

**NATIONAL  
PRISON  
RAPE  
ELIMINATION  
COMMISSION**

November 12, 2014

The Honorable Eric J. Holder  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Attorney General Holder:

As members of the former National Prison Rape Elimination Commission, we write to request a meeting with you to discuss our grave concern about recent efforts to delay or weaken effective implementation of the Justice Department's National Standards to Prevent, Detect, and Respond to Prison Rape issued on May 17, 2012 pursuant to the mandate of the Prison Rape Elimination Act (PREA).

PREA is a singular piece of legislation that united every member of Congress to end the scourge and shame of sexual abuse in confinement settings for adults and youth. The PREA standards issued by DOJ are a crucial part of your legacy at the Justice Department and your notable efforts to encourage the country's criminal justice systems to adopt more policies and practices that acknowledge the humanity and vulnerability of those under state and federal penal authority.

Prison rape remains a serious problem across the country. According to the most recent Bureau of Justice Statistics report, 4.0% of state and federal prison inmates, 3.2% of jail inmates and 9.5% of youth in juvenile settings had experienced one or more incidents of sexual abuse in the year before the survey was taken. This amounts to approximately 98,120 adults and youth in custody reporting sexual abuse. As in the community, incidents of sexual violence are significantly underreported, so the actual level of abuse is likely even higher.

We hope you agree that the national imperative should be to spur implementation of the standards, not to support delays. The Senate Judiciary Committee recently proposed amendments to PREA that would reduce financial penalties for failure to comply with the DOJ's standards, amendments that would have the untoward effect of decreasing state incentives to comply with the standards. In addition, groups working with or for correctional agencies are seeking revisions to PREA's penalty structure that would also reduce the incentive provided by those penalties for compliance. Finally, the Bureau of Justice Assistance (BJA) decided earlier this year to permit agencies to delay implementation of the audit standard until August 2016, a delay that coupled with the weak current requirements regarding assurances is likely to further delay implementation of the standards.

### **I. Financial Penalty for Failure to Comply with Standards**

We urge you to oppose efforts to weaken the current financial penalties for failure to comply with the PREA standards. Apart from constitutional lawsuits by the Special Litigation section of the Department's Civil Rights Division, the only mechanism DOJ has to press states to comply with the standards is to withhold five percent of certain federal funding to states and territories whose facilities are not fully compliant or who do not provide certain assurances regarding future compliance.

PREA requires the Attorney General to identify the applicable grants subject to withholding. Currently, the five percent penalty applies to funds for prison purposes from three federal grant programs -- Office of Juvenile Justice and Delinquency Prevention grants, STOP grants, and Byrne Justice Assistance Grants. Under the current DOJ regulations, states and territories not yet fully in compliance with the PREA standards would have no federal grant funds withheld if they assure DOJ they will use at least five percent of those grants to achieve full compliance with the PREA standards.

This fall, the Senate Judiciary Committee voted out of committee an ill-advised amendment to PREA as an attachment to the Second Chance Reauthorization Act. The proposed amendment would eliminate in some instances altogether and significantly diminish in others the federal financial penalties for failure to certify compliance or issue an assurance that agencies would come into compliance. Although the Second Chance Act has not been reauthorized, efforts to secure that reauthorization will continue and there is every indication that certain senators will continue their efforts to attach to it or use some other vehicle to amend the penalty portions of PREA.

The most recently proposed amendment would have exempted all or part of each of the specified grant programs from being subject to the financial withholding provisions of PREA. Specifically, STOP grants would be exempt in whole. OJJDP and Byrne JAG grants would be exempt in part for the next four years. During those four years, only those portions of the grants used toward

construction, administration, or operations of a police lockup, jail, prison, or other detention facility would be subject to withholding.

Any weakening of the financial penalties reduces the incentive to fully comply with PREA. As of May 15, 2014, only two states had issued certificates of compliance. Forty-six states and territories submitted assurances, as permitted under PREA regulations, regarding their intent to become fully compliant in the future. But those assurances will become hollow – and states and territories may not make them —absent the threat of financial penalties for failure to become fully compliant.

Weakening of the financial penalties has also been proposed by organizations working with or for corrections agencies. Some have suggested that states and territories should not be subject to the five percent federal funding penalty if they assure the DOJ they would spend state funds on PREA compliance in an amount equivalent to five percent of the federal funds. We believe that this proposal is unwise, and unworkable. First, BJA does not have either the ability or the authority to monitor a state's expenditures. Second, the proposal permits budgetary mischief, as money could be moved from one pot to another to make it look like the requirement is satisfied. Third, and perhaps most important, the federal government has no ability to enforce such the provision; it lacks the authority to require states to spend money if they choose not to.

There are many demands on public funds, and the use of state funds to eliminate prison rape does not get much support or attention from politicians, public leaders or the public at large. The federal funding penalty is a small but necessary incentive to strengthen the resolve of public officials to comply with the PREA standards.

## **II. Assurances**

We also urge you to review the current system of assurances which states can provide to avoid having the federal financial penalty imposed for failure to comply fully with the standards.

It is our understanding that states and territories submitting assurances are not required to provide much information to DOJ regarding their current prison rape policies and practices nor to describe their plans for the future to come into compliance with the standards. This is a serious omission, since it permits states to, in effect, avoid financial penalties without making any concrete commitments as to future action.

We believe assurances should include an analysis of the current status with regard to compliance and a timetable for corrective action that are based on the results of audits that have been undertaken as well as from information provided by corrections officials. It should be up to the discretion of the Attorney General to decide whether the analysis and corrective plans indicate sufficient commitment to achieve full compliance with the standards as to justify a temporary exemption from the financial penalty.

At some point, the availability of the assurance option to avoid the financial penalties can become simply an excuse for inaction. The Attorney General should have the discretion to end the assurance option. For example, it is hard to envision any legitimate reason for noncompliance by May, 2016; four years after the PREA standards became final. States and territories that are not fully compliant by then should be subject to the federal financial penalties.

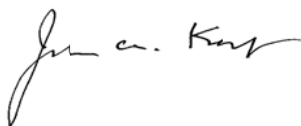
### **III. Delay in Implementing Audit Requirement**

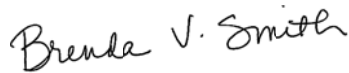
Audits are a crucial to ensure public officials and the public know what state and federal correctional agencies are doing to reduce prison rape and how effective their actions have been. Under the PREA standards, one-third of an agency's facilities were to be audited every year, so that at the end of three years all the facilities would have been audit. Earlier this year, BJA decided, without seeking public comment, that the agencies could delay compliance with the audit requirement, as long as all facilities were audited by the conclusion of the third year. We are troubled by this decision. It will deprive DOJ as well as the individual states and the public of the crucial information that professional audits provide.

At the very least, if a state refrains from conducting audits of one-third of its facilities each year, it should be required, as part of the assurance process, to explain how many audits were conducted in the preceding year and present a plan and time-table for completing audits of all the facilities before the end of the third year. It should be in the discretion of the Attorney General to decide whether those explanations regarding the audits coupled with the state's plans for actions to increase compliance with other PREA standards suffice to exempt the state from the federal financial penalty.

We would welcome the opportunity to meet with you and your designees to reaffirm our commitment to strong enforcement of PREA, to discuss the issues raised in this letter, and to express our commitment to continue working with the Department protect the men, women and children in custody. Please contact Professor Brenda V. Smith at [bvsmith@wcl.american.edu](mailto:bvsmith@wcl.american.edu) or 202-274-4261 to schedule a meeting.

Sincerely,





Members of the Former National Prison Rape Elimination Commission

The Honorable Reggie B. Walton, Chair  
Commissioner John A. Kaneb, Vice-Chair  
Commissioner James E. Aiken  
Commissioner Jamie Fellner  
Commissioner Pat Nolan  
Commissioner Brenda V. Smith  
Commissioner Cindy Struckman-Johnson

Cc: Chairman Patrick Leahy, Senator Chuck Grassley, Senator Dianne Feinstein, Senator Orrin Hatch, Senator Charles Schumer, Senator Jeff Sessions, Senator Dick Durbin, Senator Lindsey Graham, Senator Sheldon Whitehouse, Senator John Cornyn, Senator Amy Klobuchar, Senator Michael S. Lee, Senator Al Franken, Senator Ted Cruz, Senator Christopher A. Coons, Senator Jeff Flake, Senator Richard Blumenthal, Senator Mazie Hirono