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April 4, 2011

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Re: Docket No. OAG-131
National Standards to Prevent, Detect and
Respond to Prison Rape

Dear Mr. Hinchman:

We hereby submit our comments on the proposed National Standards to Prevent, Detect and Respond to Prison Rape, 28 C.F.R. Part 115. In considering these comments, we incorporate by reference and refer back to our previous submissions to the Department of Justice (DOJ) concerning this issue (LAS letters dated May 3, 2010 and October 8, 2010), annexed as Exhibits 1 and 2 respectively.

Based on the knowledge we have gained as counsel in Amador v. Andrews,¹ we have voiced grave concerns about the adequacy of the standards proposed by the National Prison Rape Elimination Commission effectively to address the scourge of custodial sexual abuse. Despite the issues that we and other advocates raised, DOJ did not strengthen the Commission's standards, but instead watered them down in almost every significant area.

DOJ's review and revision of the Commission's proposed standards has virtually ignored concerns about their efficacy in favor of a focus on their cost. By uncritically accepting correctional administrators' claims of excessive cost, DOJ has in effect allowed these officials to rewrite the standards, rendering many of them toothless. Though the Prison Rape Elimination Act provided that the standards could not impose "substantial additional costs," DOJ has offered no rationale for determining what constitutes a "substantial" cost when compared against the billions of dollars spent on incarceration in this country. Instead DOJ has proposed ineffective standards and declared them satisfactory because, it claims that even a reduction of 3% in sexual

¹ Amador v. Andrews, 03-Civ.-0650 (KJD) (GWG), is a lawsuit challenging a pattern and practice of sexual abuse of women prisoners by male correctional staff in New York State. All claims for injunctive relief were dismissed for failure to exhaust administrative remedies and an appeal is pending. Through investigating and litigating this action we have gained a unique insight into the sexual abuse of women prisoners, the attitude of correctional officials in New York State to this abuse, and the obstacles confronting these prisoners when they come forward to complain. Our experiences are described in detail in our prior submissions.

violence in jails and prisons would offset the expenses DOJ has decided its minimal steps would cost correctional administrators. “Standards” that promise such a pathetically tiny improvement as an acceptable outcome do not merit the word standards; they are part of the problem, not part of the solution.

We do not address all of the areas that DOJ has watered down from the Commission’s already weak proposed standards, nor do we address all of the questions asked by DOJ in its commentary. We focus on the proposed standards for jails and prisons and on staff sexual abuse, since these are the areas with which we are most familiar. However, as we describe below, we believe the standards, appropriately strengthened, should also be made applicable to persons in immigration detention, where the risks and reality of rape and sexual abuse are no different than in prisons and jails. Moreover, while we commend DOJ for proposing some stronger standards for juvenile detention facilities, such as limiting cross-gender pat searches to emergency situations, the juvenile standards likewise need to be strengthened consistently with our general comments.

Tinkering around the edges will not stop custodial sexual abuse. Unfortunately, as DOJ implicitly admits with its 3% benchmark, DOJ’s proposed standards do no more than tinker. Without fundamental change, the long-entrenched problem of custodial sexual abuse will continue to victimize thousands of people each year.

Fundamental Change Is Necessary to Stop Staff Sexual Misconduct.

Staff sexual abuse will not be stopped until there is a fundamental, two-pronged change in approach. Correctional systems must be required to take action when they have a reasonable basis to suspect staff sexual misconduct, even if they cannot substantiate the allegation, and correctional systems must be required to possess and use tools to enhance corroboration of complaints, thereby increasing the rate of substantiation. Without these changes, abuse will continue unabated.

1. Correctional Officials Must Be Required to Take Appropriate Action in the Face of Staff Sexual Misconduct.

Since PREA was passed in 2003, the problem of staff sexual abuse has only gotten worse. The Bureau of Justice Statistics (BJS) surveys show that the numbers of allegations of staff sexual abuse in both the United States and New York have been on the rise.² During this same period, the percentage of substantiated complaints involving staff sexual abuse³ across the nation has actually fallen, from approximately 22% in 2004 to only 13% in 2008 (the most recent data

² BJS reported a total of 1,506 allegations of staff sexual abuse in 2004, and a total of 1,818 in 2008, the most recent date for which data is available. Compare <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca04.pdf> at Appendix Table 1B with <http://bjs.ojp.usdoj.gov/content/pub/pdf/svraca0708.pdf> at Appendix Table 20.

³ In its reports, BJS uses the term “sexual misconduct” for the types of behavior now defined as “sexual abuse” in DOJ’s proposed standards.

available).⁴ During this period, New York State has continued to substantiate only a small fraction of complaints of staff sexual abuse, far below the national average.⁵

Complaints of sexual abuse are virtually only substantiated when the prisoner has physical proof of the abuse. Otherwise a prisoner's complaint of staff sexual abuse is not credited, and no action is taken against the officer. Instead, in almost every instance, the officer is permitted to stay in his post, where he is able to assault more prisoners, regardless of the credibility of the prisoner, or the strong circumstantial proof that is available. See LAS Letter, Ex. 1 at 7 (describing the experiences of several Amador plaintiffs). Nothing in DOJ's proposed standards confronts this failed approach to staff sexual misconduct.

One purported reason that correctional administrators do not take action is that they claim that their hands are tied by their contracts with their unions. See LAS Letters, Ex. 1 at 10-11, Ex. 2 at 5. The New York State Department of Correctional Services (DOCS) takes the position that, even if it believes that a staff member is sexually abusing prisoners, because of union contracts it lacks the authority to move that officer from his bid post preventively unless it has sufficient evidence to prevail in a proceeding to suspend or terminate the officer.⁶

This is not a theoretical problem. A plaintiff in Amador v. Andrews alleged that she was raped in the middle of the night in her housing area and provided sufficient corroboration that DOCS substantiated her complaint (a very rare event) and sought to discipline the officer. However, DOCS lost the arbitration. DOCS was therefore obliged to continue the officer's employment, and because of its understanding of the requirements of its contract with its union, it allowed the officer to go back to work guarding women prisoners. This past Fall he was arrested for sexually assaulting another prisoner. The human cost of DOCS' defective policies is all too real. Tragically, nothing in the proposed standards will stop staff sexual abuse so long as prison authorities can hide behind their union contracts.

DOJ does take on union contracts but only in such a limited manner as to be largely useless. The proposed standard bars correctional officials from entering into or renewing any collective bargaining agreement but only if the agreement prevents corrections officials from moving staff pending investigations.⁷ See Section 115.65(d). This will accomplish virtually nothing since investigations generally amount to a whitewash, with only small fraction of complaints substantiated. Even if the proposed standards result in a few more investigations being substantiated then, corrections officials will still claim that their hands are tied and that they cannot remove staff from a bid position unless an arbitrator agrees with their position, as in

⁴ Calculated based upon data in <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca04.pdf> at Appendix Table 1b and <http://bjs.ojp.usdoj.gov/content/pub/pdf/svraca0708.pdf> at Appendix Table 20.

⁵ New York State substantiated only 7% of complaints of staff sexual abuse in 2004, see <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca04.pdf> at Appendix Table 1b; 9% in 2005, see <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca05.pdf> at Appendix Table 1b; 10% in 2006, see <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf> at Appendix Table 1b; 5% in 2007 and 6% in 2008. <http://bjs.ojp.usdoj.gov/content/pub/pdf/svraca0708.pdf> at Appendix Table 20.

⁶ This result is not required by law. Prison officials may not use union contracts as a defense for their failure to perform their constitutionally mandated duty to protect prisoners from sexual assault. Riley v. Olk-Long, 282 F.3d 592, 597 (8th Cir. 2002).

⁷ We commend DOJ for taking even this limited step which attempts to prevent corrections officials from entering into a contract provision with their unions that enables an aspect of custodial sexual abuse to continue.

Amador. In every other area of prison life, corrections officials demand virtually unfettered deference to their expertise; only when it comes to the sexual abuse of prisoners by their staff have officials given up control of their prisons and jails.

DOJ must finally take on this failed system head-on. The standards should require, in no uncertain terms, that prison and jail administrators must remove staff from guarding prisoners (at least of the gender they are believe to have abused) when they have an objectively reasonable belief that the staff member poses a risk to prisoners' safety. If officials then claim that they cannot do so because of a contract they have entered into with their staff, then they should be required to take all legal steps to re-negotiate that contract during its term and, at a minimum, be directed not to enter again into such a contract.

2. The Standards Must Mandate the Opportunity for Meaningful Corroboration.

Even a nominally thorough investigation into staff sexual abuse will rarely substantiate the complaint because in the culture of prisons, officials will not credit the complaint of a prisoner against the denial of a staff member—even one who is the subject of multiple prior complaints—without corroboration. Staff sexual abuse happens in private and so corroboration is almost never available. As a result, in the vast majority of cases, no matter how credible the complaint and how many prior complaints have been made about the officer, nothing will be done. The DOJ's own Inspector General has itself recognized the challenges of investigating staff sexual abuse, citing the inability—or unwillingness—of the Federal Bureau of Prisons to substantiate the vast majority of investigations.⁸

Nothing in DOJ's proposed regulations addresses this reality, in which New York, with its 5% substantiation rate, will claim compliance with these requirements. See LAS Letters, Ex. 1 at 8, Ex. 2 at 3-6. This is not a problem that can be remedied by modest changes in investigative and disciplinary procedures, as proposed by the Commission, and now DOJ. See LAS Letters, Ex. 1 at 7-8, Ex. 2 at 4-5. Rather, there are two concrete steps that DOJ should require to actually improve correctional administrators' ability to substantiate and take action on complaints of staff sexual abuse.

A. Video technology is critical to effecting change, see LAS letters Ex. 1 at 8, Ex. 2 at 5, yet DOJ does not mandate its use.⁹ It can provide essential corroboration of elements of sexual abuse allegations (*e.g.*, staff taking a prisoner into an isolated location), so that internal agency investigations would lead to more substantiated complaints and to greater ability to discipline staff. Perhaps more importantly, it can deter misconduct by staff who know that they may be observed. The DOJ Inspector General itself has emphasized the utility of cameras.¹⁰ The Commissioner of the New York City Department of Corrections has acknowledged: "Video

⁸ <http://www.justice.gov/oig/reports/plus/e0904.pdf> at 55, 58.

⁹ We recognize that DOJ asks whether the regulations should mandate the use of cameras. As we have repeatedly said, the answer is a resounding "yes." DOJ should also prevent systems from sabotaging the utility of cameras by prohibiting systems from destroying tapes and discs in a matter of days or weeks. In an age when large volumes of information can be maintained on small inexpensive discs there is simply no legitimate justification for destroying this information, which needs to be maintained for at least a year since sexual abuse is often not quickly reported.

¹⁰ The DOJ IG found that: "Regular operational reviews could lead to prison improvements, such as posting surveillance cameras in areas known to be the frequent location of instances of sexual abuse to prevent and detect staff sexual abuse of inmates in those locations." <http://www.justice.gov/oig/reports/plus/e0904.pdf> at 47.

recordings are an important tool in ensuring the safety of officers and inmates and successfully prosecuting wrongdoing." Testimony of Dora Schriro, New York City Council December 15, 2010. The utility of video technology in protecting staff and prisoners from sexual violence and many other breaches in security is well recognized, and its use should be standard in at least all medium and large correctional systems.

B. The evidentiary record considered in investigations and arbitrations should be expanded. See LAS Letters, Ex. 1 at 9, Ex. 2 at 5. Many officers credibly accused of serious abuse of prisoners have been the subject of repeated prior complaints. Requiring that these prior complaints be considered as evidence in internal investigations and in disciplinary hearings, in the same way that they are allowed as evidence of propensity under the Federal Rules of Evidence, Rule 415, would go a long way to providing corroboration of a prisoner's allegation and thus to sanctions being imposed, at least for victims of repeat offenders. This proposal does not involve significant financial cost, yet DOJ has not even mandated that such information be considered as evidence of propensity or, at a minimum, of a pattern of abuse.

The Standards Must Mandate Affirmative Investigations.

For a myriad of reasons, prisoners are reluctant to come forward and complain of sexual abuse and risk retaliation, particularly since they believe that their complaints will not be credited. See LAS Letter, Ex. 1 at 6. This belief is accurate, since only a tiny percentage of complaints are substantiated. If custodial sexual abuse is to be ended, prison officials must not be allowed to sit back and take steps to stop abuse only by investigating allegations when a prisoner comes forward. Instead DOJ should require that correctional officials try to ferret out misconduct by several means. DOJ should require officials to conduct exit interviews of prisoners leaving a system's custody so that they can find out what is really going on. Likewise, as to staff about whom there are suspicions or reports of misconduct, DOJ should require correctional officials to enhance their supervision of this staff and to engage in a targeted review of videotapes (if available) so that they can determine if any further action is warranted.

The Definitions of Sexual Abuse and Harassment Need to Be Revised.

The definitions of sexual abuse and sexual harassment proposed by DOJ are confusing, see Section 115.6, potentially limiting the applicability of the standards.

Staff sexual abuse is defined to include "sexual touching," "any attempted, threatened or requested sexual touching," "indecent exposure" and "voyeurism." We agree with this definition, which acknowledges the inherently coercive power of correctional staff. However, staff sexual harassment (which is excluded from the purview of many of the proposed standards including exhaustion and data collection and review) is defined to include potentially identical conduct, *i.e.*, "repeated verbal comments or gestures of a sexual nature... including demeaning references to gender, sexually suggestive or derogatory comments..."

Repeated and demeaning sexualized comments and gestures should not be minimized as "harassment" and thereby excluded from many of the standards. Therefore, DOJ should amend its definition of staff sexual abuse to also include this behavior.

We also believe DOJ erred in deciding to omit a pattern of coercive behavior from the definitions used for inmate-on-inmate sexual abuse. This decision downplays the significance of “repeated and unwelcome sexual advances [and] requests for sexual favors” from one inmate to another. These actions are often the precursor to actual sexual touching, and should be recognized as such. Thus we suggest that DOJ revise its definitions for inmate sexual abuse and harassment to the same model which we propose for staff: a campaign of propositioning and soliciting and repeated sexualized comments would constitute sexual abuse, while an isolated comment would constitute only sexual harassment.

The Standards for Supervision and Monitoring Must Be Strengthened.

The proposed standards for supervision do not effectively address clearly identified deficiencies in supervision. See Section 115.13 (a)-(d). They call for correctional officials to determine staffing levels needed to protect inmates from sexual abuse, to consider the use of video monitoring, and to use “unannounced rounds.” All of these are fine ideas but will not deal meaningfully with the problem. See LAS Letter, Ex. 1 at 11-12 (cameras need to be required, not suggested).

DOJ rejects the best way to combat the pervasiveness of staff sexual misconduct, which is to ban outright cross-gender supervision. See LAS Letter, Ex. 1 at 13. DOJ’s Title VII concern about taking such action is overstated in the face of court decisions, such as Everson v. Michigan Dept. of Corrections, which found female gender to be a BFOQ for supervising the residential areas of female facilities, as well as other decisions which have found similar accommodations to be reasonably necessary to protect the privacy rights of female inmates.¹¹ Nor is it wrong to distinguish between male and female prisoners in this regard, and to ban cross-gender supervision in women’s prisons, given the increased vulnerability of female prisoners.

Absent a prohibition on cross-gender supervision, DOJ should mandate the use of video technology throughout prisons and jails, and certainly in housing areas and other areas that are at high risk for staff sexual abuse of inmates, rather than just calling for officials to consider their use. Such technology not only serves as an important tool for corroborating prisoners’ complaints but also is an extremely strong deterrent for staff (and prisoners) from committing sexual abuse.

DOJ takes a step in the right direction by requiring that supervisors conduct unannounced rounds in facilities whose capacity exceeds 500 inmates, see Section 115.13(d), but it does not go far enough. First, there is no reason why such practices should be limited to facilities with more than 500 inmates. Prisoners can be, and are, raped in small jails and prisons as well as large ones. However, even a requirement of “unannounced” rounds in all facilities would not be adequate. Even in facilities where supervisors conduct random unannounced rounds, correction officers routinely call ahead to alert their colleagues that a supervisor is on the way. This practice of “trip calls” is widely utilized, and high-ranking prison officials are well aware of it. See LAS Letter, Ex. 2 at 3-4. This practice means that staff always have the opportunity to avoid being caught in a compromising position by a supervisor. In a New York State prison, for

¹¹ Everson v. Michigan Dept. of Corrections, 391 F.3d 737 (6th Cir. 2004); Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993); Sepulveda v. Ramirez, 967 F.2d 1413 (9th Cir. 1992).

example, a correction officer was able to engage in near daily sexual trysts for months without his supervisors ever noticing under a regime of purportedly “unannounced” rounds. See Court of Claims testimony in Perez v. State of New York, Trial Transcript, August 4, 2010, at 20-21, 24.¹² If DOJ is serious about requiring “unannounced” rounds, it should explicitly ban the use of “trip calls,” a requirement that is cost-free.

DOJ has also watered down the Commission’s limitation on cross-gender viewing, now allowing such viewing when incidental to routine cell searches. Section 115.14. We are very concerned that this exception will swallow any privacy protections and will allow repeated viewings of prisoners in states of undress, in violation of basic standards of human dignity. Nor do we understand DOJ’s rationale in making this change since, as it acknowledges, privacy panels and other inexpensive measures can be employed to deal with correctional officials’ concern that expensive retrofitting would otherwise be required. Overview of PREA Standards, 76 Fed. Register, Number 23 at 6254. In New York, privacy issues have been addressed by implementing privacy shields and by having male staff announce their presence on the unit. See LAS Letter, Ex. 1 at 13 (citing Forts v. Ward).

The Standards Regarding Segregated Housing Must be Strengthened.

1. Segregation Should Be Used Only When It Is the Least Restrictive Alternative Available.

DOJ allows placement in segregated housing for prisoners at risk of sexual abuse and following a complaint of sexual abuse, indicating a presumptive length of no more than 90 days. See Sections 115.43 and 115.66.¹³ This endorsement of routine *de facto* punishment of victims of abuse is unacceptable, since it means that victims typically lose their housing, their programs and access to their property. It is particularly harsh since DOJ has endorsed a different and more humane standard for juveniles, *i.e.*, segregation “as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged.” See Sections 115.366 and 115.342. There is no apparent reason, and DOJ has certainly provided no explanation, why the same protective standard should not be applicable to adults as well.

2. Gender Non-Conforming Prisoners Should Not Be Involuntarily Segregated And Should Be Appropriately Housed.

Unlike the Commission’s standards, DOJ allows the assignment of inmates to particular units solely based on sexual orientation or gender identity. DOJ should modify its standard to allow gender non-conforming¹⁴ prisoners to indicate their preference for housing where they feel

¹² This transcript section is provided as Exhibit 3 to this letter.

¹³ We suggest DOJ clarify its terminology in these standards. While the title of this section, Section 115.43, refers only to protective custody, the proposed standard itself references the use of “segregated housing.” As DOJ knows, the term “segregated housing” can refer to many different forms of housing, not just protective custody. If DOJ intends to limit the use of segregated housing to protective custody, which we believe is appropriate and is presumably DOJ’s intent, it needs to make that clear.

¹⁴ We use the term gender non-conforming to refer to individuals who are transsexual, transgender, or inter-sex, or who do not identify with their biological sex.

safest, and should then require prison and jail officials to make reasonable efforts, consistent with security, to accommodate that preference.¹⁵ As part of this process, DOJ should ask corrections officials to give particular consideration to the placement of gender non-conforming prisoners, who may be especially vulnerable, in female facilities since they are generally safer and less violent than male facilities.

As with any other inmate, appropriate considerations should be taken to avoid placement of predatory inmates in housing areas with more vulnerable inmates. However, genitalia should not be the controlling factor in determining whether an inmate poses a safety threat to other inmates. Such consideration makes little sense in light of the well-documented abuses suffered by gender non-conforming prisoners.

Finally, while there may be situations where separate housing for at-risk gender non-conforming inmates is needed, the proposed standard should ensure that persons assigned to such housing are afforded the same access to privileges and programming opportunities as prisoners in general population.

Cross-Gender Searches Must Be Limited.

1. Cross-Gender Pat-Down Searches Must Be Further Restricted.

We are frankly astonished by DOJ's extremely narrow restriction on cross-gender pat searches, which limits the exemption from such searches only to inmates who have suffered previous sexual abuse while incarcerated.¹⁶ In light of the substantial evidence showing the nexus between the legitimizing of touching by staff and increased sexual abuse, see National Prison Rape Commission Report, Executive Summary, Finding 2;¹⁷ Report of the Special Rapporteur on Violence Against Women, U.N. Doc.E/CN.4/1999/68/Add.2 (4 January 1999), such searches should not be permitted. At a minimum, there is no justification for DOJ's proposed unduly restrictive exemption.

While DOJ purports to have implemented its proposed standard in order to protect inmates "most likely to suffer emotional harm during cross-gender pat-downs," see Overview of PREA Standards, Fed. 76 Register Number 23 at 6254, any history of sexual abuse is likely to make such searches extremely psychologically painful. There is simply no rational basis for distinguishing between those who were abused in prison and those who were abused before incarceration.

Although DOJ purports to be following New York State's lead on this issue, even New York State's exemption from routine cross-gender pat-down searches for women prisoners extends to all prisoners who can show a history of trauma, not just trauma while incarcerated, and not just

¹⁵ DOJ appropriately maintains the ban on placement of LGBT prisoners based solely on their identification or status for juvenile facilities. Certainly the underlying premise that no person should be placed in a particular facility against their will solely on the basis of such status should apply to adults as well. As with the use of segregation generally, DOJ provides no reason, and none is apparent, why the standard applicable to juveniles should not also protect adult prisoners.

¹⁶ The proposed standard regarding cross-gender pat searches can be found at Section 115.14(e).

¹⁷ The Commission's Report is available at: <http://www.ncjrs.gov/pdffiles1/226680.pdf>

trauma from sexual abuse. See DOCS Directive 4910.¹⁸ Notably, New York City bans pat searches of all women inmates by male staff, and restricts the searches of male inmates by female staff, mandating staff avoid genitalia. N.Y.C. Department of Correction, Directive 4508R-E at §V.A.3(c-e).¹⁹

DOJ's limitation on cross-gender pat-down searches will also accomplish virtually nothing since almost no claims of abuse during incarceration are substantiated. As a result, virtually no prisoner will ever be exempted from cross-gender pat searches under DOJ's proposal.

We recommend that DOJ amend the proposed limits on cross-gender pat-down searches to disallow them altogether, or at least of women prisoners in light of their extraordinarily high incidence of physical and sexual abuse before incarceration. If DOJ will not take this recommendation, at the very least it should expand the exemption to any incarcerated person who has previously suffered trauma, including sexual and physical trauma, prior to or during incarceration.²⁰

2. Cross Gender Searches to Determine Genitalia of Gender Non-Conforming Individuals Must Be Further Limited.

As with other incarcerated individuals, many gender non-conforming people have a history of sexual abuse and other violence prior to incarceration. In addition, they often experience sexual assault from other inmates and prison staff during their incarcerations.²¹ Furthermore, many of them have been subjected to abuse by medical staff, sometimes from a young age, including having been forced to participate in gender determinations similar to those proposed in these standards.

DOJ's proposed standard calls for these searches to be limited so that an examination of a transgender inmate's genital status is to be conducted only when this status is "unknown" and only by a medical practitioner in private. Section 115.14(d). This standard, while certainly a large step in the right direction, does not fully mitigate the problem of abusive searches of non-conforming prisoners.

These kinds of searches have often been used as a form of sexual abuse of gender non-conforming people, amounting to putting the "freaks" on display, sometimes simply to satisfy staff's prurient interests. The proposed standard does not go far enough in stopping this abuse. First, by allowing such searches to continue, it targets only these prisoners, and subjects only them to a non-consensual medical examination based solely on their gender identities for the single purpose of looking at and touching an inmate's genitalia. Second, while it is appropriate that only medical staff may conduct these searches, it is naïve to assume that this means that

¹⁸ We have previously provided this Directive to DOJ. See LAS Letter, Ex. 2 at Attachment 2.

¹⁹ We have not attached this directive, as it is not for public distribution.

²⁰ DOJ's proposed standard requiring that security staff be trained in how to conduct these searches for transgender and inter-sex prisoners does not adequately protect this population. See Section 115.14 (f). Rather, DOJ should also require that prison officials solicit and accommodate the request of gender non-conforming prisoners to be searched only by staff of a particular gender, absent an emergency.

²¹ See Sylvia Rivera Law Project, "It's War in Here": A Report on the Experiences of Transgender and Intersex People in NYS Men's Prisons, at 30 (2007).

abuse will not continue. To the contrary, medical staff, as well as security staff, have been documented to have engaged in these kinds of searches for abusive reasons.²² Third, the standard limits its protections to searches of transgender prisoners, but other gender non-conforming prisoners may also be subjected to searches of their genitalia.

If DOJ believes it essential to allow for such a genital determination to be made (something we do not believe is necessarily required), then this standard needs to be made clearer, and the categories of people protected by its terms needs to be broadened to include other gender non-conforming prisoners. Moreover, the basis for when such status is unknown needs to be stringently defined. Specifically, DOJ needs to make clear that such a search can only be conducted once by any prison or jail authority during any person's incarceration in any prison or jail system, including upon transfer, and should not and does not need to be repeated. DOJ likewise needs to make explicit that except in extraordinary circumstances, no such search is required when a prisoner is transferred from one agency to another agency during the same incarceration, including from a jail to a prison, since the examination has been conducted and its results can be communicated.

Oversight and Transparency Must Be Strengthened.

We are astonished that DOJ would propose that meaningful auditing could be conducted by an internal entity, such as an internal Inspector General's office. The DOCS Inspector General's Office is comprised of former corrections officers who generally subscribe to the view that a prisoner's claim of abuse is never enough to outweigh the word of an officer, regardless of how credible the prisoner may be or how many similar complaints of abuse have been previously lodged against the officer. See LAS Letter, Ex. 2 at 4-5. If internal entities are permitted to conduct audits of themselves, then these audits become an exercise in futility, so that it really will not matter whether they are conducted annually (as we have suggested) or every three years.

It is imperative that DOJ promulgate strong and clear auditing requirements, mandating transparency if custodial sexual abuse is to be addressed. The Commission's proposals relied too much on the good faith of corrections officials to self-assess and self-police. See LAS Letter, Ex. 1 at 11-12. Since their proposals were made public, corrections officials have only confirmed our worst fears by their self-reporting on their levels of compliance, with New York having claimed that they were in compliance with the vast majority of the Commission's proposals. See LAS Letter, Ex. 2 at 3-6.

DOJ has now watered down the substantive requirements of the standards. It also has eviscerated the auditing and reporting requirements (that were already too weak), so that there will be no effective outside scrutiny. By these actions, DOJ has ensured that corrections officials will claim full compliance with the standards while custodial sexual abuse continues unabated, with no outside person having the ability to review and challenge their claims. As a result, DOJ has taken a giant step backwards in the fight against custodial sexual abuse.

²² Id. at 22.

DOJ's Absurd Costs and Benefits Analysis Has Led to Ineffectual Proposed Standards.

In developing their proposed standards, DOJ rejected the Commission's standards, finding that implementing them would be too expensive. This conclusion was wrong for two reasons.

First, implementing the Commission's proposed standards would not cost anywhere near the unsupported and questionable numbers suggested by correctional officials. As we made clear to DOJ, New York grossly inflated its estimates of the costs of implementing the Commission's proposed standards. See LAS Letter, Ex. 2 at 3-6. The numbers claimed by correctional officials showed little to nothing besides their fervent desire to be free of oversight, and their resistance to change. See LAS Letter, Ex. 2 at 6-8.

Second, PREA did not require a one-to-one offset in costs and benefits, as DOJ seems to presume. Rather, PREA only barred the standards from imposing "additional substantial costs." Given the billions of dollars spent incarcerating almost two million people in this country, PREA certainly contemplated some costs.

By its unquestioned acceptance of the purported costs of implementing the Commission's standards and its determination that PREA prevented it from imposing any costs that were not unequivocally outweighed by its financial benefits, DOJ has engaged in an absurd calculation. Rather than proposing standards that would meaningfully mitigate custodial sexual abuse, DOJ ignored that goal. Instead, DOJ came up with standards whose costs would be offset by their benefits, even if they were fundamentally ineffectual. As a result, DOJ came up with standards whose costs would be offset if abuse were reduced by only 1 to 3%, implicitly and shockingly tolerating the continuation of almost all abuse.²³

DOJ has also ignored the benefits to the safety of everyone confined in the nation's jails and prisons if sexual abuse were reduced. In considering the costs of sexual violence, DOJ fails to recognize that this behavior not only results in harm to individual victims, but also places all staff and all prisoners in jeopardy. As the Inspector General for the Department of Justice has stated:

Staff sexual abuse of prisoners has severe consequences for victims, undermines the safety and security of prisons, and in some cases leads to other crimes....In addition to traumatizing prisoners, federal personnel may also neglect their professional duties and subvert their prison's security procedures in order to engage in and conceal their prohibited sexual relationships with prisoners. Federal personnel who are sexually involved with prisoners can be subject to extortion demands and may be more easily pressured to violate other prison rules and federal laws. Compromised personnel who have been found to have sexually abused prisoners also have been found to have provided contraband to prisoners,

²³ If DOJ insists on using this approach, then at a minimum it should clearly acknowledge that custodial sexual abuse could be mitigated substantially through additional reforms, as has occurred in some correctional systems. See Lovisa Stannow and David Kaiser, Prison Rape and the Government, New York Review of Books, Vol. 58, No. 5 (3/24/2011).

accepted bribes, lied to federal investigators, and committed other serious crimes as a result of their sexual involvement with federal prisoners.

<http://www.justice.gov/oig/reports/plus/e0904.pdf> at i.

Even assuming that a violation of human rights can be quantified in the manner suggested by the DOJ (an assumption which we question), these numbers minimize the damage of staff sexual assault that has been recognized by several recent court decisions, including in Michigan, where that State alone had to pay a class of women prisoners \$100 million for the abuse they suffered. DOJ claims that the benefit gained from preventing a forcible rape is worth between \$200,000 to \$300,000, while preventing a sexual assault involving pressure or coercion is worth only \$40,000 to \$60,000. In Neal v. Michigan Department of Corrections, Cir. Ct. Case No. 96-6869 (Michigan), however, two different juries awarded women 1.2 million to 3.4 million dollars each for rape, and \$350,000 to \$885,000 each for sexual touching including kissing or prolonged sexual harassment, making no distinction between so-called “forcible” rape and coerced or pressured sexual assault.²⁴ Force is inherent in the coercive environment of prison, and ignoring that reality disregards the severe consequences of prison sexual assault.

The process engaged in by DOJ is insulting to its core. It fundamentally ignores the mandate of PREA, which was to promulgate standards to help mitigate custodial sexual abuse, not to promulgate standards that would incur virtually no costs.

Access to the Courts Must Be Enhanced, Not Undercut.

Court access needs to be enhanced, not restricted, so that victims can at least have a chance to get redress for abuse and protection from ongoing risks of abuse. Exhaustion requirements must not be construed to prevent prisoners from bringing their meritorious complaints before the federal courts. Then if the exhaustion hurdle is overcome and court access actually achieved, the review by the courts should not be sabotaged by these standards. Such sabotage will occur unless DOJ makes clear that the standards do not set out the Constitutional minima, but rather have been promulgated to reflect the best compromise that could be reached in light of DOJ’s interpretation of Congress’ limit on the costs of regulations.

1. The Standards Regarding Exhaustion of Administrative Remedies Must Be Modified.

The Amador case is the poster-child for the “gotcha” approach by prison officials towards exhaustion, which is now being sanctioned by DOJ. See LAS Letter, Ex. 1 at 2-4. If multiple

²⁴ Other courts have also awarded substantially greater damage award than the amount of money presumed by DOJ to be the benefit from avoiding forcible rape or coerced sexual abuse. See, e.g., Shirley v. Miller, 4:02-CV-0200 (N.D. Tex.) (\$4 million award for a single incident of rape, with \$1.5 million awarded to compensate the prisoner for her physical and mental suffering, \$500,000 awarded to pay for her medical care, and \$2 million in punitive damages); Solliday v. Spence, 4:2007cv00363-RH-WCS (N.D. Fla) (over \$2.16 million award for rape on one occasion in a federal correctional facility); C.P. v. O’Donnell, 3:05-cv-00784-MJR-PMF (S.D. Ill.) (award of \$900,000 for recurrent sexual abuse over a seven week period where guard grabbed and fondled prisoner’s genitals); Kimberly v. State, No. 23954 (Hawaii) (\$300,000 in damages for sexual abuse over a 4 month period of a transgender prisoner where line officer defendant squeezed and fondled plaintiff’s breast, ordered her to submit to a strip search in view of others, intimidated her, and made sexual comments such as “those are some big tits”).

channels for reporting staff sexual abuse are allowed, as they obviously should be, then these channels must trigger a mechanism that protects a victim's ability to subsequently bring a lawsuit, if he or she so chooses. DOJ's proposal may have been intended to provide this. However, it sets up a series of confusing, needless obstacles, which will only serve to insulate correctional administrators from legal challenges.

DOJ has proposed that whenever an agency is notified of an allegation that an inmate has been sexually abused, the complaint will then be forwarded so that it initiates the agency's administrative remedy process (i.e., presumably a level-1 grievance). The problem is most prisoners won't know they have to appeal any response they receive from grievance, since they are not informed that they must exhaust the grievance process to protect their right to file a federal lawsuit and since they may receive a response from the grievance process that by its face does not appear to need to be appealed.²⁵

This is the case in New York. Prisoners in New York are told that they can complain about sexual abuse through multiple reporting channels, but they are never told that they must file a grievance and appeal it to the highest level before they can file a court case. (It is worth noting that most victims of abuse are not thinking of court cases immediately upon experiencing the trauma). So long as multiple channels for reporting are permitted, but are not considered sufficient for exhaustion, prisoners should explicitly be told that utilizing these channels will not preserve their right to sue about the misconduct, if that is going to be the agency's position in subsequent litigation. Anything else is fundamentally confusing and misleading, and ensures that the "gotcha" nature of the complaint mechanism continues.

More importantly, we see no reason why a complaint to a staff member should not be forwarded to the top level of the grievance system. Forwarding a complaint to the lowest level of the grievance system accomplishes nothing except making a prisoner jump through additional hoops.

Nor does DOJ's proposal make sense as a matter of policy. If the purpose of forwarding the complaint to the grievance system is to advance the goals of the PLRA, then when the prisoner complains about sexual abuse through one of the multiple reporting channels, that complaint should be forwarded to prison officials who actually have the authority to address the problem.²⁶ In Amador, we were told that a grievance was necessary so that Central Office staff could see the scope of the problem and take appropriate action. If the purpose of DOJ's proposal is not simply to add obstacles to prisoners bringing suit, then it makes sense that the complaint should be forwarded to the prison officials who, at least according to them, actually have the authority to effect change.

In fact, DOJ's proposal of forwarding a complaint to the lowest level of a grievance system is actually contrary to the goals of stopping staff sexual abuse, as articulated by prison officials. In

²⁵ In New York State, the response to a grievance about sexual abuse routinely says "forwarded to the IG for investigation." A prisoner will certainly not understand that this decision, at least according to prison officials, needs to be appealed.

²⁶ We question the underlying predicate of DOJ's proposal that complaints of sexual abuse must be forwarded to the grievance program to comport with the PLRA. In New York State, the grievance program has no authority to address such complaints; rather, a grievance involving staff sexual abuse is simply forwarded to the Inspector General's Office for investigation.

Amador, we were repeatedly told that IG investigations are confidential, with the Department taking the position that no one at the facility level should know about them, and that is why sexual abuse complaints are not processed through the ordinary grievance process. Certainly prison officials would not want all low-level grievance personnel to know about confidential complaints and investigations of staff sexual abuse.

The bottom line is that we do not see DOJ's role as shielding prison officials from meritorious lawsuits, and are dismayed if that is the role DOJ sees for itself. Instead, the complaint about sexual abuse, no matter who it is lodged with, should be forwarded to the appropriate body for investigation and to the highest level of the grievance authority.

Corrections officials will no doubt say that referring a complaint to the highest level of grievance is not acceptable to them because it relieves prisoners from their obligation to complain, and then allows prisoners to avoid accountability for their complaints and somehow "game" the system. That is certainly not what we are proposing. Rather, we believe that a prisoner should be able to utilize any of the multiple channels for reporting that are made available and should also be required to cooperate with any Departmental investigation that is conducted.

The other problem that correctional officials will raise is one of the timing of complaints: when does the prisoner have to complain under our proposal? DOJ suggests that a requirement that a complaint must be filed within 20 days of the incident is adequate, particularly since an extension is allowed if the prisoner can document trauma. DOJ is wrong. Twenty days is simply too short a time frame to require complaints of sexual abuse to be filed; many prisoners are too scared or too traumatized to complain within that period. Nor will allowing a prisoner additional time if he or she can provide documentation of trauma mitigate the problem. The prisoner who is afraid of complaining is not the prisoner who is in any condition to document trauma. It also will raise mini-trials within trials, as to whether the trauma was sufficient to have delayed the prisoner from filing the complaint, and even if so, whether the trauma has been sufficiently documented to justify delay. The better approach is to allow the prisoner to complain within any time period that permits correctional officials meaningfully to investigate the complaint and take action. The burden should be on correctional officials to show why they are no longer able to meaningfully investigate and take action.²⁷

If DOJ continues to believe, however, that a hard and fast time frame must be imposed, then we suggest that the minimum appropriate time frame within which the prisoner must complain is within 90 days of the abuse. This is the time frame within which notices of tort claims against the City and State of New York, respectively, must be filed. Since the time-frame set by DOJ effectively acts as a statute of limitations we suggest that anything shorter than a 90 day time-limit is both unduly harsh and unnecessary. We also believe, as is permitted in these lawsuits, that extensions should be allowed if mitigating circumstances exist and if the government officials cannot show prejudice from the delay.

²⁷ See also ABA Standards for Criminal Justice, Treatment of Prisoners, Third Edition, at Standard 23-9.1 (February, 2010), which recognizes that grievances submitted outside of reasonable deadlines should be accepted "if the prisoner has a legitimate reason for delay and that delay has not significantly impaired the agency's ability to resolve the grievance."

2. These Standards May Lead to Worse Court Results for Victims of Abuse.

If a prisoner is able to overcome the exhaustion obstacle and actually obtain access to the courts, then it is imperative that these standards not sabotage their case.

The federal courts may look to these standards as the measure of whether a prisoner's Constitutional rights have been violated. This is not a theoretical possibility. New York State has already claimed that the Amador litigation is moot because they comply with the PREA regulations. See LAS Letter, Ex. 1 at 15.

These standards were supposed to be developed to lessen the risk of custodial sexual abuse. Instead they were written with the cost of implementation as the foremost concern. They reflect a compromise that correctional administrators could live with and which would cost very little money to implement. DOJ should, at a minimum, acknowledge this reality and make it crystal clear that these standards do not purport to lay out the Constitutional minima.

It would be the bitterest of ironies if the result of PREA was to make it more difficult for a prisoner to vindicate his or her Constitutional right to be free from custodial sexual violence.

The Standards For Juvenile Detention Must be Strengthened.

While we commend DOJ for some of the stronger standards it has proposed for juvenile detention facilities, we believe these standards should be further strengthened. For example, while we agree with DOJ that residents of juvenile detention require intensive staffing, this does not mean that cameras are not also needed. While closer staff surveillance may make it harder for prisoner-on-prisoner sexual abuse to go unobserved, it does almost nothing to ensure the lawful conduct of the staff members themselves.

We also urge DOJ to recognize that the standards for juveniles should apply to all persons under 18, since their need for greater protection continues regardless of where they are housed. This is of particular significance in New York, since it is one of the last states to treat all 16 and 17 year olds as adults and to house them in adult facilities. See Advancing a Fair and Just Age of Criminal Responsibility for Youth in New York State, Prepared by the Governor's Children's Cabinet Advisory Board (2011).²⁸

We also disagree with DOJ's decision that assessments of the vulnerability of juvenile residents need not be conducted by medical or mental health staff. See Section 115.335. DOJ asserts that this restriction is not necessary since there are other "appropriately trained" staff who could engage in such inquiries but DOJ does not make clear to whom they are referring. Overview of PREA National Standards, 76 Fed. Register Number 23 at 6258. Without guidance, officials may decide that almost anyone can make such assessments, including security staff who often believe that residents are crybabies who should simply tough it out. Therefore, at a minimum DOJ should define what it means by "appropriately trained" staff, and should make explicit that such assessments cannot be conducted by security staff.

²⁸ This report is available at:

<http://www.ccf.state.ny.us/Initiatives/CabRelate/CabinetResources/AgeCriminalResponsibility.pdf>

These Standards Must Apply to Persons in Immigration Detention.

There is no basis for DOJ's decision to exclude persons in immigration detention from the benefit of these standards. PREA was meant to include all prisoners, both in criminal and civil detention. 42 U.S.C. §15609(7)(defining prison as "any confinement facility of Federal, State, or local government...")(emphasis added)). This reference clearly was intended to encompass persons in immigration detention.

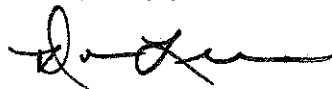
It makes no sense for immigration detainees to be excluded. They are a population extremely vulnerable to custodial sexual violence. They feel its effects dramatically, since they are often far from family and loved ones, with no support system to ease the trauma, and since they often face even more challenges to reporting, because they may not speak English, usually have no access to counsel, and are fearful they may be deported if they complain about the abuse. See National Prison Rape Elimination Commission Report, Section III, Chapter 9 (2010).²⁹

ICE's performance-based standards are not an adequate substitute for the PREA regulations in immigration facilities. However limited we find DOJ's proposed regulations, ICE's performance-based standards are even weaker, with no auditing and no consequences to non-compliance.

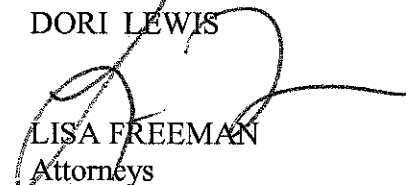
Conclusion

We are saddened by the actions taken by DOJ and hope that it will fundamentally reconsider the positions it has taken. Staff sexual assault will continue unabated so long as staff know that nothing will happen to them unless they are stupid enough to leave physical proof of their assault. If as DOJ says prison sexual assault does not have to be "inevitable" then meaningful steps have to be taken to stop it. Otherwise pretending to address the problem is worse than not addressing it all.

Very truly yours, -



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Enclosures

²⁹ The Commission's Report is available at: <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

EXHIBIT ONE

(LAS Letter of May 3, 2010)



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Re: Docket No. OAG-131
Comments on the National Standards to Prevent, Detect
And Respond to Prison Rape

Dear Mr. Hinchman:

Pursuant to the Advanced Notice of Proposed Rulemaking, we provide comments on proposed national standards for enhancing the prevention, detection and response to sexual abuse in confinement that were prepared by the National Prison Rape Elimination Commission (NPREC).

I. INTRODUCTION

We are attorneys with the Legal Aid Society of New York, the nation's oldest and largest provider of legal services to the indigent. The Prisoners' Rights Project of the Legal Aid Society was established in 1971 in the wake of the riots in jails and prisons in New York State. The Prisoners' Rights Project represents New York State and City prisoners in class action and test case litigation, advocates for them with prison and jail agencies, and advises them of their legal rights.

We are counsel for plaintiffs in Amador, et al v. Andrews, et al, 03-Civ.-0650 (S.D.N.Y. 2003), a lawsuit filed on behalf of women prisoners who allege sexual abuse by male correctional staff in New York State prisons, and who seek reform of New York's policies and practices for supervising, investigating, and disciplining staff sexual misconduct. Because of our experience in this litigation, we focus our comments on the problem of sexual abuse by male staff of women prisoners, and the steps needed to stop or at least substantially limit this abuse.

We agree with the National Prison Rape Elimination Commission that the problem of prison rape is a national tragedy that calls for meaningful intervention and we endorse adoption of the proposed standards, subject to the following amendments and reforms:

- We enthusiastically endorse the proposed standards' call for reform of the exhaustion requirement of the Prison Litigation Reform Act (PLRA), which prevents meritorious

claimants, such as the plaintiffs in the Amador lawsuit, from obtaining legal redress. (See section II.A).

- We call for the adoption of an additional standard addressing the PLRA’s “physical injury requirement,” an unconscionable obstacle to redress for prisoners who are the victims of sexual assaults, or attempted assaults. (See section II.C).
- We propose measures to strengthen the standards because in their present form they often impose only vague, unenforceable obligations, and because the determination of compliance relies excessively on self-monitoring by correctional officials. (See section III).
- We oppose measures advocated by others that would weaken the proposed standards, explaining why correctional officials’ arguments that the proposed standards are unduly onerous are in error. (See section IV).
- We finally call for the incorporation of additional language to prevent the standards from immunizing correctional systems from legal challenge to achieve needed reforms. Because of the national context in which consideration of these proposed standards is taking place, we are aware that it is unlikely that substantial improvements will be made to them now despite their deficiencies. If the standards are not strengthened, then while they will be an important first step to ameliorating the problem of staff sexual abuse, that is all that they will be. As a result, the standards must explicitly acknowledge that they are not intended to reflect the Constitutional minimum necessary to address the issue and that they do not require all of the steps needed to protect prisoners from staff sexual abuse. (See section V).

II. THE PLRA SHOULD BE REFORMED FOR VICTIMS OF CUSTODIAL SEXUAL ABUSE

A. NPREC’S Proposals About Exhaustion of Administrative Remedies Should be Adopted

As we are sure the Attorney General would agree, access to the courts is a fundamental right shared by all citizens in this country, and is a critical channel for reform of our nation’s prisons to address abuse of our most politically powerless individuals. Yet the PLRA’s exhaustion requirement¹ effectively shuts the courthouse door to victims of prison sexual assault. The NPREC proposal is an important step in the effort to amend this draconian statute.²

¹ The PLRA provides that “[N]o action shall be brought with respect to prison conditions under section 1983 ... or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

² RE-2 provides that “Under agency policy, an inmate has exhausted his or her administrative remedies with regard to a claim of sexual abuse either (1) when the agency makes a final decision on the merits of the report of abuse (regardless of whether the report was made by the inmate, made by a third party, or forwarded from an outside official or office) or (2) when 90 days have passed since the report was made, whichever occurs sooner. A report of

On the one hand, the drafters of the proposed standards, and most correctional officials, have come to recognize that prison rape will never be stopped unless multiple channels for complaint are available to its victims.³ At the same time, the PLRA mandates exhaustion of all administrative remedies, which routinely is understood to mean use of a prison's or jail's grievance system. These approaches are diametrically opposed, and lead to a "bait and switch" that forecloses access to the courts, as the saga of Amador so aptly, and painfully, illustrates.

The New York State Department of Correctional Services (DOCS) tells all victims of sexual abuse to "complain to anyone with whom you are comfortable, and your complaint will be investigated by the Inspector General's office." No woman was ever told a grievance was required, and no reasonable person would have understood it to be. All of the Amador plaintiffs did as they were told: they complained to the Inspector General's Office and the IG investigated their abuse. Yet New York State came into court and claimed that this was not enough, asserting that under the PLRA the plaintiffs also had to complain through the prison grievance system. The district court agreed, and all of the plaintiff's claims were dismissed, including those for injunctive relief. Amador v. Superintendents of Dept. of Correctional Services, 2007 WL 4326747 (S.D.N.Y., Dec. 4, 2007).

We have appealed to the Second Circuit, and we are hopeful that our clients' claims will be reinstated. However, even if we do prevail, more than seven years has passed since the case was filed, leaving other women exposed to what we believe is an unconstitutional risk of sexual abuse. And the irony is that our clients are the "lucky" ones, represented by counsel with the financial ability and the tenacity to maintain the litigation.

Even apart from the problem of requiring exhaustion through multiple channels, the PLRA exhaustion requirement is devastating for victims of sexual abuse because they face other obstacles to reporting, further inhibiting their ability to exhaust. Victims of sexual abuse often will not come forward given their trauma, shame and embarrassment, and they certainly will not come forward through a grievance mechanism which they (correctly) understand not to be confidential and which requires them to complain within days or weeks of their abuse.

The purpose of the PLRA exhaustion requirement is for correctional officials to be given notice of the underlying problem so that they can address it. That goal is met by the proposed standard's requirement that a complaint to correctional staff about sexual abuse that is investigated (or where the correctional system had a full opportunity to investigate the complaint) should be considered to have been exhausted. Therefore, if the Attorney General shares our concern about opening the courts to victims of custodial sexual abuse, then we urge you to adopt the Commission's proposed standard concerning exhaustion.

sexual abuse triggers the 90-day exhaustion period regardless of the length of time that has passed between the abuse and the report. An inmate seeking immediate protection from imminent sexual abuse will be deemed to have exhausted his or her administrative remedies 48 hours after notifying any agency staff member of his or her need for protection."

³ See RE-1 (requiring the facility to provide multiple internal reporting mechanisms as well as an outside agency available to receive reports).

B. NPREC’s Proposal About Exhaustion Should Be Clarified for Claims for Injunctive Relief

We have one particular concern about the Commission’s proposal regarding exhaustion, which is that it does not make explicit that a complaint of rape or sexual abuse should be considered sufficient to allow a claim for injunctive relief against correctional officials to go forward. This clarification is needed so that the debacle that occurred in Amador does not happen again.

In Amador, the District Court accepted New York State’s argument that even those women who filed grievances and appealed them to Central Office did not sufficiently exhaust their injunctive claims because they did not name all the persons whom their lawyers later determined would be proper defendants, and did not list all the remedies they sought in their legal complaint. Plaintiffs have appealed and await a decision from the Second Circuit on this issue. However, the idea that prisoners (especially those who have just experienced the trauma of sexual abuse), who lack counsel should be aware of all personnel responsible for hiring, training, assigning, supervising and disciplining staff, should be able to anticipate all of the remedial theories that might apply in institutional reform litigation, and should be able to articulate all of the failures in the Department’s practices for addressing staff sexual abuse is, we believe, nothing short of absurd.

Prisoners are not in a position to articulate in their grievances the types of litigation theories and requests for remedial relief that lawyers spend months developing, nor should they be required to. Correctional officials maintain a veil of secrecy over most of their policies and practices: we were able to pierce it in Amador only because we were able to speak to hundreds of women prisoners before filing suit so that we could determine patterns of abuse by specific officers. From this we were able to discern that New York requires physical proof before taking action, and that despite repeated credible complaints about an officer, he is permitted to continue to guard women prisoners until and unless he is subjected to formal employee discipline for sexual misconduct—which almost never happens. As a practical matter, individual prisoners are not able to collect such information.

We believe that nothing in the PLRA requires women prisoners to articulate their theories of injunctive or remedial relief. Given our experience in Amador, however, clarification of the PLRA exhaustion requirement concerning claims for injunctive relief regarding staff sexual abuse is needed so that other prisoners do not have their valid claims for injunctive relief dismissed.

C. NPREC’S Call for Reform of the PLRA Should Address the Physical Injury Requirement

The federal courts have repeatedly interpreted the PLRA’s “physical injury” requirement as requiring a showing of a physical injury in order to be able to obtain compensatory damages.⁴ While the PLRA’s physical injury requirement is problematic in numerous ways, it is

⁴ The PLRA provides the following limitation on recovery: “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. §1997e (e).

particularly egregious with respect to claims of sexual abuse (whether staff or prisoner-upon-prisoner).

There is no statutory definition of what constitutes “physical injury” in the PLRA. While this requirement may have been intended to weed out frivolous claims of “mere” psychological harm, it poses a significant obstacle to non-frivolous claims of sexual abuse. While some courts have considered all sexual assault to be an actionable physical injury, see Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999); Solliday v. Spence, 2009 WL 559526, *11-12 & n. 16 (N.D.Fla., Mar. 2, 2009) (sexual assault claim not barred because it was “repugnant to the conscience of mankind”); Duncan v. Magelessen, 2008 WL 2783487, *2 (D.Colo., July 15, 2008) (“unwanted sexual contact, alone, is a physical injury for which there may be compensation”), others have not. See Cobb v. Kelly, 2007 WL 2159315, *1 (N.D.Miss., July 26, 2007) (holding male prisoner’s allegation that female officer “reached her hand between his legs and rubbed his genitals” was not a physical injury under § 1997e(e)); Hancock v. Payne, 2006 WL 21751, *1, 3 (S.D.Miss., Jan. 4, 2006) (holding prisoners who alleged they were “sexually battered . . . by sodomy” did not satisfy § 1997(e)).

Thus, significant and unacceptable sexual abuse may not always be held to meet this bar. So, for example, a correctional officer who repeatedly asks a woman prisoner to perform oral sex on him and who repeatedly exposes his genitals to her, placing her in fear for her safety, arguably is not liable for compensatory damages because he has caused no physical injury. As a result, behavior that would be considered a violation of a woman’s right to be free from sexual harassment in any other context is arguably immunized and a woman prisoner has no federal recourse for damages until the officer’s conduct has become so extreme that it has resulted in her physical injury. The PLRA’s physical injury requirement thus poses yet another unjustified obstacle to federal redress for victims of sexual abuse and establishes a terrible standard as a matter of public policy. As a result, while the Commission failed to address this issue, we urge the Attorney General to add a provision clarifying that victims of custodial abuse can bring claims for damages for the potentially serious harm arising from sexual abuse, including harm resulting from sexual touching or attempted sexual touching, deeming injury arising from sexual abuse to be meet the PLRA’s physical injury requirement.

III. THE NPREC STANDARDS MUST BE STRENGTHENED

The sad reality is that the substantive proposed standards will not effectively protect prisoners from staff sexual abuse. Rather, prison systems will be able to assert compliance with the standards without making changes that matter.

We do not mean to be cynical nor to deprecate the hard work of the Commission. But based on our experience a sea change in approach is required to meaningfully address the problem of custodial sexual abuse, particularly by staff. While this is recognized by the Commission in theory (in their non-binding report and findings), the proposed standards often simply contain suggestions for improvement, rather than mandating needed action. They also rely entirely too much on the good faith of corrections officials to determine what is actually needed and to self-audit and assess their own level of compliance.

A. Correctional Officials Have Permitted Staff Sexual Abuse to Continue

Even though staff sexual abuse may be difficult to detect, there are many steps that correctional officials should have taken to meaningfully address it.

Staff sexual abuse is rarely reported due to the trauma and stigma associated with it. These fears are exacerbated for the more than 80% of women prisoners who were sexually or physically assaulted before incarceration. Because childhood abuse is often perpetrated by a loved friend or family member, many women prisoners experience intense confusion about abusive treatment. As a result, they may have problems setting appropriate boundaries and are more vulnerable to abuse, particularly by men in authority. Their apprehension about reporting is heightened because their prior reports may have been ignored, or worse, caused the destruction of their family. Women who experienced prior abuse are more likely to be reluctant to complain because they feel complicit about the current sexual abuse. For example, she may have prostituted herself for the officer in exchange for protection, or a phone call home or some other quid pro quo. She may feel ashamed or embarrassed about her participation. A prisoner has no practical way of saying “no,” potentially recreating her vulnerability as a child who experienced abuse. Whatever her initial response to the abuse, she has no way of stopping it: she is an abuse victim with no way out of the relationship, with no safe haven to retreat to.

While the trauma and stigma associated with sexual abuse cannot be avoided, the remaining factors are within the control of corrections officials. Victims of abuse do not come forward because they do not think they will be believed and, in fact, they are correct: without physical proof the reality is that the word of a correction officer will always be credited over that of a prisoner. Victims of sexual abuse also have to worry that they will be placed in some form of isolated confinement or transferred away from friends or family, even though this is nominally done for their own protection. They have to be afraid of being disciplined for admitting to the sexual contact, or for lying about it if they are not believed. Retaliation is a risk for all prisoners who complain about their treatment, but the likelihood of retaliation or intimidation is especially great in response to complaints about staff sexual abuse, since such complaints can result in staff members' being criminally charged and their family life disrupted.

Another reason why correctional staff have failed to address staff sexual abuse is because staff rarely report sexual misconduct by other staff, claiming that they never see the sexual act so that they are not sure that something untoward is occurring. This may come from a desire to protect other staff or from a belief that the abuse is not serious, i.e. that the woman purportedly wants it to happen or she is damaged goods so there is no serious harm resulting from yet another incident of abuse. In any event, staff corroboration is extraordinarily rare.

Most importantly, even when staff sexual misconduct is reported, action is rarely taken against the perpetrator. Because actual sexual contact happens in private, it invariably comes down to the word of a convicted felon against that of a correctional officer, with the result a foregone conclusion: the prisoner is not believed and nothing happens to the officer. Unless the woman has physical proof of the abuse, the officer is permitted to continue guarding women prisoners. Physical proof is difficult obtain: many forms of sexual contact do not leave physical proof, and even if the officer has engaged in an act where physical evidence could be left, all he need do is wear a condom. Nor does it matter if there have been repeated credible complaints lodged

against an officer, nor the extent of the indicia of misconduct. Without physical proof (DNA or sperm) of the actual sexual assault, the officer is still allowed to maintain his position, and continue to guard women prisoners alone and at night. In fact, New York State explicitly asserts that it cannot take any action against an officer without a finding of discipline by an external arbitrator because of the terms of its union contract.

The result is:

- An Amador plaintiff asserts that she was taken out of her cell in the middle of the night and sexually assaulted in the staff bathroom. She claims that the officer shaves his pubic area. This is confirmed, yet he still guards women prisoners and has reportedly even been promoted.
- An Amador plaintiff advises prison officials that a mattress can be found in an isolated area of the basement where prisoners are forbidden and where she was taken and sexually abused. The mattress is found, but the officer is permitted to continue to guard women prisoners. After the mattress is found, two more Amador plaintiffs allege this officer sexually abused them. This officer was seen by both staff and prisoners spending hours talking to these women. He and one of the plaintiffs were seen leaving the staff bathroom together after being alone in it for a prolonged period. This corroboration, and the prior complaints, were insufficient for prison officials to take action, and he continues to guard women prisoners.
- An Amador plaintiff reports an officer fondling, groping, and kissing her, and exposing himself to her. Her allegation is discounted because she does not have physical proof. Later, her allegation that a sergeant sexually assaulted her is credited because she was “lucky” enough to obtain DNA. Yet the first officer, about whom she lodged a credible complaint, is still guarding women prisoners.

It is against this backdrop of the complexity of the issues involved in staff sexual abuse and correctional officials’ profound intransigence in addressing it that the proposed standards must be assessed.

B. Staff Sexual Abuse Will Not Be Stopped by the Proposed Standards

The proposed standards focus on two mechanisms for addressing staff sexual abuse: criminal sanctions and actions taken by correctional officials.

Experience has taught us that criminal sanctions are ineffective in preventing staff sexual abuse. Absent physical proof, the officer will never be convicted under a reasonable doubt standard. Even with such proof, jury nullification and the attitudes of prosecutors and judges mean that convictions are rare and a sentence of jail or prison time even rarer with an underlying perception that the woman was “asking” for it or that it “was no big deal.” The Commission is aware of this, citing the appalling reality that despite criminalization of staff sexual contact in all 50 states and the federal system, prosecutors decline to prosecute most complaints of abuse. Executive Summary at page 13, Report at 118-120. Thus, while the proposed standards that address

relationships with prosecutors are important, they will not have a significant effect on staff sexual abuse.

Instead, prison and jail officials must be required to take certain steps if custodial sexual abuse is to be stopped, or seriously abated. Unfortunately, the proposed standards do not require these changes. In fact, New York State already complies with most of the proposed standards, yet that did not prevent the abuse experienced by the Amador plaintiffs. New York State already has a paper “zero tolerance” policy for staff sexual abuse. (PP-1). It has an investigative unit that has received training. (TR-4). Its investigators conduct investigations to completion (IN-1), talking to virtually every prisoner-witness available. Its investigators would never admit to discounting the word of a prisoner over that of an officer simply because of her status (IN-2), but the word of a prisoner is somehow never enough. The investigators already review all prior allegations of staff sexual abuse (IN-2), although they are given no weight unless the prior allegation was substantiated. New York already maintains that it has a “preponderance of the evidence” standard for substantiation of claims of staff sexual abuse. (IN-3).

Rather, prison officials need to transform their approach to custodial sexual abuse if it is to be stopped. Prison officials need to be required to enhance supervision, to take reasonable steps to bolster the word of a prisoner who alleges abuse, and to take back the running of their institutions from the guards. They need to encourage reporting and ensure that prisoners are not punished when they report. They must recognize the vulnerabilities of the prisoners within their custody and train staff and prisoners to take this abuse seriously. They must require staff to report red flags indicating that sexual activity is taking place. They need to take affirmative steps to try to find out what is going on in their own institutions. Finally, they must react appropriately when complaints of abuse reach them. Unless steps are taken to level the playing field so that it is not simply the word of a prisoner against that of a correction officer, staff sexual abuse will continue unabated, as has happened in New York State. Unless the following additional requirements are included in the proposed standards, the kinds of abuse experienced by the Amador plaintiffs will remain the norm:

The use of cameras and other technology must be required to deter abuse, to provide another tool for supervision, and to bolster the word of a convicted prisoner that something untoward has occurred. Without these tools, the standards will not get at the heart of what is almost always a he-said, she-said problem, with the word of a correction officer always trumping that of a convicted felon. While cameras are not a panacea if every excuse offered by an officer is accepted, they would provide important corroboration that, for example, a prisoner was taken out of her cell during the middle of the night. The proposed standards suggest, but do not require this, leaving it to prison officials to determine if cameras or other technology is needed. (PP-7). In a world of tight budgets and competing priorities, it is unlikely that many facilities will receive camera installation, without standards that mandate them.

Supervision must be enhanced, even apart from installing cameras. In New York, like much of the country, prison officials claim that supervisors conduct random and unannounced rounds. At the same time it is well-known that staff invariably call ahead to alert other staff that rounds are being conducted and that a supervisor is on the way. As a result, no officer need ever worry that he will be “caught with his pants down.” The proposed standards fail to prohibit this practice or require authentically unannounced rounds to identify and deter sexual abuse.

Prior credible complaints of staff must be considered corroborating evidence, similar to Rule 415 of the Federal Rules of Evidence. Our experience in Amador shows that an officer who engages in staff sexual misconduct rarely does so only once. In many cases there are repeated, credible complaints about him. It is not enough for prior complaints to be reviewed, as set forth in the proposed standards (IN-2); rather, they must be considered as probative evidence in assessing a new complaint.

Affirmative investigations need to be required, so that prison systems no longer sit back and wait for reports of sexual abuse to be lodged. Waiting for complaints of abuse -- even if all complaints are investigated -- is per se inadequate given all of the reasons, discussed above, that prisoners will rarely complain about staff sexual abuse. Simple requirements such as exit interviews of prisoners leaving a system's custody or targeted reviews of tapes of the actions of officers about whom there are suspicions or reports would give prison officials a wealth of information about what is happening in their prisons. The proposed standards fail to address this issue.

All reasonable investigative tools must be used. Prison officials must be required to change their hands-off attitude and use all investigative tools available to them. When we brought Amador, women prisoners repeatedly informed us of their experiences with prison officials and investigators telling them that without physical proof, staff could not be removed from guarding them. As a result, women were sent back to obtain physical proof without protection, i.e., they were returned to their housing or program assignment where they could be sexually assaulted, without prison officials safely wiring them or setting up cameras to monitor them. Polygraphs could also be used as a means to help determine what actually happened. While the proposed standards require that all complaints be investigated (IN-2), they do not require that all appropriate investigative tools be used. Even if the alleged victim is moved away from the alleged perpetrator (OR-5), this does nothing to help the next woman who is left in the hands of the alleged abuser.

Prisoners should not be disciplined for being subjected to sexual abuse or for "lying about it." Prisoners are already reluctant to come forward about sexual abuse. Even without the imposition of formal discipline, women prisoners who complain of staff sexual abuse are routinely placed in some form of isolation, and transferred, often away from friends and family. While these actions may be done nominally to protect the woman prisoner, they are understandably perceived as punishment. If prisoners can also be disciplined for their participation in the sexual activity or for lying about the complaint, then women will be chilled from coming forward.

New York State has taken meaningful steps in this area. When we brought Amador, New York State allowed prisoners to be disciplined for sexual activity with staff. They have since changed their rules so that discipline of prisoners for sexual activity with staff is authorized only in limited situations involving clear misconduct by the prisoner rather than the prisoner's simply acceding to the wishes of a staff member who has power over her in multitudinous ways. Sexual activity with staff constitutes a disciplinary offense only when a prisoner "intentionally and forcibly touch[es] the sexual or other intimate parts of an employee for the purpose of degrading or abusing such employee or for the purpose of gratifying the inmate's sexual desire." New

York State Department of Correctional Services Standards of Inmate Behavior, Rule 101.11.⁵ While the Commission recognizes these concerns in their discussion (DI-2 commentary), there is no proposed standard limiting the imposition of discipline. This should be changed.

Prisoners also can be disciplined for lying about staff sexual misconduct if prison staff do not credit their report. One of the Amador plaintiffs was charged with lying when she described a dark spot on the officer's penis that was not found four months later when a physical examination was conducted. New York State has now limited the situations where a prisoner can be disciplined for lying. Now, "[a] report made in good faith based upon a reasonable belief that the alleged conduct did occur does not constitute falsely reporting an incident or lying for the purpose of disciplinary action even if investigation does not establish evidence sufficient to substantiate the allegation." See NYS DOCS Directive 4028A at Section V.B5 (<http://www.docs.state.ny.us/Directives/4028A.pdf>). While we understand that false claims can be lodged by prisoners, our experience in Amador makes clear that very few prisoners will lie about a subject so intimate and embarrassing. The secondary gain by doing so is minimal, while the consequences of lodging a false report are high. The proposed standards again fail to address this issue, and we urge that they be revised to make clear that prisoners cannot be disciplined for complaining about sexual abuse because staff choose not to believe them.

Correctional officials must be required to take action against an officer if they have a reasonable belief that sexual misconduct has occurred. The proposed standards' requirements regarding investigations and discipline of staff are important, but they will mean nothing if correction officials are permitted to continue to fail to take action and fail to remove staff from guarding women prisoners despite clear indicia of sexual misconduct.

Staff (and prisoners) are aware of the red flags of abuse such as an officer's talking to one prisoner for hours on end, touching her, lighting her cigarette, whispering in her ear, although staff rarely reports such behavior. Because no one sees the actual sexual contact, staff must be required to report such indicia of misconduct and correction officials must be required to take action based upon these red flags. The Amador plaintiffs provided such evidence when they came forward with knowledge of an officer's shaved pubic hair or the presence of a mattress in a storage area, but DOCS failed to remove these officers from guarding women prisoners. The standards should be revised to require corrections officials to take action when confronted by credible and repeated claims of abuse. Without this requirement, abuse will not be stopped; staff sexual abuse will continue so long as staff know that no action will be taken against them absent physical proof.

Even though a federal appeals court has held that correctional officials cannot use union contracts as excuse for inaction in addressing custodial sexual abuse, Riley v. Olk-Long, 282 F.3d 592 (8th Cir. 2002), correction officials in New York continue to hide behind their contract with the correction officers' union. They say their hands are tied and that they cannot even move an officer away from his bid position without a formal imposition of discipline from an outside arbitrator, even to move an officer away from inmate-contact or away from guarding women, even if there is no change in his pay or in his hours. In every other area of prison management,

⁵ The New York State Standards of Inmate Behavior is not available on-line. We can provide you with a copy upon request.

corrections officials demand virtually unfettered deference to their purported expertise. In this area, however, they have abdicated control of their own jails and prisons. The Commission recognizes this anomaly, Report at 64-67, but they do not mandate any action. They do not require prison officials to remove an officer from guarding women if they have a reasonable suspicion that sexual misconduct has occurred. Instead they ask correctional officials to consider renegotiating contracts with their unions and to work with them to move towards meaningful implementation of the standards. That is all to the good but the fact is that if correction officials have not renegotiated contracts with the correction officers unions before, they surely will not now if national standards do not even require them to do so.

C. The Proposed Standards Rely Too Much on the Good Faith of Correction Officials

To the degree that the Commission addresses the important issues we have raised, it makes suggestions, or discusses them in its narrative report, but does not require changes. For example, cameras are not required; correction officials must simply consider whether they are needed. (PP-7).⁶ In other words, the proposed standards rely on the good faith of correctional officials to recognize that something more is needed, and then asks them to try to do something about it.

Our experience in New York is that the Department of Correctional Services thinks it is doing a fine job of dealing with the problem of prison staff sexual abuse. Asking it to review itself is not going to result in a candid self-critical analysis. Without being cynical, there is simply no reason to believe that this will occur. Amador has been pending for seven years, and New York has had plenty of time to acknowledge problems and make changes. With the exception of the issue of discipline for reporting, DOCS has repeatedly denied that there is a problem. It has vigorously defended all of the litigation filed about staff sexual abuse. It has not renegotiated its contract with the correction officers union, and does not appear to have any intention of doing so. It is simply naïve to think that correction officials will follow up on suggested changes and make pivotal revisions to policies and practices simply because they now see the light.

Even if correctional officials across the country were more inclined than their counterparts in New York to take needed action, it is extremely unlikely that they would be able to implement the proposed changes without being required to do so. Even the most enlightened correctional administrator is confronted by fiscal constraints and political realities, and there is no constituency with clout advocating for prisoners who are victims of staff sexual abuse. Installing cameras and other technology costs money, competing against an almost infinite number of other fiscal needs. Taking on collective bargaining provisions is a political bombshell. Given these realities, it is extremely unlikely that any reforms simply suggested will become reality. If something is important, it must be required by the standards or officials will be under extraordinary pressure to defer it to another day, something they already have done for years.

In addition to relying too much on suggested changes and self-auditing, the proposed standards' requirement for external auditing is too vague, calling for auditing every three years by an

⁶ PP-7: The agency uses video monitoring systems, and other cost-effective and appropriate technology to supplement its sexual abuse prevention, detection and other response efforts. The agency assesses, as least annually, the feasibility of and need for new or additional monitoring technology and develops a plan for securing such technology.

“independent and qualified”⁷ auditor “pre-certified” by the Department of Justice, with no mechanism for payment provided. While the idea of external auditing is critical, auditing every three years is not sufficient. Criteria for what is meant by an “independent” or “qualified” auditor must be laid out. A mechanism for reasonable payment must be provided. Without these changes, the proposed standard calling for external monitoring will largely be meaningless.

D. The Proposed Standards Are Cumbersome And Contain No Benchmarks for Compliance

The proposed standards contain no benchmarks against which compliance is to be assessed and are cumbersome and confusing. Nowhere in the proposed standards is any guidance given on what constitutes compliance, or non-compliance, for prison officials who would like to comply fully with the standards. In addition, the Report itself is more than 200 pages. The standards, with checklists, comprise another almost 90 pages. It is difficult to locate the standard that applies to a particular issue. The nexus between the report, the findings and the checklist (all of which are not mandatory) and the standards (which purportedly are mandatory) is confusing, particularly since most of the salient concerns are addressed everywhere but in the mandatory standards.

For example, consider the standards concerning the use of cameras and other technology. The proposed standards do not require placement of cameras. Instead, in a variety of places including within prevention planning (PP3: Inmate supervision, PP-7: Assessment and use of monitoring technology, which cross-references to DC-1: Sexual abuse incident reviews and DC-3: Data review for corrective actions), they ask correctional officials to self-determine whether more cameras or other technology are needed and, if so, whether they have taken corrective action to address the deficiency. No guidance is given on how prison officials are to make this determination, or how compliance is to be assessed. Instead, self-assessment is to be performed based on a checklist defined as non-mandatory. Under the proposed standards, cameras could be determined never to be needed or never to be installed, yet prison officials could still call themselves compliant. Under the proposed standards, the assessment of compliance is left in the hands of the very prison and jail officials whose failure to act effectively made this Commission necessary.

IV. THE PROPOSED STANDARDS SHOULD NOT BE WATERED DOWN

Despite the substantial weaknesses in the proposed standards, it is our understanding that they are at significant risk of being even further weakened. This proposition is extremely disturbing.

At the listening session that we attended at the Department of Justice, we were told that that prison and jail officials have objected to the proposed standards as too onerous, and as contrary

⁷ “The public agency ensures that all of its facilities, including contract facilities, are audited to measure compliance with the PREA standards. Audits must be conducted at least every three years by independent and qualified auditors. The public or contracted agency allows the auditor to enter and tour facilities, review documents, and interview staff and inmates, as deemed appropriate by the auditor, to conduct comprehensive audits. The public agency ensures that the report of the auditor’s findings and the public or contracted agency’s plan for corrective action (DC-3) are published on the appropriate agency’s Web site if it has one or are otherwise made readily available to the public.” AU1.

to Congress' mandate in the Prison Rape Elimination Act that the standards not impose "substantial" costs on the States.⁸ Both of these arguments are without merit.

First, as we have made clear, it is absurd that there should be objections that the proposed standards are too onerous, since they mandate so much less than is needed to deal effectively with the problem.

Second, even when the proposed standards do require changes, they do so in a measured and extremely limited fashion. Take the cross-gender supervision standard, which we were told at the listening session is one of the principal proposed standards to which objections are being lodged. It does not prohibit cross-gender supervision, even of women prisoners, despite the requirements of international standards⁹ and the belief of many advocates, and candid correctional officials, that this is the only way to stop prison staff sexual abuse. See, e.g., Everson v. Michigan Dept. of Correction, 391 F.3d 737, 748-49 (6th Cir. 2004) (prison's decision to have women guard women prisoners upheld as legitimate BFOQ in light of pervasive history of staff sexual abuse).

Instead the proposed standards set out significant but limited restrictions on cross-gender supervision. They prohibit cross-gender strip and visual body cavity searches except in emergencies; they prohibit cross-gender pat frisks and viewing prisoners of the opposite gender who are nude or performing bodily functions except in emergency or other extraordinary or unforeseen circumstances. (PP-4). These are narrowly limited prohibitions, tailored to the worst of abuses as perceived by the Commission. New York State has prohibited cross-gender strip searches and body cavity searches for decades, and has complied with similar limitations on cross-gender pat frisks of women prisoners since 2001. NYS DOCS Directive 4910.¹⁰ Likewise, New York State has limited staff observing prisoners of the opposite gender in a state of nudity for decades by the simple practice of having an officer yell "man (or woman) on the unit" when they entering an opposite-sex housing area, and by allowing prisoners to place a small piece of cloth on the front of their cell for brief periods when they are changing. Toilets and showers have privacy panels that provide needed privacy but at the same time allow necessary surveillance. See NYS DOCS Directive 2230. Almost thirty years ago the Second Circuit recognized that there were ways to balance the need for privacy with allowing supervision by the opposite gender, including the provision of "satisfactory sleepwear" and allowing prisoners to cover their cell windows for 15 minute periods. Forts v. Ward, 621 F.2d 1210, 1216-17 (2d Cir. 1980). Any claim by correctional officials that these proposed limits are too onerous or costly, in candor, serves only to show that there is an underlying resistance to change, and reinforces our skepticism that the Commission's approach of relying on the good faith of correctional officials to determine what is needed is doomed to failure.

If the Department of Justice is being told that costs of compliance are high, then the correctional systems which claim these costs should be required to explain their means of calculating them. They should be pressed to explain why they have not offered reasonable cost-efficient ways of

⁸ As noted in the Advance Notice of Proposed Rulemaking, Congress authorized the promulgation of the standards insofar as they do not "impose substantial additional costs as compared to the costs presently expended by Federal, State, and local prison authorities." Prison Rape Elimination Act of 2003, 42 U.S.C. § 15607(a)(3).

⁹ See United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 53, adopted Aug. 30, 1955.

¹⁰ This Directive is not available on-line. If you wish, we can provide you with a copy.

implementation, since the reality is that these proposed standards could be implemented at a minimal cost if only a modicum of innovation and good faith were employed.

The Advanced Notice of Proposed Rulemaking states that an accounting firm had been hired to determine the costs of implementation of the proposed standards. This process seems fundamentally flawed without a simultaneous assessment of the benefits of implementation. Such benefits are concededly hard to quantify, since it is difficult to assess the value of bringing officers who commit criminal acts to justice, or to assess the value of avoiding traumatic injury to individuals. It is similarly difficult to calculate the cost if the perception around that world were to be that custodial sexual abuse is not taken seriously by our own government. There are also clear costs to not promulgating the standards that should be taken into consideration. Prisoners who experience trauma require mental health treatment, have difficulty re-entering society, and are therefore more likely to re-offend. These are just some of the economic and non-economic costs of addressing the scars of custodial abuse which should also be considered in determining the costs associated with failing to implement the standards.

It is our understanding that some corrections officials object to the proposed standards because they do not treat small systems, with smaller budgets, differently than larger systems. Given that the proposed standards mandate so little, there is no reason to dilute them further for any system regardless of its size. We recognize, however, that if our suggestions to make cameras and other technologies mandatory were adopted, this concern might be more substantial. However, we still believe it would be without merit given that these steps are essential to actually deter custodial sexual abuse. Certainly for large systems like New York State and New York City who spend more than four billion dollars combined on their jails and prisons, the costs of implementing the standards with our proposals would be incidental and should be required to stop the scourge of prison sexual abuse. If you decide to accept our suggestions for mandatory standards, but do not wish to impose them on all systems, it may be that certain requirements should be lessened for smaller systems. But certainly, as currently drafted, any argument that the standards are too rigorous for smaller systems is a red herring and should not be credited.

There is no question that implementation of the proposed standards will cost some money, and that compliance with our suggestions would cost even more. Congress did not say that there could be no expenses associated with implementation of the NPREC standards; rather, they said there could not be “substantial” cost imposed upon the States “as compared to the costs presently expended.” “Substantial” is not defined in the statute. However, we encourage you to consider the meaning of “substantial” relative to the already enormous costs of maintaining prison systems. You should weigh the billions of dollars the United States has chosen to pay to incarcerate almost two million people against the amount needed to implement the standards and stop, or at least limit, the scourge of custodial sexual assault. When considered in this light, we do not believe that the costs of appropriate standards can legitimately be seen as “substantial.”

Finally, we address your question in the notice of proposed rulemaking, suggesting that some prison administrators object to the scope of the proposed standards as beyond the mandate of the Prison Rape Elimination Act, claiming that the standards should not deal with custodial sexual abuse apart from “rape.” If true, this is an outrageous position. The fact is that the language of PREA itself explicitly defined prison rape to include a wide variety of sexual acts including fondling and other unwanted touching. See Prison Rape Elimination Act, 45 U.S.C. §15609

(2003).¹¹ Moreover, our experience in Amador has made clear that prison rape results from a continuum of misbehavior, with custodial sexual abuse often starting with a kiss or a touch before involving an act with penetration. It is impossible to effectively prevent prison “rape” without addressing all forms of sexual assault. To limit the standards to “rape,” meaning penetration, would be to undermine the clear intent of the standards and would assure that custodial sexual abuse would continue unabated. Any such limitation would be a disgrace and we certainly expect that you will not accept this argument.

V. THE NPREC STANDARDS DO NOT REFLECT THE CONSTITUTIONAL MINIMA

We hope that you will strengthen the proposed standards before their implementation. If this does not occur, however, it is imperative that in promulgating these standards you make clear that while the standards are an important step to reducing custodial sexual abuse, they do not reflect the minimum steps needed to address this issue. There are reasons that this is the case: the limitations imposed by Congress on fiscal costs and the need for consensus by the Commission.

Our concern about this issue arises directly from our experience in Amador. New York State has already threatened to use these standards as a sword to disrupt the litigation, asserting that their promulgation will “moot or sharply curtail” the litigation.

As a result, an explicit statement is needed indicating that the standards are at most a first step towards controlling sexual abuse in prisons and that officials and the courts should not view compliance with them as immunizing them from liability for acts or omissions that cause or allow prisoners to be raped. Otherwise, prison officials will maintain that if they comply with the standards they have complied with the Constitution. Because, as we have noted, the standards require so little and depend so heavily on self-assessments, correction officials can argue that they have complied with the standards when indeed they have not, or at least have not in good faith. For example, they can argue that because they have conducted critical reviews -- even though there might be a pattern of abuse and they have never determined that cameras are needed -- that they are in compliance with the standards and therefore meet the requirements of the Constitution. As you know, challenges under the Eighth Amendment require a showing by prisoners that the asserted violation meets both the objective and subjective objective prongs of the Eighth Amendment. See Farmer v. Brennan, 511 U.S. 825 (1994) (deliberate indifference test requires plaintiffs to show both that harm was objectively serious and that prison officials had subjective intent to allow the harm to occur). Moreover in suits for money damages a defense of qualified immunity is permitted, so that correctional officials are liable only if they violated the prisoner’s clearly established rights. See e.g., Morris v. Eversley, 282 F.Supp.2d 196, 204-208 (S.D.N.Y. 2003) (defense of qualified immunity established where New York State corrections officials claimed they followed DOCS policy and simply forwarded the prisoner’s

¹¹ The Prison Rape Elimination Act defines “rape” as “the carnal knowledge, oral sodomy, sexual assault with an object or sexual fondling of a person either when forcibly or against the person’s will, where the victim is incapable of consent due to his or her youth or temporary or permanent mental or physical incapacity or through the exploitation of the fear or threat of physical violence or bodily injury.” PREA defines “sexual fondling” to mean the “touching of the private body parts of another person (including the genitalia, anus, groin, breast, inner thigh or buttocks) for the purpose of sexual gratification.” See 42 U.S.C. § 15609 (8)-(11).

complaint of rape by an officer to the Inspector General). Prison officials who are challenged by litigation will claim that their self-determined compliance with the standards means that they have acted in a manner that shields them from liability.

It was not Congress' intent in passing the Prison Rape Elimination Act and in setting up the NPREC Commission to derail meritorious litigation about custodial sexual abuse, yet that is what will happen if you do not clarify the role of the standards. While we believe that we can successfully argue that conflating these standards with the Constitutional minimum is erroneous, and that a self-assessment of compliance with the standards that was not conducted in good faith is not sufficient, it is important not only for our litigation, but for litigation brought by uncounseled victims across the United States, that these arguments be avoided.

If the Commission does not make clear that compliance with the standards is not intended to be the equivalent of compliance with the Constitution, then instead of being an important step forward in freeing prisoners from custodial sexual assault, the standards will represent an enormous step backwards.

VI. CONCLUSION

We urge that the NPREC proposed standards concerning the PLRA be adopted, and clarified both with respect to the exhaustion of injunctive claims and the physical injury requirement. As to the rest of the proposed standards, we urge that they be strengthened. If that is not done, we reluctantly endorse them as a step in the right direction, with the caveat that it is critical that their limitations be explicitly acknowledged.

We appreciate that staff sexual abuse is an extremely complex issue. However, we believe that the time has come for this country finally to take all reasonable steps to stop it. Staff sexual abuse has horrific consequences for its victims. A woman prisoner can be forcibly raped alone and at night, with no meaningful recourse or escape. A woman prisoner can experience shame and embarrassment, with long-term consequences for her mental health and ability to live a lawful life after release, as a result of participating in coerced sexual activity. A woman prisoner who has once "consented" to abuse may have no way of escape from her abuser, trapped in a cycle comparable to that of domestic violence, but with no shelters and no safe haven. A woman who has "prostituted" herself for gifts, like food or cigarettes, or a phone call home, is continuing a damaging cycle of abuse. And staff sexual abuse has consequences beyond the women involved: it can compromise security and leave officers at risk of blackmail and extortion to bring in contraband.

We do not want our prisons to be the site of coerced sexual assaults and de facto legalized prostitution. We are confident that the Attorney General of the United States shares this view. Therefore, we urge the Attorney General to adopt the suggestions made by the NPREC, with the modifications we have proposed.

Respectfully submitted,

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EXHIBIT TWO

(LAS Letter of October 8, 2010, with attachments)



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Re: Docket No. OAG-131
Comments on the National Standards to Prevent, Detect
And Respond to Prison Rape

Dear Attorney General Holder:

We are counsel for plaintiffs in Amador, et al v. Andrews, et al, 03-Civ.-0650 (S.D.N.Y. 2003), a lawsuit filed on behalf of women prisoners who allege sexual abuse by male corrections staff in New York State prisons, and who seek reform of New York's policies and practices for supervising, investigating, and disciplining staff sexual misconduct. We wrote and met with the Department of Justice ("DOJ") previously concerning the proposed national standards that were prepared by the National Prison Rape Elimination Commission ("proposed standards").¹ For your convenience, we submit our previous comments again along with this supplemental information.

Since the submission of our comments and our meeting, the Department of Justice has released "The Cost Impact Analysis of the Prison Rape Elimination Act" (Final Report, June 18, 2010) ("Cost Analysis"), an analysis of the purported costs associated with implementing the proposed standards as estimated by corrections' officials including the New York State Department of Correctional Services ("DOCS" or "the Department"). As part of their response, corrections officials provided a self-assessment of their current state of compliance.

The Cost Analysis provides only a one-sided presentation of the issues. It contains no inquiry into the benefits to be gained by implementation of the standards. There is no assessment of the reliability of corrections' officials' cost estimates or of their self-reported claims of compliance.

¹ The Prison Rape Elimination Act of 2003 set up a Commission to promulgate national standards concerning prison rape. 42 U.S.C. §15604 *et. seq.* (2003). The National Prison Rape Elimination Commission forwarded draft standards to the Attorney General for consideration. See <http://www.ncjrs.gov/pdffiles1/226682.pdf>

Yet it is obvious from the enormous variations in cost estimates by different corrections' systems that they lack foundation and reflect a biased agenda. In addition, our experience investigating and litigating staff sexual abuse in New York has provided us with unique insights into New York's misleading claims of compliance, as well as with knowledge about the bloated nature of their cost estimates. We therefore share these insights with the belief that they provide an important framework for evaluating the overall import of the Cost Analysis as well as the adequacy of the proposed standards.

DOCS has taken the position that implementation of the standards would be an impossible expense, positing numbers for compliance that are almost laughable. It claims compliance for New York State alone, with an average daily inmate population of 60,217, would require \$627 million in upfront money (in addition to ongoing costs), even though the other twelve surveyed state prison systems, with a combined average daily population of 341,308, estimate that they would need a total of only \$79.7 million. See Cost Analysis, Table 5 at 7; App. B at B-1, 3, 5, 7, 9, 11, 13, 16, 19, 21, 23, 25, 28. In particular, DOCS projects it would cost \$621 million to comply with the monitoring requirements of the proposed standards. Cost Analysis, App. B at B-18. At the same time, California, with more than double DOCS' population, estimates a cost of only \$8.3 million to attain compliance with these requirements, less than 2% of New York's estimate. Cost Analysis, App. B at B-3, 4. DOCS' hyperbolic estimates thus undermine both the integrity and the purported usefulness of the Cost Analysis. And are emblematic of its resistance to change.

The credibility of New York's Cost Analysis Response is further undercut by a recent report published by the federal Bureau of Justice Statistics ("BJS"). This report shows that New York has the highest reported rate of staff sexual abuse of women prisoners in the country and virtually the highest for men. Sexual Victimization in Prisons and Jails Reported by Inmates 2008-2009 (Aug. 26, 2010) at Table 3, <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

This reported rate of abuse is shocking, but even worse is the fact that New York, in its Cost Analysis response, simultaneously claims compliance with the majority of the proposed standards. Cost Analysis, App. B. at B-16 to B-18. This patent disconnect between the high levels of abuse prisoners report and corrections' officials' claims of compliance should serve as a wake-up call. As we detailed in our opening submission, the standards are too vague and demand way too little from corrections' officials. And self-assessment by corrections' officials, which is virtually the only means of auditing contained in the proposed standards, is simply not sufficient. The standards must be strengthened and oversight must be enhanced if sexual abuse is to be addressed.

While the public comment period is over, we strongly encourage DOJ to consider the evidence set forth below revealing that the Cost Analysis is based on erroneous, self-serving reports and to consider this information in evaluating and hopefully strengthening the proposed standards.

BACKGROUND

As the National Prison Rape Elimination Commission found, prison rape is a national scourge. Because it happens behind prison walls, it is difficult to determine the scope of the problem or

the efficacy of efforts to address it. Our litigation has given us a window into the closed world of prisons, though much of the evidence obtained in Amador is confidential and cannot be shared. However, we have obtained enough information that can be made public to raise serious questions about the validity of the Department's response to the Cost Analysis.²

Through hundreds of interviews with women prisoners and the discovery in our litigation, it is clear that despite its claims of a zero tolerance policy, the Department does not take any action against an officer unless there is physical proof of the sexual assault. One of the Amador plaintiffs asserted that she was raped by a male officer and was able to describe that he shaved his pubic area, a fact that was confirmed. Despite this telling corroboration of his assault, the officer was not fired nor even removed from contact with women prisoners. And just this week, this same officer was arrested for sexually abusing another prisoner. It is against this disturbing backdrop of tolerance, rather than "zero tolerance," that the Department's response to the Cost Analysis must be evaluated.

THE DEPARTMENT MISREPRESENTS ITS COMPLIANCE WITH THE PROPOSED STANDARDS REGARDING SUPERVISION AND INVESTIGATIONS

A genuine zero tolerance policy towards staff sexual abuse requires effective supervision, investigations, and discipline of staff when credible allegations of misconduct are received. The Department grossly distorts its levels of compliance with the proposed standards about these subjects.

DOCS Fails to Comply with the Supervision Standard

The proposed standard for supervision requires corrections officials to "provide the supervision of inmates necessary to protect inmates from sexual abuse." PP-3.³ DOCS fails to comply in the most basic of ways, with the Superintendent of the largest women's prison in New York making clear that "I don't know if that's the duty of an employee to watch out directly for signs of sexual misconduct." Supt. Andrews Depo. at 70:18-70:21. This indifference to staff sexual abuse pervades DOCS' supervisory practices. Officers about whom there have been repeated credible complaints are allowed to continue to supervise women prisoners, even alone on a housing area at night. Since DOCS does not have cameras at most of its prisons that it can use to monitor its staff's actions, it relies on supervisory rounds to watch its staff. See Dep. Supt. Wolff Depo. at 18:25-19:20. But the Department's approach to rounds is, to put it kindly, lackadaisical. Superintendents do not order additional rounds to more closely supervise staff about whom complaints of sexual abuse have been made. Supt. Andrews Depo. at 179:5-21; Dep. Supt. Wolff Depo. at 39:14-40:4. DOCS also condones the routine practice of staff calling ahead to

² At the behest of DOCS, most of the discovery in Amador is designated as confidential, including the names of the Inspector General investigators. Therefore, while we provide citations and enclose copies of information referenced in this letter, we code the names of investigators and redact non-public information. All of the deposition testimony cited is from Amador, except for references to the deposition of Superintendent Andrews who was deposed as part of another case.

³ DOCS' claim of compliance with this proposed standard is particularly absurd since, as is evident from their response to other proposed standards, they do not conduct critical incident reviews and they do not utilize monitoring technology to supplement direct supervision, both of which are required by this standard. Compare DOCS' response to PP-3 with responses to PP-7 and DC-1, App. B at B-18.

alert other corrections' staff that a supervisor is conducting rounds, even though this practice obviously allows an abusive officer to avoid being discovered in a compromising position. See Dep. Supt. Wolff Depo. at 56:10-56:23; 57:2-57:15; Supt. Lord Depo. at 50:22-52:8; Supt. Andrews Depo. at 111:6-112:16.

DOCS Fails to Comply with the Investigation Standards

DOCS grossly distorts its compliance with the proposed standards regarding investigations. It claims compliance with the proposed standard for the burden of proof in investigations, explicitly asserting that DOCS relies on a "preponderance of the evidence standard" to substantiate allegations of sexual abuse. Report at App. B, B-18 (IN-3); see also App. D, D-11; App. E, E-11; App. F, F-8. This is not the case. The Department has no standard of proof that it relies upon in deciding whether to substantiate a case of staff sexual abuse. Rather, the standard of proof varies depending on "the merits of the case." Investigator 4 Depo. at 34:2-5. Other investigators confirmed that this is the Department's position, stating explicitly that the standard of proof "depends on each case, each individual case." Investigator 1 Depo. at 64:17-66:24; see also Investigator 1 Depo. at 318:5-319:3 (standard of proof is on a "case by case" basis); Investigator 3 Depo. at 104:4-105:18 (standard of proof goes by the evidence in the case, and is based on the case and her personal opinions).

To the degree DOCS applies any consistent standard of proof to investigations of staff sexual abuse, it is significantly higher than "preponderance" of the evidence. Rather, to substantiate such an allegation and refer it for administrative action, an investigator "has to be able to prove it happened." Investigator 1 Depo. at 69:20-69:24; Investigator 4 Depo. 22:10-22:19 (DOCS will substantiate an allegation of staff sexual abuse only when "the allegation has been found to be accurate."); Investigator 5 Depo. at 75:9-18 (An allegation of staff sexual abuse is referred for disciplinary action only when the investigator can "establish" that the incident has "definitely" taken place). In other words, DOCS requires a higher standard of proof simply to refer a complaint for administrative action than is needed for a criminal conviction. It also means that notwithstanding their representation in the Cost Analysis, DOCS does not utilize a preponderance of the evidence standard in deciding whether to substantiate an allegation of staff sexual abuse.

DOCS also claims compliance with the standards setting forth requirements for the training of the investigators and the manner of the investigation, although the evidence reveals that these requirements are not, in fact, met. The standards require agency investigations be "prompt, thorough, objective and conducted by investigators who have received special training in sexual abuse investigations." Cost Analysis at B-18 (IN-2 and TR-4); see also App. D, D-4; App. E, E-4; App. F, F-4, F-8. In particular, these standards require that investigations be conducted by investigators who have received comprehensive and up-to-date training in the criteria and evidence required to substantiate a case for administrative action or prosecution referral. See Proposed Standards TR-4 and IN-2. They also require investigators to review prior complaints against the staff member to see if these prior complaints suggest a pattern of behavior that bears on the credibility of the suspected abuser. Id. They require a credibility assessment of each person spoken to, with the assessment based on the individual's motivations to lie, opportunity,

prior history of truthfulness and the consistency of their statements. Id. These credibility assessments are not to be based simply on the person's status as an inmate or staff person. Id.

Again, DOCS' Cost Analysis response does not reflect reality. DOCS IG investigators have not been trained in the criteria and evidence required to substantiate a case. See Investigator 1 Depo. at 69:5-10 (IG investigator never instructed by supervisor regarding how much evidence is needed to substantiate a case). Indeed, the Department does not even have written materials offering guidance to investigators about when to substantiate a case. See Investigator 4 Depo. at 34:6-19. DOCS investigators do not assess credibility, but instead discount prisoners' testimony simply because they are prisoners. Investigator 5 Depo. at 64:2-66:19 (IG has no standard for how much corroboration is needed; an allegation of sexual abuse is insufficient; and a prisoner's word is an insufficient basis on which to substantiate such an allegation); Investigator 3 Depo. at 80:7-80:11 (an allegation of sexual misconduct is "most likely" not sufficient for IG to substantiate). And DOCS investigators do not give consideration to prior complaints against the staff person in determining whether to substantiate a case. Investigator 3 Depo. at 251:16-252:16 (repeated prior allegations do not affect IG investigator's determination whether to substantiate a new allegation).

Meaningful Standards For Supervision, Investigation and Discipline of Staff Are Needed

It is in large part because DOCS fails to comply with these proposed standards regarding supervision and investigations that staff about whom there are repeated and credible complaints of abuse are nonetheless permitted to continue guarding women prisoners and thus permitted to engage in additional abuse.

But it is also because these proposed standards are vague and toothless that DOCS can claim compliance with them while at the same time experiencing troubling levels of reported abuse. A finding of staff sexual misconduct usually comes down to weighing a claim by a prisoner against a denial by an officer. If anything is to change, the standards must be unambiguous. Cameras must be required, not left to the discretion of the prison officials to determine if they would help. Prior allegations of abuse should not just be required to be "reviewed" by investigators but should be considered substantive evidence of propensity, as is permitted by the Federal Rules of Evidence, Rule 415. And prison officials should be required to take back control of their prisons: they should no longer be allowed to enter into corrections staff contracts that permit officers to bid for posts involving prisoner contact regardless of the number of credible complaints of sexual misconduct lodged against them. We detailed our concerns about the substantive inadequacies of the proposed standards in our opening submission, and refer you to them.

THE DEPARTMENT MISLEADS DOJ IN OTHER AREAS OF CLAIMED COMPLIANCE

The Reporting Standard

DOCS claims compliance with proposed standard RE-1, which requires multiple channels for reporting staff sexual abuse. DOCS does nominally allow multiple channels for reporting,

however, they simultaneously demand that only their grievance program be used before a prisoner can bring a federal lawsuit. See Amador v. Superintendents of Dept. of Correctional Services, 2007 WL 4326747 (S.D.N.Y. Dec. 4, 2007). DOCS' renouncement of its other channels for reporting effectively negates this claimed compliance.

Moreover, DOCS does not provide at least one way for inmates to report abuse to an outside entity or public office not affiliated with the agency. In claiming compliance, DOCS is presumably relying on the Inspector General's Office as this entity; however, the Inspector General's Office is not an outside entity, but rather is part of DOCS.⁴ See Response to Audit Report 96-S-58 by DOCS Commissioner Goord, April 2, 1999. Indeed, the Inspector General's investigative staff, including the Director of the Sex Crimes Unit, is comprised largely of former correction officers. Investigator 4 Depo. at 9:23-10:15; Investigator 1 Depo. at 8:7-8:9; Investigator 5 Depo. at 9:2-7; 10:11-11:7; Investigator 3 Depo. at 247:4-247:11. To claim that the Inspector General's office is an independent entity is not true, rendering DOCS' claims of compliance simply false.

The Notification Standard

DOCS' response about proposed standard IN-1 is also misleading. This proposed standard requires "notification to victims and/or other complainants in writing of investigation outcomes." DOCS indicates that they cannot comply with this requirement because State law prohibits such disclosures to non-victim complainants. Regardless of whether this is true (and this is an arguable point) it obfuscates the bigger issue: DOCS does not inform victims of sexual abuse of the results of their investigations, even when the victim herself has complained. See Investigator 4 Depo. at 174:7-175:18 (SCU does not tell inmates the results of their investigations); Investigator 1 Depo. at 320:16-320:25 (IG does not tell victim if complaint has been found unsubstantiated); Investigator 2 Depo. at 177:8-177:10 (same); Investigator 3 Depo. at 98:17-99:5 (same). We have interviewed scores of women prisoners over almost a decade who have complained to the IG, and we can recall only one woman who was ever told the results of the IG's investigation into her allegations of staff sexual abuse. While DOCS' response may have been technically accurate, since they are right that they do not comply with this proposed standard, the tenor of their response would lead one to believe that the only barrier to their compliance is their failure to notify non-victim witnesses. This is not the case.

DOCS INFLATES ITS PROJECTED COSTS FOR IMPLEMENTATION OF THE PROPOSED STANDARDS

Although we are not in a position to rebut DOCS cost estimates in detail, DOCS' claims of the cost of achieving compliance appear grossly inflated, particularly since New York estimates the highest upfront compliance costs, by far, of any of the sites reporting in the Cost Analysis. See Cost Analysis, App. A at A-7. These inflated costs reflect DOCS' deep-seated resistance to needed change.

⁴ Unlike virtually every other State agency in New York, DOCS has its own inspector general's office which is part of the agency itself and which is not even authorized by law. See State of New York Office of the State Comptroller Division of Management and Audit Report at 96-S-58; see also Response to Audit Report 96-S-58 by DOCS Commissioner Goord, April 2, 1999 .

DOCS' Inflated Cost Estimates to Install Monitoring Technology

As we noted at the outset, DOCS claims that compliance with the monitoring standards would cost \$621 million, for “full video installation at 35 facilities [and] increased coverage in 4 female facilities.” Cost Analysis, App. B at B-18. Even assuming DOCS required full video installation at all 39 of these facilities, this breaks down to an inconceivable cost of almost \$16 million per prison, an estimate that for one prison is almost double California’s projected cost for achieving compliance for its entire system. Cost Analysis App. B at B-4. Nor is California somehow ahead of the game on monitoring technology, since only three of California’s 33 prison facilities already have video equipment, and since the remainder are “old buildings that are difficult to retrofit.” *Id.* Moreover, DOCS previously successfully applied for funds for monitoring technology under the Prison Rape Elimination Act, and nothing we have seen suggests that their prior request fell anywhere near their current cost estimate.

DOCS' Inflated Cost Estimates to Limit Cross-Gender Pat Frisks

We are similarly extremely skeptical of DOCS’ claim that in order to comply with the limitations on cross-gender pat frisks at female facilities that they would have to increase staffing by 50%, or hire an additional 620 officers at a yearly cost of \$53,000 per officer or \$33.9 million dollars. Cost Analysis App. B at B-18. The fact is that DOCS has been under stringent restrictions concerning cross-gender pat frisks at women’s prisons for almost a decade, when a lawsuit was filed about this issue and DOCS revised their policies. *See* DOCS Directive 4910, at § III.B.3. This inflated projected cost of complying with this standard alone accounts for 77% of their total projected annual (as opposed to up front) costs for compliance with all of the proposed standards, and should not be accepted at face value.

DOCS' Inflated Cost Estimates to Train and Educate Staff

DOCS estimates that training and education requirements would “weigh heavily” in the costs of compliance. Cost Analysis, App. B at B-16. Again, we doubt their estimates, particularly since New York claims it would cost \$4.5 million up front to provide training under the proposed standards, while the other twelve surveyed states combined projected a total cost for training of less than a million dollars. Cost Analysis, App. B at B-18. Their claims also seem particularly exaggerated in light of the fact that they have claimed to provide training about custodial sexual abuse for years. In 2005, the Department promulgated policies requiring that all employees (including non-uniform employees) receive initial and in-service training at least every three years that related to the prevention, detection, response and investigation of sexual abuse in a corrections’ environment. DOCS Directives 4027A (Sexual Abuse Prevention & Intervention-Inmate-on-Inmate) and 4028A (Sexual Abuse Prevention & Intervention-Staff-on-Inmate).⁵

⁵ At the same time, DOCS also required that all contractors, contract employees, volunteer and interns receive training consistent with their level of inmate contact relating to the prevention, detection and response to sexual abuse. *See* DOCS Directives at <http://www.docs.state.ny.us/Directives/4027A.pdf> and <http://www.docs.state.ny.us/Directives/4028A.pdf>. Then-Commissioner Goord issued a Statewide directive immediately implementing this policy, requiring that all employees be scheduled for mandatory training on these subjects, and requiring that all contractors and volunteers likewise receive it as appropriate. *See* Memorandum from

Even before this, all DOCS staff received training about these issues, to at least some degree. See Investigator 5 Depo. at 27:5-27:14; 29:5-30:22 (all DOCS employees received training on working with female offenders). As a result, New York's \$4.5 million dollar projection to simply to develop a "new" curriculum seems outlandish. While additional meaningful training is certainly needed, DOCS' projected costs are totally out-of-line.

DOCS' Inflated Cost Estimates to Develop a Computer System to Help Prevent Retaliation

We are skeptical about DOCS' claims that it would cost \$500,000 to comply with proposed standard OR-5, agency protection against retaliation, in order to develop a computer system that would permit Central Office to monitor inmate victims and witnesses. Again, DOCS projects the highest costs of any of the reporting sites; indeed, none of the other reporting prisons reported any cost at all to implement this standard. Cost Analysis, App. A at A-60. Moreover, it is our understanding that the DOCS Inspector General's officer already has a capacity to track by computer the names of victims and witnesses to allegations of abuse. See Investigator 4 Depo. at 178:5-178:9 (SCU has access to computer files about complaints of staff sexual abuse). As a result, we question why it would cost DOCS a half a million dollars simply to modify, or duplicate, their existing computer systems.

DOCS' MISLEADING RESPONSES CONFIRM THAT THE PROPOSED STANDARDS RELY TOO MUCH ON THE GOOD FAITH OF CORRECTIONS' OFFICIALS

As we stated in our opening comments, the proposed standards are unduly optimistic in their reliance on the good faith of corrections' officials to identify the shortcomings of their own systems and then to act to rectify them. Our experience in New York has shown that the Department, despite its appalling rates of sexual abuse, thinks it is doing a fine job. We predicted that "Asking it to review itself is not going to result in a candid self-critical analysis. Without being cynical, there is simply no reason to believe that this will occur." Unfortunately DOCS' distorted presentation of reality in their Cost Analysis response serves only to confirm our prediction.

In light of DOCS' response, it is imperative that instead of relying on suggested or recommended changes, the standards contain clear and unambiguous requirements. Self-auditing is clearly insufficient, and straight forward benchmarks assessed by strong external auditing must be required instead. As we previously suggested, auditing must take place more than once every three years by an objective auditor with strong credentials. Public scrutiny must be enhanced. Corrections' officials, like those in DOCS, who have a self-serving agenda, should no longer be able to hide behind false representations.

THE STANDARD REGARDING EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NECESSARY

The proposed standard regarding exhaustion of administrative remedies is essential to the proposed standards as a whole. This standard would ensure that victims of custodial sexual

Commissioner Goord to All Employees re: Policy on the Prevention of Sexual Abuse of Inmates (June 15, 2005 (116006-116007)).

abuse have recourse to the courts, in the event correctional officials fail to protect them. As a result, these victims would not be deprived court access due to their reliance on misleading information about how to report or to obstacles arising from their traumatic experience, as has happened to the plaintiffs in Amador. As with all the standards, the Cost Analysis presents a one-sided view of this proposed standard, overlooking its essential benefits and taking at face value the obstructionist views of some correctional officials.

DOCS, like every prison system surveyed, claims that compliance with the proposed standard regarding the exhaustion of administrative remedies would be a “major policy issue,” with the “48 hour exhaustion requirement” identified as a particular sticking point. Cost Analysis App. B (RE-2). Prison officials object to this standard because they claim it would “directly violate the PLRA,” would shorten grievance periods, and would ultimately lead to “systemic abuse” allowing a prisoner quicker access to the courts, even if the prison ultimately did everything possible to protect the prisoner. Id., App. A at A-17-18. We believe these claims are without merit.

First, based on our experience in Amador, we are skeptical of corrections’ officials’ motives with respect to exhaustion. As noted above, DOCS has disingenuously claimed “multiple channels” for reporting, while asserting only formal grievances satisfy the PLRA exhaustion requirement, depriving prisoners of access to the courts. Because it has provided a defense even to meritorious lawsuits, we are not surprised that corrections’ officials oppose efforts to simplify or clarify exhaustion requirements.

Second, prison officials’ claim that a ninety day exhaustion process would allow frivolous cases to tie up law enforcement resources, see id. at A-18, has no basis in reality. Ninety days is ample time for prison officials to address claims of sexual abuse, whether they are frivolous or legitimate.

Third, the “48 hour exhaustion” requirement only comes into play when a prisoner is seeking a preliminary injunction, or some other form of “immediate” protection or urgent relief from “imminent” sexual abuse. In those rare instances where a prisoner believes they are at imminent risk of sexual abuse and provides notice of this fact, it is certainly reasonable to expect the facility to take action within 48 hours of the report. As a result, the potential costs involved are small and are simply not sufficient to outweigh a prisoner’s need to seek immediate protection from a court if confronted by a non-responsive correctional system and imminent sexual abuse. Finally, as recognized by the authors of the Cost Analysis, any litigation or other expenses from this standard are so speculative that they are not appropriate to consider. App. A at A-17-18.

Fourth, the exhaustion proposal does not contradict the PLRA, as correctional officials have contended. The goal of the PLRA is to ensure that prison officials have notice of a prisoner’s complaint and the opportunity to fix it before the prisoner can seek relief from the federal courts. The proposed standard simply sets up a process that is fully consistent with this purpose. In addition, this standard does not mandate any action, but rather describes a procedure that is required for prison officials to maintain federal funding.

Because judicial review is the ultimate auditing and enforcement mechanism to ensure the protection of the most basic rights of prisoners who suffer from sexual abuse, this proposed standard is a critical tool in addressing custodial sexual abuse.

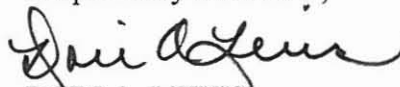
CONCLUSION

Reducing staff sexual abuse will not be easy: it happens in private and it often comes down to the word of a convicted felon against that of a correction officer. It is for this reason that clear requirements for cameras and other means of collecting evidence corroborating the victim are essential. It also is certain that staff sexual abuse will not be significantly reduced until corrections' officials themselves take the necessary actions to stop it. Unfortunately, our experience indicates that this will not occur until outside pressures force them to do so. That is why the standards are crucial.

We happen to have access to information about New York that reveals that the Department's purported compliance and cost estimates are disingenuous and misleading. There is no reason to think that New York is unique in resisting change, or in providing unreliable information in the Cost Analysis. Corrections' officials in many other states share the Department's opposition to oversight and object to implementation of the standards. We therefore urge the Department of Justice to recognize that the Cost Analysis is unreliable and biased and that it provides more information about the weakness of the proposed standards than it does about the actual costs of implementation.

Staff sexual abuse can be significantly reduced if the necessary steps are taken. We therefore urge the Department of Justice to strengthen, and then promulgate, the proposed standards.

Respectfully submitted,



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Submission to DOJ dated May 3, 2010

DOCS Directive 4910

Memo from Commissioner Goord to all Employees re Training (June 15, 2005)

New York State Office of the Comptroller Report re: Department of Corrections' Services

Inspector General's Office Report at cited pages

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EXHIBIT THREE

(Perez v. State of New York Excerpt of Trial Transcript)

NEW YORK STATE
COURT OF CLAIMS

----- X

Claim No. 108710

JEANETTE PEREZ,

Claimant,

- against -

STATE OF NEW YORK,

Respondent.

----- X

New York, New York

August 4, 2010

HEARING BEFORE:

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A. Yes.

Q. And during a count was there a CO present on the third floor?

A. Yes.

Q. And how predictable was the timing of the counts?

A. Just about everyday it was the same time.

Q. Did you ever receive a gift from Peter?

A. Yes.

Q. And what was it?

A. A wedding band.

Q. Are you familiar with the inmate rule book?

A. Yes.

Q. Are you familiar with any rule that - are you familiar with rules regarding sexual relations?

A. Yes.

Q. Say again?

A. Yes.

Q. What was your understanding as to your having sex with a correction officer?

A. I knew it was not allowed.

Q. Did you have sexual encounters with Peter?

A. Yes.

Q. When did they start?

A. In '99.

Q. Do you know the month?

A. The beginning of the year, like the beginning of the year.

Q. When was the first time that you had sexual contact with Peter - where was the first time you had sexual contact with Peter?

A. I'm not really understanding because sexual contact to me is different from the oral sex and everything, so -

Q. When I say contact - sexual contact, I mean the whole gambit from touching to intercourse.

A. Was when he took me to the stairs.

Q. And what stairs did he take you to?

A. C, (inaudible) marked C.

Q. How did Peter take you away from the other inmates?

A. He either picked me up on the unit where I was housed or he would call for me.

Q. And with respect to this time on the stairway, what was the reason that you were on the stairway with him?

A. He told the officer in my unit that it was a cleaning assignment.

Q. What sort of sex did you have with Peter the first time that you were on the stairway?

A. Oral sex.

Q. Aside from that time did you have oral sex on the Stairway C with Peter?

A. Say that again, I'm sorry.

Q. Aside from this time that you just testified to, did you ever again have sex with Peter on Stairway C?

A. You asking me if I had more sex with him on those stairs?

Q. Yes.

A. I don't recall.

Q. Did you have sex with Peter on any other stairway?

A. Yes.

Q. And what stairway was that?

A. Stairway A.

Q. In connection with Stairway A did you see Peter receive a set of keys?

A. Yes.

Q. Who did he receive the keys from?

A. Sergeant Smith.

Q. Did you ever have sex in the gym?

A. Yes.

Q. How did Peter isolate you so you could have sex in the gym?

A. By - he'd picked me up from my unit or he'll call for me or it will be like after the inmates would go back to the units.

Q. And what sort of sex did you have in the gym?

A. Oral sex.

Q. Did you have sex on the roof of the facility?

A. Yes.

Q. And how did Peter put you in the position so you could have sex on the roof?

A. Meaning?

Q. How did you get - how did the other COs - how did the other people who would be there - withdrawn.

Were there any other people around when you had sex on the roof with Peter?

A. No.

Q. How did you then come to have sex with Peter when there was no one around?

A. Again, either because nobody was coming up to the roof. They call - roof runs I believe is every hour so they - say they called it at nine o'clock in the morning, you got 15 minutes to get there. After 15 minutes, you know, nobody gets there, we already know that until ten o'clock again they're not going to call the next roof run.

Q. When were you housed on the honor floor?

A. In the beginning of '99.

Q. Did you have sex at the third floor officer's station?

A. Yes.

Q. What sort of sex did you have?

A. Intercourse.

Q. Who was the CO who was assigned to the third floor

housing officer's post?

A. Officer Zawislak.

Q. How many times did you have sex at the officer's post?

A. The (inaudible)?

Q. Yes.

A. I think once.

Q. Once you were - once you had your room on the honor floor where did you generally have sex with Peter?

A. Say that again, I'm sorry.

Q. You're on the honor floor, where did you generally have sex with Peter?

A. In the room.

Q. In your room?

A. Yes.

Q. And tell the Court the frequency of the sex that you had with Peter.

A. Every time he was on the unit.

Q. And he could have been on the unit as a roundsman?

A. Yes or when he was working the unit.

Q. Was your sex ever interrupted by a supervisor touring the housing unit?

A. That I recall, no.

Q. Were you ever given a heads-up about a supervisor touring the -

A. Yes.

Q. - housing unit?

A. Yes.

Q. Who gave you the heads-up?

A. Officer Hill.

Q. Did you have sex with Peter in January of 2001?

A. Yes.

Q. Did you take birth control pills?

A. Yes.

Q. And why were they prescribed?

A. To regulate my menstrual.

Q. Did there come a time when the prescription lapsed or the drugs were withdrawn?

A. Yes.

Q. And when was that?

A. Between October or November of 2000 or maybe September, during that time.

Q. Did you mention to Peter that you were no longer taking birth control pills?

A. Yes, I did.

Q. And what physical activities continued after you told him this?

A. We continued to have sex.

Q. Did Peter use a condom?

A. No.