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Attorney General Holder
Robert Hinchman, Senior Counsel
Office of Legal Policy, Department of Justice
950 Pennsylvania Avenue, NW, Room 4252
Washington, DC 20530

RE: Docket No. OAG–131; AG Order No. 3244–2011
National Standards To Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder:

With this letter the American Civil Liberties Union (ACLU) provides commentary on the Standards to Prevent, Detect, and Respond to Prison Rape proposed by the Department on January 24, 2011. The American Civil Liberties Union is a nationwide, non-partisan organization with over a half million members, countless additional supporters and activists, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws.

The ACLU and many of our legal projects, such as the National Prison Project (NPP), the Immigrants Rights Project (IRP), and the Lesbian, Gay, Bisexual and Transgender (LGBT) Project, have long worked to protect and promote the civil and constitutional rights of prisoners and immigration detainees. Our years of experience in the American criminal justice system have made us acutely aware of the problem of sexual violence in our prisons, jails and detention centers. As a result, we advocate for greater oversight and institutional accountability to help eradicate this pervasive problem. In October 2001, NPP held a first-of-its-kind conference on this very issue entitled "Not Part of the Penalty: Ending Prison Rape." NPP subsequently investigated allegations of prison rape and sexual abuse nationwide, bringing several civil rights cases on behalf of victims as a result. Because of the ACLU's expertise on rape and sexual assault in prison, our attorneys have provided expert testimony to the Commission on Safety and Abuse in America's Prisons convened by the Vera Institute of Justice as well as the National Prison Rape Elimination Commission (NPREC) and have also served on the Commission's Standards Development Expert Committee.

The comments below first answer several of the questions posed in the Notice of Proposed Rulemaking and then address other aspects of the

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Department's proposed standards where the ACLU believes the Department needs to revise, reconsider or augment its approach to the standards in order to ensure the far-reaching effects in preventing abuse promised by the Commission's original proposed standards.

In a separate set of comments submitted jointly with the National Center for Transgender Equality, Lambda Legal, the National Center for Lesbian Rights; and several other organizations, we have proposed additional modifications to the standards to protect lesbian, gay, bisexual, transgender, and intersex prisoners. These changes are necessary to adequately protect this highly vulnerable population within our prisons, jails and juvenile detention centers.

A. Responses to the Questions Posed by the Department

Question 16: Should the final rule contain any additional measures regarding oversight and supervision to ensure that pat-down searches, whether cross-gender or same-gender, are conducted professionally?

Despite findings in each of the Bureau of Justice Statistics' inmate surveys that a significant percentage of sexual abuse in all types of corrections facilities is perpetrated by staff members of the opposite sex, the DOJ's proposed revision to NPREC's Standard PP-4 (limits to cross-gender viewing and searches) fails to provide the enhanced protections necessary in this area. It is notable that NPREC had already revised its standard to substantially reduce its requirements due to fiscal and personnel concerns. Rather than strictly prohibiting cross-gender searches and supervision in any areas where inmates disrobe or perform bodily functions – which, consistent with international human rights standards, is the norm in most other western countries – NPREC's final recommended standard allowed for an emergency exception to the general prohibition on such searches and viewing. The ACLU previously asserted its position that even the NPREC standard should be strengthened. But the Department's proposed alternative standard represents an even weaker version with even greater possibilities of encouraging abuse.

The DOJ's proposed standard fails to address the dangers of cross-gender supervision and searches in a number of areas. First, the proposed standards for adults do not prohibit cross-gender pat-down searches, even though such searches routinely involve intimate contact through clothing, including with genital areas.[i] Instead, the Department's proposed standard merely requires that agencies train staff "in how to conduct cross-gender pat-down searches, and searches of transgender detainees in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs." Proposed DOJ PREA Regulations § 115.14(a). This is a 360 degree change from the reasoned compromise adopted by the NPREC standard. It is also contrary to the best practices embodied in the ABA *Standards on the Treatment of Prisoners* which limit cross-gender bodily searches to emergency situations. Standard 23-7.9 (b) provides: [ii]

> Except in exigent situations, a search of a prisoners' body, including a pat-down search or a visual search of the prisoner's private bodily area, should be conducted by corrections staff of the same gender as the prisoner.

Both the NPREC and the ABA standards recognize that body searches of prisoners by correctional staff of the opposite sex involve significant privacy interests for prisoners and allow staff access to the bodies of prisoners in a way that fosters abuse. The Department's decision to ignore these dignitary interests and the dangers created by sanctioning routine cross-gender bodily contact cannot be justified.

The Department's inclusion of an exception to non-emergency cross-gender pat-down searches for prisoners who can demonstrate that they "have suffered documented prior cross-gender sexual abuse while incarcerated," is also wholly inadequate. *See* Proposed Standard §114.14(e). This exception fails to recognize that victims – especially in prison – are frequently too afraid to report sexual abuse. And many others attempted to report such abuse, but have been ignored or retaliated against by corrections staff. This exception also ignores the substantial body of case law prohibiting pat-down searches of female prisoners by male officers and the fact that many prisoners, especially women prisoners, have histories of being sexually victimized in the community.[iii]

Other areas of the revised standards are both insufficient and likely to foster abuse. For example, the DOJ's proposed standard attempts to limit cross-gender supervision of prisoners' private bodily areas and functions, by requiring corrections officials to "implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency [or] by accident." DOJ Proposed PREA Regulations § 115.14 (c); *see also* § 115.314(c) (applying same standard to juveniles). However, the efficacy of this proposed standard is completely undercut by an exception which would permit such cross-gender supervision of prisoners' and juveniles' private bodily areas "when such viewing is incidental to routine cell checks." This exception eliminates any practical limitation on cross-gender viewing of adult prisoners and juveniles because in many facilities prisoners and juveniles use the toilet and sometimes wash in their cells. This exception also undercuts any incentive for agencies to limit the dangerous practice of cross-gender viewing – such as requiring that officers of the opposite gender announce themselves prior to entering the cell block – due to the addition of this easily abused loophole.

The DOJ must close this loophole in order to ensure a culture where the dignity and bodily integrity of adult and youth prisoners is respected. A better approach to limits on cross-gender viewing is embodied in the ABA *Standards on the Treatment of Prisoners*. The ABA standard requires that "correctional authorities should employ strategies and devices to allow correctional staff of the opposite gender to a prisoner to supervise the prisoner without observing the prisoner's private bodily areas." ABA Standards on the Treatment of Prisoners, Standard 23-7.10.

In its commentary to the proposed rules, the Department reiterated many of the claims made by PREA's opponents that a standard prohibiting routine cross-gender pat searches and viewing would require substantial costs in hiring staff and/or for facility construction, or would lead to discrimination against hiring female correctional staff. The ACLU is very sensitive to any risk that agencies might discriminate against women in employment. However, it is our experience that this concern is a red herring. It is notable that a survey by the National Institute of

Corrections in 1999 found that 20 state systems already had policies that do not allow routine cross-gender pat-searches.[iv] They have done so without the massive employment problems predicted by PREA's opponents. Correctional agencies can comply with the standards set forth by NPREC and the ABA by engaging in careful prison management, such as being careful with shift assignments so that they take account of the gender-specific roles allowed in searching and employing other low-cost solutions. For example, requiring officers of the opposite gender to announce themselves before entering a dormitory area, and providing screens or towels for shower and toileting privacy, would go a long way toward meeting the inmate supervision requirements at little cost. Similarly, pat searches can be conducted only at locations near points of contact with potential contraband, allowing for more thorough searches at the most appropriate times and freeing up staff resources for other critical job functions. In light of the important dignitary rights at stake here and the BJS data, which shows the high percentages of cross-gender abuse by staff, the protections required by NPREC and the ABA are clearly needed in all facilities.

Question 24: Because the Department's proposed standard addressing administrative remedies differs significantly from the Commission's draft, the Department specifically encourages comments on all aspects of this proposed standard.

The administrative remedy regulations proposed by the Department are inadequate to protect victims of sexual assault in prisons, jails and juvenile detention centers. One of the key shortcomings of the proposed standard is its exacerbation of the barriers to access to the courts created by the Prison Litigation Reform Act (PLRA). Unfortunately, the DOJ's draft standard represents a significant step backwards from the remedial measures proffered by NPREC.

The PLRA Undermines Protections for Victims of Sexual Abuse

When officials fail to protect inmates from sexual abuse, victims need access to legal redress that is not hindered by unrealistic and arbitrary procedural requirements. Unfortunately, the PLRA, which requires prisoners to exhaust "such administrative remedies as are available" before filing suit, all too often proves to be an insuperable barrier to victims of sexual abuse. The Supreme Court has held that this requirement means that prisoners must complete the prison's internal administrative grievance process, including "compliance with an agency's deadlines and other critical procedural rules."[v] On the face of it, this is a sound idea. We want to encourage correctional facilities to manage problems and improve conditions without court intervention. Unfortunately, in practice, this provision of PLRA has done the most damage to the ability of prisoners to present meritorious constitutional claims.[vi]

This is true for a number of reasons. First, there is the reality of prisoner demographics. Prisoners, as a general matter, have very low rates of literacy and education.[vii] Moreover, the number of severely mentally ill and cognitively impaired persons in prison is staggering. According to the most recent report by BJS, 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates in the United States suffer from mental illness.[viii] And experts estimate that people with mental retardation may constitute as much as 10 percent of the prison population.[ix] As a result, the PLRA's exhaustion requirement has proven to be a trap for the unschooled and the disabled.

Second, there is the reality of how prison internal complaint procedures or grievance systems often operate. Deadlines are very short in many grievances systems, almost always a month or less, and not infrequently five days or less.[x] Nonetheless, these deadlines, many measured in hours or days rather than weeks or months, operate as statutes of limitations for federal civil rights claims. Moreover, a typical system does not have just one deadline that could lead to forfeiture of a claim; it may have three or more such deadlines as prisoners must appeal to various levels of a grievance system.

Other technical obstacles arise all the time that lead to prisoners being denied their right to sue. The rules may require that grievances be submitted only on approved forms, and the forms may not be available.[xi] The forms may be available, but only from the staff member who is responsible for the action the prisoner wishes to challenge.[xii] Many grievance system rules give administrators discretion not to process grievances if the prisoner has filed too many; some systems also require that only one subject be raised on each grievance submitted.[xiii] Further, it is a routine practice for grievances not to be given responses by staff in a timely manner, whether or not the system rules indicate a deadline for staff responses. There may be ambiguity about what issues are grievable, or a difference between what the rules say and actual practice by administrators. Even a highly educated prisoner, or the rare prisoner with access to legal advice, will be unsure how to proceed when there is no literal way to comply with the rules in circumstances like these.[xiv] For illiterate, mentally ill, cognitively challenged prisoners, and youth in both adult and juvenile facilities, these convoluted administrative systems are virtually impossible to navigate, as they are for prisoners suffering the aftermath of sexual violence. Thus, constitutional protections for many of the most vulnerable are lost irrevocably under the PLRA because of technical misunderstandings rather than lack of legal merit.

The power imbalance inherent in prison leaves incarcerated people, and especially youth, concerned about experiencing retaliation if they file grievances. This problem has played out in especially sinister ways for detained youth. For example, children detained by the Texas Youth Commission (TYC) were subject to rampant sexual abuse by staff for years and could not safely complain because many times the perpetrators themselves held the key to the complaint box. No child in TYC could hope to overcome the constraints of the PLRA, leaving children with nowhere to go for help and the courts powerless to intervene. Once the scandal broke and the Texas legislature stepped in, detained children and their parents were able to come forward and over 1,000 complaints of sexual abuse were alleged.[xv] But such atrocities should never have happened.

Unfortunately, the tragedy in TYC is not an isolated incident of sexual abuse of juvenile prisoners. Other cases amply illustrate the barriers children face in seeking protection from the courts because of the PLRA. In *Minix v. Pazera*, for example, corrections staff allowed the rape and repeated assault of a child detainee. But the boy's lawsuit was thrown out of court because he did not file a formal grievance, even though he feared further abuse if he reported the incidents, and even though his mother repeatedly contacted prison and juvenile court officials to try to get them to stop the abuse. To satisfy the PLRA's exhaustion requirement, the boy would have had to file his formal grievance within 48 hours of being attacked. 2005 WL 1799538, 2005 U.S. Dist. LEXIS 10913 (N.D. Ind. July 27, 2005).

Too often, there is also an inverse relationship between the responsiveness of the grievance system and the importance of the issue. Even if routine complaints are handled reasonably well, grievances that implicate misconduct or abuse by prison staff, such as complaints about sexual abuse, are the most likely to be subject to a strict interpretation of the system's rules or to simply disappear. Because of the likelihood that a decision that the prisoner failed to exhaust according to the grievance system's technical rules will immunize the potential defendants from both damages and injunctive relief,[xvi] the PLRA establishes an incentive for prison officials to use their grievance systems as a shield against accountability, rather than an effective management tool.

During our years of work on prisoner rape and sexual abuse, the ACLU finds that this PLRA provision has an especially harsh impact on victims of prison rape. In our scores of interviews and correspondence with rape victims in prisons and jails around the country, we were shocked to discover how many young men are forced into prostitution by violent prison gangs. Even more chilling is the common response of prison officials to the victims' desperate pleas for protection: their only two options were to "fight or f…." Among the many victims we interviewed, we found the same patterns later discovered by NPREC in its investigation of prison rape, those who are young, mentally ill, or otherwise especially vulnerable, are the most subject to sexual violence in prison and the least able to navigate the hurdles of PLRA. Moreover, we heard account after account of victims who were sexually abused, and sometimes brutally raped, by custodial staff, and then warned that if they reported the assault they would be disbelieved, punished, and set up on bogus charges that would lengthen their prison terms by years. For nearly all of these victims, they have no right to go to federal court because, while they were still suffering the severe trauma and terrible wounds of sexual assault, and frequently terrified of reporting their assault for fear of retaliation and further abuse, they did not manage to fill out the proper forms in the proper order for purposes of PLRA exhaustion.

The Department's Proposed Administrative Exhaustion Standard Further Exacerbates the PLRA Problems Created for Victims of Sexual Abuse and All Prisoners Whose Rights have been Violated.

The problems created by the PLRA's exhaustion requirement are so well established that Congress has considered amending the PLRA to allow for a more balanced exhaustion requirement,[xvii] and the ABA has also endorsed reform.[xviii] NPREC's own top recommendation to Congress concerned the overly broad application of the PLRA to prisoners' serious civil rights claims, and in particular, the negative consequences the law has had for victims of sexual abuse and the accountability of prison officials for that abuse.[xix]

DOJ's rejection of NPREC's proposed standard which seeks to ameliorate the worst harms of PLRA for victims of sexual abuse raises serious questions about the ultimate efficacy of the final standards for both youth and adult prisoners. Instead of adopting NPREC's carefully thought out exhaustion proposal, the proposed regulation merely requires correctional facilities to provide prisoners with a minimum of 20 days in which to file a grievance after being victimized by sexual violence, with an additional 90-day extension available only if the prisoner provides

documentation that he or she was prohibited from filing based on trauma. *See* DOJ Proposed PREA Regulations §§ 115.52, 115.252, and 115.352.

DOJ's proposed 20-day deadline for filing a grievance is grossly unjust, unnecessarily harsh, and likely to have a broad negative impact beyond victims of custodial abuse. By essentially adopting the Federal Bureau of Prison's (BOP) insufficient 20-day deadline for grievances, the DOJ has created an incentive for agencies that currently provide more time for prisoners to file grievances to shorten their deadlines.[xx] The proposed regulation would be likely to produce a nationwide default 20-day deadline that will essentially become the statute of limitations for all prisoner civil rights claims. In effect, the DOJ is now, through its role in enforcing PREA, raising barriers to access to courts beyond those that PLRA itself created. It would be far more equitable and justifiable for the Department to mandate the same deadline for prisoners to file a grievance related to sexual abuse, as that adopted for civil rights claimants under Title VII, requiring that charges be filed with the agency within 180 days after the alleged incident occurred. *See* 42 U.S.C. § 2000e-5(e)(1).

The proposed threshold for granting a 90-day grievance deadline extension for sexual abuse victims also fails to ameliorate the problems victims face in filing. While the DOJ has appropriately recognized that victims of sexual abuse will frequently be unable to comply with the 20-day deadline, the proposed 90-day extension based on a prisoner's ability "to provide documentation…that filing a grievance within the normal time limit was or would likely be impractical…" does not address the reality of victims' predictable needs, nor does it place any burden on the correctional agency to establish prejudice to justify denial of a late grievance. Requiring prisoners to present some form of documentation in order to establish trauma or a practical inability to file sets a nearly impossible threshold for the vast majority of prisoners. Prisoner victims typically lack formal education; have frequently been the victims of violence prior to their incarceration; may be experiencing trauma as a result of the assault; frequently experience shame and humiliation as a result of the assault; and fear retaliation for reporting, even to medical or mental health personnel. At least equally important, prisoners do not have the means to create documentation in prison or to secure any documentation that may exist. Such documentation is almost entirely subject to the control of prison officials. Moreover, the difficulties of obtaining such documentation would be especially daunting for the victims the DOJ purports to be concerned with – those who are so traumatized or otherwise incapacitated that they cannot file within the normal timeframe.[xxi]

At the most basic level, given the recognition that victims of custodial violence face multiple barriers to reporting their abuse within a short deadline, DOJ's standards should require that correctional agencies accept grievances filed past the 20-day deadline when the justification for delay outweighs the prejudice to the correctional agency in investigating the complaint.

The Department has attempted to ameliorate its harsh grievance requirements by allowing for some third party initiation of complaints as in Proposed Standard § 115.52(c)(1). This protective measure, however, is largely undermined by the subsequent requirement that an agency may require the alleged victim to personally pursue all subsequent steps in the administrative remedy process. Proposed Standard § 115.52(c)(3). This requirement leaves traumatized prisoners and extremely vulnerable prisoners, such as the severely mentally ill and the cognitively impaired,

with little enhanced protection because there is no reason to believe that most such prisoners will be able to handle the requirements of appeals – often more than one – or file them within the very short timeframes frequently required. The Department's allowance for parents or legal guardian's to file on behalf of juveniles, both original grievances and appeals, is a more protective step. Proposed Standard § 115.52(c)(4). But it too, must be more cognizant of facts on the ground. Many incarcerated youth will not have parents or legal guardians who can offer them protection or with whom they can confide sexual abuse. These especially vulnerable youth will be left unprotected unless the list of third-parties that can file grievances on behalf of youth are expanded to include other family members, the youth's attorney or other legal advocate. At the same time, parents and family members should be put on notice of any problems their children are confronting and they should be given the ability to meaningfully participate in decisions made about the youth's treatment and safety.

Another troubling aspect of the Department's revised standard is its specific provision that a corrections agency may discipline a prisoner for intentionally filing an emergency grievance where no emergency exists. Proposed Standard § 115.52(d)(5). This provision invites abuse by agencies and will likely lead to a chilling effect on prisoner's willingness to file an emergency grievance. At the very least, such a one-sided provision should clarify that disciplinary action is only permissible against residents who file an emergency grievance with no basis to believe that an emergency exists, and with the intent to deceive.

The Department Should Adopt NPREC's Proposed Standard.

In contrast to the DOJ's proposed revision, NPREC's proposed Standard RE-2 (exhaustion of administrative remedies) recognizes that the harsh procedural requirements and unintended consequences of many prison grievance systems cannot realistically be met by prison rape survivors. Similarly, the practice by some agencies of requiring that inmates report complaints to a specific officer – who may have been involved or complicit in the abuse – wholly undermines whatever policies or other efforts facilities have in place to address sexual abuse. Standard RE-2 provides a practical solution to these problems by requiring that a sexual abuse complaint will be deemed exhausted for the purposes of the PLRA "(1) when the agency makes a final decision on the merits of the report of abuse (regardless of whether the report was made by the inmate, made by a third party, or forwarded from an outside official or office) or (2) when 90 days have passed since the report was made, whichever occurs sooner." This standard respects the concerns of the PLRA. Rather than encourage frivolous lawsuits, this standard will increase the efficiency with which prison rape and sexual violence cases proceed, by allowing courts to focus on the substantive claims of survivors instead of litigating their compliance with technicalities.

By encouraging reporting to counselors, inspector generals, law enforcement, and similar bodies within the prison system, the proposed NPREC standard also more closely aligns with the needs of victims and law enforcement that the standard proposed by the Department. Such reporting is far safer and more practical for victims who justifiably may fear retaliation. By contrast, prison grievance systems are rarely confidential and a grievance filed by a victim may well end up in the hands of the actual perpetrator. While prison grievance systems are designed to resolve the incidental complaints of institutional life, such as requests for bunk changes, they are ill-equipped for the type of serious, confidential reporting necessary in potential criminal

investigations. Indeed, requiring reporting through the prison grievance system is likely to impair a successful criminal investigation because it will frequently notify perpetrators at a time that they can cover up evidence and intimidate the victim.

The proposed NPREC standard RE-2 represents a thoughtful and balanced intermediate step that recognizes the uniquely difficult situation for victims of sexual abuse in prison and prison officials attempting to investigate these claims effectively. We understand that some corrections officials expressed concern that proposed NPREC standard RE-2 is inconsistent with the PLRA's exhaustion requirement, in specifying when a procedure will be deemed exhausted. However, the proposed standard is well within the scope of NPREC's authority and does no more than require corrections agencies to adopt grievance policies that are more responsive to the particular challenges faced by victims of sexual abuse. This is appropriate given the sensitive and traumatic nature of sexual assault, and the unique needs of prisoner victims which NPREC exhaustively documented.

Question 36: Should the final rule include a standard that governs the placement of juveniles in adult facilities?
AND
Question 37: If so, what should the standard require, and how should it interact with the current JJDPA requirements and penalties mentioned above?

The ACLU opposes incarceration of youth in adult facilities. We are therefore pleased to see the Department paying particular attention to the problems of juveniles in adult facilities. Youths confined in adult prisons are amongst the most vulnerable populations in custody. Adult facilities housing youth face a dangerous dilemma, forced to choose between housing them in the general adult population where they are at substantial risk of sexual abuse, or in segregated settings that can exacerbate mental health problems. The Department should prohibit placing youth in adult jails and prisons to reduce the sexual abuse of youth without subjecting them to harmful segregation or isolation. At a minimum, children should be presumptively housed in juvenile facilities with a requirement of an evidentiary hearing (with counsel for the child) when the juvenile facility, court or other entity seeks to overcome that presumption. The ACLU supports the comments submitted by the Campaign for Youth Justice which address in detail questions 36-37.

Questions Related to the Audit Standard

External scrutiny is vitally important to the strength of any public institution – and corrections facilities are no exception. Sound oversight, conducted by a qualified independent entity, can identify systemic problems while offering effective solutions. The Commission's original Standard AU-1 (audit requirement) laid a critical foundation for the ultimate success of the Standards by mandating essential components of independent oversight. The Department now 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, a number of advocacy organizations with experience in prison oversight, investigations of sexual abuse in detention, victim's rights, and community responses to sexual violence, including the ACLU, Just Detention International, and the Correctional Association of

New York, amongst others, came together to study this issue and proffer the following practical and effective model to the Department.

The guiding principle of this model is that an 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 a corrections system. Thorough audits will also help prevent problems and lead to safer, more effective prison management and ultimately, lower fiscal and human costs to the community.

This model also places central importance on realistic, cost-effective strategies to ensure that every facility is monitored. In order to achieve this outcome, we believe the Department should endorse triennial audits of every facility as proposed by the Commission. Site visits are essential for an auditor to meaningfully assess whether complaints of sexual abuse are being appropriately filed and facilities are properly documenting, investigating, and, where appropriate, responding to acts of sexual abuse. If the agency does not mandate triennial site visits to all facilities, we urge it to establish a tiered system by which at least every three years all facilities are remotely assessed for compliance with the standards through a review of their policies, records, data and other documents and contacts with facility administrators, staff and inmates, and a select number of facilities – chosen for cause and randomly – are visited for more comprehensive auditing. These more comprehensive audits will be conducted in an ongoing manner. The basic reviews and visits must be performed by an entity that is structurally external to the corrections agency being audited, and by individuals who have no recent relationship with the agency. The auditors must also have a victim-centered approach that incorporates expertise in both corrections and sexual violence. The findings and reports of the auditors must be available to the public (with any confidential information redacted) and facilities must submit and follow corrective action plans when problems are found.

Recognizing the enforcement role the Department will play in any audit scheme and the need to determine the meaning of "full compliance" with the standards, we believe the Department should use the multi-tiered approach that it employs in other contexts, whereby s*ubstantial compliance* means compliance with all absolute mandatory provisions and most components of the remaining provisions; *partial compliance* occurs when the monitor identifies gaps in compliance that go beyond anecdotal incidents, technicalities, or temporary factors; and n*on-compliance* is a designation of last resort when a facility refuses to establish and/or implement an action plan to address gaps that have previously been identified.

Below, we respond to the individual questions of the Department and further explain the details of the audit model outlined above.

Question 28: Should audits be conducted at set intervals, or should audits be conducted only for cause, based upon a reason to believe that a particular facility or agency is materially out of compliance with the standards? If the latter, how should such a for-cause determination be structured?

While "for cause" audits have some value, oversight cannot rely exclusively on this method. Audits based on cause do not serve the important preventative role of identifying problems before they give rise to serious problems, one of the greatest cost savings potentially derived from the standards. Moreover, while criteria for establishing cause can be developed (and our suggestions are provided in response to Question 29), no standard is fool proof. Reporting is inherently unreliable, some facilities may suppress information, such as grievances and other reports, to avoid audits, and facilities may have systemic problems that directly go to the means for measuring cause (such as poor recordkeeping or insufficient access to reporting mechanisms and the auditor). Systems with these types of deficiencies would benefit tremendously from random audits, but are unlikely to be identified in for cause audits.

Despite the limitations of relying exclusively on cause to determine where to audit, for cause audits should be part of the auditing structure. Facilities with known problems are unquestionably in need of outside guidance. Mandatory audits of these facilities would help identify problems and realistic solutions while providing needed accountability.

A cost-efficient, effective oversight system should include a hybrid of random and for cause audits. Such a structure would provide attention and accountability to the most deficient facilities while keeping all institutions 'on their toes' to maintain the best possible policies and practices.

Question 29: If audits are conducted for cause, what entity should be authorized to determine that there is reason to believe an audit is appropriate, and then to call for an audit to be conducted? What would be the appropriate standard to trigger such an audit requirement?

A qualified and independent auditor is the best entity to determine when an audit is appropriate. As the value of audits come from their external nature, allowing corrections administrators to choose where to audit would undercut the important oversight role of the auditor. Officials who fear accountability in poorly performing facilities may avoid subjecting those facilities to audits. Even where officials seek outside monitoring to address known dangers, they are unlikely to be able to effectively identify facilities that may have problems that are unnoticed by staff.

The appropriate standard to use in determining when cause has been met to trigger an audit depends on the oversight structure established – specifically, the extent to which this structure relies exclusively on cause in determining who to audit. If the Department adopts, as we suggest, a hybrid structure that includes both random and for cause audits, then the standard for cause can be fairly lenient – affording the auditor sufficient discretion to assess what triggering events would amount to cause. However, if random audits are not being conducted, then the cause determination must be more inclusive.

Triggering events for determining that cause exists for a full audit should include a range of justifications, including but not limited to:

- follow-ups to previous audits to assess implementation of corrective action plans;
- agency requests for assistance;
- documentation of existing problems or incidents;

- reasonable suspicion of any instance of staff-on-inmate abuse, as well as inmate-on-inmate abuse that appears to be the result of a deficiency in staff efforts to prevent or respond to abuse; and
- an auditor's review of documents at a facility or contacts from inmates or staff that indicates possible non-compliance with the Standards..

In order to implement the "for cause" audit system effectively, the auditing entity must be able to gather information and intelligence from various sources, for example, media reports; facility self-reports; prisoner complaints; family/friend/community concerns; contacts with advocacy groups and other citizen action efforts; and national reporting and research bodies.

Question 30: Should all facilities be audited or should random sampling be allowed for some or all categories of facilities in order to reduce burdens while ensuring that all facilities could be subject to an audit?

We urge the Department to mandate that every facility be visited by the auditor at least every three years. Site visits are necessary because external review of documents concerning sexual abuse is not sufficient to assess compliance with the standards. As the Commission amply documented, many inmates and staff are extremely reluctant to report sexual abuse; if a complaint is not filed, there will be no documents for the auditor to review. Unfortunately, non-disclosure of sexual abuse may be greatest at the very facilities where non-compliance may exist due to intimidation or violence. Similarly, it is difficult to assess the adequacy of investigations without access to the complainants or witnesses. Finally, it is very difficult to determine whether there is a culture of abuse or intimidation at a facility without a site visit. Conditions within a system can vary dramatically from one facility to the next and only by visiting each facility can the monitor ensure that dangerous conditions do not exist.

However, if full audits at every facility are not approved by the Department, we urge as a less desirable alternative that the Department should establish a tiered system that includes some external monitoring of all facilities with full audits at only a selected number. At least every three years, all facilities should, at a minimum, be assessed for compliance with the standards through auditor reviews of their policies, records, data and other documents and remote contacts with facility administrators, staff and inmates. Even if auditors cannot visit every facility, each facility should be prepared for an on-site audit. Random audits will help achieve this dynamic.

Every facility should also submit a self-assessment of compliance with the standards to the auditing entity on a yearly basis. This will ensure that prison administrators are actively including the standards in routine prison management exercises. It will also provide an ongoing source of information for the auditing entity.

As discussed above, the best alternative to full audits for every facility would include a hybrid of random and for cause audits, all determined by the auditing entity (not the agency). In addition, once a facility is deemed to be out of compliance – based on a paper review or a prior audit – that facility should also be subject to a full audit that includes a visit to ensure that they are taking the steps needed to come into compliance.

Question 31: Is there a better approach to audits other than the approaches discussed above?

As detailed in our response to prior questions, full audits including auditor visits for all facilities every three years is the best approach. In the alternative, a tiered approach of paper reviews throughout a system with visits to facilities selected based on cause, prior finding of noncompliance, and random selection would provide the best balance between comprehensive and cost-effective monitoring.

Question 32: To what extent, if any, should agencies be able to combine a PREA audit with an audit performed by an accrediting body or with other types of audits?

PREA audits can be combined with other audits, but only if they are conducted by auditors who have sufficient independence from the agency and are qualified with expertise both about corrections and sexual violence. Traditional audits – conducted solely by corrections practitioners and generally linked to voluntary fee-based accreditation – will not suffice.

The importance of independence cannot be overstated. Unless the review is conducted by an entity that is structurally external to the corrections agency being audited, and by individuals who have no recent relationship with the agency, the integrity of the audit will be compromised. To ensure sufficient autonomy, the auditing entity should be appointed or contracted for a fixed term by the governor/chief executive or the legislature – not the corrections agency. Some inspector generals and other public monitoring bodies are sufficiently independent, but entities that report to the head of the agency being audited (as permitted by subsection (a)(2) of §§ 115.93, 115.193, 115.293, 115.393) must not suffice.[xxii] Entities that ultimately answer to the head of the Department can easily be pressured to minimize or ignore certain concerns, or be prevented from fully examining conditions through the allocation of resources.

Ideally, audits would be conducted by teams that include at least one corrections practitioner (who may also be involved in other types of audits of corrections facilities) and at least one expert in sexual violence prevention and response from the community (who may be involved in other audits pertaining to federal funds, as required by VOCA or VAWA). An effective PREA auditor must also have prior expertise and/or training in both sexual violence and the corrections environment. The balance between prior expertise and current training will vary, but being a retired corrections official, by itself, is not a sufficient qualification. Without state certification in rape crisis counseling, a corrections-only monitoring entity is unlikely to be aware of the best practices in the community – many of which require only slight modification to account for the unique concerns in the corrections environment. More importantly, only a crisis counseling professional will have sufficient expertise in appropriately gathering information from traumatized individuals and picking up cues of possible concerns that inmates and others may not feel comfortable explicitly sharing.

Question 33: To what extent, if any, should the wording of any of the substantive standards be revised in order to facilitate a determination of whether a jurisdiction is in compliance with that standard?

The nature of the PREA standards, by necessity, is primarily qualitative. Quantitative indicators help measure compliance but will not sufficiently measure the overall effectiveness of prevention and response efforts. As a result, auditors must be provided with a fair amount of discretion to determine compliance based on overall effectiveness and ultimately, the safety of individual facilities.

Question 34: How should "full compliance" be defined in keeping with the considerations set forth in the above discussion?

Immediate and absolute compliance with all the PREA standards is unlikely to be achieved by all systems at all times, and both the standards as a whole and the audit provisions in particular, should be seen as a means of trouble-shooting problems and identifying solutions. As a result, the definition of "full compliance" deserves a nuanced approach. In other contexts, the Department of Justice uses a multi-tiered approach that would be equally effective here. This approach defines different types of compliance to be evaluated by the monitor, including the following:

- *Substantial Compliance* meaning compliance with all absolute mandatory provisions and most components of the remaining provisions;
- *Partial Compliance* resulting when the monitor identifies gaps in compliance that go beyond anecdotal incidents, technicalities, or temporary factors; and
- *Non-compliance* being a designation of last resort when a facility refuses to establish and/or implement an action plan to address gaps that have previously been identified.

The goal of the standards is to ensure a base level of protection in all facilities. No legitimate stakeholder truly wants any system to lose any funding. Moreover, relying on the draconian penalty of lost funding – without lesser sanctions available – would create a disincentive to finding noncompliance. Through this multi-tiered system, agencies can have the ample opportunity to correct deficiencies, with alternative sanctions providing pressure (and possibly assistance) for coming into compliance, and the loss of funds can be considered a last resort for extreme situations only.

In line with the ABA's standards for external monitoring and inspection in correctional facilities, we also suggest that correctional facilities be required to respond in a public document (that redacts any confidential or security-related information) to the findings of the auditing entity, to develop corrective action plans to address identified problems, and to periodically document compliance with recommendations or explain non-compliance.[xxiii] As mentioned above, follow-up "for cause" audits should also assess and report on agency efforts to address identified problems and make suggestions for continuing facility improvement and compliance.

Question 35: To what extent, if any, should audits bear on determining whether a State is in full compliance with PREA?

Determining full compliance must incorporate the assessment of an outside monitor in order to have any meaning. In this respect, the audits should play a crucial role. However, they need not be the only indicia relied upon. While not conducting the reviews itself, the Department should verify that each inspection was properly conducted by a qualified monitor, and that corrective action plans are both implemented and monitored.

Auditors should be required to make their reports publicly available, and the agency, the staff and inmates within the facility, and the general public should have an opportunity to respond. When a facility is found to be out of compliance (in full or in part), it must develop an action plan that sufficiently addresses the concerns raised in the report – after which compliance with the action plan must be at least as decisive as the initial audit in assessing full compliance with PREA.

Audit/oversight issues not addressed by questions

Aside from suggesting that the Department will subsequently establish guidelines for determining who may become a certified auditor and how audits should be conducted, the proposed standards provide no guidance on these issues.

Auditor certification and recertification must ensure that the monitors are sufficiently qualified and independent. As discussed above, government entities should only be considered independent if they are truly separate from the agency being audited – and do not answer to the agency head for their funding or other resources. Expertise in addressing sexual violence, and in particular working with survivors of sexual victimization, is just as important as expertise in corrections and similarly cannot be fully learned in a brief training course. Audit teams should be strongly encouraged – if not required – to include a community member on the monitoring team to add to the integrity and accountability of the audits. This could be a professional from a partnering organization (such as the local rape crisis center or state sexual assault coalition) or a volunteer with appropriate background and commitment. Further, members of the audit teams must be aware of the relevant legal requirements, including civil rights law.

To conduct effective audits, the PREA monitors must have free and unfettered access to the facility. Such access must include the right to make unannounced visits and to enter and tour all areas of any facility, including contract facilities.[xxiv] Such unannounced visits are the cornerstone of all effective corrections monitoring. This does not mean that visits will not be consistent with security needs or that a very brief wait for auditors to comply with security demands, such as facility counts, will not occur. However, as the ABA Standards note: "security concerns do not provide a justification for disallowing unannounced inspections, nor do rationales related to convenience of correctional staff."[xxv] Auditors must also be permitted to review all documents, be able to copy any documents (including documents related to pending investigations), and take those copies off-site for review; and to conduct private, confidential interviews with staff and prisoners, including prisoners in protective custody or solitary confinement.[xxvi]

The agency must ensure that there are accessible mechanisms for inmates and staff to engage in confidential communications with the auditor (both on-site and via mail/telephone), and that mechanisms are in place to ward off retaliation for contacting the auditor. In addition to making themselves available to staff and inmates, the auditor must publicly advertise its work and solicit input from the community before and after facility visits as well as in response to its reports. In each audit, the monitor should be responsible for independently verifying that the facility is making reasonable progress in achieving compliance with the PREA Standards and thereafter maintaining such compliance. Each monitor's report shall describe the steps taken to analyze conditions and assess compliance with the Standards, including documents reviewed and individuals interviewed (unless confidentiality is requested), and the factual basis for each of the monitor's findings. The monitor's reports should also include specific recommendations for actions needed to bring the facility into compliance with the PREA Standards.

The monitor's findings should be publicly available – except for private information (such as victim's names) – to fulfill the transparency and accountability expectations of such oversight. In addition to providing hard copies to the facility law libraries and to any inmate who requests one, the reports should be posted on the websites of the auditor, the agency, the Department and the PREA Resource Center, so that they appear in all of the logical places where stakeholders and other interested parties are likely to look for them.

Other audit-related questions posed by the Department

Question 3: Should the final rule provide greater guidance as to how agencies should conduct such monitoring? If so, what guidance should be provided?

There is a fundamental problem with the proposed rules for monitoring private prisons, and the mere addition of new "guidance" will neither solve this problem nor comport with the intent of Congress in enacting PREA. Deviating from the Commission's recommendations, the proposed rule relies on "routine monitoring" – contractual monitoring mechanisms already in place – rather than audits specifically focused on reducing prison rape.[xxvii] The proposed rule should be revised to require PREA-specific audits.

Routine monitoring of contracts has failed to deter the private prison industry both from violating its contractual obligations to the public and subjecting prisoners to horrid conditions. In 2007, the Texas Youth Commission (TYC) fired contract monitors – and former GEO Group employees – who failed to report horrid conditions at a GEO Group juvenile facility in West Texas.[xxviii] TYC monitors "not only failed to report substandard conditions but praised the operation. In the monitors' most recent review … the prison was awarded an overall compliance score of 97.7 percent. In that review, monitors also thanked GEO staff for their positive work with TYC youth."[xxix]

It later came to light that some of the monitors – immediately before commencing their employment as state monitors of GEO's contract performance – had worked *for* the GEO Group.[xxx] When TYC finally sent independent auditors (not the routine monitoring staff) to the

youth facility, the auditors "got so much fecal matter on their shoes they had to wipe their feet on the grass outside."[xxxi] And despite the contract monitors' stellar reviews, the auditors reported that juveniles at the facility were exposed to insect infestations, were kept in cells that "were filthy, [and] smelled of feces and urine," and were segregated by race. Juveniles reported that they were not allowed to go to church services for months; were not allowed to brush their teeth for days; and were "forced to urinate or defecate in some container other than a toilet."[xxxii]

These, then, are the horrors that "routine monitoring," *NPRM* at 15, wrought for children in West Texas – and there is no reason to believe that such monitoring will be any more effective in curbing prison rape. In the past seven months alone, audits in two states have demonstrated the ineffectiveness of routine contractual monitoring of for-profit prisons:

- In September 2010, the New Mexico Legislative Finance Committee reported that although GEO and Corrections Corporation of America (CCA) failed to maintain prison staffing levels required by contract, the state corrections department – headed by Secretary Joe Williams – declined to collect contractual fines. The Committee found that the state might have collected more than $18 million from the private prison companies if Williams and the corrections department had enforced the contractual penalties owed by the private prisons. Prior to becoming the head of the corrections department, Williams worked for the GEO Group as a warden.[xxxiii]

- In December 2010, the Hawaii Auditor General reported that Hawaii's corrections department, which sends prisoners to an out-of-state CCA facility, "circumvented the procurement process and ignored oversight responsibility for out-of-state contracting."[xxxiv] Further, the corrections department's "'partnership' with CCA has resulted in an over-reliance by … department staff on CCA's representations of contract performance."[xxxv] Auditors "observed the contract monitoring team take the testimony of the contractor's staff without verifying their statements against documentary evidence. These unverified claims comprised a large body of evidence, and led the [corrections department] to conclude that the CCA was in full compliance with contract requirements."[xxxvi]

Not only will the proposed rule's reliance on "routine monitoring" allow sexual assault to continue unabated at for-profit prisons, but the proposed rule also violates the intent of Congress by creating two different sets of auditing rules for private and for-profit prisons.[xxxvii] Such a dual regime would violate the plain language of PREA, which mandates national standards: "[T]he Attorney General shall publish a final rule adopting *national standards* for the detection, prevention, reduction, and punishment of prison rape." 42 U.S.C. § 15607(a)(1) (emphasis added). These national standards must apply to public and private prisons alike: "The term 'prison' means any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government …" *Id.* § 15609(7). As the Supreme Court has stated, "a legislature says in a statute what it means and means in a statute what it says," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992), and here Congress said – and meant – that unified national standards should govern public and private prisons.

In short, any meaningful effort to reduce rape in private prisons and to comply with the intent of Congress requires the final rule to mandate PREA-specific audits, such as the audits discussed in questions. PREA monitoring should not be folded into routine mechanisms for monitoring contracts because such mechanisms do not work and will not prevent rape.[xxxviii]

Question 61: Is there any basis at this juncture to estimate the compliance costs associated with §§ 115.93, 115.193, 115.293, and 115.393, pertaining to audits? How much do agencies anticipate compliance with this standard is likely to cost on a per-facility basis, under various assumptions as to the type and frequency or breadth of audits?

Given the lack of specificity of what a PREA audit would entail, it is difficult to estimate with any precision the costs associated with the auditing process. Therefore, we believe it would be useful to comment on the Booz Allen cost analysis study, which was sought by the Department to assess costs of the Commission's recommendations and provides a reasonable starting point for deriving a cost estimate for the new standards.[xxxix] Booz Allen concluded that the total cost for an audit of a prison system would be $32,400 per prison, $24,700 per jail, $17,000 per juvenile or community corrections facility, and $9,400 per lockup.[xl] These estimates were based upon the assumption that a prison audit entailed a four-day visit by a four-person team; jail audit, three days; juvenile or community corrections facility, two days; and a lockup, one day. We believe the time estimates for these visits are reasonable and that the cost projections for staff, travel, lodging and incidental expenses for the auditor are also justifiable. The direct audit costs were estimated at $14,100 per prison, $11,000 per jail, $7,900 per juvenile or community corrections facility, and $4,800 per lockup.

It is unclear from the estimate, however, whether the number of days for each audit also included time for the auditors to fully document their findings and recommendations concerning the site visit. Although much of the documentation by the auditing team could occur during the actual audit, we believe at least an additional 50% of auditor site visit time should be added to the work of each auditor to complete documentation of the visit. This would represent an additional two days per auditor for a prison visit, 1.5 days for a jail visit, one day for a juvenile or community corrections facility visit and a half-day for a lockup. This would result in the auditor only costs increasing to approximately $18,900 per prison, $14,600 per jail, $10,300 per juvenile or community corrections facility and $6,000 per lockup.

The Booz Allen estimation of costs also included a significant expenditure for the "level of effort" of staff assigned by the audited correctional agency for activities associated with the audit. It concluded, based upon information provided by the Missouri Department of Corrections, a full-time employee would be needed to support four prison audits per year. This resulted in facility-based costs of $18,300 per prison, $13,800 per jail, $9,200 per juvenile or community corrections facility, and $4,600 per lockup. These costs exceed the actual auditor costs and are excessive. Given the more limited nature of the PREA audits, we questions why the correctional department staff would need the equivalent of three months of effort by one individual to prepare for and respond to an audit. Much of the necessary data is being collected pursuant to other PREA standards, and it is difficult to image why more than a week or two of effort would be needed prior to and after the audit by the support staff. Even if additional time is required for preparation and response, it would seem reasonable that one individual could

coordinate eight prison or 10 jails audits per year. Consequently, we assert the facility-based cost could be reduced by half for the prisons and jails, and by one-third for the lockups and the juvenile or community corrections facilities.

Applying these new assumptions to the total audit costs, we estimate that auditors and facility support staff costs would result in an estimate of approximately $28,000 per prison, $21,500 per jail, $16,400 per juvenile or community corrections facility and $9,000 per lockup. The annualized costs per prison would be one-third these amounts, given the projection of triennial audits, resulting in an annual cost of approximately $9,300 per prison, $7,100 per jail, $5,500 per juvenile/community corrections facility, and $3,000 per lockup.

The Department of Justice cites the Booz Allen audit costs in its *Initial Regulatory Impact Analysis (IRIA) for Notice for Proposed Rulemaking, Proposed National Standards to Prevent, Detect, and Respond to Prison Rape Under the PREA*. [xli] In that report, the Department concluded in its cost-benefit analysis that the auditing costs were "unknown" because its standards did not specifying the frequency of audits and therefore, the Department could not allocate an annual cost. The IRIA PREA Cost Analysis noted the annualized cost for the Booz Allen analysis would be $77.5 million per year for 1,668 prisons; 3,365 jails; 2,810 juvenile facilities; lockups operated by at least 4,469 different agencies; and approximately 530 community confinement facilities.[xlii] This compared to a total of $544.4 million for compliance costs for the all other PREA standards proposed by the Department.[xliii] The Booz Allen auditing cost would add an additional 14% to the current estimated cost for national facilities. The IRIA PREA Cost Analysis concluded that ongoing costs of full compliance without the audit costs "would have to yield approximately a 2.3% to 3.5% reduction from the baseline in the average annual prevalence of prison rape for the ongoing costs and the monetized benefits to break even, without regard to the nonmonetary benefits." [xliv] Utilizing our revised audit costs per facility and applying it to the IRIA estimate of national facilities, our annual auditing costs would be $71.4 million. Based upon the IRIA PREA Cost Analysis of the benefits of reductions in prison rapes, the total costs with auditing would break even if there was a 2.6% to 4.0% reduction in rape incidents, an increase of only 0.30% to 0.45% in the rape reduction rate if the triennial audits costs are included.

We assert the expenses associated with triennial audits are reasonable and within the statutory limitation that the Department not adopted any standards "that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 42 U.S.C. § 15607(a)(3). We believe quality auditing will substantial increase the likelihood that significant reductions in prison rape will occur, certainly much greater than the 0.45% prison rape reduction that would yield a net benefit by implementation of these auditing standards.

B. Comments on Individual Standards

§ 115.43 Protective Custody; § 115.66 Post-allegation protective custody/ § 115.342(c) – Placement of residents in housing, bed, program, education and work assignments; § 115.366 Post-allegation protective custody

We support Proposed Standard § 115.43's inclusion of restrictive guidelines for the use of involuntary protective custody but believe that this section could be improved by providing clearer limitations on involuntary segregated housing. We are concerned that the lack of guidance provided to correctional agencies in Proposed Standard § 115.43 will permit agencies to keep many vulnerable prisoners in involuntary segregation in punitive conditions for far too long.

Placing victims in such housing is punitive by default as it results in a loss of services and programs, can brand the prisoner as a victim or snitch, and leaves the victim isolated, often without the type of medical and mental health support s/he needs. As a result, placing victims in such custody offers little protection and may in fact exacerbate the mental trauma of sexual abuse.

The Negative Consequences of Placing Vulnerable Victims in Isolation Units

Typically, protective custody units are little different than administrative segregation units or other forms of disciplinary housing. In fact, they are often in the same area or actually in the same physical space. Conditions in these units typically involve placing people alone in cells for 23 hours a day or more with little or no human interaction, reduced natural light, little access to recreation, strict regulation of access to property, such as radios, TV or commissary items, greater constraints on visitation rights, and the inability to participate in group or social activities, including eating.

This type of isolation is well recognized as difficult for human beings to endure and psychologically harmful.[xlv] A California prison psychiatrist expressed the common experience in solitary confinement: "It's a standard psychiatric concept, if you put people in isolation, they will go insane. Most people in isolation will fall apart."[xlvi] Indeed, research demonstrates that the clinical impacts of isolation can actually be akin to physical torture.[xlvii]

In addition to increased psychiatric symptoms generally, suicide rates and incidents of self-harm are notably higher for prisoners in isolation units. In California for example, although less than 10% of the state's prison population was held in isolation units in 2004, those units accounted for 73% of all suicides.[xlviii]

Long-term isolation is psychologically difficult for even relatively healthy individuals, but it is devastating for those with mental illness. When the severely mentally ill people are subjected to isolation they deteriorate dramatically. Many engage in bizarre and extreme acts of self-injury and suicide. It is not unusual for clinicians to report that prisoners in solitary confinement have compulsively cut their flesh, repeatedly smashed their heads against walls, swallowed razors and other harmful objects, or attempted to hang themselves.

The impacts of isolation on the mentally ill go even further because they typically do not receive meaningful treatment for their illnesses while confined. Mental health treatment in many prisons is highly inadequate, but the problems in long-term isolation units are even greater because the extreme security measures in these facilities render appropriate mental health treatment, beyond mere medications, nearly impossible. For example, because prisoners in isolation units are often not allowed to sit alone in a room with a mental health clinician, any "therapy" will generally take place at cell-front where other prisoners and staff can overhear the conversation. Most prisoners are reluctant to say anything in such a setting so this type of treatment is largely ineffective.

The shattering impacts of isolation housing are so well-documented that every federal court around the country to consider the question of whether placing the severely mentally ill in such conditions is cruel and unusual punishment has found a Constitutional violation.[xlix]

The DOJ Should Augment its Proposed Standard by Adopting Protections Recommended by the ABA

Placing vulnerable prisoners and victims of sexual violence in these types of units without greater protections for their welfare than currently embodied in the Department's proposed standards is clearly insufficient. In recognition of the inherent problems of long-term isolation, and the special need to protect vulnerable prisoners, the American Bar Association's *Standards for Criminal Justice, Treatment of Prisoners*, Chapter 23-5.5, sets forth careful policies to address the need to protect vulnerable prisoners and the restrictions this creates within the corrections environment. The solutions presented in the Standards embody a consensus view of representatives of all segments of the criminal justice system who collaborated exhaustively in formulating the final ABA Standards. The balance struck by the ABA's policy should inform the further development of Sections 115.43 and 116.66 of the Department's proposed standards.

In particular, the ABA standard requires that correctional authorities should not assign a prisoner to involuntary protective custody for a period exceeding 30 days "unless there is a serious and credible threat to the prisoner's safety and staff are unable to adequately protect the prisoner either in the general population or by a transfer to another facility." ABA Standards on the Treatment of Prisoners, Standard 23-5.5(d). This standard ensures that victims will not be placed in protective custody overly long unless security needs are truly paramount. In contrast, the Department's proposed standard only requires that an agency not "ordinarily assign" a prisoner to involuntary segregation for a period exceeding 90 days. The Department should adopt the ABA's 30 day ceiling as well as its security-based justification for extended involuntary stays in segregation.

While the ABA's Standards acknowledge that some restrictions on prisoners in protective custody may be unavoidable, they also acknowledge that many restrictions can be avoided in such status and that conditions in protective custody need not be as stark as disciplinary segregation. In fact, there are security reasons for ensuring the amelioration of such harsh conditions because they tend to discourage prisoners from seeking protection. Recognizing the competing interests at stake, ABA Standard 23-5.5(g) requires the following:

If correctional authorities assigned a prisoner to protective custody, such a prisoner should be:

(i) Housed in the least restrictive environment practicable, in segregation housing only if necessary, and in no case in a setting that is used for disciplinary housing:
(ii) allowed all of the items usually authorized for general population prisoners;
(iii) provided opportunities to participate in programming and work as described in Standards 23-8.2[l] and 8.4[li]; and
(iv) provided the greatest practicable opportunities for out-of-cell time.

The Department has attempted to strike this same balance with Proposed Standard § 115.43(b):

> Inmates placed in segregated housing for this purpose shall have access to programs, education, and work opportunities to the extent possible.

While this draft begins to address the problem, it does not cover the complexity of issues and conditions involved in protective custody housing. We therefore urge the Department to adopt the more protective requirements set forth in the ABA Standards.

Incarcerated Youth Require Greater Protection.

The risks inherent to placing vulnerable adults in isolation housing are even greater when they involve youth. Even short periods of isolation can have particularly negative consequences for youth, including raising the risk of suicide[lii] and exacerbating emotional and mental health needs. Isolating a youth who may have been a recent victim of sexual misconduct adds these negative effects to an already traumatic experience. Additionally, isolation deprives youth of programming designed to support their rehabilitation, such as educational services.[liii] While the Department's proposed standards retain more of the NPREC's protections against segregating detained youth, Proposed Standard §§ 115.342(c) and 115.366 still allow for the dangerous and damaging practice of isolating vulnerable and victimized youth without clear limits on how long that practice can occur. The Department's final rule should not permit jurisdictions to expand the use of isolation, thus relying on one dangerous practice when working to eliminate another. The standard should explicitly limit isolation to no more than 72 hours and ensure that these youth enjoy the same privileges as other residents.

§ 115.83 – Access to Emergency Medical and Mental Health Services

In the ACLU's May 2010 submission to the Department we urged that final regulations guiding access to emergency medical and crisis intervention services explicitly include the routine offering of pregnancy prophylaxis (commonly referred to as "emergency contraception" or "EC") to sexual abuse victims who are at risk of pregnancy from rape.

Recognizing that rape victims "fear becoming pregnant as a result of rape" and that "[p]regnancy resulting from rape is indeed the cause of great concern and significant additional trauma to the victim," for over a decade, the Sexual Assault Nurse Examiner (SANE) Development and Operation Guide has addressed pregnancy risk evaluation and prevention.[liv] Consistent with SANE guidelines, the American College of Obstetricians and Gynecologists recommends that

EC be offered to all rape patients at risk of pregnancy.[lv] Likewise, in their guidelines for treating women who have been raped, the American Medical Association advises physicians to ensure that rape patients are informed about and, if appropriate, provided EC.[lvi]

In short, offering and providing EC is part of the standard of care for women who have been raped. Accordingly, DOJ must ensure that the rights and health of sexual assault survivors in prisons and jails are not unnecessarily endangered by a failure to incorporate counseling about, and provision of, EC in its final national standard. The proposed standard requires that:

> (d) Inmate victims of sexual abuse while incarcerated shall be offered timely information and access to all pregnancy-related medical services that are lawful in the community and sexually transmitted infections prophylaxis, where appropriate.[lvii]

While this proposed standard somewhat revised the Commission's version, we remain deeply concerned that imprisoned women at risk of pregnancy as a result of rape will be denied access to EC because the standard does not make explicit provision for its use – as it does for prophylaxis used to prevent the transmission of sexually transmitted diseases. The Department's final regulations should include explicit guidelines requiring counseling about pregnancy prevention options and the *onsite* provision of EC in *all* prisons, jails, lockups, and community correction facilities housing women, including those that house adults, juveniles, immigrant detainees, and pre-sentence detainees. In addition, because the effectiveness of EC diminishes with delay, the standard should emphasize that it is imperative to offer EC to female inmates who have been raped at the earliest opportunity—whether that arises during an initial admission exam, a post-assault emergency exam, or at any other time. With these additions to the proposed standard, DOJ can better help rape victims prevent the trauma of unintended pregnancies and safeguard their reproductive and mental health.

The Proposed National Standards Provide No Analysis or Adequate Justification for Excluding Immigration Detention Facilities and Would Create an Illogical Patchwork of PREA Coverage.

The proposed National Standards are completely inadequate to address the serious problem of sexual abuse and assault in immigration detention. A recent ACLU FOIA request revealed that since January 2007 there have been 125 complaints of sexual abuse in immigration detention. Instead of implementing the extensive progress on immigration detention reform measures made by NPREC, which included a hearing dedicated to those facilities and a specialized expert working group, the proposed National Standards set aside the Commission's carefully considered recommendations without analysis or adequate justification. This dismissive treatment of immigration detention is contrary to PREA's intent; creates an illogical patchwork of PREA coverage whereby an immigration detainee's protections depend on the composition of a detention facility's population; and, worst of all, promises to leave detainees vulnerable to continued abuse in the absence of enforceable protections. DOJ should reverse its unsupportable exclusion of immigration detention facilities, which incarcerate about 400,000 people annually,[lviii] from the National Standards.

The proposed standards contain a rule that "[i]f a majority of a facility's inmates are awaiting adjudication of criminal charges, serving a sentence of one year or less, or awaiting post adjudication transfer to a different facility, then the facility is categorized as a jail, regardless of how the facility may label itself. As discussed in greater depth below, these terms do not encompass facilities that are primarily used for the civil detention of aliens pending removal from the United States."[lix] The consequence of this definition is that some immigration detainees, namely those housed in facilities with 50% or more of the inmates serving criminal sentences will be covered while the others will not. An individual immigration detainee in a local jail with inmates who are accused of crimes or are serving short sentences would be protected by the Department's standards, but as soon as he or she is transferred to a facility with a majority of immigration detainees, the protection evaporates. Shifting proportions of criminal inmates versus civil immigration detainees at a particular facility could even lead to the absurdity that the facility is covered one day and not the next. Mathematical arbitrariness is no way to approach the widespread problems of sexual abuse and assault common to *all* detention facilities.

DOJ's proposed standards are directly contrary to PREA's intent to protect every detainee from sexual abuse and assault. The House Judiciary Committee's PREA report made clear that [t]he provisions of this legislation, including both the reporting requirements and the standards and protections developed by the Attorney General, are intended to apply to all individuals detained in the United States in both civil and criminal detentions."[lx] A principal co-sponsor of the bill, Rep. Bobby Scott, similarly expressed the common understanding that "[n]o detainee, regardless of whether he or she is being held on criminal charges or in civil detention, shall be excluded from any reports, nor be exempted from the protections provided for under any standards related to this legislation."[lxi] PREA's language in its definitional section reflects Congress's universal, detainee-focused intent: "The term 'prison' means any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government."[lxii] Regardless of the contemporary transfer of responsibilities for immigration detention from DOJ to the Department of Homeland Security ("DHS"), PREA's intent was unaffected. The national implementing standards must reflect this clear Congressional intent, which is entirely unaddressed by DOJ.

The proposed standards never return to the promised "greater depth" of discussion regarding why immigration detention facilities are not included. There is no analysis whatsoever of this omission from the standards themselves. Under a heading titled "supplemental immigration standards," DOJ does provide a cursory justification for why it rejected the *additional*, customized protections developed by the Commission. This section is equally bereft, however, of the careful and even-handed appraisal the Commission's expert efforts deserve.

DOJ's discussion begins with an unsupported assertion that housing immigration detainees separately is impractical, based on unidentified sources: "Several commenters expressed concern that this would impose a significant burden on jails and prisons."[lxiii] Without a thorough examination of this claim by DOJ, it is impossible to credit the proposed standards' implicit concurrence with it.

DOJ then compounds its initial *ipse dixit* with the blanket statement that "[t]he Department has similar concerns about the Commission's other proposed supplemental standards, such as

imposing separate training requirements, requiring agencies to attempt to enter into separate memoranda of understanding with immigration-specific community service providers, and requiring the provision of access to telephones with free, preprogrammed numbers to specified Department of Homeland Security offices." Why these three widely disparate (and only exemplary) proposals all constitute "significant burdens" that counsel wholesale rejection of the Commission's recommendations is unexplained. There is, moreover, a complete absence of discussion in DOJ's notice of characteristics that informed the Commission's supplemental standards because they are uniquely prevalent in the immigration detainee population, for example limited English proficiency; the fear among immigration detainees that reporting sexual abuse will result in their deportation; and the near-total absence of legal counsel for immigration detainees (84 percent of detainees lack an attorney).[lxiv]

The proposed standards also appear to contradict their earlier exclusion of primarily civil detention facilities by stating that "[t]he Department expects that its proposed general training requirements, along with the general requirements to make efforts to work with outside government entities and community service providers, will serve to protect immigration detainees along with the general inmate population."[lxv] If the standards do not apply to immigration detention facilities, most immigration detainees would not be so protected.

Finally, the proposed standards place undue and unearned reliance on DHS Immigration and Customs Enforcement agency's ("ICE") self-policing of its facilities. According to the proposed standards, "[t]he Department notes that ICE has published Performance Based National Detention Standards for the civil detention of aliens pending removal from the United States by ICE detention facilities, Contract Detention Facilities, and State or local government facilities used by ICE through Intergovernmental Service Agreements to hold detainees for more than 72 hours, and that one standard specifically addresses Sexual Abuse and Assault Prevention and Intervention." Left conspicuously unmentioned is that these 2008 Performance Based National Detention Standards ("PBNDS") are inapplicable to half of ICE's detained population, as well as being completely unenforceable. They also have significant substantive problems and omissions that led ICE to formulate a 2010 version which currently covers only a small fraction of detainees. Left conspicuously unmentioned is that these 2008 Performance Based National Detention Standards ("PBNDS") are both inapplicable to many ICE facilities, including six of the agency's top 20 by population, and completely unenforceable."

The 2008 PBNDS do not mirror PREA, as they lack central features of the statute such as the requirements that law enforcement be informed of reported rapes, that criminal investigations ensue, and that these investigations are coordinated with administrative inquiries. Ironically, DHS documents show that the same number of sexual abuse complaints (38) were lodged by immigration detainees in 2009 and 2010. ICE's detention reforms, which began in August 2009, combined with the 2008 PBNDS, have not ameliorated the number of sexual abuse complaints. DOJ's reliance on ICE's ineffective and often inapplicable 2008 PBNDS to absolve itself from responsibility for immigration detainees is dangerously misplaced and will result in a starkly inferior regime of protection for this vulnerable population.

The Record of Sexual Assaults Against Immigration Detainees Strongly Supports the Application of Enforceable National PREA Standards to Them.

The sexual abuse of women immigration detainees by a Corrections Corporation of America guard working at the T. Don Hutto Detention Center in Taylor, Texas that was discovered in May 2010, illustrates an urgent need for enforceable national sexual abuse standards. This abuse took place at a facility that ICE had promoted as a model of its detention reforms, under the auspices of a newly installed ICE Detention Services Manager. ICE's failure to prevent the Hutto abuse demonstrates how the agency's oversight regime is insufficient and how the ICE model of self-policing falls short. The Hutto violations are not isolated or unique but rather reflect long-standing failures throughout the ICE detention system. Other incidents of sexual abuse in ICE detention since 2007 have occurred at Hutto; Port Isabel, Texas; Pearsall, Texas; and in Florida.[lxvi] Human Rights Watch's comprehensive 2010 report examined "more than 15 separate documented incidents and allegations of sexual assault, abuse, or harassment from across the ICE detention system, involving more than 50 alleged detainee victims," and concluded that "[t]his accumulation of reports indicates that the problem cannot be dismissed as a series of isolated incidents, and that there are systemic failures at issue. At the same time, the number of reported cases almost certainly does not come close to capturing the extent of the problem."[lxvii]

ICE's response to the Hutto assaults lacked transparency and ICE was uncooperative with the ACLU and other non-governmental organizations in tracking down all possible Hutto victims. ICE resisted committing to preventive action such as providing then-current detainees "know your rights" information about sexual assault and abuse. With a backdrop of unenforceable PBNDS, detainees and their advocates had little recourse to achieve reform and redress.

ICE's treatment of individual sexual assault victims has been just as deficient. At the Eloy Detention Center, for example, the ACLU of Arizona learned of a transgender woman who was sexually assaulted while in ICE custody. From the start of her detention, she suffered discrimination, harassment, and humiliation because of her gender identity. She was placed in "protective custody" throughout her eight months of detention and it was while in this custody classification that the sexual assault by a detention officer took place. Shockingly, a second sexual assault was subsequently perpetrated on her by a detainee. While she has since been released, she still suffers from the emotional pain and humiliation she endured while at Eloy.

DOJ retains an opportunity to correct its mistaken proposed national standards to be true to PREA's intent and to demonstrate a nationwide commitment to protecting all detainees from sexual abuse. Leaving sexual abuse prevention and investigation to ICE's unenforceable PBNDS is unacceptable. Past victimization of immigration detainees has been rampant and, along with attention to the distinctive characteristics of this vulnerable population, must inform how DOJ approaches PREA implementation. On both statutory interpretation and policy grounds, immigration detention facilities must be included in the national standards.

Conclusion

The proposed standards are as urgently needed today as they were seven years ago, when Congress mandated the creation of these guidelines to protect the millions of men, women and children in our country's prisons, jails and detention centers from the life altering trauma of sexual abuse in custody. We urge you to consider the serious issues raised in these comments; revise the proposed standards accordingly; and promulgate the standards without further delay.

Respectfully submitted,

Laura W. Murphy,
Director
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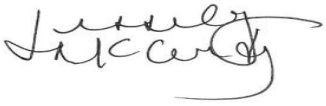

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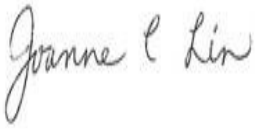

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[i] *See, e.g. Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (describing the cross-gender pat-down search of a female prisoner to include, "…According to the prison training material, a guard is to '[i]se a flat hand and pushing motion across the [inmate's] crotch area.' The guard must '[p]ush inward and upward when searching the crotch and upper thighs of the inmate.' All seams in the leg and the crotch area are to be 'squeez[ed] and knead[ed.'….").

[ii] The full text of the *ABA Standards for Criminal Justice, Treatment of Prisoners* is available online at: http://www.abanet.org/crimjust/standards/treatmentprisoners.html

[iii] Courts have recognized the link between abusive pat-downs and past sexual abuse of prisoners – regardless of whether or not the abuse occurred in the prison or the community – as justifications for finding Eighth Amendment violations where policies require women to submit to pat-downs by male officers. *See, e.g., Jordan*, 986 F.2d 1521 (describing history and traumatized reactions of plaintiffs); *Colman v. Vasquez*, 142 f. Supp. 2d 226 (D. Conn. 2001) (denying qualified immunity on a claim in which the plaintiff alleged that cross-gender pat-downs violated the 8th Amendment, pointing to plaintiffs' assignment to a special unit for sexually traumatized prisoners). The national data also supports the predominance of sexual abuse in the prison population, especially amongst women. The Bureau of Justice Statistics found that between 37-39% of women prisoners have a history of sexual abuse. Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers* (Bureau of Justice Statistics, Apr. 1999) available at http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf.

[iv] National Institute of Corrections Prisons Division and Information Center, *Cross-Sex Pat Search Practices: Findings from NIC Telephone Research* (January 6, 1999), available at http://www.nicic.org/downloadds/pdf/1999/014891.pdf.

[v] *Woodford v. Ngo*, 548 U.S. 81, 90-91, 126 S.Ct. 2378, 2386 (2006). This "proper exhaustion" rule contrasts sharply with the treatment of other civil rights litigants in federal court. Concerning the administrative filing requirement of Title VII of the Civil Rights Act of 1964, the Court said that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love v. Pullman*, 404 U.S. 522, 526 (1972), and it refused to allow violation of a state administrative time limit to bar the litigant from proceeding in federal court.

[vi] *See* Giovanna E. Shay & Joanna Kalb, *More Stories of Jurisdiction Stripping and Executive Power: The Supreme Court's Recent Prison Litigation Reform Act (PLRA),* 29 Cardozo Law Review 291, 321 (2007) (reporting that in a study of cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo,* 548 U.S. 81, 126 S. Ct. 2378 (2006), all claims survived exhaustion in fewer than 15% of reported cases).

[vii] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17-19 (2003), available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102.

[viii] James, Doris J. & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates, Bureau of Justice Statistics Special Report* 1, Department of Justice, Bureau of Justice Statistics, December 14, 2006.

[ix] Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at www.thearc.org/faqs/crimqa.html.

[x] *See Woodford v. Ngo*, *supra* note 5 at 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two to five days).

[xi] *See, e.g., Spaulding v. Oakland Co. Jail Medical Staff,* 2007 WL 2336216 at *2 (E.D. Mich. Aug. 15, 2007) (lawsuit dismissed despite prisoner's claim that he was unable to obtain required grievance form).

[xii] *See, e.g. Richardson v. Spurlock,* 260 F.3d 495, 499 (5th Cir. 2001) (prisoner failed to exhaust because grievance system refused to consider grievance submitted on wrong form).

[xiii] See*, e.g., Harper v. Laufenberg*, 2005 WL 79009 at *3 (W.D. Wis. Jan. 6, 2005) (prisoner failed to exhaust because grievance system refused to consider grievance that it considered to raise two complaints rather than one).

[xiv] These are all problems that staff at the National Prison Project encounter routinely as we attempt to advise prisoners on how to avoid losing their rights to sue.

[xv] *See, e.g.*, Sylvia Moreno, *In Texas, Scandals Rock Juvenile Justice System: Hundreds to Be Released as State Looks at Abuse Allegations and Sentencing Policies*, WASH. POST, Apr. 5, 2007, at A3.

[xvi] *See Woodford*, *supra* note 5 (prisoner who has not complied with rules of the grievance system has failed to exhaust, so lawsuit must be dismissed).

[xvii] Prison Abuse Remedies Act of 2009, H.R. 4335 (111th Cong. 2009) (PARA). PARA would reform the PLRA's exhaustion requirement along the same lines as the Standard RE-2 by providing that a court stay any prisoner case for 90 days if the prisoner has failed to comply with the facility's grievance procedure to allow prison officials to solve the problem before the case proceeds in federal court.

[xviii] *See* ABA Resolution 102B, 2007 Midyear Meeting (Prison Litigation Reform Act), available at http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredtwob.doc.

[xix] *National Prison Rape Elimination Commission Report* (June 2009), Recommendations (page 238)

[xx] The BOP's Administrative Remedy Program does not comply with the ABA's Standard 23-9.1 for grievance procedures or Standard 23-9.2 setting forth requirements for access to the judicial process. It should not be used as the model on which the PREA regulations are based.

[xxi] The ABA Standards have dealt with the timing of grievance filings by requiring that all grievances submitted or appealed outside the reasonable deadlines be accepted "if a prisoner has a legitimate reason for delay and that delay has not significantly impaired the agency's ability to resolve the grievance." ABA, TREATMENT OF PRISONERS STANDARDS 23-9.1(e)(iv). In addition to this more practical approach to grievance deadlines, the Standard provides that a prisoner's failure to exhaust prior to filing a suit should not be a procedural bar to the courts. *See* ABA, TREATMENT OF PRISONERS STANDARDS 23-9.2(d).

[xxii] This distinction is consistent with the ABA's oversight resolution and its Treatment of Prisoners Standards. *See* ABA, TREATMENT OF PRISONERS STANDARDS, 23-11.3(a) (external monitoring and inspection).

[xxiii] *See* ABA, TREATMENT OF PRISONERS STANDARDS, 23-11.3(c) (external monitoring and inspection).

[xxiv] *Id*. at STANDARD 23-11(b). These requirements are also required in the ABA's external monitoring standards.

[xxv] *Id*. at STANDARD 23-11, Commentary, subdivision ((b).

[xxvi] These requirements are further supported in the ABA's standards. *See* ABA, TREATMENT OF PRISONERS STANDARDS, 23-11.3(b) (external monitoring and inspection).

[xxvii] The Commission correctly recommended that new contracts with for-profit prisons must "specify that the public agency will monitor the [private] entity's compliance with [PREA] standards as part of its monitoring of the entity's performance." PP-2. The *NPRM*, however, states that the relevant proposed rules (Sections 115.2, 115.112, 15.212, and 115.312) have been weakened in that corrections departments are "not required to conduct audits of [their] contract facilities but rather must include PREA as a part of its *routine monitoring* of compliance with contractual obligations." *NPRM* at 15 (emphasis added).

[xxviii] Steve McGonigle, *Fired TYC Monitors Had Worked for Facility's Operator*, DALLAS MORNING NEWS, Oct. 12, 2007

[xxix] Doug J. Swanson & Steve McGonigle, *Seven TYC Workers Fired After Inmates Found Living in Filth*, DALLAS MORNING NEWS, Oct. 3, 2007.

[xxx] Steve McGonigle, *Fired TYC Monitors Had Worked for Facility's Operator*, DALLAS MORNING NEWS, Oct. 12, 2007

[xxxi] Doug J. Swanson, *TYC Investigates Staff for Ties to Jail Operator*, DALLAS MORNING NEWS, Oct. 6, 2007.

[xxxii] Texas Youth Commission, Coke County Juvenile Justice Center Audit, 5-9 (2007).

[xxxiii] State of New Mexico Legislative Finance Committee, Review of Private Prison Contracts Penalty Assessment (Sept. 8, 2010); Trip Jennings, *Sen. Smith: Williams' Work for GEO Casts 'Cloud' over Decision Not to Fine Firms*, NEW MEXICO INDEPENDENT, Sept. 21, 2010.

[xxxiv] Hawaii State Auditor, Management Audit of the Department of Public Safety's Contracting for Prison Beds and Services: A Report to the Governor and the Legislature of the State of Hawaii, Report No. 10-10 (December 2010), at 15.

[xxxv] *Id.* at 36.

[xxxvi] *Id.*

[xxxvii] For instance, private facilities would be able to avoid the requirements set forth in Proposed Standard § 115.93 which guarantee the independence in the auditor as well as DOJ certification of the auditor; the requirement that auditor's reports be publicly posted; and the other policies DOJ ultimately promulgates to govern the conduct of PREA audits. Certainly, such a separate and unequal system is in no way justified by the nature of the problem of custodial sexual abuse in private v. public facilities.

[xxxviii] In the event that the Department rejects this proposal and fails to create a separate mechanism for PREA audits, the Department should, as a bare minimum, adopt the recommendations for strengthened monitoring made on pages **[ ]-[ ]** of the comments of Prison Legal News.

[xxxix] Booz, Allen Hamilton, *Prison Rape Elimination Act Cost Impact Analysis, Final Report* at 79-80 (June 18, 2010).

[xl] *Id*.

[xli] Department of Justice, *Initial Regulator Impact Analysis (IRIA) for Notice of Proposal Rulemaking*, *Proposed National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA)* at 53 (January 24, 2011) .

[xlii] *Id.* at 30-31.

[xliii] *Id.* at 59.

[xliv] *Id.* at 61. The IRIA analysis found that a one percent reduction in the baseline prevalence of prison rape was worth between $157 million and $239 million.

[xlv] *See e.g.*, Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 American Journal of Psychiatry 1450 (1983); R. Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 Social Justice 8 (1988); S.L. Brodsky and F.R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 Forensic Reports 267 (1988); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124 (2003); H. Miller and G. Young, *Prison Segregation: Administrative*

Detention Remedy of Mental Health Problem?, 7 Criminal Behaviour and Mental Health 85 (1997); H. Toch, *Mosaic of Despair: Human Breakdown in Prison*, Washington DC: American Psychological Association (1992).
[xlvi] HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS, 149 n. 513 (October 21, 2003).

[xlvii] Reyes, H., *The worst scars are in the mind: psychological torture*, 89 Int Rev Red Cross 591-617, 2007; Basoglu, M., Livanou, M., Crnobaric, C., *Torture vs. other cruel, inhuman and degrading treatment: is the distinction real or apparent?* 64 Arch Gen Psychiatry 277, 285 (2007).

[xlviii] Expert Report of Professor Craig Haney at 45-46, n. 119, Coleman v. Schwarzenegger/ Plata v. Schwarzenegger, Nos: Civ S 90-0520 LKK-JFM P, C01-1351 THE (E.D. Cal/N.D. Cal. Aug. 15, 2008).
[xlix] *See*, *e.g.*, *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) ("[c]onditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners"); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence that prison officials fail to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" states an Eighth Amendment claim).
[l] ABA, TREATMENT OF PRISONERS STANDARDS, 23-8.2 (Rehabilitative Programs).
[li] ABA, TREATMENT OF PRISONERS STANDARDS, 23-8.4 (Work Programs).
[lii] Lindsay M. Hayes, National Center on Institutions and Alternatives, *Juvenile Suicide in Confinement: A National Survey*, Office of Juvenile Justice and Delinquency Prevention (2009), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf (describing a "strong relationship between juvenile suicide and room confinement").
[liii] Michael Puisis, Ed., Clinical Practice in Correctional Medicine 139 (2006) (noting that "[v]arious activities, positive relationships between staff and youth, individual attention, and accessible counseling are all aspects of the general program that help stabilize youth….").
[liv] *See, e.g.,* SANE Development & Operation Guide at 75-76, 104-06, 118 (Aug. 1999) (Office for Victims of Crime Doc.: NCJ 170609).
[lv] *See, e.g.,* Am. Coll. Obstet. Gynecol., Acute Care of Sexual Assault Victims (2009), *available at* http://www.acog.org/departments/dept_notice.cfm?recno=17&bulletin=1625.
[lvi] *See, e.g.,* Am. Med. Ass'n, Strategies for the Treatment and Prevention of Sexual Assault (1995); Am. Med. Ass'n, National Advisory Council on Violence and Abuse, Policy Compendium (Apr. 2008) (H-75.985 Access to Emergency Contraception).
[lvii] *See* Proposed Standard § 115.83(d).
[lviii] Dr. Dora Schriro, Immigration Detention Overview and Recommendations. (Oct. 6, 2009), 6, available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf
[lix] Department of Justice, Notice of proposed rulemaking re: National Standards To Prevent, Detect, and Respond to Prison Rape. 76 Fed. Reg. 6248, 6250 (Feb. 3, 1011).
[lx] House of Representatives Committee on the Judiciary, Report on the Prison Rape Reduction Act of 2003, 108th Cong., 1st sess. (2003); H.R. Rep. No. 108-219, at 14, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr219.108.pdf
[lxi] *Id.* at 115 (prepared statement).
[lxii] 42 U.S.C. § 15609(7).
[lxiii] 76 Fed. Reg. at 6265.
[lxiv] American Bar Association Commission on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases. (2010), 5-8, available at http://new.abanet.org/immigration/pages/default.aspx
[lxv] *Id.*
[lxvi] See Carol Lloyd, "Hanky-Panky or Sexual Assault?" Salon.com (May 31, 2007); "Ex-Fed Agent Pleads Guilty in Sex-Assault Case." Miami Herald (Apr. 3, 2008); Brian Collister, "More Sex Assault Allegations at Immigrant Detention Center." WOAI.com (Dec. 29, 2008); Mary Flood, "Ex-Prison Guard Admits to Fondling Immigrant Women." Houston Chronicle (Sept. 24, 2009).

[lxvii] Human Rights Watch, Detained and At Risk: Sexual Abuse and Harassment in United States Immigration Detention. (Aug. 2010), 3, available at http://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf