PROTECTING LESBIAN, GAY, BISEXUAL, TRANSGENDER, INTERSEX, AND GENDER NONCONFORMING PEOPLE FROM SEXUAL ABUSE AND HARASSMENT IN IMMIGRATION DETENTION

Comments Submitted in Response to
Docket No. ICEB-2012-0003
Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities

February 26, 2013

Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
Potomac Center North, 500 12th Street SW
Washington, DC 20536

RE: Docket No. ICEB-2012-0003, Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities

February 26, 2013

On behalf of the undersigned lesbian, gay, bisexual, and transgender and allied organizations, we submit these comments on the Department of Homeland Security's Proposed National Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement, Docket No. ICEB-2012-0003. We appreciate the opportunity to provide these comments to address the specific concerns of people who are lesbian, gay, bisexual, transgender, gender non-conforming, or have intersex conditions (LGBTI people).

DHS's standards must build on the years of extensive study and effort that went into the PREA standards released by the Department of Justice (DOJ) in 2012. The DOJ PREA standards resulted from a nine year process that included approximately 100 hours of expert testimony, a comprehensive report prepared by the National Prison Rape Elimination Commission, two public comment periods, thousands of pages of public comments, and three years of a DOJ working group's time. They are a negotiated set of standards that meet the statutory mandate to address prisoner rape in a cost effective manner and are the recognized floor for a set of policies that can adequately respond to the crisis of sexual abuse in our nation's detention facilities. DHS's standards should in no respect fall below this floor, but should appropriately account for the civil nature of confinement in DHS custody and the immigration status of detainees.

SIGNATORIES' INTEREST IN THE DHS PREA STANDARDS

The signatories share a commitment to ending sexual abuse in DHS confinement facilities. As organizations concerned about the rights of lesbian, gay, bisexual, and transgender people, and with human rights more broadly, the signatories believe that full implementation of the Prison Rape Elimination Act is the best way to end the crisis of abuse in DHS confinement facilities.

- 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.

- The **Human Rights Campaign** is America's largest civil rights organization working to achieve lesbian, gay, bisexual and transgender equality. HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental

fairness and equality for all. HRC seeks to improve the lives of LGBT Americans by advocating for equal rights and benefits in the workplace, ensuring families are treated equally under the law and increasing public support among all Americans through innovative advocacy, education and outreach programs.

- **Immigration Equality** is a national organization which advocates for the rights of lesbian, gay, bisexual, transgender, and HIV-positive immigrants. Immigration Equality runs a pro bono asylum project, provides technical assistance to attorneys, maintains an informational website, and fields questions from LGBT and HIV-positive individuals from around the world. Additionally, through education, outreach and advocacy, Immigration Equality works to change the laws that unfairly impact LGBT and HIV-positive immigrants**.** Immigration Equality runs a national hotline that provides free legal information for detained LGBT and HIV positive immigrants, regularly provides direct representation for detainees, and matches low-income asylum seekers in detention with volunteer attorneys. Immigration Equality has helped draft training materials for detention staff who work with LGBT immigrants and has authored the leading manual on preparing sexual orientation-based and HIV-based asylum claims.

- **Lambda Legal** is the oldest and largest national legal organization whose mission is to safeguard and advance the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and policy work.

- 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.

- The **National Center for Transgender Equality** is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on national issues of importance to transgender people. By empowering transgender people and our allies to educate and influence policymakers and others, NCTE facilitates a strong and clear voice for transgender equality in our nation's capital and around the country. Because of the well-documented vulnerability of transgender people to sexual abuse in confinement settings, PREA implementation has been a major focus of NCTE's work over the last several years.

- The mission of the **National Gay and Lesbian Task Force** is to build the grassroots power of the lesbian, gay, bisexual and transgender (LGBT) community. We do this by training activists, equipping state and local organizations with the skills needed to organize broad-based campaigns to defeat anti-LGBT referenda and advance pro-LGBT legislation, and building the organizational capacity of our movement. Our Policy Institute, the movement's premier think tank, provides research and policy analysis to support the struggle for complete equality and to counter right-wing lies. As part of a broader social justice movement, we work to create a nation that respects the diversity of human expression and identity and creates opportunity for all.

- The **Sylvia Rivera Law Project** is a collective organization founded on the understanding that gender self-determination is inextricably intertwined with racial, social and economic justice. We provide free civil legal services to low-income people and people of color who are transgender, intersex, or gender nonconforming in New York State on issues such as prisoners' rights, immigration, name changes, identity documents, discrimination, and public benefits. We also engage in policy work, impact litigation, public education, and support of community organizing to advance the rights of our communities. We have served well over 1100 clients since we opened in 2002, nearly 400 of whom have received our assistance in relation to mistreatment in an institutional setting.

- **Transgender Law Center** is the leading national legal organization dedicated to advance the rights of transgender and gender nonconforming people. Transgender Law Center works to change law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression.

OVERVIEW OF THE PROBLEM

While we believe the Department's regulations have the potential to drastically reduce the incidence of sexual abuse and harassment in confinement settings, we are concerned that the proposed regulations fall short of what is needed to address the crisis of sexual abuse facing those who are detained. Specifically, we urge the Department to make some important changes in order to enhance the regulations' effectiveness in fulfilling the mandate of the Prison Rape Elimination Act (PREA) and the President's May 17, 2012 Memorandum, and in preventing harm to LGBTI people in detention.

LGBTI people make up a significant percentage of those detained in immigration detention and holding facilities.[1] Research on sexual abuse in confinement settings consistently documents the heightened vulnerability of LGBTI people to sexual victimization at the hands of facility staff and other detainees.[2] The sexual abuse of LGBTI people in detention violates their basic human rights, violates the government's constitutional obligation to provide safe and humane conditions

[1] *See e.g.*,G.J. Gates & F Newport, *Special Report, 3.4% of U.S. Adults Identify as LGBT*, Gallup News, Oct. 18, 2012, available at http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx; A. Beck, P. Harrison, & P. Guerino, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09* 11 (Bureau of Justice Statistics, Jan. 2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf (finding twelve percent of youth in the study reported a sexual orientation other than heterosexual); C. Struckman- Johnson & D. Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. Interpersonal Viol., 1591, 1597 (2006) (finding 11 percent of survey participants in men's facilities identified as gay or bisexual and 28 percent of survey participants in women's prisons identified as lesbian or bisexual).

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

of confinement, and impedes the likelihood of a detainee's ability to obtain lawful immigration status when eligible and to successfully transition back into the community.

Organizations such as the ACLU, the National Immigrant Justice Center, and Just Detention International have documented reports by LGBTI immigrants in detention about the sexual abuse they have faced, ranging from constant harassment to sexual assault, as well as the harmful use of prolonged involuntary solitary confinement for these detainees.[3] The following examples illustrate the widespread abuse faced by LGBTI detainees:

- For 22 hours a day, Alexis Cortez-Reyna, a transgender woman, was confined to a 5-by-9-foot cell in the Theo Lacy Detention Facility, a local jail in California that houses only men. Eventually the time out of the cell was reduced to about 45 minutes. When Alexis once asked why dayroom time for gay or transgender immigrants at the facility was cut to less than two hours, a guard responded, "Because you need to learn not to be a faggot."[4] Guards singled her out for public searches in which they forced her to remove her outer clothing and mocked her exposed breasts. Officers purposefully withheld toilet paper from transgender detainees, and refused to let Alexis see a doctor for the entire five months she was in the facility.[5]
- After living in Arizona for 20 years, Tanya Guzman-Martinez, a transgender woman, was detained by Immigration and Customs Enforcement (ICE) at the Eloy Detention Center for eight months from 2009 to 2010. Tanya was held in a men's housing unit, and isolated for approximately six weeks in the Special Housing Unit (SHU), where she endured severe restrictions on her freedom of movement and contact with others. After being asked a series of humiliating sexual questions, a staff member sexually assaulted her, forcing her to watch him masturbate and then forcing her to ingest his semen, threatening to have her deported if she resisted. When she reported the abuse, she was sent back to SHU for approximately ten days. A few months later, Tanya was threatened by a male detainee who tried to force her to engage in oral sex. When she reported this, she was again sent to SHU and was not aware if the detainee who threatened her was disciplined in any way. These incidents, combined with constant harassment by other staff, caused Tanya to suffer severe depression and anxiety.[6]
- "Juan," a gay man, was sexually assaulted by two other detainees while detained at Otero County Detention Center. Despite repeated requests for a transfer to another

[3] *See, e.g.*, The American Civil Liberties Union of Arizona, *In Their Own Words: Enduring Abuse in Arizona Immigration Detention Centers*, 23, June 2011; National Immigrant Justice Center, Letter to Margo Schlanger, Officer for Civil Rights and Civil Liberties, Re: Submission of Civil Rights Complaints regarding Mistreatment and Abuse of Sexual Minorities in DHS Custody (April 13, 2011), available at: http://www.immigrantjustice.org/sites/immigrantjustice.org/files/OCRCL%20Global%20Complaint%20Letter%20April%202011%20FINAL%20REDACTED_0.pdf.

[4] Suzanne Gamboa, "Immigrant Group Alleges Abuse Because of Sexual Orientation, Gender Identity," *The Miami Herald*, April 13, 2011 (http://miamiherald.typepad.com/gaysouthflorida/2011/04/immigrant-group-alleges-abuse-because-of-sexual-orientation-gender-identity.html)

[5] Cindy Carcamo, "Gay, Transgender Immigrant Detainees Claim Abuse in O.C. Jails," *The Orange County Register*, April 14, 2011 (http://www.ocregister.com/news/detention-296367-complaints-immigration.html?plckOnPage=6)

[6] The American Civil Liberties Union of Arizona, *In Their Own Words: Enduring Abuse in Arizona Immigration Detention Centers*, 22 (2011).

facility because he feared for his safety, he was not transferred until three months after the incident, when ICE Headquarters intervened. In the meantime, the only "protection" detention staff offered was placement in the "hole," a punitive form of solitary confinement. An Otero County guard told Juan after the assault that he should "Walk like a man, not like a gay man."[7]

- "B," a transgender woman, was held at the Santa Ana City Jail in Orange County, California in 2010. "B" was detained with men and transported to immigration court in a van with male detainees, one of whom violently forced her to perform oral sex. Traumatized, and with no faith that facility staff would take the assault seriously and protect her during any investigation, she never reported it.[8]
- Before a hearing of the National Prison Rape Elimination Commission in December 2006, Mayra (now Esmeralda) Soto, a transgender woman, testified about fleeing Mexico after being repeatedly raped, and then being forced to perform oral sex on a guard at the San Pedro Service Processing Center in 2003. In her testimony about the assault, Soto emphasized the trauma caused by not just the assault, but by the events that followed her reporting of it. She felt hostility and pressure to retract her accusation from the other guards at the detention center. The guard who assaulted her was fired, but took a plea resulting in a sentence of just six months, plus probation. When Mayra was detained at the same facility in 2005, she heard that a woman resembling her had been murdered by a gang with associations to the guard who assaulted her. She was housed with the general male population, where she was subject to sexual harassment. After being injured in a fight between two detainees who claimed to "own her," she was placed in solitary confinement.[9]

In a recent report based on extensive public records requests, interviews, site visits, and detainee accounts, the National Immigrant Justice Center and Physicians for Human Rights concluded that: "People who are mentally ill and people who identify as lesbian, gay, bisexual, or transgender (LGBT) often are assigned to solitary confinement because jail staff is unwilling to deal with their unique circumstances and/or because staff thinks of solitary confinement as a 'protective' status for vulnerable populations."[10] These isolating conditions are often insufficient to protect detainees and can be harmful in and of themselves. Indeed, segregation can foster conditions that lead to harassment, abuse, and sexual assault of detainees by detention staff.[11]

LGBTI detainees have often faced harassment, abuse, and assault on account of their sexual orientation or gender identity, either in their home countries or in the U.S. prior to detention. As a result, many have viable claims for asylum, and others may qualify for immigration benefits as

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[7] Yasmin Nair, "NIJC Files Mass Civil Rights Complaint on Behalf of LGBT Immigrant Detainees," *The Windy City Times*, April 13, 2011 (http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=31423)
[8] Andrew Harmon, "Eights Months in Solitary," *The Advocate*, May 7, 2012 (http://www.advocate.com/news/news-features/2012/05/07/transgender-detainees-face-challenges-broken-immigration-system?page=0,2), 2
[9] Mayra Soto, Testimony before the National Prison Rape Elimination Commission Testimony, Los Angeles, December 13, 2006, http://www.justdetention.org/en/NPREC/esmeraldasoto.aspx
[10] Heartland Alliance's National Immigrant Justice Center and Physicians for Human Rights, *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention*, September 2012, 9
[11] Leena Kurki and Norval Morris, "The Purposes, Practices, and Problems of Supermax Prisons," 28 CRIME & JUSTICE 385, 409 (2001).

victims of trafficking or violent crime. Too often, fears of sexual assault in detention cause LGBTI detainees with such claims to "give up" and accept deportation to a country where they will be persecuted. All of our organizations are committed to policy reforms that protect LGBTI people in confinement. We urge the Department to adopt final regulations that will improve the safety of all people who are detained, including LGBTI people.

RECOMMENDATIONS ON SPECIFIC SECTIONS

A. § 115.5 General definitions.

Recommended final language:

Contractor means a person who or entity that provides services on a recurring basis pursuant to a contractual agreement with the agency or facility. The term "c*ontractor"* includes all employees and sub-contractors of that person or entity.

Comments:

We appreciate and support the inclusion of definitions for the terms *gender nonconforming*, *intersex*, and *transgender*, which are used throughout the proposed rule.

The term "contractor" is clearly used through the standards to mean not only the person or entity with whom DHS contracts but also all employees or sub-contractors of that person or entity. The recommended change simply makes this intended meaning explicit.

B. §115.6 Definitions related to sexual abuse and assault.

Recommended final language:

Sexual abuse of a detainee by a staff member, contractor, or volunteer

(5) threats, intimidation, requests, harassment, indecent, profane or abusive language, or other actions or communications, aimed at encouraging, coercing or pressuring a detainee to engage in a sexual act;

(8) ~~unnecessary or inappropriate visual surveillance of a detainee~~ Voyeurism by a staff member, contractor, or volunteer including unnecessary or inappropriate visual surveillance of a detainee, requiring a detainee to expose his or her buttocks, genitals, or breasts; or unnecessarily viewing or taking images of all or part of a detainee's naked body or of a detainee performing bodily functions.

Comments:

Again, the majority of this section is adequate. The two definitions that are insufficient are both part of defining sexual abuse of a detainee by a staff member, contractor, or volunteer. Research from the Bureau of Justice Statistics demonstrates that at least one-half of survey respondents

who report being sexually abused identify their abuser as a staff member.[12] Effective policies must therefore take into account the varied ways in which staff are able to commit sexual abuse.

As the definition section demonstrates, no sexual contact between a staff member and detainee is permissible. While the proposed definition covers many ways in which staff, contractors, or volunteers may sexually abuse detainees, modifications are needed to capture all forms of abuse.

Staff members, contractors, and volunteers must be on notice that requesting or encouraging sexual contact with a detainee is impermissible behavior. Such actions can be seen as a grey area for some staff, contractors, or volunteers because of the lack of explicit force or coercion. Given the power differential between a detainee and a staff member, contractor, or volunteer, though, any sexual contact resulting from such invitations is never consensual and must be punished accordingly. The best way to prevent a staff member, contractor, or volunteer from taking such actions is to define them clearly as sexual abuse and to educate these categories of people on setting appropriate boundaries.

One of the most important boundaries that staff members, contractors, and volunteers must observe is respecting the privacy and dignity of partially or fully unclothed detainees. The proposed language on "visual surveillance" of detainees fails to capture fully the scope of prohibited behavior. While no definition can foresee all types of voyeurism in which a bad actor may participate, the DOJ definition included above is preferable. This more comprehensive definition is more instructive and helps to frame the context of the behavior.

C. §115.12: Contracting with non-DHS entities for the confinement of detainees.

Recommended final language:

(a) When contracting for the confinement of detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, including other government agencies, the agency shall:
   1. include in any new contracts ~~or contract renewals~~ the entity's obligation to adopt and comply with these standards; and
   2. initiate contract modification negotiations with any existing non-DHS private or public agency or other entity within 90 days of the effective date of this rule to require adoption and compliance with these standards. Such negotiations must be completed within 270 days of the effective date of this rule. If a contract with an existing non-DHS private or public agency or other entity is scheduled to be renewed within 270 days of the effective date of this rule, that renewal process may take the place of a modification request so long as the renewed contract requires adoption and compliance with these standards.

[12] A list of PREA research conducted by the Bureau of Justice Statistics can be found at: http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=20. In particular, those reports based on anonymous surveys of inmates and former inmates (i.e. *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-08* and *Sexual Victimization Reported by Former State Prisoners, 2008*) found high rates of abuse by staff.

(b) Any new contracts, contract modifications or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.

(c) To the extent an agency contracts for confinement of immigration detention facility detainees, all rules in this subpart that apply to the agency shall apply to the contractor, and all rules that apply to staff or employees shall apply to contractor staff.

Comments:

DHS agencies must secure implementation of the DHS PREA standards within all contract confinement facilities in a timely manner. Failure to do so significantly undermines the goals of PREA and DHS's ability to protect everyone confined under its authority.

DHS makes liberal use of contract confinement facilities. In its NPRM, DHS lists three broad categories of such facilities: "contract detention facilities (CDFs) are owned by private companies and contracted directly with ICE; detention services at Intergovernmental Service Agreement (IGSA) facilities are provided to ICE by States or local governments through agreements and may be owned by the State or local government, or a private entity; and Intergovernmental Agreement (IGA) facilities are provided to ICE by States or local governments through intergovernmental agreements and may be owned by the State or local government, but not private entities." An overwhelming majority of immigration detainees are held in these facilities.

To address the crisis of sexual abuse in DHS confinement facilities effectively, DHS must fully implement PREA within all facilities in a timely manner. Unfortunately, as drafted, the contracting provisions are inadequate for this task. ICE alone has numerous contracts which have no regular renewal date, will not be renewed for up to 20 years, or are explicitly in effect in perpetuity. In that context, a requirement that the DHS PREA standards become operational in contract facilities only upon contract renewal becomes meaningless. This opens a very large gap in implementation that substantially undermines the potential effectiveness of these regulations.

To close this gap, DHS must require that its components pro-actively seek contract modifications to apply the DHS PREA standards to facilities run by non-DHS private or public agencies or other entities. The signatories are proposing a reasonable timeline for seeking and securing modification of existing contracts. While this timeline would mean that thousands of detainees held in contract facilities would be without the protection of the DHS PREA standards for nine months, it is a common sense compromise between the urgency of the situation and the administrative process necessary to modify existing contracts.

The proposed language also takes into account that some contracts do have annual renewal dates and allows for most of those dates to stand-in for the modification requirement.

The recommended language for §115.12(c) is materially identical to that found in §115.112(c) and is very important to DHS's stated goal of requiring that contract facilities "comply with the DHS sexual abuse standards." This is especially true in the immigration detention context due to the significant percentage of detainees held in contract facilities. As DHS does not explain in its

Discussion of Proposed Rule why this subsection would apply in the holding facility context but not the immigration detention context, the signatories believe the absence of the above language to be an error that must be corrected.

If, instead, the omission was intentional, the signatories strongly urge DHS to reconsider. Every effort must be made to make clear to contract facilities the scope of their obligations once their contract has been modified. This language is important in meeting that goal. Failure to include this language will create opportunities for poorly performing contractors to excuse their failure to comply fully with the standards.

D. § 115.15: Limits to cross-gender viewing and searches.

Recommended final language:

(a) Searches may be necessary ~~to ensure the safety of officers, civilians and detainees~~; to detect and secure evidence of criminal or dangerous activity. ~~; and to promote security, safety, and related interests at immigration detention facilities.~~

~~(b) Cross-gender pat-down searches of male detainees shall not be conducted unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required or in exigent circumstances.~~

(c) No~~C~~cross-gender pat-down searches of ~~female~~ detainees shall not be conducted unless in exigent circumstances.

(*) Facilities shall not meet the requirements of this section by restricting any detainees' access to regularly available programming or other opportunities in order to comply with this provision.

(g) Each facility shall implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in exigent circumstances or when such viewing is ~~incidental to routine cell checks or is otherwise~~ appropriate in connection with a medical examination or monitored bowel movement. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(i) The facility shall not search or physically examine a detainee for the sole purpose of determining the detainee's ~~gender~~ genital characteristics. If the detainee's ~~gender~~ genital status is unknown, it may be determined during conversations with the detainee, by reviewing medical records, or, if necessary, learning that information as part of a routine medical examination that all detainees must undergo as part of intake or other processing procedure. ~~broader medical examination conducted in private, by a medical practitioner~~.

(j) The agency shall train security staff in proper procedures for conducting pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. All pat-down searches shall be conducted in a professional and respectful manner, and in the

least intrusive manner possible, consistent with security needs, these regulations, and ~~existing~~ compatible agency policy, including consideration of officer safety. Same-gender searches for transgender and intersex detainees shall be conducted based on a detainee's gender identity absent a safety-based objection by the detainee.

Comments:

DHS has responsibly identified searches as one place where staff has the type of access to detainees that can facilitate or precipitate sexual abuse. In many ways, the DHS proposed search provisions are strong. The signatories offer the above recommendations in only a few areas in order to more fully address the potential for harm.

Proposed explanation of searches in (a)

The proposed explanation of searches in (a) seems an odd inclusion in these regulations. To the degree that any such explanation is necessary, it must be better tailored to meet the constitutional rights of detainees and basic principles of dignity of confinement. As drafted, the explanation is overly broad and would provide support for searches in instances where none is warranted. Such support can be used to mask abusive use of searches. The recommended changes seek to fix this problem.

Cross-gender searches generally

The recommended changes in (b) and (c) add adult and juvenile male detainees to DHS's proposed ban of cross-gender pat-down searches (except in exigent circumstances). Men in detention are at high risk of sexual abuse by female staff.[13] Cross-gender pat-down searches routinely involve intimate contact through clothing, including with genital areas. DHS's standards must recognize that body searches of adult and juvenile male detainees by staff of another sex intrude upon significant privacy interests for detainees and allow staff access to the bodies of detainees in a way that can foster abuse.

DHS already recognizes this principle when it comes to adult and juvenile female detainees. Signatories urge the Department to not ignore it when it comes to adult and juvenile male detainees. Except in exigent situations, a search of a prisoners' body, including a pat-down search, should be conducted by corrections staff of the same gender as the prisoner. If DHS is unwilling to add adult male detainees to subsection (c), it must still expand this basic protection to juvenile male detainees by adding them to this subsection.

An unintended and dangerous consequence of limiting cross-gender searches may be that facilities seek to comply by limiting the liberty of detainees. The language recommended above prohibits such an inadequate solution. This language is particularly necessary in DHS confinement facilities as the Department has gone to great lengths to craft a number of policies regarding recreation and programming. DHS's goal of increasing the liberty of detainees is

[13] *Sexual Victimization Reported by Former State Prisoners, 2008,* Bureau of Justice Statistics, p. 6 (2012)("Among victims of staff sexual misconduct, 79% were males reporting sexual activity with female staff.")

appropriate given the civil nature of its confinement facilities. This provision must be included to prevent bad actors from circumventing detainees' liberty through inappropriate implementation of these standards.

Cross-gender viewing

DHS rightfully addresses cross-gender viewing in (g). However, the efficacy of this proposed standard is completely undercut by an exception which would permit such cross-gender supervision of detainees' private bodily areas "when such viewing is incidental to routine cell checks." This exception eliminates any practical limitation on cross-gender viewing of adult and juvenile detainees because in many facilities detainees use the toilet and sometimes wash in their cells. This exception may also undercut the important requirement in the standards that require officers of the opposite gender to announce themselves prior to entering the cell block – due to the addition of this easily abused loophole. DHS must close this loophole in order to ensure a culture where the dignity and bodily integrity of detainees is respected.

Clarifying language in (i) and (j)

We strongly support DHS's inclusion of § 115.15(i). Pat-down searches of transgender or intersex detainees are often pretext for satisfying a staff member's curiosity or sexual impulse related to the physiology of these detainees' anatomy. Prohibiting such abusive searches through a provision like § 115.15(i) is essential. Unfortunately, as drafted, this provision unintentionally creates a perception that a transgender or intersex detainee's anatomy determines that person's gender. While we are pleased that § 115.15(i) generally tracks the DOJ final rule, we also note that the proposed rule confusingly refers to searches for the purpose of "determining the detainee's gender." As recommended by the Commission, the DOJ final rule specifically addressed searches to determine the type of a person's genitalia.

Both from a medical and legal point of view, a person's genital characteristics are not synonymous with their gender;[14] yet the language of the proposed rule sends a confusing signal that a person's genital characteristics and their gender are one and the same. This would tend to undermine the purpose of § 115.42(b), which is to end the practice of treating a detainee's anatomy as defining their gender for purposes of housing. While the language of § 115.15 would have no technical effect on the requirements of § 115.42, as the DOJ has noted, "[t]he importance of language in creating an institutional culture" should not be overlooked,

[14] While external genital features as observed at birth are typically used as the basis of initial gender assignment, a wide array of anatomical, physiological, and psychological traits are associated with gender, and there is no consensus that any single trait defines gender in a medical sense. See, e.g., Julie A . Greenberg, *Defining Male and Female*, 41 ARIZ. L. REV. 265, 275-76 (1999) (citing John Money, SEX ERRORS OF THE BODY AND RELATED SYNDROMES (2d ed. 1994)); In re Heilig, 816 A.2d 68 (Md. 2003). Legally, U.S. jurisdictions employ widely varying definitions of sex and standards for recognizing changes of sex, with many jurisdictions employing different definitions for different purposes. Compare, e.g., Cal. Health & Safety Code § 103425 (providing for change of sex on birth certificate based on physician certification that the person has undergone "appropriate clinical treatment," without requiring any change in genital anatomy); with W. Va. Code St. R. § 64-32-12 (requiring proof of surgery, without specifying whether this must entail genital reconstruction); with Tenn. Code Ann. § 68-3-203(d) (prohibiting any change of sex designation).

particularly with respect to language used to refer to detainees.[15] We recommend this language be revised to provide greater clarity. In addition, we believe the reference in § 115.15(i) to the permissibility of obtaining information about genital characteristics in the context of medical examinations is unduly vague and should be clarified. In particular, it should be made clear that such examinations must be a part of a legitimate medical examination that all detainees must undergo as part of intake or other processing procedure, and that an examination cannot be ordered solely to assess the detainee's genital characteristics, which would defeat the purpose of this requirement.

The recommended changes to §115.15 (j) are simply for the purpose of clarity and to avoid any conflict between existing policy and the regulations.

Guidance on searches of transgender and intersex detainees

While we support the proposed limitations on cross-gender searches, as written it is unclear how they should be applied to transgender and intersex detainees, whose gender may differ from the gender with which they are housed. Absent any formal guidance stating who shall administer routine security and contraband-related searches of transgender and intersex inmates and residents, these individuals are at unnecessary risk of sexual abuse and trauma. The need for clear requirements in this area is highlighted by the Commission's findings that searches present a heightened risk of gender-based abuse, and that transgender and intersex inmates and residents are highly vulnerable to abuse by staff.[16] The Commission heard testimony from two experts who testified that individuals from these groups are frequently targeted for unnecessary, abusive, and traumatic pat and strip searches, and that these searches can be excuses for and precursors to sexual abuse.[17] This testimony is also supported by reports from human rights organizations.[18] In order to adequately address protect the safety and dignity of transgender and intersex inmates and residents, we strongly urge the Department to include specific guidance on how facilities of all types should apply the restrictions on cross-gender searches and supervision to transgender and intersex individuals.

Transgender and intersex individuals are at high risk of sexual abuse when subjected to physical searches. And for many, the trauma of past sexual abuse is also aggravated by staff members conducting pat-down searches. As is true for all detainees, this risk and trauma can be reduced if the person conducting the search is of the same gender as the individual. But unlike for other inmates and residents, for transgender and intersex detainees the gender-related characteristics that make them particularly vulnerable when being searched by male or female staff may not correlate with whether the detainee is housed in a male or female setting. For example, when

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[15] US DOJ Review Panel on Prison Rape, *Report on Sexual Victimization in Prisons and Jails*, 48 (April 2012).
[16] National Prison Rape Elimination Commission, *Report*, 62-63, 72-73 (June 2009).
[17] *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars*, Hearing Before the National Prison Rape Elimination Commission (Aug. 13, 2005) (testimony of Christopher Daley & Dean Spade).
[18] *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.

transgender women, who identify, live and present themselves as women, are housed in men's facilities, they are nevertheless perceived by men around them as women or highly vulnerable feminine individuals, as evidenced by the extremely high rates at which trans women experience abuse by other inmates in men's prisons.[19] And while for many transgender women this vulnerability is best addressed by placement in female housing, there will nevertheless be cases where placement in a male facility is appropriate at a particular time, yet the detainee still faces significantly different risks related to searches than male detainees in the same facility. Without clear guidance to facilities, it is likely that transgender and intersex detainees will, by default, be subject to routine searches by staff of the gender with which they are housed, which in some cases may actually increase their vulnerability – directly contrary to the intent of the requirements regarding cross-gender searches.

To ensure that the purpose of these requirements is met with respect to these particularly vulnerable populations, we recommend adding in § 115.15(j) a clarification that, subject to a limited exception, for transgender and intersex detainees a search conducted by a staff member of the same self-identified gender as the detainee constitutes a same gender search. However, our recommended language also provides that in cases where a transgender or intersex detainee asserts a legitimate, safety-based objection to being routinely searched by members of the same self-identified gender, the detainee would searched by staff of the other gender for purposes of the requirements of § 115.15. So, for example, there may be cases in which a transgender man being housed with women has a legitimate, safety-based concern with being routinely searched by male staff because, based on his appearance and past experience in institutional settings, he strongly believes this would put him at greater risk. In this case, the transgender man would be able to make a safety-based objection to being searched by male staff and would instead be searched by female staff except in exigent circumstances.

The feasibility of our recommended approach is demonstrated by the fact that number law enforcement and correctional agencies currently use more liberal policies whereby every transgender individual in custody is able to choose the gender of personnel they will be searched by. This approach is currently used by the New York City, Los Angeles, and District of Columbia Police Departments, the Denver Sheriff's Department, the Cumberland County Sherriff's Department in Maine, and by the New York State Office of Children and Family Services in its juvenile facilities.[20] A similar approach has recently been adopted by the government of the United Kingdom for both police and correctional searches.[21]

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[19] *See, e.g.*, V. Jenness et al., *Violence in California correctional facilities: An empirical examination of sexual assault* (Center for Evidence-Based Corrections 2009); 167-68.

[20] Police departments in several Canadian jurisdictions, including Toronto, Vancouver, and Edmonton, have adopted a similar policy following a 2006 ruling by the Ontario Human Rights Commission. *See* Forrester v. Peel (Regional Municipality) Police Services Board, [2006] Ont. Hum. Rts. Trib. Dec. No. 13. Other jurisdictions, such as the Multnomah County, Oregon Sherriff's Department and Corrections Services of New South Wales, Australia, perform all searches according to the gender identity of the inmate.

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

E. § 115.22 Policies to ensure investigation of allegations and appropriate agency oversight.

Recommended final language:

(d) Each facility protocol shall ensure that all allegations are promptly reported to the agency as described in subsection (e) and (f) below, and~~, unless the allegation does not involve potentially criminal behavior,~~ are promptly referred for investigation to an appropriate law enforcement agency with the legal authority to conduct criminal investigations. If the allegation involves a juvenile victim, a referral must also be made to the appropriate agency under mandatory reporting laws. The facility head, or its assignee, must request that the law enforcement agency conduct an appropriate investigation of each allegation of abuse. A facility may separately, and in addition to the above reports and referrals, conduct its own investigation. However, this investigation will not supplant or impede a criminal investigation when potentially criminal behavior is present.

(h) The ~~agency~~ PSA Compliance Manager, or its assignee, shall ensure that any alleged detainee victim of sexual abuse ~~that is criminal in nature~~ is provided access to U nonimmigrant visa information. This information will include instruction on how to apply for the U visa and contact information for a legal service provider with the expertise to assist them. Unless an allegation of sexual abuse is determined to be unfounded by the law enforcement agency investigating the abuse, the facility head or its assignee shall make every effort to ensure that the victim has legal counsel from a local organization that can provide advice on petitions for U nonimmigrant status.

(i) The agency shall designate qualified staff members or DHS employees for the completion of a USCIS Form I-198, Supplement B for any detainee victim of sexual abuse who meets the certification requirements.

(j) The agency shall ensure that any alleged detainee victim of sexual abuse is not removed from the United States while the investigation is pending, unless the detainee victim specifically and expressly waives this prohibition in writing. In situations where the detainee victim is a member of a family unit, the agency shall ensure that no non-abusive family members are removed from the United States while the investigation is pending. In addition, the agency shall also ensure that the victim is not transferred to another facility in a way that materially interferes with the investigation of the allegation unless essential to the protection of the victim. In that case, the agency shall ensure that the victim continues to be available to cooperate with the investigation.

(k) If the victim cooperates with the investigation and if the allegations are not found to have been unfounded, the agency will ensure the victim is not removed from the United States if the victim indicates a wish to petition for U nonimmigrant status and moves to file such a petition within a reasonable period. In such a case, the agency will ensure the victim is not removed unless the petition for a U nonimmigrant status is denied by USCIS.

(l) If the alleged detainee victim is an unaccompanied alien child in removal, the PSA Compliance Manager, or its assignee, will immediately notify ORR if the detainee victim wishes

to remain in the United States while the investigation is pending. The PSA Compliance Manager will facilitate the immediate transfer of the juvenile to ORR.

(m) If the detainee victim is a juvenile in a family unit and the sole parent or legal guardian in that unit has allegedly victimized any juvenile, the PSA Compliance Manager, or its assignee, shall consult with the designated State or local mandatory reporting agency regarding the release and placement of all juvenile(s) in the family unit with State or local social services agency. If the State or local social services agency refrains from assuming custody but a criminal or administrative investigation results in a finding, the juveniles will be deemed unaccompanied and ORR will be notified for the transfer.

Comments:

The recommended changes to this section are important. The changes to (d) stems directly from the experiences of advocacy organizations trying to secure criminal investigations and/or child protection investigation of incidents of abuse. In some cases, local law enforcement officials were told not to investigate an allegation of sexual assault at a DHS contract facility because it would be handled internally. In others, law enforcement or child protection services agencies refused to investigate allegations, claiming a lack of jurisdiction because the detainee was in federal custody. The reference to allegations that do not involve "potentially criminal behavior" is deleted since any allegation of sexual abuse as defined in §115.6 is potentially criminal. The recommended language simply furthers the intent of the proposed language by giving administrators and local law enforcement agencies clear guidance.

Similarly, the recommendations to (h) provide additional guidance to help administrators understand who has responsibility for providing U visa information and what that information should contain. Traditionally, survivors of sexual abuse in DHS confinement facilities have received little, if any, information or assistance in applying for a U visa. The benefits of the U visa to law enforcement efforts are well known. As increased attention is paid to investigating and prosecuting criminal sexual abuse that occurs in DHS confinement facilities, the U visa will become a more important law enforcement tool.

The recommended language for new subsection (i) is meant to prevent qualified agency personnel from declining to assist a detainee with a U visa application. The experiences of advocacy organizations is that even agencies who have staff members who are qualified to complete Supplement B do not require they do so for appropriate detainees. Oftentimes, this is because of a lack of understanding completing Supplement B is not an admission of liability on the part of the agency but simply an acknowledgement that the detainee was or is likely to be helpful in an investigation.

Additionally (j) and (k) seek to prevent detainees from being removed from the United States while the investigation is pending. The agency must also ensure that the victim is not unnecessarily transferred to a different facility. If necessarily transferred, the victim must remain available to cooperate with the investigation. In these circumstances, where there is evidence that the agency's preventative measures have failed to protect the victim, it is the agency's

responsibility to take appropriate legal measures to prevent the victim's removal from the U.S. while the investigation is pending.

The changes in (l) and (m) recognize that DHS must follow standard child welfare practices when juveniles are survivors of sexual abuse. In addition to following mandatory reporting laws, agencies must consider whether a child should be transferred to ORR custody. While this will almost always be true in situations where the child is a designated unaccompanied minor, it may also be true in instances where the child had entered DHS custody as a member of a family unit if the sole adult in that unit is a danger to children. In such cases the sole parent or legal guardian should be deemed no longer "available" to care for the child in accordance with the definition of an unaccompanied alien child, 6 U.S.C § 279(g). In both of these cases, ORR is recognized as better suited to providing children with appropriate care and services.

These recommended changes strengthen DHS's commitment to making sure U visas are used to aid in criminal investigations when the crimes occur in confinement facilities.

F. § 115.31: Staff training.

Recommended final language:

(b) All current facility staff, and all agency employees who may have contact with immigration detention facility detainees, shall be trained within one year of the effective date of these standards, and the agency or facility shall provide refresher ~~information~~ training every two years. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.

Comments:

Overall, the staff training provisions will, if fully implemented, make a significant difference in preventing sexual abuse. Well run trainings are vital components to transforming the culture of DHS detention facilities. However, the proposed language unwisely weakens the staff training provision as it exists in the DOJ final rule. A one-time training that is unsupported by even a modest continuing education requirement is insufficient. The recommended change will not be burdensome to facilities but will greatly benefit individual staff members. Ongoing training, augmented by off-year refresher information, will account for staff turnover, keep staff focused on DHS's "zero tolerance" and will allow staff members to share experiences about implementation of the standards.

G. § 115.35(c): Specialized training: Medical and mental health care.

Recommended final language:

(c) Any facility that does not use DHS medical practitioners shall provide training for its own medical providers. The agency shall review and approve the facility's policy and procedures to ensure that facility medical staff is trained in procedures for examining and treating victims of sexual abuse, in facilities where medical staff may be assigned these activities.

(d) Medical and mental health care practitioners shall also receive the training mandated for employees under § 115.31 or for contractors and volunteers under § 115.32, depending upon the practitioner's status at the agency.

Comments:

The two recommended sentences for this provision are meant to correct what most likely are drafting oversights. First, the addition to § 115.35 (c) simply makes clear that non-DHS medical practitioners must be trained as well. This is consistent with the DOJ final rule, which requires agencies to make the same training available to all medical and mental health care practitioners who work regularly in their facilities. Clearly, DHS means for these personnel to receive training, but they are not mentioned in the proposed language. They are included in § 115.35 (c) because this is the section that discusses individual facilities' policies and procedures.

The proposed addition to § 115.35 (d) is clear on its face, and follows the DOJ final rule. Medical personnel must be trained on basic sexual abuse prevention just as other personnel are. These professionals need to understand the totality of the facility's sexual abuse prevention efforts and their own responsibility to prevent and report abuse. As medical personnel are oftentimes involved in private conversations with detainees, it is likely that detainees will report abuse to these personnel. Additionally, medical personnel have unique access to detainees and frequent opportunities to commit abuse if they choose to do so. They are a key part of any facility's prevention efforts and bear some risk as potential perpetrators. For these reasons, they must receive the core prevention training along with their specialized medical training. Given that these employees have such a high degree of contact with detainees and residents who have been sexually abused, it is especially critical that they are competent to communicate appropriately with LGBTI and gender nonconforming detainees, who are at elevated risk of being sexually abused.

H. § 115.41: Assessment for risk of victimization and abusiveness.

Recommended final language:

(a) The facility shall assess all detainees on intake to identify those likely to be sexual aggressors or sexual victims and shall house detainees to prevent sexual abuse, taking necessary steps to mitigate any such danger. The assessments shall be conducted using an objective screening instrument. Each new arrival shall be kept separate from the general population until he/she is classified and may be housed accordingly.

(c) The facility shall also consider, to the extent that the information is available or made available by the detainee through the assessment process, the following criteria to assess detainees for risk of sexual victimization:

(4) whether the detainee has previously been incarcerated or detained;

(7) whether the detainee has self-identified as, or is perceived to be, gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

Comments:

The proposed provisions for assessing a detainee's risk of victimization and abusiveness are strong overall. The recommended changes are meant to facilitate the implementation of a neutral and thorough screening process, and to track the DOJ final rule. The recommended addition to (a) is likely inherent in this provision, given the impossibility of completing useful assessments without such an objective screening instrument However, it is helpful to add the recommended language to avoid any confusion.

The recommended additions to (c) will provide clearer guidance to staff conducting assessments. In many cases, a detainee will disclose information that is not in the file or a detainee will share information that does not fit neatly in the assessment tool. A staff member needs to understand that this information, if credible, should be included in the assessment.

The recommendation for (c)(4) is simply to account for a detainee's prior experience in a DHS confinement facility. The recommendation for (c)(7) will help staff better understand that a detainee who is perceived to be LGBTI is as much at risk of being targeted for abuse as a detainee who identifies as LGBTI. By adding "perceived to be," the staff member conducting the assessment must not only consider the detainee's identity but also how that detainee is seen by others. Because being LGBTI or gender nonconforming is still highly stigmatized, and many detainees have previously been targeted for discrimination, harassment, and violence (whether in the United States or in another country) due to their LGBTI or gender nonconforming status, many detainees may not explicitly self-identify as such during an initial assessment. Nevertheless, these detainees may be identifiable and vulnerable to abuse because of their appearance, mannerisms, or other characteristics. We therefore urge that, as in the DOJ final rule, this section be revised to require assessment of whether a detainee has self-identified *or is perceived to be* LGBTI or gender nonconforming.

I. § 115.42 Use of assessment information.

Recommended final language:

(b) ~~When making assessment and housing decisions for a transgender or intersex detainee~~ In deciding whether to assign a transgender or intersex inmate to a facility for male or female detainees, and in making other housing and programming assignments, the agency or facility shall consider the detainee's gender self-identification and an assessment of the effects of placement on the detainee's health and safety. The agency or facility facility shall consult a medical or mental health professional as soon as practicable on this assessment. The agency or facility ~~should~~ shall not base placement decisions of transgender or intersex detainees solely on the identity documents or physical anatomy of the detainee; a detainee's self-identification of his/her gender and self-assessment of safety needs shall always be taken into consideration as well. The agency or facility's placement of a transgender or intersex detainee shall be consistent with the safety and security considerations of the facility, and placement and programming assignments for each transgender or intersex detainee shall be reassessed at least twice each year to review any threats to safety experienced by the detainee.

(c) ~~When operationally feasible, t~~Transgender and intersex detainees shall be given the opportunity to shower separately from other detainees.

(d) Except as provided in (e), neither the agency nor a facility shall place lesbian, gay, bisexual, transgender, or intersex detainees in particular housing, bed, or other assignments solely on the basis of such or status;

(e) The facility may, on a voluntary basis and consistent with an individualized risk assessment, place lesbian, gay, bisexual, transgender, or intersex detainees in dedicated facilities, units, or wings established for the purpose of protecting such detainees, provided that detainees in any such facility, unit, or wing have access to programs, privileges, education, and work opportunities to the same extent as other detainees in the general population.

(f) The facility shall not, for the purpose of preventing sexual abuse, adopt restrictions on detainees' access to medical or mental health care, or on manners of dress or grooming traditionally associated with one gender or another.

Comments:

Individualized placement decisions for transgender and intersex detainees

We strongly support § 115.42(b)'s requirement of individualized housing decisions for transgender and intersex detainees that are not based solely on identity documents or anatomy. While § 115.42(a) requires individualized housing assignments generally, the purpose of § 115.42(b) is specifically to address decisions with respect to whether a detainee is placed in a male or female facility or housing unit. Many facilities have previously applied automatic gender placement rules based on single factors such as the anatomy or gender designations on official records of the detainee. The purpose of this provision, as articulated by DOJ in its final rule, is to change that practice: "In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, an agency may not simply assign the inmate to a facility based on genital status."[22] Research indicates that automatic placement on this basis is one of the greatest reasons transgender and intersex detainees are so vulnerable to sexual assault in confinement. A statewide survey in California found that, when transgender women are automatically placed in men's prisons because of their genital characteristics, they are 13 times more likely to be sexually abused than other inmates.[23]

Because this aspect of placement has not previously been individualized in most facilities, it is important that all covered facilities clearly understand their responsibilities under this provision. Therefore, we strongly recommend clarifying the language of this provision to state explicitly, as the DOJ final rule does, that it applies to decisions as to whether to assign a detainee to a facility

[22] National Rules to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37106, 37110 (June 20, 2012).
[23] V. Jenness et al., *Violence in California correctional facilities: An empirical examination of sexual assault* (Center for Evidence-Based Corrections 2009).

for male or female detainees, as well as to other housing and programming assignments. Additionally, in implementing this provision, DHS may need to make some operational adjustments to when the assessment required by (a) is done for transgender and intersex detainees. Some immigration detention facilities only house male detainees or only house female detainees. Therefore, it may be necessary to assess these detainees prior to them being assigned to a particular facility in order to minimize the need for facility transfers after an assessment is done at a facility. The suggested addition of "or agency" is meant to facilitate such an early assessment if needed. We also note that unlike the other sentences in this § 115.42(b), and in the proposed rule generally, the first part of the third sentence confusingly uses the term "should" instead of "shall"; we strongly urge that this be changed to conform to the rest of the rule.

Because ICE and most contracting entities currently lack procedures for making individualized decisions with regard to male versus female housing placements, it is critical for ICE to ensure such procedures are swiftly developed to ensure implementation of this provision. As with many other aspects of PREA implementation, this necessarily involves both effective policies and procedures and real culture change. Making placement decisions on bases other than identity documents or anatomy – while increasingly recognized as a best practice – will be a departure from the previous procedures and institutional culture of many facilities, and from the intuitive assumptions of some staff and administrators. Without appropriate procedures and training, placement decisions could too easily be "individualized" in name only. While the proposed rule appropriately identifies factors that should *not* be a sole basis for placement decisions, field offices and facilities need guidance as to the range of factors that should be considered, how those factors should be evaluated, and how to ensure all relevant information is obtained during assessment. Implementing procedures must also address how to ensure that detainees do not end up in inappropriate placements solely as a result of being routed to an all male- or female-facility prior to a full assessment. To ensure that the final rule can be swiftly implemented, we recommend that the Department work expeditiously to develop a short-term, regional pilot project for individualized housing placements for these populations ahead of the publication of a final rule.

Safe shower access for transgender and intersex detainees

Transgender and intersex detainees are often viewed and treated with scorn and derision by other detainees. Too often, such treatment precipitates sexual abuse. Allowing transgender and intersex detainees to shower separately is a common-sense safety measure. We strongly support the inclusion of § 115.42(c); however, we are very concerned by the addition of the vague phrase, "when operationally feasible." This addition represents an unnecessary weakening of § 115.42(f) of the DOJ final rule, and the Department provides neither any description of the need for this language nor any explanation of its intent. We can imagine no circumstance in which complying with this requirement is not operationally feasible. DOJ determined, as required by law, that this requirement is achievable for all prisons and jails without substantial additional cost and it is already being implemented in the Federal Bureau of Prisons. As FBOP's PREA Program Statement makes clear, facilities may comply with this requirement either by allowing transgender or intersex detainees to shower at a different time than others, or by ensuring that

single shower stalls are available.[24] Furthermore, no emergency exception is needed, as detainees do not need to shower in emergency situations. We strongly urge that the final rule track the language of the DOJ final rule.

Limiting automatic placements based solely on sexual orientation or gender identity

We are very concerned by the complete omission of any limitation on making automatic housing, bed, or other assignments based solely on sexual orientation or gender identity, such as those included in §§ 115.42(g), 115.242(f), and 115.342(c) of the DOJ final rule. While we understand the desire for DHS to retain "some flexibility" in housing assignments, particularly with respect to the use of dedicated housing units, we also believe that some limits and clarity on the use of such units, and on the use of LGBTI status as a sole basis for automatic and involuntary housing or bed assignments more generally, are appropriate.

As the Commission recognized, automatic housing placements that are "based solely on a person's sexual orientation, gender identity, or genital status … can lead to labeling that is both demoralizing and dangerous."[25] The Commission's proposed standard prohibiting placement solely on the basis of sexual orientation or gender identity was based on the experience and advice of many corrections administrators. After initially omitting limitations on the use of housing, bed or other assignments based solely on an individual's sexual orientation or gender identity in its proposed rule, the Department of Justice ultimately concluded that, while "agencies should retain the option of using dedicated facilities, units, or wings to house LGBTI inmates," nevertheless "to do so carries its own risk, and that it should be undertaken only in limited contexts."[26] This conclusion was based on the input of numerous advocates, researchers, and corrections experts.

In the context of the *civil* confinement of juveniles, the DOJ included in both its proposed and final rule a general prohibition on making *any* automatic housing, bed, or other assignments based solely on LGBTI status or identification. The Department explained that "[d]espite good intentions, the practice of using dedicated facilities, units, or wings to house LGBTI inmates may result in youth being unable to access the same privileges and programs as others in general population housing, effectively punishing youth for their LGBTI status."[27] The DOJ also noted that the small size of the typical juvenile facility made it unlikely such units could be operated without subjecting residents to undue isolation– a concern equally applicable to many immigration detention facilities. More broadly, the DOJ stated that, "[w]hile some LGBTI residents may require protective measures, such an assessment should occur only after a holistic assessment of the risk confronting the specific inmate, and should not be implemented automatically as a matter of facility policy."[28] With respect to both juvenile and adult facilities, the DOJ noted that an important consequence of these rules was that they "would preclude

[24] *See* Program Statement 5342.09, Sexually Abusive Behavior Prevention and Intervention Program (Aug. 20, 2012).
[25] National Prison Rape Elimination Commission, *Report*, 80 (2009).
[26] National Rules to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37106, 37153 (June 20, 2012).
[27] *Id.*
[28] *Id.*

automatic placement in involuntary protective custody on the basis of gender identity" or sexual orientation, while preserving the use of protective custody on an appropriately limited, individualized basis.[29]

We recommend an approach based in part on DOJ § 115.42(g) for adult jails and prisons and in part on DOJ § 115.342(c) for civil juvenile detention facilities, but with somewhat greater allowance for the appropriate use of dedicated housing units for LGBTI and gender non-conforming detainees. Under this approach, automatic and involuntary housing, bed, or other assignments based solely on LGBTI status or identification – including automatic, involuntary placement in protective custody on this sole basis – would generally be prohibited. However, a facility would be permitted to assign LGBTI detainees to dedicated housing units provided that (i) such assignment was voluntary and based on an individualized assessment, and (ii) detainees in any such unit had equal access to programming and other opportunities. We note that since the adoption of the DOJ final rule, some agencies have expressed concern that the rule may be construed to prohibit the use of dedicating housing units where placement is entirely voluntary. Since this result was never intended, we proposed slightly modified language that would clarify this intent.

Restrictions on medical and mental health care access and gender expression

Finally, we recommend that § 115.42 incorporate a prohibition on facility policies that punish detainees' gender expression, or restrict access to medical or mental health care, in the name of preventing abuse. Some correctional agencies have invoked PREA to prohibit certain forms of gender expression for the alleged purpose of reducing sexual abuse. For example, the Idaho Department of Correction has implemented the following prohibitions on gender expression: "To foster an environment safe from sexual misconduct, offenders are prohibited from dressing or displaying the appearance of the opposite gender. Specifically, male offenders displaying feminine or effeminate appearance and female offenders displaying masculine appearance to include, but not limited to, the following: Hairstyles, Shaping eyebrows, Face makeup, Undergarments, Jewelry, Gender opposite clothing."[30] Additionally, in recent years some agencies have also invoked sexual abuse prevention as a basis for restricting access to health care, especially for transgender individuals. Recent litigation has shown both that some agencies continue to invoke these rationales, and that courts do not find them credible basis to impose punitive conditions on detainees.[31]

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[29] *Id.* at 37154-37155.

[30] Idaho Department of Correction 325.02.01.001 (4), "Prison Rape Elimination." (Aug. 17, 2004, rev'd May 20, 2009), available at http://www.idoc.idaho.gov/content/policy/680. This policy provides for a limited exception to this prohibition for inmates diagnosed with gender identity disorder, in accordance with the inmate's treatment plan. See also Ky. Corr. Policy No. 17.1, Inmate Personal Property (2009) ("A male inmate shall not wear or possess female attire or attire that has been altered and is feminine in appearance"), available at http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH17/17-1%20Inmate%20Personal%20Property.pdf.

[31] See, e.g., *Fields v. Smith*, 653 F.3d 550, 557-58 (1st Cir. 2011) (citing expert testimony of former corrections official and ACA committee member Eugene Atherton that it was "an incredible stretch" to justify a prohibition on feminizing hormone therapy for inmates on the basis of preventing assaults); Battista v. Clarke, F.3d (1st Cir. 2011) (rejecting security rationales for denying feminizing hormone therapy where defendants failed to substantiate these concerns).

Restricting access to medical care on the supposed grounds of preventing abuse raises obvious, grave constitutional concerns. Additionally, by prohibiting transgender and gender nonconforming individuals from expressing their gender in a way that is integral to their identities, these restrictions promote victim-blaming and reinforce cultural biases that make transgender and gender nonconforming detainees vulnerable to abuse. There is no support for the use of such discriminatory, stigmatizing, and punitive practices as a means to prevent abuse. We urge the Department to explicitly prohibit these harmful practices.

J. § 115.43: Protective custody.

Recommended final language:

(a) These procedures, which should be developed in consultation with the ICE Enforcement and Removal Operations Field Operations Director having jurisdiction for the facility, must require detailed documentation of the ~~document detailed~~ reasons for ~~placement of~~ placing an individual in administrative segregation and the reason why no alternative means of separation from likely abusers can be arranged.

(b) Restrictions on a detainee's liberty due to protective custody shall always be accomplished by the least restrictive means capable of maintaining the safety of the detainee and the institution. Use of administrative segregation by facilities to protect vulnerable detainees shall be restricted to those instances where reasonable efforts have been made to provide appropriate housing and shall be made for the least amount of time practicable, and when no other viable housing options exist, as a last resort. The facility should assign such detainees to administrative segregation for protective custody only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ~~ordinarily~~ exceed a period of 30 days.

(c) Facilities that place detainees in administrative segregation for protective custody shall provide those detainees access to programs, visitation, counsel and other services available to the general population to the maximum extent practicable. Facilities will thoroughly document all denials of access for detainees in protective custody, the reason for such denials, and their duration, and will take all reasonable steps to remedy conditions that limit access.

d) Facilities shall implement written procedures for the regular review of all detainees held in administrative segregation, as follows:

(1) a supervisory staff member shall conduct a review within 72 hours of the detainee's placement in administrative segregation to determine whether segregation is still warranted; ~~and~~

(2) When a detainee has been held in administrative segregation for 20 days, the facility administrator shall notify the Field Office Director; and

(~~2~~3) a supervisory staff member shall conduct, at a minimum, an identical review after the detainee has spent seven days in administrative segregation, and every week thereafter for the remaining 20 days ~~first 30 days, and every 10 days thereafter~~.

Comments:

Judicious use of protective custody is a very important means of addressing sexual abuse in DHS confinement facilities. Misusing protective custody, however, can cause significant mental and emotional harm to detainees. A number of aspects of DHS's proposed protective custody provision are positive improvements over the provisions in the DOJ PREA standards. The recommended changes largely have to do with proper documentation and use of such custody in a civil detention setting.

As previously discussed, LGBTI detainees are commonly subjected to prolonged, restrictive, and psychologically damaging segregation – ranging from solitary confinement to "lock down" in their cells for 22 hours per day. Some facilities impose "protective custody" on LGBTI detainees and house them with detainees who they know will likely sexually abuse them. LGBTI detainees often endure this treatment for extended periods – up to months at a time – without formal determinations of the necessity of segregation and without an appeals process. Courts have found that a blanket policy of placing LGBTI detainees in indefinite, restrictive segregation violates due process.[32] As one court has stated, officials may not "attempt[ ] to remedy one harm with an indefensible and unconstitutional solution."[33] Other practices and policies reported by LGBTI detainees, such as restricting access to recreation and reading material, are blatantly punitive in nature and thus violate constitutional protections. The following examples come from complaints filed in 2011 with the Office for Civil Rights and Civil Liberties:

- [D] was held in segregation for four months in ICE's Houston Processing Center, justifying their decision on the basis that [D] presented "effeminately." Facility staff refused to provide [D] a Bible and permitted him only one hour of recreation – in a cold nine-by-thirteen-foot cell – per day.
- In the McHenry County Jail in Illinois, [R]'s freedom of movement was restricted and she was denied privileges such as reading material available to the general population.
- An asylum seeker from Mexico was kept on a daily 22-hour lockdown during her detention in the Theo Lacy facility in California. The detention center arbitrarily subjected all sexual minorities to this isolated detention. She endured homophobic slurs from officers, who often extended her lockdown to more than 23 hours per day. One officer allegedly told her that the punishment was to "teach her not to be transgender."[34]

The ACLU of Arizona reported similar experiences by LGBT detainees in a 2011 report:

- "Simon," a gay man who had been assaulted and harassed both in his home country and in detention was placed in protective custody when he was detained in Eloy because he

[32] Medina-Tejada v. Sacramento County, 2006 WL 463158 (E.D.Cal. 2006); R.G. v. Koller, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006); Tates v. Blanas, 2003 WL 23864868 (E.D. Cal. 2003).
[33] *R.G.*, 415 F. Supp. 2d at 1156.
[34] National Immigrant Justice Center, Letter to Margo Schlanger, Officer for Civil Rights and Civil Liberties, Re: Submission of Civil Rights Complaints regarding Mistreatment and Abuse of Sexual Minorities in DHS Custody (April 13, 2011), available at: http://www.immigrantjustice.org/sites/immigrantjustice.org/files/OCRCL%20Global%20Complaint%20Letter%20April%202011%20FINAL%20REDACTED_0.pdf

told officers that he had been previously assaulted and was afraid for his safety. While there, he was made to wear an orange disciplinary jumpsuit and was shackled any time he was taken to court or for visitation. He felt humiliated and worried that the shackles would give the immigration judge the wrong impression and negatively affect his immigration case. Even though Simon's family wanted to visit him at the detention center, he did not want them to see him in shackles. As a result of these traumas, and compounded by his continued detention, Simon suffers from severe depression and anxiety.

- An Arizona immigration attorney report that "My client ... has no criminal record, and before leaving [his] home county, was raped ... While he was detained in Florence, he was raped by another detainee in the bathroom. It was reported to the police, but the prosecutor in Pinal County declined to prosecute. After the rape, he was placed in isolation. He couldn't eat, couldn't sleep; just kept reliving trauma. He is completely alone, not even a television ... When he is brought to visitation (or anywhere else), he is shackled hands, feet, and waist. They refuse to take off the shackles even to speak with me, and this is despite the fact that we are in a non-contact booth through a glass window."[35]

Recommended changes to (a) and (c) are focused solely on creating a sufficient record. Misuse of protective custody is a widespread and tempting practice for facility administrators. Therefore, further infringements on the liberty of detainees within protective custody must be made only as a last resort. Requiring that a facility document the context in which a detainee is assigned to protective custody and the limits this custody places on a detainee's access to services is a necessary component for review of those decisions. The signatories strongly recommend that these documentation requirements, which are similar to those in the DOJ PREA standards, be adopted.

Further, the changes to (b) emphasize the need to exhaust alternatives to administrative segregation and to place a strict time limit on the use of protective custody are vital components of a sensible protective custody provision in a civil confinement facility. Too often, administrative segregation is a facility's only or preferred form of protective custody. It should be the policy of all DHS detention facilities to first exhaust alternatives to administrative segregation before placing any detainees there for the purpose of protection. While the proposed language already implies such a policy, it is important that the guidance is explicit.[36] Placing a 30 day time limit on protective custody creates a reasonable safeguard against the danger that a vulnerable detainee will languish indefinitely in torturous forms of isolation. Civil confinement facilities that are unable to find appropriate housing for a vulnerable detainee within 30 days cannot reasonably be considered to meet the basic tenets of the term "civil confinement," and should not be used to hold DHS detainees. For this reason, the signatories urge adoption of the recommended changes to (b).

[35] The American Civil Liberties Union of Arizona, *In Their Own Words: Enduring Abuse in Arizona Immigration Detention Centers*, 23-25 (2011).

[36] For a more thorough discussion of minimum requirements for protective custody, please see the ACLU's separate comments.

In order to track which facilities are possibly using protective custody inappropriately, a facility must contact the Field Office Director when any detainee has been held in such custody for 20 days. This will provide the FOD with real-time notification of any detainee who is approaching the 30 day deadline. If the FOD is concerned that the detainee is being treated inappropriately, the FOD will have time to intervene before the facility runs afoul of the deadline.

K. § 115.53 Detainee access to outside confidential support services.

Recommended final language:

(c) Each facility shall make available to detainees information about local organizations that can assist detainees who have been victims of sexual abuse, including mailing addresses and telephone numbers (including toll-free hotline numbers where available). If no such local organizations exist, the facility shall make available the same information about national organizations. The facility shall enable reasonable, <u>confidential</u> communication between detainees and these organizations and agencies~~, in as confidential a manner as possible~~.

<u>(d) When complete confidentiality is not possible, the facility shall document the reason(s) why and inform the detainee, prior to giving access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.</u>

Comments:

Access to outside confidential support services is an important aspect of effective follow-up care for a survivor of sexual abuse in a DHS confinement facility. These services are vital to a survivor's well-being and help to mitigate some of the worst negative health consequences of sexual abuse. Infringing on the confidentiality of these services compromises their effectiveness, runs counter to professional guidelines for counselors, and, in some cases, may disqualify service providers from working with immigration detainees. Confidentiality can be especially important for LGBTI detainees who may fear being blamed for the abuse, punished, or otherwise retaliated against based on their sexual orientation or gender identity or expression.

In a civil confinement setting, infringing on the confidentiality of these communications can rarely, if ever, be justified. Nothing about these communications would compromise the safety or order of a civil confinement facility. For these reasons, the signatories recommend that, as a matter of policy, these communications be confidential.

In those rare instances in which a particular conversation cannot be confidential, the signatories recommend, consistent with the DOJ final rule, that the reasons be documented and that the detainee be informed about the infringement.

L. § 115.66: Protection of detainees from contact with alleged abusers.

Recommended final language:

Staff, contractors, and volunteers ~~suspected of perpetrating~~ alleged to have perpetrated sexual abuse shall be removed from all duties requiring detainee contact pending the outcome of an investigation. Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with any detainees pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

Comments:

Protection should arise based on an allegation of sexual abuse. "Suspicion" assumes a preliminary determination by a responsible official. The separation should occur upon the allegation so as to best protect the victim.

As the workforces of many DHS immigration facilities are unionized, the recommended language above is necessary to make sure that no collective bargaining agreement negates the intent of this provision. As DHS recognizes, separating staff that are under investigation from detainees is a common sense security precaution. The above language, borrowed from the DOJ PREA standards, is a necessary component to effective implementation of this provision.

M. § 115.67: Agency protection against retaliation.

Recommended final language:

~~Staff, contractors, and volunteers, and immigration detention facility detainees, shall not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force. For at least 90 days following a report of sexual abuse, the agency and facility shall monitor to see if there are facts that may suggest possible retaliation by detainees or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any detainee disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. DHS shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.~~

(a) The agency shall establish a policy to protect all detainees and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse investigations from retaliation by other detainees or staff, and shall designate which staff members or departments are charged with monitoring retaliation.

(b) The agency shall employ multiple protection measures, such as housing changes or transfers for detainee survivors or abusers, removal of alleged staff or detainee abusers from contact with victims, and emotional support services for detainees or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) For at least 90 days following a report of sexual abuse, the agency shall monitor the conduct and treatment of detainees or staff who reported the sexual abuse and of detainees who were

reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by detainees or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any detainee disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) In the case of detainees, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(f) As a component of preventing retaliation, a facility's PSA Compliance Manager, or assignee, shall make sure that the mandates of §115.22(h-m) are fulfilled.

Comments:

The proposed anti-retaliation provision is wholly inadequate. One of the most significant barriers preventing reporting sexual abuse in detention is fear of retaliation. As was mentioned above, this is particularly true in the immigration context as detainees fear being removed from the U.S. as a likely form of retaliation for reporting abuse.

Given this, the signatories strongly recommend that DHS adopt the DOJ's comprehensive anti-retaliation provision. The DOJ's anti-retaliation infrastructure is clear and pro-active. It anticipates that a facility or individual staff within a facility will be tempted to retaliate against a detainee reporting abuse – particularly when that abuse was perpetrated by a staff member. DHS should adopt this plan and ensure that a description of it is included in the comprehensive detainee education course.

N. § 115.78 Disciplinary sanctions for detainees.

Recommended final language

(c) At all steps in the disciplinary process provided in paragraph (a), any sanctions imposed shall be commensurate with the severity and circumstances of the committed prohibited act, the detainee's disciplinary history, and the sanctions imposed for comparable offenses by other detainees with similar histories; ~~and~~ sanctions shall be intended to encourage the detainee to conform with rules and regulations in the future.

Comments:

It is important in sanctioning detainees for sexual abuse that sanctions be equitable and appropriate for the offense. The above recommended language is borrowed from the DOJ PREA standards and best guides relevant staff members in reaching this goal. The signatories recommend that DHS adopt these changes, which will go a long way in preventing the misuse of these regulations to inappropriately punish LGBTI detainees.

O. § 115.86 Sexual abuse incident reviews.

Recommended final language

~~(a) Each facility shall conduct a sexual abuse incident review at the conclusion of every investigation of sexual abuse and, where the allegation was not determined to be unfounded, prepare a written report recommending whether the allegation or investigation indicates that a change in policy or practice could better prevent, detect, or respond to sexual abuse. The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so in a written response. Both the report and response shall be forwarded to the agency PSA Coordinator.~~

~~(b) Each facility shall conduct an annual review of all sexual abuse investigations and resulting incident reviews to assess and improve sexual abuse intervention, prevention and response efforts. The results and findings of the annual review shall be provided to the agency PSA Coordinator.~~

(a) The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

(c) The review team shall include upper-level management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(d) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;
(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;
(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;
(4) Assess the adequacy of staffing levels in that area during different shifts;
(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and
(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1)-(d)(5) of this section, and any recommendations for improvement and submit such report to the facility head and PREA compliance manager.

(e) The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

Comments:

As proposed, the sexual abuse incident review provision is inadequate, and lacks sufficient specificity to ensure that such reviews will be meaningful. The purpose of the incident review is to determine how a facility's existing policies and practices failed to prevent an assault and what changes need to be made to prevent further assaults. As DHS's stated goal is to eliminate all sexual abuse from its facilities, it is important that the standards lay out a uniform procedure for reviewing teams to follow when investigating incidents of sexual assault. The amendments we recommend here will make it easier to identify those detainees most vulnerable to abuse, and correct any shortcomings in a facility's sexual abuse prevention procedures. Without sufficiently specific criteria, a reviewing team is severely limited in its ability to identify patterns and implement policy change.

The procedure we recommend follows the DOJ final rule. , It requires the participation of higher level facility staff and detailed review of each incident, including a determination if the victim's racial, gender, or other identity was a motivating factor in the attack. Any burden on staff resources required to implement this more detailed plan will be offset by the future incidents of sexual abuse that are prevented by correcting flaws in existing policies or practices.

P. § 115.93: Audits of standards.

(a) During the three-year period starting on [INSERT DATE ONE YEAR PLUS 60 DAYS AFTER EFFECTIVE DATE OF THE STANDARDS], and during each three-year period thereafter, the agency shall ensure that each of its immigration detention facilities, including those run by a non-DHS private or public entity, is audited at least once.

(b) The agency may order an expedited audit of a DHS run facility, or request an expedited audit of a facility run by a non-DHS private or public entity if the agency has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with PREA-related issues.

(e) The DHS Office of Civil Rights and Civil Liberties will also create a process by which a member of the public may recommend an expedited audit of any facility if that person believes that the facility may be experiencing problems related to sexual abuse.

Comments:

The signatories applaud DHS's efforts to provide appropriate independent oversight of the implementation of its PREA standards. Effective audits will help determine whether the policies required by the standards have become practice within audited facilities. The proposed audit provisions for immigration detention facilities are generally strong. The above recommended changes are offered to clarify the scope of the audits and to augment the proposed expedited audit process.

As drafted, it is unclear whether DHS intends for contract facilities to be bound by this audit provision through the contracting provision. Given that most immigration detainees are confined in contract facilities, any exemption of those facilities from this provision would practically

nullify the benefits of requiring audits. Therefore, this lack of clarity is understood to be a drafting issue and the above language in (a) and (b) is offered for clarification purposes.

If an exemption was contemplated in the proposed standards, the signatories urge DHS in the strongest terms to remedy this error. Given that DHS has no direct control over contract facilities and that a majority of the individual facilities are not primarily intended to confine civil detainees, audits are the single best tool the Department will have to measure compliance with the standards. For that reason, this provision must apply – via the contracting provision – to all immigration detention facilities.

Additionally, the signatories applaud DHS's inclusion of an expedited audit provision. This provision is important in responding to problems or concerns in specific facilities. The language recommended for (e) simply creates an additional means of information gathering by allowing members of the public to alert the DHS Office of Civil Rights and Civil Liberties (CRCL) of problem facilities. CRCL already has a means by which members of the public can file complaints and will therefore be able easily to accommodate this additional reporting stream.

STANDARDS FOR HOLDING FACILITIES AND TEMPORARY HOLDING ROOMS

While our detailed comments have focused on the proposed rules for immigration detention facilities, it is critical that all persons confined by DHS, in all settings, are adequately protected from abuse. We recommend that the changes we proposed for the immigration detention standards also be incorporated in any corresponding provisions relating to holding facilities.

In addition, we strongly urge DHS to ensure a minimal floor of protections for temporary holding rooms that are not in DHS holding facilities.

We support the comments on standards for holding facilities and temporary holding rooms submitted by Just Detention International, the Women's Refugee Commission, et al., and incorporate those comments here by reference.

RESPONSES TO DHS SOLITICED QUESTIONS REGARDING AUDITS

I. Would external audits of immigration detention facilities and/or holding facilities conducted through random sampling be sufficient to assess the scope of compliance with the standards of this proposed rule?

No. As is clear from the NPRM, DHS utilizes a wide variety of holding facilities which are run by very different types of government and private entities. The culture, structure, and governing philosophies vary widely between facilities. Random sampling would require some consistency between the entities implementing the standards -- a degree of consistency that is completely absent from the structure of DHS confinement facilities.

Further, even if all DHS confinement facilities were run under one administrative umbrella, the degree of discretion that individual facility heads have, the difference between the populations

being held, and the differences in physical layout make use of random sampling insufficient for measuring compliance across facilities.

II. *Once a holding facility is designated as low risk, would it be a more cost effective yet still sufficient approach to furthering compliance with the standards to externally audit a random selection of such facilities instead of re-auditing each such facility once every five years?*

No. Any designation of a facility as low risk would be a mistake. As described in VII L, designating a facility low risk based on one successful audit demonstrates a lack of understanding of the scope of the culture change necessary to end the crisis of sexual abuse in DHS confinement facilities. As specified above, the signatories believe there should be no five-year auditing cycle.

Further, use of random sampling in measuring compliance with the standards is, as detailed more fully in VIII B2, is a mistake.

III. *Would the potential benefits associated with requiring external audits outweigh the potential costs?*

Yes. External scrutiny, and the transparency and accountability it brings, are vitally important to the strength of any public institution – and confinement facilities are no exception. Sound oversight, conducted by a qualified independent entity, can identify systemic problems and offer solutions. DHS faces the challenge of establishing regulations that will successfully translate the oversight function of the standards into policy and practice across the country. Recognizing this important challenge, the signatories have provided comments that, if adopted, would result in a practical and effective audit model.

A realistic, cost-effective monitoring system is critical to the standards' overall effectiveness and impact. Outside audits are needed to provide a credible, objective assessment of a facility's safety, and to identify problems that may be more readily apparent to an outsider than to an official working within that system. Thorough audits will help prevent abuse and lead to safe facilities, more effective prison management, and, ultimately, lower fiscal and human costs to the community.

It is important to note that DHS cost projections do not seem to account for those contract facilities that will already be doing audits under the DOJ PREA standards. The signatories see no reason why the two audits could not be conducted simultaneously so long as the auditor is properly trained in the differences between the standards and writes separate (but closely related) reports for each set of standards. Allowing for simultaneous audits would dramatically reduce the cost of auditing the DHS PREA standards and increase the overall cost to the facility only negligibly, if at all.

Further, DHS should consider offering an abbreviated auditor training and certification process for auditors already certified by DOJ. It is conceivable that DOJ-trained and certified auditors could take part in an abridged DHS auditor training focusing on the differences between the two sets of standards, the principles of civil confinement, and the unique features of DHS detainees.

IV. Is there a better approach to external audits other than the approaches discussed in this proposed rule?

Yes. Audits could be conducted on an unannounced basis so that conditions within the facility are seen as they typically are. Also, facilities that are required to take corrective action after an audit could be required to undergo a follow-up audit 18 months later to assess the degree to which the corrective action has been effective. Auditors could be required to work in teams that include advocates and/or former detainees so that a more comprehensive inspection can be done of a facility and the conditions of detention. This team could be required to meet with a certain percentage of current and former detainees and employees, contractors, and volunteers to make sure more voices and experiences inform the audit. And, DHS could require that all facilities submit to expedited audits when requested by CRCL.

While each of these recommendations would improve the quality of the audits, the signatories recognize that tension exists between an audit's complexity and cost. In deference to that tension, the signatories believe that the audit plan laid out above, including the recommended changes, is sufficient to determine the degree to which the standards are being implemented and will keep costs at a reasonable level.

Further, if DHS still wishes to adopt a system of designating certain facilities as low risk and auditing those facilities less frequently, it can always move to amend the PREA standards at a later date. For instance, after two complete three-year audit cycles, DHS and advocates will have two audit reports for each facility (if DHS accepts the recommendations included in this comment). With this evidence in hand, DHS can better determine if some facilities can appropriately be audited on a less frequent basis and advocates will have concrete data to use in providing comment on that plan.

The signatories do not believe that the above recommended audit plan must be in place in perpetuity. However, it is clear that, to be effective, this plan must be in place for a sufficient amount of time to gather the data needed properly to assess any changes.

V. In an external auditing process, what types of entities or individuals should qualify as external auditors?

Auditing DHS confinement facilities requires a well rounded individual or team of individuals. An effective auditor or audit team must have prior expertise and/or training in both sexual violence dynamics and detention environments. The balance between prior expertise and current training will vary, but being a retired corrections or detention official, by itself, is not a sufficient qualification. State certification in rape crisis counseling should be a strongly preferred qualification. Any auditor or audit team must have demonstrable skills in gathering information from traumatized individuals and picking up cues of possible concerns that detainees and others may not feel comfortable sharing.

VI. Would external audits of immigration detention facilities conducted through random sampling be sufficient to assess the scope of compliance with the standards of this proposed rule?

No. Please see answer to question 1 above.

CONCLUSION

The sexual abuse of LGBTI people in immigration detention and holding facilities must end. Strong regulations are urgently needed to protect all detainees from the devastation of sexual abuse. The Department's draft regulations go a long way in making clear that no detention should ever include sexual victimization. We strongly urge the Department to strengthen the regulations noted above to ensure that all people in detention receive the basic protections from sexual abuse contemplated under PREA.

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

Sincerely,

American Civil Liberties Union
Human Rights Campaign
Immigration Equality
Lambda Legal
National Center for Lesbian Rights
National Center for Transgender Equality
National Gay and Lesbian Task Force
Sylvia Rivera Law Project
Transgender Law Center