

**A SUMMARY OF THE NATIONAL STANDARDS FOR THE DETECTION,  
PREVENTION, REDUCTION AND PUNISHMENT OF PRISON RAPE  
FOR ADULT PRISONS & JAILS**

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## Introduction

National Standards for the Detection, Prevention, Reduction, and Punishment of Prison Rape, promulgated by the Department of Justice (“DOJ”), were published in the Federal Register on June 20, 2012, 28 C.F.R. Part 115 (2012). The Standards apply to both prisons and jails and address both inmate-on-inmate and staff-on-inmate sexual abuse and sexual harassment.

The Prisoners’ Rights Project of the New York City Legal Aid Society summarizes below what we believe are the most important parts of these Standards, organized in a way that we think is easy to understand, using language that we believe is a little clearer than the Standards themselves. For example, the Standards talk about “the agency” having to do certain things, but since this summary will be read mostly by people in jail and prison in New York, we think it is clearer to talk about the obligations of the New York State Department of Corrections and Community Supervision (“DOCCS”) and the New York City Department of Correction (“DOC”). Even though we talk about DOC/DOCCS having to do certain things, all of the requirements described below apply to all jails and prisons across the United States.

We provide commentary about the significance of the Standards. We designate our comments by putting them in italics; anything in italics is our commentary, and is not found in the actual Standards. The material in regular type is our summary of what the Standards say, and we have put in bold the portions of the summary that we think are most important. Some of the Standards affect inmate-on-inmate sexual abuse while some are focused on staff-on-inmate abuse, while many affect both. We have noted which Standards apply to which issue, and which apply to both.

You should look at the Standards themselves to see their actual language. Throughout, we provide citations to the Standards so that you can review them. In addition, DOJ wrote hundreds of pages of commentary also included in the Federal Register, *see* 28 C.F.R. Part 115, so you should review that as well if you are considering relying on the Standards, since it can be important to know DOJ’s intent. Also since the Standards were promulgated as required by the Prison Rape Elimination Act (“PREA”), 42 U.S.C. § 15601 *et. seq.* (2003), if you are attempting to rely on the Standards in any way, you should also be familiar with PREA. If you would like a copy of the actual Standards or of PREA, please let us know.

The Standards should be followed by prison and jail officials, although unfortunately the sanctions for failing to follow them are not as severe as many advocates would have liked. As described in more detail below, auditing of compliance is required to take place every three years, with the Governor being required to certify that the State prisons are in compliance with the Standards. If there is not compliance then the system can lose up to 5% of its federal funding. (Unfortunately, this is not that severe a sanction since, for example, DOCCS gets only a very small amount of its funding from the federal government). Some information about compliance is required to be made public, and some policies and procedures may be available under FOIL.

There are additional and somewhat different standards that address sexual abuse in Lockups (§§ 115.111-115.193), Community Confinement Facilities (§§ 115.211-115.293), and Juvenile Facilities (§§ 115.311-115.393). These are not summarized below.

The following is a summary only of the Standards that apply to jails and prisons.

## Impact of the Standards On Litigation

The Standards are important if you bring a lawsuit about sexual assault. Though the Standards do not seem to have the force of law, as DOJ said, "...these standards may influence the standard of care that courts will apply in considering legal and constitutional claims brought against corrections agencies and their employees arising out of allegations of sexual abuse." 28 C.F.R. Part 115 at 181 (Executive Order 13132 – Federalism).

We think it is extremely unlikely that a Court would allow a prisoner to bring a lawsuit to enforce the Standards directly or under Section 1983 alleging that their violation is a basis for suit.<sup>1</sup> However, the Standards may be very important in any lawsuit you bring about custodial sexual assault: if the Standards were not followed then this may provide crucial support to strengthen your claim that your constitutional rights have been violated.

You should plead in your Complaint that the Standards put jail and prison officials on notice of what is required to protect prisoners from assault and that if the Standards were not followed, then that is strong evidence that prison or jail officials were deliberately indifferent to your protection. As part of your proof you should try to show how the Standards were not followed and how, if they had been, that would have helped to protect you from sexual abuse. If the defense of qualified immunity is raised, then you can argue not only that your right to be free from abuse in this manner was clearly established as shown by the Standards, but that they showed the type of conduct that could reasonably be expected from prison or jail officials to protect prisoners. Depending on your facts, you may be able to argue that the prison's PREA coordinator or PREA point person had notice of the risks you were subjected to, or that the high-ranking staff who conducted sexual abuse incident reviews were aware of the risks posed specifically to you, or of the risks posed by the person who assaulted you, or of the risks posed in a particular location with a particular staffing pattern. For example, if you are claiming assault by a staff person or other prisoner with a history of committing sexual abuse, then you can argue that the risks posed by that person should have been considered by these high-ranking staff both as part of the annual staffing reviews and as part of the sexual abuse incident reviews, as required

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<sup>1</sup> For a statute to create a private cause of action or to create a right enforceable under Section 1983 the statute must create an unambiguous expression of Congressional intent to confer an individual right enforceable under Section 1983. *Taylor v. Vermont Department of Education*, 313 F.3d 768 (2d Cir. 2002). Being in the group of persons "within the general zone of interest that a statute is intended to protect" is not enough to make the statute enforceable through Section 1983. *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002). The Prison Rape Elimination Act and the Standards that were promulgated under PREA's authority -- both of which contemplate enforcement only through the loss of federal funding and neither of which focus on individual rights but on the general obligations of the agency -- are *not* likely to be found to contain such an unambiguous expression of Congressional intent as is needed to confer an individual right that is enforceable. Compare *Taylor v. Vermont Department of Education*, 313 F.3d 768 (2d Cir. 2002) (holding records-access provision under Family Educational Rights Act created no personal rights enforceable under Section 1983) with *Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004) (holding individual rights created that could be enforced under Section 1983 when Congress' intent was to confer a right to certain Medicaid benefits upon persons who meet various eligibility requirements). That DOJ interpreted its statutory mandate to find that these Standards are not binding upon the States is likely the final evidence that these regulations will *not* be enforceable under Section 1983. See e.g., *Marcel v. Donovan*, 2012 WL 8689777, \*5 (E.D.N.Y. March 14, 2012) (court finds agency's interpretation of statute as authorizing only administrative enforcement and not private enforcement to be "compelling" evidence that statute cannot be privately enforced).

by the Standards. If you plead this, you may be able to obtain in discovery incident reviews or staffing reviews that pertain to a review of the defendant or location at issue in your suit as part of discovery (even if they are not available through FOIL).

The fact that an agency complies with the Standards does not mean that you cannot prevail in a lawsuit, although it will certainly make a lawsuit more difficult. In drafting the Standards DOJ was limited, since Congress made clear that they could “not impose substantial additional costs” upon the States. 42 U.S.C. § 15606(3) (2003). DOJ therefore explicitly noted that compliance with the Standards does not necessarily end the inquiry, making clear that “The standards are not intended to define the contours of constitutionally required conditions of confinement. Accordingly, compliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse. Furthermore, while the standards aim to include a variety of best practices, they do not incorporate every promising avenue of combating sexual abuse, due to the need to adopt national standards applicable to a wide range of facilities while taking costs into consideration.” 28 C.F.R. Part 115 at 4 (Executive Summary, Part A).

Finally, in your litigation you may end up in a dispute about what a particular Standard means or how it was intended to be implemented. Sometimes the meaning is clear from the plain language of the Standard, but sometimes it is not. You should look at DOJ’s commentary, but even then the Standard may be ambiguous. So, for example, “trip calls” (calls by staff alerting other staff that supervisors are conducting rounds) are prohibited under the Standards except when required for legitimate operational needs. If your prison or jail has issued a policy that reiterates the language of the Standard but then still allows these calls to be made as a matter of routine, then you could argue that that the Standard has not been complied with. Or take another example. The investigations standard requires prison and jail administrators to “consider” prior complaints as part of an investigation. The term “consider” is not defined by the Standards. So you may want to argue that “considering” prior complaints means reviewing them to see if there were patterns of misconduct that could serve as corroborative evidence. If this did not happen and such patterns of misconduct have been disregarded you could again argue that the Standard has not been followed. Because there has not yet been litigation under the Standards, we cannot tell you how best to frame such arguments or how courts will view them.



## **Definition of Sexual Abuse by Another Inmate, §115.6<sup>2</sup>**

Inmate-on-inmate sexual abuse occurs when the victim does not consent, is coerced into compliance through overt or implied threats of violence, or is unable to consent to or refuse any of the following sexual acts:

Vaginal or Anal Sex: Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

Oral Sex: Contact between the mouth and the penis, vulva, or anus;

Sexual Assault with an Object: Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and

Sexual Fondling: Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person.

An inmate is unable to consent to sexual activity if the inmate is a minor, or if the inmate is mentally or physically incapacitated. An inmate is non-consenting if “consent” is gained through exploitation of fear of threat of physical violence or bodily injury.<sup>3</sup>

**Sexual abuse** (*both by another inmate as well as by staff*) **excludes unintentional or incidental contact. Sexual abuse by another inmate does not include kissing or consensual sexual acts.**

Although kissing and sexual activity even if consensual are not considered sexual abuse under these Standards, **inmates may still be subject to punishment for any sexual activity even if consensual if prohibited by the agency.** §115.78 (g).

**Sexual fondling excludes contact incidental to a physical alteration.**

**Sexual harassment by another inmate**: repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature.

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<sup>2</sup> The Standards refer to “inmates” and thus we use that term instead of “persons in prison or jail.”

<sup>3</sup> All citations contained in this summary refer to 28 U.S.C. at § \_\_\_\_.

## **Definition of Sexual Abuse by a Staff Member, § 115.6**

**Legal Aid Comment:** *Sexual abuse by staff is defined more broadly than sexual abuse by another inmate. It includes conduct not listed above. It cannot be consented to by a prisoner. Sexual abuse by staff (as well as by another inmate) excludes unintentional or incidental contact. It also excludes legitimate contact made by custodial or medical personnel in the process of collecting evidence of rape, providing medical treatment, or conducting searches in a manner consistent with constitutional requirements. We expect that there will continue to be disputes about whether something constitutes sexual abuse or not. For example, many complaints of sexual abuse arise from searches. Prison officials may argue that such searches do not constitute “sexual abuse” because the contact is related to official duties and is without intent to “abuse, arouse, or gratify sexual desire.” DOCCS has taken the position, for example, that many complaints of sexual abuse arise should not in fact be categorized as sexual abuse because they simply reflect a misunderstanding by prisoners of what constitutes a “legitimate” pat frisk. If you are complaining about conduct related to a search or to any other official duty, make sure you include that you believe the contact was not required by official duties because it went much further than necessary, and that it was conducted in a manner intended to be abusive or for the pleasure of the employee.*

**Sexual abuse by staff occurs with or without consent of the inmate** when any of the following sexual acts occur:

**Vaginal or Anal Sex:** Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

**Oral Sex:** Contact between the mouth and the penis, vulva, or anus;

**Kissing:** Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

**Sexual Assault with an Object:** Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

**Sexual Fondling:** Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

**Attempted Abuse:** Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in previous paragraphs;

Exposure of Genitalia, Buttocks, or Breast: Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, and

Voyeurism: Any invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions

**Inmates cannot consent to sexual activity with staff.**

**“Staff” includes** correctional staff of any rank, a contractor, or a volunteer.

**Staff sexual harassment:** repeated verbal comments or gestures of sexual nature, demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.

**Requirement of Zero-Tolerance Towards Sexual Abuse, § 115.11**

*(Applies to Sexual Abuse and Harassment By Staff and By Another Inmate)*

***Legal Aid Comment:** Zero tolerance without more doesn't mean much, but it is an important first step. It means that no sexual abuse should be tolerated and that an agency must promulgate and implement other policies to prevent it. The fact that the agency is required to have a PREA coordinator and each prison is required to have a PREA point person with oversight responsibilities may mean that you could name them as defendants if the Standards are not being followed at your prison or jail and you believe you were injured as a result.*

DOC/DOCCS must have a written policy of **zero tolerance** of sexual abuse and sexual harassment, which outlines its approach to preventing, detecting, and responding to such conduct.

Any outside entity who contracts with DOC/DOCCS must fully comply with these Standards.

DOC/DOCCS must appoint an upper-level, DOC/DOCCS wide **PREA coordinator**. This person must have sufficient time and authority to develop, implement, and oversee a plan to comply with these Standards in all of its facilities.

In order to ensure that PREA standards are met, each facility must designate a “**PREA point person**” to coordinate compliance efforts. Each facility should designate a **PREA compliance manager** with sufficient time and authority to coordinate PREA compliance efforts within the facility.

## **Screening for Risk of Sexual Victimization and Abusiveness**

***Legal Aid Comment:** Advocates have long believed that meaningful screening for risk of victimization and taking the results into consideration in classification decisions, including housing and program assignments, are critically important steps towards preventing custodial sexual abuse, particularly by other persons in jail and prison. While it is not clearly mandated how this information is to be considered, the Standards require that the person in jail or prison's own perception of vulnerability and prior history of victimization are factors that the jail or prison must at least consider in coming to these decisions.*

### **1. Screening, § 115.41**

*(Applies to Sexual Abuse By Another Inmate)*

Within 72 hours of arrival or upon transfer to another facility, **all inmates must be assessed for their risk of being sexually abused by other inmates or of being sexually abusive toward other inmates.** Such assessments must be conducted using an objective screening instrument.

To **assess the risk of an inmate being sexually victimized**, the initial screening must consider the following: any mental, physical, or developmental disabilities; age; physical build; previous incarcerations; whether criminal history is exclusively nonviolent; prior convictions for sex offenses; whether inmate is perceived to be LGBTI; previous experience of sexual victimization; inmate's own perception of vulnerability; and whether inmate is detained solely for civil immigration purpose.

To **assess the risk of an inmate being sexually abusive**, the initial screening must consider prior acts of sexual abuse, prior convictions for violent offenses, and known history of prior institutional violence or sexual abuse.

**Within 30 days** of an inmate's arrival, the facility must **reassess** the inmate's risk of victimization or abusiveness based on any additional, relevant information received after the initial screening. An inmate's risk level must be reassessed if the facility receives a referral or request, if there is an incident of sexual abuse, or if additional information surfaces about the inmate's risk level.

DOC/DOCCS must implement privacy controls to ensure that sensitive information is not used against the inmate by staff or other inmates. **Inmates may not be disciplined for refusing to answer or for not disclosing complete information in response to an assessment question.**

### **2. Use of Screening Information, § 115.42**

*(Applies to Sexual Abuse By Another Inmate)*

The information gathered from the risk screening required by § 115.41 must be used to inform housing, bed, work, education, and program assignments. **The goal is to keep inmates with a high risk of being sexually victimized separate from those with a high risk of being**

**sexually abusive.** DOC/DOCCS must make individualized determinations about how to ensure the safety of each inmate.

### **3. Protective Custody, § 115.43**

*(Applies to Sexual Abuse By Staff and by Another Inmate)*

***Legal Aid Comment:*** *The Standard places the burden on prison and jail officials to justify the use of involuntary segregated housing for protection and, when such housing is used, to justify restrictions on prisoners' access to programs and services. The Standard restricts the use of involuntary protective custody to situations where no alternate means of protecting the person in custody are available, and when such housing is used then the prisoner is to be provided programs, privileges, education and work "to the extent possible."*

**Inmates at high risk for sexual victimization must not be placed in involuntary segregated housing,** unless there are no other available alternative means of separating the inmate from likely abusers. If an assessment of available alternatives cannot be made immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while the facility completes the assessment. Inmates must be assigned to segregated housing only until an alternative means of separation is arranged. This period must not exceed 30 days.

If there are no alternative means, the facility must clearly document the basis of the facility's concern for the inmate's safety and the reason why no alternative means can be arranged. The facility must review the housing assignment every 30 days to determine whether continued separation is necessary.

**If an inmate is placed in segregated housing for this purpose, the inmate must have access to programs, privileges, education, and work opportunities to the extent possible.** If access to any of these opportunities is restricted, the facility must document which opportunities have been limited, the duration of the limitation, and the reason for the limitation.

## **Supervision and Monitoring**

***Legal Aid Comment:** These requirements, while not as stringent as advocates urged, are still important.*

### **1. Annual Staffing Plans, § 115.13**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

***Legal Aid Comment:** Jail and prison officials are now required to conduct annual reviews of staffing, including an assessment of whether more staffing is needed in certain places because of things like architectural blind spots or because there have been many prior sexual abuse complaints at a particular location. Officials are now required to consider the prevalence of both substantiated and unsubstantiated incidents of sexual abuse in determining staffing.*

DOC/DOCCS must develop an **annual staffing plan** that provides for adequate levels of staffing, and where applicable, provides for the **implementation of video monitoring** to protect inmates against sexual abuse. The staffing plan should **consider** generally accepted practices, judicial/Federal/internal findings of inadequacy, the layout of the facility (including “blind-spots” or areas of isolation), the composition of the inmate population, the number and placement of supervisory staff, timing of programs, any applicable laws, the prevalence of **substantiated and unsubstantiated incidents of sexual abuse**, and any other relevant factors.

### **2. Upgrades to Facilities and Technologies, § 115.18**

*(Applies to Sexual Abuse by Staff and by Another Inmate)*

***Legal Aid Comment:** Contrary to requests by many advocates, cameras are not required.*

When designing or redesigning a facility, DOC/DOCCS must consider the effect of the design on DOC/DOCCS’s ability to protect inmates from sexual abuse. When installing a video monitoring system, electronic surveillance system, or other monitoring technology, DOC/DOCCS must consider how such technology may enhance its ability to protect inmates from sexual abuse.

### **3. Rounds, § 115.13**

*(Applies to Sexual Abuse and Harassment by Staff)*

***Legal Aid Comment:** Supervisory rounds must be announced and “trip calls” (the practice of staff calling ahead to tip off other staff that a supervisor is conducting rounds), are now restricted so that they are only permitted if needed for the “legitimate operations” of the facility. While advocates urged that these calls be prohibited because they have been a significant factor in allowing staff sexual abuse to continue this restriction means that the prison and jail will now have the burden of justifying why trip calls are permitted on any sort of routine basis.*

DOC/DOCCS must have a policy and practice of upper-level supervisors conducting and documenting unannounced rounds during both day and night shifts to identify and deter staff sexual abuse and sexual harassment. The policy must **prohibit “trip calls.”** A trip call is when

staff alerts other staff that supervisory rounds are occurring. “Trip calls” must be prohibited under this policy unless the call is related to the legitimate operational functions of the facility.

#### **4. Hiring and Promotion Decisions, § 115.17**

*(Applies to Staff Sexual Abuse and Harassment by Staff)*

**Legal Aid Comment:** *The Standard restricts who may be hired and also requires an agency to consider sexual harassment incidents in making decisions about promotions. From DOJ’s comments, it is clear that this language is intended to include “a wide range of behaviors without criminal, civil, or administrative adjudication.” 28 C.F.R. Part 115 at 68 (III. Overview). While the Standard does not prohibit promotions if there have been unsubstantiated allegations, the agency will now have at least have to consider them in making promotion decisions, which in New York City jails and State prisons has, to our understanding, not been the usual practice.*

**DOC/DOCCS must not hire or promote anyone who may have contact with inmates, or enlist the services of any contractor, who has engaged in sexual abuse** in a prison, jail, lockup, community confinement facility, juvenile facility, or any other institution, or who has been civilly or administratively adjudicated or criminally convicted of engaging or attempting to engage in sexual activity through force, threat of force, coercion, or without consent. DOC/DOCCS must impose a continuing duty on its employees who have contact with inmates to disclose any such misconduct.

DOC/DOCCS must **consider any incidents of sexual harassment** when deciding whether to hire or promote anyone who may have contact with inmates.

Before hiring a new employee who may have contact with inmates, DOC/DOCCS must perform a **criminal background check** and make its best efforts to **contact all previous employers** for information about **substantiated allegations** or **pending investigations** of sexual abuse. DOC/DOCCS must perform a criminal background check on contractors.

Criminal background checks must be performed at least every five years for current employees and contractors. All applications for employment must have a section for disclosure of previous sexual misconduct. Omissions of previous misconduct or providing false information must be grounds for termination.

#### **5. Sexual Abuse Incident Reviews and Corrective Action, §§ 115.86, 115.88<sup>4</sup>**

*(Applies to Sexual Abuse by Staff and by Another Inmate)*

**Legal Aid Comment:** *Jail and prison officials are now required to conduct sexual abuse incident reviews of all complaints of sexual abuse, whether substantiated or not, and as part of these reviews must determine whether policies need to be changed and whether additional supervision (of an area or of a person) is needed.*

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<sup>4</sup> Incident Reviews and Corrective Action are described in more detail below, under Data Collection and Follow-Up, since that is where they are listed in the Standards.



Within 30 days of the conclusion of **every sexual abuse investigation** where allegations were found to be **substantiated or unsubstantiated** (but not if found unfounded), a **sexual abuse incident review**. Must be conducted by upper-level management, with input from line supervisors, investigators, and medical or mental health practitioners.

The review team should **consider a need for policy or practice change**. The review team should also consider **whether the incident was motivated by race, ethnicity, gender identity, LGBTI identification/status/perceived status, gang affiliation, or other group dynamics**. The review team should also **examine the area** where the incident allegedly occurred to assess whether physical barriers in the area enabled the abuse, should **assess staffing levels**, and should assess whether **monitoring technology** should be deployed or improved.

The **team should prepare a report of its findings**. The report should include determinations of considerations and recommendations for improvements. These reports should be submitted to the facility head and the PREA compliance manager. If the facility does not implement the recommended improvements, they must document their reasons. **The agency should collect this data to assess and improve the effectiveness of its sexual abuse policies, practices, and training. It should identify problem areas, take corrective action on an ongoing basis, and prepare an annual report** of its findings and corrective actions. These reports should include comparisons of the current year's data and actions with those of prior years in order to assess progress in addressing sexual abuse.

**Privacy and Searches, § 115.15**

*(Applies to Sexual Abuse and Harassment By Staff)*

**Legal Aid Comment:** *The prohibition of cross-gender pat frisks of female persons in custody is an important step although it does not take effect until 2015. As we note in the definitions section, we expect there will continue to be disputes about whether contact constitutes sexual abuse by staff or whether it is excluded from the Standards' definitions of abuse.*

**Cross-gender strip searches and cross-gender visual body cavity searches (search of the anal or genital opening) are not permitted**, except in “exigent circumstances” or when performed by a medical practitioner. **Within 3 years of the Standards’ publication, cross-gender pat-down searches of female inmates** are not permitted, except in exigent circumstances, and in those cases, the search must be documented. Security staff must be trained in how to conduct cross-gender pat-down searches and in conducting them, staff must be professional and respectful, and must conduct them in the least intrusive manner possible, consistent with security needs.

The facility must put forth a policy that allows **inmates to shower, perform bodily functions, and change clothing without staff of the opposite sex viewing** their breasts, buttocks, or genitalia except under exigent circumstances or if such a viewing is incidental to routine cell checks. **All staff of the opposite gender must announce their presence** when entering an inmate-housing unit.

## **Reporting**

**Legal Aid Comment:** *Although the Standards did not exempt complaints of sexual abuse from grievance requirements, as advocates urged, the Standards should make reporting easier and should make it easier to comply with PLRA exhaustion requirements.*

### **1. Inmate Reporting, § 115.51**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

Inmates must be provided with **multiple internal ways to privately report** sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting such incidents, and staff neglect or violation of responsibilities that may contribute to such incidents. **Inmates must also have at least one way to report abuse or harassment to a public or private entity outside DOC/DOCCS**, who are then forward the report to DOC/DOCCS officials, **which will allow the inmate to remain anonymous upon request.**

**Staff must accept reports made verbally, in writing, anonymously, and from third parties.** Verbal reports must be promptly documented.

Staff must be provided a method for privately reporting sexual abuse or sexual harassment of inmates.

### **2. Exhaustion of Administrative Remedies, § 115.52**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

**Legal Aid Comment:** *Under the Prison Litigation Reform Act a person in custody must exhaust all available administrative remedies before filing a civil suit based on federal law. In almost all circumstances this means that a prisoner must file an agency grievance and appeal it to the highest level permitted. (In DOCCS this means appealing a grievance to the Central Office Review Committee (“CORC”).) The Standards now require the agency to allow a grievance about sexual abuse to be filed at any time and also allow a third party to file such a grievance, although an agency may require the prisoner personally to pursue its appeal. DOCCS will have to modify its grievance policy to comply with these requirements. These Standards do not affect prisoners in DOC because, at least as of 2012, DOC does not allow grievances about abuse or harassment.*

#### **a. Agency Exemption**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

**Legal Aid Comment:** *Because DOC does not allow grievances about sexual abuse, it is exempt – that is, it does not have to start allowing such grievances and then the satisfy the provision of this Standard.*

If an agency does not have administrative procedures to address inmate grievances regarding sexual abuse, it is exempt from these exhaustion standards.

***b. Filing a Grievance***

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

***Legal Aid Comment:*** *As of summer, 2012 DOCCS's policy requires a grievance to be filed within 21 days of the abuse, although this time limit may be extended to 45 days when there are mitigating circumstances. In order to be compliant with the Standards, DOCCS will have to adjust their current policy*

There must be **no time limit imposed on when an inmate may submit a grievance** regarding an allegation of sexual abuse. However, an agency may impose time limits to any portion of a grievance that does not allege an incident of sexual abuse. Further, an agency is not restricted from defending against an inmate lawsuit on the ground that the applicable statute of limitations has expired.

**Inmates do not have to utilize informal grievance processes.** An agency is also not required to attempt to resolve with staff an alleged incident of sexual abuse.

***c. Protection From Accused Staff***

*(Applies to Sexual Abuse by Staff)*

An agency must ensure that inmates who allege sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint. An agency must also ensure that the grievance is not referred to a staff member who is the subject of the complaint.

***d. Receiving a Decision***

*(Applies to Sexual Abuse by Staff and by Another Inmate)*

If you filed a grievance regarding an allegation of sexual abuse, you must receive a **final decision** on the merits of any portion of a grievance that alleges sexual abuse **within 90 days of the initial filing of the grievance**. This 90-day period does not include time spent by the inmate preparing an administrative appeal.

If more time is needed to make an appropriate decision, **an agency may claim an extension of up to 70 days**. Inmates must be notified in writing of any such extension and must be provided a date by which a decision will be made.

At any level of the administrative process (including the final level), **if an inmate does not receive a decision** within the allotted time (including any extensions), **the inmate may consider the lack of a response to be a denial**.

***e. Third Party Reporting, §§ 115.52(e), 115.54***  
*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

***Legal Aid Comment:*** *DOCCS will have to amend its grievance policy to be compliant since as of summer, 2012, third parties cannot file grievances for prisoners.*

**Third parties** (*fellow inmates, staff members, family members, attorneys, and outside advocates*) must be permitted to assist an inmate in filing a grievance relating to allegations of sexual abuse, and **must be permitted to file such grievances on behalf of inmates.**

An agency must establish a procedure for receiving third-party reports and must distribute publicly information on how to report sexual abuse and sexual harassment on behalf of an inmate.

If a third party files for administrative remedies on behalf of an inmate, **the facility may require permission from the alleged victim to file the request. An inmate may decline to have the request processed** on his/her behalf; the facility must document that decision. **The facility may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.**

***f. Filing an Emergency Grievance***  
*(Applies to Sexual Abuse by Staff and by Another Inmate)*

An agency must establish procedures for filing an **emergency grievance** for alleging that an inmate is subject to a **substantial risk of imminent sexual abuse**. After receiving an emergency grievance, an agency must immediately forward the grievance to a level of review at which immediate corrective action may be taken. If you filed an emergency grievance, an **initial response must be provided within 48 hours** and a **final decision must be made within 5 calendar days**.

When an agency learns that an inmate is subject to a substantial risk of imminent sexual abuse, it must take immediate action to protect the inmate. § 115.62.

***g. Punishment for Grievances Made in Bad Faith***  
*(Applies to Sexual Abuse by Staff and by Another Inmate)*

*Be aware that a prisoner can still be punished if the complaint is deemed by the agency to have been made in bad faith.*

**Inmates may be punished for filing a grievance** related to alleged sexual abuse only if the grievance is filed in **bad faith**. § 115.52. Reports made in good faith and based on a reasonable belief shall not constitute falsely reporting an incident or lying; rather, they constitute reports made in good faith and shall not be punishable, even if the allegations are unsubstantiated. § 115.78.

**3. Staff and DOC/DOCCS Reporting Duties, §§ 115.61, 115.63**  
*(Applies to Sexual abuse and Harassment by Staff and by Another Inmate)*

**Legal Aid Comment:** *Be aware that complaints to medical and mental health staff may well not be confidential since they must report allegations of sexual abuse or harassment that have been made to them, unless prohibited by the law in your jurisdiction.*

**All staff have a duty to report** immediately any knowledge, suspicion, or information regarding an incident of **sexual abuse or sexual harassment** that occurred in any facility. Staff also has a duty to report **retaliation** against inmates or staff who have reported incidents, as well as any **staff neglect or violation of responsibilities** that may have contributed to an incident or retaliation.

If a facility receives an allegation of inmate sexual abuse at another facility, the head of the facility that received the allegation must notify the head of the facility where the alleged abuse occurred within 72 hours of receiving the allegation. The head of the facility where the alleged abuse occurred must ensure that the allegation is investigated properly.

Apart from reporting to designated supervisors or officials, **staff must not reveal any information related to a sexual abuse report.** This information should only be revealed to the extent necessary to make treatment, investigation, and other security and management decisions.

**Medical and mental health practitioners** are required to report sexual abuse, unless otherwise precluded by Federal, State, or local law. Inmates must be advised about the practitioner's duty to report and the limitations of confidentiality at the initiation of services.

**All allegations of sexual abuse and sexual harassment must be reported to the facility's designated investigators.**

**Official Response Following an Inmate Report**  
(Applies to Sexual Abuse by Staff and by Another Inmate)

*Legal Aid Comment: Victims should have access to a victim advocate, and the agency must make some efforts to prevent retaliation following a complaint of sexual abuse or harassment.*

**1. Examinations, § 115.21**

**Victims of sexual abuse should have access to forensic medical exams (either on-site or at an outside facility) without cost.** These exams must be performed by either Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs). If neither can be made available, the exam may be performed by other qualified medical practitioners. However, all efforts to provide SAFEs or SANEs must be documented.

**2. Access to Outside Support and Victim Advocates, §§ 115.53, 115.21**

*Legal Aid Comment: A rape crisis center refers to an entity that provides intervention and related assistance to victims of sexual assault of all ages. If access to a rape crisis center is not available, then a victim should have access to a victim advocate either from a community-based organization or to an agency staff person. Advocates had expressed concerns about victims only receiving access to an agency staff person. DOJ attempted to address these concerns by requiring that staff person be trained and screened.*

**Inmates should have access to outside victim advocates for emotional support services** related to sexual abuse. You must be given mailing addresses and telephone numbers (including toll-free hotline numbers) of local, State, or national victim advocacy or rape crisis organizations. These communications must be as confidential as possible. Inmates must be notified of the extent to which communications will be monitored before inmates are given access to this contact information.

**Victims of sexual abuse should be provided access to a victim advocate from a rape crisis center** DOC/DOCCS may utilize a rape crisis center that is part of a governmental unit, so long as it is not part of the criminal justice system and offers a comparable level of confidentiality as a nongovernmental entity. If a rape crisis center is unavailable, DOC/DOCCS must provide a qualified staff member from a community-based organization, or a qualified DOC/DOCCS staff member. A qualified staff member is an *individual* who has been screened for appropriateness to serve in this role and who has received education concerning sexual assault and forensic examination issues in general. The victim advocate, community-based organization staff member, or the qualified DOC/DOCCS staff member **should accompany and support the victim through the forensic examination process and investigatory interviews, and should provide emotional support, crisis intervention, information, and referrals.** If an outside investigatory agency is responsible for investigating the allegations, DOC/DOCCS must request that they follow these requirements. These requirements also apply to any outside State

entities and any Department of Justice office that are responsible for investigating allegations of sexual abuse in prisons or jails.

### **3. Protection Against Retaliation, § 115.67**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

DOC/DOCCS must implement a **policy to protect** all inmates and staff who report incidents of sexual abuse or harassment, or who cooperate with investigations from retaliation by other inmates or staff. Protection measures, such as housing changes or transfers, removal of contact, and emotional support services for inmates or staff who fear retaliation must be made available.

**For at least 90 days** following a report (or longer if necessary), **DOC/DOCCS must monitor the treatment of inmates or staff** who reported the abuse and of inmates who suffered the abuse to **assess and remedy any signs of retaliation**. Items to monitor include inmate disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff.

If you reported an incident, you should receive **periodic status checks**. If you express a fear of retaliation, DOC/DOCCS must take appropriate measures to protect you. A duty to monitor terminates if DOC/DOCCS determines that the allegation is unfounded.



## **Investigations**

***Legal Aid Comment:** Unfortunately it is not clear how much these Standards will change current practice in New York. They will make the standard of proof needed to substantiate a complaint clearer, require credibility determinations be made, and require that these determinations not be based solely on the belief that prisoners never tell the truth. It also requires that persons in custody be told the results of the investigation. In jurisdictions outside New York, these Standards may lead to significant improvement in investigations.*

### **1. Definitions, § 115.5**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

A substantiated allegation means an allegation that was investigated and determined to have occurred. An unsubstantiated allegation means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred. Unfounded allegation means an allegation was investigated and determined not to have occurred.

### **2. Investigations, § 115.22**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

***Legal Aid Comment:** Understand that even though an investigation of a complaint of sexual abuse or harassment by staff is required to be conducted, you must also exhaust all available administrative remedies. In New York State, this means that even if the DOCCS' Inspector General's Office is investigating your allegations, you must also file a grievance and appeal it to the highest level possible if you want to be able to bring a federal (or possibly State) lawsuit. If you receive a response to your grievance that says the I.G. is investigating, you still should appeal that decision to CORC.*

**All allegations of sexual abuse and sexual harassment must be administratively or criminally investigated.** A policy must be set in place that ensures all allegations are referred for investigation to an agency with the legal authority to conduct criminal investigations (unless the allegations do not involve potentially criminal behavior). All referrals must be documented. This policy must be published on the DOC/DOCCS's website, or made available through other means if the agency does not have a website.

If a separate investigatory entity is involved, the policy must outline the responsibilities of both DOC/DOCCS and the investigatory entity. Any State entity or Department of Justice component that is responsible for the investigation must have in place a policy governing the conduct of such investigations.

### **3. Administrative Investigations, §§ 115.71-115.72**

*(Applies to Sexual Abuse by Staff and by Another Inmate)*

For all allegations of sexual abuse, specially trained investigators must promptly, thoroughly, and objectively gather and preserve physical and DNA evidence and any available

electronic monitoring data. Investigators must also interview the alleged victim, suspected abuser, and witnesses. The **credibility** of individuals who are interviewed must be assessed on an individual basis and must **not be determined by status as inmate or staff**. Prior complaints/reports of sexual abuse involving the alleged abuser must also be considered.

The purpose of an **administrative investigation** is to determine whether staff actions or omissions contributed to the abuse. These investigations must be documented in written reports that include descriptions of physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings. The evidentiary standard from administrative investigations must be **no higher than a preponderance of the evidence**.

#### **4. Criminal Investigations, § 115.71**

*(Applies to Sexual Abuse by Staff and by Another Inmate)*

**Criminal investigations** must also be documented in written reports that contain descriptions of physical, testimonial, and documentary evidence. **If substantiated allegations appear to be criminal, they must be referred for prosecution.**

All written reports resulting from administrative or criminal investigations must be retained by DOC/DOCCS as long as the alleged abuser is employed or incarcerated by DOC/DOCCS. If an alleged abuser or victim departs from the employment or control of the facility or DOC/DOCCS, the **departure must not be grounds for terminating an investigation.**

#### **5. Reporting Investigation Results to Inmates, § 115.73**

*(Applies to Sexual Abuse by Staff and by Another Inmate)*

Following an investigation of an inmate's allegations of sexual abuse, DOC/DOCCS must inform the inmate as to whether the allegation has been determined to be **substantiated, unsubstantiated, or unfounded.**

Following a determination that an inmate's allegation of sexual abuse by a staff member is **substantiated or unsubstantiated**, DOC/DOCCS must inform the inmate whenever the staff member is no longer posted within the inmate's unit or is no longer employed at the facility, or when DOC/DOCCS learns that the staff member has been indicted or has been convicted on a charge related to sexual abuse within the facility. There is no duty to report to an inmate if the allegation is determined to be unfounded.

Following an inmate's allegation that he or she was **sexually abused by another inmate**, DOC/DOCCS must inform the alleged victim whenever DOC/DOCCS learns that the alleged abuser has been indicted or convicted on a charge related to sexual abuse within the facility.

All notifications or attempted notifications to complaining inmates must be documented. DOC/DOCCS no longer has a duty to report this information to an inmate if the inmate has been released from custody.

## Discipline of Staff and of Inmates

### **1. Disciplinary Sanctions for Staff, Contractors, and Volunteers, §§ 115.76-115.77**

*(Applies to Sexual Abuse by Staff)*

**Legal Aid Comment:** *Despite strenuous urging by some advocates, the Standards do not take on collective bargaining agreements directly, so in jurisdictions like New York the Standards do not require correctional staff to be removed from their “bid” posts absent a finding by an arbitrator.*

**Termination** must be the **presumptive disciplinary sanction** for staff who have engaged in sexual abuse. **All terminations** or resignations by staff who would have been terminated **must be reported to law enforcement agencies and relevant licensing bodies**, unless the activity was clearly not criminal. If a staff member violates the facility policies relating to sexual abuse or sexual harassment, the disciplinary sanction must be determined based on the nature and circumstance of the acts committed, the staff member’s disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

Contractors or volunteers who have engaged in sexual abuse must be prohibited from contact with inmates and must be reported to law enforcement agencies, unless the activity was clearly not criminal. The facility must then take appropriate remedial measures.

### **2. Discipline of Inmates, §115.78<sup>5</sup>**

*(Applies to Sexual Abuse by Staff and by Another Inmate)*

**Legal Aid Comment:** *Persons in custody can be disciplined for the sexual abuse of another prisoner, although certain factors must be considered.*

#### **a. Punishment for Inmate Abusers**

*(Applies to Sexual Abuse by Another Inmate)*

Inmates are subject to disciplinary sanctions following an administrative or criminal finding that the inmate engaged in sexual abuse. These sanctions shall be proportionate with the nature and circumstances of the abuse committed, the inmate’s disciplinary history, and sanctions imposed for comparable offenses by other inmates with similar histories. When determining sanctions, DOC/DOCCS should consider whether the inmate’s mental disabilities or mental illnesses contributed to his or her behavior. DOC/DOCCS may require the inmate to participate in therapy, counseling, or other interventions in an attempt to correct the motivations for the abuse.

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<sup>5</sup> As noted above, inmates can be disciplined for consensual sexual activity with another prisoner or for a report of sexual abuse not made in good faith.

***b. Punishment for Inmate-on-Staff Sexual Abuse***  
*(Applies to Sexual Abuse by Staff)*

***Legal Aid Comment:*** *Persons in custody cannot be disciplined for sexual contact with staff unless there is a finding that the staff member was not consenting to the contact. However, nothing in the Standards prohibits a prisoner from being disciplined for other misconduct they report or are found to have engaged in, such as distributing contraband that a person who is abusing you has brought into the facility. We understand that DOCCS will not ordinarily discipline a prisoner for misconduct directly related to the abuse, such as being out of place. As noted above, prisoners can be disciplined for a report of sexual abuse not made in good faith.*

Inmates can only be punished for sexual contact with staff members if DOC/DOCCS finds that the staff member did not consent to such contact.

***c. Prohibition of all Sexual Activity***  
*(Sexual Abuse by Another Inmate)*

***Legal Aid Comment:*** *Nothing in the Standards prohibits an agency from disciplining a prisoner for sexual contact with another prisoner if it is prohibited by agency rules, even if the contact was consensual.*

Although consensual sexual activity between inmates does not constitute sexual abuse, **DOC/DOCCS may prohibit all sexual activity between inmates and may discipline inmates for such activity.**

**Medical and Mental Health Care**<sup>6</sup>  
(Applies to Sexual Abuse by Staff and by Another Inmate)

*Legal Aid Comment: The Standards contain certain important requirements about access to mental and medical care.*

**1. Medical and Mental Health Screenings, § 115.81**

If the initial intake screening indicates that an inmate has experienced prior sexual victimization, the inmate should receive a **follow-up** meeting with a medical or mental health practitioner **within 14 days** of the intake screening. If the screening indicates that the inmate has previously perpetrated sexual abuse, the inmate should be offered a **follow-up** meeting with a mental health provider **within 14 days** of the intake screening.

Information about sexual victimization or sexual abusiveness that occurred in an institutional setting should be kept private among medical and mental health practitioners and other staff. This information may be shared in order to inform treatment plans and housing, bed, work, education, and program assignments.

Inmates must give **informed consent** to medical and mental health practitioners before the practitioners report information about prior sexual victimization that did not occur in an institutional setting.

**2. Access to Emergency Medical and Mental Health Services, § 115.82**

If you are a victim of sexual abuse while in custody, you should receive timely and unimpeded access to **emergency medical treatment and crisis prevention services**. If there are no qualified medical or mental health practitioners on duty at the time a report of recent abuse is made, security staff first responders should take steps to protect the victim and should immediately notify medical and mental health practitioners.

You should also be offered information and access to **emergency contraception, pregnancy tests, and sexually transmitted infections prophylaxis** where medically appropriate. These treatments must be provided **without cost** and regardless of whether the victim names the abuser or cooperates with any investigation in response to the incident.

**3. Ongoing Medical and Mental Health Care**

DOC/DOCCS should offer you medical and mental health evaluations, and where appropriate, treatment if you have been sexually victimized while in custody. These evaluations and treatments should include **follow-up services, treatment plans**, and, when necessary, **referrals for continued care** following a transfer or release from custody. The quality of care should be consistent with the community level of care.

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<sup>6</sup> As noted above, consistent with State law, medical and mental health staff have a duty to report sexual abuse and harassment that you tell them about.

**If pregnancy results** from sexual abuse while incarcerated, such **victims should receive timely and comprehensive information and access to all lawful pregnancy-related medical services.**

**If an inmate contracts a sexually transmitted disease** as a result of sexual abuse while in custody, treatment services should be provided **without cost** and regardless of whether the victim names the abuser or cooperates with any investigation in response to the incident.

DOC/DOCCS should attempt to conduct a **mental health evaluation of all known inmate-on-inmate abusers within 60 days** of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

## **Education and Training**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

**Legal Aid Comment:** *The Standards require that persons in custody be advised of their rights under the Standards, that staff be trained on recognizing, preventing and reporting custodial abuse, and that investigators receive specialized training.*

### **1. Employee Training**

#### ***a. General Training, §§ 115.31-115.32***

All employees who have contact with inmates must be trained on a number of issues, including: the zero-tolerance policy; their obligations under agency policies and procedures concerning prevention, detection, reporting and responding to sexual abuse and harassment; inmates' right to be free from sexual abuse and sexual harassment; inmates' right to be free from retaliation for reporting such acts; dynamics of sexual abuse and sexual harassment in confinement; common reactions of victims; how to detect signs of threatened or actual abuse; how to avoid inappropriate relationship with inmates; how to communicate effectively and professionally with inmates (including LGBTI inmates); and how to comply with relevant mandatory reporting laws. Volunteers and contractors must be trained on their responsibilities under the agency's sexual abuse and harassment policies and procedures based on the services they provide and the level of contact they have with inmates, but at a minimum all volunteers and contractors who have contact with inmates must be notified of the agency's zero-tolerance policy and how to report incidents of abuse and harassment.

**Training of employees must be tailored to the gender of the inmates at the employee's facility.** If an employee is reassigned to a facility that houses a different gender, they must receive additional training. DOC/DOCCS must provide a "**refresher training**" for each employee **every two years** to ensure that all employees know DOC/DOCCS's current sexual abuse and sexual harassment procedures and policies. In years when an employee does not receive refresher training, DOC/DOCCS must provide "**refresher information**" on current sexual abuse and sexual harassment policies. DOC/DOCCS must document all employee training and verify that employees understand the training they received.

#### ***b. Specialized Training: Investigations, § 115.34***

In addition to general sexual abuse and sexual harassment training, investigators must also receive more extensive training in conducting such investigations in confinement settings. This specialized training must cover techniques for interviewing victims, proper use of *Miranda* and *Garrity* warnings, evidence collection, and criteria and evidence required to substantiate a case. DOC/DOCCS must document the investigators' completion of the required specialized training. Any State entity for Department of Justice component responsible for investigating allegation of sexual abuse in confinement settings must provide such training to its investigators.

*c. Specialized Training: Medical and Mental Health Care, § 115.35*

All full- and part-time medical and mental health care practitioners who work regularly in the facilities must be trained in: how to detect signs of sexual abuse and sexual harassment; how to preserve physical evidence; how to respond effectively and respectfully to victims; and how to report allegations or suspicions.

**2. Inmate Education, § 115.33**

**During intake**, all inmates must receive information about the zero-tolerance policy and about how to report sexual abuse and sexual harassment. **Within 30 days of intake**, inmates must receive a comprehensive education about their rights to be free from sexual abuse and sexual harassment, and about DOC/DOCCS's policies and procedures for responding to such incidents. This education must be done either in person or through video. Key information must be continuously and readily available through posters, inmate handbooks, or other written formats. DOC/DOCCS must document all inmate participation in these education sessions.

**If you are a current inmate and you have not received such education**, you must receive education **within one year** of PREA's effective date. Inmates must also receive education upon transfer to the extent that the policies and procedures differ from facility to facility.



## **Special Populations**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

### **1. Youthful Inmates**

**Legal Aid Comment:** *The Standards contain special requirements about separation and monitoring of young inmates, and about reporting obligations. This means in places like New York, where people who are sixteen and older are prosecuted as adults and confined in adult jails and prisons, they have to be separated from older prisoners from prisoners who are over 18 in housing areas and monitored closely in program areas.*

#### ***a. Definitions, § 115.5***

Youthful inmates are any inmates **under the age of 18** who are under adult court supervision and incarcerated or detained in a prison or jail.

#### ***b. Supervision and Monitoring, § 115.14***

Youthful inmates must not be placed in a housing unit in which they have sight, sound, and or physical contact with any adult inmate through the use of a shared dayroom, common space, shower area, or sleeping quarter. In areas outside of housing areas, DOC/DOCCS must either **maintain sight and sound separation between youthful and adult inmates**, or **provide direct staff supervision** when there is contact between youthful and adult inmates.

DOC/DOCCS must make all efforts not to place youthful inmates in isolation in order to comply with this provision. Unless there are exigent circumstances, DOC/DOCCS must not deny youthful inmates exercise and any legally required special education services in order to comply. Youthful inmates must have access to other programs and work opportunities to the extent possible.

#### ***c. Reporting Information About Prior Sexual Victimization, § 115.82***

**Medical and mental health practitioners** are also required to report sexual abuse, unless otherwise precluded by Federal, State, or local law. Inmates must be advised about the practitioner's duty to report and the limitations of confidentiality at the initiation of services.

If the alleged victim is **under the age of 18**, or a **“vulnerable adult”** under a State or local statute, DOC/DOCCS **must report the allegation** to the designated State or local services DOC/DOCCS under applicable **mandatory reporting laws**.

Inmates must give informed consent to medical and mental health practitioners before the practitioners report information about prior sexual victimization that did not occur in an institutional setting (**unless the inmate is under the age of 18**).

## **2. Lesbian, Gay, Bisexual, Transgender, Intersex (LGBTI) and Gender Nonconforming Inmates**

*(Applies to Sexual Abuse and Harassment by Staff and by Another Inmate)*

**Legal Aid Comment:** *The Standards contain critically important requirements about LGBTI and gender nonconforming inmates.*

### ***a. Definitions, § 115.5***

**Gender Nonconforming:** A person whose appearance or manner does not conform to traditional societal gender expectations

**Intersex:** A person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female (Intersex medical conditions are sometimes referred to as disorders of sex development)

**Transgender:** A person whose gender identity (i.e., internal sense of feeling male or female) is different from the person's assigned sex at birth

### ***b. Screening, § 115.15***

**Legal Aid Comment:** *Advocates had urged the adoption of this Standard to abate some of the worst abuses transgender and intersex prisoners have experienced. An examination to determine genital status is not allowed to be performed by facility staff just for that purpose, and if genital status is truly unknown then it should be determined by conversation, by reviewing the prisoner's medical records, and then only if necessary, is a physical examination allowed and then only as part of a broader examination by medical staff that is conducted in private.*

**Facility staff is not permitted to physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status.** If genital status is unknown, it must be determined by asking the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

### ***c. Use of Screening Information, § 115.42***

**Legal Aid Comment:** *Whether a transgender or intersex prisoner is to be housed in male or female prison or jail, and to what housing and program units they are to be assigned, is still left to agency discretion but the Standards nonetheless make progress. Decisions have to be made on a case-by-case basis and have to be reviewed periodically based on the prisoner's actual experiences. And, perhaps most importantly, the views of the person in custody are required to be given serious consideration.*

**Determination of facility, housing, and program placement for transgender or intersex inmates must be made on a case-by-case basis,** with the goal of ensuring the inmate's health and safety. In deciding this, DOC/DOCCS must also consider present management or

security problems. Facility and housing placements and programming assignments for each transgender or intersex inmate must be **reassessed at least twice each year** to review any threats to safety experienced by the inmate. **The inmate's own views on his or her safety must be given serious consideration.** When DOC/DOCCS learns that an inmate is subject to a substantial risk of imminent sexual abuse, it must take immediate action to protect the inmate. § 115.62.

**Transgender and intersex inmates must be given the opportunity to shower separately from other inmates.**

**DOC/DOCCS must not place LGBTI inmates in dedicated facilities, units, or wings based solely on such identification or status,** unless such placement is in connection to a consent decree, legal settlement, or legal judgment for the purpose of protecting LGBTI inmates.

#### *d. Employee LGBTI Training, § 115.15*

Security staff must be trained in how to conduct pat-down searches of transgender and intersex inmates. The staff must be professional and respectful, and must conduct the searches/pat-downs in the least intrusive manner possible, consistent with security needs.

### **3. Inmates with Disabilities and Limited English Proficient (LEP) Inmates, § 115.16**

Inmates with disabilities (e.g. inmates who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities) must have **equal access to DOC/DOCCS's efforts** to prevent, detect, and respond to sexual abuse and sexual harassment. When necessary, **interpreters must be provided** for inmates who are deaf, hard of hearing, or not English proficient in order to effectively, accurately, and impartially interpret necessary information. Except in limited circumstances when immediate interpretation is necessary, DOC/DOCCS must not rely on inmate interpreters, inmate readers, or any type of inmate assistants.

#### *a. Inmate Education, § 115.33*

**Inmate education must be provided in formats accessible to all inmates.** Inmates who are limited English proficient, deaf, visually impaired, or otherwise disabled, and inmates who have limited reading skills must be provided with the information in a format that is suitable for them.

**Written materials** must also be provided in formats and through methods that ensure effective communication with inmates with disabilities. DOC/DOCCS is not required to take actions that will fundamentally disrupt the nature of a service, program or activity; nor are they responsible for taking actions that carry an undue financial or administrative burden. Those terms are promulgated under Title II of the Americans With Disabilities Act, 28 CFR 35.164.

#### *4. Inmates Detained Solely for Civil Immigration Purposes*

##### *a. Inmate Reporting, § 115.51*

If an inmate is detained solely for civil immigration purposes, they must be provided with information on how to **contact consular officials** as well as **officials at the Department of Homeland Security** in addition to information regarding the **multiple internal ways to privately report** sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting such incidents, and staff neglect or violation of responsibilities that may contribute to such incidents. Inmates must also have at least **one way to report abuse or harassment to a public or private entity outside DOC/DOCCS**, who then forward to report to DOC/DOCCS officials (this allows inmates to remain anonymous).

##### *b. Access to Outside Support and Victim Advocates, §§ 115.53, 115.21*

Inmates who are detained solely for civil immigration purposes must be provided access to immigrant services agencies in addition to access to outside victim advocates for emotion support services related to sexual abuse. Inmates must be given mailing addresses and telephone numbers (including toll-free hotline numbers) of local, State, or national victim advocacy or rape crisis organizations. These communications must be as confidential as possible. Inmates must be notified of the extent to which communications will be monitored before inmates are given access.

##### *c. Screening, § 115.41*

In order to **assess the risk of an inmate being sexually victimized**, the initial screening must consider the following: any mental, physical, or developmental disabilities; age; physical build; previous incarcerations; whether criminal history is exclusively nonviolent; prior convictions for sex offenses; whether the inmate is perceived to be LGBTI; previous experience of sexual victimization; the inmate's own perception of vulnerability; and **whether the inmate is detained solely for civil immigration purpose**. See § 115.41 for more information about screening, and § 115.42 for more information about the use of screening.

## **Data Collection and Review**

***Legal Aid Comment:** These Standards may not sound important, but they are. Reviews of all investigations have to be conducted regardless of whether found substantiated or unsubstantiated; recommendations for changes in policy, staffing levels, and the need for technology have to be made; and these changes implemented or the reasons for not making them must be documented. They require records to be created and to be reviewed by high-ranking staff which will not only hopefully lead to change, but also means that prison and jail officials cannot claim that they were not aware of the scope and severity of the problem of custodial sexual abuse. Some of these records must be made public, some may be available through FOIL (although many will not be provided, we suspect), and some may be available through discovery if you are bringing litigation.*

### **1. Sexual Abuse Incident Reviews, § 115.86**

DOC/DOCCS must conduct a **sexual abuse incident review** within 30 days of the conclusion of **every sexual abuse investigation** where allegations were found to be either **substantiated or unsubstantiated**. Reviews do not need to be conducted for allegations that were determined to be unfounded. Upper-level management officials should conduct these reviews, with input from line supervisors, investigators, and medical or mental health practitioners.

The review team should **consider a need for policy or practice change and whether the incident was motivated by race, ethnicity, gender identity, LGBTI identification/status/perceived status, gang affiliation, or other group dynamics**.

The team should also **examine the area** where the incident allegedly occurred to assess whether physical barriers in the area enable abuse. Further, the team should **assess staffing levels** and whether **monitoring technology** should be deployed or improved.

The **team should prepare a report of its findings**. The report should include determinations of considerations and recommendations for improvements. These reports should be submitted to the facility head and the PREA compliance manager. If the facility does not implement the recommended improvements, they must document their reasons.

### **2. Data Collection, § 115.87**

For every allegation of sexual abuse, DOC/DOCCS should collect accurate and uniform data (*using a standardized instrument and set of directions*). An **aggregation** of the incident-based sexual abuse data should occur at least **annually**. This data should include, at a minimum, the data necessary to answer all questions from the most recent version of the Survey to Sexual Violence conducted by the Department of Justice.

DOC/DOCCS should maintain, review, and collect data as needed from all available incident-based documents (*reports, investigation files, and sexual abuse incident reviews*).

DOC/DOCCS should also collect this data from every private facility with which it contracts for the confinement of its inmates.

Upon request, the agency must provide all sexual abuse data from the previous calendar year to the Department of Justice no later than June 30.

### **3. Data Review for Corrective Action, § 115.88**

Review data should be collected to assess and improve the effectiveness of DOC/DOCCS's sexual abuse policies, practices, and training. DOC/DOCCS should identify problem areas, take corrective action on an ongoing basis, and **prepare an annual report** of its findings and corrective actions for each facility and for the agency as a whole. These reports should include comparisons of the current year's data and actions with those of prior years and provide an assessment of the agency's progress in addressing sexual abuse. **The report is to be approved by the agency head and made available to the public** through the agency website, or if the agency does not have a website, through some other means.

### **4. Data Storage, Publication, and Destruction, § 115.89**

**DOC/DOCCS must make all aggregated sexual abuse data publicly available at least annually through its website.** If an agency does not have a website, then it must use some other means. **All personal identifiers should be removed before the data is made public.** DOC/DOCCS **may also redact specific material** from reports when published in order to prevent threats to the safety and security of the facility, but they must describe the nature of the material that is redacted. **DOC/DOCCS must maintain sexual abuse data collection for at least 10 years after the date of the initial collection.**

## **Auditing, §§ 115.93, 114.401-.405**

*Legal Aid Comment: Auditing whether the agency is complying with the Standards, and whether sexual abuse remains persistent is a critical component of the Standards. While advocates had urged more stringent requirements, and while it remains debatable whether the Standards require sufficient independence and sufficient criteria for auditing the agency's progress, at least DOJ took some steps in making the auditing process independent of the agency. Persons in custody may share problems they have experienced with the auditor and may communicate with him or her confidentially. The auditor is expected to attempt to communicate with community-based or victims-advocates who might have insight into relevant conditions.*

### **1. Frequency and Scope of Audits, § 115.401**

**During the three year period** that starts August 20, 2013 (or one year plus 60 days after the publication of the Standards) **DOC/DOCCS must ensure that every jail/prison it operates is audited at least once. Each year at least one-third of the jails/prisons must be audited.** DOJ can recommend expedited auditing of a particular facility if they believe it may be experiencing problems relating to sexual abuse, and the recommendation may include referrals to resources that may assist the agency with PREA-related issues.

DOJ will develop and issue an audit instrument that will provide guidance on the content and conduct of the audits.

**DOC/DOCCS will bear the burden of demonstrating compliance** with the Standards.

The **auditor shall review all relevant agency-wide policies, procedures, reports,** internal and external audits, and accreditations for each facility type; shall review, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period; **shall have access to, and shall observe, all areas** of the audited facilities; shall be able to request and receive copies of any relevant documents; shall retain and preserve all documentation (including, e.g., video tapes and interview notes) relied upon in making determinations and shall provide them to DOJ on request; **shall interview a representative sample of inmates and shall be permitted to conduct private interviews** of them; shall interview a representative sample of supervisors and administrators; **inmates shall be permitted to send confidential information or correspondence to the auditor** in the same manner as they are permitted to communicate with counsel; and the **auditor shall attempt to communicate with community-based or victim advocates** who may have insight into relevant conditions.

### **2. Auditor Qualifications, §115.402**

**Audits shall be conducted by 1) a member of a correctional monitoring body that is not part of, or under, the agency; 2) a member of an auditing entity such as an inspector general's office or ombudsperson's office that is external to the agency; or 3) other outside individuals with relevant experience.**

All auditors shall be certified by DOJ. DOJ shall develop and issue procedures for certification, including training.

No audit may be conducted by an auditor who has received financial compensation from the agency being audited (apart from PREA audits) during the 3 years prior to being retained, nor can an agency employ or otherwise financially compensate an auditor for 3 years subsequent to the agency's retention of the auditor.

### **3. Audit Contents, Findings, and Corrective Action Plan §§ 115.403-115.404**

**Audit reports shall state whether agency-wide policies and procedures comply** with the Standards.

**For each Standard, the auditor shall determine whether the audited facility “Exceeds” Standard, “Meets” Standard, or “Does Not Meet” Standard.** “Exceeds” means substantially exceeds the requirement of the Standard; “Meets” means substantial compliance; complies in all material ways with the Standard for the relevant period; and “Does Not Meet” means requires corrective action. The audit summary shall, among other things, indicate the number of provisions the facility has achieved at each grade.

**The audit report shall describe the methodology, sample sizes and basis for the auditor’s conclusions** with regard to each standard for each facility and **shall make recommendations for any required corrective action plan. Personally identifiable inmate or staff information shall be redacted** but shall be provided to the agency upon request or to DOJ.

**The final report shall be published on the DOC/DOCCS’ website** and if the agency does not have a website shall be otherwise made readily available to the public.

**A finding of “Does Not Meet” Standard shall trigger a 180-day corrective action period.** The auditor and the agency shall jointly develop a corrective action plan to achieve compliance. The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility. After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action. If the agency does not achieve compliance it may (at its discretion and cost) request a subsequent audit once it believes it has achieved compliance.

### **4. Audit Appeals, § 115.405**

Within 90 days of the auditor’s final determination, an agency may appeal to DOJ regarding any specific audit finding it believes is incorrect. If DOJ determines the agency has stated good cause for a re-evaluation, the agency may commission a re-audit by an auditor mutually agreed upon by the agency and DOJ. The agency shall bear the costs of this re-audit, which shall be considered final.



**State Compliance, §115.501**

***Legal Aid Comment:** If the State is not in full compliance, then the agency can lose up to 5% of its federal funding. 42 U.S.C. 15607(c)(2) (2003).*

In determining whether the State is in full compliance with the Standards pursuant to PREA, the Governor shall consider the results of the most recent agency audits.