PRISON LEGAL NEWS

Dedicated to Protecting Human Rights

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August 4, 2008 **SENT VIA FAX AND EMAIL**

National Prison Rape Elimination Commission
Attn: Public Comments on Standards
1440 New York Avenue NW, Suite 200
Washington, DC 20005-2111

RE: Comments on NPREC Draft Standards for Lockups, Juvenile Facilities and Community Corrections Facilities

Dear Commissioners:

On July 4, *Prison Legal News* submitted comments related to the Commission's draft standards for Adult Prisons and Jails. We now submit comments related to the draft standards for Lockups, Juvenile Facilities and Community Corrections Facilities, which incorporate some of the issues raised and discussed in our previous correspondence.

Prison Legal News (PLN) is a national monthly publication that reports on criminal justice and corrections-related litigation and news. We have extensively covered topics related to the rape and sexual abuse of prisoners; further, PLN's editor, Paul Wright, served on the advisory board of Stop Prisoner Rape until May 2008, when the advisory board was dissolved.

Our comments on the second set of NPREC draft standards are as follows, by section:

Glossary

Inclusion of kissing in sexual abuse/harassment definitions

The definition for sexual abuse in the Glossary does not include mention of unwanted, forcible or unwelcome kissing (mouth to mouth contact). Certainly, however, staff members who kiss prisoners are engaging in inappropriate conduct, and kissing can be a "grooming" technique that leads to further inappropriate sexual acts. Thus, the Standards should include or address kissing under the definition of sexual abuse and/or sexual harassment.

Leadership and Accountability

Separating Juvenile Offenders from Adult Offenders

Although the draft standards for Juvenile Facilities include requirements for heightened safety for vulnerable residents (PP-2) and an assessment of resident vulnerability (CL-2), there is no explicit requirement that juvenile residents age 17 and under be separated from those who are age 18 and over. It would appear that juvenile residents who are minors are *per se* vulnerable and should be prevented from co-mingling with residents who are legally adults. Juveniles are particularly vulnerable to sexual manipulation and abuse; this includes juveniles convicted as adults who are held in adult prisons, which the Standards should specifically address.

Detection and Response

1. Mandatory reporting of staff sexual abuse to prosecuting authorities

Under proposed Standard DI-1, the Committee states in the discussion section that "the agency should refer any substantiated allegations for criminal prosecution." Yet there is no *requirement* that correctional agencies refer incidents of employee sexually abusive conduct for prosecution. It would be a much stronger deterrent if staff knew that sexual misconduct of a criminal nature would not only result in their termination, but also would result in the mandatory notification of prosecuting authorities. At the very least, mandatory referral to prosecuting authorities should be required for staff accused of sexually abusive penetration. Notably, in the draft standards for Lockups, Standard DI-2, the Committee states that cases of detainee-on-detainee sexual abuse should be referred to appropriate prosecuting authorities; however, there is no similar provision for referrals in cases involving staff-on-detainee sexual abuse. We can conceive of no legitimate reason why the former cases should be referred for prosecution but not the latter.

2. Applicability of the Prison Litigation Reform Act

Under proposed Standard RE-1, the Committee states, "Any report of sexual abuse made at any time after the abuse, which names a perpetrator and is made in writing to the agency, satisfies the exhaustion requirement of the Prison Litigation Reform Act [PLRA]."

Likewise, the Standard should specify that the PLRA's current requirement that prisoners show "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 of the PLRA. In at least one case a court has found 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 plaintiffs' allegations of abuse, including that a staff member "sexually battered them by sodomy," were barred by § 1997e(e)). As noted in the Committee's discussion of Standard IN-1, "Unlike other

forms of brutality or violence that may occur in correctional facilities, sexual abuse is less likely to be witnessed, cause visible injury, or leave other physical evidence." Prisoners who have been subjected to sexual abuse may suffer mental or emotional injuries but have no physical injuries. Allowing such victimized prisoners the ability to seek damages for emotional or mental injuries would incentivize prison agencies to take measures to minimize sexual abuse and would provide such prisoners some measure of justice and compensation.

Similarly, other provisions of the PLRA limit the ability of sexually abused prisoners to obtain relief through the courts, including the PLRA's exhaustion requirement (which, in some cases, may result in grievances concerning sexual abuse being decided by prison employees who are complicit in such abuse); the PLRA's limitation on attorney fees, which makes attorneys less willing to represent prisoners victimized by sexual abuse; and the PLRA's time restrictions on consent decrees – including those designed to remedy prison conditions that facilitate sexual abuse. Nor should the PLRA be applied to juvenile offenders, who are least likely to be able to comply with the PLRA's myriad requirements and restrictions. In short, the PLRA operates to frustrate the ability of prisoners who are victims of sexual abuse to obtain relief and redress through the courts. It is therefore recommended that the PLRA not be applied to prisoners who raise claims of rape or sexual abuse. Note that PLRA reform legislation is presently pending in Congress (H.R. 4109); for more information on the PLRA's impact on juvenile offenders and in sexual abuse cases, please contact Jody Kent at the SAVE Coalition – (202) 548-6617.

Monitoring

Public access to sexual abuse data from private prison companies

In the Committee's discussion of standard DC-2, the Committee notes "...the public may have a legitimate interest in the data collected by agencies because of the information it provides about the safety of these public institutions," and states that "All aggregate data ... should be readily available to the public. Agencies should also establish a nonburdensome process to allow researchers, academics, journalists, and others access to incident-based data."

This is especially true for privately-run prisons, as the Freedom of Information Act (FOIA) and state public record laws often do not apply to private prison firms. The Standards should specify that private prison firms which are otherwise not required to comply with public records laws or FOIA must provide public access to aggregate and incident-based data collected pursuant to the NPREC Standards. This is necessary because most private prison companies are secretive about their internal incident-reporting data. CCA, for example, routinely labels such data as attorney-client privileged, or "proprietary" and not for distribution. CCA is presently lobbying to defeat H.R. 1889, which would require private prison companies that contract with federal agencies to

comply with FOIA requests. Thus, this Standard should provide specific disclosure requirements for private prison companies that otherwise are not obligated to disclose the data collected under NPREC Standards to members of the public. Government agencies also are sometimes reluctant to disclose data related to sexual assaults, and the Standards should include provisions for review or oversight of an agency's refusal or failure to publicly disclose such data.

Other Comments and Concerns

1. Compliance with and enforceability of NPREC Standards

PLN has significant concerns regarding the enforceability of the NPREC Standards. When we raised this issue during the NPREC's May 5, 2008 media conference call, we were informed that compliance with the Standards would be achieved through the following mechanisms, which we address separately below.

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

The 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 NPREC Standards.

First, PLN is unaware of an example where federal funds were withheld from a state corrections agency due to its failure to comply with federal statutory mandates. Such financial penalties are largely meaningless without strict and consistent enforcement.

More importantly, this incentive to comply with the Standards only applies to states; it does not apply to county or municipal agencies (which also may receive federal funds either directly or indirectly), to the federal Bureau of Prisons or other federal agencies that house prisoners (such as ICE or the Department of Defense), or to private prison contractors.

In order to ensure that non-state prison agencies comply with the Standards under this incentive mechanism, the Standards should require state agencies to withhold 5% of any funds disbursed to county or city corrections agencies that fail to comply with the Standards – e.g., 5% of funds disbursed by the state through federal grants or block grant programs, or from direct payments to county or municipal agencies for housing state prisoners in local facilities. Further, the Standards should require federal, state and county/municipal corrections agencies to withhold 5% of funds paid to private prison contractors that fail to comply with the NPREC Standards.

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.

The 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 settings (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 by prison agencies upon prisoners, it is highly unlikely that including agencies that fail to comply with the NPREC Standards on a list, for the purpose of shaming them into compliance, would be successful. Some prison agencies have already demonstrated that they are perfectly willing to engage in shameless conduct; others, through their reluctance to embrace reforms, have proven they have no shame. Therefore, we do not believe this is an effective means of achieving compliance.

C. The NPREC 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 NPREC Standards is not statutorily required or legally enforceable. Like the prison and jail standards of the American Correctional Association (ACA), they 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, 391 n.13 (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"); also see *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 upon the foregoing, PLN feels that absent the force of law to ensure compliance with and enforcement of NPREC Standards, the incentives for voluntary compliance are inadequate. The Standards notably do not provide for a private cause of action for enforcement purposes, which in our view is a grave failing and weakness. Additionally, the existing enforcement mechanisms are focused more on state corrections agencies and not on local or federal corrections agencies, or private prison contractors.

2. Cross-gender supervision of prisoners

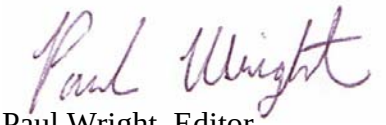
Under proposed Standard PP-3, prison agencies must restrict cross-gender supervision in non-emergency situations where inmates disrobe or perform bodily functions. To further reduce the possibility of sexual abuse or harassment resulting from cross-gender supervision, we suggest the Commission consider requiring agencies to adopt policies whereby *same*-gender supervision is the rule in all non-emergency custodial situations rather than only those that involve disrobing and bodily functions. Or, in the alternative, to prioritize staff positions to facilitate same-gender supervision. For example, following systemic sexual abuse of female prisoners in the Michigan prison system, the U.S. Sixth Circuit Court of Appeals upheld a Dept. of Corrections 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. Use of one-piece garments for female prisoners

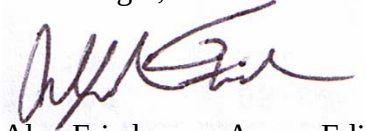
PLN is aware that some detention facilities, possibly including lockups and juvenile facilities, require female prisoners to wear one-piece garments; e.g., jumpsuits. When such prisoners use the toilet facilities they have to remove the jumpsuit to below their waists, which exposes their breasts. As housing units are routinely monitored by prison staff, including the toilet areas, staff are able to view the exposed breasts of female prisoners when they use the toilet facilities. There is no legitimate penological justification as to why female prisoners should have to expose their breasts when using the toilet, and this practice results in unnecessary voyeurism by prison staff. Thus, the Standards should require detention facilities to provide two-piece garments to female prisoners to alleviate this problem.

Thank you for your consideration of our comments on the second set of NPREC draft standards; please contact us should you require additional information or clarification of our comments.

Sincerely,



Paul Wright, Editor



Alex Friedmann, Assoc. Editor