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The Honorable Janet Napolitano
United States Department of Homeland Security
Office of Policy
Potomac Center North
500 12th Street SW
Washington, DC 20536

Re: American Bar Association Comments on *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, 77 FR 75299 (December 19, 2012); DHS Docket No. ICEB-2012-0003

Dear Secretary Napolitano:

From 2007-2011, persons held in immigration detention facilities filed more than 170 allegations of sexual abuse.¹ According to the Department of Justice, sexual abuse is one of the most underreported crimes in America.² More than 60 percent of victims never report their abuse to the police.³ DHS's proposed *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities* are a positive step toward ensuring that sexual abuse is eliminated from immigration detention facilities.

The American Bar Association (ABA) is the largest voluntary professional association in the world, with nearly 400,000 members, and is committed to serving its members, improving the legal profession, eliminating bias and enhancing diversity, and advancing the rule of law throughout the United States and around the world. Through its Commission on Immigration, the ABA advocates for modifications in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and operates pro bono legal representation programs that encourage volunteer lawyers to provide high quality representation for immigrants, with a special emphasis on the treatment of individuals in immigration detention.

¹ Monica Arpino, *How Much Sexual Abuse Gets "Lost in Detention"?*, FRONTLINE, Oct. 19, 2011, available at <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/how-much-sexual-abuse-gets-lost-in-detention>; Lisa Graybill, *Immigration Detainees Fear Rape and Death*, ACLU BLOG, Oct. 25, 2011, <http://www.aclu.org/blog/prisoners-rights-immigrants-rights/immigration-detainees-fear-rape-and-death>.

² *Id.*; *In Their Own Words: Enduring abuse in Arizona immigration detention centers*, AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, July 13, 2011, at 23, available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/07.13.2011_InTheirOwnWords.pdf

³ Arpino, *supra* note 3.

The ABA Commission on Immigration (Commission) has a long history of collaboration with Immigration and Customs Enforcement (ICE) on the Detention Standards. As a stakeholder in developing the standards, the ABA manages a Detention Standards Implementation Initiative that sends volunteer attorneys to detention facilities to report to ICE on the implementation of those standards. The Commission also operates a detainee correspondence project, including a toll-free hotline accessible to immigration detainees across the country. In response to calls and letters from detainees, the Commission forwards individual complaints of standards violations and other serious concerns to ICE, the DHS Office for Civil Rights and Civil Liberties, and the DHS Inspector General.

In August 2012, the ABA adopted Civil Immigration Detention Standards, calling for ICE to transition to a comprehensive civil detention system.⁴ The Civil Immigration Detention Standards specifically incorporated the Prison Rape Elimination Act (PREA) as a key protection for detainees.

The proposed regulations are a positive step toward better protecting vulnerable detainees from abuse. However, the ABA has several recommendations to ensure thorough protections are put in effect and maintained at all facilities. Our comments address the following main concerns: the limited applicability of PREA to facilities with existing contracts, the application of PREA regulations to holding facilities and transportation, the need to strengthen oversight and accountability mechanisms, and a concern that some of the proposed regulations fall short of the existing DOJ standards.

1. DHS should incorporate the new PREA regulations into facility contracts within one year of finalizing the regulation.

The ABA believes immigration detainees, who are held pursuant to ICE's civil immigration authority, merit standards that meet or exceed the protections guaranteed to other populations in custody.⁵ The ABA believes that ICE should bear the responsibility for safeguarding and protecting the rights of all residents. The proposed regulation would permit DHS detention and holding facilities under contract to continue operations through the duration of their contracts without requiring the implementation of these new PREA regulations. This would result in civil detainees continuing to receive lower standards of protection than those afforded to criminal inmates. Instead of waiting for new contracts or renewals to impose these necessary standards, the DHS should negotiate with its contractors and implement the regulations within one year of promulgating this regulation.

As written, the proposed PREA regulations will cover DHS detention and holding facilities. The different types of facilities include service processing center (SPC) facilities, contract detention facilities (CDFs), Intergovernmental Service Agreement (IGSA) facilities, and Intergovernmental Agreement (IGA) facilities. However, the regulations will not take direct effect in those facilities operated under contracts or agreements, namely CDFs and IGSA

⁴ ABA Civil Immigration Detention Standards, adopted August 2012, <http://www.abanow.org/2012/06/2012am102>.

⁵ ABA Civil Immigration Detention Standards, August 2012, available at http://www.americanbar.org/groups/public_services/immigration/civilimmidetstandards.html.

facilities. Instead, the regulations will be implemented in any new contracts or contract renewals with these facilities. This is not sufficient.

In 2011, nearly half of ICE's detention and holding facilities were owned or operated by private prison companies.⁶ Most of the contracts with private prison providers are typically five years.⁷ If the standards designed to prevent sexual abuse are not implemented until the end of those contracts, none of the detainees during that period will benefit from the protection of the regulations.

The regulations as applied to IGSA's with county sheriffs are even more problematic. Most of these agreements have no expiration at all. Thus the regulations may never go into effect in those IGSA facilities that maintain their current agreements. In 2009, approximately 50% of the detained population was being held primarily in nondedicated or shared-use county jails through IGSA's.⁸ The other 50% of the detainee population was being held in 21 facilities. Of those facilities, 14 were either CDFs or dedicated county jails under IGSA's.⁹ Since over 400,000 people are detained by ICE annually, a great number of individuals, both current and future detainees, will never be protected by the proposed regulations absent remedial action by the Department of Homeland Security.¹⁰

Detainees in contracted facilities are more vulnerable than detainees in DHS- or government-operated facilities. The contracting and financing arrangements are so complicated that paths to responsibility and accountability are obfuscated.¹¹ Contractors are not required to reveal their records of complaints to the public, as the Freedom of Information Act does not apply to private contractors; also, under some contracts, ICE does not have the authority to fire contracted employees, even after evidence that an employee has sexually harassed a detainee. Instead, ICE must depend on the facilities' internal procedures to deal with any problems.

There have been reports of sexual abuse in private contract facilities. In May 2007 at the T. Don Hutto Immigration Facility, a video surveillance camera showed a guard, employed by Corrections Corporation of America (CCA), crawling out of a detained mother's cell in the middle of the night. The guard had had sexual contact with the woman while her child slept in a crib in the same room, but was never prosecuted.¹² One detention facility guard told the *San Antonio Reporter* that, "If [the guards] had the opportunity . . . some of the guards were just touching, groping, but if they had the opportunity they had sex with them. The female detainees, a lot of them, were willing because they thought . . . their chances of staying were

⁶ *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, THE NATIONAL IMMIGRATION FORUM, Aug. 2012, at 6, available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

⁷ Dora Schriro, *Immigration Detention Overview and Recommendations*, IMMIGRATION AND CUSTOMS ENFORCEMENT, Oct. 6, 2009, at 11, available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

⁸ Schriro, *supra* note 5, at 10.

⁹ *Id.*

¹⁰ Grace Trueman, *Pocketing a Pretty Penny: Sexual Victimization, Human Rights, and Private Contractors in the U.S.*, 89 U. DET. MERCY L. REV. 339, 368 (2012).

¹¹ Trueman, *supra* note 6, at 352.

¹² *Id.* at 346.

going to increase. That's not the case whatsoever.”¹³ Such stories are far from unique and serve to show that those in charge are willing to cover up incidents of sexual abuse in their facilities.

Contracts should be modified to apply the PREA regulations to all detention and holding facilities within, at most, a year of PREA’s implementation in immigration facilities. If the DHS’s contracts are randomly distributed in time, then most of the DHS’s contracts will not require renewal within a year of PREA’s passage. In other words, a year after Congress and the Administration have decided that noncompliance with PREA standards is intolerable, noncompliance will be the norm. Factor in the facilities under IGSA’s with no contract expiration dates, and noncompliance will continue, in many cases, indefinitely.

2. The Standards for DHS holding facilities and transportation of detainees should afford the same level of protection required for detention facilities.

The standards set forth for DHS Holding Facilities in sections 115.110 – 115.195 need to afford, at a minimum, the same level of protection to detainees as the standards for the Detention Facilities, set out in sections 115.10 – 115.95. The intended purpose of these Holding Facilities is short-term confinement of recently detained individuals or those being transferred from other facilities. For numerous reasons, immigration detainees are already in a more vulnerable position than prison inmates. Not only are the authorities charged with their detention the same ones in control of their immigration proceedings, but many immigration detainees do not speak English, are victims fleeing violence in their native countries, or have been trafficked to the United States. Furthermore, because of the fear of retaliatory deportation, immigration detainees are less likely to report abuse. Those who are in temporary detention situations are arguably even more vulnerable because of the transient nature of their situation. If a detainee in one of these holding facilities is sexually abused, the likelihood of the victim reporting the incident or having any opportunity for recourse is severely diminished because he or she will soon be transferred to another location or deported.

In 2011, the American Civil Liberties Union brought to light facts from a class action lawsuit that the organization filed on behalf of three immigrant women who were sexually abused while they were in ICE custody at the CCA-operated T. Don Hutto Family Residential Center in Taylor, Texas.¹⁴ The women were abused by a guard of the facility while he was transporting them alone to the airport or bus station nearby. Even though there were rules in place against detainees being transported without an escort officer of the same gender, this rule was violated on a regular basis. The lawsuit alleges that “ICE, Williamson County and CCA were deliberately indifferent and willfully blind to the fact that Dunn and other employees regularly violated the rule...”¹⁵ This incident highlights the risk of sexual abuse that transport poses for detainees, even when there are rules in place. The PREA regulations

¹³ *Id.* at 347.

¹⁴ *Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees Is Widespread National Problem*, AMERICAN CIVIL LIBERTIES UNION, Oct. 19, 2011, available at <http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse>.

¹⁵ *Id.*

can take a step toward reducing these risks by imposing the same heightened protections and auditing procedures in temporary holding facilities as are required in detention facilities.

In addition, contracts for transportation of detainees, and those being physically deported, should be explicitly included in the new PREA regulations. When detainees are being transported, they are more vulnerable and disoriented than in detention, and there are fewer people nearby from whom they could seek protection. While the regulations can be read as covering transportation settings, it should be made explicit.

The distinctions in resources and facility infrastructure between DHS Detention Facilities and DHS Holding Facilities are not so great that the full regulations could not be implemented. Therefore, we propose that the Subpart B Standards for DHS Holding Facilities be changed to mirror those of the Subpart A Standards for DHS Detention Facilities, including the ABA's language changes and additions proposed below.

3. DHS should strengthen the auditing mechanisms in the proposed regulations.

a. Standards for and frequency of audits and consequences for failure to comply

The ABA has several specific recommendations to improve the auditing standards. Audits are essential to achieve the Department's stated goal of eliminating all forms of sexual abuse in immigration detention. Without regular external audits, PREA's effectiveness will be significantly undermined. The ABA Civil Detention Standards recommend biannual audits to be conducted on each facility to ensure ongoing compliance. Based on the ABA's experience organizing facility tours, small improvements are frequently reported by detainees immediately preceding a tour or audit, as it encourages facility staff to evaluate their work and compliance with standards.

The proposed regulations posed a question regarding individualized audits of facilities or whether random sampling of facilities would satisfy the auditing requirement. We believe that random sampling would not be as effective in ensuring ongoing compliance with PREA at all facilities. In order to maintain independence, auditors: (1) should not be employees of DHS or the detention center and (2) should have the authority to transfer a detainee who is an alleged victim of sexual assault or rape while such crime is investigated.¹⁶

Detainees should be notified of these standards. Moreover, the auditor's contact information should be disseminated to each detainee. Detainees' phone calls made to the auditor should be free of charge and confidential. All complaints should be promptly investigated, and the audit committee should make appropriate recommendations to Congress to ensure compliance with PREA.

¹⁶ This provision was added to protect alleged victims from retaliation. Whether to be temporarily transferred during an investigation is a choice to be made by the detainee. If the detainee, auditor or the committee determines that transfer to another detention facility is not a safe option for the detainee, alternatives to detention shall be explored.

Our final concern is that the proposed PREA regulations do not cite clear consequences for failing an audit for compliance with PREA. A robust regulation would include contractual language that gives DHS the option to terminate a contract or to discontinue holding detainees at a facility that failed an audit.

b. Detainee communication with auditors and outside entities

In addition to more frequent audits of all facilities at which detainees are held, the ABA recommends several steps to improve the quality of audits. As PREA seeks to mitigate the underreporting and concealment of sexual abuse, the regulation must provide for multiple avenues of communication and environments in which individuals can safely reveal sensitive information. Sexual assault is one of the most underreported crimes in the world. The reasons for not reporting such crimes can only be exacerbated in a detention setting—victims are in an isolated environment with the perpetrator, detainees may understandably find it difficult to trust staff members of the detention center because they are part of the entity incarcerating her, retaliation for reporting could be unbearable in such a small community, and so on. Often, the detainees are not aware of their rights or are afraid to exercise them for fear of retaliation.¹⁷ Therefore, the regulation must require proactive notification to detainees of opportunities to report such crimes.

Because individuals reporting incidents of sexual abuse or harassment may position themselves for retaliation by the perpetrator, accommodations for one-on-one, confidential interviews are necessary for an accurate audit. Other detainees and staff members should not have knowledge of who engaged in a one-on-one interview with the auditor. In addition, the auditor should engage in a method of follow-up with individuals interviewed to ensure that retaliation against whistleblowing employees and detainees does not occur.

The regulations must provide multiple avenues of communication in which individuals can safely reveal sensitive information. Detainees should be permitted to send confidential information or correspondence to the auditor, and detainees should be notified, both verbally and in writing, that they may send confidential information to an external auditor through multiple avenues of communication. Translations of detainees' complaints should be provided by a neutral translation company at no cost to the detainee.

Further, the ABA suggests that mechanisms to call outside organizations be specifically improved for purposes of reporting sexual abuse. Detainees often report difficulties in accessing telephones. Lines can be nonfunctioning, costs can be prohibitively expensive, and privacy is sometimes nonexistent. Telephone banks similar to pay phones are usually placed close together and lack the privacy panels that are required by the ICE Detention Standards. The lack of privacy is particularly troubling in regard to reporting sexual abuse because it makes it impossible to have a confidential telephone conversation. In addition, detainees are aware that telephone calls are monitored or recorded, and they are often unaware of the procedure to request an unmonitored call, which makes discussing staff-on-detainee sexual abuse problematic.

¹⁷ *Id.*

Problems have also arisen when detainees try to contact agencies outside the detention facility. Detainees are often reluctant to report abuse to anyone who they view as being affiliated with ICE. This includes the DHS Office of the Inspector General (OIG). The lack of toll-free access to hotlines to nongovernmental victim advocacy or rape crisis organizations, as well as measures to ensure confidentiality for the communications, reduces the likelihood of reporting abuse. Hotline access would solve the problem of detainees being afraid to report abuse to another governmental agency.

There are logistical concerns that detainees have reported to the ABA that should be addressed. Even when detainees have attempted to try to contact a governmental agency they have encountered several obstacles. Toll-free numbers to groups such as the Joint Intake Center are sometimes blocked by the facility's telephone system. A recent change in procedure has left detainees skeptical that ICE does, in fact, take their complaints seriously: the toll-free number for OIG previously connected detainees to a person who discussed their concern with them and assigned them a case number. Now the number goes directly to voice mail and detainees report not receiving responses from OIG regarding the concerns they express in the voice mail messages.

c. Incorporation of PREA audits into other audit mechanisms

In addition to audits scheduled specifically to address compliance with these regulations, there are several steps that could improve auditing of these regulations at a minimal cost to the Department. The Department could encourage or require that all current facility audit mechanisms incorporate in existing tools questions and checklists regarding compliance with these regulations. This would include but is not limited to the ongoing work of Detention Service Monitors, external facility audits conducted by Nakamoto, and Department investigations by the Office for Civil Rights and Civil Liberties.

Nongovernmental organizations can be useful partners in monitoring compliance with detention standards, including the regulations at issue here. Many organizations with a history of highlighting sexual abuse complaints may be interested in collaborating with the Department to ensure effective monitoring in the future. The Department could create a toolkit for nongovernmental organizations to undertake facility tours or audits and report their findings.

4. Regulatory provisions should meet the standards set forth by the Department of Justice.

The ABA supports full implementation of the PREA standards elaborated by the Department of Justice and notes that while many provisions meet or even exceed those standards, some fall short. Some of these include the provisions pertaining to preventing retaliation against anyone who reports abuse or participates into an investigation of a report of abuse (§115.67/§115.167), keeping detainees in immigration detention facilities apprised of investigations in their reports of abuse (§115.73), and conducting thorough sexual abuse incident reviews (§115.86/§115.186). These draft provisions should be replaced in whole with the corresponding DOJ provisions.

In a number of other areas, DHS has included provisions that, in part, fall below the DOJ's floor. These provisions could be fixed with small changes borrowed from the relevant DOJ standards. For example, the proposed juvenile standards are not sufficient and do not limit the excessive use of administrative segregation as a means of protecting juveniles (§115.14/§115.114). As drafted, the training standards also do not require the same level of ongoing training of staff, contractors, and volunteers on their duty to be proactive about preventing and reporting abuse (§115.31/§115.131). The detainee education proposal does not provide adequate information to detainees about their right to be free of sexual abuse, guidance on how to protect themselves from abuse, and instructions on how to report instances of abuse (§115.33/§115.133). And, the reporting standards are missing a provision allowing staff to report sexual abuse anonymously (§115.51/§115.151).

5. Lack of Specialized Regulations for Children in Immigration Custody

Children in immigration custody are particularly vulnerable to sexual victimization. According to the Department of Justice's Bureau of Justice Statistics Special Report on Sexual Victimization in Juvenile Facilities from January 2010 (BJS Report), at least one in ten youths in state juvenile facilities was sexually abused.¹⁸ The National Prison Rape Elimination (NPRE) Commission Report (2009) notes that "juveniles in confinement are much more likely than incarcerated adults to be sexually abused . . . [and] to be effective, sexual abuse prevention, investigation, and treatment must be tailored to the developmental capacities and needs of youth."¹⁹

This type of abuse creates dramatic life-long effects that can result in post-traumatic stress disorder, violence, prostitution, depression, and suicide.²⁰ The National Institutes of Health states that "childhood experiences often setup cascading events" that impact adult health.²¹ Failure of specific redress for juvenile sexual abuse in detention and correctional facilities ignores these far-reaching consequences on youth in detention.²²

The standards proposed by the NPRE Commission Report are essential to address and eliminate sexual assault on the most vulnerable population in custody. However, for these standards to be effective, clarity on the implementation of special procedures for youth and

¹⁸ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 2008-2009 (2010).

¹⁹ NAT'L PRISON ELIMINATION COMM'N, REPORT, at 16 (2009).

²⁰ Mark D. Hayward, *The Long Arm of Childhood: The Influence of Early Life Conditions on Adult Morbidity and Mortality*, PENN. STATE UNIVERSITY, 2004, available at http://www.rand.org/labor/aging/rsi/rsi_papers/2004_hayward4.pdf; see *Migrant Women and Children at Risk: In Custody in Arizona*, WOMEN'S REFUGEE COMM'N, Oct. 2010, at 3-4, available at <http://womensrefugeecommission.org/programs/detention/women-in-detention>.

²¹ *Id.*

²² *Captured Childhood*, INTERNATIONAL DETENTION COALITION, 2012, at 81, available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/03-29-2012_Captured_Childhood-report.pdf.

access to necessary mental and physical health care are vital for healing from and eliminating sexual assault.²³

6. Conclusion

While the Agency's proposed standards are promising, the ABA believes that they should be further clarified and strengthened in the several areas described above. Those additional improvements should be incorporated into the standards without delay.

Sincerely,



Thomas M. Susman
Director
Governmental Affairs Office
American Bar Association

²³ In *Alexander S. v. Boyd*, the federal district court for the District of South Carolina held that a state detention center's policies violated the Fourteenth Amendment by failing to provide adequate education to special-needs youth, adequate medical services due to shortage of nurses, and adequate programming. *Alexander S. v. Boyd*, 876 F.Supp. 773, 787-90, 797 (D.S.C. 1995).