Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

May 3, 2010

SENT VIA MAIL AND ELECTRONICALLY

Robert Hinchman, Senior Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, NW., Room 4252
Washington, DC 20530

RE: Public Comment Concerning Docket No. OAG-131

Dear Mr. Hinchman:

The Human Rights Defense Center submits the following comments regarding the proposed Prison Rape Elimination Act (PREA) standards to be promulgated by the Attorney General's office, under Docket No. OAG-131. The Human Rights Defense Center (HRDC) is a not-for-profit organization that works to protect the rights of people who are incarcerated. We publish *Prison Legal News* (PLN), a monthly publication that reports on criminal justice-related issues, and have extensively covered topics related to sexual abuse of prisoners. PLN's editor, Paul Wright, served on the advisory board of Stop Prisoner Rape (now Just Detention Int'l).

Although HRDC supports national, enforceable standards for the prevention of rape and sexual abuse of prisoners – including the adoption of the proposed standards developed by the National Prison Rape Elimination Commission – we believe the proposed standards do not go far enough. Our comments reference specific proposed PREA standards for adult prisons and jails, but apply equally to similar standards for other types of correctional facilities and/or prisoner populations, where applicable (e.g., juvenile facilities and immigration detention centers).

1. Glossary - Definitions

A. Agency is defined as a "unit of a governing or corporate authority with direct responsibility for the operation of any facility that confines inmates or detainees." However, "agency head" is defined as "the chief authority of a Federal, State, or local correctional or law enforcement system," which notably does not include the chief of a corporate entity or authority that operates correctional facilities. The definition of "agency head" should include the corporate officers of companies that operate correctional facilities, just as the term "facility head" in the proposed standards encompasses corporate officials who manage private prisons.

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B. The definition of "sexual abuse" does not include kissing (mouth to mouth contact). Prison employees who kiss prisoners, which may involve coercion or force, are engaging in blatantly inappropriate conduct; further, kissing may be used as a "grooming" technique that leads to further sexual abuse. Therefore, the standards should include kissing under the definition of staff-prisoner sexual abuse and/or staff-prisoner sexual harassment.

2. Cross-gender Supervision of Prisoners (PP-4)

Proposed standard PP-4 prohibits cross-gender supervision in non-emergent situations where prisoners disrobe or perform bodily functions. To further reduce the possibility of sexual abuse or harassment resulting from cross-gender supervision, we suggest that the standards require agencies to adopt policies whereby *same*-gender supervision is the rule in all non-emergency situations rather than only those that involve disrobing and bodily functions. In the alternative, agencies should be required to prioritize staffing positions to facilitate same-gender supervision. Following systemic sexual abuse of female prisoners in Michigan's prison system, for example, the U.S. Sixth Circuit Court of Appeals upheld a Department of Correction policy that required same-gender staff positions in female housing units. See: *Everson v. Michigan DOC*, 391 F.3d 737 (6th Cir. 2004), *petition for rehearing en banc denied, cert. denied*.

3. Hiring and Promotion Reviews (PP-6)

Proposed standard PP-6 states that agencies may not hire or promote employees who have engaged in sexual abuse in an institutional setting or who have engaged in sexual activity in the community facilitated by force, the threat of force or coercion. However, it is unclear whether currently-employed staff who meet this criteria must be terminated or whether they are "grand-fathered in" under the standards. To meet the zero-tolerance goal of eliminating sexual abuse, all currently-employed prison staff who have engaged in sexual abuse in an institutional setting, or who have engaged in sexual activity in the community facilitated by force, the threat of force or coercion, should be terminated after the PREA standards become effective; i.e., this standard should specify that there is no "grandfather" provision for currently-employed staff members. Agencies should not have to wait until such employees are reviewed for promotions – which may take years – but should terminate them once the PREA standards become effective.

4. Provisions Related to the Prison Litigation Reform Act (RE-2)

Proposed standard RE-2 addresses the exhaustion requirements under the Prison Litigation Reform Act (PLRA) for prisoners who are raped or sexually assaulted. However, this standard does not make it clear whether prisoners still must use an existing institutional grievance system for exhaustion purposes or if the PREA standards overrule grievance procedures (including any time limits to file institutional grievances). This standard should explicitly state to what extent

institutional grievance procedures are overruled vis-à-vis reports of sexual abuse, for PLRA exhaustion purposes. The standard should also specify that so long as a report of sexual abuse is made in compliance with PREA standards, an agency shall not raise an affirmative defense of non-exhaustion in any civil litigation filed by or on behalf of the victimized prisoner.

Further, the standards should specify that the PLRA's requirement that prisoners must allege a "physical injury" before bringing suit for mental or emotional damages (42 U.S.C. § 1997e(e)) *does not apply* to acts of sexually abusive conduct, or that prisoners who have been subjected to sexually abusive conduct have satisfied the physical injury requirement under the PLRA. In one case a court has held that sodomy did not meet the PLRA's "physical injury" requirement. See: *Hancock v. Payne*, 2006 WL 21751 at *1, 3 (S.D. Miss., Jan. 4, 2006) (holding that plaintiffs' allegations of abuse, including that a staff member "sexually battered them by sodomy," were barred by § 1997e(e)). The PLRA's physical injury requirement should not apply to prisoners who are raped or sexually abused, and the standards should reflect this by requiring prison and jail agencies to waive that defense in any civil litigation involving victimized prisoners.

5. Mandatory Reporting of Staff Sexual Abuse to Law Enforcement (DI-1)

Proposed standard DI-1 states, "All terminations for violations of agency sexual abuse policies are to be reported to law enforcement agencies and any relevant licensing bodies." This standard apparently does not apply to staff members who resign before they are terminated for violating sexual abuse policies. That is, the way the proposed standard is written, only terminations – not resignations – of sexually abusive employees result in referrals to law enforcement agencies and applicable licensing bodies. It would be a much stronger deterrent if staff knew that substantiated cases of sexual abuse would not only result in presumptive termination, but also would result in the mandatory notification of law enforcement authorities and relevant licensing bodies whether employees voluntarily resign *or* are terminated.

6. Aggregate Collected Data – When Required (DC-2)

Proposed standards DC-2, DC-3 and DC-4, concerning data collection, specify that incident-based sexual abuse data must be aggregated, and aggregate collected sexual abuse data must be made publicly available, "at least annually." However, this means that the public can expect to review an agency's progress in reducing sexual abuse only once a year, when the annual report is released. Additionally, agencies may not be able to identify ongoing trends of sexual abuse involving specific facilities or employees if collected data is only required to be aggregated "at least annually." It would provide greater transparency and allow agencies to identify trends in sexual abuse if collected data is aggregated – and such data is made available to the public – at least monthly. As most computer programs that are used to collect data are capable of creating reports with ease, monthly reports of aggregate collected data would not be burdensome. Thus, DC-2 should specify that collected sexual abuse data must be aggregated and made available to the public on at least a monthly basis rather than at least annually.

7. Timing of Compliance Audits (AU-1)

Proposed standard AU-1 requires compliance audits "at least every three years." The goal of zero tolerance for sexual abuse in correctional facilities is too important to allow lapses of three years between such audits. Thus, this standard should mandate compliance audits each year, or at most every two years rather than three.

Additional General Comments

1. Compliance With and Enforceability of PREA Standards

HRDC has significant concerns regarding the enforceability of the PREA standards. When we raised this issue during a National Prison Rape Elimination Commission conference call, we were informed that compliance with the standards would be achieved through the following three methods, which we address separately below:

A. States that fail to adopt and comply with the PREA standards would forfeit funds received under certain federal grant programs.

PREA states, "For each fiscal year, any amount that a State would otherwise receive for prison purposes for that fiscal year under a grant program covered by this subsection shall be reduced by 5 percent, unless the chief executive of the State submits to the Attorney General" a statement that they have adopted and are in compliance with the PREA standards.

We are unaware of an example where federal funds have been withheld from a state corrections agency due to its failure to comply with federal statutory mandates. Such financial penalties are meaningless without a strict and consistent enforcement mechanism.

B. Prison agencies that fail to comply with the standards will be included in an annual report issued by the Attorney General's office, which will serve as a means of embarrassment and an incentive for compliance with the standards.

PREA states, "Not later than September 30 of each year, the Attorney General shall publish a report listing each grantee that is not in compliance with the national standards...." Presumably, inclusion in such reports will prove embarrassing and agencies will endeavor to comply with the standards so as to avoid this "shaming" disincentive. However, states previously have engaged in systemic sexual abuse of female prisoners (Michigan); segregating HIV-positive prisoners in separate-and-unequal housing (Alabama); providing grossly deficient medical care resulting in dozens of unnecessary deaths each year (California); depriving prisoners of food as punishment (South Carolina), etc. Given the documented abuses that have been inflicted upon prisoners, it is highly unlikely that including agencies that fail to comply with the PREA standards on a list, for

the purpose of shaming them into compliance, would be successful. Some prison officials have already demonstrated that they engage in shameless conduct; others, through their reluctance to embrace necessary reforms, have shown they have no shame. Therefore, we do not believe this is an effective means of ensuring compliance.

C. The PREA standards will become standards of care which can be used in civil litigation; agencies that do not adopt or comply with the standards therefore risk liability, which serves as an incentive for compliance.

The problem with this incentive approach is that compliance with the PREA standards is not statutorily mandated or legally enforceable. Like the standards of the American Correctional Association (ACA), PREA standards do not create enforceable rights and do not determine the legality of an act or failure to act. See, for example: *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) ("It is absurd to suggest that the federal courts should subvert their judgment as to alleged Eighth Amendment violations to the ACA whenever it has relevant standards"); see also *Gates v. Cook,* 376 F.3d 323, 337 (5th Cir. 2004) (ACA standards "may be a relevant consideration," but compliance "is not per se evidence of constitutionality").

Based on the foregoing, HRDC believes that absent the force of law to ensure compliance with and enforcement of the PREA standards, the incentives for voluntary compliance are inadequate. Further, the standards are unclear in regard to the auditing process whereby an agency's PREA reports are subject to review and verification by an independent official or organization to ensure they are based upon reliable data. For example, while PREA requires the "chief executive" of a state to submit a statement that the state is in compliance with PREA standards, who verifies that such statements are in fact accurate? It is unclear which state, federal or non-government agency will assume this oversight responsibility through the auditing process specified in AU-1.

Notably, the standards do not provide for a private cause of action for enforcement purposes, which in our view is a significant failing. This will likely require a remedy by Congress, and we encourage the U.S. Department of Justice to lobby Congress to strengthen PREA by including a private cause of action for victimized prisoners when agencies fail to follow the standards.

2. Cost Considerations for Implementing the Standards

The Attorney General's office has noted that PREA specifies that national standards must not "impose substantial additional costs compared to the costs presently expended by federal, state and local prison authorities." Requiring prison and jail authorities to do anything they do not currently do, as most of the standards mandate, will result in additional costs. However, it must be noted that by reducing or eliminating sexual abuse in correctional facilities through enforcement of the standards, the costs associated with such abuse will be reduced. This includes staff time in investigating incidents involving sexual abuse; the cost of criminal prosecutions of staff

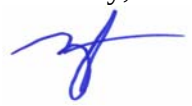
or prisoners who engage in sexual abuse (and the cost of any terms of incarceration following convictions for same); the cost of medical and/or mental health treatment for victims of sexual abuse; the cost of settlements or damage awards in lawsuits or claims filed by victims of sexual abuse, etc. Thus, when evaluating the cost of implementing and enforcing PREA standards, the reduction in costs that accompanies a decrease in sexual abuse must be factored in.

3. Conflict of Interest Involving the Attorney General

HRDC also wants to note that the Attorney General's office has an inherent conflict of interest in regard to promulgating the PREA standards and with any monitoring of those standards. The Attorney General is responsible for defending the Bureau of Prisons and federal prison staff in civil suits filed by prisoners who have been sexually abused by federal prison employees. Thus, there is an inherent conflict of interest in terms of the Attorney General promulgating standards that may have an effect on civil cases in which the Attorney General's office represents federal prison officials accused of sexually abusing prisoners.

Thank you for your consideration of our comments regarding the PREA standards under Docket No. OAG-131, and please contact us should you require any additional information.

Sincerely,



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