

May 10, 2010

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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

Dear Attorney General Holder,

The HIV Project within Lambda Legal Defense & Education Fund (“Lambda Legal”) submits these comments to the proposed National Standards to Prevent, Detect and Respond to Prison Rape (the “Standards”) developed by the National Prison Rape Elimination Commission.

Lambda Legal Defense and Education Fund (“Lambda Legal”) is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those living with HIV through impact litigation, education and public policy work. Lambda Legal has represented the interests of people living with HIV since the beginning of the epidemic, and our work has ensured access to treatment, promoted effective prevention policies, and helped combat discrimination, bias and stigma.

Lambda Legal is a signatory – along with the National Center for Transgender Equality, the National Center for Lesbian Rights, the American Civil Liberties Union, and the Transgender Law Center – to a letter in support of and addressing concerns related to lesbians, gay men, bisexuals and transgender people raised by the proposed the Standards. Through its HIV Project, Lambda Legal submits these supplemental and separate comments in order to address specific concerns related to the civil rights of people living with HIV.

Lambda Legal’s HIV Project strongly agrees that victims and perpetrators of sexual abuse should be made aware of the risk at which they may have been placed for transmission of a sexually transmitted infection (STI) as a result of an incident of sexual abuse and that they should be offered testing and treatment with respect to the potential transmission of STIs, including HIV. The Standards, however, do not recognize the particularly sensitive nature of the results of an HIV test, and Lambda Legal’s HIV Project does not think that the Standards adequately address the counseling that should accompany HIV testing, the safeguarding of the confidentiality of the results, or the limited purpose for which the results may be appropriately utilized.

We believe the Discussion of testing for HIV specifically should include:

- A statement that information about results of tests for sexually transmitted infections (“STIs”), including HIV, must be treated confidentially, pursuant to all applicable federal, state and local law, and should not be shared with non-medical personnel (including non-

medical members of a sexual assault response team). Comparably to the text related to information about prior sexual victimization (in MM-1), the Standards should state that “any information pertaining to an inmate’s HIV status must be handled with the utmost sensitivity and limited to the medical practitioners who need to know in order to develop treatment plans.”

- A statement requiring that before an HIV test is administered to an inmate, the inmate will be provided with pre-test counseling and informed written consent will be obtained from the inmate. In addition, the Discussion should state that post-test counseling will be provided to each inmate to whom an HIV test is administered.
- A statement that victims have the right to refuse medical and/or mental health care, including tests for HIV and other STIs. The text should specifically state that inmates who refuse medical and/or mental health care should not be harassed or penalized in any way because of that decision. Furthermore, the Discussion should include a requirement that the victim be made aware that the refusal to engage in HIV testing will not in any way impact the investigation of his or her allegation of sexual abuse.

In addition, Lambda Legal’s HIV Project strongly objects to making either the victim’s or perpetrator’s HIV/AIDS status part of the data collection process. The current version of the Standards includes HIV/AIDS status (on Appendix C) as information that should be collected regarding victims and inmate perpetrators, implying that the collection of such information is necessary to answer all of the questions from the Bureau of Justice Statistics’ (BJS) Survey on Sexual Violence. A review of the most current version of the BJS Survey on Sexual Violence, however, reveals that the HIV/AIDS status of victims and/or perpetrators is not part of the information being sought in this survey, and Lambda Legal questions how the collection and aggregation of this data will in any way further the Standards stated “goal of eliminating sexual abuse and keeping inmates safe.” Instead, we see a serious risk of violating the confidentiality rights of and causing further harm and risk of harm to victims (and alleged perpetrators) of sexual abuse by moving this highly sensitive information out of an individual’s medical records and into records that are not accorded the same degree of protection under applicable federal, state and local law. HIV/AIDS status, therefore, should be removed from Appendix C and should not be included at all as part of any data collection process.¹

¹ Furthermore, the Standards do not provide guidance as to how such information is to be collected. It would be illegal for agency personnel to extract this information from the individual’s medical file, because such information is protected by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). If, instead, personnel tasked with obtaining this information for each incident of sexual abuse were to solicit the information directly from the parties involved, interviewers would need to apprise each party of the right to refuse to answer questions relating to his or her HIV/AIDS status, as well as the potential ramifications of revealing this information for use outside of the healthcare context. Any potential benefit of collecting this information (which, as stated above, we fail to see) is heavily outweighed by the difficulties involved in doing so in a manner that appropriately respects the confidentiality rights of the individuals from whom the information is being collected.

Finally, Lambda Legal's HIV Project wishes to point out that the discussion of the HIV travel and immigration ban as part of the "Supplemental Standards for Facilities with Immigration Detainees" (ID-10) is inaccurate. As the proposed Standards suggested was likely, the Department of Health and Human Services ("HHS") rewrote the applicable regulations after the proposed Standards were issued and removed HIV from the list of communicable diseases of public health significance. However, the following statement (contained in the Discussion of ID-10) regarding the potential immigration consequences of a positive HIV-test was incorrect: "[E]ven when HHS changes its policies, immigrants seeking legal status in the United States who are known to be HIV-positive will have to seek a waiver from HHS to do so, as all people with communicable diseases are required to do." That statement was and is false. HIV-positive immigrants seeking legal status in the United States no longer need to do anything that is not required of every other immigrant seeking such status, because HHS "change[d] its policies" and removed HIV from the list of communicable diseases of public health significance. Given this change in the law and the potential for spreading harmful misinformation on this subject, Lambda Legal suggests that this Standard should eliminate any discussion of immigration consequences and focus instead upon obtaining informed consent for HIV testing and providing pre- and post-test counseling in the native language of the immigrant detainee.

The HIV Project at Lambda Legal would like to thank the National Prison Rape Elimination Commission for its hard work in drafting and revising the proposed Standards and the Department of Justice for soliciting further comment upon them. We hope that the Department finds our comments regarding the civil rights of people living with HIV to be helpful as it moves toward finalizing the National Standards to Prevent, Detect and Respond to Prison Rape.

Sincerely yours,



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HIV Project Staff Attorney