



**Human Rights Watch Comments on the
National Standards To Prevent, Detect, and Respond to Prison Rape,
proposed by the Department of Justice on Feb 3, 2011**

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I. Introduction

Human Rights Watch submits these comments to the Department of Justice in response to its Notice of Proposed Rulemaking of February 3, 2011 regarding its Proposed Rule for National Standards To Prevent, Detect, and Respond to Prison Rape (“PREA standards”).

Human Rights Watch has worked for years to draw the public’s attention to sexual abuse in the nation’s confinement facilities and to advocate for changes in policies and practices that would eliminate such abuse.¹ We strongly supported the National Prison Rape Elimination Act (“PREA”) unanimously passed by Congress in 2003 and were honored to have a staff member serve as a commissioner on the National Prison Rape Elimination Commission created by PREA.² We believe that the standards authorized by PREA must provide clear and effective national guidelines to keep adults and juveniles in confinement safe from sexual abuse. Prison rape is an inexcusable and unacceptable violation of the basic rights of all people in detention. That it has been as prevalent as it is, as suggested by the Department’s own calculation that 216,600 adults and youth were sexually abused in confinement facilities in 2008, reflects the failure of correctional agencies to take such abuse seriously and to adopt and enforce the policies necessary to end it.³ Since PREA was enacted, many agencies have taken measures to reduce prison sexual abuse. But many lag behind. Whether because of lack of leadership, commitment, public support, or financial resources—or some combination thereof—too many facilities have not taken the steps necessary to end prison rape, as reflected in its continued prevalence. National standards remain as imperative today as when Congress called for their creation in 2003.

PREA set out a process for the development of such standards. First, it called for the creation of a National Prison Rape Elimination Commission (hereinafter the “Commission”) that would research and issue a report on the causes and consequences of prison rape and also propose national standards for enhancing the detection, prevention, reduction, and

¹ Human Rights Watch, *All too Familiar: Sexual Abuse of Women in U.S. State Prisons* (New York: Human Rights Watch, 1996); Human Rights Watch, *No Escape: Male Rape in US Prisons* (New York: Human Rights Watch, 2001) <http://www.hrw.org/legacy/reports/2001/prison/>; Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, August 25, 2010, <http://www.hrw.org/en/reports/2010/08/25/detained-and-risk-o>.

² Jamie Fellner, senior advisor to the US Program of Human Rights Watch served as a commissioner with the National Prison Rape Elimination Commission. She is the principal author of these comments.

³ Department of Justice, “Notice of Proposed Rulemaking, National Standards to Prevent, Detect, and Respond to Prison Rape,” *Federal Register*, Vol. 76, No. 23, February 3, 2011, <http://www.federalregister.gov/articles/2011/02/03/2011-1905/national-standards-to-prevent-detect-and-respond-to-prison-rape> (accessed March 25, 2011), p. 6268, Table 1.

punishment of prison rape. Those standards would be submitted to the Attorney General, who would within a year issue a final rule adopting national standards. According to the legislation, the Attorney General should issue final standards based on his “independent review, after giving due consideration” to standards proposed by the Commission and taking into account the instruction not to impose standards that would add substantial costs compared to current correctional costs. We think it clear from the process set out by Congress that it intended the Commission to undertake the extensive research and analysis necessary to develop effective, feasible standards and that those standards should not be weakened by the Attorney General unless they added “substantially” to current correctional costs.

The Department has worked hard on its proposed standards. Some of those standards clarify and strengthen the Commission’s standards, and we welcome those changes. Others, however, significantly weaken the protections against prison rape proposed by the Commission. We understand the Department’s desire to adopt standards that are logistically and financially feasible and that will have “buy in” from the correctional community. But it is inconsistent with the history of prison rape, as well as the goals of PREA, to propose standards that will not do the necessary job simply because weaker standards may be more palatable to some corrections agencies. Congress knew it was mandating change when it called for national standards. It knew that additional expenditures were inevitable. And it expected the Department to provide leadership within the corrections community, not retreat.

We urge the Department to review each of its draft standards against two criteria: first, whether it will advance the goal of preventing, detecting, reducing, and punishing prison rape more effectively than the Commission’s proposed standards; and second, if not, whether a weakening of the Commission’s standards is necessary to remain within limits of the “substantial” additional costs constraint.

Human Rights Watch offers its comments in four parts. We address the cost-benefit analysis undertaken by the Department; the cost of the standards proposed by the Department; the standards proposed for adult prisons and jails; and the standards proposed for juvenile facilities. We are not offering comments with regard to other facilities covered by PREA. We do not address all of the Department’s proposed standards in our comments below. Instead, we focus only on those which we believe fail to meet the Department’s obligations to develop strong and effective national PREA standards or which we feel warrant comment for some other reason.

II. Comments on the Department's Cost-Benefit Analysis

On January 24, 2011, the Department of Justice released an Initial Regulatory Impact Analysis for Notice of Proposed Rulemaking (IRIA) in connection with the standards that it proposed to prevent, detect, and respond to prison rape. The IRIA contains an assessment of the quantitative and qualitative costs and benefits of its proposed prison rape standards and it concludes that the benefits outweigh the costs, even when the substantial non-monetary benefits of avoiding prison rape are not included in the analysis.⁴ We certainly agree with the Department's conclusion. But we think it has substantially underestimated the monetary value of the benefits. If, as we believe, the "benefits" should be valued at a far higher figure than the Department suggests, the amount of expenditures that can be spent consistent with a cost-benefit analysis increases significantly.

The "costs" in the Department's cost-benefit analysis are the costs of complying with its proposed rape standards. The benefits consist of the quantifiable and non-quantifiable "costs" of sexual abuse that would be avoided. The Department relies on two different methodologies to calculate the value of the costs that can be quantified. One tries to determine the tangible and intangible monetary costs that are incurred because of a crime; the other looks at the amounts society is willing to pay to avoid that crime. Drawing on both of these methodologies, the Department calculates a monetary "value" for different kinds of prison sexual abuse. In essence, it assigns a per-unit dollar figure for each kind of abuse. The monetary "costs" of sexual abuse that are avoided become the quantifiable benefits of the rape reduction standards.

Estimating the monetary "costs" of crime is at best a fraught and imperfect effort, particularly when dealing with crimes such as sexual abuse whose principal cost is due to the pain, suffering, and quality of life diminution of the victims. If a cost-benefit calculation is going to be undertaken, however, it should not be done with arbitrary assumptions, ignorance of the nature and impact of sexual abuse and the harm it wreaks on its victims, or by, in essence, pulling numbers out of a hat. The unreasonably low "costs" calculated by the Department for sexual abuse in adult prisons and jails, however, reflect all of these.

⁴ In the IRIA, the Department accurately describes many of the non-quantifiable but nonetheless enormously significant costs on inmates, their families, correctional agencies, and society at large from prison sexual abuse.

More specifically, the Department's cost estimates suffer from:

1. The Department's arbitrary decision to treat sex secured by pressure or coercion as significantly less costly than sex obtained through physical force or the threat;
2. The Department's failure to properly understand the significance and costs of abusive inmate-on-inmate contact, staff sexual contact, and what the Department considers "willing" sex with staff.
3. The Department's decision to assign costs based on the number of individuals who have been abused (i.e. prevalence), rather than also taking into account the fact that many individuals are victimized multiple times (incidence).
4. The Department's failure to take into account the compensatory damages awarded in prison sexual abuse cases as another indicator of the monetary costs of such abuse.

Categories of Prison Sexual Abuse

For the purposes of its cost-benefit analysis, the Department has created four categories of prison rape and sexual abuse and has assigned unit avoidance benefits, i.e. costs, to abuse in the different categories and depending on whether the abuse occurs in adult or juvenile facilities.⁵ The categories, distinguished by the level of coercion involved and the nature of the sexual abuse, are:

- Rape involving force/threat of force: This category consists of incidents of anal or vaginal penetration, oral contact with the penis or vagina, and "hand jobs" which result from physical force or threat of physical force whether by staff or another inmate. (In these comments Human Rights Watch will refer to such acts as rape, sexual assault, or sex by force.)
- Nonconsensual sexual acts involving pressure/coercion: Includes the same types of acts as in the rape category, except the perpetrator (who can be either staff or another inmate), without using force or the threat of force, pressured the inmate or made the inmate feel he or she had to participate. (In these comments Human Rights Watch will refer to such acts as sex, rape, or sexual assault via coercion or pressure.)

⁵ Although these comments address the cost benefit analysis for inmates in adult prisons and jails, we believe that many of the same defects apply to the Department's cost-benefit analysis as it applies to juveniles in juvenile facilities. We urge the Department to revisit all of its cost benefit analyses for juveniles as well as adults.

- Abusive sexual contacts: This is limited to inmate-on-inmate contact, consisting only of the unwanted (forced, coerced, or pressured) touching of the buttocks, thigh, penis, breasts, or vagina of an inmate in a sexual way.
- Willing sex with staff: This misnamed category includes staff-on-inmate willing sex and sexual contacts and nonconsensual staff-on-inmate sexual contacts.⁶

The Department asserts that it was necessary to create the four categories because existing sexual victimization categories, such as those used by the BJS in its surveys of sexual violence in prison,⁷ do not “fully reflect [the] complexity of sexual victimization” behind bars and do not lend themselves to the assignment of costs. Contrary to the Department’s intent, however, the categories obfuscate rather than clarify the nature of sexual abuse in prison. The flaws in the conceptualization of the categories are then amplified by the unreasonably low “costs” assigned to some of them.

Research suggests that the largest of the quantifiable “costs” per sexual assault victimization are intangible, i.e. the pain, suffering, and loss of dignity that reduces the quality of the victim’s life. For example, in one of the studies relied on by the Department to support its cost calculations, suffering and lost quality of life accounted for 85 percent of the total costs calculated per adult sexual victimization. It is of course extremely difficult to come up with average figures that do justice to the enormous variety of factors at play in any given case of abuse and its effects on victims who differ significantly in terms of prior histories, mental and physical health, etc. For each of its categories of abuse, the Department has included a baseline prevalence of the number of persons who have experienced such abuse in a given year. (As we discuss below, we contest the decision to use prevalence data for the cost-benefit analysis that does not take into account the multiple victimizations endured by many victims of prison sexual abuse.) The prevalence data was developed by the Department based on prison rape victimization surveys undertaken by the Bureau of Justice Statistics. The total number of victims in adult prisons and jails in 2008 was 199,500.

⁶ US Department of Justice, *Clarification of Initial Regulatory Impact Analysis for Notice of Proposed Rulemaking, Proposed National Standards to Prevent, Detect, and Respond to Prison Rape under the Prison Rape Elimination Act (PREA)*, Docket No. OAG-131, RIN 1105-AB-34, March 24, 2011.

⁷ The BJS, for example, distinguishes between inmate on inmate nonconsensual sex and abusive sexual contacts, but does not differentiate such acts on the basis of whether force or pressure is used.

Differentiation between sex by force or by pressure

The Department creates two categories of nonconsensual sex: one for rape involving force or the threat thereof, and the other for sex obtained through pressure or coercion. It then assigns a value between \$200,000 and \$300,000 for the cost of the rape of an adult victim and a value between \$40,000 and \$60,000 for sex secured by other forms of pressure or coercion. That is, sex secured by pressure or coercion is valued at only one-fifth the cost of sex secured by force or threat thereof. The Department states that it believes it is “appropriate to make this distinction because the cost to the victim and to society of a rape involving force or threat of force is, in our view, substantially greater than the cost of a nonconsensual sexual act involving lesser forms of pressure or coercion.” The Department’s “view” is not, however, shared by experts nor is it substantiated by the studies relied upon by the Department in its calculations. As one expert in violence against women said, the Department’s distinction “doesn’t make sense.”⁸

As a starting point, it is useful to note that the criminal law definition of rape does not require the presence of force or threat thereof. Rape in criminal law is typically understood as nonconsensual sex committed by physical force, threat of injury, or through duress or pressure. A man who gets a former wife to have sexual intercourse with him by threatening her that otherwise she will never see her child again has raped that woman as surely as if he held a knife to her throat. In neither case has the victim freely consented to the sex. It is also telling that under the Violence Against Women Act, sexual assault is defined to include any conduct proscribed by chapter 109 of Title 18, and 18 U.S.C. sec. 2241 makes it a crime for a person to cause another person in a federal prison “to engage in a sexual act by threatening or placing that other person in fear (other than fear of death, serious bodily injury or kidnapping).”⁹ The statute recognizes that one could be put in fear of many things—loss of a job, loss of a home—and sex secured by instilling such fear can constitute sexual assault.

The Department suggests that drawing a distinction between forcible and non-forcible rape is appropriate because, it claims, there typically is no physical injury in non-forcible rape and therefore such rape is “less costly.” It is not clear why the Department would believe that rape accomplished through “threat of force” would lead to physical injury more frequently than rape accomplished through other forms of threat. There is no question, as

⁸ Human Rights Watch telephone interview with Professor Susan Sorenson, University of Pennsylvania, March 10, 2011.

⁹ The victim can be in a federal prison or “in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency...” 18 U.S.C. § 2242. If the federal inmate is put in fear of death, injury, or kidnapping, then the crime amounts to aggravated sexual abuse, 18 U.S.C. § 2241, which is also included in the Violence Against Women Act definition of sexual assault.

Human Rights Watch has documented, that rape in prison (whether involving force or other forms of coercion) can include brutal violence causing great physical harm even death.¹⁰ But we are not aware of evidence that documents how frequently rape through force or threat of force in prison (or even outside of prison) leads to physical injury other than that from the sex itself.

There is a limited amount of data on the prevalence of injuries connected with sexual abuse in prison, and it does not differentiate between nature of abuse (e.g. rape with force or via pressure) and resulting injuries. For example, according to inmate surveys by the Bureau of Justice Statistics, 20.7 percent of male inmates and 17.2 percent of female inmates who reported inmate-on-inmate sexual victimization in prison reported physical injury. Staff sexual abuse also caused injuries; 9.3 percent of male inmates and 19.2 percent of female inmates who reported staff sexual abuse in prison reported injuries.¹¹ The BJS data does not, however, indicate the physical injuries associated with different kinds of sexual abuse; injuries are reported for victims of different kinds of sexual abuse combined, those involving force and those involving other forms of coercion.

It is worth noting that some of the other possible physical harms from sex—for example, infection (HIV/AIDS, other sexually transmitted infections, and infectious diseases such as tuberculosis and hepatitis B and C) and physical consequences such as pregnancy—do not depend on whether the sex was secured through force or coercion.

Perhaps the Department assumed the psychological impact of forcible sex is greater than that of sex obtained through pressure or coercion. But there is no basis for such a belief. As one legal expert in sexual assault cases stated, “There is no way to intelligently conclude that sexual acts obtained through coercion or pressure are inherently psychologically less damaging than sex obtained through force.”¹² Another expert told Human Rights Watch that she was not aware of any research in the peer-reviewed literature that even sought to identify and assess differences in the psychological impact of sexual abuse depending on whether or not force was used.¹³ When a perpetrator threatens a victim with dire

¹⁰ Human Rights Watch, *No Escape*.

¹¹ Allen J. Beck and Paige M. Harrison, “Sexual victimization in Prisons and Jails Reported by Inmates, 2008-09,” Bureau of Justice Statistics, August 2010, <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjr10809.pdf> (accessed March 30, 2011), pp. 22-23, Tables 16 and 17. The tables also report rates of injury for inmates victimized in jails.

¹² Human Rights Watch telephone interview with John Clune, Esq., attorney with and co-founder of Victim Justice, Denver, Colorado, March 10, 2011.

¹³ Human Rights Watch telephone interview with Professor Susan Sorensen, University of Pennsylvania, March 10, 2011.

consequences, e.g. loss of a needed job or loss of access to a child, if the victim does not consent to sex, the psychological consequences of that sex can be as damaging and long lasting as if the sex had been secured by physical force. A victim can be as traumatized, as emotionally scarred, from the one as from the other. Sex by rape—whether or not force is used or threatened—can erode self esteem, trigger depression, prompt substance abuse, and damage interpersonal and social relations, not to mention possibly trigger even more serious psychological problems such as post-traumatic stress disorder and suicide. Some experts believe the psychological impact of rape without physical force can be even greater than when force is used. When a victim is physically forced into sex he may not blame himself as much or question whether he was somehow at fault in the rape.¹⁴

For purposes of calculating costs to victims of sexual abuse in prison, there is even less reason to distinguish between sex by force or by other forms of coercion. Prisons are inherently coercive environments in which there is no bright line between force, the threat of force, pressure, and coercion. There are, of course, overtly violent rapes in prison, perpetrated by inmates as well as by staff. But many victims of prison rape have never had a knife to their throat or been beaten up. They may have never been explicitly threatened. But they have nonetheless engaged in sexual acts against their will, believing they had no choice. In the case of inmate-on-inmate nonconsensual sex, violence does not have to be used or even explicitly threatened. The possibility of violence is known to all, and everyone knows that it is not possible to say ‘no’ to powerful prisoners without dire consequences. Take the not uncommon scenario in which an inmate who is owed money by another inmate says he will forgive the debt if the inmate has sex with him. There does not have to be force or an explicit threat of force in the communication: the victim knows if he doesn’t agree to sex “voluntarily” he will probably be physically forced into it later. For many prisoners, the atmosphere of fear and intimidation is so overwhelming that they acquiesce to sexual exploitation without putting up obvious resistance. The victim’s acute awareness of his own vulnerability is exploited by the perpetrator, who coerces the victim into unwanted yet “unforced” sexual contact.

In the free world, a person being pressured into sex may have ways to avoid or escape from it without incurring harm. In prisons, however, victims are stuck in captivity without options to get away. In prison, once an inmate has been targeted by another inmate, the options to get the perpetrator to leave him alone or to resist him are few, and may involve more danger than acquiescing. Moreover, once an inmate has been victimized by another inmate, he has

¹⁴ Human Rights Watch telephone interview with Sheri Vanino, Psy.D., psychologist with and co-founder of Victim Justice, Denver, Colorado, March 10, 2011.

been “turned out,” and lives in well-grounded, constant fear that he may be victimized again by the original perpetrator or by others, unless he accepts “protection” (in exchange for sex) from another inmate.¹⁵ Many victims of prison sexual abuse are at risk of developing what has been termed “complex post-traumatic stress disorder,” the psychological injury from protracted exposure to trauma in a situation which they cannot control and from which they cannot get away.¹⁶ The victim knows he cannot simply leave, he cannot make the perpetrator inmate leave, and in most cases he knows that complaining to staff is usually not a good option (being labeled a snitch could put him in serious danger from other inmates). The absence of viable alternatives explains the title of the report Human Rights Watch wrote about male inmate-on-inmate prison rape, *No Escape*. In this context, the psychological consequences of sexual victimization secured through pressure are particularly grave. Feelings of impotence, rage, and constant fear are added to the trauma of sex under duress.

While the scenario is different for staff-on-inmate sex, the harm from sex under duress is not. There are all too many cases in which staff have physically assaulted inmates and forced them to have sex. But the overwhelming power that staff members have over inmates’ lives gives them the leverage to compel inmates to have sex with them even without violence. If an inmate refuses to have sex with an officer, the officer may write up false disciplinary reports that may, for example, result in the prisoner’s loss of visitation or telephone privileges or loss of good time credits that will help him leave prison sooner. There is no way to escape the officer; complaining to prison officials may accomplish nothing; worse, it may lead to retaliation, not protection. As in the case with inmate-on-inmate victimization, an inmate victimized by staff is in the traumatic situation of not being able to escape. Once the inmate has submitted to sex with a staff member, she knows there is a high likelihood the officer will victimize her again and again. She may see him every day, and live in dread waiting for him to insist again on sex. Is there any basis for the Department to assume that the psychological toll of being in this untenable position is less than if the officer simply physically forced himself upon her?

¹⁵ Human Rights Watch, *No Escape*.

¹⁶ Complex post-traumatic stress disorder is a psychological injury that results from protracted exposure to prolonged social and/or interpersonal trauma with lack or loss of control, disempowerment, and in the context of either captivity or entrapment, i.e. the lack of a viable escape route for the victim. See, e.g., Judith L. Herman, *Trauma and Recovery* (New York: Basic Books, 1992); Judith L. Herman, “Complex PTSD: A syndrome in survivors of prolonged and repeated trauma,” *Journal of Traumatic Stress*, vol. 5 no. 3 (1992), p. 377; Susan Roth, Elana Newman, David Pelcovitz, Bessel van der Kolk, and Francine S. Mandel, “Complex PTSD in victims exposed to sexual and physical abuse: results from the DSM-IV Field Trial for Posttraumatic Stress Disorder,” *Journal of Traumatic Stress*, vol. 10 no. 4 (1997), p. 539.

As the Department acknowledges, the largest quantifiable cost to victims of sexual assault comes from psychological suffering and lost quality of life. The IRIA quotes from an article by prison rape expert Robert Dumond that victims of prison sexual violence “undergo a destructive, catastrophic, life changing event. They are likely to experience physical, emotional, cognitive, psychological, social, and sexual problems as a result. Even one event may precipitate a life-time of pain and suffering.”¹⁷ The article also notes that the “short-term (and long term) effects on male and female sexual violence victims might include a wide range of psychiatric problems such as PTSD, rape trauma syndrome, anxiety, depression, exacerbation of preexisting psychiatric disorders, and suicidal feelings.”¹⁸

The article from which these quotes are taken does not, however, support the Department’s apparent assumption that prison rape secured by force causes greater suffering and diminished quality of life than rape via coercion. Dumond is describing the consequences of prisoner sexual violence; he does not limit such violence to rape by force. Instead, as he explains, it “is a complex continuum which includes a whole host of sexually coercive (non-consensual) behaviors, including sexual harassment, sexual extortion and sexual assault, which can involve inmates and/or staff as perpetrators.” There is nothing in this article by Dumond (or in any of his other writings) that suggests that sex secured through coercion is inherently less costly to the victim or society than sex secured through force or threat of force. Indeed, Dumond expressly rejects that view. As he recently wrote to Human Rights Watch, the Department’s “fundamental assumption that ‘physical force’ per se is more psychologically damaging is not supported either in clinical practice or in the literature.”¹⁹ Dumond also pointed out to Human Rights Watch that sexual abuse victims who have experienced prior abuse are likely to experience even greater trauma. BJS data shows that a significant proportion of prison and jail inmates in fact have been previously sexually victimized.²⁰

The sources relied on by the Department to develop unit avoidance costs for prison sexual abuse also do not support the distinction the Department makes between the costs of rape

¹⁷ Robert W. Dumond, “The impact of prisoner sexual violence: challenges of implementing public law 108-79, The Prison Rape Elimination Act of 2003,” *Journal of Legislation*, vol. 32 (2006), 150-151.

¹⁸ *Ibid.* p. 151.

¹⁹ Email to Human Rights Watch from Robert W. Dumond, March 17, 2011.

²⁰ Allen J. Beck and Paige M. Harrison, “Sexual victimization in Prisons and Jails Reported by Inmates,” p.14, Table 8. Among prison inmates reporting sexual victimization, 11.0 percent of those reporting inmate-on-inmate abuse and 8.7 percent of inmates reporting staff sexual misconduct said they had been previously victimized. Figures for prior sexual victimization in the jail population are somewhat lower (7.4 percent and 6.1 percent).

with and without force. For example, the Department draws on the calculations developed by economist Ted Miller to determine the victim compensation costs of rape and abusive sexual contact in Minnesota.²¹ Adjusting Miller's figures to 2010 dollars, adjusting slightly for the prison context, and rounding up slightly, the Department sets the figure of \$200,000 as the lower limit for the range of costs of prison rape involving force or threat of force.²² Nothing in Miller's study suggests, however, that rape through coercion without force should be valued at only one-fifth that amount. When Human Rights Watch interviewed Miller, he said that his cost calculations for rape included unwanted sex that was obtained through pressure, coercion, or manipulation, as well as by force.²³ Rape would include an employer "forcing" an employee to have sex with him by saying if she refused he would fire her. Miller insisted that his work provided no basis for distinguishing the costs of rape depending on whether physical force was involved. Indeed, Miller said he was not aware of any studies or research that even attempt to distinguish between types of rape for purposes of ascertaining compensation costs. He concluded that the Department's decision that the costs associated with sex obtained through pressure or coercion were only 20 percent of the costs associated with rape by force was "arbitrary" and "out of bounds."²⁴

The other expert study relied on by the Department, by Mark A. Cohen, uses a "willingness to pay" model for determining the cost of sexual assault, and concludes that people are willing to pay an average of \$304,308 in 2010 dollars to prevent rape and sexual assaults in their communities.²⁵ The Department accordingly sets \$300,000 as the upper limit to the range of unit avoidance benefits for rape using force or threat thereof and \$60,000 (one-fifth of the \$300,000) as the upper range for the value of sex obtained through pressure or coercion. However, the public survey on which Cohen's analysis is based did not define rape or sexual assault. We do not know what kind of rape the respondents had in mind when they were surveyed. In fact, Cohen recently told Human Rights Watch that his study does not support a cost differentiation between kinds of sexual assault. Moreover, he told us that he "knows of

²¹ Ted Miller, et al, "Costs of Sexual Violence in Minnesota," Minnesota Department of Health, July 2007, http://www.pire.org/documents/mn_brochure.pdf (accessed March 2, 2011).

²² For example, it deletes lost work and earnings and increases the cost of contracting a sexually transmitted disease because the risk is much higher of doing so in prison than in the general population.

²³ Human Rights Watch telephone conversation with Ted Miller, Principal Research Scientist, Pacific Institute for Research and Evaluation, Calverton, Maryland, March 2, 2011.

²⁴ Ibid.

²⁵ In this model people are asked how much they would be willing to pay to reduce the prevalence of certain types of crime in their community by a certain percentage, and extrapolations are made from those responses to determine the value to society of avoiding one incident of the specified crime. Mark Cohen, et al, "Willingness-to-Pay for Crime Control Programs," *Criminology*, vol. 42 no. 1 (February 2004).

no basis for valuing sexual acts accomplished via force or threat of force differently than sexual acts accomplished via other forms of pressure or coercion.”²⁶

Abusive Inmate on Inmate Sexual contact

Human Rights Watch does not object to the Department’s decision to create a category of sexual abuse that consists of unwanted inmate-on-inmate sexual touching, groping, etc. We do object, however, to the Department’s decision to assign a value of \$375 to such contact. That paltry figure suggests the Department’s failure to understand the significance and impact of such touching in prison. Indeed, to its credit, the Department realized this figure is “conservative” and invited comments as to whether a higher figure would be more appropriate. It would be.

What is the basis for the \$375 figure? The Department refers to the work by Ted Miller as its source. As part of his research into the costs of sexual violence in Minnesota, Miller came up with the figure of \$386 in costs associated with “other sexual assault” of adults outside of prison, which included unwanted touching, grabbing, kissing, and fondling.²⁷ When Human Rights Watch spoke with Miller, he explained the kind of incident he included within “other sexual assault” in his study would be, for example, if a client at a bar put his hand on a waitress’ breast or touched the buttocks of another patron. The figure was low because victims of such assaults outside of prison are “unlikely to encounter any costs beyond a small diminution of quality of life due to embarrassment, humiliation and the like” and that he had not assigned any mental health costs to that category of victim.²⁸ He was surprised that the Department would have used this cost as the basis for deciding the cost of unwanted sexual contact in prison.

What may be relatively harmless albeit offensive behavior in the free world can be threatening and traumatizing in prison. An offensive patron can be forced to leave a bar, for example, or the patron who is offended can leave as well. In prison, the victim cannot escape the predator, as discussed above. Moreover, unwanted sexual touching in prison can be terrifying. If a powerful inmate fondles another inmate’s genitals the touch likely signals a

²⁶ Human Rights Watch telephone conversation with Mark A. Cohen, vice president for research at Resources for the Future, Washington D.C., March 28, 2011.

²⁷ In 2010 dollars, that cost was listed in Table 3 of the IRIA as \$386. In Table 4, in which the Department assigned its unit avoidance benefits according to category of abuse, the figure for abusive sexual contacts is listed as \$375. No explanation is given for the difference. It may be simply clerical error; it may be that the Department somehow thought abusive contact in prison was less costly than in the free world.

²⁸ Human Rights Watch telephone conversation with Ted Miller, Principal Research Scientist, Pacific Institute for Research and Evaluation, Calverton, Maryland, March 2, 2011.

predatory intent. The victim may know he is marked and may have very good reasons to fear that unwanted sexual penetration will come next. The psychological toll on the targeted inmate trapped in close proximity to his abuser is greater than a quick, albeit unwanted, pass in a bar.

Staff-on-Inmate Sex and Sexual Contact

According to the Department, staff-on-inmate sexual contact, whether the inmate was “willing” or “unwilling,” is assigned a value of \$375, the same as “willing” sex with staff.²⁹ On its face, this is bizarre, even leaving aside for the moment whether sex or sexual contact between staff and inmates can ever be truly “willing” on the part of the inmate. We can see no reason the cost to the inmate of unwanted sexual contacts would be the same as willing contacts, nor why either would be given the same value as “willing” sexual penetration. In making such equivalencies, the Department appears not to appreciate the significance of unwanted sexual touching by prison staff.

Notably, the Department cites no basis at all for the figure of \$375 for staff on inmate sexual contacts. Perhaps it was using the cost calculations undertaken by Miller for “other sexual assault.” But as discussed above, Miller’s costs assumed offensive but potentially avoidable and/or fleeting sexual contact. Such contact has little in common with staff sexually touching inmates. The loss of freedom in prison, the environment of staff hostility towards inmates that permeates many prisons, the powerlessness to protect oneself, the difficulty to get management to respond to allegations that staff are touching an inmate inappropriately—these and other factors make “unwanted touching by staff” far more serious than, say, unwanted touching outside of prison. When a staff member fondles an inmate’s breasts, for example, it can be offensive, humiliating, degrading, terrifying, and traumatic. Indeed, the staff member may intend to provoke such feelings. The inmate cannot escape the staff member, and may fear the staff member intends to do it again or to engage in other forms of sexual abuse, e.g. sexual penetration, in the future. Given the prevalence of multiple incidents of victimization (see below) such fears are entirely reasonable and hence likely for inmates to experience. Inmates are all too often trapped between accepting such misconduct without saying or doing anything, or risking retaliation if they speak up. Inmates

²⁹ US Department of Justice, *Clarification of Initial Regulatory Impact Analysis*. Based on the responses of inmates to questions it asks during its surveys of sexual abuse in prisons and jails, the Bureau of Justice Statistics classifies staff on inmate sexual contacts as willing or unwilling. See, e.g., Allen J. Beck and Paige M. Harrison, “Sexual victimization in Prisons and Jails Reported by Inmates.”

who have been subjected to staff sexual touching may feel anger, frustration, depression, and self-loathing. They also may experience fear and dread that more of the same—or worse—is to come. Psychological consequences of this sort should be monetized at something far above a mere \$375. As noted below, plaintiff inmates who have alleged sexual contacts by staff have been awarded far more than \$375 in litigation.

Moreover, in calculating the costs to the victim, the Department should also more closely consider the question of whether there can ever be truly “willing” staff-on-inmate sex in the inherently coercive environment of prison where there is such an enormous power and control differential between staff and inmates. The law precludes the defense of “consent” in staff sexual misconduct cases precisely because the power differential precludes truly voluntary agreement. An inmate may indicate in a BJS survey that he “willingly” had sex with a staff member, because he was not threatened or bribed, but his agreement to sex is conditioned by the context. But that does not mean it carries no emotional and psychological repercussions. Harm to self-esteem, reliving prior trauma, exacerbation of anger and depression, and fear because of inability to escape the staff member are all potential consequences in this scenario. We note that the Department did recognize that “willing” sex had some cost, but see no basis for the assessment of \$375. In some court cases, such as the Michigan case noted below, the distinction between “unwilling” and “willing” sex between inmates and prison staff is rejected, and we believe that it is likely the actual psychological consequences of staff-on-inmate sex, even if described as “willing,” can be serious.

Prevalence versus Incidence

Any reasonable assessment of the costs of prison sexual abuse must take into account the fact that many victims suffer multiple incidents of abuse. According to the most recent sexual victimization data by the Bureau of Justice Statistics, 46.7 percent of male inmates and 31.4 percent of female inmates who reported inmate-on-inmate victimization in prison experienced 3 to 11 or more incidents of victimization, and 54.6 percent of male prison inmates and 48.7 percent of female prison inmates who experienced staff-on-inmate victimization reported 3 to 11 or more incidents of such staff sexual abuse.³⁰ Inmates in jails also reported multiple victimizations: 48.8 percent of male inmates and 28.3 percent of female inmates who reported inmate-on-inmate sexual victimization experienced 3 to 11 or

³⁰ Allen J. Beck and Paige M. Harrison, “Sexual victimization in Prisons and Jails Reported by Inmates,” p. 21, Table 15, and p. 23, Table 17.

more incidents and 54.2 percent of male inmates and 34.9 percent of female inmates who reported staff-on-inmate sex victimization reported 3 to 11 or more such incidents.³¹

The Department has used “prevalence” as the baseline for purposes of its cost-benefit analysis and has not taken multiple victimizations into account in its calculations of the costs of rape. The Department cites no research or clinical experience—and we are not aware of any—that suggests that the pain and suffering of a person who has been, for example, raped once is the same as that of a person who has been raped multiple times. The literature on rape costs cited by the Department, for example, are not based on prevalence, but on incidence.³² The Department³³ supports its decision to use prevalence data by arguing that it would be difficult to determine how many victims endure multiple instances of which kind of abuse. While that may be true, it is a difficulty the Department should wrestle with rather than avoid entirely given the high proportion of incarcerated victims who suffer multiple victimizations.

Damages Awarded in Litigation

It is curious that the IRIA does not discuss compensatory damages from court cases involving prison sexual abuse. Such damages can be seen as reflections of the monetary “costs” society assigns to a victim’s abuse. The damages could also be considered a separate set of “benefits” from prison rape elimination standards, i.e. costs to prison agencies that would be avoided if prison sexual abuse were reduced (if used this way, costs of attorneys fees paid to plaintiffs’ attorneys should also be included in the totals, along with the internal agency costs of litigation). Either way the cost-benefit analysis is not complete if such data is simply ignored.

We urge the Department to gather information about compensatory damages and attorneys’ fees in prison sexual abuse cases and to incorporate such data into the IRIA. Such information should, at the very least, be readily available from the Bureau of Prisons.

³¹ Ibid.

³² Ted. R. Miller, et al, “Costs of Sexual Violence in Minnesota”; Mark Cohen, et al, “Willingness-to-Pay for Crime Control Programs,” *Criminology*.

³³ The Department argues that the Bureau of Justice Statistics has computed the inmate victimization data by the most severe incident experienced, so counting all incidents for an inmate would overstate the severity of the victim’s experiences. It also indicates that in cases of serial victimization over a short period of time, there is difficulty in separating incidents. See IRIA, pp. 6-8.

The potentially enormous financial implications of prison sexual abuse litigation for the Department’s cost-benefit analysis are readily apparent from the lawsuits by female inmates against the Michigan Department of Corrections for staff sexual abuse. The Michigan Department of Corrections recently settled a large class action lawsuit for \$100 million.

It is instructive to look at the damages awarded to individual women in the Michigan cases in which female inmates alleged staff abuse that ranged from sexually degrading language to groping and exposure of genitals by male employees to sexual intercourse, oral sex, and digital penetration. The damages figures suggest the Department’s figures for sexual abuse err on the low side, especially for abuse that does not involve sexual intercourse or penetration.

The charts below show the awards to the individual plaintiffs according to the nature of the abuse they endured and according to whether the awards were made as part of the settlement, or through mediation or in two trials that took place before the class action was filed.³⁴ We do not have information regarding how many incidents of abuse each woman endured, but the figures—whether seen as calculated for prevalence or incidence—provide a powerful benchmark for the costs the women incurred because of their abuse.

CLASS ACTION SETTLEMENT FOR 800+ WOMEN - EXCLUSIVE OF ATTORNEY FEES & COSTS <i>Neal, et al v MDOC, et al, Washtenaw County Circuit Court, File No. 96-6986-CZ</i>		
Category	Description of Categories	Award Ranges
1	Sexual intercourse, oral sex, digital penetration	\$221,569.08 - \$469,597.61*
2	Cross-gender pat-downs, groping by a male employee of the Department, subjected to a male employee purposefully exposing his genitals and/or masturbating, forced to touch the genitals of a male employee of the Department, or attempted sexual assault	\$3,828.86 - \$110,910.09
3	Sexual harassment including physical gestures, sexually degrading language, and privacy violations such as leering, observing while showering, dress, using toilet, etc.	\$2,349.13 - \$26,599.13

*Awards of two women were excluded due to typically low awards due to unique circumstances of their cases.

³⁴ The course of the litigation in the Michigan case is long and somewhat tortured, but for the purposes of damages, the bottom line is that while most of the women received awards through the class action settlement, 36 inmates were awarded damages through mediation, and eighteen won damages in two trials.

MEDIATION EVALUATIONS FOR 36 WOMEN <i>LaCross, et al v Zang, et al, Washtenaw County Circuit Court, File No. 05-944-CZ</i>		
Category	Description of Categories	Award Ranges
1	Sexual intercourse, oral sex, digital penetration	\$312,000.00 - \$612,000.00
2	Cross-gender pat-downs, groping by a male employee of the Department, subjected to a male employee purposefully exposing his genitals and/or masturbating, forced to touch the genitals of a male employee of the Department, or attempted sexual assault	\$30,000.00 - \$70,000.00
3	Sexual harassment including physical gestures, sexually degrading language, and privacy violations such as leering, observing while showering, dress, using toilet, etc.	\$6,000.00 - \$30,000.00

TRIAL JUDGMENTS <i>Neal, et al v MDOC, et al, Washtenaw County Circuit Court, File No. 96-6986-CZ</i>		
Category	Description of Categories	Award Ranges
1	Sexual intercourse, oral sex, digital penetration	\$600,000.00 - \$3,600,000.00
2	Cross-gender pat-downs, groping by a male employee of the Department, subjected to a male employee purposefully exposing his genitals and/or masturbating, forced to touch the genitals of a male employee of the Department, or attempted sexual assault	\$335,000.00 - \$550,000.00

CLASS ACTION SETTLEMENT <i>Nunn, et al v. MDOC, et al, U.S. District Court of Michigan, Eastern District of Michigan, File No. 96-cv-71416</i>		
Classification	Definition	Average Net Settlement
1	Sexual assaults involving penile or digital penetration, oral sex, and/or masturbation	\$204,867.00
2	Sexual assaults involving groping and/or intrusive pat downs	\$117,871.00
3	Sexual harassment involving verbal abuse such as demands for sex; demeaning and degrading language referring to their gender; sexual habits; desires; using language such as 'slut,' 'bitch,' and 'whore'; praising or demeaning their bodies or suggesting that they were undesirable sexual objects	\$79,912.50
4	Privacy violation involving viewing plaintiffs nude or partially undressed	\$48,946.00
5	Retaliation for giving support to others who had reported any of the above	\$111,877.50

It is also notable that these substantial rape awards were given even in the absence of use of force. According to the attorney representing the plaintiffs, the defendants had argued all the sex with staff was consensual because the women did not try to physically resist the sex and they waited to report the incident, if they ever did. In addition, some of the women received food, extra visits, or other benefits by having sex with the staff. The jury and the mediators, however, in fixing this schedule of awards, appeared to understand that the inherently coercive nature of prison obviates the possibility of truly consensual sex with prison staff.³⁵

The Michigan cases also provide a basis for raising considerably the “costs” assigned to staff sexual touching. The damages awarded in Michigan for staff groping, purposely exposing genitals, sexually degrading language, privacy violations, and other such “non-penetration” misconduct ranged from \$2,349.13, to a high of \$550,000 at trial. It is telling that the lowest amount (for sexual harassment including physical gestures, sexually degrading language and privacy violations) is nonetheless six times higher than the figure of \$375 that the Department has assigned to nonconsensual staff touching. At mediation, the lowest amount awarded for such conduct was \$6,000. The highest award for abusive sexual contact, in the 1999 settlement in the Nunn case, was \$79,912.50.

The jury data used by Miller in the calculations that the Department relied on were from rape and sexual assault cases between 1980 and 1991. The amounts awarded in more recent years may have risen considerably. This is suggested by a recent Lexis-Nexis search undertaken using its “verdict and settlement analyzer” service for sexual assault and rape cases from 1990 to 2011.³⁶ The median verdicts and settlements were somewhat under \$500,000, and the average awards soared to well over \$2 million. While settlements typically incorporate other costs, such as attorneys’ fees, they are nonetheless instructive.

Cost-Benefit Implications of Using Reasonable Cost Estimates

Even using the Department’s cost data, the quantifiable costs from prison sexual abuse provide a strong basis to rebut critics of national prison rape elimination standards who object on cost-benefit grounds to spending more than insignificant amounts to combat such

³⁵ Human Rights Watch telephone interview with Deborah Labelle, attorney, March 3, 2011.

³⁶ The March 8, 2011 search was done by Robert Toone, attorney with Foley Hoag, LLP. The search was for verdict or settlements in (i) sexual assault in employment/labor cases, (ii) sexual assault in “governments” cases, (iii) rape cases generally, and (iv) rape in employment/labor cases. There is no doubt considerable overlap between the cases identified as “sexual assault” and those identified as “rape” cases. There was little difference in the average and median verdicts and settlements in the different categories.

abuse. Using the Department's low cost figures, the total annual quantifiable costs for sexual abuse in adult prisons and jails is approximately \$14.4 billion.³⁷ By any calculation, this is an overwhelming figure. Large as it is, this figure seriously underestimates the real quantifiable costs, to the extent they can be fairly quantified at all. For example, if the same cost is assigned to rape by force or by coercion (as it should be), and the Department's low figure of \$200,000 per rape is used, the total costs are \$19.7 billion dollars.

The Department must reconsider the costs it has assigned for unwanted sexual contacts by staff or inmates and so called "willing" sex with staff. As discussed above, the current costs cannot be justified and reflect misunderstandings of prison sexual abuse. Even a modest increase in the current cost numbers will have a significant impact given that the Department's figures indicate there are 100,900 annual incidents of such abuse in adult prisons and jails. Grounding cost estimates on a more defensible basis, in turn, will place appropriate remedial measures in a more realistic perspective, given the legislative requirement for cost-benefit analysis that the Department must perform.

³⁷ Rape involving force: \$13.1 billion (65,400 incidents at \$200,000 each); nonconsensual sexual acts via pressure/coercion: \$1.3 billion (33,200 incidents at \$40,000 each); abusive sexual contacts: \$15.8 million (42,000 incidents at \$375 each); "willing" sex with staff: \$22.1 million (58,900 incidents at \$375 each).

III. The Cost of Eliminating Prison Rape

According to the Bureau of Justice Statistics (BJS), the annual national corrections cost in 2007 was about \$74 billion.³⁸ Large as this number is, it understates the true costs of corrections. It excludes for example, the costs of smaller cities and counties and it does not include the costs of verdicts and settlements in litigation, which can be sizeable. The national corrections cost is also expected to grow considerably from the 2007 figure. For example, according to the Department's calculations, total national corrections costs will be \$91.2 billion in 2012.³⁹

It is clear that hundreds of millions of dollars could be spent to comply with PREA standards to reduce and eliminate prison rape without incurring "substantial additional expenditures". If compliance with national rape standards required corrections agencies to increase total national costs by \$740 million annually that would only be an increase of 1 percent over the 2007 expenditures, which would be difficult to characterize as a "substantial" increase. Using the total corrections expenditures estimated for 2012, a 1 percent increase would amount to \$910 million.

The projected upfront and ongoing costs of the Department's proposed PREA standards are considerably less than 1 percent of current annual corrections expenditures or those projected for 2012. Its projected \$213 million in start up costs constitutes a little more than one-quarter of one percent (.28 percent) of current expenditures. Its projected \$544.5 million in subsequent annual ongoing costs constitutes only .74 percent of current expenditures. Using \$91.1 billion as the total expenditures, the projected \$213 million start up costs amounts to .23 percent of expenditures, and the annual ongoing costs amount to .60 percent.

We appreciate the Department's effort to craft standards that are realistic from a financial perspective, particularly in these times of straitened correctional budgets. Congress understood that it would take additional resources to meet the goals of PREA and the constraint it set did not preclude anything but "substantial" additional costs. We believe the

³⁸ Tracey Kyckelhahn, "Justice Expenditure and Employment Extracts," Bureau of Justice Statistics, September 2007. The figure reflects corrections expenditures by federal, state, and local governments in counties with populations of 500,000 or more or cities with populations of 300,000 or more.

³⁹ US Department of Justice, "Notice of Proposed Rulemaking," *Federal Register*, vol. 76 no. 23, February 3, 2011, p.6273, Table 9A.

Department has focused too singularly on costs in crafting its standards, and has excluded effective, important protections for inmates (as we explain in our separate comments critiquing the proposed standards).

IV. Comments on Department's Standards for Adult Prisons and Jails

PREA Standards for Immigration Facilities

In the Department's rulemaking notice, it stated: "Protection from sexual abuse should not depend on where an individual is incarcerated: It must be universal."⁴⁰ We could not agree more. This is indeed the principal reason why the Department must not exclude from PREA standards any facility which confines immigration detainees, regardless of whom is operating that facility. Congress did not intend an immigration detainee to be protected from sexual abuse by PREA standards if Immigration and Customs Enforcement (ICE) has placed her in a local jail but not if ICE has placed her in one of its own facilities.

While in many circumstances it may be that the Justice Department does not have jurisdiction to establish regulations or rules applicable to ICE, in the case of PREA, Congress intended to have all individuals confined in federal, state or local facilities covered by PREA standards. Congress' goal is not satisfied if ICE chooses to adopt some or all of the PREA standards. Congress intended the PREA standards to be a baseline for all facilities.

Please see the letter Human Rights Watch sent to President Obama, in the Appendix to these comments, for a fuller explanation of our views regarding immigration detention facilities being covered by PREA.

In addition, all facilities that confine immigration detainees should be required to adopt the supplemental standards proposed by the Commission. As detailed by the Commission,⁴¹ by Human Rights Watch,⁴² and by others,⁴³ immigration detainees are particularly vulnerable to

⁴⁰ US Department of Justice, "Notice of Proposed Rulemaking," p. 6250.

⁴¹ National Prison Rape Elimination Commission, "National Prison Rape Elimination Commission Report," June 2009, <http://www.ncjrs.gov/pdffiles1/226680.pdf> (accessed March 25, 2011), pp. 174-188.

⁴² Human Rights Watch, *Detained and at Risk*.

⁴³ Women's Commission for Refugee Women and Children (now Women's Refugee Commission), "Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center," October 2000, http://womensrefugeecommission.org/component/docman/doc_download/272-behind-locked-doorsabuse-of-refugee-women-at-the-krome-detention-center-behind-locked-doorsabuse-of-refugee-women-at-the-krome-detention-center?q=behind+locked+doors (accessed March 25, 2011); Florida Immigrant Advocacy Center (FIAC), "INS Detainees in Florida: A Double Standard of Treatment," December 2001, <http://www.fiacfla.org/reports/INSDetaineesInFlorida.pdf> (accessed March 25, 2011); FIAC, "INS Detainees in Florida: A Double Standard of Treatment (Supplement)," January-April 2002, <http://www.fiacfla.org/reports/SupplementToINSDetainees.pdf> (accessed March 25, 2011); Mark Dow, *American Gulag*, (Berkeley: University of California Press, 2004), pp. 3, 52, 143, 239; Women's Refugee Commission, "Halfway Home: Unaccompanied Children in Immigration Custody," February 2009, <http://womensrefugeecommission.org/programs/detention/unaccompanied-children> (accessed March 25, 2011).

sexual abuse. Due to a shortage of publicly available data and the closed nature of the immigration detention system, the extent to which ICE detainees are subject to sexual abuse nationwide is unclear, but the known incidents and allegations are too serious and too numerous to ignore. They point to an urgent need for ICE facilities to be held to the supplemental standards as well as the main body of standards proposed by the Commission. Immigration detainees are frequently transferred far from lawyers, family, friends, and community support; they may have language barriers to communication with staff; they may have strong fears of retaliation—including the fear of expedited deportation—that prevent them from reporting abuse; and they may not even know they have a right to be protected from abuse. The supplemental standards were carefully crafted to respond to the unique vulnerabilities of immigration detainees and should be included in the Department’s final standards and made applicable to all immigration detainees, wherever they are confined.

§115.11 Zero tolerance of sexual abuse; Prison Rape Elimination Act coordinator

We welcome the Department’s recognition of the signal importance of a zero tolerance policy for sexual abuse and harassment. It strikes us as a reasonable accommodation to cost concerns to require a full time PREA coordinator only in facilities of a certain size. We would, however, propose that the cut-off be 500 inmates, which is consistent with the cost concerns raised by critics of the original Commission standard. There may be efficiencies and more effective responses if the PREA coordinator also works on prison safety issues, such as inmate-on-inmate violence and staff-on-inmate excessive use of force. However, the danger is that the PREA work might be subordinated to more traditional security and safety concerns. Perhaps the solution is to mandate that in facilities with 500 or more inmates, the coordinator may have other prisoner safety responsibilities, but should allocate at least 50 percent of his or her time to prison rape elimination specifically.

§115.12 Contracting with other entities for the confinement of inmates

The intent of the Commission’s standard PP-2, which is now revised in the Department’s §115.12, was to ensure that inmates confined in privately owned and/or operated facilities be protected by PREA standards. Section 115.12 does not modify this crucial protection. Private companies may try to pass any increased costs from compliance with PREA standards onto public agencies, but this, like other costs, is subject for negotiation between the parties. Certainly no responsible agency should want the men and women under its jurisdiction to be confined in facilities which put them at unnecessary risk of sexual abuse simply to save money. Public agencies typically monitor the compliance of private

companies with whom they contract for the confinement of inmates. What §115.12 correctly mandates, is that (regardless of whatever else their monitoring entails) agencies must monitor the contractual obligation to comply with PREA standards. The private agencies will also be subject to audits under the PREA standards.

§115.13 Inmate supervision

The standard proposed by the Department, that for each facility “the agency shall determine adequate levels of staffing, and where applicable video monitoring, to protect inmates against sexual abuse,” leaves agencies with no obligation to actually provide even the minimum level of staffing needed to ensure inmate safety. The standard reflects, in our judgment, an abdication of the Department’s responsibility to create strong effective standards of safety that will prevent, detect, and respond to sexual abuse, even if agencies may have to incur some additional expenses to protect inmates from sexual abuse. (It is worth pointing out that appropriate deployment of staff will also prevent, detect, and respond to other forms of violence, inmate or staff misconduct, and life endangerment.)

The standard requires no more than the creation of pieces of paper. It requires agencies to determine adequate levels of staffing and, where applicable video monitoring for their facilities, §115.13(a); to establish a plan for how to conduct staffing and, where applicable, video monitoring, §115.13(b); and to annually determine whether changes are needed in staffing patterns and video systems, §115.13(c). There is no requirement that the agency actually implement its staffing plans or make the changes its reviews indicate are necessary to provide inmate safety from sexual abuse. The absence of any staffing implementation requirement is why the IRIA indicates the standard will have minimal cost impact.⁴⁴ The result will be continued sexual abuse without the abatement required by Congress, the Eighth Amendment, and sound correctional practice.

A substantial majority of the systems and facilities studied by Booz Allen Hamilton,⁴⁵ at the Department’s request, believe they have the requisite staffing levels and would incur no costs to meet PP-3, the inmate supervision standard that the Commission had proposed (“security staff provide the inmate supervision necessary to protect inmates from sexual abuse”). A small number of facilities, however, indicated “they were understaffed relative to levels commensurate with adequate supervision necessary to meet minimal constitutional

⁴⁴ US Department of Justice, *Clarification of Initial Regulatory Impact Analysis*.

⁴⁵ Booz Allen Hamilton, “Prison Rape Elimination Act (PREA) Cost Impact Analysis, Final Report,” June 18, 2010, <http://www.ojp.usdoj.gov/programs/pdfs/preacostimpactanalysis.pdf> (accessed March 25, 2011).

staffing levels and best practices.”⁴⁶ The Department—which is the chief law enforcement agency in the nation and charged with protecting constitutional and other legal rights—should not adopt weak supervision standards under PREA that permit some agencies to maintain what they recognize as constitutionally inadequate staffing levels. Congress did not intend for inmates to remain at risk of sexual abuse so that agencies could avoid reasonable and necessary cost increases. The Department’s proposed standard, in essence, rewards agencies which have failed in their responsibility to provide adequate staffing, while other agencies have taken on the costs necessary for adequate staffing. Congress sought to raise the bar, not capitulate to agencies that have failed in their responsibilities to maintain minimum staffing requirements.

It is neither necessary nor feasible for the Department to specify any proposed staff-inmate supervision ratios. Agencies can and should be required to make decisions as to how many staff or what level should be required at their facilities to keep inmates safe from sexual abuse.

The Department should rewrite §115.13 to require each agency to develop **and implement** a staffing plan for each facility that the agency has determined is adequate to provide inmate supervision that will protect inmates from sexual abuse, taking into consideration the physical layout of each facility, the classification of the inmate population, and any other relevant factors. The staffing plan should also identify those posts that must be filled in every shift, regardless of unexpected absences or staff shortages. In addition, the standard should require that the agency monitor the effectiveness of its facility staffing at keeping inmates safe and to annually review its staffing and video monitoring to assess their effectiveness at keeping inmates safe in light of reported incidents of sexual abuse, identify the changes it considers necessary (as currently in §115.13), and **then to implement those changes**.

Booz Allen estimated the costs of developing the staffing to comply with the Commission’s PP-3 standard would be \$26.8 million in startup costs and \$1.823 billion dollars in annual ongoing costs. The accuracy of this estimate is questionable, both because of the methodology used to extrapolate national costs from the small sample of facilities studied by Booz Allen, and because at least some of the facilities studied by Booz Allen were apparently uncertain as to what level of staffing would be required under PP-3. In any event, even assuming the Booz Allen estimates accurately reflect compliance costs for the Commission’s staffing standard, we believe the costs are worth it. Adequate staff

⁴⁶ Ibid, pp. 18-19.

supervision is too crucial in preventing sexual abuse to be cast aside in favor of paper plans. If agencies cannot provide the staffing that in their judgment is adequate, then inmate populations must be reduced to a level for which the staffing is adequate. A strong Department standard on inmate supervision should help provide agencies with the necessary ammunition to go to elected officials and argue either for more money or inmate population reductions.

The weakness of standard 115.13 as currently drafted is by no means ameliorated by §115.13(d), which requires larger facilities to implement a policy and practice of unannounced rounds by supervisors during all shifts. There is nothing affirmatively wrong with this provision; there is just no reason to believe it will have a significant impact. It is folly to think that such rounds will catch misconduct as it occurs. And, because there is no requirement for how frequently such rounds are conducted (nor even a requirement as to where they are conducted), there is no reason to assume they will have much of a deterrence effect. Moreover, even if a round begins unannounced, it will not continue unannounced: staff will immediately communicate to each other the presence of intermediate or higher level supervisors conducting rounds. Such unannounced rounds are less important than regular security inspections that effectively monitor inmate and staff activities.

Video monitoring

Human Rights Watch does not object to the incorporation of video monitoring into the inmate supervision standard (§115.13). Video monitoring, properly deployed, can contribute greatly to the prevention as well as detection of inmate-on-inmate as well as staff-on-inmate abuse; it can also vindicate inmates and staff wrongly accused of misconduct. We agree with the Department that each agency should determine the deployment of staff and, if they choose, video monitoring systems that it deems effective to protect inmates.

We also recognize that the language of the Commission's video standard (PP-7) caused a misunderstanding that the Commission intended extensive video systems to be mandatory. Former commissioners explained to the Department's PREA Working Group that the standard had been misunderstood. Nevertheless, the Department included the high costs of mandatory video systems, as calculated by Booz Allen, in its final assessment of the costs that would be imposed by the Commission's standards compared to the costs that would be imposed by the Department's. According to Booz Allen, the Commission's PP-7 video standard, as incorrectly understood, accounted for 96% of all upfront costs associated with implementation of the Commission's standards. If those video costs are deleted, then the

upfront costs of complying with all of the Commission’s remaining standards drop from approximately \$6.5 billion to \$260 million.

Critical incident reviews

Human Rights Watch realizes that the Commission had included in PP-3 as well as DC-1 requirements regarding critical incident reviews of sexual abuse incidents and that the Department has placed all language regarding review of sexual abuse incidents in standard 115.86. We note, however, that the requirement in §115.86 does not require the agency to implement any changes as a result of the findings arising from the incident reviews. This is, unfortunately, consistent with the failure to require any implementation of staffing needs in standard 115.13. It is not enough to identify needs and deficiencies. Prevention of sexual abuse requires action to address them.

§115.14 Limits to cross-gender viewing and searches

Human Rights Watch strongly supports the Department’s decision to prohibit cross-gender strip searches or visual body cavity searches by nonmedical staff except in the case of emergency. We also think it a sensible requirement to require all cross-gender strip or body cavity searches to be documented.

Cross-gender pat searches

Unfortunately, the Department has not adopted the Commission’s prohibition on cross-gender pat searches. Failure to include such a prohibition in 115.14 leaves inmates vulnerable to sexual abuse by staff. Surveys of inmates by the Bureau of Justice Statistics have revealed that staff sexual abuse is more prevalent in the nation’s prisons and jails than inmate-on-inmate abuse.⁴⁷ Staff abuse takes the form of sexual contacts, e.g. touching only, as well as sexual acts (e.g. intercourse). Inmates have recounted countless instances of cross-gender staff conducting pat searches that include fondling, groping, and touching breasts, buttocks, genitals and thighs in a sexual way. According to the Bureau of Justice Statistics, 42.9 percent of male inmates and 40 percent of female inmates who reported staff sexual touching said it occurred during a pat down.⁴⁸ Most inmates who report staff

⁴⁷ According to the BJS, 41,700 prison and jail inmates reported inmate-on-inmate sexual abuse and 57,000 reported staff-on-inmate abuse. Allen J. Beck and Paige M. Harrison, “Sexual victimization in Prisons and Jails Reported by Inmates, 2008-09,” p. 7, Table 1.

⁴⁸ Ibid, p. 24, Table 19.

sexual misconduct say it was by a member of the opposite sex.⁴⁹ Abusive touching during a cross-gender pat search can also be the precursor to further staff abuse, e.g. sexual acts. Prohibiting cross-gender pat searching should contribute substantially to the reduction of all forms of staff sexual misconduct.

The sexual touching that can occur under cover of a pat search is abusive in its own right. It makes inmates feel degraded, vulnerable, fearful, angry, and trapped. It also can trigger fear and trauma, as it may well be a signal of a staff person's intention to further abuse the inmate, e.g. by forcing her to have sex with him. The Department apparently made the decision to permit cross-gender pat searches at the urging of agencies who believe they would have to undertake major additional expenses to revise the gender proportions of their staffs, primarily to reduce the proportion of line staff who are women. This is not a reason for the Department to completely jettison the prohibition on cross-gender pat searches that was contained in the Commission's proposed standard, PP-4.

One alternative might be to prohibit pat searches of female inmates by male staff, and to prohibit women from pat searching men, with the proviso that an agency may have up to two years to implement that prohibition if necessary in light of the current gender composition of its staff and its inmates.

Men pat searching women

The reasons to prevent male staff from routinely pat searching women are widely recognized and overwhelming. It can diminish sexually abusive touching. It also protects women from what for many is a highly traumatic invasion of their physical privacy. A high percentage of female inmates have histories of physical and sexual abuse before incarceration. Having men pat their bodies can be especially troubling and difficult for them, triggering painful memories and provoking strong feelings of fear, anger, and vulnerability. Many agencies already prohibit male staff from routinely pat searching female inmates precisely because of the substantial benefits from such a policy and practice.

The costs of compliance with a standard prohibiting male staff from pat searching female inmates should be low. The Booz Allen report makes clear that most of the systems and agencies that predicted significant costs if they have to eliminate cross-gender pat searches were predicting costs from prohibiting female pat searches of male inmates. Most prison

⁴⁹ Ibid. 68.8 percent of male victims of staff sexual misconduct in prison and 64.3 percent of male victims in jail reported that the staff perpetrator was a female. The figures are even higher for women: 71.8 percent of female victims of staff sexual misconduct in prison and 62.6 percent of female victims in jail indicated the staff perpetrator was a male.

systems in the US (the Bureau of Prisons being a notable exception) already do not permit men to pat search women. It is our understanding that many jails, especially larger ones, also already typically prohibit men from routinely pat searching women.

PREA standards should not permit lower protections for inmates than those that are already in place and that are widely recognized as best practices. The Department should keep the Commission's prohibition on male staff pat searching female inmates except in emergencies. If further research by the Department indicates that smaller jails would find it exceedingly difficult to comply with this prohibition, then it should permit a phase in period for them, as suggested below.

Women pat searching men: Phasing in the prohibition

A substantial proportion of the current workforce in many male prisons is female. For many agencies a prohibition on women staff pat searching male inmates would require significant and costly personnel changes to ensure there is a sufficient number of male staff to pat search the male inmate population. To lessen the cost burden of a major workforce realignment, the Department's standard could permit a phase in over time of the prohibition of women pat searching men. The standard would contain a proviso that if the prohibition cannot be immediately implemented, then 1) agencies would have to prepare within six months from the date the PREA standards take effect a plan for revising their workforce to permit them to fully implement the prohibition within two years and, 2) at the end of the two year period, the agency must fully comply with the prohibition on women pat searching men.

We believe permitting a phase in addresses legitimate cost concerns without sacrificing the important protection that elimination of all cross-gender routine pat searches provides inmates.

Viewing Inmates

We strongly endorse the goal reflected in the proposed standard 115.14(c) of preventing nonmedical staff of the opposite gender from being able to view inmates' breasts, buttocks or genitalia while inmates shower, perform bodily functions, and change clothing, except in the case of an emergency. For far too long, inmates in adult prisons and jails have been subjected to the unnecessary and degrading viewing of their naked bodies or parts thereof, often accompanied by derogatory and harassing language. Indeed, in all too many cases, such viewing has played a role in patterns of pervasive sexual abuse that include sexual assaults.

We object, however, to the provision in the Department's proposed standard that such viewing is permissible if it is an accident or when it is incidental to routine cell checks. Obviously, accidents can happen. But explicitly exempting accidents encourages staff to say the viewing was an accident, regardless of whether it was or whether it could have been prevented by better policies and practices. We even more strongly object to permitting cross-gender viewing of inmates' naked buttocks, breasts, and genitals if it is "incidental" to routine cell checks. That is an exception that comes perilously close to swallowing the rule. There are numerous measures facilities can take to protect inmates' privacy and dignity during routine cell checks. They range from installing privacy screens in shower areas to having staff loudly announce their presence on the floor before beginning to look into cells. We have great confidence in the ability of correctional agencies to devise low cost and effective ways to protect inmates' bodies from exposure to members of the opposite sex.

Transgender searches

We strongly endorse standard 115.14(d), which prohibits examinations of a transgender inmate to determine genital status unless that status is unknown, in which case the examination must be in private by a medical practitioner. The standard provides long-needed protection for transgender inmates from abusive, degrading, and harassing examinations that have no legitimate security or safety purpose.

Exempting victims from cross-gender pat searches

Proposed standard 115.14(e) permits an exemption from non-emergency cross-gender pat searches for inmates who have previously suffered documented cross-gender sexual abuse while incarcerated. This exemption is not an acceptable solution to the problem of cross-gender pat searches. First, if the goal is to reduce the trauma that victims of abuse may experience when pat searched by a member of the opposite sex, then why not exempt inmates who have been sexually victimized regardless of where the abuse occurred? Second, the standard requires the prior abuse to have been "documented." Does this mean an inmate would have had to report the abuse? Would the report have to have been substantiated? Third, such an exemption would violate the rights of privacy of sexual abuse victims. How would staff know who is exempted from cross-gender pat searches unless those who have been prior victims are identified? And once identified as a former victim, not only is privacy lost, but the identification raises the possibility of harassment and even future abuse. Human Rights Watch strongly urges the Department to eliminate this counterproductive provision in its entirety and instead to implement measures to eliminate non-emergency cross-gender pat searches as we have suggested above.

Training

All pat searches should be conducted in a professional and respectful manner and training to that end is necessary, as the Department recognizes with its proposed standard 115.14(f). The Department is mistaken, however, if it believes that training in cross-gender pat searches will obviate the problems with routine cross-gender pat searches briefly summarized above. Training simply does not offer enough protection. Better to eliminate the occasion for abuse than to hope training will prevent it.

§115.15 Hiring and promotion decisions

Human Rights Watch strongly supports this standard which aims to prevent the hiring and promotion of persons with a record of sexually abusive or criminal conduct. Indeed, we commend the Department for strengthening the Commission's standard PP-6 regarding hiring and promotion decisions. Our only concern is that the Department's standard has eliminated the Commission's requirement that agencies do a criminal background check before promotions. While the Department's standard (unlike the Commission's) requires a criminal background check every five years for current employees, there is a possibility that an employee might be convicted of a sexual abuse crime in the interim and could be promoted without the agency knowing about that crime. Although it would be grounds for termination if the agency discovered that the employee had failed to reveal information about this conviction, it may be several years before the agency finds out. We think it wiser to require criminal background checks every five years and before every promotion.

§115.17 Upgrades to facilities technology

We strongly support the Department's proposed standard requiring agencies to consider the impact on its ability to protect inmates from sexual abuse whenever the agency designs, acquires, or plans substantial expansion or modification of existing facilities (§115.17(a)) and a similar requirement when agencies install or update video monitoring or other monitoring and surveillance systems (§115.17b)). We think, however, that the standard should also require that an agency not undertake any changes in monitoring technology or in facilities' physical plants if its studies show such changes would decrease its ability to protect inmates from sexual abuse. PREA requires agencies to move forward, not backward, on preventing sexual abuse even if there may be other competing considerations.

§115.22 Agreements with outside public entities and community service providers

The Department has proposed a requirement that agencies maintain or attempt to enter into memoranda of understanding or other agreements with community service organizations that provide support services to sexual abuse victims, a requirement which the Commission had included in its standard RP-2. Unlike the Commission, however, the Department does not require agencies to seek to enter into agreements with agencies that “help victims of sexual abuse during their transition from incarceration to the community.” The Department suggests it eliminated this provision for cost reasons. It is not clear what those costs would be. Booz Allen did not identify any significant cost associated with the Commission’s standard, and the Commission standard did not require agencies to fund transition services in the community. Having an MOU or agreement with such a community provider could, for example, only require the agency to permit the provider access to inmate victims before release to enable the provider and inmate to begin developing plans for needed services following release. Given the benefits to inmates who have been sexually victimized while incarcerated to have access to services upon release, we urge the Department to incorporate these agencies into §155.22.

§115.31 Employee training

Human Rights Watch supports the substance of the proposed standard and objects only to the time periods included therein.

We are concerned by the fact that the standard provides no time within which new employees should receive the training. We recommend that the employee training called for by §115.31 be provided during academy training before staff take up their posts if they have not previously worked in a corrections facility; and for employees new to an agency who have prior corrections experience, the training should occur within a reasonable set period of time after beginning employment.

The proposed standard permits current employees to be trained up to a year after the PREA standards go into effect. This is a needlessly and excessively long period. Given the prevalence of staff sexual abuse of inmates, it is clearly imperative that all staff be properly trained as quickly as possible. We urge the Department consider whether a shorter time period, e.g. three or six months, might be more effective at protecting inmates while not posing an undue burden on agencies.

§115.32 Volunteer and contractor training

The standard, which requires agencies to provide training in agency sexual abuse policies to volunteers and contractors, should specify that no volunteers or contractors may have routine contact with inmates unless and until they have received the training.

§155.33 Inmate education

Human Rights Watch endorses the substantive content of this standard. However, given the importance of inmate PREA education, we believe that current inmates who have not previously received the education required by this standard should receive it in a period considerably shorter than one year after PREA standards take effect. We urge the Department to consider a shorter time period, e.g. three months.

§115.41 Screening for risk of victimization and abusiveness

We endorse this standard but have one suggestion. We believe §115.41(f) should be rewritten to clarify that rescreening is required any time an inmate has been sexually victimized or has sexually abused another inmate after the initial screening.

§115.42 Use of screening information

We strongly endorse the requirements of standard §115.42 that agencies make individualized determinations, based on screening information and other factors, about how to keep each inmate safe from sexual abuse. Individualized determinations are particularly important with regard to lesbian, gay, bisexual, transgender, intersex, and other gender non-conforming inmates, who have for too long been subjected to agency decisions predicated on preconceived notions, stereotypes, or bias that do little, in fact, to respect their rights and to keep them safe from sexual abuse.

With regard to whether the standard should permit units for particular for inmates who are LGBTI or otherwise gender non-conforming, many prisoners have found refuge from harassment and violence in these types of designated units. However, because of the risk of discrimination, exclusion and stigma, as well as the need for flexibility for prisoners who may want to transfer to another unit in order to take advantage of an educational or vocational opportunity, it is important that assignment to these units be voluntary. The standard should make clear that agencies should not be able to confine inmates in such special units over their objection.

We strongly support the requirements in §115.42(c), (d), and (e) regarding assignment and screening of transgender and intersex inmates. The standard helps to guide agencies who all too often, as documented in the Commission’s report, have failed to acknowledge the unique vulnerabilities of those inmates to abuse. Automatic assignment of transgender inmates to particular facilities based solely on birth gender, for example, has been a common practice that has needlessly subjected them to sexual assaults. We urge the Department to further strengthen this standard, however, by clarifying that agencies shall not make housing or other assignments solely on the basis of genital status.

§115.43 Protective custody

Human Rights Watch supports this standard (and §115.66, which makes §115.43 apply to the use of protective custody following an allegation of sexual abuse) with one major caveat.

The standard as currently drafted permits agencies to impose lengthy periods of involuntary protective custody to protect inmates who are at risk of sexual abuse and who have been sexually victimized. The presumptive time period is up to 90 days, but extensions are permissible. We think 90 days is too long a period for involuntary protective custody, and permitting lengthy extensions means extensions will become routine. We are confident that agencies who take seriously the responsibility not to involuntarily impose protective custody for longer than absolutely necessary can come up with viable alternatives in less than 90 days. To permit months upon months of involuntary protective custody penalizes potential or actual victims of sexual abuse, particularly since many agencies may decide that it is not possible for them to provide access to programs, education, and work opportunities to inmates in protective custody. (Section 115.43(b) only requires agencies to provide such access “to the extent possible.”) The standard should permit involuntary protective custody for only a brief specified period with no extensions.

§115.51 Inmate reporting

This standard permits inmates to report to outside entities but eliminates the provision contained in the Commission’s standard RE-1 that permits an inmate to be able to make such a report confidentially. We believe the Department has struck the wrong balance between the competing interests of encouraging inmates to report abuse to outside entities and of enabling agencies to respond to abusive conduct. Over time, as inmates become more convinced that agencies will take reports of abuse seriously and will protect them from retaliation, they will be more willing to report to agencies. But for now, many do not have that confidence. If they report to an outside entity but request confidentiality, that entity can still alert the agency in general terms to possible problems without identifying the inmate

and the agency can take steps to respond. Take the example of an inmate who alleges that a staff person on the night shift has been abusing inmates in a particular unit but requests confidentiality. The outside entity can report to the agency that it has received a confidential report that staff abuse is occurring on the night shift. The agency does not need to know the name of the inmate to begin its investigations. For purposes of this standard, we do not object if agencies designate a governmental entity independent from agency leadership, such as an inspector general, as the outside entity that receives inmate reports of abuse.

§115.52 Exhaustion of administrative remedies

Ever since 1996, inmates have been frustrated in their efforts to obtain judicial redress for prison abuse, including sexual abuse, because of the Prison Litigation Reform Act (PLRA). Unfortunately, PREA standards cannot reform the many provisions of PLRA that deny inmates equal justice under law. PREA standards can and should, however, substantially modify the impact of one of the PLRA's barriers to justice for victims of sexual abuse, that which requires inmates to have exhausted their administrative remedies before filing suit or the case will be dismissed. All too often, the procedures for administrative remedies are needlessly complex and burdensome and have extremely short deadlines. They have the effect (and perhaps the intention) of tripping up inmates who do not "cross every 't' and dot every 'i.'" The smallest mistake can preclude the inmate from having her day in court.⁵⁰

The Department has the authority under PREA to require agencies to change their administrative remedy procedures in ways that make it easier for victims of sexual abuse to comply with their requirements and thus protect their right to seek redress from the courts, should they seek to exercise that right. Under the Commission's standard RE-2, an inmate will be deemed to have exhausted her administrative remedies 90 days after the report of abuse was made (and by whomever the report was made) or when the agency makes a final decision on the merits of the report of abuse, whichever occurs sooner. A report of sexual abuse triggers the 90 day period regardless of the length of time that has passed between the abuse and the report. The Commission's proposed standard RE-2 reflected a sound and feasible balance between the legitimate needs and interests of abused inmates and those of the agencies. It insures the agencies have an appropriate opportunity to respond to an inmate's complaint before that inmate files a lawsuit. It also ensures that inmates who do not satisfactorily initiate or navigate what are currently often complicated grievance procedures with extremely short deadlines do not forfeit their day in court. The Initial Regulatory Impact Analysis found that RE-2 would have a negligible cost to implement.

⁵⁰ Human Rights Watch, "*No Equal Justice: The Prison Litigation Reform Act in the United States*," June 2009, <http://www.hrw.org/en/reports/2009/06/16/no-equal-justice-o>.

Given the need to ensure victims of sexual abuse have access to the courts, it is surprising and unfortunate the Department refused to maintain the robust exhaustion of administrative remedies standard of the Commission, RE-2. We strongly urge it to reconsider. The Department's standard unjustifiably offers less protection to inmates.

Time period to file

We strongly object to §115.52(a)(1) which permits agencies to have administrative remedy procedures that require reports of abuse to be filed within 20 days after the abuse occurred. Twenty days is far too short in light of the trauma and fear of retaliation that abused inmates often experience and that may prevent them from being able to confront reporting the abuse. Some critics objected to the Commission's decision not to set a time limit between the abuse and report of the abuse on the grounds that inmates may delay months after the abuse before making a report, which can make an investigation more difficult. As agency policy and practices improve and reassure inmates that it is in their best interests to report abuse and that they will not be exposed to retaliation, delays in reporting should decrease. Agencies can also in their training with inmates impress upon them the importance of reporting abuse promptly.

We know of no other situation in which people whose legal rights may have been violated are blocked from access to the courts if they haven't filed a complaint with agencies, police, or other authorities within a very short period, even though in those cases too, the cases may have grown stale. Statutes of limitations, for example, are typically no less than a year and usually considerably more. If a balance must be struck between the difficulties for investigations months after the incident of abuse and permitting inmates to report and preserve their right to a day in court if they should seek it, the balance should be struck in favor of the latter.

The Department notes that the 20 day period matches the limitations period used by the Federal Bureau of Prisons (BoP) for grievances. This may be BoP policy, but that fact alone does not make it good policy. We suspect that the BoP's 20 day period has prevented meritorious cases from going forward. In addition, the Department points out that the BoP's time limitation is shorter than that for grievances in 18 states. This raises the question of why the Department would set a deadline that is shorter than more than a third of the states. Such a standard may simply encourage those states with longer deadlines to shorten their time periods, again, needlessly harming inmates with scant gain for legitimate agency interests.

The provision in §115.52(a)(2) of a retroactive 90 day extension for filing is inadequate as a remedy to the twenty day reporting period. The extension is available for inmates who provide documentation “such as from a medical or mental health provider” that it was impractical to file within normal time period. The provision raises more questions than it answers: who besides a medical or mental health provider could provide the requisite documentation? How much and what sort of evidence would the inmate have to offer before documentation would be provided? What would be the burden of proof to establish impracticality? If an inmate alleges fear of retaliation, does that allegation establish impracticality or would he have to substantiate why he feared retaliation? In our view §115.52(a)(2) adds another level of needless complexity to exhaustion of administrative remedies procedures which are already typically far too complicated. What is needed, instead, is simplification.

We welcome the Department’s decision that final agency decisions on the merits of sexual abuse grievances should be issued within 90 days of initial filing of a grievance. Section 115.52(b)(1) should be rewritten, however, to state explicitly that inmates will be deemed to have exhausted their administrative remedies at the end of the 90 day period, regardless of whether the agency has in fact issued its final decision.

The good work that the Department did by establishing a 90 day period for the agency’s final response is undercut by §115.52(b)(3) which permits an agency to claim an extension of another 70 days essentially any time it chooses. If, for example, the agency does not ensure sufficient numbers of investigators for sexual abuse reports, it may well find itself not being able to respond in a timely fashion. Why should the onus of the agency’s inadequate staffing fall on inmates who seek to get into court to obtain relief? Ninety days is ample time for an agency to commence and even conclude an investigation in simple straightforward cases. Even in more complicated cases, agencies should be able to make good headway into their investigations during this period, certainly enough to be able to explain to the court what they are doing, and to seek a stay in court proceedings if necessary to permit further investigations.

According to the Department, the 90 day limit and the 70 day extension are consistent with current BoP procedures. The Department should explain whether it has given special weight to BoP procedures in contrast to those of other agencies. It should also explain why it believes the BoP’s procedures are the best ones to set for all state and local agencies. The BoP has had its own much documented problems with sexual abuse in its facilities, and it is

not readily apparent why its policies are necessarily better suited to ensuring that inmates are able to get into court and in a timely fashion to seek judicial relief from sexual abuse.⁵¹ Standard 115.52 directs agencies to consider any allegation that an inmate has been sexually abused (other than an allegation by another inmate) to be treated as a request for an administrative remedy. We commend the Department's recognition that it is inconsistent for agencies to tell inmates they will investigate all sexual abuse allegations and then to seek to have a lawsuit dismissed on the grounds that the inmate failed to file a formal grievance with the proper official. Standard 115.52(c)(1) provides that any report of abuse, by the inmate or a third party, should be deemed to trigger the administrative remedies process. We do not contest the Department's view that a third party report should not lead to a complete bypassing of the grievance system and that third party reports will be channeled into the normal grievance system unless the alleged victim requests otherwise.

Under the Department's standard, however, reports by other inmates would not be channeled into the normal grievance system, i.e. they would not be treated like other third party reports. The Department provides only one reason for this exclusion: to reduce the likelihood that inmates would attempt to manipulate staff or other inmates by making false allegations. We do not believe the Department has a sound basis for fearing false allegations by inmates about the victimization of other inmates. Nor do we believe that the risk of false claims justifies not treating those claims as initiating the administrative remedy process. The agency has been given a heads up on possible abuse and the clock should start ticking on the period within which the agency must respond.

§115.52(d) Emergency grievances

The Department recognizes that there may be situations of imminent harm to an inmate in which the normal grievance procedure would move too slowly to prevent harm. Standard 115.52(d)(1) accordingly requires agencies to establish procedures for filing emergency grievances. But the subsequent subsections of §115.52(d) belie the very purpose and value of an emergency procedure.

First, if the inmate is at risk of imminent harm, the Department should not give the agency a total of seven days before it takes a final agency decision – seven days during which the agency may not take any meaningful steps to protect the inmate yet during which he cannot seek emergency help from the courts. Second, the standard leaves it up to the agency to

⁵¹ US Department of Justice, Federal Bureau of Prisons, *Sexual Abuse/ Assault Prevention and Intervention: A System Response and Agency Plan* (1998); US General Accounting Office, *Women in Prison: Sexual Misconduct by Correctional Staff* (1999); US Department of Justice, Office of the Inspector General, *Deterring Staff Sexual Abuse of Federal Inmates* (2005)

decide whether there is in fact an emergency. Take the scenario in which an inmate has been explicitly threatened with rape by another inmate who has sexually assaulted many other inmates, but has not ever been disciplined by the agency for his conduct. The potential victim seeks relief from the agency, which does not take steps to protect the inmate and decides there is no emergency because it has no conclusive evidence the inmate is dangerous. It decides to simply process the inmate's report as a regular grievance – and it has 90 days to respond. The inmate is precluded from going to court to get emergency help. The probable net result: the inmate is raped.

The Department seems to have been unduly swayed by excessive agency fears of baseless allegations of imminent sexual abuse. To the contrary, most inmates are reluctant to report abuse for fear of retaliation. In our view, inmate “gamesmanship” is less of a likelihood than inmate silence. Again, if the choice is permitting an inmate to go into court to seek protection that he may not really need versus permitting a heedless or indifferent agency to block his access to court and leave him exposed to danger, we think the Department should err on the side of the former.

We also strongly oppose §115.52(d)(5) which permits an agency to discipline an inmate for intentionally filing “an emergency grievance where no emergency exists.” No criteria are specified for what constitutes an emergency or for an agency to determine what “intentionally” constitutes abuse of the procedure. The provision is more likely to cause the harm of chilling inmates from seeking protection than to cause the good of deterring false allegations. Again, there is no data to suggest inmates frequently make false sexual abuse claims and that this is a problem of such magnitude as to warrant the provision.

If the Department is going to retain §115.52(d)(5) it should rewrite it to make clear that the agency may only discipline an inmate for intentionally filing a false emergency grievance when the agency proves the inmate knows the specific facts that he alleges in the grievance are false.

§115.53 Inmate access to outside confidential support services

The Department recognizes the value of enabling inmates to have access to outside support services, including victim advocates, and the value of enabling those communications to be as confidential as possible. Unfortunately, §115.53 permits agencies to vitiate that confidentiality if it has “security needs” to do so. We urge the Department to rewrite the standard to track the language in Commission's standard RE-3 that agencies ensure

communications with such advocates are “private, confidential and privileged, to the extent allowable by Federal, State, and local law.”

Agencies have a legitimate interest in knowing if an inmate was raped and if there is a perpetrator in their facilities. The interests of the agency, however, should not outweigh the interests of the inmate in privacy, his need for support, and his need to protect himself from possible retaliation from reporting to the agency. The agency has other ways to learn about abuse, including by encouraging inmates to report it. It does not have to deny needed confidentiality to inmates who want to talk with outside support groups.

§115.61 Staff and agency reporting duties

This is a strong and crucial standard that Human Rights Watch supports with one caveat.

We believe that inmates should be able to talk with medical and mental health staff confidentially if they choose. We understand the agencies’ legitimate need to know about and respond to abuse, and that if confidentiality is maintained, perpetrators may remain undetected and be able to abuse again. Nonetheless, consideration for the needs of the victim leads us to believe they should have the option of being able to receive the necessary care from medical and mental health staff without having to fear such staff will report the abuse against their wishes. We believe inmates will be increasingly willing to permit medical and mental health staff to report their abuse as agencies show they can effectively protect inmates who have been victimized. But it is clear inmates currently do not have that confidence. According to the Bureau of Justice Statistics, for example, three quarters of men who report having been victims of sexual abuse in prison have never reported abuse.⁵²

We think the Department should permit the functional equivalent of the Department of Defense’s “restricted reporting options”, which the Department references in its Notice of Proposed Rulemaking.⁵³ Inmates would be able choose to confidentially disclose the details of a sexual assault to receive medical treatment and counseling, and the healthcare personnel would not be required to report the abuse. The healthcare personnel could, with the inmate’s consent, gather evidence (e.g. through a rape kit) that could be maintained

⁵² Allen J. Beck and Paige M. Harrison, “Sexual victimization in Prisons and Jails Reported by Inmates,” p. 22, Table 16.

⁵³ Department of Justice, “Notice of Federal Rulemaking,” p. 6258, referring to Department of Defense Instruction, Number 6495.02, Sexual Assault and Response Program Procedures, available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf> (accessed March 25, 2011).

confidentially for possible future use should the inmate decide to report or permit the reporting of the abuse.

§115.65 Agency protection against retaliation

This standard should provide effective protection against retaliation for inmates and staff who report sexual abuse or sexual harassment or who cooperate with sexual abuse or sexual harassment investigations. The Department has made important additions to the retaliation standard (OR-5) proposed by the Commission: §116.65(c), requires the continuation of monitoring for possible retaliation after 90 days if the initial monitoring indicates a continuing need; and §115.65(d) responds to the problem that bargaining agreements have sometimes left agencies unable to protect inmate victims of staff sexual abuse by removing alleged staff abusers from contact with them.

While Human Rights Watch strongly supports this standard, we think it would be even better if the Department includes in it the Commission's language in OR-5 that "the agency discusses any changes [in treatment of inmates or staff] with the appropriate inmate or staff member as part of its efforts to determine if retaliation is taking place..." We think it helpful to impress upon agencies the importance of getting the perspective and insights of the inmate or staff member who may be a victim of retaliation. They may well be able to shed light on what is going on that the agency would not otherwise necessarily obtain.

§115.73 Reporting to Inmates

Standard 115.73 requires agencies to provide certain information to inmates who have alleged sexual abuse about the results of investigations into those allegations. Human Rights Watch believes the Department should strengthen this standard to require agencies provide even more information to inmates. If an inmate alleges sexual abuse, respect for the inmate requires that she know what steps the agency has taken to hold the perpetrator accountable and the results. Providing such information to the victim also will strengthen facility safety: as inmates learn that inmate as well as staff perpetrators of sexual abuse are in fact held accountable, potential perpetrators are more likely to be deterred from abuse and inmate victims are more likely to come forward if they have been abused.

Section 115.73 requires the agency inform an inmate who alleges sexual abuse by another inmate or a staff person whether the allegation has been substantiated, unsubstantiated, or unfounded by the agency. This is not enough. If the allegation has been substantiated the victim should be told what the agency has done in response to the abuse, whether administrative sanctions have been imposed and whether the agency has reported the abuse to prosecutors. The victim also should be told whether an indictment was filed and

what the result of the criminal proceeding was. When a staff member was the perpetrator, §115.73(c) also requires agencies to inform the victim when the staff member is longer posted in the inmate's unit, is no longer employed at the facility, has been indicted on a charge related to the abuse, or has been convicted on that charge. Again, this is not enough. The victim should also be told if the agency forwarded the case to the prosecutor, if the agency removed the staff member from the unit or terminated his employment because of the abuse, and what the result of the criminal proceeding was (e.g. acquittal or conviction). Telling an inmate a staff perpetrator no longer works at the facility is important to relieve the victim of fear he will abuse her again. But it is also important that she know whether he is gone because the agency took steps to protect inmates by firing a known abuser. We recognize that staff members have privacy interests. But unless state or federal law dictates otherwise, in our judgment staff privacy interests are forfeited when they engage in sexual abuse.

The Department has suggested undefined security concerns should limit the information provided to the inmate. In our judgment, security concerns should not preclude providing the information described above. If the agency has concerns for the inmate's security if given any of the information discussed above, it should communicate those concerns to the inmate. If it has concerns for the security of alleged inmate or staff perpetrator it can warn the victim against taking matters into her own hands and it can also take steps to monitor and protect the alleged perpetrators.

The Department does not require the communication of information to the inmate victim in writing. However, we recommend the Department require documentation, signed by the inmate, that the inmate was given information in the designated categories, e.g. the result of an agency investigation.

§115.76 Disciplinary sanctions for staff

Human Rights Watch strongly supports this standard with one correction. As currently written, §115.76(b) makes termination the presumptive sanction for staff who have engaged in sexual touching. Termination should be presumptive, however, for staff who have engaged **in sexual acts** or sexual contacts with inmates. We suspect the omission of "sexual acts" in the current language of §115.76 was inadvertent.

We think it might be helpful to add language to the effect that whether or not the acts or contacts were "willing" on the part of the inmate is immaterial in determining whether the

staff member should be terminated. Under state laws, inmate consent is not a defense to criminal sexual abuse by staff, and it should not be grounds for imposing a sanction lighter than termination.

§115.82 Access to emergency medical and mental health services

Human Rights Watch strongly supports this standard but has two recommended changes to the language. We welcome the Department’s inclusion of §115.82(d) which makes clear that pregnancy related medical services and prophylaxis for sexually transmitted diseases shall be offered where appropriate. Since this is in a separate paragraph than §115.82(a) it might be helpful to insert “without cost to the inmate” into the provision. An inmate who has been raped and becomes pregnant or acquires a sexually transmitted disease should not have to pay for the medical costs of whatever services, procedures, or treatment she elects to receive. We would also recommend that the language in this provision “where appropriate” be replaced with “as medically appropriate.”

§115.83 Ongoing medical and mental health care for sexual abuse victims and abusers

We endorse this standard, subject to one necessary revision. The standard should include language that makes clear that all of the ongoing medical and mental health care provided to inmates who are victims of sexual abuse during their incarceration, including pregnancy-related medical services, shall be at no cost to the victim.

We commend the Department for recognizing the importance of providing mental health treatment to inmates who sexually abuse other inmates as a means to increase inmate safety. We agree with the Department’s judgment, which the Commission also shared, that the benefits of reducing future abuse by known abusers justify any additional mental health treatment costs.

§115.86–§115.89 Data collection and review

Human Rights Watch supports the four standards proposed by the Department addressing data collection and review. Proper data collection and review is crucial to an agency’s ability to respond to abuse, objectively track its ability to protect inmates from sexual abuse, and take the necessary measures to improve the protection of inmates.

We note that the Department in §115.88 omits the requirement in the corresponding Commission standard (DC-3) to require agencies to submit their annual report to the

appropriate legislative body. We think that requirement is sensible, and will help enable legislators to exercise better their oversight and budgetary responsibilities. Keeping legislators informed is particularly important given the all too common predilection of legislators not to want to provide agencies with the funds necessary to operate safe facilities that respect inmates' human rights.

§115.93 Audits of Standards

Regular audits by qualified independent auditors of agency compliance with PREA standards is crucial to prevent and respond to prison rape. Such audits will enable agencies, legislative bodies, and the public to know the extent to which facilities are complying with the PREA standards. They can be a resource for the Attorney General in determining whether states are meeting their statutory responsibilities. They will also provide agencies with objective, expert feedback on their performance, helping agencies understand if deficiencies exist in their policies and practices and providing a basis for developing corrective steps. Audits (as well as publication of agency data and corrective action plans as required by the proposed standards) will increase the transparency of agency operations and enhance agency accountability for operating safe prisons. Indeed, because of the closed nature of prisons, regular audits may be even more important than for many other public institutions.⁵⁴

Timing of Audits

The Department has asked for comments on whether audits should occur according to a set schedule, at random, for cause or some combination thereof. We strongly believe that if audits are to serve their purposes effectively, they must also be conducted periodically and regularly; an audit of every facility every three years as recommended by the Commission in standard AU-1 is, we believe, sufficiently frequent to be meaningful without being so frequent as to be onerous. We note that Booz Allen's cost calculations did not indicate that audits every three years would impose significant additional costs on agencies. But we would not object if the three year requirement were modified so that after two rounds of audits that find full compliance, the time between audits could be lengthened by a year or two or the Department could consider alternating full audits with more streamlined audit process.

We strongly object to a standard that would only require random or for cause audits. Random audits do not satisfy the objectives for audits noted above. Every agency needs the

⁵⁴ Jamie Fellner, "Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission," *Pace Law Review*, vol. 30 no.5 (Fall 2010).

oversight, transparency, accountability, and feedback provided by audits. Audits “for cause” fail for similar reasons. No agency will be perfect; auditing provides benefits even to agencies that are doing a good job; the benefits from audits should not be limited only to agencies with the worst performance. In addition, the idea of audits for cause raises a host of questions: what would constitute “for cause,” who would decide that facilities are out of compliance, and what information would they have on which to make that decision. The Bureau of Justice Statistics, for example, does not annually survey every facility in the country.

Independence of auditor

It is crucial that audits be conducted by individuals and entities that are qualified and independent of the agency being audited. Standard 115.93 lays out a number of good criteria for establishing the necessary independence, with one exception: it permits the auditing entity to be “within the agency but separate from its normal chain of command, such as an inspector general....” Any individual or entity who reports to the head of the agency or to the agency’s governing board, does not have the total independence that is required to ensure the integrity—and the appearance of integrity—of the audit function. The point is that the audit should be conducted by someone truly external to the agency and who thus is as free of conflicts of interest as is possible in an imperfect world. We say this with full respect for the remarkable oversight exercised by many inspector generals who work within an agency. Nevertheless, while such entities can undertake valuable internal self-assessment they lack the full independence necessary to conduct PREA audits.

Additional Standard: Youth in Adult Facilities

The Department asks whether there should be an additional standard to govern the placement and treatment of juveniles in adult facilities. We believe the only appropriate standard would be to prohibit the placement of any person below the age of 18 in an adult confinement facility. Youth are different from adults cognitively and socially, and therefore need special protections, including protections from sexual abuse. Those protections cannot be provided in adult facilities. The Commission’s report found that “[m]ore than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse.” A recent report on youth in adult facilities in Texas found that “These

youth are five times as likely to be victims of sexual abuse and rape as youth held in the juvenile system.”⁵⁵

Adult facilities housing youth are forced to choose between housing them in the general adult population where they face substantial risk of sexual abuse, or in segregated settings that can exacerbate mental health problems and deny them access to valuable programming opportunities.

For a fuller explanation of the reasons why youth should not be confined in adult facilities and why PREA standards should prohibit such confinement, please see the comments submitted to the Department by the Campaign for Youth Justice, the Center for Children’s Law and Policy, and hundreds of other organizations including HRW, in response to the Department of Justice’s Questions to the field numbers 36 and 37 contained in Docket No. OAG-131; AG Order No. 3244 – 201.⁵⁶

⁵⁵ Michele Deitch, et. al., “From Time Out to Hard Time: Young Children in the Adult Criminal Justice System,” (Austin: University of Texas at Austin, 2009) <http://www.endjwop.org/wp/wp-content/uploads/2010/04/From-time-out-to-hard-time.pdf>, p. 55.

⁵⁶ Letter from Campaign for Youth Justice, signed on to by Human Rights Watch, to Attorney General Eric Holder, April 4, 2011, http://www.campaignforyouthjustice.org/documents/PREA_sign-on_letter.pdf.

V. Standards for Juvenile Facilities

Human Rights Watch urges the Department to review all of its standards for residents in juvenile facilities to ensure they reflect appropriate policies and practices for youth. The standards appear to have been lifted with little or no modification from the standards for adult prisons and jails. Different policies and practices, however, may be more effective at holding youth accountable while protecting them from sexual abuse than those that are designed for adults. Science, law, and common experience recognize that youth under the age of 18 are different from adults. As the United States Supreme Court noted in 2005, the character of a juvenile is less “fixed” than that of an adult.⁵⁷ The Supreme Court stated that as compared to adults, juveniles have a “lack of maturity and an underdeveloped sense of responsibility;” they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;” and their characters are “not as well formed.”⁵⁸ These factors make them especially vulnerable to violence in institutions. Standards for facilities that house juveniles should take into account their special vulnerabilities and the corresponding responsibilities of juvenile facilities to take youth- appropriate measures to protect, supervise, and guide youth who are residents.

Definition of Youth

We encourage the Department to define youth, juvenile, or child, for purposes of its PREA standards, as any person below the age of 18, irrespective of state or federal law relating to the age of criminal responsibility.

Sexual Harassment

Various provisions of the draft regulations exclusively address sexual abuse, but should also address sexual harassment. Under the definition of sexual harassment included in the Department’s draft regulations, some behavior that most states would consider to be child abuse is termed sexual harassment. Sexual harassment is left out of the coverage of most provisions of the Department’s draft regulations, even though it presents obvious harms to children. We recommend including sexual harassment in the standards regarding: reporting duties and training of staff, guidelines for investigations, timelines for filing grievances, confidentiality requirements, protection against retaliation, agency data collection, and

⁵⁷ *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (banning death penalty for youth who committed crime before the age of 18).

⁵⁸ *Graham v. Florida*, 560 U.S. ____ (2010).

several others in order to clarify the responsibilities of the various stakeholders and better protect the safety of youth.

§115.311 PREA coordinator

As 12 percent of youth in juvenile facilities reported experiencing sexual abuse in 2009, a PREA coordinator is crucial to oversee compliance with PREA standards. The draft standard only requires that agencies and facilities appoint a full-time PREA coordinator if the resident population is greater than 1000. According to the Department's Initial Regulatory Impact Assessment, this means that only 11 state juvenile systems will fall under this requirement. The final regulation should require that all agencies operating youth facilities designate a PREA coordinator and that the coordinator is allocated sufficient time, taking into account the number of youth confined by the agency, to ensure the standards are implemented properly.

§115.313 Supervision and monitoring

The draft standard fails to require agencies to provide staffing to keep residents safe in juvenile facilities. We reiterate for juvenile facilities the comments we made above concerning the importance of requiring agencies to implement their staffing plans and revisions to those plans.

The Department asks whether the PREA standards should establish minimum staffing ratios in juvenile facilities. Consistent with the recommendations of juvenile justice experts, we propose establishing a minimum 1:6 ratio for supervision during waking hours and a 1:12 ratio during sleeping hours, recognizing the value of continuous, direct supervision in preventing sexual misconduct.

§ 115.314 Limits to cross-gender viewing and searches

We are concerned that §115.314 does not adequately protect transgender and intersex residents from unnecessary, abusive, and traumatic searches. Even when conducted by medical professionals, touching a transgender or intersex resident's genitals or requiring a resident to undress so the professionals can determine their genital status is unnecessary and inherently traumatic. We urge the Department to prohibit facilities from engaging in such searches. In the very limited circumstances where this information is needed by a facility, it can be determined by asking the resident, reviewing the resident's medical records or other files, or during routine intake medical examinations.

We also strongly urge the Department to include specific guidance as to how facilities should apply the restrictions on cross-gender searches to transgender and intersex residents. The gender of the staff member assigned to search a particular transgender or intersex resident should be determined on a case-by-case basis. As individual transgender and intersex residents may have different privacy and safety concerns, facility staff should ask such residents to indicate the gender of staff by whom they feel most safe being searched. Facilities should accommodate these requests, regardless of whether the unit in which the youth is housed is designated for males or females.

Furthermore, the Department's authorization of cross-gender viewing of residents in states of undress "incidental to routine cell checks" diminishes the scope and effectiveness of the Department's intended limitation of cross-gender viewing. This provision should be removed. The practice of officers viewing residents of the opposite sex in states of undress should be prohibited in non-emergency situations.

§115.315 Accommodating residents with special needs

The current standard does not require agencies to provide limited English proficient (LEP) youth and youth with disabilities with accommodations throughout the entire investigation and response process. We encourage the Department to ensure that LEP youth and youth with disabilities receive the same protections under the standards as other youth throughout the entire investigative and response process.

§115.331 Employee training

While we commend the Department's recognition of the importance of training all employees working with youth, the draft regulations provide insufficient guidance for training employees regarding unique considerations pertaining to juveniles. The regulation should additionally include the need for staff in juvenile facilities to receive training on: 1) the pertinent age of consent laws to ensure proper understanding of the limited circumstances under which voluntary sexual contact between juvenile residents constitutes unlawful conduct; 2) adolescent development to ensure better understanding of the characteristics, limitations, and behaviors of juvenile residents; 3) behavioral manifestations of trauma in youth and appropriate responses by adults; and 4) effective and professional ways to communicate with juvenile residents who are limited English proficient, deaf, visually impaired, or otherwise disabled, as well as those with limited reading skills, learning disabilities, or cognitive or emotional limitations.

§ 115.342 Placement of residents in housing, bed, program, education, and work assignments

Human Rights Watch welcomes the Department's requirement, in §115.342, that agencies use the information they obtain about residents to guide placement decisions with an eye toward keeping all residents safe from sexual abuse.

We are pleased that this standard prohibits agencies from placing LGBTI residents in any particular housing solely on the basis of such identification or status. However, this standard fails to include gender non-conforming appearance as a factor agencies must take into account when determining housing, bed, program, education, and work assignments for residents, even though gender non-conforming youth are often victimized because of their appearance. Gender non-conforming appearance should be added as a criterion to consider under §115.342(b).

The Department's draft standard does not provide sufficient guidance to agencies on making determinations for housing transgender or intersex residents and fails to include consideration of the resident's views of his or her own safety. Many facilities struggle with appropriate housing options for these residents and will solely look to the resident's genital status. Transgender and intersex residents are very vulnerable to sexual abuse if their safety needs are not considered in housing determinations. We strongly encourage the Department to include specific guidance for facilities on what to consider when assigning a transgender or intersex resident to a facility or unit for male or female residents. At the very least, the standard should specify that housing determinations for transgender or intersex residents should not be based solely on their genital status.

Under the Department's draft regulations, facilities may isolate youth only as a last resort and for a limited period of time in their efforts to ensure the safety of residents. We think it would be helpful to clarify that isolation for protective purposes should never be imposed on residents solely because they are or are perceived as being lesbian, gay, bisexual, transgender, or intersex. Even short periods of isolation can have particularly negative consequences for youth, including raising the risk of suicide, exacerbating emotional and mental health needs, and depriving youth of programming, such as educational services. For this reason, juvenile justice experts hold isolation should be no longer than 72 hours.⁵⁹ Use of isolation must be used only when no other option is available to keep a youth safe and for

⁵⁹ Juvenile Detention Alternatives Initiative, "Detention Facility Self-Assessment," (2006), §VI.E, p.94, <http://www.jdaihelpdesk.org/Docs/Documents/JDAI%20Detention%20Facility%20Assessment%20Practice%20Guide.pdf> (accessed March 30, 2011).

limited time only until a more appropriate arrangement can be put in place. The final regulation should also limit this isolation to no more than 72 hours and must ensure that youth enjoy the same privileges and program opportunities as other residents while they are isolated.

§115.352 Exhaustion of administrative remedies

The proposed standard imposes a short grievance timeline that ignores important developmental differences between adults and youth that may contribute to a child's hesitancy to report abuse. The short timeline not only prevents young victims from being protected through the administrative process; it also unreasonably restricts their ability to bring valid legal claims. We urge the Department to rewrite the standard to impose no time limit for victims in juvenile facilities to report abuse and to require agency policy to consider administrative remedies exhausted 90 days after a report is made.

§115.373 Reporting to Residents

Standard 115.373 requires agencies to report back to residents on the results of their investigations into allegations of sexual abuse. We believe the standard should be modified to require the agency to also report back to any adult third party who reported the allegation to the agency and to the residents' parents or legal guardians if they were not the reporters. Trauma, fear of retaliation, and limited knowledge of legal rights and procedures discourage youth from reporting sexual abuse. Often it is lawyers, family, and other adults outside the facility who make reports of abuse to the agencies. The Department has taken special notice of the need for family involvement in pursuing complaints of sexual abuse on behalf of children, allowing parents or legal guardians both to file grievances regarding sexual abuse as well as to pursue subsequent steps in the grievance process. Requiring the notification of parents, legal guardians, and other adults who filed reports of abuse strengthens the transparency and accountability required to ensure efficacy of the agency's sexual abuse prevention and response efforts.

§ 115.376 Disciplinary sanctions for staff

The draft standard states that termination is the presumptive disciplinary sanction for staff to those who have engaged in sexual touching of residents. Termination should be the sanction for staff who engage in any sexual touching or sexual acts with residents. (We suspect the failure to include sexual acts was inadvertent.) We also believe the sanction should be mandatory upon an administrative finding that staff sexually touched or engaged in sexual acts as defined by PREA with any resident. There can be no excuse for the betrayal

of residents in the care and custody of adults that such sexual abuse represents. A firm, absolute and unequivocal prohibition against sexual misconduct with residents must be matched by a firm, absolute, and unequivocal sanction of termination for any staff member who sexually abuses residents by touching them sexually or engaging in sex with them.

§115.377 Disciplinary sanctions for residents

We strongly object to the title of this proposed standard and the language in it that requires disciplinary sanctions for residents who engage in sexual abuse with other residents. The Department has, in effect, simply taken the standard regarding sanctions for inmates in adult facilities and included it in the standard for juvenile facilities without taking into consideration the very great differences between adults and youth. The punitive approach to misconduct mandated by the standard is inconsistent with recognition by juvenile experts that positive tools, support, and supervision that help youth develop a sense of responsibility and accountability for their actions may be more appropriate to encourage better behavior by residents and to foster a safe environment than punishment. There is no basis for the Department to override agency judgment on such matters by requiring disciplinary sanctions, although agencies should have the authority to impose such sanctions in lieu of or in addition to other interventions.

We urge the Department to adopt the title of language in the Commission's proposed standard DI-2 for juvenile facilities, "Interventions for residents who engage in sexual abuse" and that it adopt the Commission's standard in its entirety. The Commission correctly understood that juvenile residents should, as DI-2 states, "receive appropriate interventions if they engage in resident-on-resident sexual abuse. Decisions regarding which types of interventions to use in particular cases, including treatment, counseling, educational programs, or disciplinary sanctions, are made with the goal of promoting improved behavior by the resident and ensuring the safety of other residents and staff." The Commission also correctly required agencies making decisions regarding interventions or disciplinary sanctions following resident-on-resident sexual abuse to "take into account the social, sexual, emotional, and cognitive development of the resident and the resident's mental health status."

The Department's proposed standard addressing disciplinary sanctions for juvenile residents is also problematic because it fails to provide guidance on appropriately responding to resident-on-resident voluntary sexual contact where a resident does not have the legal capacity to consent because of age or disability. The inclusion of the words "who is unable to consent or refuse" in the Department's definition of sexual abuse requires juvenile

facilities to treat some voluntary sexual activity between residents as sexual abuse if one or both residents could not legally consent under state law. We understand that youth engaging in sexual activity in a facility may be disciplined under the facility's rules, but do not believe that the PREA standards' additional requirements should be applied to youth engaged in voluntary sexual activity with one another.

We also urge the Department to remove §115.377(d) from this standard. This provision requires the facility to consider whether to condition the access to programming of a resident who has engaged in sexual abuse on the resident's willingness to participate in interventions designed to address the reasons for the abuse. This is a counterproductive and punitive standard that has no place in effective juvenile justice service delivery. It may have a purpose for adults, but not for youth. Positive incentives are generally more effective than punitive sanctions at encouraging youth to participate in treatment.

Finally, §115.377 does not prohibit or otherwise restrict the use of isolation as a disciplinary sanction for youth who have engaged in the sexual abuse of another resident or non-consenting staff member. While isolation may be appropriate as a sanction for adults, we believe it is rarely an appropriate sanction for misconduct by youth and if used should only be imposed for a short period. We urge the Department to insert a provision in this section that: 1) encourages agencies to consider positive interventions and lesser disciplinary sanctions short of isolation before imposing isolation as a disciplinary sanction for sexual misconduct by a youth; 2) if isolation is imposed, agencies must limit it to no more than 72 hours; and 3) requires agencies to ensure isolated youth receive daily visits from mental health or medical professionals.

§115.393 Audits of standards

Audits conducted by independent, qualified professionals are as necessary to provide a credible, objective assessment of a juvenile facility's compliance with PREA as for adult facilities. We incorporate by reference here all of our earlier comments concerning audits in adult facilities.

Appendix

Letter to US President Barack Obama

February 15, 2011

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Re: Exclusion of Immigration Detention Facilities from Proposed PREA Standards

Dear President Obama:

The undersigned organizations write to express grave concern about a proposed rule by the Department of Justice that excludes immigration detention facilities from coverage under the Prison Rape Elimination Act of 2003 (PREA). According to the Notice of Proposed Rulemaking issued on January 24, 2011, the proposed rule would "not encompass facilities that are primarily used for the civil detention of aliens pending removal from the United States."[\[1\]](#)

The exclusion of immigration detention from standards on preventing, detecting, and responding to sexual assault in custody is unjustifiable. It ignores the history of sexual assault in immigration detention, is inconsistent with the intent of PREA and the administration's own efforts at detention reform, and implicates basic human rights obligations undertaken by the United States. Moreover, it threatens the safety of the hundreds of thousands of men, women, and unaccompanied children in the custody of Immigration and Customs Enforcement (ICE) or the Office of Refugee Resettlement. We urge you to instruct the Department of Homeland Security and the Department of Health and Human Services that all facilities in which immigration detainees are placed are covered under PREA. We also urge you to direct the Department of Justice to correct the serious error of excluding facilities in which immigration detainees are placed from its proposed rule.

Immigration detainees, like all persons in custody, are vulnerable to abuse. Language and cultural barriers, histories of state-sanctioned abuse in their home countries, and a fear that

reporting abuse will result in deportation all increase the likelihood that a non-citizen will not feel safe reporting sexual abuse and that perpetrators will not be held accountable. Unlike criminal defendants, immigration detainees have no right to an attorney, and as a result may not be aware of their right to be free from sexual abuse, nor whom to contact if they are sexually assaulted.

The known incidents and allegations of sexual abuse in immigration detention are serious and numerous. In its 2009 report to the attorney general, the National Prison Rape Elimination Commission documented widespread reports of sexual abuse in immigration facilities over the last 20 years.^[2] In August 2010 Human Rights Watch released a report compiling incidents and allegations of assaults, abuses, and episodes of harassment that have emerged across the rapidly expanding national immigration detention system.^[3] These included the assaults of five women detained at the Port Isabel Service Processing Center in Texas in 2008 when a guard entered each of their rooms in the infirmary, told them that he was operating under physician instructions, ordered them to undress, and touched intimate parts of their bodies.^[4] In 2009 the Women's Refugee Commission released a report that documented incidents of sexual and physical abuse of unaccompanied children in immigration custody, including the repeated sexual assaults of children at the Away From Home Texas Sheltered Care Facility in Nixon, Texas.^[5]

Horror at custodial abuses like these drove the Senate and the House of Representatives to unanimously pass the Prison Rape Elimination Act of 2003.^[6] The intent of PREA to include immigration detention in the measure is clear. The statute defines "prison" to mean "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."^[7] Statements in the House Judiciary Committee report emphasize the application of the statute's protections to both criminal and civil detainees.^[8] Senator Edward M. Kennedy, a lead cosponsor of PREA, specifically called attention to immigration detainees in his remarks at the first hearing of the National Prison Rape Elimination Commission.^[9] The exclusion of immigration facilities from PREA standards would also lead to anomalous and unjustifiable results. Under the proposed rules, an immigration detainee in a local jail would be protected by PREA but would lose that protection if transferred to an ICE facility. It is inconceivable that Congress intended PREA protection for detainees to depend on the facility that confines them.

Indeed the inclusion of immigration detention has been presumed by the National Prison Rape Elimination Commission and others charged with implementation of the act. The commission held a hearing on immigration detention during the research phase of its work and included both a section on immigration detention in its final report and an immigration

detention supplement to its recommended standards.^[10] At the same time, the Bureau of Justice Statistics has included immigration detention in the collection of statistics on prison rape mandated by PREA. The Department of Homeland Security itself has acknowledged the importance of the statute for its facilities. For example, in her 2009 report on the state of the immigration detention system, Dora Schiro, detention expert and then advisor to Secretary Janet Napolitano, stated, "The system must make better use of sound practices such as ... practices that comply with the [Prison] Rape Elimination Act."^[11]

The failure to include immigration detention under the standards also implicates US obligations under the Convention against Torture and the International Covenant on Civil and Political Rights.^[12] The International Covenant on Civil and Political Rights obligates states to ensure that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."^[13] The Convention against Torture, which the US ratified in 1994, states that governments are responsible for not only acts of torture committed by government officials, but also those committed with their acquiescence.^[14] In reviewing US compliance with the treaty, the Committee against Torture has expressed concern about "reliable reports of sexual assault of sentenced detainees, as well as persons in pretrial or immigration detention."^[15] In addition to jeopardizing US compliance with international law, this exclusion would send a troubling message to other countries that their citizens, should they be detained in the US pending administrative immigration proceedings, will be afforded fewer protections against sexual assault than convicted criminals.

Efforts by ICE to address sexual assault through revising its own detention standards are important steps but do not obviate the need for ICE to be bound by the PREA regulations. ICE detention standards, subject to modification through collective bargaining, lack the force of law.

Finally, this error in the proposed rule undermines the administration's own efforts to reform the immigration detention system. In announcing the administration's intention to work toward a "truly civil detention system," Assistant Secretary for ICE John Morton outlined a vision of a system that would demonstrate greater respect for the dignity of individuals held in the agency's custody. Certainly that vision is incompatible with excluding detained immigrants from protections against sexual assault and abuse.

To summarize, we recommend:

- *Instructing the Department of Homeland Security and the Department of Health and Human Services that all facilities in which immigration detainees are placed are covered under PREA; and*
- *Directing the Department of Justice to correct the serious error of excluding facilities in which immigration detainees are placed from its proposed rule.*

We would welcome the opportunity to meet to discuss this further. Antonio Ginatta will be in touch with your office to arrange a meeting with our organizations. In the meantime, please feel free to contact him at 202.612.4343 or at ginatta@hrw.org.

Sincerely,

Kenneth Roth, Executive Director
Human Rights Watch

Laura W. Murphy, Director
ACLU Washington Legislative Office

Rachel B. Tiven, Executive Director
Immigration Equality

Lovisa Stannow, Executive Director
Just Detention International

Mary Meg McCarthy, Executive Director
National Immigrant Justice Center

Ali Noorani, Executive Director
National Immigration Forum

A. Frank Donaghue, Chief Executive Officer
Physicians for Human Rights

Pat Nolan, Vice President
Prison Fellowship

Sara Totonchi, Executive Director
Southern Center for Human Rights

Jim Harrington, Director
Texas Civil Rights Project

Sarah Costa, Executive Director
Women's Refugee Commission

cc: Cass Sunstein, Administrator
Office of Information and Regulatory Affairs

Cecilia Muñoz, Deputy Assistant to the President and Director of Intergovernmental Affairs
Office of Intergovernmental Affairs

[1] "National Standards to Prevent, Detect, and Respond to Prison Rape; Notice of Proposed Rulemaking," 76 Fed. Reg. 6248-6302 (February 3, 2011), http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm.pdf (accessed February 15, 2011), p. 6250.

[2] National Prison Rape Elimination Commission, "Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails: Supplemental Standards for Facilities with Immigration Detainees" (NPREC Report), June 2009, <http://www.ncjrs.gov/pdffiles1/226680.pdf> (accessed February 3, 2011), p. 174-188.

[3] Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, August 25, 2010, <http://www.hrw.org/en/reports/2010/08/25/detained-and-risk-o>.

[4] *Ibid.*, p. 8.

[5] Women's Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Custody*, February 2009, <http://womensrefugeecommission.org/programs/detention/unaccompanied-chil...> (accessed February 9, 2011).

[6] Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 972 (2003), 42 U.S.C.A. §§ 15601-09 (Lexis 2010), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills... (accessed February 3, 2011).

[7] *Ibid.*, sec. 10(7).

[8] U.S. House of Representatives Committee on the Judiciary, *Report on the Prison Rape Reduction Act of 2003*, 108th Cong., 1st sess., 2003, H. Rept. 108-219, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_repor... (accessed February 3, 2011), p. 14, 115.

[9] Senator Edward M. Kennedy, remarks during National Prison Rape Elimination Commission hearing, "The Cost of Victimization: Why Our Nation Must Confront Prison Rape," June 14, 2005, http://www.cybercemetery.unt.edu/archive/nprec/20090820160727/http://npr...docs/SenatorEdwardKennedyRemarks_Vol_1.pdf (accessed February 3, 2011).

[10] NPREC Report, p. 174-188.

[11] Dora Schriro, ICE, DHS, "Immigration Detention Overview and Recommendations," October 6, 2009, <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (accessed February 3, 2011), p. 22.

[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States on October 21, 1994, <http://www2.ohchr.org/english/law/cat.htm> (accessed February 3, 2011); International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, <http://www2.ohchr.org/english/law/ccpr.htm> (accessed February 3, 2011).

[13] ICCPR, art. 10(1).

[14] Convention against Torture, art. 1(1).

[15] CAT, "Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, United States of America," CAT/C/USA/CO/2, May 18, 2006, <http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA....> (accessed February 3, 2011), para. 32.