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April 4, 2011

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Department of Justice
950 Pennsylvania Avenue
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Washington, DC 20530

Docket No. OAG-131 (Prison Rape Standards)

Dear Mr. Hinchman:

On behalf of the American Bar Association, I offer the following comments for your consideration relating to the National Standards to Prevent, Detect and Respond to Prison Rape (DOJ Proposed Standards) promulgated pursuant to The Prison Rape Elimination Act (PREA), and published in Federal Register on February 3, 2011.¹

The views expressed in this letter are based upon the *ABA Criminal Justice Standards on the Treatment of Prisoners* (“ABA Standards”) adopted by the ABA House of Delegates in February 2010 and express the policy of the American Bar Association.² These standards are the product of a five-year drafting process, and reflect the expertise and viewpoints of drafters representing all segments of the criminal justice system. Participating in this work were prosecutors, defenders, judges, current and former chief administrators and the general counsel of major correctional systems, and liaisons from the American Correctional Association and the U.S. Department of Justice, among others. These standards are based on and supported by existing law, and by generally accepted correctional policies and practices. The portions of this letter dealing with auditing also rely on specific policy approved by the ABA House of Delegates in 2008.³

¹ 76 Fed. Reg. 6248 (February 3, 2011).

² The Standards can be accessed at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf

³ ABA, Resolution 2008AM104(B)(“Key Requirements for the Effective Monitoring of Correctional and Detention Facilities”)(hereafter “ABA Resolution”) may be accessed at: http://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting.html.

The ABA strongly supports the implementation of the PREA Standards as a necessary step towards ensuring that the human rights and dignity of prisoners are respected. The General Principles of the ABA Standards recognize that “loss of liberty and separation from society should be the *sole* punishments imposed by imprisonment,” and the government’s basic obligation to “protect prisoners from harm from other prisoners and staff.” See Standards 23-1.1(e) and (c). PREA demonstrates Congress’s commitment to these bedrock principles of a just correctional system.

We appreciate that the Department requested comments on a large number of specific issues raised by particular provisions of the DOJ Proposed Standards. Without suggesting any opinion on other provisions of those standards, we confine our comments here to five issues: cost, of cross-gender searches and supervision, housing of juveniles in adult facilities, institutional grievance procedures, and auditing.

Cost of Compliance with PREA

PREA requires that “The Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.”⁴ The statute does not elaborate on the meaning of “substantial additional costs,” and its legislative history is not particularly illuminating. The National Prison Rape Elimination Commission (NPREC) proposed that any costs necessary to bring a particular facility into compliance with constitutional norms should not be included in the calculation of the costs of compliance. The Department rejects this common-sense proposal as “in tension with the plain language of the statute” and “in any event impractical to apply.”⁵

We find it hard to understand the Department’s position here. After recognizing the “especially pernicious effects [of rape and sexual abuse] in the correctional environment,” it proceeds to assert that an agency’s statutory obligation to “remain conscious of costs” is more important than its obligation to comply with constitutional norms.⁶ It is only a short additional step to a conclusion that jurisdictions may opt out of compliance with the Constitution because it is too costly. The Supreme Court has unequivocally held that cost cannot be a factor in failing or refusing to meet constitutional obligations.⁷ Following this bedrock principle, the ABA

⁴ 42 U.S.C. § 15607(a)(3).

⁵ 73 Fed. Reg. at 6273.

⁶ Id. at 6267:

. . . PREA mandates that the Attorney General remain conscious of costs in promulgating national standards. Moreover, the statutes that require agencies to express the benefits and costs of regulations in economic terms do not distinguish between regulations that implement civil rights statutes and regulations that implement other laws.

⁷ See *Watson v. City of Memphis*, 373 U. S. 526, 537 (1963) (“[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.”); see also *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (“[A] lack of funds allocated to prisons by the state legislature . . . will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment.”); *Finney v. Arkansas Board of Corr.*, 505 F.2d 194, 201 (8th Cir. 1974) (“Lack of funds is not an acceptable excuse for unconstitutional conditions

Standards provide that “[a] lack of resources should not excuse treatment or conditions that violate prisoners’ constitutional or statutory rights, and that “[g]overnmental authorities [must] provide sufficient resources to implement these standards.” See Standards 23-1.1(i) and (j). Even if Congress had the power to excuse jurisdictions from their obligation to comply with basic constitutional norms based on cost, which we believe it does not, there is no reason to think that Congress intended to do so in this case. Inclusion of costs necessary to ensure compliance with the Eighth Amendment and other applicable constitutional provisions should be an indispensable part of a commitment to the rule of law enforceable by the federal government even without PREA’s command. Accordingly, we urge the Department to clarify what we are confident is its commitment to constitutional prison conditions without regard to cost and to accept the NPREC proposal for calculating the costs of compliance with PREA.

Cross-gender searches and supervision of prisoners.

The ABA urges reconsideration of DOJ Proposed Standard 115.14 that addresses cross-gender searches and supervision. Its provisions reject sound proposals made by NPREC, are inconsistent with ABA policy as expressed in the Treatment of Prisoners Standards, and are manifestly inadequate to protect prison victims of sexual assault. The Department should modify its Proposed Standard to prohibit non-emergency cross-gender pat-searches entirely, and limit cross-gender viewing more strictly.

1. Cross-gender searches

The NPREC recommended prohibiting non-emergency pat searches of prisoners by correctional officers of the opposite gender. It also recommended prohibiting non-emergency cross-gender viewing of prisoners who are nude or performing bodily functions.⁸ The DOJ Proposed Standard replaces the NPREC proposed prohibition on non-emergency cross-gender pat-searches with an extremely limited exemption solely for those “inmates who have suffered documented prior cross-gender sexual abuse while incarcerated.” The ABA Standard on cross-gender pat searches is essentially the same as the NPREC proposal, and we previously urged the Justice

of incarceration.”); *Flynn v. Doyle*, 630 F. Supp. 2d 987, 993 (E.D. Wis. 2009) (“Matters of administrative convenience must ultimately give way when constitutional rights are in jeopardy.”); *Laube v. Haley*, 234 F. Supp. 2d 1227, 1250, 1252 (M.D. Ala. 2002) (“It is well-established that funding is not an excuse for constitutional violations.”); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 182 (D. Mass. 2002) (“However, it would not be reasonable to deny an inmate adequate medical care because it would be expensive to do so ‘Lack of funds ... cannot justify an unconstitutional lack of competent medical care and treatment for inmates.’” (quoting *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) (citations omitted) (alteration in original))).

⁸ The Commission’s Recommendation PP-4 provides:

Limits to cross-gender viewing and searches Except in the case of emergency, the facility prohibits cross-gender strip and visual body cavity searches. Except in the case of emergency or other extraordinary or unforeseen circumstances, the facility restricts nonmedical staff from viewing inmates of the opposite gender who are nude or performing bodily functions and similarly restricts cross-gender pat-down searches. Medical practitioners conduct examinations of transgender individuals to determine their genital status only in private settings and only when an individual’s genital status is unknown.

Department to endorse it. See Standard 23-7.9(b).⁹ We urge the Department to reinstate the NPREC recommendation prohibiting cross-gender pat-searches except in emergencies.

The NPREC recommendation, like ABA Standard 23-7.9(b), reflects that pat-down searches, are by their design, highly intrusive.¹⁰ Even if performed in accordance with professional standards, they are perceived as a sexualized touching, especially by individuals with histories of sexual abuse or trauma.¹¹ The DOJ Proposed Standard fails to recognize the vulnerability of large portions of the incarcerated population of men and women by limiting exemptions to individuals who have been sexually abused while incarcerated. Moreover, even those prisoners who have been sexually assaulted in prison may find it impossible to provide documentation of their abuse.¹² The Proposed Standard also fails to take into account the particularly serious injury cross-gender pat-searches would cause juveniles housed in adult facilities, injury that has been recognized for decades.¹³

⁹ ABA Standard 23-7.9(b) provides:

(b) Except in exigent situations, a search of a prisoner's body, including a pat-down search or a visual search of the prisoner's private bodily areas, should be conducted by correctional staff of the same gender as the prisoner.

¹⁰ Even a search performed in accordance with training, as described below, follows is intrusive and degrading: During the cross-gender clothed body search, the male guard stands next to the female inmate and thoroughly runs his hands over her clothed body starting with her neck and working down to her feet. According to the prison training material, a guard is to "[u]se a flat hand and pushing motion across the [inmate's] crotch area.' The guard must '[p]ush inward and upward when searching the crotch and upper thighs of the inmate.' All seams in the leg and the crotch area are to be 'squeeze[ed] and knead[ed].' Using the back of the hand, the guard also is to search the breast area in a sweeping motion, so that the breasts will be 'flattened.' Superintendent Vail estimated that a typical search lasts forty-five seconds to one minute. A training film, viewed by the court, gave the impression that a thorough search would last several minutes."

Jordan v. Gardner, 986 F.2d 1521, 1523 (9th Cir. 1993) (en banc) (internal citations omitted); see also *Forde v. Zickefoose*, 720 F.Supp.2d. 170, 173 (D.Conn. 2010)(describing pat search procedure in Federal Bureau of Prisons as requiring officers "to move their hands in a circular motion against the inmate's body during a pat search in order to ensure 'maximum coverage.'")

¹¹See, e.g., *Jordon v. Gardner*, 986 F. 2d 1521 (9th Cir. 1993) (en banc) (describing history and traumatized reactions of plaintiffs); *Colman v. Vasquez*, 142 F. Supp. 2d 266 (D. Conn. 2001) (denying qualified immunity on a claim in which the plaintiff alleged that cross-gender pat-downs violated the Eighth Amendment, pointing to plaintiffs' assignment to a special unit for sexually traumatized prisoners).

¹² Of almost 2,500 allegations of staff sexual harassment in 2007-08, only 126 could be substantiated. BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007-2008 5 (2011). The vast majority of the remainder, 1,475, are labeled as "unsubstantiated". *Id.* In the federal system, "[a]n allegation is 'unsubstantiated' or inconclusive when the evidence does not allow the investigator to determine whether the alleged incident occurred or not." U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, THE DEPARTMENT OF JUSTICE'S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES: SEPTEMBER 2009 58 (2009)(hereafter "EFFORTS TO PREVENT STAFF SEXUAL ABUSE"). Presumably, therefore, the Department's limited exemption would be inapplicable to over half of those alleging staff sexual harassment in situations where the agency could not conclude that the assault had not, in fact, occurred. (Those allegations that can be shown to be false are labeled as "unfounded;" there were 758 unfounded allegations during 2007-08. *Id.*)

¹³ See, e.g., *City of Philadelphia v. Pennsylvania Human Relations Comm'n*, 300 A. 2d 97, 102 (Pa. Comm. 1973):

The DOJ Standard also fails adequately to account for the high incidence of sexual assault generated during cross-gender pat-searches. The National Inmate Survey reports that a third of staff sexual misconduct victims were abused as part of a pat-down search.¹⁴ Similarly, Bureau of Prisons officials believe “that male staff members were most often accused of sexual misconduct stemming from pat searches.”¹⁵ There are significant data on sexual abuse against female prisoners by male staff in the context of pat searches, as well as evidence that the searches lead to a sexualized environment, encouraging abuse.¹⁶ Demonstrating this relationship, male officers’ pat-downs of women have escalated to other unwanted sexual contact, including forcible rape.¹⁷

In rejecting the NPREC recommendation, the Department stated its view that implementing a general prohibition of cross-gender pat-down searches cannot be achieved without limiting employment (or post assignment) opportunities for men or women.¹⁸ The Department has failed to cite any evidence that employment opportunities would be lost should the Commission’s recommendation be adopted. Indeed, some states already limit cross-gender pat searches and do not allow routine cross-gender pat-downs in female facilities.¹⁹ Relying on this evidence, a federal court in Connecticut recently found that the Bureau of Prisons had “failed to present any evidence as to why many state penal institutions forbid non-emergency cross-gender pat searches, but [it] is incapable of doing the same” and “gender-based assignment of shifts, even

To subject a girl in this age group to a thorough search of her body by a male supervisor could cause not only a temporary traumatic condition, but also permanent irreparable harm to her psyche. It is no different where females supervise male juveniles. To have a woman supervisor observe daily showers of the boys at a time in life when sex is a mysterious and often troubling force, is to risk a permanent emotional impairment under the guise of equity.

¹⁴ *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*. National Inmate Survey, Department of Justice, Bureau of Justice Statistics. Table 18: Sex of perpetrator of sexual staff misconduct, by facility type and sex of victim.

¹⁵ EFFORTS TO PREVENT STAFF SEXUAL ABUSE, supra note 12 at 26 (“[T]he high number of abusive sexual contact allegations provides some support for the BOP’s perception.”)

¹⁶ Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, 1996 and Human Rights Watch, *United States—Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, A Human rights Watch Short report, Vol. 10 No. 2, September 1998.

¹⁷ *Colman*, 142 F. Supp. 2d., at 236 (“[P]laintiff here challenges the constitutionality of, in summary, a policy allowing frequent cross-gender pat searches of a female prisoner already identified as particularly vulnerable due to prior sexual assault, who allegedly became the victim of a sexual assault by a prison guard who was permitted to ‘pat’ her pursuant to that policy.”); see also *Peddle v. Sawyer*, 64 F.Supp. 2d 12.16 (D.Conn. 1997)(denying motion to dismiss Eighth Amendment allegations of intentional sexual assault based on repeated inappropriate groping and touching during pat searches); *Neal v. Dep’t of Corr.*, 2009 WL 187813 (Mich. App. 2009) (describing trial in which pat-down searches and rapes were linked).

¹⁸ 76 Fed. Reg. at 6253.

¹⁹ National Institute of Corrections Prisons Division and Information Center, *Cross-Sex Pat Search Practices: Findings from NIC Telephone Research* (January 6, 1999). In this 1999 prison survey by NIC, only seven systems reported a policy allowing routine cross-gender pat-downs in female facilities. By 2001, four of those states began prohibiting male pat searches of women prisoners, leaving the Federal system and two states in the extreme minority.

where it prevents correctional officers from selecting preferred assignments, is a ‘minimal restriction’ that can be tolerated.”²⁰ Moreover, the Department has created settlements in a number of instances that require a “ban on pat-down” searches of female prisoners by male staff absent exigent circumstances during an evaluation period of at least six months.²¹ In each instance, the state prison found no need to resume the pat-down searches, finding no increased security concerns and manageable staffing and costs increase.

Another rationale proffered for rejecting the NPREC recommendation prohibiting cross-gender searches is the assertion that the “DOJ believes that the benefits of eliminating cross-gender searches does [sic] not justify the costs of imposing such a rule across the board.”²² Neither the costs nor benefits are clearly defined. That so many state prison systems prohibit cross-gender searches in policy or practice demonstrates that degrading and harmful cross-gender searches can be eliminated without endangering security or incurring excessive cost. Cross-gender pat searches have grave implications, not only because of an increased risk of sexual assault, but also because the performance of these searches, even where done professionally, may result in the violation of several constitutional provisions.²³ As previously pointed out, the Supreme Court has unequivocally held that cost cannot be a factor in failing or refusing to meet constitutional obligations.²⁴

2. Cross-gender viewing

The NPREC recommendation permits viewing of prisoners of the opposite gender only in emergency situations. DOJ Proposed Standard 115.14 permits cross-gender viewing not just in emergency situations, but also “when such viewing is incidental to routine cell checks.” The ABA Standard on cross-gender viewing is somewhat more permissive than the NPREC recommendation where cross-gender viewing is concerned, but it would stop substantially short of permitting the sort of routine viewing evidently contemplated by the DOJ Proposed Standards. See Standard 23-7.10.²⁵ ABA policy explicitly encourages correctional authorities to use

²⁰ *Forde v. Baird*, 720 F. Supp. 2d 170, 180-81 (D. Conn. 2010) (quoting *Tipler v. Douglas County*, 482 F.3d 1023, 1027 (8th Cir. 2007)) (citing *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998); *Jordan v. Gardner*, 986 F.2d 1521, 1539 (9th Cir. 1993) (Reinhardt, J., concurring)).

²¹ See e.g., *Everson v. Michigan Dep’t of Corrections*, 391 F.3d 737, 743 (6th Cir. 2005).

²² 76 Fed. Reg. at 6253.

²³ See cases cited at note 10, *supra*.

²⁴ See *supra* note 7 and accompanying text.

²⁵ ABA Standard 23-7.10 provides:

Correctional authorities should employ strategies and devices to allow correctional staff of the opposite gender to a prisoner to supervise the prisoner without observing the prisoner’s private bodily areas. Any visual surveillance and supervision of a prisoner who is undergoing an intimate medical procedure should be conducted by correctional officers of the same gender as the prisoner. At all times within a correctional facility or during transport, at least one staff member of the same gender as supervised prisoners should share control of the prisoners.

strategies and devices that would allow cross-gender supervision while maintaining a prisoners' privacy. We urge the Department to incorporate language in this Proposed Standard that would require facilities to use strategies and devices to protect prisoner privacy even during routine cell checks.

Placement of juveniles in adult facilities

The ABA believes it imperative that the DOJ Proposed Standards include a provision governing the placement of juveniles in adult prisons and jails regardless of the venue in which they are prosecuted and tried. ABA policy on this issue is clear and unequivocal: ABA Standard 23-3.2(b) provides:

No prisoner under the age of eighteen should be housed in an adult correctional facility. Where applicable law does not provide for all such prisoners to be transferred to the care and control of a juvenile justice agency, a correctional agency should provide specialized facilities and programs to meet the education, special education, and other needs of this population.²⁶

Juveniles are one of the most vulnerable populations in correctional facilities, and to ignore their special circumstances is to undermine the intent and value of the PREA Standards. Juvenile prisoners are at significant risk of sexual assault from older and larger prisoners and staff. Their size, immaturity, and lack of a social network make them easy targets for physical and sexual abuse, as does the fact that they are easily intimidated. Indeed, the NPREC found that “[m]ore than any other group of incarcerated persons, youth incarcerated with adults are probably at the

The difference between the approach of ABA Standard 23-7.10 and the NPREC recommendation is not dramatic, but we believe it is important. Our language is positive rather than negative; it encourages rather than discourages cross-gender supervision, which we believe has been beneficial to American corrections by allowing women correctional officers full employment opportunities in men's prisons. At the same time, our language takes seriously the risk of sexual misconduct posed by unrestricted viewing of the private bodily areas of female prisoners by male officers or those of male prisoners by female officers. The approach and language of our Standard 23-7.10 was developed after extensive consultation with a large number of correctional administrators, experts, and advocates; we believe its affirmative approach is substantially less controversial than the PREA Commission's language, but that it would accomplish the same goal. In fact, the NPREC discussion of the issue suggests that it had in mind something similar to the “strategies and devices” approach of Standard 23-7.10, explaining: “Agencies are encouraged to use a number of tools to aid compliance with this standard, including the use of privacy panels for shower and toilet areas and making verbal announcements when a staff member of the opposite gender is in an area.” But the actual proposed NPREC recommendation seems to prioritize instead exclusion of female officers from supervision of male prisoners and vice versa. We urge your adoption of language closer to our Standard 23-7.10.

²⁶ See also American Bar Association, “Youth in the Criminal Justice System: An ABA Task Force Report,” Summary of Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners, Washington, DC: 2002.

http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_jjpoli_cies_YCJSReport.authcheckdam.pdf.

highest risk for sexual abuse.”²⁷

It is particularly important to separate minors from adults because minors confined with adults are much more likely to be physically and sexually assaulted by other prisoners, and to commit suicide.²⁸ See Convention on the Rights of the Child, G.A. Res. 44/25, Annex, Art. 37, U.N. Doc. A/44/49 (Nov. 20, 1989) (requiring that every child deprived of liberty shall be separated from adults unless it is in the best interest of the child not to do so). Yet adult prisons in this country currently house approximately three thousand prisoners under 18 years of age, while adult jails house another eight thousand juveniles.²⁹ In a great many states, juveniles are held in adult jails while awaiting trial and housed in adult prisons after conviction.³⁰ Because the federal law that generally prohibits juveniles to be housed with adult offenders does not apply in the case of youth who are transferred to adult court,³¹ many of these juveniles are co-mingled with adult criminals.³²

Many states have begun to recognize the importance of housing youth who have been transferred to adult court with age-appropriate peers in juvenile facilities.³³ Two states, Virginia and Pennsylvania, passed laws in 2010 that require housing pre-trial youth in juvenile detention facilities instead of adult jails. But these are isolated legislative changes and far too many states still allow juveniles to be housed with adults, exposing them to the kind of abuse and victimization to which they are particularly vulnerable. We therefore urge that the DOJ Proposed Standards prohibit the housing of juveniles under the age of 18 in adult jails and prisons, regardless of the venue in which they are prosecuted and tried.

²⁷ National Prison Rape Elimination Commission, *Report* (June 2009), p. 18, <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

²⁸ James Austin *et al.*, *Juveniles in Adult Prisons and Jails: A National Assessment* 9 (Bureau of Justice Assistance, 2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

²⁹ See William J. Sabol *et al.*, *Prisoners in 2008* (Bureau of Justice Statistics, Dec. 2009), App’x tbl.13, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>, (estimate is computed by subtracting listed ages, 18 and above, from listed total); Todd D. Minton & William J. Sabol, *Jail Inmates at Midyear 2008 – Statistical Tables*, at 5 tbls .6-7 & 9 tbl.13 (Bureau of Justice Statistics, March 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf>.

³⁰ See Michele Deitch, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System* 23 (Austin: LBJ School of Public Affairs, University of Texas, 2009)(noting that in twenty-seven states and in the District of Columbia, juveniles under the age of 12 can be tried as adults).

³¹ See Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601 *et seq.*, requiring the separation of adults from juveniles not processed through the adult criminal justice system. See also 28 C.F.R. § 31.303(d).

³² A new report that examines this issue in Texas found that only 68% of juveniles in Texas prisons are provided with sheltered housing, while most of the rest are housed with adult offenders. Michele Deitch, *Juveniles in the Adult Criminal Justice System in Texas* (Austin: LBJ School of Public Affairs, University of Texas, 2010), pp. 24-25.

³³ See Campaign for Youth Justice, *State Trends* (Washington, DC, March 2011).

Exhaustion of Administrative Remedies

The ABA urges the DOJ to reconsider its Proposed Standards 115.51 and 115.52 regarding requirements for exhaustion of administrative remedies for prisoner grievances as a precondition to pursuing claims in the courts. These proposed standards reject sound proposals made by NPREC, are inconsistent with ABA policy and are manifestly inadequate to protect prison victims of sexual assault.

One of the key shortcomings of the DOJ Proposed Standards is the failure to address barriers to access to the courts created by the Prison Litigation Reform Act (PLRA)³⁴ that will particularly affect victims of sexual abuse. The PLRA, passed by Congress in 1996, obstructs court access for survivors of custodial sexual abuse by requiring prisoners to exhaust administrative remedies in corrections facilities before seeking relief in the courts.³⁵ Under the PLRA, prisoners are forever barred from seeking redress in federal court for their most fundamental constitutional and human rights unless they can successfully navigate a maze of frequently arcane, arbitrary, and intricate internal grievance rules created by prison officials that even lawyers find baffling.³⁶ Often, prisoners must navigate this maze within a few short days or weeks of the violation.

The exhaustion requirement of the PLRA has an especially harsh impact on victims of prison rape and sexual abuse. When prisoners are raped or assaulted by another prisoner or a correctional officer, they may be unable or unwilling to use the grievance system due to shame or trauma arising from the abuse and due to their isolation from family and community support. In addition, these prisoners often fear retaliation for reporting the incident internally.

Many prison grievance rules are complex and often arbitrary, with deadlines that are virtually impossible for prisoners to navigate successfully, especially because prisoners are frequently illiterate, learning disabled, seriously mentally impaired, or fearful of retaliation. The PLRA's exhaustion provision forecloses many prisoners who were victims of sexual violence or abuse that PREA condemns from securing redress for their legal rights.

The Department's rejection of the NPREC's proposed amelioration of this problem will abnegate the ultimate efficacy of the final standards. Instead of adopting a carefully calibrated exhaustion proposal, the proposed regulation merely requires correctional facilities to provide prisoners with a minimum of 20 days in which to file a grievance after being victimized by sexual violence, with an additional 90-day extension available only if the prisoner provides documentation that he or she was prohibited from filing based on trauma, removal from the facility, or "other circumstances indicating impracticality."³⁷

³⁴ Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e (2006).

³⁵ *See id.*, § 1997e(a).

³⁶ *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (holding that the PLRA requires "proper exhaustion" which "demands compliance with an agency's deadlines and other critical procedural rules.")

³⁷ *See* National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6281-82, 6292, 6298 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. 115) (Proposed Standards §§ 115.52, 115.252, and 115.352 respectively).

The proposed 20-day deadline for filing a grievance is grossly unjust, unnecessarily harsh, and likely to have a broad negative impact beyond victims of custodial abuse. By essentially adopting the BOP 20-day deadline, Proposed Standard 115.152 creates an incentive for agencies that currently provide more time for prisoners to file grievances to shorten their deadlines.³⁸ The proposed regulation would be likely to produce a nation-wide default 20-day deadline that will essentially become the statute of limitations for all prisoner civil rights claims. In effect, the Department is now, through its role in enforcing PREA, raising barriers to access to courts beyond those that PLRA itself created.

The proposed threshold for granting a 90-day grievance deadline extension for sexual abuse victims fails to address the problems victims face in filing grievances. While the Department has appropriately recognized that victims of sexual abuse will frequently be unable to comply with the 20-day deadline, the proposed 90-day extension based on a prisoner's ability "to provide documentation . . . that filing a grievance within the normal time limit was or would likely be impractical" does not address the reality of the debilitating trauma experienced by victims of sexual assault nor does it place any burden on the correctional agency to establish prejudice that might warrant denial of a late grievance.

Requiring prisoners to present some form of documentation to establish trauma or a practical inability to file is inconsistent with ABA policy and sets a nearly impossible threshold for the vast majority of prisoners. Prisoner victims typically lack formal education; have frequently been the victims of violence prior to their incarceration; may be experiencing trauma as a result of the assault;³⁹ frequently experience shame and humiliation as a result of the assault; and fear retaliation for reporting, even to medical or mental health personnel. At least equally important, prisoners do not have the means to create documentation in prison or to secure any documentation that may exist. Such documentation is almost entirely subject to the control of prison officials. Moreover, the difficulties of obtaining such documentation would be especially daunting for the victims the Department purports to be concerned with – those who are so traumatized or otherwise incapacitated that they cannot file within the normal timeframe.

The ABA Standards have dealt with PLRA exhaustion by requiring that all grievances submitted or appealed outside the reasonable deadlines be accepted "if a prisoner has a legitimate reason for delay and that delay has not significantly impaired the agency's ability to resolve the grievance." See ABA Standard 23-9.2(d). In addition to this more practical approach to grievance deadlines, the Standard provides that a prisoner's failure to exhaust prior to filing a

³⁸ As described in the Notice of Proposed Rulemaking at 76 Fed. Reg. 6259, a recent survey reflects that the 20-day deadline is shorter than the general limitations period for grievances in 18 states. See Appendix, Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent, *Woodford v. Ngo* (No. 05-416) (2006).

³⁹ Many people who have been exposed to actual or threatened sexual violation suffer symptoms that include avoidance of reminders of the event, an inability to remember the event, persistent avoidance of stimuli associated with the traumatic event and negative alterations in cognitions and mood that are associated with the traumatic event. DSM-IV § 309.81. It is highly unlikely that anyone who is unable to remember the event and is in a state of persistent avoidance will have documentation of that trauma.

suit should not be a procedural bar to the courts. We urge the Department to revise the proposed regulation to recognize that victims of sexual assault and abuse often have legitimate reasons for delay.

Like ABA Standard 23-9.2(d), the original standard proposed by the NPREC for exhaustion of administrative remedies seeks to ensure that courts will not be deprived of the opportunity to review prisoners' claims of custodial sexual abuse by short prison grievance deadlines. That standard reads as follows:

Under agency policy, a detainee has exhausted his or her administrative remedies with regard to a claim of sexual abuse either (1) when the agency makes a final decision on the merits of the report of abuse (regardless of whether the report was made by the detainee, made by a third party, or forwarded from an outside official or office); or (2) when 90 days has passed since the report was made, whichever occurs sooner. A report of sexual abuse triggers the 90-day exhaustion period regardless of the length of time that has passed between the abuse and the report. A detainee seeking immediate protection from imminent sexual abuse will be deemed to have exhausted his or her administrative remedies 48 hours after notifying any agency staff member of his or her need for protection.⁴⁰

NPREC developed this proposed standard as a result of its documented findings that the shortcomings in prison grievance requirements frequently serve as a barrier to judicial review of allegations of serious sexual abuse of prisoners.⁴¹ The NPREC's proposed standard appropriately reconciles the goal of ensuring appropriate redress of prisoner claims of sexual abuse with the requirement of the PLRA that prisoners exhaust administrative grievance systems or forfeit their right to bring a lawsuit.⁴² The NPREC's standard provides that the administrative process will be deemed exhausted whenever a final decision on a report of sexual abuse is rendered, regardless of whether the complaint was "made by the detainee, made by a third party or forwarded from an outside official or office."⁴³ Alternatively, the prisoner's administrative remedies will be deemed exhausted 90 days after the complaint is made, if this is shorter. The 90-day period begins to run when the abuse is reported, regardless of how much time has passed between the incident and the complaint. In addition, the NPREC standard provides for an emergency provision for prisoners seeking "immediate protection from imminent sexual abuse," whereby a procedure is deemed exhausted 48 hours after the complaint is made. In summary, the NPREC standard provides that administrative process will be deemed exhausted no longer than 90 days after a report of sexual abuse is filed, without regard to who files it, and in an emergency after 48 hours.

⁴⁰ See NATIONAL PRISON RAPE ELIMINATION COMMISSION, *supra* note 222 (Commission Proposed Standard RE-2: Exhaustion of Administrative Remedies).

⁴¹ See *id.*, at 10, 92, 152.

⁴² See Prison Litigation Reform Act of 2005, 42 U.S.C. 1997(e) (2006).

⁴³ NATIONAL PRISON RAPE ELIMINATION COMMISSION, *supra* note, 222.

Society looks to the DOJ for effective and just law enforcement, including vigorous enforcement of civil and constitutional rights. The ABA therefore urges the DOJ to reconsider its proposed standard for exhaustion of administrative remedies and adopt instead the fair and workable standard originally proposed by NPREC.

Audit Requirements

DOJ Proposed Standard 115.93 describes the audits required to ensure compliance with PREA. It confirms that “independent audits are critical to ensuring that facilities are doing all they can to eliminate prison rape.”⁴⁴ We support the definition of independent audits in language that is entirely consistent with ABA policy.⁴⁵ By establishing a mechanism that holds facilities accountable for their compliance with the standards and by making such information transparent for the public, the Department is taking major strides towards the protection of prisoners’ safety. Independent, external oversight of conditions in correctional facilities is an essential tool for protecting human rights in a closed institutional environment. Audits of the kind envisioned by the DOJ Proposed Standard represent one form of such independent, external oversight.⁴⁶

The Department has asked for guidance about whether audits should be conducted at set intervals, or “only for cause, based upon a reason to believe that a particular facility or agency is materially out of compliance with the standards.”⁴⁷ ABA policy provides that an effective auditing system must include both routine and “for cause” audits.⁴⁸ Routine audits on a staggered but regular schedule, such as the triennial audits suggested by the Department, serve an important preventative role by identifying problems before they become serious and therefore result in significant cost savings.⁴⁹ The agency’s knowledge that these audits will take place encourages improvement in anticipation of review. PREA audits should be viewed as collaborative efforts between corrections officials and outside auditors to improve conditions.⁵⁰

⁴⁴ 76 Fed. Reg. 6248, 6264.

⁴⁵ See ABA Standard 23-11.2(b), 23-11.3(a). ABA Resolution, supra note 2, Key Requirements No. 3 and 5. To insure independence, Key Requirement No. 3 requires that the head of a monitoring entity be hired by an elected official for a fixed term, subject to approval by a legislative body, and be removable only for cause.

⁴⁶ See Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1444 (2010) (including auditing of compliance with standards among a list of the critical functions of correctional oversight); see also ABA Standard 23-11.2(a) (2010).

⁴⁷ 73 Fed. Reg. at 6265, Question 28.

⁴⁸ See ABA Resolution, Key Requirement No. 5.

⁴⁹ Cost savings can also be achieved by requiring the facilities to submit certain documentation to the auditing body on a routine basis. Pursuant to Section 115.93 (e), the Department should authorize the auditing entity to require that each facility submit annually aggregate statistics on complaints filed with the agency alleging sexual abuse by either prisoners or staff and the outcomes of the investigations of such complaints; copies of all relevant grievances; copies of facility policies relevant to implementation of the PREA Standards; and copies of any relevant internal audits conducted by the agency.

⁵⁰ See ABA Resolution, Key Requirements Nos. 6, 7, 8, 9, 10, 11, 12, 16, 18, and 19. The international treaty body, the CPT, provides a worthy model of collaborative oversight. See Silvia Casale, *The Importance of Dialogue and*

It is also essential that any audit take into account interviews with prisoners (both randomly selected and those who have expressed concerns in the form of grievances or similar filings) and observations of actual practice. Audits of facilities with known problems should be subject to “out-of-sequence” audits.⁵¹ Triggers for such audits might include follow-up on previously identified problems; an agency’s request for assistance from the auditing body; or reports of sexual abuse or rape.⁵²

An auditing body alone should decide which facilities are audited, lest its independence be compromised.⁵³ To this end, auditing bodies should develop a system for gathering intelligence from a number of sources, including routine reports from the agency and documentation from facilities, complaints from prisoners or their families and friends;⁵⁴ contacts with advocacy groups; media accounts; official statistical reports from BJS.⁵⁵

We agree that PREA audits can be combined with other audits, such as those necessary to achieve accreditation of correctional facilities. However, another audit or an agency’s accreditation status should not be allowed to substitute for a PREA audit. In any event, it is critical that the auditing body be independent of the agency under review⁵⁶ and comprised of experts (including experts on sexual assault and abuse).⁵⁷ Audits must also meet the other standards set forth in ABA policy, including unfettered access to the facility; agency responsiveness; review of outside complaints; assessment of ongoing concerns; and transparency of the auditing process, reports, and action plan.⁵⁸ The Department should incorporate in its Standards mechanisms for ensuring minimum levels of quality and reliability in these audits.⁵⁹

Cooperation in Prison Oversight, 30 PACE L. REV. 1490, 1494 (2010) (describing the cooperative dialogue between the oversight body and the correctional administrators as an ongoing process that continues” from one visit to the next” and that involves “follow up on particular issues to facilitate the next steps forward”).

⁵¹ We prefer this term to the more adversarial “for cause.”

⁵² See ABA Resolution, Key Requirements Nos. 5 and 19.

⁵³ See ABA Resolution, Key Requirements Nos. 1, 5, 10 & 19.

⁵⁴ Auditing bodies should develop a process by which the public, as well as staff and prisoners at a particular facility, can transmit information confidentially. See ABA Resolution, Key Requirement No. 13.

⁵⁵ One of the foremost international prison oversight bodies—the Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Prisoners (CPT)—has a similar intelligence gathering process in place by which it determines which facilities it will visit as part of its oversight mandate. See generally Rod Morgan and Malcolm Evans, *Combating torture in Europe*, (Strasbourg Cedex: Council of Europe Publishing, 2001).

⁵⁶ Independence is the most critical feature of any oversight or auditing body. See ABA Standards 23-11.2(b), 23-11.3(a); see also ABA Resolution, Key Requirement No. 1.

⁵⁷ See ABA Resolution, Key Requirement No. 4.

⁵⁸ See ABA Standard 23-11.3(a) (scope of review); Standard 23-11.3(b) (access and other authority). See also ABA Resolution, Key Requirement No.1. ABA Standard 23-11.3(b) provides in pertinent part:

We agree that if a particular jurisdiction has an independent monitoring or accreditation body responsible for conducting routine inspections of conditions in that facility, that oversight body could also conduct the PREA audits.⁶⁰ To combine such functions is both sensible and cost-effective. But this oversight body must be truly independent. Thus, we disagree with the DOJ Proposed Standard 115.93(a)(2) that would allow entities like an Internal Audit Division or an agency's Inspector General to conduct the external audits required by PREA. However well such entities are positioned to conduct internal self-assessments of compliance, they are not sufficiently independent to perform the external monitoring function envisioned by PREA.

Every agency must achieve "full compliance" with the PREA Standards, as required by law. There must be zero tolerance for sexual abuse. And, we believe that funding sanctions can and should be used judiciously to encourage compliance. Incremental steps can be taken to respond to an agency's failure to achieve full compliance, beginning with more frequent audits and offers of technical assistance. If repeat audits do not show sufficient steps towards compliance, sanctions should be considered.

The auditing entity should not be the judge of whether an agency has achieved "full compliance" with the PREA standards. An important benefit of the audits will be to ensure that there is public reporting of accurate findings.⁶¹ Those findings should not be compromised by having the auditor serve as a judge as well as an investigator.

Monitoring teams should . . . receive authority to (i) examine every part of every facility; (ii) visit without prior notice; (iii) conduct confidential interviews with prisoners and staff; and (iv) review all records, except that special procedures may be implemented for highly confidential information.

In other countries, unannounced inspections are a routine and critical element of the monitoring process for every well-respected inspection entity. Inspected fettered access and unannounced inspections are the norm in other countries. See, e.g., Anne Owers, *Submission to Vera Commission*, 22 WASH. U. J.L. & POL'Y 231, 233 (2006).

⁵⁹ See ABA Resolution, Key Requirement No. 2 (requiring adequate funding and staffing of the oversight entity).

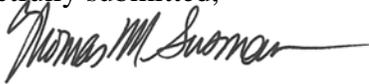
⁶⁰ See Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010) (describing oversight bodies in each state, not all of which comply with ABA policy).

⁶¹ See ABA Standard 23-11.3(a). The correctional agency should also be required to respond in a public document to the findings of the monitoring agency. Standard 23-11.3(c). See also ABA Resolution, Key Requirements 17 and 18.

Finally, we urge the Department to reconsider its decision to modify the NPREC standard that allows the auditing body to determine its own needs for access to a facility, as well as to documents, personnel, and prisoners.⁶² The authority to enter a facility at any time in order to observe operations and to speak confidentially with prisoners and staff is a critical element of independent oversight.⁶³ Without unfettered access, auditors may not be able to confirm violations of the standards, even when they have intelligence suggesting that safety problems exist. Moreover, it is the potential for unannounced inspections (whether or not they are actually conducted) that maintains staff vigilance. Any restrictions on the auditor's ability to conduct meaningful audits and to gather information compromise the auditor's independence and undermine public confidence in the audit process.

Thank you for consideration of our views.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

⁶² 73 Fed. Reg. at 6265.

⁶³ See note 58, *supra*.