlasio, a gay man, told officials that he felt vulnerable in the open dormitory at a federal prison and that he felt threatened by a gang member, but he and the gang member were housed together anyway. Keith was repeatedly raped by this man who threatened to stab him and used other gang members to intimidate him so that he would not fight back or report the abuse. Keith contracted HIV from this abuse.¹⁵
- Troy was a small, gender non-conforming 12 year old when he was first detained in a juvenile corrections facility. A few days after he was placed in a Los Angeles youth facility, a boy at the facility forced Troy to perform oral sex on him. Shortly thereafter, Troy was raped by another older boy. For the next twenty years, Troy was in and out of youth and adult facilities, where he was repeatedly sexually assaulted.¹⁶

an incident of sexual victimization, compared to 18.5 percent of inmates identifying as homosexual, and 9.8 percent of inmates identifying as bisexual or "other").

¹⁰ COMMISSION REPORT, at 148. See also Sylvia Rivera Law Project, *supra* note 4; Stop Prisoner Rape, *In the Shadows: Sexual Violence in US Detention Facilities* (2006), available at http://www.justdetention.org/pdf/in_the_shadows.pdf; Stop Prisoner Rape & ACLU National Prison Project, *Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners* (2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf>.

¹¹ V. Jenness et al., *Violence in California correctional facilities: An empirical examination of sexual assault 3*. (Center for Evidence-Based Corrections 2009) (emphasis added).

¹² *Id.* at 29-30.

¹³ L. Sexton, V. Jenness & J. Sumner, *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, JUSTICE QUARTERLY (in press/online edition), 22 (2009), available at <http://www.informaworld.com/10.1080/07418820903419010>.

¹⁴ See American Psychological Association Policy Statement, *Transgender, Gender Identity, and Gender Expression Non-Discrimination* (2008), available at <http://www.apa.org/about/governance/council/policy/transgender.aspx>; National Commission of Correctional Health Care, *Position Statement: Transgender Health Care in Correctional Settings* (2009), available at <http://www.ncchc.org/resources/statements/transgender.html>.

¹⁵ *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars*, Hearing Before the National Prison Rape Elimination Commission (August 13, 2005) (testimony of Keith DeBlasio).

¹⁶ Testimony of Troy Erik Isaac, House Crime Subcommittee hearing Keeping Youth Safe While in Custody – Sexual Assault in Adult and Juvenile Facilities, February 23, 2010, available at <http://judiciary.house.gov/hearings/pdf/Isaac100223.pdf>

- D.W. is a transgender woman who was incarcerated in a men’s prison in New York and was repeatedly raped by her cellmate who had been stalking and threatening her for months. When she finally gained the courage to report the abuse, she was given a disciplinary infraction for engaging in sexual activity.¹⁷
- Robin Lucas, a lesbian in a California prison on a first-time non-violent offense, was sent to segregation in a men’s prison. The male guards there harassed, taunted, and threatened her for being a lesbian. Guards allowed male prisoners into her cell to assault her and after she made a complaint the sexual abuse escalated. One evening three inmates entered her cell, handcuffed her, and raped her. Although she won a civil lawsuit against the prison, none of the guards or inmates involved were disciplined or criminally charged.¹⁸
- At the Krome Immigration Detention Center in Miami, Florida, a transgender woman named Christina was placed in solitary confinement because officials were unsure whether to house her with the men or with the women. The officer responsible for bringing her meals and watching over her cell-block attacked Christina, attempting to force her to perform oral sex on him. He then sodomized her until he heard another individual approaching. Even though Christina filed a report against the officer, he was allowed back in her cell where he raped her a second time. He was ultimately convicted of having sex with a detainee.¹⁹
- Kendall Spruce is a bisexual man who was raped by more than 25 other inmates over the course of nine months during his incarceration at an Arkansas state prison. He contracted HIV as a result of the attacks. Although he reported the abuse, prison officials failed to provide him with safe housing. Because of his sexual orientation, they told him that he must have enjoyed being raped.²⁰

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. If implemented, the Commission’s standards have the potential to improve the safety of all people, including LGBTI people, involved in the justice system. We ask that the Department adopt standards that will prevent the kinds of abuse suffered by Keith, Troy, D.W., Robin, Christina, and Kendall.

¹⁷ *D.W. v. Fischer*, Index No. 3127-09 (N.Y. Supr. Ct. 2009) (filed under seal).

¹⁸ See Amnesty International, *Crimes of Hate, Conspiracy of Silence* 30 (2001), available at <http://www.amnesty.org/en/library/info/ACT40/016/2001>.

¹⁹ Jody A. Benjamin, *Ex-Guard Gets Prison in Krome Sex Case*, SUN SENTINEL (June 25, 2001).

²⁰ *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars*, Hearing Before the National Prison Rape Elimination Commission (August 13, 2005) (testimony of Kendell Spruce).

II. Support for Specific Standards

To assist in developing its standards, the Commission reviewed the relevant literature; commissioned studies on sexual abuse; held public hearings; and consulted with corrections leaders and their staff, professional corrections associations, survivors of sexual abuse, health care providers, legal experts, and researchers. The Commission consulted people with expertise in the administration of the full range of corrections facilities, including many corrections administrators who had experience implementing practices in their jurisdictions that have proven effective at reducing the incidence of sexual abuse. As a result of the extensive input from a wide range of corrections experts, the Commission's standards reflect pragmatic solutions to the grave problem of sexual abuse. We are especially pleased to see that all four sets of standards recognize the well-documented vulnerabilities of LGBTI individuals to sexual abuse. Among the strengths of the Commission's standards that we strongly urge the Department to include in the final rules are the following:

- **Prevention Planning (PP) and Response Planning (RP)** standards make clear to officials that their facilities must have a zero tolerance approach to all forms of sexual abuse and clear protocols in place to be able to respond effectively to sexual violence if it occurs. Such provisions are especially important to LGBTI individuals since they are particularly vulnerable to sexual abuse and their reports of sexual abuse are often treated as less serious than are similar reports from non-LGBTI inmates and not given an appropriate response. Standards **RP-2**²¹ through **RP-4** (**RP-2** and **RP-3** for Lockups and **ID-1** for Immigration) further ensure that officials coordinate with the appropriate outside entities to promote the reporting, investigation, and prosecution of sexual abuse in their facilities.
- **Training and Education (TR)** will help employees, volunteers, contractors, and inmates know how to prevent, detect, and respond to incidents of sexual abuse. Comprehensive and well-crafted training is critical to fostering a better understanding of, and correcting the misconceptions about, LGBTI persons, and assisting staff and inmates with strategies to keep LGBTI inmates safe. We strongly support **TR-1's** requirement that staff training include strategies for communicating effectively and professionally with all inmates.
- **Screening for Risk of Sexual Victimization and Abusiveness (SC) and Assessment and Placement of Residents (AP)** will help ensure that facilities are aware of each individual's particular risk of victimization and that an inmate's sexual orientation, genital status, or gender identity does not subject that person to more punitive conditions. Given the heightened vulnerability to sexual abuse of LGBTI inmates, we strongly support the inclusion of a gay or bisexual sexual orientation and gender nonconformance (e.g. transgender or intersex identity) in the criteria for screening male inmates for risk of victimization in adult prisons and jails. And given the likelihood that some LGBTI individuals may choose not to disclose their sexual orientation or gender

²¹ References to specific standards refer to all four sets of standards, with exceptions noted in parenthesis.

identity during screening, we also strongly support the inclusion of inmates' self-perception of vulnerability in the screening of male and female inmates (**SC-1**). As discussed below, we believe these criteria must be in screening instruments for all facilities, including those used for female inmates and juvenile residents.

The importance of **SC-2** and **AP-2's** prohibition of segregation of vulnerable inmates except temporarily and as a last resort, and the requirement of equal access to programs and services, cannot be overemphasized. And the specific requirement in **SC-2** that lesbian, gay, bisexual, transgender and other gender nonconforming inmates may not be placed in particular facilities, units or wings solely on the basis of sexual orientation, genital status or gender identity will go a long way in helping to prevent the segregation of LGBTI inmates. As discussed below, the prohibition on this practice should also be included in Juvenile standard **AP-2**. Even when purportedly for their own protection, the involuntary segregation of LGBTI and other gender nonconforming inmates 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 individuals for their vulnerable status is unjust and harmful, promotes bias against LGBTI inmates, and discourages honest responses to screening questions.²²

- **Reporting (RE) and Official Response (OR)** standards respond directly to three of the most common reasons given by inmates for why they fail to report sexual abuse: they do not believe their reports “will be taken seriously, kept confidential, and/or result in any tangible positive consequences.”²³ These concerns are especially true for LGBTI individuals, who are often wrongly presumed to have instigated sexual abuse and whose reports of assault often are not credited.
- **Investigations (IN) and Discipline (DI)** standards will help ensure that all allegations of abuse, including third-party and anonymous reports, are fully investigated, and that substantiated allegations are properly handled in administrative and criminal proceedings. Far too often, perpetrators who target LGBTI inmates for abuse are able to act with impunity. These provisions will ensure that the sexual abuse of LGBTI inmates is treated just as seriously as other sexual abuse.
- **Medical and Mental Health Care (MM)** standards recognize the critical role that medical and mental health staff play in identifying an inmate's risk for victimization (**MM-1**), protect inmates from undue financial disincentives and burdens by ensuring

²² Inmates commonly explain their choice not to report sexual abuse by describing their fear of being placed in administrative segregation. Jenness et al., *supra* note 11 at 61. Similarly, a corrections facility that blindly classifies residents on the basis of sexual orientation, gender identity or gender nonconformance will discourage residents from reporting these risk factors. See Stop Prisoner Rape & ACLU National Prison Project, *supra* note 10 at 4 (discussing the overuse of segregation for transgender inmates).

²³ Jenness et al., *supra* note 11, at 62. See also Sylvia Rivera Law Project, *supra* note 4, at 24 (finding that incidences of harassment or abuse by fellow prisoners “were never without either the implicit permission or active participation of correctional officials”).

they have access to emergency and ongoing medical and mental health care free of charge (**MM-2**), and require that responsive services for victims achieve the level of care they would receive in the community (**MM-3**). LGBTI inmates may feel more comfortable disclosing abuse, or fear of abuse, to medical or mental health staff and need access to the basic level of care provided to survivors of sexual abuse in the community.

- **Data Collection and Review (DC)** standards properly require agencies to collect data and review the information, including both incident-based and aggregate data, to improve the effectiveness of prevention, detection, and response policies, practices, and training. These basic quality assurance practices help agencies identify patterns of victimization, learn from past problems, and improve protections for LGBTI and other vulnerable inmates.

We understand that some corrections officials have opposed the inclusion of specific Commission standards regarding the topics below, but these important standards represent the minimum steps necessary to prevent sexual abuse of LGBTI people; the Department cannot weaken them without seriously compromising the mandates of PREA. For the reasons that follow, all of the standards related to these topics should be maintained:

- **Inmate Supervision:** Because inmates who identify as or are perceived to be LGBTI are at heightened risk of sexual abuse, they often need heightened supervision that provides sufficient protection without amounting to punishment. Each set of the Commission’s 2008 draft standards required “continuous sight and sound supervision,” while the final Commission standard (**PP-3**) merely requires staff to provide the “supervision necessary to protect inmates from sexual abuse.” Contrary to the concerns of some corrections officials, the Commission’s standards neither require nor encourage the over reliance on cameras. Standard **PP-7 (PP-8 for Lockups)** calls for the use of appropriate, cost-effective technology based on a feasibility assessment and plan that accounts for an individual jurisdictions’ financial limitations. This flexible approach defers to local expertise and analysis and would therefore impose no significant expenses on facilities.
- **Cross-Gender Supervision:** We urge the Department to adopt standard **PP-4 (PP-5 for Lockups)** with the modifications recommended below regarding its application to transgender inmates. The BJS surveys of adult jail inmates and juvenile facility residents found that a significant percentage of sexual abuse is perpetrated by staff members of the opposite sex,²⁴ highlighting the importance of minimizing the physical contact inmates have with staff of the opposite sex. Rather than limiting cross-gender supervision in all areas where inmates disrobe or perform bodily functions – which, consistent with international human rights standards, is the norm in most other western countries – the final recommended standard only prohibits *actually viewing* inmates of

²⁴ Beck and Harrison, *Sexual Victimization in Local Jails*, *supra* note 13, at 9; Beck et al., *Sexual Victimization in Juvenile Facilities*, *supra* note 1, at 13.

the opposite gender who are nude or performing bodily functions and performing body cavity, strip and pat searches on inmates of the opposite sex. The standard also makes exceptions to this requirement in cases of emergencies or for other extraordinary or unforeseen circumstances. 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.

Notably, several courts have upheld limitations on cross-gender searches and supervision as a bona fide occupational qualification (BFOQ) in women's facilities.²⁵ In some jurisdictions, civil rights litigation has resulted in similar limitations being imposed, either as injunctive relief or upon recommendations pursuant to a CRIPA investigation by the DOJ.²⁶ The BJS studies actually found cross-gender staff sexual abuse more prevalent in men's facilities, so these basic measures are urgently needed in men's as well as women's institutions.

With respect to limitations on viewing, officers of the opposite gender can announce themselves before entering a dormitory area, and/or screens or towels can be provided for shower and toileting areas to allow for basic privacy without compromising security. Intrusive searches that require bodily exposure or physical contact can usually be limited to areas that serve as potential points of contact for contraband. While many facilities regularly conduct cursory pat searches throughout a facility, 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. **PP-4's** basic limitations on cross-gender viewing and searches represent the bare minimum necessary to protect LGBTI and other vulnerable inmates from staff sexual abuse.

- **Oversight and Accountability:** Because of the homophobia and transphobia that pervades corrections culture, outside review is vital to protecting LGBTI residents and inmates. Sound oversight, conducted by a qualified independent entity, can identify systemic problems while offering effective solutions. Standard **AU-1** mandates the essential components of independent oversight in a cost-efficient manner. Done properly, this outside monitoring will provide a credible objective assessment of a

²⁵ See, e.g., *Everson v. Mich. Dep't of Corrections*, 391 F.3d 737 (6th Cir. 2004) (holding that gender was a BFOQ for certain positions in Michigan's women's prisons, based in part on "the endemic problem of sexual abuse in Michigan's female facilities"); *Tharp v. Iowa Dep't of Corrections*, 68 F.3d 223 (8th Cir. 1995) (upholding facility's decision to exclude male employees from posts in female housing unit).

²⁶ See, e.g., Letter from Thomas Perez, Assistant Attorney General, Department of Justice, to Hon. Mitch Davis, Governor of Indiana 43 (Jan. 29, 2010) (recommending, among other things, that cross-gender strip searches be prohibited in non-emergencies); *Women Prisoners v. District of Columbia*, 877 F.Supp. 634, 679-81 (D.D.C. 1994) (ordering, among other things, that: male employees announce their presence when entering a female housing unit and not invade the privacy of women prisoners without a valid penological reason), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995) (vacating portions unrelated to sexual abuse allegations, modifying training and staff reporting provisions regarding sexual abuse claims and provisions concerning other issues).

facility's safety, identifying problems that may be more readily apparent to an independent monitor than to an official working within a detention system. Outside monitoring will also help make systems accountable when they do not meet the standards' requirements.

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

III. Recommendations to Enhance the Standards

Although we strongly support the Commission's standards, below are some important changes we believe are necessary to enhance the standards' capacity to fulfill the mandate of PREA and to prevent harm to LGBTI people in detention.²⁷

1. Viewing and Searches of Transgender and Intersex Inmates

While we strongly support the proposed limitations on cross-gender searches and viewing (Standard PP-4), we are concerned by the lack of guidance regarding how this standard applies to transgender and intersex inmates. At present, transgender women in particular are frequently searched by male staff, notwithstanding the fact that many transgender women have breasts and a feminine appearance, a practice that invites abuse. 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 are highly vulnerable to abuse by staff. The Commission heard testimony from two experts, Christopher Daley and Dean Spade, who testified that individuals from these groups are frequently targeted for unnecessary, abusive, and traumatic frisks and strip searches, and that these searches can

²⁷ We have proposed specific language to improve certain standards. The checklists associated with the standards we discuss should also be amended to conform to the improvements we propose.

be excuses for and precursors to sexual abuse.²⁸ This testimony is supported by reports from human rights organizations.²⁹

Accordingly, in order to be fully effective the restrictions on cross-gender viewing and searches *must* include guidance on how they should be applied to transgender and intersex inmates. As a best practice, facility staff should ask transgender and intersex inmates to name the gender of staff they feel most safe being searched by. This pragmatic approach is currently used by the District of Columbia Police Department and by the New York State Office of Children and Family Services in its juvenile facilities. Police departments in several Canadian jurisdictions, including Toronto, Vancouver, and Edmonton, have adopted this policy following a 2006 ruling by the Ontario Human Rights Commission.³⁰ A similar approach is used in numerous jurisdictions in the UK, including the London Metropolitan police, and has been approved by the Association of Chiefs of Police of Scotland.³¹ If there must be a general presumption about who should conduct searches and viewing of transgender prisoners, we recommend that all searches and viewing of transgender and intersex inmates be conducted by women 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.

As the Commission recognized, however, searches present a risk of abuse regardless of the staff conducting them. We therefore strongly urge that the standards include a clear requirement that strip searches and visual body cavity searches of any inmate be conducted only for legitimate, contraband-related purposes. Searches or medical examinations of inmates for the sole purpose of determining genital status should be prohibited. Such searches are inherently traumatic for transgender and intersex inmates and present a serious potential for abuse, even under the limited circumstances permitted in the proposed standards. In the very limited circumstances where this information is needed by a facility, it should be determined from the inmate, medical records, or other reliable sources, or during routine medical examinations.

Specific recommendations

- **PP-4 (PP-5 for Lockups): Limits to cross-gender viewing and searches** – We recommend replacing the final sentence of this standard with the following two sentences:

²⁸ *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars*, Hearing Before the National Prison Rape Elimination Commission (August 13, 2005) (testimony of Christopher Daly & Dean Spade)

²⁹ 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>.

³⁰ See *Forrester v. Peele* (Regional Municipality), [2006] O.H.R.T.D. No. 13; 2006 HRTO 13.

³¹ See Ass’n of Chiefs of Police of Scotland, *ACPOS Transgender People in Custody Guidance* § 4.5 (n.d.), available at http://www.acpos.police.uk/Documents/Policies/ED_TransgenderPeopleCustodyGuidanceV2.pdf.

Requests by transgender and intersex individuals to be searched by either male or female staff are accommodated whenever possible. Searches or medical examinations of transgender and intersex individuals solely to determine their genital status should not be conducted.

2. Screening for Risk of Sexual Victimization and Abusiveness

We strongly support the inclusion of the provision in SC-1 in the standards for Adult Prisons and Jails and Community Corrections, which requires screening of male inmates for a variety of established risk factors, including risk related to sexual orientation, gender identity and gender nonconformance. While fewer studies exist of women’s settings, the Commission found that “[l]esbian and bisexual women also are targeted in women’s correctional settings,” disproportionately to their numbers.³² Additionally, because abusers rarely distinguish between sexual orientation and gender identity or expression, and because both transgender men and transgender women may be placed in either men’s or women’s facilities, screening for gender identity and gender nonconformance-related vulnerability is also warranted in both men’s and women’s settings.

As the Commission rightly recognized in the discussion of SC-1, “[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.” Because inmates are not required to answer screening questions, we strongly recommend clarifying in the language of the standard that inmates should not be disciplined for their responses or lack of response to these questions. Pressuring inmates to disclose personal information such as sexual orientation could undermine trust between inmates and corrections staff, which is essential to allow inmates to report abuse.

Specific recommendations

- **SC-1: Screening for risk of victimization and abusiveness** – We recommend that Standard SC-1 for Adult Prisons and Jails and Community Corrections be revised to add the following text to the end of the first paragraph:

Inmates are not required to answer all screening questions and should not be disciplined if they do not disclose having a lesbian, gay, bisexual, or transgender identity or an intersex condition.

And this standard should be further revised to add the following text shown in bold:

At a minimum, employees use the following criteria to screen male inmates for risk of victimization: mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for

³² COMMISSION REPORT, at 74.

sex offenses against an adult or child, **gay or bisexual sexual orientation, transgender or intersex status**, gender nonconformance, prior sexual victimization, and the inmate's own perception of vulnerability.

...

At a minimum, employees use the following criteria to screen female inmates for risk of sexual victimization: prior sexual victimization, **lesbian or bisexual sexual orientation, transgender or intersex status, gender nonconformance**, and the inmate's own perception of vulnerability.

Although at this time there are no comprehensive studies identifying the characteristics of youth who are at greatest risk of being victimized in juvenile facilities, the Commission has identified some characteristics, including being LGBTI, that may be associated with higher vulnerability to sexual abuse. A recent BJS study of sexual victimization reported by youth, released after the publication of the standards, highlights this heightened vulnerability of these youth. The BJS survey found that more than one in five non-heterosexual youth reported sexual victimization involving another youth or facility staff.³³ And non-heterosexual youth were almost ten times as likely as heterosexual youth to have reported abuse by other residents while in custody (12.5 percent vs. 1.3 percent).³⁴ While the BJS survey did not ask about gender identity, the Commission found that transgender girls are especially vulnerable to abuse, especially when housed with boys.³⁵ 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.³⁶ Yet unlike standard SC-1 for Adult Prisons and Jails, standard AP-1 does not include transgender or intersex status or gender nonconformance as a required factor for screening. Also unlike the standards for Adult Prisons and Jails, AP-1 does not include a resident's own perception of vulnerability as a consideration during the screening process, despite the Commission's recommendation in its report that facilities "encourage all residents during intake to tell staff if they fear being abused."³⁷ These omissions weaken the Juvenile standard's effectiveness in addressing the extreme vulnerability of LGBTI residents.

It is also essential to ensure that sexual orientation and gender identity are never used as an indicator of potential abusiveness of residents in juvenile facilities. A fall 2009 report by the Equity Project found that professionals throughout the juvenile justice system routinely stereotype LGBT youth as sexually predatory, rather than as youth who are vulnerable to sexual

³³ A. Beck, P. Harrison, and P. Guerino, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09*. Bureau of Justice Statistics 11 (January, 2010), available online at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf>.

³⁴ *Id.* Twelve percent of the youth in the study reported a sexual orientation other than heterosexual. *Id.*

³⁵ *COMMISSION REPORT*, at 148.

³⁶ *Elimination of Prison Rape: Focus on Juveniles*, Hearing Before the National Prison Rape Elimination Commission (June 1, 2006) (testimony of Cyryna Pasion).

³⁷ *COMMISSION REPORT*, at 149.

abuse.³⁸ We recommend that, as in the adult standards, Juvenile standard AP-1 clearly state that sexual orientation, transgender or intersex status, and gender nonconformance are indicators for risk of victimization.

Specific recommendations

- **AP-1: Obtaining information about residents** – We recommend that this standard be revised to add the following text shown in bold to the second sentence of the standard:

At a minimum, employees attempt to ascertain information about prior sexual victimization or abusiveness; sexual orientation, **transgender or intersex status, or gender nonconformance**; current charges and offense history; age; level of emotional and cognitive development; physical size/stature; mental illness or mental disabilities; intellectual/developmental disabilities; physical disabilities; **the resident’s own perception of vulnerability**; and any other specific information about individual residents that may indicate heightened needs for supervision, additional safety precautions, or separation from certain other residents.

We recommend that the standard be further revised to add the following sentence to the end of the standard:

Facilities use information related to sexual orientation, transgender or intersex status, and gender nonconformance as indicators for heightened risk of victimization.

3. Individualized Classification Decisions

We strongly support the requirement in SC-2 of individualized classification decisions and especially the prohibition on placement in particular facilities, units or wings solely on the basis of sexual orientation, genital status, or gender identity. Individualized determinations are particularly important for transgender and intersex inmates. 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.” For this standard to be fully effective, it should also prohibit classification of LGBTI inmates solely on the basis of birth gender, as well as gender identity and genital status. Additionally, in the Commission’s recommendations regarding this standard, it “strongly urge[d] agencies to give careful thought and consideration to the placement of each transgender inmate and not to automatically place transgender individuals in male or female housing based on their birth gender or current genital status.” While the Commission’s Report states that this is already required by the proposed standard,³⁹ we recommend making this requirement explicit in the

³⁸ The Equity Project, *Hidden Injustice: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts* 104-106 (2009), available at http://www.equityproject.org/pdfs/hidden_injustice.pdf.

³⁹ COMMISSION REPORT at 74.

standard. If an intersex inmate disputes his or her initial classification in male or female housing, the standard should require that facility medical practitioners re-evaluate this classification based on the recommendation from a medical specialist experienced in diagnosis of intersex conditions.⁴⁰

As in secure facilities, vulnerable individuals in community corrections facilities may be subject to unnecessary limitations on their access to programs, education, and work opportunities. Access to these opportunities is especially critical for individuals who are transitioning back to the community. We strongly recommend that, as in the Adult Prisons and Jails Standards, Community Corrections Standard SC-2 specify that, to the extent possible, risk of victimization should not limit access to programs, education, and work opportunities.

Specific recommendations

- **SC-2: Use of screening information (Adult Prisons and Jails)** – We recommend that the following language shown in bold be added to this standard:

...The facility makes individualized determinations about how to ensure the safety of each inmate, **including whether to house a transgender or intersex inmate in a men’s or women’s setting. If an intersex inmate disputes his or her initial classification in male or female housing, facility medical practitioners re-evaluate this classification based on recommendations from a medical specialist experienced in diagnosis of intersex conditions.** Lesbian, gay, bisexual, transgender, **intersex**, or other gender-nonconforming inmates are not placed in particular facilities, units, or wings solely on the basis of their sexual orientation, genital status, **birth gender**, or gender identity.

- **SC-2: Use of screening information (Community Corrections)** – We recommend adding the following language shown in bold to this standard:

...Lesbian, gay, bisexual, transgender, **intersex**, or other gender-nonconforming defendants/offenders are not placed in particular housing assignments solely on the basis of their sexual orientation, genital status, **birth gender**, or gender identity.

We further recommend adding the following sentence to the end of this standard:

⁴⁰ In addition, we support the more detailed comments and recommendations for protecting intersex inmates from sexual abuse submitted separately by Advocates for Informed Choice (AIC). AIC is the first organization in the country to undertake a coordinated strategy of legal advocacy for the civil rights of children born with variations of reproductive or sexual anatomy (intersex conditions).

To the extent possible, risk of sexual victimization should not limit access to programs, education, and work opportunities.

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 general population. This practice essentially punishes LGBTI youth because they may be victimized by others and denies them access to the same privileges and programs as other residents. A prohibition on placing LGBTI inmates in segregated facilities is included in the Adult Standards and is as necessary, if not more necessary, in the juvenile context in order to ensure that LGBTI youth and other gender-nonconforming residents are not placed in segregated units, in isolation, or worse, in sex offender units as sometimes occurs. To ensure appropriate individualized determinations, Juvenile standard AP-2 should explicitly prohibit housing, bed, and other assignments based solely on sexual orientation, gender identity, birth gender or genital status. Because inappropriate placements of transgender girls greatly increases their risk of victimization, AP-2 also should explicitly require that facilities make an individualized determination as to whether a transgender or intersex resident will be housed in a boys' or girls' facility. Further, in order to protect the physical safety of intersex residents, the standard should also require facility medical practitioners to evaluate the appropriateness of an intersex resident's initial placement in boys' or girls' housing, based on the recommendations of a medical specialist experienced in diagnosis of intersex conditions.

Specific recommendations

- **AP-2: Placement of residents in housing, bed, program, education and work assignments** – We recommend adding the following after the second sentence of this standard:

Lesbian, gay, bisexual, transgender, intersex, or other gender-nonconforming residents are not placed in particular assignments solely on the basis of their sexual orientation, genital status, birth gender, or gender identity. The facility makes individualized determinations about whether a transgender resident will be housed in a boys' or girls' setting. Facility medical practitioners evaluate the appropriateness of an intersex resident's initial placement in boys' or girls' housing, based on the recommendations of a medical specialist experienced in diagnosis of intersex conditions.

We recognize that not all lockup facilities will be able to conduct systematic risk screening for all detainees, and strongly support the requirements of Lockups Standard PP-4 to address vulnerabilities regardless of how they are identified. In order to be fully effective, however, facilities must know what their staff are expected to look for and respond to. Accordingly, the standard should specifically incorporate the indicators of vulnerability listed in the discussion of

the standard, to ensure that identified vulnerable detainees receive heightened protection, including either continuous direct supervision or placement in a single cell.

Specific recommendation

PP-4: Heightened protection for vulnerable detainees (Lockups) – We recommend adding the following sentence to end of this standard:

For purposes of this standard, law enforcement staff treat the following as indicators of vulnerability: mental or physical disability, young age, slight build, nonviolent history, prior convictions for sex offenses against an adult or child, lesbian, gay, or bisexual sexual orientation, transgender or intersex status, gender nonconformance, prior sexual victimization, and the detainee’s own perception of vulnerability.

Protection for especially vulnerable inmates should include addressing situations that place those inmates at the greatest risk. 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).⁴¹ 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.⁴² The Commission identified showers as a “danger spot” that is often inadequately supervised.⁴³ This high risk of abuse could be minimized by providing transgender and intersex inmates the opportunity to shower privately, apart from other inmates.

Specific recommendations

SC-2: Use of screening information (Adult and Community Corrections)/AP-2 Placement of residents in housing, bed, program, education and work assignments (Juvenile)/PP-4: Heightened protection for vulnerable inmates (Lockups) – We recommend that the following sentence be added to the end of each of these standards:

Transgender and intersex inmates should be provided private access to showers separate from other inmates.

4. Consensual Sexual Activity between Inmates

Congress intended PREA to address sexually abusive behavior and not consensual sexual contact. Accordingly, we urge the Department to distinguish clearly between sexual abuse,

⁴¹ Jenness, V., Maxson, C. L., Matsuda, K. N., & Sumner, J. M. (2007). *Violence in California correctional facilities: An empirical examination of sexual assault*, p. 35. Irvine, CA: Center for Evidence-Based Corrections.

⁴² See Sylvia Rivera Law Project, “It’s War in Here”, at 29-31.

⁴³ COMMISSION REPORT at 60.

which should always fall under the purview of these standards, and consensual sexual activities between inmates, which a facility may prohibit, but should not treat as sexual abuse. Specifically, all four sets of standards should explicitly make clear that they are aimed at sexually abusive conduct only, not consensual sexual conduct between inmates.⁴⁴ This clarification would help to distinguish between the serious harms and trauma of sexual abuse that PREA is intended to prevent and a facility's interest in preventing sexual activity between inmates. It would also ensure that facilities do not further penalize and pathologize same-sex sexual activity.

Specific recommendations

- **Glossary:** We recommend adding the following to the end of the first sentence in the definition of "inmate-on-inmate sexual abuse":

Consensual sexual contact or penetration between inmates is not sexual abuse.

5. Voluntary Sexual Activity between Residents in Juvenile Facilities

Because the majority of residents in juvenile facilities are minors, we urge the Department to specify the limited circumstances under which juvenile facilities can treat voluntary sexual contact⁴⁵ between residents as abuse. 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.⁴⁶ In addition, some juvenile facilities house youth as old as 25. Considering that many residents of juvenile facilities are old enough to consent to sexual activity with other similarly aged youth, we urge the Department to address the following concerns:

⁴⁴ 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 Standards 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.

⁴⁵ "Voluntary sexual contact" does not include sexual contact between residents involving force; threat of force; pressure or coercion; offers of money, favors, special protection, or special treatment; or that for some other reason is unwilling.

⁴⁶ 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 the 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 sexually 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 under-age minors to consent when there is no more than 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 August 6, 2008), available at http://www.4parents.gov/sexrisky/teen_sex/statelaws_chart/statelaws_chart.html

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

Specific recommendations

- **Glossary- Juvenile Standards:** The definition for “resident-on-resident sexually abusive penetration” should read:

Penetration by a resident of another resident without the latter’s consent, or of a resident who is coerced into sexually abusive penetration by threats of violence, or a resident who is unable to consent or refuse.

The standards 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.⁴⁷ Without this guidance, we are concerned facilities will use the standards to target LGBTI youth for harsh sanctions and even prosecutions, for engaging in voluntary sexual contact with similarly aged residents, whether or not that contact is legally consensual. When all parties can legally consent, contact between similarly aged youth should not be treated as sexual abuse. 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 nevertheless be taken into account. According to a report by the Bureau of Justice Statistics, 35 percent of all substantiated incidents of sexual violence between residents in juvenile facilities in 2005-06 were voluntary sexual contacts.⁴⁸ The findings of this report indicate that youth designated as

⁴⁷ The inclusion of the words “who is unable to consent or refuse” in the definition of resident-on-resident sexually abusive contact (and in our recommended definition for resident-on-resident sexually abusive penetration) 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 it is state law which makes this conduct illegal in certain states, we recognize that this is not the forum in which to express our disagreement.

⁴⁸ A. Beck, D. Adams, and P. Guerino, *Sexual Violence Reported by Juvenile Correctional Authorities, 2005-06* 5. (Bureau of Justice Statistics Jul. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrica0506.pdf>.

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).⁴⁹ These findings demonstrate that facilities are in need of guidance to help them appropriately respond to these incidents. We urge the Department to take the following steps to ensure appropriate responses to voluntary sexual contact between similarly aged youth.

First, the Department should specify that the standards do not trump states’ age of consent laws and therefore, they do not apply to voluntary sexual contact between minors who, under the laws of that state, can legally consent to engage in such contact.

Second, standard DI-2 should discourage the use of harsh sanctions to punish similarly-aged youth who engage in voluntary, but legally non-consensual, sexual contact. Specifically, facilities should not treat these youth as sexually aggressive, violent, or deviant, or attempt to change their sexual orientation. 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.

Third, standard OR-1 should clearly state the standards 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 rape⁵⁰ 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 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.⁵¹

Finally, we urge the Department to require in standard TR-1 that facilities provide training for employees covering the topics discussed in this section. Because investigators will have the responsibility in some cases of determining whether an act between two residents represents sexual abuse or merely prohibited consensual activity, investigators (TR-4) should also be trained on these topics.

⁴⁹ *Id.* at 11.

⁵⁰ 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.

⁵¹ 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 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.

Specific recommendations

- **DI-2: Interventions for Residents who Engage in Sexual Abuse** – The following sentence should be added after the last sentence of juvenile standard DI-2:

In cases of resident-on-resident sexual abuse involving similarly aged youth engaging in voluntary, though legally non-consensual sexual contact, facilities must take into account the voluntary nature of this conduct when determining interventions.

The following sentences should be added to the end of the last paragraph in the discussion of juvenile standard DI-2:

Facilities should not use harsh sanctions to punish similarly aged youth who engage in voluntary, but legally non-consensual, sexual contact. Specifically, facilities should not treat these youth as sexually aggressive, violent, or deviant, or attempt to change their sexual orientation. 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.

- **OR-1: Staff and Facility Head Reporting Duties** - The following sentences in bold should be added to juvenile standard OR-1:

... Medical and mental health practitioners are required to report sexual abuse to designated supervisors and officials as well as the designated State or local services agency and must inform residents of their duty to report at the initiation of services. **Staff and medical and mental health practitioners should be familiar with the age of consent laws in their state and understand that voluntary sexual contact between residents who can legally consent to engage in such contact under state law is not sexual abuse and should not be reported as child abuse. Similarly, staff and medical and mental health practitioners also need to 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.**

- **TR-1: Training for Employees** - The following bolded language should be added to juvenile standard TR-1:

The agency trains all employees to be able to fulfill their responsibilities under agency sexual abuse prevention, detection, and response policies and procedures, the PREA standards; and under relevant Federal, State, and local law **(including age of consent laws and laws related to mandatory reporting).**

Additionally, the agency trains all employees on . . . the dynamics of sexual abuse in confinement, **the distinctions between acceptable adolescent sexual behavior and sexually aggressive and dangerous behavior**, and common reaction of sexual abuse victims. ...

- **TR-4: Specialized Training: Investigations** - The following bold language should be added to juvenile standard TR-4:

Specialized training must include . . . sexual abuse evidence collection in confinement settings, **the age of consent applicable in the jurisdiction where the facility is located, how to distinguish between acceptable adolescent behavior and sexually aggressive and dangerous behaviors**, and . . .

6. Hiring and Promotion

In all four sets of standards, the discussions related to the provisions for hiring and promotion decisions (PP-6; PP-7 in Lockups), include remarks on the “unnecessary additional risk of hiring or retaining individuals whose conduct has demonstrated a lack of personal commitment to PREA’s goals.” However, the standard requires screening only of new hires and of persons seeking promotions. When the standards are ultimately implemented, this means existing employees will not be subject to this screening requirement unless they are up for promotion. We therefore recommend revising the standard as follows to make clear that existing employees should also be carefully screened and re-screened periodically.

Specific recommendations

- **PP-6: Hiring and promotion decisions** – We recommend that the following language be added to the end of this standard:

These requirements also apply to everyone employed by the agency at the time the Standards take effect even if they are not new hires or being considered for promotion.

7. Disciplinary Sanctions for Staff

In all four sets of standards, the provision for disciplinary sanctions for staff (DI-1) provides that “[t]he presumptive disciplinary sanction for staff members who have engaged in sexually abusive contact or penetration is termination.” 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 known precursors to acts of sexually abusive touching or penetration. Retention of employees found to have committed any form of sexual abuse puts inmates at risk of further and escalating victimization.

Specific recommendations

- **DI-1: Disciplinary sanctions for staff** – We recommend that this standard be revised to read as follows:

Staff is subject to disciplinary sanctions up to and including termination when staff has violated agency sexual abuse policies. The presumptive disciplinary sanction for staff members who have engaged in **sexual abuse of an inmate** is termination. All terminations for violations of agency sexual abuse policies are to be reported to law enforcement agencies and any relevant licensing bodies.

8. Disciplinary Sanctions for Inmates

In the provision for disciplinary sanctions for inmates in the standards for Adult Prisons and Jails, Community Corrections, and Juvenile Facilities (DI-2), we recommend making clear that inmates may not be disciplined for making reports that are determined to be unsubstantiated. The fact that an incident could not be proven does not mean that it did not occur. The Commission cited a report by the Bureau of Justice Statistics that found that the majority of allegations of sexual abuse – 55 percent – were “unsubstantiated,” meaning that investigators could not determine whether or not the abuse occurred, and noted that “[t]here is no reason to believe . . . that extremely low substantiation rates are attributable to a high number of false allegations.”⁵²

Specific recommendations

- **DI-2: Disciplinary sanctions for inmates** – We recommend that the following sentence be added to the end of this standard:

Under no circumstances may inmates be disciplined for making reports that are ultimately determined to be unsubstantiated.

9. Medical and Mental Health Screening

The standards for medical and mental health intake screenings in Adult Prisons and Jails and Juvenile Facilities (MM-1) instruct that the medical and mental health screening of inmates include questions about past sexual victimization. We support this provision and the recommendation in the Discussion that inmates be informed that they are not required to answer questions pertaining to sexual victimization. Such informed consent is important because the use of this information is outside the normal bounds of provider-patient confidentiality. But we recommend also mandating that inmates be informed how this information will be used in the facility, e.g. decisions concerning housing, bed, work, education and program assignments, before answering questions about past sexual victimization.

⁵² COMMISSION REPORT, chapter 5.

Specific recommendations

- **MM-1: Medical and mental health screenings-history of sexual abuse** – We recommend that the following sentence be inserted preceding the last sentence in this standard:

If medical and mental health professionals provide any of the information they gather to staff to use for housing, work and programming decisions, or to outside agencies for the purposes of reporting sexual abuse, they must inform inmates of those purposes before eliciting that information.

10. Access to Emergency Medical Services

We recommend including in the standards for access to emergency medical and mental health services in all four sets of standards (MM-2 in Adult Prisons and Jails and Juvenile Facilities, MM-1 in Lockups and Community Corrections) a requirement that victims of sexual abuse be offered prophylactic treatment for HIV and emergency contraception if the treating medical practitioners believe such treatment is medically indicated.

Specific recommendations

- **MM-2: Access to emergency medical and mental health services** – We recommend that this standard be revised to incorporate the bold language:

Victims of sexual abuse have timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment. **This includes access to prophylactic treatment for HIV and emergency contraception when such treatment is deemed by medical practitioners to be medically indicated. . . .**

11. Clarifying Terminology

In all four sets of standards, the Glossary provides that “cultural competence” is defined as “[t]he ability to work and communicate effectively with people of diverse racial, ethnic, religious, and social groups based on an awareness and understanding of differences in thoughts, communications, actions, customs, beliefs and values.” We agree with the Commission that cultural competence among corrections staff is critically important to their ability to effectuate the goals of PREA. But given the Commission’s finding that lesbian, gay, bisexual, and transgender individuals are highly vulnerable to abuse, we recommend revising this definition as follows to include these groups:

Specific recommendations

- **Glossary:** The definition for “cultural competence” should be revised to include the language in bold:

Cultural competence: The ability to work and communicate effectively with people of diverse racial, ethnic, religious, and social groups, **including lesbian, gay, bisexual, transgender and intersex individuals and individuals with physical and mental disabilities**, based on an awareness and understanding of differences in thoughts, communications, actions, customs, beliefs, and values.

In all four sets of standards, the Glossary contains definitions for the terms “transgender” and “gender nonconforming.” We strongly support the inclusion of these terms to ensure understanding by corrections staff. We suggest the following revised definitions to help distinguish between the two terms and provide a better understanding:

Specific recommendations

- **Glossary:** The definition for “transgender” should be modified to include the language in bold:

Transgender: A term describing persons whose gender identity and/or gender expression do not **correspond to the sex** assigned to them at birth.

- **Glossary:** The definition for “gender nonconforming” should be replaced with the following:

Gender nonconforming: A term describing persons whose gender expression does not conform to gender stereotypes generally associated with their birth sex, but who do not personally identify as transgender.

IV. Response to Questions in the ANPR

1. *What would be the implications of referring to “sexual abuse” as opposed to “rape” in the Department’s consideration of the Commission’s proposed national standards?*

We encourage the Department to use the term “sexual abuse” rather than “rape” in promulgating its national standards because the term “sexual abuse” is more commonly understood to encompass the range of victimizing behaviors Congress intended to address in PREA. In order to establish a zero-tolerance culture to prevent prison rape, PREA recognizes that prison systems must address a broad range of sexually abusive acts, which Congress included in its definition of “rape.” However, the term “rape” is commonly understood in the context of its use in criminal law. The criteria for criminal rape vary by state, but are generally

defined narrowly as acts of forcible sexual intercourse. Because this common understanding does not include all the sexually abusive acts included in PREA's definition of rape, practitioners responsible for implementing PREA might misunderstand PREA's intent and work just on preventing forcible sexual intercourse, rather than on the full range of conduct Congress intended to address. The term "sexual abuse" is the more commonly understood "umbrella" term that includes the broad range of sexually abusive acts covered by PREA.⁵³

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

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

2. *Would any of the Commission's proposed standards impose "substantial additional costs"?*

With respect to costs, PREA provides that "[t]he Attorney General shall not establish a national standard under this section that would impose substantial additional costs *compared to the costs presently expended by Federal, State, and local prison authorities.*"⁵⁴ Those costs – the Commission pegged them at \$68 billion when it released its report in June 2009 – are staggering, so it is difficult to fathom that any additional costs facilities incur to comply with the standards are substantial relative to these enormous expenditures.

⁵³ Use of the term "sexual abuse" would also be consistent with the federal criminal definition of sexual abuse, 18 U.S.C. § 2242.

⁵⁴ 42 U.S.C. § 15607(a)(3) (emphasis added).

PREA received bipartisan support and passed unanimously in both the House and Senate, and its legislative history shows that Congress intended that an examination of “substantial additional costs” meant *net costs* calculated by taking into consideration the savings to facilities as well as the reduction in government spending outside of prison on health care, violent crime, and recidivism. Congress found that prison rape undermines the public health by contributing to the spread of HIV/AIDS, tuberculosis, hepatitis B and C, and other diseases; “endangers the public safety by making brutalized inmates more likely to commit crimes when they are released”; increases violence and the risk of violence in prisons, contributes to unemployment and homelessness; increases health and mental health expenditures, both inside and outside of prison systems; and increases recidivism.⁵⁵ The Commission’s investigation led it to the same conclusion – that there are far-reaching consequences of prison sexual abuse.⁵⁶

The Rehabilitation Act of 1973, 29 U.S.C. § 794(a), like PREA, conditions the receipt of federal funds on compliance with specific remedial standards. Also like PREA, its requirement that governments make accommodations to public facilities has a cost limitation which limits required accommodations to those that do not cause an “undue hardship.”⁵⁷ Both costs and benefits are considered to determine if an accommodation imposes an undue burden.⁵⁸ The cost limitation in PREA should be read consistently with the way costs are analyzed under the Rehabilitation Act, by weighing them against the vast benefits of ending prison sexual abuse.

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

The position by opponents of the proposed standards that essentially any additional cost imposed by the standards would be impermissibly “substantial” is sharply at odds with the funding structure created by the Act. PREA provides that each State must either come into compliance with the national standards or else deduct five percent of prison-related federal funding to allow for federal oversight. Congress understood that this five percent reduction for non-compliance would be the incentive for states to come into compliance. As Senator Jeff

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

⁵⁶ COMMISSION REPORT, 47-48.

⁵⁷ See 34 C.F.R. § 104.12; 45 C.F.R. § 84.12. See also 42 U.S.C. § 12111(10)(A) (“‘undue hardship’ means an action requiring *significant* difficulty or *expense*”) (emphasis added) (29 U.S.C. § 794(d) adopts the standards of the Americans with Disabilities Act for employment discrimination complaints).

⁵⁸ *Nelson v. Thornburgh*, 567 F. Supp. 369, 379 (D.C. Pa. 1983) (the Rehabilitation Act and Americans with Disabilities Act regulations “reflect a conscious effort at balancing the needs of the handicapped with the budgetary realities of programs receiving federal funds”). See also *New Mexico Ass’n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 854 (10th Cir. 1982) (remanding Rehabilitation Act challenge to the adequacy of state’s educational programs for disabled students to weigh the cost of modifying existing programs against the benefit based, in part, on the number of children who would benefit from the changes).

Sessions explained, “if a State is not in compliance, it can use the 5-percent money that they would otherwise lose to work on this problem. If they do that, they will not end up losing any money, but it will be a way of us saying: If you are going to continue to draw Federal money, take this issue seriously.”⁵⁹

The standards promulgated by the Commission are an appropriate compilation of the practices that many correctional professionals understand are needed in order to meet the constitutional mandate that they protect incarcerated persons from sexual abuse. Courts have long rejected insufficient funding as an excuse for unconstitutional conditions of incarceration.⁶⁰ Therefore, compliance with the majority of these standards do not impose additional costs that are not independently required by the Constitution or other sources of law.

Evaluating “substantial additional costs” in relation to the massive money spent on corrections administration, the standards’ benefits, the PREA funding structure, and the constitutional mandate under which correctional facilities operate makes it abundantly clear that any additional costs of complying with the standards would not be substantial.

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

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

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

⁵⁹ Senate Debate, July 28, 2003.

⁶⁰ See, e.g., *Harris v. Thigben*, 941 F.2d 1495, 1509 (11th Cir. 1991); *Williams v. Edwards*, 547 F.2d 1206, 1212-13 (5th Cir. 1977); *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972); *Finney v. Ark. Bd. of Correction*, 505 F.2d 194, 202 (8th Cir. 1974); *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F.2d 392, 399 (2d Cir. 1975).

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

V. Conclusion

The sexual abuse of LGBTI people in prisons, jails, immigration detention, lockups, community corrections, and juvenile facilities must stop. Strong standards are urgently needed to protect all people, including LGBTI people, from this devastating, but all too common abuse. The Commission's standards go a long way in making clear that no court sentence, regardless of the offense, should ever include sexual victimization. We urge the Department to promulgate the Commission's standards with our recommended changes. Every day without these critically important measures, additional LGBTI people in custody will be sexually abused.

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

Sincerely,

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