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***Submitted electronically at http://www.regulations.gov***

Attorney General Holder
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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:

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 origi

Both the NPREC and the ABA standards recognize that

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

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.

documentation that he or she was prohibited from filing based on trauma. *ee* 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. *ee* 42 U.S.C. § 2000e-5(e)(1).

The proposed threshold for granting a 90-day grieva

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

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 N

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

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 pro

- 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 def

***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 e6417(d) [illegible]

***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:

- *n Co p nce* meaning compliance with all absolute mandatory provisions and most components of the remaining provisions;
- *P r Co p nce* resulting when the monitor identifies gaps in compliance that go beyond anecdotal incidents, technicalities, or temporary factors; and
- *Non co p nce* 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 tr.53536(i)-2.53530.956417(n)-0.956417(c)3.115789( )-0.479431(b)-6125(c)3.1515789( )-0.426 da(

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," *NP M* 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

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

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 *nd rd for Cr n ce re en of Pr oner*, 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 [illegible]

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 *on e* provision of EC in 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.

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 wit

***The Record of Sexual Assaults Against Immigration D***

## Conclusion

The proposed standards are as urgently needed today as they were seven years ago, when Congress mandated the creation of these guidelines

[v] *oodford 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," *Lo e P n*, 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] *ee* Giovanna E. Shay & Joanna Kalb, *More or e of r d c on r pp ng nd E ec e Po er e pre e Co r ecen Pr on L g on efor Ac PL A* 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 *oodford 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., *L er cy Be nd Pr on Prof e of e Pr on Pop on fro e N on Ad L er cy r ey* xviii, 17-19 (2003), available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102.

[viii] James, Doris J. & Lauren E. Glaze, *Men e Pro e of Pr on nd n e B re of ce c pec epor* 1, Department of Justice, Bureau of Justice Statistics, December 14, 2006.

[ix] Leigh Ann Davis, *Peop e Men e rd on n e Cr n ce y e*, available at www.thearc.org/faqs/crimqa.html.

[x] *ee oodford Ngo*, *pr* note 5 at 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievanc

[xxvi] These requirements are further supported in the ABA's standards. *ee* ABA, TREATMENT OF PRISONERS STANDARDS, 23-11.3(b) (external monitoring and inspection).
[xxvii] The Commission correctly recommended that new cont

*De en on e edy of Men e Pro e ?*, 7 Criminal Behaviour and Mental Health 85 (1997); H. Toch, *Mo c of De p r n Bre do n n Pr on*, 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., *e or c r re n e nd p yc o og c or re*, 89 Int Rev Red Cross 591-617, 2007; Basoglu, M., Livanou, M., Çrnobaric, C., *or re o er cr e n n nd degr d ng re en e d nc on re or pp ren* 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] *ee*, *e g* , *z o n on*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *re d on o er gro nd* , 243 F.3d 941 (5th Cir. 2001), *d ered o on re nd*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) ("[c]onditions in TDCJ-ID's administrative segregation units clearly violate constitutional st

[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