PREVENTING THE SEXUAL ABUSE OF YOUTH IN CORRECTIONAL SETTINGS

Comments Submitted in Response to Docket No. OAG-131; AG Order No. 3143-2010

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Dear Attorney General Holder,

Thank you for the opportunity to comment on the National Prison Rape Elimination Commission (NPREC) Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse. Until the passage of the Prison Rape Elimination Act (PREA) in 2003, federal law did not clearly recognize that children in detention and correctional settings were particularly at risk of sexual abuse. Yet findings from the most recent Bureau of Justice Statistics (BJS) survey of youth in juvenile facilities, data collection mandated by PREA, demonstrate the extent to which youth are at risk of sexual victimization. According to the BJS data, an estimated 12 percent of adjudicated youth in juvenile facilities experienced sexual abuse in 2008 and 2009: 10.3 percent of youth surveyed reported an incident involving a staff member and 2.6 percent reported an incident involving another youth. We know from other studies that youth are at an even higher risk of abuse when placed in adult facilities.

The sexual abuse of youth in juvenile detention facilities, adult jails and prisons, lockups, and community corrections must stop. Every day in the United States, state and local courts and governments manage over 100,000 youth in out-of-home care and supervise several hundred thousand youth on probation. The majority of youth in out-of-home placements are incarcerated in juvenile detention facilities or long-term youth correctional facilities. However, thousands of youth are placed in non-secure community corrections settings such as group homes or shelters, held temporarily in lockups, and incarcerated in adult jails and prisons. Therefore, each of the four sets of standards proposed by the NPREC, not just the juvenile standards, has a role to play in the prevention of the sexual abuse of children.

As the recent sexual abuse scandals in Texas and Indiana have shown, strong standards are urgently needed to protect juveniles from this devastating but all too common abuse. The Commission’s standards go a long way toward making clear that no court sentence, regardless of the offense, should ever include sexual victimization. The sexual abuse of young people violates their basic human rights, violates the government’s constitutional obligation to provide safe and humane conditions of confinement, and impedes the likelihood of a successful transition to adulthood. We believe that full implementation of the NPREC standards not only will reduce sexual abuse, but also will help reduce other forms of physical abuse or gang violence that make detention and correctional settings dangerous to staff and residents. Although we strongly support the standards, some important changes are necessary to enhance the standards’ capacity to fulfill the mandate of the Prison Rape Elimination Act and prevent harm to youth. Our detailed recommendations include the following key issues:

1 The terms children, youth, and young people are used interchangeably throughout this document to refer to: (1) persons under the age of 18; and (2) young people through the age of 25 who are under the jurisdiction of the juvenile court or are detained in juvenile detention or correctional facilities.


• **Direct Supervision:** Appropriate supervision ensures that staff can identify problem signs among youth early on. Responsible, professional adults trained in adolescent behavior and development should engage in continuous, direct supervision of youth and should not rely on video surveillance.

• **Employee, Volunteer, and Contractor Training:** Those who work in facilities that house youth should receive training on adolescent development, the prevalence of trauma and abuse, mandatory reporting requirements, and the agency’s zero tolerance policy on sexual abuse of incarcerated persons.

• **Screening and Assessment by Medical and Mental Health Practitioners:** The standards should preserve the caretaking relationship medical and mental health professionals have with youth by eliminating any inquiries by medical and mental health staff into a youth’s history of engaging in sexual abuse (i.e., any prior offending behavior). This information can be gathered by other staff. The standards should require that medical and mental health professionals obtain informed consent before sharing sensitive information gathered at intake for housing, education, and other purposes.

• **Quality Assurance of Medical and Mental Health Care:** Medical and mental health programs should engage in quality assurance activities, of which compliance with these standards should be a part.

• **Emergency and Ongoing Medical and Mental Health Care:** The standards should ensure access to prophylactic HIV treatment and emergency contraception and pregnancy-related services.

• **Assessment and Placement of Residents:** The standards should provide more specific guidance on how to use individual safety plans to keep vulnerable youth safe and avoid resorting to blanket policies for certain groups, such as lesbian, gay, bisexual, or transgender (LGBT) youth. Specifically, the standards should require that facilities develop such plans using information from assessments, encourage residents to inform staff during intake if they fear being abused, and require facilities to house youth whose underlying offense is a status offense (i.e., when they are detained pursuant to a valid court order) separately from other residents.

• **Non-Abusive Sexual Activity between Residents:** Facilities may prohibit voluntary consensual sexual activity among residents by rule. However, the standards should not treat such activity as sexual abuse, as it may lead to overly harsh responses that misuse limited resources and have a disproportionately negative impact on certain groups, such as LGBT youth.

• **Isolation:** The standards should include a clear statement of the dangers associated with isolation in order to reinforce a facility’s responsibility to keep children safe without resorting to that practice. Additionally, youth who engage in sexual abuse should not be subjected to prolonged disciplinary isolation as punishment for that behavior.

• **Youth in Adult Facilities:** The Adult and Lockup Standards should ensure that youth are not held in adult facilities outside of the narrow circumstances allowable under federal law and policy. While children should never be housed in adult facilities, the child-specific protections such as the "sight
and sound separation” and six-hour maximum under the Juvenile Justice and Delinquency Prevention Act (JJDPA) should apply to youth who are held in adult facilities.

- **Limited English Proficient (LEP) Children**: LEP youth not only must understand sexual misconduct policies and reporting procedures, but also must be able to communicate with staff during other important phases, including investigation, medical and mental health care, and other supportive services. The standards should reinforce the need to provide culturally and linguistically appropriate services to youth and their families.

- **Staff Hiring and Qualifications**: The standards should ensure the agency hires, retains, and promotes staff members who are qualified by experience, education, and background to protect children by considering information from civil protection orders and annual criminal background checks.

- **Cross-Gender Viewing, Searches, and Supervision**: By prohibiting the viewing of residents of the opposite gender who are nude or performing bodily functions and by limiting cross-gender pat-down searches, the standards underscore the need to protect youth from harmful cross-gender interactions and recognize that a large percentage of sexual abuse of young people in facilities is perpetrated by staff members of the opposite sex. The standards also should prohibit one-on-one cross-gender supervision and provide additional guidance on how these prohibitions apply to transgender residents.

We urge you to promulgate the Commission’s standards with our recommended modifications without delay. Every day that these critically important measures are not in place, youth will continue to be abused while in custody.

Thank you for your consideration.

Sincerely,

Neelum Arya, Campaign for Youth Justice
Sue Burrell, Youth Law Center
Jessica Feierman, Juvenile Law Center
Samantha Harvell, First Focus
Bert L’Homme, Children’s Defense Fund
Jody Marksamer, The Equity Project
Dana Shoenberg, The Center for Children’s Law and Policy
Organization Descriptions and Contact Information

Our organizations are committed to policy reforms that remove youth from adult facilities, improve the conditions of confinement for youth held in juvenile facilities, and ensure that youth under community supervision are kept safe. Many of our organizations have extensive experience working to improve the conditions of confinement for youth held in juvenile and adult facilities. Please feel free to contact us if you have questions about our recommendations or other concerns regarding children and youth.

- The **Campaign for Youth Justice** (CFYJ) is dedicated to ending the practice of prosecuting, sentencing, and incarcerating youth under the age of 18 in the adult criminal justice system. CFYJ advocates for reforms to the justice system by serving as a clearinghouse of information on youth prosecuted as adults; conducting original research; providing support to federal, state, and local elected officials, policymakers, and advocates; coordinating outreach to parents, youth, and families; and leading national coalition efforts to reauthorize the Juvenile Justice and Delinquency Prevention Act.  
  *Staff Contact*: Neelum Arya, Research and Policy Director, (202) 558-3580, narya@cfyj.org

- The **Center for Children’s Law and Policy** (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in those systems. The Center’s work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP has a central role in major foundation-funded juvenile justice initiatives in the United States including the John D. and Catherine T. MacArthur Foundation’s Models for Change initiative and the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative (JDAI). CCLP staff provide training and technical assistance nationwide on assessing conditions of confinement in juvenile facilities, investigate potentially abusive conditions for youth in locked juvenile and adult facilities, and advocate for needed changes to the Prison Litigation Reform Act.  
  *Staff Contact*: Dana Shoenberg, Senior Staff Attorney, (202) 637-0377 ext. 107, dshoenberg@cclp.org

- The **Children’s Defense Fund** (CDF) is a non-profit child advocacy organization that has worked relentlessly for more than 35 years to ensure a level playing field for all children, with special attention to the needs of poor and minority children and those with disabilities. CDF champions policies and programs that lift children out of poverty, protect them from abuse and neglect, and ensure their access to quality health and mental health care and early childhood and education experiences. CDF’s *Cradle to Prison Pipeline*® Crusade seeks to achieve a fundamental paradigm shift in policy and practice away from punishment and incarceration and toward prevention and early intervention and sustained child investment.  
  *Staff Contact*: Bert L’Homme, Coordinator of the Cradle to Prison Pipeline® Crusade, (202) 662-3554, blhomme@childrensdefense.org
• **The Equity Project** is an initiative to ensure that lesbian, gay, bisexual, and transgender (LGBT) youth in juvenile delinquency courts are treated with dignity, respect, and fairness. The Equity Project examines issues that impact LGBT youth during the entire delinquency process, ranging from arrest through post-disposition. Core activities of The Equity Project include: gathering information from stakeholders about LGBT youth in juvenile delinquency courts, identifying obstacles to fair treatment, reporting findings, and crafting recommendations for juvenile justice professionals. The Equity Project recently released *Hidden Injustice*, the first effort to examine the experiences of LGBT youth in juvenile courts across the country (see Appendix A). The report is based on information collected from 65 interviews with and a survey of 414 juvenile justice professionals, including judges, defense attorneys, prosecutors, probation officers, detention staff, and other juvenile justice advocates; focus groups and interviews with 55 youth who possess relevant firsthand experience; and an extensive review of relevant social science and legal research findings. Partners of The Equity Project include Legal Services for Children, National Center for Lesbian Rights, and the National Juvenile Defender Center.

  *Staff Contact:* Jody Marksamer, Staff Attorney, (415) 365-1308, jmarksamer@nclrights.org

• **First Focus** is a bipartisan advocacy organization that is committed to making children and families a priority in federal policy and budget decisions. First Focus brings both traditional and non-traditional leaders together to advocate for federal policies that will improve the lives of America’s children. Child health, education, family economics, child welfare, and child safety are the core issue areas in which First Focus promotes bipartisan policy solutions. With respect to child safety, First Focus works to ensure that our children grow up in a setting that is safe from physical and environmental hazards that can have far-reaching effects on a child’s well-being. First Focus works to protect children from hazardous consumer products and other substandard physical, chemical, and environmental living conditions. In addition, First Focus works to increase investments in criminal prevention and intervention efforts for at-risk youth, such as those in the juvenile justice system.

  *Staff Contact:* Samantha Harvell, Senior Director, Early Childhood and Juvenile Justice Policy, (202) 657-0683, samanthah@firstfocus.net

• **Juvenile Law Center (JLC)** is one of the oldest multi-issue public interest law firms for children in the United States. JLC maintains a national litigation practice that includes appellate and amicus work. JLC promotes juvenile justice and child welfare reform in Pennsylvania and nationwide through policy initiatives and public education forums. JLC uses the law to protect and promote children’s rights and interests in the child welfare and juvenile justice systems, with a particular emphasis on ensuring that public systems do not harm children and youth in their care. JLC works to ensure that the juvenile justice and child welfare systems, which were created to help vulnerable children and youth, provide them with access to education, housing, physical and behavioral health care, employment opportunities and other services that will enable them to become productive adults.

  *Staff Contact:* Jessica Feierman, Supervising Attorney, (215) 625-0551, jfeierman@jlc.org.
The Youth Law Center (YLC) is a public interest law firm that works to protect children in the nation's foster care and juvenile justice systems from abuse and neglect, and to ensure that they receive the necessary support and services to become healthy and productive adults. Since 1978, its lawyers have worked across the United States to reduce the use of out-of-home care and incarceration, to ensure safe and humane conditions in out-of-home placements, to keep children out of adult jails, and to secure equitable treatment for children in both systems. Its efforts have focused on strengthening families and on advocating for education, medical and mental health, legal support, and transition services needed to assure children's success in care and in the community. YLC advocates for increased accountability of the juvenile justice and child welfare systems, and champions professional and public education.

Staff Contact: Sue Burrell, Staff Attorney, (415) 543-3379 ext. 3911, sburrell@ylc.org
Part I. Support for the NPREC Standards

The juvenile justice system was designed in recognition of the developmental differences between adult and juvenile offenders and the need to provide a rehabilitative and therapeutic environment to ensure that youth become healthy and productive members of society. The majority of youth who have contact with law enforcement and the justice system pass through the justice system only once, never to return. Yet if they are sexually abused, they will live with lifelong consequences that may include persistent mental illness and tendencies toward substance abuse and further criminal behavior. Justice agencies thus have a responsibility and a challenge: prevent sexual abuse now or risk long-term consequences for victims.

The Commission’s standards make clear that no court sentence, regardless of the offense, should ever include sexual victimization. The NPREC consulted with individuals with a broad range of correctional expertise when drafting the standards. As a result of the extensive input from corrections practitioners, including juvenile facility conditions experts and facility administrators, the Commission’s standards reflect pragmatic solutions to a complicated problem. We are pleased to see that all four sets of standards reflect a comprehensive approach that encompasses the critical areas necessary to prevent abuse. Among the strengths of the NPREC standards are the following:

- **Prevention Planning (PP)** and **Response Planning (RP)** standards make clear to officials that their facilities must have a zero tolerance approach to all forms of sexual abuse and protocols that ensure an effective response to sexual violence when it occurs. Hiring and retaining qualified employees is one of the most significant challenges facing corrections officials. Standard PP-6 (and PP-7 for Lockups) will help prevent adults who prey on children from being hired or promoted if they have a history of prior abuse against children. Juvenile Standard RP-1 will ensure that forensic medical examiners are trained in the unique psychological and emotional conditions of younger victims of sexual abuse so that they can conduct reliable and sensitive examinations where youth are involved. Standards RP-2 through RP-4 ensure that facilities coordinate with appropriate outside entities to support the reporting, investigation and prosecution of sexual abuse of children.

- **Training and Education (TR)** of employees, volunteers, contractors, and residents in facilities will help them know how to prevent, detect, and respond to incidents. We are especially pleased to see the requirement of specialized training for those completing sexual abuse investigations and for medical and mental health providers so they will know how to respond effectively without creating further trauma for youth victims. Staff training and supervision are crucial; staff need to understand the harmful nature of sexual abuse involving children and its potential consequences. We think it is valuable that Adult, Juvenile, and Community Corrections Standard TR-3 will also ensure that educational materials targeted to the inmate/resident/defendant/offender will be in accessible formats appropriate for the age and
level of cognitive and emotional development, including persons who have limited English proficiency, are deaf, are visually impaired, or otherwise have a disability.

- **Screening for Risk of Sexual Victimization and Abusiveness (SC)** in the adult standards and **Assessment and Placement of Residents (AP)** in the juvenile standards will help ensure that placement or classification decisions will take into account each individual’s particular risk of victimization. We commend the NPREC for recognizing the harms isolation can cause, especially for young people, and are glad to see the limits on isolation in the standard requiring that youth at high risk of sexual victimization will only be placed in segregated housing as a last resort, and then only until an alternative means of separation from likely abusers can be arranged. We believe that the standard should go even further to prevent unnecessary use of isolation, as discussed below. The Adult and Community Corrections Standard SC-2 is crucial to ensuring that lesbian, gay, bisexual, transgender (LGBT), or other gender-nonconforming inmates are not placed in segregated units or given particular housing assignments solely on the basis of their sexual orientation, genital status, or gender identity. We believe this provision should also be included in Juvenile AP-2.

- Standards related to **Reporting (RE)** and the **Official Response Following an Inmate Report (OR)** will ensure that incidents of sexual abuse can be easily reported, and clear policies and procedures will ensure that staff and agency leadership provide a coordinated response (OR-4) and prevent retaliation for reporting abuse (OR-5). We strongly support the requirement in Standard OR-1 that all staff members report abuse immediately, and that they not reveal any information related to a sexual abuse report to anyone other than those who need to know. In particular, we support Juvenile Standard OR-1’s enhanced responsibilities to inform the juvenile court, the victim’s parents or legal guardians, and/or the victim’s caseworker, and we agree with the flexibility not to inform parents or legal guardians when the situation warrants that response (e.g., when parental rights have been terminated or when reporting to the victim’s family may place the victim in danger or otherwise interfere with treatment). We also support the exhaustion provisions outlined in Standard RE-2, which will improve youths’ opportunity to seek legal relief for sexual abuse and misconduct within the unfortunate constraints of the exhaustion requirements of the Prison Litigation Reform Act of 1996 (PLRA).

- **Investigations (IN)** and **Discipline (DI)** standards will ensure that all allegations of abuse, including third-party and anonymous reports, will be fully investigated, and that substantiated allegations will be properly handled. We applaud these requirements, as failing to investigate allegations sends a message that reporting is not worth the risk of retaliation, particularly when there are no consequences for the abuser. We also commend NPREC for recognizing that intervention decisions for residents who engage in sexual abuse must take into account the social, sexual, emotional, and cognitive development of the resident and his or her mental health status. (Juvenile Standard DI-2).
• **Medical and Mental Health Care (MM)** standards recognize the critical role that medical and mental health staff play in identifying a resident’s risk for victimization (MM-1). We support the provisions protecting residents from inappropriate financial burdens by ensuring that access to emergency and treatment services are available free of charge (MM-2), and requiring a proper level of responsive services for victims that matches the level of care one would receive in the community (MM-3).

• **Data Collection and Review (DC) and Audits (AU)** standards properly require agencies to collect data and use both incident-based and aggregate data to improve the effectiveness of prevention, detection, and response policies, practices, and training. These basic quality assurance practices help agencies learn from past problems and prevent them in the future. In addition, Standard AU-1 will strengthen the independent oversight of facilities and ensure transparency.

We understand that some corrections officials have challenged specific NPRec standards regarding the issues below. We offer our thoughts on these issues as they relate to the needs of children:

• **Direct Supervision:** In any facility in which youth are held, they need appropriate supervision. The recommended Standard PP-3 merely requires the “supervision necessary to protect residents from sexual abuse.” Responsible, professional adults trained in the behaviors and developmental needs of the adolescent population should be supervising young residents in correctional settings. This protection is best accomplished through continuous, direct supervision, as staff are more likely to identify signs of developing problems among youth when they interact with them regularly. Accordingly, we encourage the Department to strengthen Standard PP-3 to require direct, continuous supervision of youth. In addition, we understand that there has been concern among the correctional community about the standards’ encouraged use of surveillance technology. We strongly believe that cameras are not sufficient substitutes for direct supervision, and that facilities must be careful not to become dependent on technology that separates youth and staff. The recommended standards neither require, nor should they encourage, an overreliance on video surveillance. Standard PP-7 (PP-8 for Lockups) asks jurisdictions to supplement their sexual abuse prevention plans with video monitoring and other technology, and to conduct an annual study to determine the need for and feasibility of incorporating new technology. We think this is a balanced approach to the use of video and other technology, acknowledging its potential contributions while deferring to local expertise and analysis. The flexible approach of Standard PP-7 (PP-8 for Lockups) would therefore impose no significant expenses.

• **Cross-Gender Supervision:** We urge you to adopt Standard PP-4 (PP-5 for Lockups). Each of the BJS’ inmate surveys has found that a significant percentage of sexual abuse is perpetrated by staff members of the opposite sex. Rather than limiting cross-gender supervision in any areas in which inmates disrobe or perform bodily functions – which, consistent with international human
rights standards, is the norm in most other western countries – the final recommended standard only prohibits *actually viewing* inmates of the opposite gender who are nude or performing bodily functions. It also minimizes the physical contact that staff have with youth of the opposite gender by restricting cross-gender frisks to emergency situations. These basic privacy measures are especially important for youth, who are still developing physically and emotionally. This is a reasonable compromise and accommodation of the hiring and promotion challenges faced by correctional administrators seeking to provide equal employment opportunities, while still protecting youth from harmful cross-gender viewing and touching. On page 34 we offer additional recommendations to improve this standard further.

- **Exhaustion Provisions**: Standard RE-2 will improve youths’ opportunity to seek legal relief for sexual abuse and misconduct within the unfortunate constraints of the exhaustion requirements of the Prison Litigation Reform Act of 1996 (PLRA). Youth in secure facilities are particularly vulnerable to abuse. However, they are also ill-equipped to navigate complex administrative rules and comply with short deadlines, given that they generally lack meaningful access to counsel and other legal resources while detained or incarcerated. Although we believe that youth should not fall within the scope of the PLRA, we recognize that such changes were beyond the scope of the Commission’s work. The framework outlined in Standard RE-2, when applied in conjunction with the reporting requirements outlined in Standard RE-1, strikes an adequate balance between an agency’s legitimate interest in the opportunity to respond meaningfully to a report of sexual abuse or misconduct and a youth’s interest in securing any legal relief to which he or she is entitled.

- **Oversight**: Without proper oversight, the standards cannot truly fulfill PREA’s mandate. The recent sex abuse scandals in Texas and Indiana, where officials ignored complaints of widespread staff sexual misconduct and/or retaliation, highlight the importance of external scrutiny. Standard AU-1 mandates the essential components of independent oversight in a cost-efficient manner. In addition to providing needed accountability, this outside monitoring can provide a credible, objective assessment of a facility’s safety, identifying problems that may be more readily apparent to an independent auditor than to officials working within a system. Existing oversight entities, such as an inspector general, a protection and advocacy organization, or an ombudsman’s office, could be empowered to conduct these reviews. The costs that may be incurred by the agency, in terms of financial impact as well as safety, will be outweighed by the tremendous benefits this outside assessment can bring. By identifying areas of noncompliance and addressing potential hazards proactively, dangerous practices will be reformed, avoiding potential costs and reducing child sexual abuse.
Part II. Recommendations for Improvements to the Standards

We believe that full implementation of the NPREC standards not only will reduce sexual abuse, but also will help reduce other forms of physical abuse or gang violence that make detention and correctional settings dangerous to staff and residents. Although we strongly support the standards, some important changes are necessary to enhance the standards’ capacity to fulfill the mandate of the Prison Rape Elimination Act and prevent sexual victimization of youth.

After a brief discussion of our rationale for each recommended change, we suggest textual changes to the relevant Standards, with deletions of text struck through and additions of text in bold. Given the consistency of language used across the four sets of standards, coupled with the fact that youth are held in each type of facility or correctional setting, our recommended changes are intended to apply to all sets of standards unless noted otherwise. Finally, we request that the Department make the corresponding adjustments to the checklists and discussion as necessary.

1. Employee, Volunteer, and Contractor Training

We applaud the Commission’s recognition in Standards TR-1 and TR-2 of the importance of training all adults working with youth in facilities about the dynamics of sexual abuse in confinement and residents’ rights to be free from abuse and retaliation from reporting. However, we believe that Standard TR-1 should be tailored more to reflect the particular vulnerabilities of young people and the harms associated with sexual abuse of children.

Specific Recommendations:

TR-1: Employee Training

We encourage the Department to add the following text to the list of topics in Standard TR-1 that must be covered in staff trainings in all facilities that house young people:

1) adolescent development, including what is normal and acceptable behavior of adolescents in the facility, how to distinguish between acceptable adolescent behavior and sexually aggressive and dangerous behaviors, and the ways in which sexual victimization can affect healthy development;
2) the prevalence of trauma and abuse histories among the youth population in juvenile/criminal justice facilities, possible behaviors of youth with trauma and abuse histories, and appropriate ways of responding to those behaviors;
3) the most current research on factors that make youth vulnerable to sexual abuse;

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4 We use the term “resident” throughout, even though the terms may vary across the standards.
4) the agency’s zero tolerance policy toward sexual abuse and the employee’s duty to report misconduct, that failure to report will be investigated along with any allegations of sexual abuse, and that staff who failed to report will be disciplined;
5) the age of consent laws and laws related to mandatory reporting in the jurisdiction; and
6) effective and appropriate communication with lesbian, gay, bisexual, transgender (LGBT), and other gender-nonconforming youth.

We acknowledge that the NPREC inserted an appendix with a list of recommended training topics, but we feel that the above topics are too important to be merely discretionary.

2. Screening and Assessment by Medical and Mental Health Practitioners

While we are pleased to see the involvement of medical and mental health providers in screening and response in the standards, we suggest some important adjustments. First, in Standards AP-1 and MM-1, medical and mental health professionals are assigned the responsibility for asking youth about sensitive information such as their sexual orientation and history of victimization. We agree with the choice to have trained professionals ask such sensitive questions, but urge the Department to omit from the list the questioning of youth about their history of engaging in sexual abuse. Asking a health care professional to question a youth about prior offending behavior disrupts the caretaking relationship that health care professionals are seeking to foster with youth. Such information can be gathered without poisoning this important relationship from the first time youth and health care professionals meet. Second, these standards should make clear that if medical and mental health professionals provide the information they gather to staff to use for housing, work, and programming decisions, they must inform youth of those purposes before eliciting information. Such informed consent is important because the use of this information is outside the normal bounds of provider-patient confidentiality.

Specific Recommendations:

**Juvenile Standard AP-1: Obtaining Information about Residents**

This standard should be amended to read:

- “. . . Medical and mental health practitioners are the only staff permitted to talk with residents to gather information about their sexual orientation or gender identity, prior sexual victimization, history of engaging in sexual abuse, mental health status, and mental or physical disabilities. If medical and mental health professionals provide the information that they gather to staff to use for housing, work, and programming decisions, or to outside agencies for the purposes of reporting sexual abuse, they must inform youth of those purposes before eliciting that information. If the facility does not have . . .”
The following should be removed from part (c) of the checklist:

- “medical and mental health practitioners are the only staff permitted to talk with residents to gather information about their . . . history of engaging in sexual abuse . . . .”

The following should be added to the checklist as item (d):

- “Do medical and mental health professionals inform youth that the information they provide may be shared with staff for housing, work, and programming purposes and with outside agencies for the purposes of reporting sexual abuse before engaging in any questioning on these topics if that information is used for those purposes?”

The following language should be added to the end of the discussion accompanying this standard:

- “If medical and mental health professionals share any of the information gathered during this intake process for the purposes of housing, work, or programming decisions, or for the purposes of reporting sexual abuse, they must inform youth that the information may be shared in that manner before engaging in any questioning on these topics. Such informed consent is important because the use of this information is outside the normal bounds of provider-patient confidentiality.”

- In January 2010, the Bureau of Justice Statistics released data on the sexual victimization of youth in the juvenile justice system, estimating that more than 1 in 10 youth in state juvenile facilities and large local facilities were sexually victimized by staff or youth in a 12-month period. The discussion section that accompanies this standard should include information from this study or, at a minimum, a reference to the study.\(^5\)

**Juvenile Standard MM-1: Medical and Mental Health Intake Screenings**

The following language should be removed from the first sentence of this standard:

- “[d]uring medical and mental health reception and intake screenings, qualified medical or mental health practitioners talk with residents to ascertain information regarding the resident’s sexual orientation, gender identity, prior sexual victimization or history of engaging in sexual abuse (whether it occurred in an institutional setting or in the community) . . . .”

The following sentence should be added after the third sentence of this standard:

- “If medical and mental health professionals provide the information that they gather to staff to use for housing, work, and programming decisions, or to outside agencies for the purposes of reporting sexual abuse, they must inform youth of those purposes before eliciting information.”

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The following should be removed from part (a) of the checklist:

- “prior sexual victimization or history of engaging in sexual abuse (whether it occurred in an institutional setting or in the community)”

The following item should be added to the checklist as item (f):

- “Do medical and mental health professionals inform youth that the information they provide may be shared with staff for housing, work, and programming purposes and with outside agencies for the purposes of reporting sexual abuse before engaging in any questioning on these topics if that information is used for those purposes?”

The following language should be removed from the second sentence of the first paragraph of the discussion:

- “Before asking resident questions about prior sexual victimization, engaging in sexual abuse, or the resident’s sexual orientation or gender identity, medical and/or mental health practitioners should inform residents that they are not required to answer sensitive questions if they would prefer not to.”

The following language should be added after the second sentence in the first paragraph of the discussion:

- “If medical and mental health professionals share any of the information gathered during this intake process for the purposes of housing, work or programming decisions, or for the purposes of reporting sexual abuse, they must inform youth that the information may be shared in that manner before engaging in any questioning on these topics. Such informed consent is important because the use of this information is outside the normal bounds of provider-patient confidentiality.”

The last sentence of the first paragraph of the discussion should be amended to read:

- “Similarly, mental health practitioners should exercise their professional judgment to determine whether a resident who discloses prior sexually abusive behavior without being prompted by a question about such behavior, regardless of when it occurred, requires treatment such as counseling or other therapeutic interventions.”

The following language should be removed from the third sentence in the fourth paragraph of the discussion:

- “[b]y having medical or mental health care practitioners ask questions about sexual orientation, gender identity, prior sexual victimization, history of abusiveness, . . .”
3. Quality Assurance of Medical and Mental Health Care

Medical and mental health programs generally engage in quality assurance activities. Whether in the MM standards or the DC standards, we believe that the standards should require facility-based health care programs to include compliance with these standards in their quality assurance activities. Requiring quality improvement programs would help jurisdictions build the capacity necessary to comply with the standards.

Specific Recommendations:

DC-3: Data Review for Corrective Action

- The following statement should be added to this standard after the second sentence: “Medical and mental health providers must include compliance with the standards as part of their quality assurance activities, and the annual report should include data from those quality assurance activities.”

- The following item should be added to the checklist of this standard following item (d): “Do medical and mental health providers include compliance with the standards as part of their quality assurance activities?”

- The following sentences should be added to the discussion of this standard: “Additionally, because medical and mental health programs generally engage in quality assurance activities, these standards require that facility-based health care programs include compliance with the standards as an explicit component of their quality assurance activities. Information on quality assurance activities that relate to compliance with the standards should also be included in the annual report.”

MM-1: Medical and Mental Health Intake Screenings

- The following language should be added as an independent paragraph at the end of the discussion: “If the agency does not already have a quality improvement program for medical and mental health services, it should take steps to implement a structured quality improvement program to assess its delivery of medical and mental health care services to sexual abuse victims and subsequently introduce strategies for improvement where weaknesses are identified.”

4. Emergency and Ongoing Medical and Mental Health Care

While standards MM-2 and MM-3 recognize the importance of providing emergency and ongoing medical and mental health services to youth victims of sexual abuse, they fail to provide clear guidance to facilities regarding access to prophylactic HIV treatment and emergency contraception as well as options that must be available to a girl who has had a positive pregnancy test after abuse.
Standard MM-2 fails to require facilities to provide victims of sexual abuse the option of medical care that can help prevent HIV infection or pregnancy. The standard should specifically require that facilities inform youth who become abuse victims about all of the options available to help prevent HIV infection after abuse and offer all youth prophylactic treatment for HIV at the time of their first medical examinations, if medically indicated. In addition, this standard should make clear that a girl who accesses medical care within five days of vaginal rape must be given information about and access to emergency contraception medication in order to maximize her ability to prevent pregnancy should she wish to do so. We urge the Department to include provisions that would require immediate access to unbiased and complete information regarding emergency HIV and pregnancy prevention options.

In the event that a girl becomes pregnant due to sexual abuse, standard MM-3 does not ensure that she will have access to the pregnancy-related services she needs. This standard should include explicit mandatory requirements that pregnant girls receive unbiased, accurate information about all of their options, including abortion and continuing the pregnancy, and that they receive the full range of material support they would need in order to follow through with their decisions. A girl who has become pregnant after being sexually assaulted by a staff member should never be forced to carry that staff member’s child if she does not want to. Counseling should also be required to include truthful and unbiased information about abortion, including information about the law regarding minors and abortion in that state, procedures and abortion providers, and options for transportation and funding.

**Specific Recommendations:**

**MM-2: Access to Emergency Medical and Mental Health Services**

- The following sentence should be added after the first sentence of this standard: “This includes access to prophylactic treatment for HIV and emergency contraception when such treatment is deemed by medical practitioners to be medically indicated and is lawful in the community.”

- The following should be added as the last paragraph of the discussion of this standard: “Facilities must inform youth abuse victims about all of the options available to help prevent HIV infection after abuse and offer all youth prophylactic treatment for HIV at the time of their first medical examinations, if medically indicated. In addition, a girl who accesses medical care within five days of vaginal rape must be given information about and access to emergency contraception medication in order to maximize her ability to prevent pregnancy should she wish to do so.”

**MM-3: Ongoing Medical and Mental Health Care for Sexual Abuse Victims and Abusers**

- The following should be added after the third sentence of this standard: “Victims who become pregnant as the result of sexual abuse must receive unbiased, accurate information about all of their options, including abortion and continuing the pregnancy, and must receive the full range of material support they would need in order to follow through with their decision on how to proceed.”
• The last sentence of the third paragraph of the discussion of this standard should read: “Victims who have positive tests should receive counseling and have access to all pregnancy-related medical services that are lawful in the community.”

• The following sentences should be added at the end of the third paragraph of the discussion of this standard: “Counseling must include information and the opportunity to discuss all pregnancy outcome options. This includes truthful and unbiased information about abortion, the law regarding minors and abortion in that state, procedures and abortion providers, and options for transportation and funding. Counseling must include information to help her determine if she wishes to continue the pregnancy, such as what would happen after childbirth, whether she has the option to keep her child with her for a period of time after birth, the feasibility of raising a child given the length and circumstances of her confinement, and what arrangements can be made regarding placement with relatives, foster care, or adoption.”

5. Assessment and Placement of Residents

Although Juvenile Standard AP-2 calls for all placement decisions to be made on an “individualized basis with the goal of keeping all residents safe and free from sexual abuse,” we believe the juvenile standards do not provide sufficient guidance on how to do this. Additional information should be included in AP-1 to help facilities better identify youth who are vulnerable to sexual abuse, and AP-2 should be amended to ensure appropriate placement for youth identified in the screening process as vulnerable because they are lesbian, gay, bisexual, or transgender (LGBT) or perceived to be or are detained on a status offense. Changes are needed in the following five areas:

First, we believe that the Commission’s recommendation in its report that facilities “encourage all residents during intake to tell staff if they fear being abused” should be explicitly included in Juvenile Standard AP-1. Knowing this information will help facilities to better identify vulnerable youth, develop an appropriate safety plan, and protect youth who fear for their safety before they are actually abused. This is especially important because there are no validated instruments to screen for a youth’s vulnerability to sexual abuse, so a youth’s assessment of his or her own vulnerability is particularly important to consider.

Second, although at this time there are no comprehensive studies identifying the characteristics of youth who are at greatest risk of being victimized in juvenile facilities, the Commission has identified some characteristics, including being LGBT, that may be associated with higher vulnerability to sexual abuse. A recent BJS study of sexual victimization reported by youth, released after the publication of the standards, highlights this heightened vulnerability for LGBT youth. The BJS survey found that more than one in five non-heterosexual youth reported sexual victimization involving another youth or facility

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staff. And non-heterosexual youth were almost ten times as likely as heterosexual youth to have reported abuse by other residents while in custody (12.5 percent vs. 1.3 percent). While the BJS survey did not ask about gender identity, the Commission found that transgender girls are particularly vulnerable to abuse, especially when housed with boys. This danger is starkly illustrated by the testimony before the Commission of Cyryna Pasion, a transgender girl, who, after being transferred from the girls’ unit to a boys’ unit at the Hawaii Youth Correctional Facility, was sexually harassed, abused, and threatened with rape on an almost daily basis. Yet unlike Standard SC-1 for Adult Prisons and Jails, Juvenile Standard AP-1 does not include transgender or intersex status or gender nonconformance as a required factor for screening. In addition, a fall 2009 report by The Equity Project found that professionals throughout the juvenile justice system routinely stereotype LGBT youth as sexual predators, rather than as youth who are vulnerable to sexual abuse (see Appendix A). We recommend that, as in the adult standards, Juvenile Standard AP-1 clearly provide that sexual orientation, gender identity, and gender nonconformance are indicators for risk of victimization.

Third, in order to ensure that employees gather the information necessary to make informed decisions about placement at intake, Standard AP-1 should emphasize the need for and the benefit of consistent criteria in the intake screening process. Facilities should adopt intake assessment policies that are followed by all intake staff, so that a youth’s safety in housing, work, and educational programming is not determined by which staff member completes the intake assessment process.

Fourth, the Commission rightly recognized that juvenile status offenders “are particularly vulnerable to abuse or coercion by more experienced, sophisticated, and violent residents.” Standard AP-2 should make clear that individuals who are placed in a facility because of status offenses, or a violation of a court order where the underlying offense is a status offense, should be housed separately from other residents.

Fifth, to ensure individualized determinations for LGBT youth, Standard AP-2 should explicitly prohibit housing, bed, and other assignments based solely on sexual orientation, gender identity, birth gender, or genital status. Unfortunately, many juvenile facilities have segregated or isolated LGBT youth for their own protection, presumably because it is easier for the facility to keep LGBT youth in isolation than it would be to address the sexual violence that these youth face in the general population. In addition to the harm resulting from the use of isolation discussed below, this practice essentially punishes LGBT youth because they may be victimized by others and denies them access to the same privileges and programs as other residents. This placement prohibition is included in the adult standards and is as

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8 Id. Twelve percent of the youth in the study reported a sexual orientation other than heterosexual. Id.
10 Elimination of Prison Rape: Focus on Juveniles, Hearing Before the National Prison Rape Elimination Commission (June 1, 2006) (testimony of Cyryna Pasion).
necessary, if not more necessary, in the juvenile context to ensure that LGBT youth and other gender-nonconforming residents are not placed in segregated units, in isolation, or, worse, in sex offender units as sometimes occurs. Because inappropriate placement of transgender girls greatly increases their risk of victimization, AP-2 also should explicitly require that facilities make an individualized determination as to whether a transgender resident will be housed in a boys’ or girls’ facility.

Specific Recommendations:

Juvenile Standard AP-1: Obtaining Information about Residents

• The second sentence of this standard should be amended to read: “At a minimum, employees attempt to ascertain information about . . . sexual orientation, transgender or intersex status, or gender nonconformance; current charges and offense history; age; level of emotional and cognitive development; physical size/stature; mental illness or mental disabilities; intellectual/developmental disabilities; physical disabilities; the resident’s own perception of vulnerability; and any other specific information . . . .”

• The following sentence should be added at the end of the standard: “Facilities should adopt consistent criteria for screening residents at intake.”

• The following should be added to the checklist of this standard as item (e): “Do staff use consistent criteria when gathering information about residents during the intake process?”

• The discussion of this standard should include the following statement after the first sentence of the first paragraph: “In order to ensure that for each resident employees gather all relevant information outlined in this standard during the intake process, facilities should adopt consistent criteria for screening residents.”

Juvenile Standard AP-2: Placement of Residents

• The following sentence should be included after the second sentence of the standard: “Lesbian, gay, bisexual, transgender, or other gender-nonconforming residents are not placed in particular housing, bed, or other assignments solely on the basis of their sexual orientation, genital status, birth gender, or gender identity. The facility makes individualized determinations about whether a transgender resident will be housed in a boys’ or girls’ setting.”

• The following sentence should be added to the end of the last paragraph of the discussion of this standard: “Because transgender girls are at much greater risk of sexual abuse when housed with male residents, facility staff should seriously consider whether placement in a girls unit is most appropriate, taking into account the specific needs and vulnerabilities of the individual transgender resident.”
• The following sentence should be added at the end of the standard: “Residents who are placed in a facility because of status offenses, or a violation of a court order where the underlying offense is a status offense, should be housed separately from other residents.”

• The discussion of this standard should clearly reference the statutory language of the Deinstitutionalization of Status Offenders (DSO) requirement [42 U.S.C. 5633(a)(11) and (a)(23)] and additional rules, regulations, and guidance from the Office of Juvenile Justice and Delinquency Prevention related to the requirement (see Appendices B and C).

6. Non-Abusive Sexual Activity between Residents

Because the majority of residents in juvenile facilities are minors, we urge the Department to specify in the juvenile standards the limited circumstances under which juvenile facilities can treat voluntary sexual contact between residents as abuse.

First, the juvenile standards should clarify that consensual sexual contact between residents who are able to consent should not be treated as sexual abuse. Congress only intended PREA to address sexually abusive behavior and not consensual sexual contact between residents. Many residents of juvenile facilities are old enough to consent to sexual activity with other similarly aged youth. In most states the age of consent is 16, and in more than half the states, minors 14 or older can consent to sexual contact with others who are close to them in age. In addition, some juvenile facilities house youth as old as 25. We urge the Department to distinguish clearly between sexual abuse, which should always fall under the purview of these standards, and consensual sexual activities between residents, which a facility may prohibit but should not treat as sexual abuse. This statement would help to distinguish between the serious harms and trauma of sexual abuse that PREA is intended to prevent and a facility’s interest in preventing sexual activity between residents. It would also ensure that facilities do not further penalize and pathologize same-sex sexual activity.

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13 “Voluntary sexual contact” does not include sexual contact between residents involving force; threat of force; pressure or coercion; offers of money, favors, special protection, or special treatment; or that for some other reason is unwilling.

14 While some facilities may prefer to treat all sexual conduct as sexual abuse so that facility staff do not have to discern whether or not sexual conduct between residents was abusive, this concern is misplaced. The Standards require facility staff to report any suspicion of sexual abuse, leaving it to trained investigators to determine whether the conduct constituted sexual abuse for purposes of the PREA-mandated responses.

15 According to the U.S. Department of Health and Human Services, in 2008 there were only three states where the age of consent for sexual activity was 18, two states where it was 17, and ten states where it was 16. In these 15 states, minors younger than the age of consent can never legally consent to sexual activity. In the remaining 35 states and the District of Columbia, minors younger than the state’s age of consent can consent to sexual activity with similarly-aged peers depending on the age and relative age of the parties. In six of these states, minors have to be at least 15 years of age in order to consent to sexual activity with similarly aged youth. In the remaining 29 states and the District of Columbia, the minimum age of consent to sexual activity with a similarly-aged peer varies from 10 to 14 years of age. In addition, the age difference allowed between peers varies greatly by state, with some states only allowing for under-age minors to consent when there is a two year age gap between the parties while other states allow for up to a ten year age gap. See U.S. Department of Health and Human Services, State Laws on Age Requirements and Sex (last revised August 6, 2008), available at http://www.4parents.gov/sexrisky/teen_sex/statelaws_chart/statelaws_chart.html.
We also urge the Department to include language in the standards that will further clarify what activities do not fall under the definition of sexual abuse. Facilities sometimes use rules prohibiting physical and sexual affection between residents by characterizing all touching or physical contact as sexual (e.g., hand holding, hugging, and braiding hair). We recommend that Standard DI-2 should explicitly state that residents should never be disciplined for consensual affectionate acts with one another and the Department should make clear that LGBT youth should not be subject to discriminatory discipline for consensual affectionate acts because they are LGBT. To punish and stigmatize LGBT residents, whom staff may assume are engaging in sexual conduct with other residents based solely on their gender identity or sexual orientation, makes it harder for LGBT residents to report actual sexual abuse because they may fear that staff members will punish them.

**Specific Recommendation:**

**Juvenile Glossary: Resident-on-Resident Sexual Abuse**

- The definition of *resident-on-resident sexual abuse* in the juvenile standards should be amended to read: “Encompasses all incidents of resident-on-resident sexually abusive contact and resident-on-resident sexually abusive penetration. **Consensual sexual contact or penetration between residents who can legally consent to such activity is not sexual abuse.**”

Second, the definition of resident-on-resident sexually abusive penetration requires all facilities to treat any sexual penetration between residents as sexual abuse, regardless of whether the activity is voluntary and the residents involved are legally able to consent. This definition conflicts with PREA’s purpose. It also would undermine the effectiveness of the standards, as facilities would have to use their limited resources to investigate and file reports for sexual activity that would not be considered sexual abuse in any other setting. Defining sexual abuse in this way would require these institutions to treat all residents involved in substantiated reports of non-abusive sexual penetration the same as they treat residents found to be perpetrators of actual sexual abuse. In addition to the tangible negative consequences these youth would face, inappropriately labeling them as sexual abusers for engaging in consensual sexual activity would cause them lasting emotional harm. The brunt of those harms would fall disproportionately on LGBT youth. The Adult, Lockup, and Community Corrections Standards define sexually abusive penetration to include only *nonconsensual* sexual penetration and penetration involving an inmate who is unable to consent or refuse. We strongly urge the Department to use the same definition for the juvenile standards.

**Specific Recommendation:**

**Juvenile Glossary: Resident-on-Resident Sexually Abusive Penetration**

- The definition of *resident-on-resident sexually abusive penetration* in the juvenile standards should read: “**Penetration by a resident of another resident without the latter’s consent, or of
a resident who is coerced into sexually abusive penetration by threats of violence, or a resident who is unable to consent or refuse. The sexual acts included are . . .”

Third, the inclusion of the words “who is unable to consent or refuse” in the definition of resident-on-resident sexually abusive contact requires juvenile facilities to treat some voluntary sexual activity between residents as sexual abuse based on the age or relative ages of the youth involved. Because the standards do not provide any guidance regarding how to handle these incidents, we are concerned that LGBT youth will be targeted for harsh sanctions and even prosecutions for voluntary sexual contact with similarly aged residents. A report by the Bureau of Justice Statistics found that 35 percent of all substantiated incidents of sexual violence between residents in juvenile facilities in 2005-06 were voluntary sexual contacts. The findings of this report indicate that youth designated as perpetrators of these voluntary sexual contacts often received harsher sanctions than those found to be perpetrators of abusive sexual contacts. For example, “perpetrators” of voluntary sexual contact were more than twice as likely to be placed in solitary confinement (25 percent) or be referred for prosecution (27 percent), compared to perpetrators of abusive sexual contact (12 percent and 13 percent respectively). Facilities need additional guidance to prevent them from misapplying the standards in cases of voluntary sexual contact between similarly aged youth.

We urge the Department to specify that the standards do not trump states’ age of consent laws. Standard OR-1 should be amended so that it does not expand facilities’ mandatory reporting requirements beyond the state’s definition of child abuse, since one-third of states do not consider statutory rape between youth to be child abuse. In the majority of the remaining states, there are only limited circumstances, such as very young age (e.g., under age 12) or large gap in age between the parties, when mandated reporters are required to report statutory rape not involving a person responsible for the care of the minor. While in many states staff may not be mandated to report all incidents of resident-on-resident sexual abuse, staff members in every state are mandated to report all allegations or suspicions of staff-on-resident sexual abuse.

In addition, Standard DI-2 should discourage the use of harsh sanctions to punish similarly aged youth who engage in voluntary, but legally non-consensual, sexual contact. Specifically, facilities should not treat these youth as sexually aggressive, violent, or deviant, or attempt to change their sexual orientation. In addition, interventions for “victims” and “perpetrators” of voluntary sexual contact should not be more punitive than those for sexual contact that is forced, aggressive, or violent. As noted earlier, we urge the Department to require that facilities provide training on these topics.

17 Id. at 11.
19 See id. at 11.
Specific Recommendations:

**Juvenile Standard OR-1: Staff and Facility Head Reporting Duties**

- The following sentences should be added after the third sentence of this standard: “Staff and medical and mental health practitioners should be familiar with the age of consent laws in their states and understand that voluntary sexual contact between residents who can legally consent to engage in such contact is not sexual abuse and should not be reported as child abuse. Similarly, staff and medical and mental health practitioners also need to understand the scope of their states’ mandatory reporting laws and whether or not voluntary sexual activity between close-in-age residents who cannot legally consent is considered child abuse and must be reported to the proper agency.”

**Juvenile Standard DI-2: Interventions for Residents Who Engage in Sexual Abuse**

- The following sentence should be added after the last sentence of this standard: “In cases of resident-on-resident sexual abuse involving similarly aged youth engaging in voluntary, though legally non-consensual sexual contact, facilities must take into account the voluntary nature of this conduct when determining interventions.”

- Add this to the discussion of the standard: “It is important that facilities do not mischaracterize physical contact or touching between residents as sexual. Residents should not be disciplined for having non-sexual affectionate physical contact with other residents, such as holding hands, hugging, or doing each other’s hair. This type of physical affection is healthy adolescent expression. LGBT youth should not be prohibited from these activities because of their sexual orientation or gender identity.”

**TR-4: Specialized Training: Investigations**

- Investigators will have the responsibility in some cases of determining whether an act between two residents represents sexual abuse or merely prohibited consensual activity. Investigators should also be trained in: “the age of consent applicable in the jurisdiction where the facility is located and how to distinguish between acceptable adolescent behavior and sexually aggressive and dangerous behaviors.”

**7. Isolation**

Under the NPREC standards, facilities may isolate youth in their efforts to eliminate sexual abuse and violence. However, the standards should not permit jurisdictions to expand the use of isolation, thus relying on one dangerous practice when working to eliminate another. We recommend two sets of modifications to prevent such a response.
First, the standards must do more to highlight the dangers associated with isolation and clarify a facility’s responsibility to keep children safe without resorting to that practice. Recent research captures the serious dangers associated with isolation: a February 2009 report from the Office of Juvenile Justice and Delinquency Prevention described a “strong relationship between juvenile suicide and room confinement,” since approximately half the suicide victims were on room confinement status at the time of death and died during waking hours (6 a.m. to 9 p.m.)\(^{20}\) and a review of social science research on the topic characterized isolation as “harmful.”\(^{21}\) Additionally, the American Psychiatric Association has stated that “[c]hildren should not be subjected to isolation, which is a form of punishment that is likely to produce lasting psychiatric symptoms.”\(^{22}\) However, the current standard on resident placement in juvenile facilities (AP-2) does not explicitly mention those dangers, nor does it stress alternative ways of protecting youth who may be particularly vulnerable to victimization. Instead, the standard permits facilities to use isolation to protect youth, albeit as a last resort. This language may permit facilities to adopt blanket policies to manage certain vulnerable populations, such as LGBT youth, through the use of isolation. The standards need to be clear that facilities cannot rely on isolation to protect youth who are vulnerable to victimization and abuse. We encourage the Department to include a much clearer statement that the use of isolation endangers youth through an increased risk of suicide, and that facilities must identify ways of meeting their constitutional obligation to protect the youth in their care without resorting to that practice.

Second, the standards should bar the use of extended periods of isolation as punishment for residents who engage in sexual abuse, given the dangers that are associated with the practice. The discussion that accompanies Juvenile Standard DI-2 (Interventions for Residents Who Engage in Sexual Abuse) recognizes that “isolation as a disciplinary sanction is harmful for all residents, especially residents with mental illness.” Yet the standard itself does not include language prohibiting that practice, and the discussion only “strongly discourage[s]” the use of extended isolation as a form of punishment. To be sure, isolation can and does have a legitimate, short-term purpose in juvenile facilities: as a last resort in managing an imminent threat to the physical safety of youth and/or staff. However, the standard should not expand isolation beyond that limited role, and should explicitly state that “no resident should be subject to prolonged disciplinary isolation.”

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Specific Recommendations:

Juvenile Standard AP-2: Placement of Residents in Housing, Bed, Program, Education, and Work Assignments

• The final sentence of this standard should read as follows: “Facilities should not rely on the use of isolation to keep youth safe. Facilities must identify ways of protecting youth in their care from harm without resorting to the use of isolation.”

• Checklist item (c) of this standard should be modified to read as follows: “Have facilities identified ways to protect youth in their care from harm without resorting to the use of isolation?”

• The last paragraph of the discussion of this standard should include the following language: “The use of isolation itself poses dangers to youth, including an increased risk of suicide, the potential to aggravate existing mental health conditions, and the likelihood of producing lasting psychiatric symptoms.”

Juvenile Standard DI-2: Interventions for Residents Who Engage in Sexual Abuse

• The standard should include the following language before the final sentence: “No resident should be subject to prolonged disciplinary isolation as punishment for engaging in resident-on-resident sexual abuse.”

• The last sentence in the second paragraph of the discussion of this standard should read as follows: “As such, disciplining a resident with prolonged periods of isolation is potentially dangerous to the resident and is prohibited by these standards.”

8. Youth in Adult Facilities

Adult facilities holding children face a dangerous dilemma – they must choose between housing youth in the general adult population where they are at substantial risk of sexual abuse, or housing youth in segregated settings in which isolation can cause or exacerbate mental health problems. Although the Commission sought to protect vulnerable populations within adult facilities, we believe the adult standards do not go far enough to address the specific hazards associated with housing youth 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.” In addition, “[b]ecause of the extreme risk of sexual victimization for youth in adult facilities, the Commission urges that individuals

under the age of 18 be held separately from the general population.”

Despite the acknowledgment that youth in adult facilities are at the highest risk, no standard within the adult standards specifically requires the separation of youth from adults, and the standards themselves fail to address the increased risk of harm that youth face in adult facilities.

Research shows that youth are not safe in adult facilities. According to BJS statistics, youth under the age of 18 represented 21 percent of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005, and 13 percent in 2006 – surprisingly high since only one percent of jail inmates are juveniles.

The situation for youth held in adult prisons is no less dire; Deborah LaBelle, an attorney working with over 400 youth serving sentences of life without possibility of parole testified before the Commission that 80 percent of those youth had been sexually assaulted within the first year of their incarceration. Many additional examples of sexual abuse against youth in adult facilities were brought to light at public hearings of the Commission, including the stories of T.J. Parsell, a 17-year-old boy raped within 24 hours after entering an adult prison; Rodney Hulin, a 16-year-old boy who was raped almost immediately after entering an adult prison and committed suicide after being in the facility for three months; and Chino Hardin, a youth who testified about her experiences of sexual abuse when incarcerated at 15 years of age in an adult women’s prison.

Too many children incarcerated in jails and prisons across the United States are currently at risk, and will continue to be at risk of sexual abuse or suicide, unless the standards are strengthened. An estimated 200,000 youth are tried, sentenced, or incarcerated as adults every year. Most of these youth are charged with non-violent offenses.

Unfortunately, the dangers that youth face in adult facilities result in some

24 Id. at 19.
25 The discussion to Adult Standard SC-2 notes: “If an agency is responsible for the confinement of individuals under the age of 18, a strong effort should be made to house these individuals separately from the general population. Although young inmates in general may be victimized more often, inmates under the age of 18 are not fully emotionally or physically developed and therefore may be particularly susceptible to abuse if housed with older inmates.”
29 Linda Bruntymer, Testimony before the National Prison Rape Elimination Commission, The Cost of Victimization: Why Our Nation Must Confront Prison Rape (June 14, 2005); see also Human Rights Watch, No Escape 61 (2001).
30 Chino Hardin, Testimony before the National Prison Rape Elimination Commission, Elimination of Prison Rape: Focus on Juveniles 4 (June 1, 2005).
31 Jennifer L. Woolard et al., Juveniles within Adult Correctional Settings: Legal Pathways and Developmental Considerations, 4 Int’l J. Forensic Mental Health 18 (2005); Coalition for Juvenile Justice, Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Criminal Court (2005).
32 Campaign for Youth Justice, The Consequences Aren’t Minor: The Impact of Trying Youth as Adults and Strategies for Reform (Mar. 2007).
33 Campaign for Youth Justice, Jailing Juveniles (Nov. 2007); Heather C. West et al., Bureau of Justice Statistics, Prison Inmates at Midyear 2008 (Mar. 2009).
youth never making it out of these facilities – youth are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.\textsuperscript{34} Research shows that for youth held in adult jails, as many as one-half of these youth will be sent back to the juvenile justice system or not be convicted. Most of these youth will have spent \textit{at least one month} in an adult jail and one in five of these youth will have spent \textit{over six months} in an adult jail.\textsuperscript{35} The majority of youth held in adult prisons are also likely to be released in early adulthood. A recent OJJDP report noted that 78 percent of youth convicted as adults were released from prison before their 21st birthday, and 95 percent were released before their 25th birthday.\textsuperscript{36} There is no justification for subjecting these youth to the dangers of adult facilities when they could be housed in more appropriate juvenile facilities.

Not only does confining youth with an adult and more experienced criminal population create major safety concerns for youth, but studies also show that this practice has no deterrent value and has failed to improve public safety. For example, recent literature reviews by both the Centers for Disease Control and Prevention (CDC) Task Force on Community Preventive Services and the Office of Juvenile Justice and Delinquency Prevention found that trying youth as adults is harmful to public safety; juveniles transferred from the juvenile court system to the criminal system are approximately 34 percent more likely than youth retained in the juvenile court system to be rearrested for violent or other crimes.\textsuperscript{37}

In light of the evidence that youth cannot be kept safe in adult facilities and the research demonstrating that keeping youth in adult facilities is harmful to the youth and to public safety, we recommend that the U.S. Department of Justice make three types of modifications to the standards to ensure that youth are fully protected from sexual victimization in adult facilities.

First, the adult standards should be modified to require removal of youth from adult jails and prisons altogether. This change would be consistent with existing laws and policies used by the Federal Bureau of Prisons that prohibit the placement of youth in adult jails and prisons in federal custody. The Federal Juvenile Justice and Delinquency Prevention Act\textsuperscript{38} (not to be confused with the Juvenile Justice and Delinquency Prevention Act\textsuperscript{39} that applies to the States, which is discussed below) specifies the requirements for incarcerating a juvenile who has not attained his or her 18th birthday and any juvenile sentenced under the Federal Act as a juvenile delinquent. Title 18 U.S.C. § 5039 states:

\begin{quote}
"No juvenile committed ... to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges."
\end{quote}

\textsuperscript{35} Campaign for Youth Justice, \textit{Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America} (Nov. 2007).
\textsuperscript{38} 18 U.S.C. §§ 5031 through 5042.
\textsuperscript{39} 42 U.S.C. §§ 5601 through 5681.
Federal Bureau of Prisons Program Statement 5216.05 provides additional procedures required for handling youth under the age of 18: “A juvenile who has not attained his or her 18th birthday is to be placed in a juvenile facility which has an appropriate level of programming and security.”

Removing youth from adult facilities is a recommendation with strong support from diverse organizations ranging from the American Public Health Association to the National Association of County Officials (NACo). Appendix D includes a compilation of policy statements from eighteen national organizations demonstrating the need to keep youth out of adult facilities or, at a minimum, separated from other adults. Adult and juvenile correctional professionals including the Association of State Correctional Administrators, American Correctional Association, Council of Juvenile Correctional Administrators, American Jail Association, and the National Juvenile Detention Association, all have long-standing policies demonstrating their endorsement of keeping children out of adult facilities.

Specific Recommendations:

The best way to modify the adult standards to incorporate this prohibition would involve making either of the following changes:

• **PP-2: Contracting with Facilities for the Confinement of Residents:** Add an additional requirement to PP-2 that adult correctional agencies contract with facilities run by juvenile justice agencies to house their youth populations. Suggested language for the modified standard is: “The public correctional agency contracts with other juvenile facilities with appropriate levels of programming and security to house individuals under the age of 18.” The discussion of this standard should clearly reference the statutory language of the Federal Juvenile Justice and Delinquency Prevention Act (18 U.S.C. 5039) and related policies of the Federal Bureau of Prisons. In addition, the discussion of this standard should clearly reference the statutory language and related guidance of the Juvenile Justice and Delinquency Prevention Act as discussed below.

• Create a new standard requiring the removal of youth from adult facilities. Suggested language for the new standard is: "No youth under the age of 18 may be placed or retained in an adult jail or other adult correctional institution in which he or she has contact with other adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges." The discussion for a new standard should also reference the applicable legal requirements of both the Federal Juvenile Justice and Delinquency Prevention Act and the Juvenile Justice and Delinquency Prevention Act that applies to the States.

Second, we recommend that the standards explicitly reference the existing legal requirements of the Juvenile Justice and Delinquency Prevention Act (JJDPA) that are attached in Appendices B and C. Although we believe that youth should be removed from adult jails and prisons, as a practical matter youth may need to be held in adult jails temporarily until transport to a juvenile facility can take place.

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40 Federal Bureau of Prison Program Statement 5216.05.
41 42 U.S.C. §§ 5601 through 5681.
In contrast, there is no justification to allow youth to be held in adult prisons. The Juvenile Justice and Delinquency Prevention Act of 1974 (the act that applies to the States) has two core protections that help protect youth housed in adult jails. The “jail removal” core protection currently protects youth who are under the jurisdiction of the juvenile justice system by prohibiting these youth from being held in adult jails and lockups except in very limited circumstances. In these limited circumstances, the “sight and sound” core protection limits the contact these youth have with adult inmates. While these core protections have worked to keep many children out of adult jails for the past 30 years, the current JJDPA does not apply to youth under the jurisdiction of the adult criminal court. We believe these core protections ought to apply to youth under the jurisdiction of the adult criminal court; the JJDPA is currently due for reauthorization, and legislative proposals currently being considered, such as Senate Bill 678, would extend these core protections to youth in the adult criminal justice system. A recent Department of Justice views letter regarding Senate Bill 678 demonstrates the Department’s support for these legislative proposals as well.\footnote{Letter from Assistant Attorney General Ronald Weich to Senate Judiciary Committee Chairman Patrick J. Leahy (Apr. 15, 2010), available at http://judiciary.senate.gov/resources/documents/111thCongress/upload/041510DOJViewsLetterJJDPA.pdf.} It is uncertain whether the reauthorization of the JJDPA will occur prior to the issuance of final regulations on PREA. Regardless, we believe the standards implementing PREA should prohibit the placement of youth under the age of 18 in adult facilities in order to protect them from sexual victimization and explicitly incorporate the very limited circumstances in existing law that limits when youth can be housed in adult jails.

Specific Recommendation:

- In the discussion sections of the applicable standards in both the Adult and Lockup Standards, additions should be made to clearly reference the prohibition and the specific exceptions to ensure that youth are not housed in adult jails, prisons, or lockups outside of the narrow allowable circumstances mentioned in the JJDPA [42 U.S.C. § 5633(a)(12) and 42 U.S.C. § 5633(a)(13)].

Finally, while children should never be held in adult facilities, to the extent that they are, the child-specific protections in the juvenile facility standards should be incorporated equally into the adult standards.

Specific Recommendations:

There are many ways to modify the adult standards to ensure that the needs of children are fully incorporated, including:

- Directly incorporating all child-specific language from the juvenile standards into the adult standards;
- Drafting a supplemental set of standards, similar to the set of standards designed for facilities with immigration detainees; or
• Creating a new standard which would require that all adult facilities housing youth under the age of 18 maintain compliance with the juvenile standards as well.

9. Limited English Proficient (LEP) Children

Children who do not speak English should receive the same protections and supports under the standards as children who do speak English. Some, but not all, of the current standards do include provisions that address the needs of residents who are limited English proficient (LEP). For example, Standard PP-5 (Accommodating Residents with Special Needs) requires facilities to ensure that LEP residents understand sexual misconduct policies and can directly report abuse or victimization. However, other standards do not explicitly require facilities to ensure that LEP residents are able to communicate with staff during investigation, medical and mental health care, and the provision of other supportive services that might be necessary after a youth is victimized. Standard RP-1 requires that a juvenile facility make a “victim advocate” available to youth during forensic medical exams. This standard recognizes that “the forensic medical exam is an important element of both evidence collection and treatment for recent sexual abuse victims” and that “undergoing this exam for the first time after being sexually abused may feel like a particularly invasive and traumatizing experience.”

We encourage the Department to add language to this standard that would require jurisdictions to ensure that victim advocates and others providing response services to youth are able to communicate with LEP residents at all stages of the process, either through direct communication in the youth’s primary language or through translation.

Standard RP-2 requires that an agency enter, maintain, or attempt to enter agreements with community service providers that are able to (1) provide residents with emotional support services related to sexual abuse and (2) help victims of sexual abuse during their transition from incarceration to the community. This standard should require agencies to maintain or attempt to enter into agreements with community service providers with a language capability for any language that comes up regularly at a facility. Additionally, given the importance of ensuring that residents with limited English proficiency receive the same protections as youth who speak English, we would encourage the Department to use the term “linguistic competence” alongside “cultural competence,” and to include requirements of cultural and linguistic competence in the standards relating to resident education (TR-3), medical and mental health intake screenings and ongoing care (MM-1 and MM-3), and the provision of services to youth victims and their families through a facility’s coordinated response to an incident of sexual abuse (OR-4). As employees need to be able to communicate effectively and professionally with all residents, the standards should require that facilities train employees on how to communicate with residents with limited English proficiency (TR-1).

43 See Standard RP-1 (Evidence Protocol and Forensic Medical Exams).
Specific Recommendations:

Glossary: Cultural and Linguistic Competence

- The term “cultural competence” should be broadened to “cultural and linguistic competence,” or “linguistic competence” should be added to the glossary.

AP-1: Obtaining Information about Residents

- Identifying LEP residents at intake can help ensure that facilities are equipped to meet the needs of those youth early on. The standard, checklist, and discussion should add “level of English proficiency” to the list of key information that should be gathered during an intake assessment.

RP-1: Evidence Protocol and Forensic Medical Exams

- The final sentence of the standard should read: “The facility makes available a victim advocate to accompany the victim through the forensic medical exam process and ensures that the victim advocate can communicate with the resident throughout the investigation, medical and mental health care, and other supportive services that may be necessary after a youth is victimized.”

RP-2: Agreements with Outside Public Entities and Community Service Providers

- The following item should be added to the checklist for this standard: “Does the agency maintain or attempt to enter into agreements with community service providers with a language capability for any language other than English that comes up regularly at a facility?”

RE-3: Resident Access to Outside Support Services and Legal Representation

- The following item should be added to the checklist for this standard: “Does the facility provide the current mailing addresses and telephone numbers, including toll-free hotline numbers, of national victim advocacy or rape crisis organizations with a language capability for any language other than English that comes up regularly at a facility?”

TR-1: Employee Training

- The following should be added to the end of the second sentence in the first paragraph of the discussion of this standard: “and residents with limited English proficiency.”

TR-3: Resident Education

- The last sentence of this standard should be amended to read: “The agency provides culturally competent resident education accessible to all residents, including those who are LEP, deaf, visually impaired, or otherwise disabled as well as inmates who have limited reading skills.”
MM-1: Medical and Mental Health Intake Screenings

- The second sentence of this standard should be modified to read: “Such conversations are conducted in a culturally and linguistically competent manner that the medical or mental health practitioner deems appropriate for each resident in light of the resident’s age and developmental status according to the practitioner’s professional judgment and use inclusive language that avoids implicit assumptions about a young person’s sexual orientation.”

MM-3: Ongoing Medical and Mental Health Care for Sexual Abuse Victims and Abusers

- The last sentence of this standard should be amended to read: “The facility conducts a mental health evaluation of all known abusers and provides culturally and linguistically competent treatment, as deemed necessary by qualified mental health practitioners.”

OR-4: Coordinated Response

- The following should be added at the end of this standard: “Efforts are made to provide culturally and linguistically competent services to youth victims and their families.”

10. Staff Hiring and Qualifications

The current standard on staff hiring and qualifications (PP-6) provides that facilities must “run criminal background checks for all applicants and employees being considered for promotion . . . .” However, it does not include any requirement to conduct regular criminal record checks in between those time points. As written, the standard would permit a staff member who engages in abusive behavior one month after initial employment to continue his or her employment at the facility. Only when that staff member came up for promotion, which could be years in the future or not at all, would the danger to youth be identified. Similarly, under this standard an agency may not “promote anyone who has engaged in sexual abuse in an institutional setting or who has engaged in sexual activity in the community facilitated by force, the threat of force, or coercion.” As written, the standard would bar promotion for a staff member who engaged in sexual abuse; however, it would not clearly bar that person from continuing to work with children in the facility.

The wording in the current standard specifically addresses acts of sexual abuse committed by staff or potential staff. However, the standard does not reference other relevant behavior that may have a strong bearing on a staff member’s ability to prevent and report sexual misconduct, such as a failure to protect youth from harm. Additionally, the standard omits any reference to civil protection orders, which may provide useful information regarding a staff member’s history of or propensity to engage in sexual abuse. This standard should also include language that encourages agencies to make the prevention of sexual abuse and victimization an affirmative goal of their hiring and promotion practices.
Specific Recommendations:

PP-6: Hiring and Promotion Decisions

- The following statement should be added before the first sentence of this standard: “The agency hires, retains, and promotes staff members who are committed to PREA’s goals and are qualified by experience, education, and background to protect children.”

- The following statement should be added after the first sentence of this standard: “Additionally, agencies must remove staff from contact with youth at the facility if such information is uncovered after they have been hired, to the extent permitted by law or collective bargaining agreements.”

- The second sentence of this standard should be modified to include the bolded language below: “Consistent with Federal, State, and local law, the agency makes its best effort to contact all prior institutional employers for information on substantiated allegations of sexual abuse; must run criminal background checks for all applicants and employees being considered for promotion; must conduct annual criminal background checks for current employees; and must examine and carefully weigh any history of criminal activity at work or in the community, including convictions for domestic violence, stalking, child abuse and sex offenses, as well as civil protection orders issued against the applicant, or any other previous conduct that suggests a failure to protect children or a likelihood of failing to protect them, including by sexually abusing them or failing to prevent sexual abuse by others.”

- The checklist of this standard should add the following as a new item following item (c): “Does the agency conduct annual criminal background checks for employees who are not eligible for promotion?”

- The checklist of this standard should add the following two items to the list of relevant behaviors in item (d): “Any civil protection order issued against staff” and “Any other previous conduct suggesting a failure to protect children.”

- The following sentence should be added at the end of the first paragraph of the discussion of this standard: “In order to ensure a safe environment for youth and staff, agencies must remove staff from positions of contact with youth upon learning that an individual has engaged in sexual abuse in an institutional setting or has engaged in sexual activity facilitated by force, the threat of force, or coercion, to the extent permitted by law or collective bargaining agreements.”

- The second paragraph of the discussion of this standard should include the following statement after the first sentence: “Additionally, agencies must conduct annual criminal background checks for current employees who are not eligible for promotion in order to ensure that staff have not engaged in abusive behavior since they were hired.”
11. Cross-Gender Viewing, Searches, and Supervision

As stated above, we strongly support the proposed limitations on cross-gender searches and viewing in Standard PP-4. However, the standard should prohibit one-on-one cross gender supervision and should provide guidance regarding how this standard applies to transgender and intersex residents.

First, we are concerned that the standard does not provide sufficient protection for residents because it does not prohibit one-on-one cross-gender supervision. The recent BJS survey of juvenile facility residents found that more than 95 percent of sexual abuse by staff is perpetrated by staff members of the opposite gender, highlighting the importance of minimizing the opportunities that staff have with residents unsupervised.\(^4^4\) To reduce staff-on-resident sexual abuse, agencies must preclude staff members from being one-on-one with residents of the opposite gender when out of sight of cameras, other staff, or other residents, including during transportation of residents outside the facility.

Second, to adequately address the safety concerns of transgender and intersex residents and protect their privacy and dignity, we strongly urge the Department to include specific guidance on how facilities should apply the restrictions on cross-gender searches and viewing to transgender and intersex residents. At present, transgender girls, in particular, are frequently searched by male staff, notwithstanding having breasts and a feminine appearance. This practice invites abuse. Reports from human rights organizations and testimony before the Commission show that transgender women and girls are frequently targeted for unnecessary and traumatic frisks and strip searches, and that these searches can be excuses for, and precursors to, sexual abuse.\(^4^5\)

Transgender and intersex residents should be asked to specify the gender of staff they feel can most safely search them. This pragmatic approach is currently used by the New York State Office of Children and Family Services in all juvenile facilities, the District of Columbia Police Department, and numerous jurisdictions in Canada and the United Kingdom.\(^4^6\) If there must be a general presumption about who should conduct searches and viewing of transgender and intersex residents, we recommend that these duties be performed by female facility staff, except in the case of emergency.

Searches or examinations of residents for the sole purpose of determining genital status should also be prohibited. Such searches are inherently traumatic for transgender and intersex residents and present a serious potential for abuse, even under the limited circumstances permitted in the Commission’s standards. Juvenile facilities should be conducting thorough medical examinations for every resident as part of the intake process. Any question about a resident’s genital status can be addressed during these


routine medical examinations rather than in the context of an examination with the sole purpose of determining a resident’s genital status.

Specific Recommendations:

PP-4: Limits to Cross-Gender Viewing and Searches

- The second sentence of this standard should be amended to read: “Except in the case of emergency or other extraordinary or unforeseen circumstances, the facility restricts non medical staff from viewing residents of the opposite gender who are nude or performing bodily functions and similarly restricts cross-gender pat-down searches and cross-gender one-on-one supervision of residents, including during transportation of residents outside the facility.”

- The last sentence of this standard should be removed and replaced with the following: “Requests by transgender and intersex residents to be searched by either male or female staff are accommodated whenever possible. Medical examinations or other searches of transgender and intersex residents solely to determine their genital status should not be conducted.”

- The third and fourth sentences of the fifth paragraph of the discussion of this standard should be replaced with the following: “To protect the privacy and dignity of transgender and intersex residents, this standard prohibits medical examinations or searches to determine genital status. Any question about a resident’s genital status is most appropriately addressed during the routine initial medical screening that all residents go through, rather than in the context of an examination with the sole purpose of determining a resident’s genital status.”

12. Miscellaneous

Below are several additional recommendations we believe would help to prevent, detect, respond, and monitor the sexual abuse of children in correctional settings.

INTERVENTIONS FOR RESIDENTS WHO ENGAGE IN SEXUAL CONDUCT WITH STAFF

Findings from the most recent BJS study demonstrate that the overwhelming majority of youth are victimized by facility staff. Of these youth, 4.3 percent reported that they experienced sexual contact as a result of force or coercion, compared to 6.4 percent who reported sexual contact without force or coercion.\footnote{Allen J. Beck et al., Bureau of Justice Statistics, Victimization in Juvenile Facilities Reported by Youth (Jan. 2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf.} In all situations, youth should not be punished for sexual activity with staff members. Even where youth may appear to have consented to sexual activity, they remain under the power and control of staff.
Specific Recommendation:

**DI-2: Interventions for Residents Who Engage in Sexual Abuse**

- The discussion should include the following language: “Residents should never be subject to disciplinary sanctions for sexual activity with staff members. Even in situations where residents appear to have consented to sexual activity, they remain under the power and control of staff.”

**ACCESS TO WRITTEN MATERIALS**

Standard RE-1 requires facilities to “provide multiple internal ways for residents to report easily, privately and securely sexual abuse, retaliation by other residents or staff for reporting sexual abuse, and staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse.” For youth in secure facilities, writing complaints is one of the ways youth can report sexual abuse or victimization. However, given that secure juvenile facilities are highly regulated environments, youth may not have ready access to paper and writing implements. The standards should ensure that youth have access to materials so they are able to report sexual abuse in writing.

Specific Recommendation:

**RE-1: Resident Reporting**

- The checklist of this standard should include the following as a new item following item (b): “Does the facility provide opportunities for residents to have access to the paper and writing implements necessary to register a written complaint?”

- The following statement should be inserted at the end of the second paragraph of the discussion of this standard: “Given that secure facilities are highly regulated environments, facilities must ensure that residents have access to the paper and writing implements necessary to register a written complaint.”
FAMILY MEMBERS AS THIRD-PARTY REPORTERS

Given that youth may confide in family members outside of a secure facility after being sexually abused or victimized, facilities and agencies must provide clear channels through which relatives can relay those reports.

Specific Recommendation:

RE-4: Third-Party Reporting

- The first sentence of this standard should be modified to read as follows: “The facility receives and investigates all third-party reports of sexual abuse, including from family members of youth, and refers all third-party reports of abuse to the designated State or local services agency with the authority to conduct investigations into allegations of sexual abuse involving child victims (IN-1 and RP-4).”

- The following statement should be inserted after the first sentence of the discussion of this standard: “In particular, facilities should ensure that parents and guardians are aware of how to report sexual abuse, given the possibility that youth will confide in family members rather than facility staff.”

CROSS-FACILITY REPORTING

Clarification is needed for reporting requirements when a facility receives an allegation that a resident was abused at a different facility. Someone reading Standard OR-2 might be confused as to whether they are also bound by Standard OR-1, and assume that he had completed his responsibilities by notifying in writing the head of the facility where the alleged abuse occurred. Standard OR-2 should be modified to prevent confusion and ensure that staff complete child abuse reports and other requirements expeditiously even when residents are no longer in the facility where the abuse occurred.

Specific Recommendation:

OR-2: Reporting to Other Confinement Facilities

- The following should be added to the beginning of the first sentence of this standard: “In addition to following the reporting duties outlined in Standard OR-1...”

DEFINITIONS OF THE TERMS TRANSGENDER AND GENDER NONCONFORMING

We strongly support including definitions for “transgender” and “gender nonconforming” in the standards to ensure that these terms are understood by facility staff. We suggest the following revised definitions to help distinguish between the two terms:
Specific Recommendations:

**Glossary: Transgender**

- The definition for “transgender” should be amended to read: “A term describing persons whose gender identity and/or expression do not correspond to the gender roles assigned to them at birth.”

**Glossary: Gender Nonconforming**

- The definition for “gender nonconforming” should be amended to read: “A term describing persons whose gender identity and/or gender expression does not conform to gender stereotypes generally associated with their birth sex, but who do not personally identify as transgender.”
Part III. Response to Questions in the Advance Notice of Proposed Rulemaking

1. What would be the implications of referring to “sexual abuse” as opposed to “rape” in the Department’s consideration of the Commission’s proposed national standards?

We encourage the Department to use the term “sexual abuse” rather than “rape” in promulgating its national standards because the term “sexual abuse” is more commonly understood to encompass the range of victimizing behaviors Congress intended to address in PREA. In order to establish a zero-tolerance culture to prevent prison rape, PREA recognizes that prison systems must address a broad range of sexually abusive acts, which Congress included in its definition of “rape.” However, the term “rape” is commonly understood in accordance with its use in criminal law. The criteria for criminal rape vary by state, but are generally narrowly defined as acts of forcible sexual intercourse. Because this common understanding is not inclusive of all of the sexually abusive acts included in the definition of rape found in PREA, practitioners responsible for implementing PREA might misunderstand the intent of the law and work just on preventing forcible sexual intercourse, rather than the full range of conduct intended to be addressed. As revealed in the statute’s definitions, Congress intended much more comprehensive treatment of this problem than the terms would suggest. The term “sexual abuse” is preferable, as it is more commonly understood to be an umbrella term that includes the broad range of sexually abusive acts covered by PREA.

The Department is not required to use the exact language of a statute when promulgating regulations. Regulations elaborate on the broad language of a statute, which often requires an agency to include more detail in order for the statute to be effectuated. Therefore, the Department’s use of the term “sexual abuse” instead of “rape” is well within its purview; it provides the necessary detail to help juvenile and criminal justice professionals implementing PREA to fully understand its scope and fulfill Congress’ goal.

In addition, in order to carry out Congress’ intent to make prevention of sexual abuse a top priority in every prison system, we believe the Department should adopt the Commission’s comprehensive definition of sexual abuse. The Commission’s definition of sexual abuse adds important elements Congress did not include: staff-on-resident voyeurism, staff-on-resident indecent exposure, and sexual harassment (resident-on-resident and staff-on-resident). These behaviors constitute sexually abusive conduct that is unlawful in most states. In addition, victims of voyeurism, indecent exposure, and sexual harassment can also experience post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental health issues. These outcomes will increase mental health care needs.

48 In addition, many people still believe that rape occurs only when a stranger attacks an adult woman using overwhelming force. Using this definition, boys or men cannot be raped; girls and adolescents cannot be raped; no one can be raped by someone they know; and forced oral or anal sex does not constitute rape.
49 Use of the term “sexual abuse” would also be consistent with the federal criminal definition of sexual abuse. See 18 U.S.C. § 2242.
expenditures both inside and outside of facilities. In addition to having many of the same lasting and serious harms as other types of sexual abuse, voyeurism, indecent exposure, and sexual harassment in detention and correctional settings are known precursors to the types of sexually abusive conduct that are explicitly included in the definition of rape in PREA. Preventing, detecting, and reducing the occurrences of these behaviors will enable officials to better prevent the sexually abusive conduct that Congress explicitly included in its use of the term “rape.”

We urge the Department to adopt the NPREC’s definition of sexual abuse and to use it in its final standards.

2. Would any of the Commission’s proposed standards impose “substantial additional costs”?

The Eighth and the Fourteenth Amendments of the United States Constitution forbid cruel and unusual punishment of incarcerated persons. This includes a responsibility to protect incarcerated individuals from harm during their incarceration. The standards promulgated by the NPREC are an appropriate compilation of the practices that many correctional professionals understand are needed in order to meet that constitutional mandate. Courts have long rejected insufficient funding as an excuse for failing to ensure the Constitutional rights of incarcerated people. Therefore, compliance with the majority of these standards do not impose additional costs because they fulfill the government’s responsibilities under the Constitution or other sources of law. Keeping track of data regarding allegations and substantiated incidents of sexual misconduct, analyzing them, learning from mistakes and conducting periodic audits are all key components to effective quality assurance. Systems need to be able to identify their problems and figure out whether they are implementing strategies effectively in order to truly effectuate the protections imagined by Congress.

Relative to the billions of dollars spent on corrections every year, the costs for implementing these standards, even for the least prepared jurisdiction, will be small. Most facilities housing youth can meet the standards’ requirements through low and no-cost options, such as repurposing staff and incorporating information about sexual abuse into existing training and orientation materials. While there may be some upfront “costs of conversion” as corrections professionals examine their facility layout, staffing patterns, existing training curricula, and modify those aspects of policy and procedure that fail to thoroughly protect against sexual abuse, we anticipate these costs to be minimal, especially when weighed against the human costs of failure to prevent abuse and the potential costs of litigation from resultant harms.

We believe compliance with the standards will prove especially cost-effective with respect to reducing the sexual abuse of children. Research conducted by the National Institute of Justice (NIJ) shows that child sexual abuse is among the most costly crimes against children. In fact, as a nation we already are paying the costs of sexual abuse as the NIJ study estimates that each year child sexual abuse in America
costs the nation $23 billion. Although the direct economic costs associated with sexual abuse of children in correctional environments are not known, all available research indicates that preventing the sexual abuse of children is cost-effective.

Any considerations of the cost of protecting residents from sexual abuse must be understood in light of the dramatic benefits of doing so – for the agency, the individual, and society. For the agency, implementing the standards’ provisions will promote safety and efficiency, resulting in net savings in areas such as investigations, resident health care, and transportation for outside treatment. Moreover, preventing sexual abuse and providing victimized youth with appropriate follow-up care minimizes the likelihood that they will suffer the life-long emotional trauma often experienced by victims of sexual abuse.

We hope that any cost analysis completed by the Justice Department will specifically incorporate the findings from several cost studies related to child sexual abuse. According to a September 2007 Economic Impact Study by Prevent Child Abuse America, an extensive body of research demonstrates that child sexual abuse has pervasive and long-lasting effects on children, their families, and the society. In addition to the costs associated with the immediate adverse consequences resulting from abuse, the effects of abuse extend far beyond adolescence, compromising lifetime productivity. Children who have been sexually abused are more likely to experience adverse outcomes in a number of areas, including:

- Poor physical health (e.g., chronic fatigue, altered immune function, hypertension, sexually transmitted diseases, obesity);
- Poor emotional and mental health (e.g., depression, anxiety, eating disorders, suicidal thoughts and attempts, post-traumatic stress disorder);
- Social difficulties (e.g., insecure attachments with caregivers, which may lead to difficulties in developing trusting relationships with peers and adults later in life);
- Cognitive dysfunction (e.g., deficits in attention, abstract reasoning, language development, and problem-solving skills, which ultimately affect academic achievement and school performance);
- High-risk health behaviors (e.g., a higher number of lifetime sexual partners, younger age at first voluntary intercourse, teen pregnancy, alcohol and substance abuse); and
- Behavioral problems (e.g., aggression, delinquency, and adult criminality).

Beyond the economic impact of sexual abuse in detention, the moral costs of continuing to allow children to be sexually abused by staff, other youth, or adult inmates, when the Commission has identified clear ways to prevent it, must also be considered. When a youth is placed in a facility, the government becomes his or her guardian and incurs the absolute responsibility to protect that child from abuse. Failing to take the steps needed to prevent sexual abuse and avoid its devastating impact on victims and their loved ones is in direct opposition to the rehabilitative goal of the juvenile justice system.

Ultimately, the Office of Management and Budget will require the Department to conduct a cost-benefit analysis of the standards. An examination of facility administrators’ estimates of costs alone will not meet this requirement. We urge you to examine the full range of cost savings that will come from implementing the recommended standards by specifically examining the impact these standards will have on children. We believe that a full analysis will reveal that, in the aggregate, the cost savings will far outweigh any small short-term cost.

3. Should the Department consider differentiating within any of the four categories of facilities for which the Commission proposed standards ...?

Every facility is responsible for upholding the Eighth and the Fourteenth Amendments of the United States Constitution which forbid cruel and unusual punishment of incarcerated persons and include a responsibility to protect incarcerated individuals from harm. These Constitutional requirements do not vary with facility size, personnel, or other resource constraints.

The Commission’s standards represent basic measures that all facilities must put in place to meet their constitutional obligations to protect residents from abuse. Relative to adult prisons, most juvenile detention facilities are rather small. Nonetheless, the BJS found shockingly high rates of abuse, confirming the urgent need for these standards in all institutions. Varying compliance requirements based on factors such as the size and resources of a facility will needlessly complicate the otherwise straightforward expectations set forth in the existing NPREC standards. Facilities across the country have different architectural hazards; use varied methods of supervision of residents (e.g., the preferred method of direct supervision protects against abuse more than linear surveillance methods or reliance on monitoring technologies); employ different staffing patterns across units; operate different housing arrangements across units (e.g., large dormitories with bunk beds versus single-man cells); and frequently operate in overcrowded conditions compromising the ability to keep residents safe. Therefore, every facility, large and small, rural and urban, will have some areas in the facility that are at heightened risk for sexual abuse to occur. The standards were drafted to be flexible enough to accommodate these differences. In fact, the juvenile standards were specifically designed to account for the wide age range among youth confined in a single facility, and to address care in both short-term detention facilities and long-term confinement facilities.

Attempts to modify the standards to respond to facility-by-facility differences would not aid in the prevention of sexual abuse. The Department would have to establish arbitrary cut-off points, creating a
bright line rule for when facilities can shirk their duty to protect youth, and these cut-off points will inevitably be challenged by facilities on the margins. Even once those distinctions are defined, the dynamic nature of detention facilities will inevitably result in changes in these factors at specific institutions, thereby creating a question about where a facility with changed circumstances would fit within the compliance hierarchy. Facilities often have fluctuating populations which can vary by day of week and even season, thus creating unnecessary confusion if standards were based on facility population. It would be likely that a facility would need to follow one set of standards on certain days, but a different set of standards on different days. This confusion is unnecessary because the standards were drafted with an understanding of the multiple types and constraints of facilities. Furthermore, facilities of every size should be able to take a comprehensive approach to preventing sexual abuse, which is the framework that is proposed by the NPREC standards.

However, as discussed above, we believe that the adult standards fail to account for the unfortunate reality that youth are incarcerated in those facilities. The child-specific protections included in the juvenile facility standards should be incorporated equally into the adult standards until youth have been removed wholesale from those facilities.
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Appendices

A. *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*

B. Relevant Statutory Sections of the Juvenile Justice and Delinquency Prevention Act (JJDPA)

C. Guidance Manual for Monitoring Facilities Under the JJDPA

D. Policy Statements in Support of Removing Youth from Adult Facilities