Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

April 4, 2011 **SENT VIA MAIL AND ELECTRONICALLY**

Robert Hinchman, Senior Counsel
Office of Legal Policy
Department of Justice
950 Pennsylvania Avenue, NW., Room 4252
Washington, DC 20530

**RE: DOJ Proposed Rulemaking for PREA Standards, Docket No. OAG–131**

Dear Mr. Hinchman:

The Human Rights Defense Center (HRDC) is a non-profit organization that advocates for the human rights of people who are incarcerated. HRDC publishes *Prison Legal News*, a monthly publication that has reported on criminal justice-related issues – including the problem of prison rape – for over two decades. HRDC director Paul Wright previously served on the advisory board of Stop Prison Rape (now Just Detention International).

HRDC hereby submits formal comments related to the DOJ's proposed rulemaking for PREA standards in Docket No. OAG-131. We previously submitted comments to the National Prison Rape Elimination Commission in July 2008 when the Commission sought public input as to the PREA standards, and we also submitted comments to your office in May 2010 relative to the proposed standards.

Initially, we note that the DOJ's proposed rules for the PREA standards are a hollow shell of what was originally envisioned by prisoners' rights advocates and others concerned about the issue of prison rape and sexual assault. If the intent is to provide the greatest possible protections for prisoners against being sexually assaulted and raped while in custody, then the watered-down rules proposed by the DOJ fail to reach that laudable goal. Rather, the proposed rules constitute weaker standards that are apparently designed to be more palatable to corrections officials, many of whom expressed opposition to the standards as developed by the Commission.

We realize that the DOJ is constrained by the statutory language of PREA, but want to voice our objection to the language in PREA that the standards not "impose substantial additional costs" (42 U.S.C. 15607(a)(3)) – as if we as a civilized society can put a price tag on the trauma

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of rape and sexual abuse experienced by prisoners. Thus, while we submit the following comments concerning the DOJ's proposed rulemaking for the PREA standards, our comments should not be construed as an endorsement of said proposed rules, which we believe lack the strongest protections that need to be in place in order to adequately address the serious issue of prison rape and sexual abuse. When Congress limited the PREA standards by specifying that measures to prevent prison rape must not "impose substantial additional costs," it placed cost considerations above efforts to stop the sexual abuse and rape of prisoners. Consequently, the DOJ's proposed rules reflect the fact that we get only what we are willing to pay for.

With the above being said, HRDC submits the following formal comments in regard to the DOJ's proposed rulemaking concerning the PREA standards, in which we respond to selected proposed rules and comment on related matters regarding the standards.

## COMMENTS RE THE PROPOSED RULES

### § 115.6 (Definitions)

We note that sexual harassment, as defined for inmates/detainees/residents ("prisoners" in these comments), includes "unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature...." But the definition of sexual harassment as applied to *staff, contractors and volunteers* only encompasses "verbal comments or gestures." We submit that the definition of sexual harassment applied to prisoners and staff should be the same; staff should be held to the same definition of sexual harassment applicable to prisoners, otherwise the definition creates a double standard.

Further, the definitions of "sexual abuse" and "sexual harassment" do not include unwanted, forcible or coerced kissing (mouth to mouth contact). Prison employees who kiss prisoners, which may involve coercion or force, are engaging in blatantly inappropriate conduct; further, kissing may be used as a "grooming" technique that leads to further sexual abuse. There is no conceivable legitimate reason why staff should kiss prisoners. Thus, the standards should include kissing, with or without consent, under the definition of sexual abuse or sexual harassment.

### §§ 115.12, 115.112, 115.212, 115.312 (Contracting with Other Entities)

Initially, it should be noted that private prison contractors differ in several material respects from public-sector corrections agencies. Private prison companies, whether managing adult, juvenile or immigration detention facilities, often operate under a combination of contractually-required policies and rules as well as their own (corporate) policies and protocols – such as those related to employee hiring and training, internal audits and internal incident reporting. Further, private prison firms have a profit motivation to minimize reporting of incidents that may subject them to contractual penalties, result in the cancellation or non-renewal of contracts, or have an adverse impact on their stock performance.

For example, the State of Hawaii declined to renew its contract with CCA to house female prisoners at the company's Otter Creek Correctional Center in Kentucky in 2009 following a scandal in which six CCA employees – including the prison's chaplain – were charged with sexually abusing or raping prisoners. The prisoners were returned to Hawaii while the State of

Kentucky replaced its female prisoners at Otter Creek with male prisoners. CCA reportedly failed to report at least one of the incidents of sexual abuse.

Due to the inherent conflict that for-profit private prison companies have in reporting adverse incidents that may negatively affect their lucrative contracts with government agencies, they have an incentive to minimize or conceal such incidents. In 2008, for example, a former CCA manager-turned-whistleblower revealed that CCA kept two sets of internal audit reports – a detailed version with auditors' notes that was for in-house use only, and another version without the detailed notes that was provided to government contracting agencies. According to a March 13, 2008 article in *TIME* magazine, the latter audit reports were allegedly "'doctored' for public consumption, to limit bad publicity, litigation or fines that could derail CCA's multimillion-dollar contracts with federal, state or local agencies."

Therefore, it is recommended that the rule related to Sections 115.12, 115.112, 115.212 and 115.312 include specific guidance as to monitoring when public agencies contract with private prison companies. Such monitoring should be independent of the private contractor to avoid the conflicts of interest noted above. Monitoring should be conducted by the same public agency staff responsible for reviewing PREA compliance at the agency's publicly-operated facilities, if applicable, or by staff retained specifically to ensure PREA compliance by the contractor.

Such monitoring staff should have *no current or prior financial or employment relationship with the private prison contractor*. Further, such monitoring staff should not be the same staff that is responsible for monitoring other aspects of contractual compliance involving the private prison contractor; rather, the monitoring staff should be specifically trained in PREA standards so as to focus on PREA compliance. The monitoring staff should not rely solely on reports or audits provided by the private contractor; instead, monitoring should include not only a review of the documentation provided by the contractor but also confidential interviews with and/or surveys of both facility staff and inmates, to evaluate the contractor's compliance with PREA.

**§§ 115.16, 115.116, 115.216, 115.316 (Hiring and Promotion)**

This standard provides that "The agency shall either conduct criminal background checks of current employees at least every five years or have in place a system for otherwise capturing such information for current employees." We believe that criminal background checks every five years is insufficient, particularly because absent background checks conducted through NCIC or a similar nationwide source, it would be difficult to detect criminal conduct committed by staff in other states/jurisdictions.

Given the sensitive security functions of correctional facilities, background checks conducted on a more frequent basis, such as annually or every two years, would be more appropriate. Otherwise, if staff engages in criminal sexual misconduct after being hired, which is not brought to the attention of the agency they work for, they could continue working in a correctional setting for up to five years before the misconduct is discovered under the proposed rule. We believe this is insufficient and a security risk.

Also, notably, the proposed rule regarding criminal background checks does not appear to apply to contractors or volunteers, although such background checks equally should be required. As contractors and volunteers are not typically "hired" or "promoted," they do not fall under the proposed rule as written; this needs to be corrected.

**§§ 115.52, 115.252, 115.352 (Exhaustion of Administrative Remedies)**

We believe that prisoners who are victims of sexual abuse or sexual harassment should not be required to file a formal grievance when reporting sexual abuse or harassment; rather, any report, notification or statement by the prisoner that puts staff on notice of the alleged sexual abuse or harassment should be sufficient in lieu of using the formal grievance process (e.g., a statement made to internal affairs investigators, or a letter or "kite" sent to corrections staff).

Prisoners who report sexual abuse may not have timely access to the grievance process due to placement in segregation or protective custody, removal to an outside medical facility, transfer to another prison, or due to staff who withhold grievance forms or otherwise intentionally frustrate the grievance process. Thus, for purposes of administration exhaustion under the PLRA, we do not believe that victims of sexual abuse or harassment should have to file a formal grievance if other types of reporting put staff on notice of the sexual abuse or harassment.

We believe the minimum 20 days (with optional 90-day extension) for victims of sexual abuse to access the grievance process, as stated in the proposed rule, is insufficient given our concerns as stated above. For example, the optional 90-day extension is only applicable when a prisoner can "provide[] documentation, such as from a medical or mental health provider or counselor...." Yet the medical or mental health providers or counselors will often be agency employees, thus the proposed extension of time to pursue the grievance process will hinge on prisoners obtaining documentation from agency staff, who may be reluctant to provide same.

The use of alternate means of reporting sexual abuse so as to meet the administrative exhaustion requirement is in fact already mentioned in section (c)(1) of this proposed rule, which states, "Whenever an agency is notified of an allegation that a resident has been sexually abused ... it *shall consider such notification* as a grievance or request for informal resolution submitted on behalf of the alleged resident victim for purposes of initiating the agency administrative remedy process." However, it is not clear whether that provision of the proposed rule applies to self-reports of sexual abuse by prisoners. We submit that agencies should be required to consider notifications such as letters or statements by prisoners to be grievances for the purpose of initiating the administrative remedy process, without requiring the filing of a formal grievance. If this is what the proposed rule already intends, it should be clarified.

Also, this rule does not address situations where prisoners have been sexually abused or harassed by staff who monitor, oversee or control the grievance process. The rule should specify that staff members accused of sexually abusing or harassing prisoners shall not oversee, monitor or control the grievance process relative to grievances that allege such sexual abuse or harassment.

Further, despite the DOJ's decision not to address the physical injury component of the PLRA, we submit that the standards should specify that the PLRA's requirement that prisoners show "physical injury" before bringing suit for mental or emotional damages (42 U.S.C. § 1997e(e)) is inapplicable to acts of sexual abuse, or that prisoners who have been subjected to sexual abuse have *per se* satisfied the physical injury requirement of the PLRA. This would not abrogate the PLRA's requirement, but rather would redefine "physical injury" within the context of sexual abuse. This redefinition is necessary because at least one court has found that sodomy did not meet the PLRA's "physical injury" requirement. See: *Hancock v. Payne*, 2006 WL 21751 at *1, 3 (S.D. Miss., Jan. 4, 2006) (holding plaintiffs' allegations of abuse, including that a staff member "sexually battered them by sodomy," were barred by § 1997e(e)).

Additionally, we object to section 5 of this proposed rule, which states that "an agency may discipline a resident for intentionally filing an emergency grievance where no emergency exists." Since staff would be the arbiters of whether an emergency exists, and staff may not be unbiased when one of their own is accused of sexual abuse or sexual harassment, we do not believe that a prisoner should be subject to discipline for filing an emergency grievance when the prisoner has a good faith belief that an emergency grievance is necessary.

Finally, we note that this proposed rule does not apply to lockups (i.e., there is no comparable rule 115.152). To the extent that lockups have grievance procedures or require exhaustion of administrative remedies, though, a similar rule should be applicable to such lockups.

**§§ 115.76, 115.176, 115.276, 115.376 (Disciplinary Sanctions for Staff)**

This proposed rule apparently does not include sanctions – including dismissal and reporting to law enforcement agencies – for *contractors or volunteers* who engage in sexual abuse or sexual harassment. Contractors and volunteers should be subject to termination/dismissal and reporting to law enforcement agencies to the same extent as sexually abusive staff members.

**§§ 115.61, 115.161, 115.261, 115.361 (Staff and Agency Reporting Duties)**

This proposed rule does not require agencies to discipline or sanction staff who do not report knowledge, suspicion or information regarding an incident of sexual abuse. Requiring staff to report such incidents, while failing to mandate any disciplinary measures for *not* making such reports, is insufficient. Agencies should be required to impose disciplinary measures on staff who do not report their knowledge, suspicion or information related to sexual abuse.

**§§ 115.65, 115.165, 115.265, 115.365 (Agency Protection Against Retaliation)**

Section (d) of this proposed rule states that an agency "shall not enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff abusers from contact with victims pending an investigation." We suggest that a similar requirement be applied to agencies that contract with private prison companies – e.g., "agencies shall not enter into or renew any contracts with private prison operators that limit the agency's ability to remove alleged private prison staff abusers from contact with victims pending an investigation." This rule should be expanded to encompass private prisons operators as over 120,000 prisoners nationwide are held in privately-operated facilities, according to the DOJ. If the "other agreement" language in the proposed rule already contemplates extending the rule to contracts with private prison operators, this should be clarified or made explicit.

**§§ 115.93, 115.193, 115.293, 115.393 (Audits of Standards)**

In regard to the length of time between audits, we do not believe an audit conducted once every three years is sufficient; however, we recognize the cost and impact on staff resources resulting from full audits for agencies with numerous correctional facilities. We therefore suggest that for state prison systems, private prison operators, the federal Bureau of Prisons and the Department of Homeland Security, audits of 1/3 of the agency's facilities be conducted annually, with the facilities being selected randomly so they do not have advance notice they will be audited. Thus, over a three-year period, each of an agency's facilities will be audited at least once. For smaller agencies with fewer facilities (e.g. lockups, jails), we recommend annual audits.

Further, the proposed rule should include a provision for an immediate or emergency audit if it is determined there are excessive reports of sexual abuse or sexual harassment at a given facility.

## OTHER COMMENTS RE THE STANDARDS

### Lack of Enforcement Mechanism for the Standards

We take issue with the fact that there is no viable enforcement mechanism for non-compliance with or violation of the standards. PREA specifies that "any amount that a State would otherwise receive for prison purposes for that fiscal year under a grant program covered by this subsection shall be reduced by 5 percent, unless the chief executive of the State submits to the Attorney General a statement that they have adopted and are in compliance with the NPREC Standards." However, we are unaware of any case in which a state has forfeited federal law enforcement or criminal justice funding due to non-compliance with statutory requirements.

Also, the fact that a state only risks the loss of 5% of federal funding "for prison purposes" is an indication of the low priority that Congress placed on preventing prisoner rape – as the loss of 10 percent, 20 percent or a higher percentage would have been a much more effective deterrent for states that fail to comply with PREA.

Nor is there any apparent mechanism to challenge or require proof of a state's assertion that is has adopted and is in compliance with the standards. And, of course, the loss of federal funds as provided in PREA is not applicable to county or city correctional agencies, the federal Bureau of Prisons or other federal agencies that operate detention facilities, nor to private prison firms. In short, if there is no remedy to enforce the standards then their value is greatly diminished.

To remedy some of these deficiencies related to enforcement of the standards, we recommend that a final paragraph be added to §§ 115.12, 115.112, 115.212 and 115.312, as follows:

> "Any such new contracts or contract renewals with private agencies or other entities shall include enforcement provisions to ensure that the private agencies or other entities are in compliance with the PREA standards. Such enforcement provisions shall include but not be limited to monetary sanctions for non-compliance with the standards, including at a minimum the forfeiture of 5% of funds to be paid to the private agencies or other entities pursuant to an agency's contract if the private agencies or other entities are not in compliance with the PREA standards."

Finally, the standards do not provide for a private cause of action for enforcement purposes, which in our view is a significant failing. This will likely require a remedy by Congress, and we encourage the DOJ to lobby Congress to strengthen PREA by including a private cause of action for victimized prisoners when agencies do not follow the standards.

### Failure to Include Standards for Immigration Detention Facilities

We object to the DOJ's decision not to include a set of standards designed for immigration detention facilities. Immigration detainees constitute a specialized population that is much more vulnerable to victimization due to language barriers, unfamiliarity with the U.S. legal system, lack of citizenship, fear of adversely affecting deportation proceedings if abuse is reported, etc.

Therefore, we believe the proposed rules should include PREA standards specific to immigration detention facilities. Further, the standards should apply to military facilities and tribal facilities if such facilities do not already fall within the scope of the proposed rules.

**Attorney General – Conflict of Interest**

We reiterate our concerns, as expressed in our prior comments submitted to your office in May 2010, that the U.S. Attorney General's office has an inherent conflict of interest in regard to promulgating the PREA standards and with any monitoring of those standards. The Attorney General is responsible for defending the Bureau of Prisons and federal prison staff in civil suits filed by prisoners who have been sexually abused by federal prison employees. Thus, there is an inherent conflict of interest in terms of the Attorney General promulgating standards that may have an effect on civil cases in which the Attorney General's office represents federal prison staff accused of raping or sexually abusing prisoners.

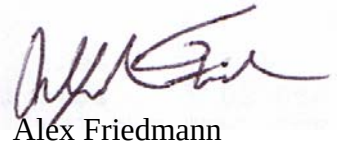
**Endorsement of Comments by Just Detention International**

Lastly, to the extent that they do not conflict with our comments as stated above, we endorse and adopt the comments submitted by Just Detention International relative to the proposed rules.

Thank you for your time and attention in considering our comments concerning this important issue, and please feel free to contact us should you require any additional information.

Sincerely,

Paul Wright
Executive Director, HRDC



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