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Submitted via [www.regulations.gov](http://www.regulations.gov)

April 4, 2011

Attorney General Eric H. Holder, Jr.  
U.S. Department of Justice  
950 Pennsylvania Ave. NW  
Washington, DC 20530**RE: National Standards to Prevent, Detect, and Respond to  
Prison Rape, Docket No. OAG-131; AG Order No. 3244-2011**

Dear Attorney General Holder:

On behalf of the National Disability Rights Network and the 57 Protection and Advocacy Systems (P&As) that NDRN represents nationwide, we thank you for the opportunity to submit these comments regarding the proposed **National Standards to Prevent, Detect, and Respond to Prison Rape** (herein "the Proposed Standards"). We appreciate your leadership in acknowledging that sexual victimization of prisoners is unacceptable – whether they be children, juveniles, or adults, and regardless the reason they are confined in juvenile or adult correctional facilities.<sup>1</sup>

The Proposed Standards recognize that an ever-increasing number of prisoners, especially those in jails and juvenile justice facilities, are individuals who have disabilities<sup>2</sup> and other special needs (e.g., prisoners who have limited English proficiency). Due to the presence of increasingly large numbers of vulnerable prisoners, it is imperative that the final standards reflect best practices in disability and effective communication accommodations – matters which we address below.

Importantly, the Proposed Standards take into account the well-documented scientific evidence that children, adolescents, and juvenile offenders are different from adults in their brain development, maturation, and vulnerability to being exploited and victimized.<sup>3</sup> The Proposed Standards also recognize what is now known about the lifelong effects of trauma experiences during childhood, and gender differences with regard

to trauma histories and their influence on behaviors. By taking these and related behavioral health issues into account, confinement facilities can create environments that are safer and healthier for security staff and those who they are charged to confine and protect.

The **National Disability Rights Network (NDRN)** is the membership organization for the **Protection and Advocacy (P&A) Systems**, a nationwide network of Congressionally mandated, legally-based disability rights agencies operating independently in every state and territory in the United States.<sup>4</sup> P&A agencies have the authority to provide legal representation and advocacy services to all individuals with disabilities in any type of facility or community setting -- including prisons, jails, juvenile justice facilities, schools, and community correctional facilities. The federal authorizing statutes for the P&A Systems authorize them to monitor facilities, investigate complaints of abuse and neglect, and provide training and technical assistance to facility administrators to correct deficiencies found.<sup>5</sup>

In light of the extensive disability expertise of the P&A network, our comments about the Proposed Standards primarily address special needs prisoners in general (Part C) as well as specific categories of special needs (Section D), and related first responder issues (Part E).

That information provides the framework for our comments regarding:

- Question 17 (Part F),
- exhaustion of remedies, and additional accommodations needed to safeguard special needs prisoners (Part G), and
- related cost issues (Section H).

In addition, we have signed on to comments submitted by other organizations that raise other concerns and suggestions about the Proposed Standards.

## **A. Proposed standards of note**

The Proposed Standards incorporate important improvements over the ANPRM circulated for comment last year. We support using “**sexual abuse**” in lieu of “rape” as well as the proposed definition of “sexual abuse” (§ 115.6) which excludes consensual sexual activity while not excluding sexual activity with those “unable to consent.” State statutes and common laws typically deem certain individuals unable to consent due to their age, the existence of certain disabilities, and when government employees have abused their authority. To the extent that state laws vary widely on this issue, including guidance regarding “consent” might help provide uniformity in the protections for vulnerable populations across our nation.<sup>6</sup>

We also support the proposed definition of “**juvenile facility**” (§ 115.5) to refer to anyone confined in it. This broad definition ensures that the standards apply to and protect all children and youth confined in juvenile facilities, not just those who are

accused of or been adjudicated for having engaged in a delinquent act or criminal offense.<sup>7</sup>

Victims of sexual abuse (“sexual abuse” is used collectively herein to refer to sexual abuse or harassment), particularly those who are vulnerable due to age, disability, or communication impairments, often are reluctant to report abuse. The Proposed Standards include several provisions that will make it more likely that sexual abuse will be disclosed, investigated, and addressed. These include: providing multiple reporting options, including external abuse hotlines [e.g., §§ 115.15(a) & 115.53(a)], accepting third party and anonymous reports [e.g., §§ 115.54, 115.61(e) & 115.71(a)], providing access to confidential emotional support services and victim advocates [e.g., §§ 115.21(d)&(e), 115.53(a) & 115.55(b)] as well as prompt, unimpeded access to emergency medical and mental health services [e.g., §§ 115.53(a) & 115.82(a)] along with appropriate follow-up care [§§ 115.83}, and limiting access to confidential information [e.g., §§ 115.41(g), 115.61(b) & 115.81(e)].

Other important provisions in the proposed standards require correctional facilities to: identify **prisoners with special needs** [e.g., § 115.15], improve hiring processes to minimize the opportunity for sexual perpetrators to work in their facilities [e.g., § 115.16], and provide private methods for staff to report abuse [e.g., § 115.51(d)]. In addition, staff are required to accept reports made in any form by any person [e.g., § 115.51(c)], and prisoners are to be informed of the results of investigations [e.g., § 115.73].

We also support your suggestion to remove the current ban on using **Victims of Crime Act** (VCA) funding for treatment and rehabilitation services provided to incarcerated victims of sexual abuse. To the extent that the ban has been applied to those victimized while incarcerated who are no longer in confinement, VCA funding should also be allowed for treatment and rehabilitation services provided to them.

## **B. Proposed standards that need fine tuning**

The definition of **juvenile facility** is limited to facilities that are “primarily” used to confine juveniles under the age of 18. Presumably “primarily” is used as a qualifier in recognition that many juvenile facilities confine individuals who are older than 18, including adjudicated juveniles who turn 18 while confined in a juvenile facility.

While we concur with the proposed definitions for “detainee,” “inmate,” and “resident,” there appears to be a need to use terminology that refers to them collectively. “Offender” is too narrow to serve that purpose (e.g., defendants confined in a jail pending trial are not “offenders,” delinquent youth are not offenders, nor are non-adjudicated youth confined in detention facilities), but is used sporadically in the Proposed Standards. Using “**prisoner**” is a better term to refer to all confined persons, juveniles, and adults, who are confined for any reason in any type of secure confinement facility. For example, the definition of “community confinement facility” uses the word “offender” which has the unintended effect of excluding those confined in

juvenile community confinement facilities. The final rules should delete the use of “offender” and replace it with “prisoner.”

Two changes are needed regarding facility obligations to perform **criminal background checks** before hiring [see, e.g., § 115.16(b)]. First, in addition to performing criminal background checks, facilities should be required to check any **abuse and neglect registries** maintained in their state regarding caretakers of vulnerable populations who have been found to have abused, neglected, or exploited a person in their charge.<sup>8</sup> Secondly, the background check provisions should be reworded to require criminal and abuse registry background checks only after making a qualified offer of employment contingent on passing these background checks, rather than doing checks on everyone who applies for a job. There are constitutional impediments to the latter. Since background checks are not always free, the former also saves money.

The Proposed Standards include a comprehensive list of useful topics to be covered during **employee training** [e.g., § 115.31]. However, the list does not include several topics relating to special needs prisoners that are critically important because those with special needs are more vulnerable to being victimized than other prisoners. Additional topics for employee training include:

- ✓ Identifying special needs prisoners who have disabilities or effective communication needs.
- ✓ Disability sensitivity training.
- ✓ Communicating with special needs prisoners.
- ✓ The effects of trauma histories and trauma informed practices.
- ✓ Dealing with the “code of silence” that often exists in institutional settings, and avoiding retaliation from co-workers for complying with sexual abuse reporting obligations.

The **prisoner education** obligations of facilities appropriately include refresher information to be provided yearly as well as upon transfer to a different facility [e.g., § 115.33(c)], and importantly require this education be provided in accessible formats for prisoners who have special needs [e.g., § 115.33(d)]. We offer some additional comments about accessible formats in Part E below.

The Proposed Standards require specialized training for “medical and mental health care” practitioners [e.g., § 115.35], and require them to report sexual abuse of which they become aware [e.g., §151.61(c)]. However, the definition of “**medical practitioners**” on its face does not include the dental professions. The final standards need to also apply to dentists and dental hygienists who, as employees or contractors, provide dental services in a confinement facility on a reoccurring basis.

**Screening prisoners for risk of victimization or threat of abusiveness** is a critical component of a strong abuse prevention strategy. However, this screening needs to take place much sooner than the “within 30 days of confinement” allowed by the Proposed Standards [e.g., § 115.41(e)] – particularly for juveniles in any kind of facility.

The 30-days timeframe is likely to be sufficient for rescreening prisoners who are being transferred from a facility when the transferred prisoner has been screened within the past six months and the results of that screening are provided to the receiving facility contemporaneously with the prisoner's arrival. Although the unique design characteristics and prisoner demographics in each facility make it necessary for transferred prisoners to be rescreened on admission, the 30-day window for that rescreening is less problematic than it is for new or transferred prisoners who have no recent history of having been screened.

The **protective custody** standards [e.g., § 115.43] include important protections to avoid unnecessary isolated confinement, which is especially important given what is now known about the severe mental health effects of prolonged isolation, especially for special needs prisoners.<sup>9</sup> These provisions only address, however, situations when "involuntary" segregated housing might be appropriate, but does not provide guidance regarding voluntary requests for protection due to fears of being victimized.

The **reporting** provisions focus on how prisoners can report abuse and harassment, retaliation, or staff actions that may have contributed to abuse [e.g., § 115.51(a) & (b)]. They importantly require all staff to report any knowledge, suspicion, or information regarding sexual abuse [e.g., § 115.61(a)], and likewise medical and mental health care practitioners unless precluded by law [e.g., § 115.61(c)]. However, the Proposed Standards fail to affirmatively require reporting by contractors, volunteers (e.g., clergy, tutors, and mentors), and other third parties (e.g., visitors, staff of social services agencies).

The Proposed Standards require **disciplinary sanctions** to be taken against staff and other prisoners for violating sexual abuse or harassment policies [e.g., §§ 115.76 & 115.77], but are silent about sanctions against contractors and volunteers beyond reporting them to law enforcement authorities. At a minimum, it should be clear in the final rules that substantiated allegations should result in immediate suspension and termination of any contract, agreement, or arrangement pursuant to which individual contractors, volunteers, and third parties had direct contact with prisoners.

The Proposed Standards are silent about **failure to report**. The final rules should require that substantiated failure to report should result in disciplinary action against staff (up to and including discharge), and appropriate corrective action taken with contractors (including termination of their contract) and volunteers (including revocation of volunteer privileges). Anyone, other than prisoners and legal counsel for prisoners, who has cause to believe that sexual abuse has occurred should have a reporting obligation, and failure to report should result in meaningful consequences.<sup>10</sup>

No time frames are provided for completing **administrative investigations** [e.g., §§ 115.21 & 115.71]. This is inconsistent with best practices for sexual abuse investigations by child protective and adult protective service agencies. In addition to a prompt initial response, 30 calendar days to complete an investigation and reach a finding is a best practice in abuse investigations involving children or adults. While more

than 30 days might be needed to finalize the written investigation report, it is feasible and important for many reasons to arrive at a finding within 30 calendar days, and then promptly inform the facility and the alleged victim of that finding.

Requiring administrative investigations to be completed within 30 calendar days is important for a broad spectrum of reasons, especially given that not all allegations will be substantiated and some will result in an “unfounded” finding [e.g., § 115.73(a)].

- Accused employees may have been temporarily suspended or reassigned pending the results of the investigation, which might result in staffing problems for the facility. The results of the investigation allow the facility to make permanent staffing decisions.
- Wrongfully accused employees who are exonerated by an investigation need prompt closure to clear their names and return to work.
- Accused prisoners may be locked down in isolation cells pending the results of an investigation and, if cleared of the accusations, be allowed back into the general population.
- Victimized prisoners often experience considerable anxiety about whether the investigation will result in an unsubstantiated finding, which could mean ongoing exposure to victimization or retaliation by the accused perpetrator (staff or prisoner) and the need to request protective custody.

The **data collection** provisions [e.g., § 115.387(a)] should be revised to require that information about the disability and special needs status of alleged and confirmed victims be included in the required data collection and analysis.

### **C. Disability and effective communication accommodations – general considerations**

For purposes of these comments, **special needs prisoners** include confined youth and adults who: are deaf or hard of hearing; are living with mental illness; or have a physical, sensory, intellectual, developmental, cognitive, or psychiatric disability that impairs communication. “Special needs prisoners” also includes prisoners who have limited English proficiency (LEP). In addition to general comments about special needs prisoners, we offer more specific comments in Part E below with regard to several specific categories of special needs.

Impaired communication skills increase vulnerability to being abused and exploited. Providing disability and effective communication accommodations is critically important to ensuring the ability to:

- ✓ Comprehend the training provided about the facilities policies and procedures relating to sexual abuse and harassment [e.g., § 151.33].
- ✓ Effectively report abuse that has occurred.
- ✓ Provide accurate information to first responders.
- ✓ Assist in investigations.

- ✓ Meaningfully understand and access grievance and informal resolution processes.

As a result, a range of accommodations will be necessary for special needs prisoners in order to ensure that the final rules accord them protections, safeguards, and due process equal to those provided to other prisoners.

**Effective communication needs and accommodations for prisoners in any special needs category are not identical.** There is rarely an approach to effective communication that serves as a one-size-fits-all for every individual in the same special needs category. Similarly, all prisoners without special needs who speak English as their primary language do not have the same maturity and literacy to read or comprehend the spoken language at the same grade level. As a result, it is a best practice to adopt universal precautions for communicating with all prisoners – such as using a sixth grade reading level for written materials intended for adults,<sup>11</sup> and a third grade reading level for confined juveniles.<sup>12</sup> In addition to universal precautions designed to be effective for the largest number of communications, policies and practices need to be in place to provide accommodations for the smaller number of individuals who need them.

In any institutional environment with a diverse population, it is crucial for all staff to be sensitive to the importance, and individualized nature, of effective communication in promoting security and effective behavior management. This necessary **staff sensitivity and communication competence** is achieved by:

- ✓ Pertinent policies, procedures, and practices that emphasize effective communication in all areas prisoner interactions.
- ✓ Training for all new staff during an orientation curriculum that needs to be completed before working in positions with direct prisoner contact, along with annual refresher training.
- ✓ On-going supervision of staff to ensure communication competence, including debriefing sentient incidents, and requiring participation in self-improvement training as needed.
- ✓ Oversight and quality assurance.

All confinement facilities are likely to have special needs prisoners in their custody – whether known or unknown to the facility. As a result, the best way to meet the effective communication needs of all prisoners is to have in place best practices that are minimally necessary for a broad range of special needs, consistent with concepts of “universal design.”<sup>13</sup>

**Best practices in correctional facilities with regard to disability and effective communication accommodations include:**

- Adopting and implementing policies, procedures, and practices that emphasize effective communication in all aspects of prisoner interactions (e.g., intake, classification, health care, disciplinary proceedings).

- Identifying during the intake/booking/admission process those prisoners who have special needs, including accommodations for effective communication, by providing specialized training for intake/booking/admissions staff on effective approaches to obtaining this information from prisoners to ensure it is accurate and complete, and using appropriate questionnaires and screening tools that are available in various accessible formats.
- Documenting this information in each prisoner's files and facility records in a manner that makes it available only to facility staff who have a need to know the information (e.g., classification staff, medical and mental health care staff, ADA coordinators, grievance staff, and those who will have contact with the prisoners in due process settings).
- Maintaining a database in which to promptly enter this information, and making it easily accessible to security and other staff who might need to use that information on short notice (e.g., during the initial response to the reporting of a sexual abuse incident when forensic evidence might still be available).
- Training staff about confidentiality and privacy issues, taking prompt disciplinary action for violations, and ensuring that information about disabilities and mental health diagnoses are disclosed only on a need-to-know basis.
- Forwarding information in a timely manner when a prisoner is transferred to another facility, agency, or service delivery system.
- Having services and contracts in place for routine accommodations to ensure effective communication with common special needs populations (e.g., a contract with providers of foreign-language interpretation services by video conferencing; a contract with a service provider of video relay services for communicating with persons who are deaf; in larger facilities, hire designated staff who are certified ASL interpreters and on call 24/7).
- Having processes in place, including specialized training for designated staff who will review information received about prisoners who have effective communication needs, in order to identify additional non-routine communication services that need to be put in place (e.g., a prisoner who has expressive aphasia who needs individualized supports to communicate;<sup>14</sup> a prisoner with a significant traumatic brain injury who needs specific accommodations to understand communications).
- Having processes and on-going training in place to collect, record, and enter in the facility's database any effective communication needs that become known or are developed subsequent to being admitted to the facility (e.g., a prisoner who develops a speech disability due to a stroke, an aging prisoner who develops dementia, prisoners who become actively psychotic while in long-term isolation).
- Ensuring all staff, contractors, and volunteers who have contact with prisoners are provided periodic sensitivity training on effective communication with special needs populations.
- Educating prisoners and those who visit them about the facility's commitment to providing disability and effective communication accommodations, what accommodations are available, and how to make confidential requests for individualized accommodations.
- Educating all prisoners and staff about the facility's zero tolerance policy (e.g., §115.11) and related matters, including: the rights of prisoners to be free from



sexual abuse and harassment, their rights to same gender searches and viewing, reporting obligations of staff who have reason to believe that sexual abuse or harassment has occurred, how victims can report sexual abuse or harassment, how third parties can make reports, the rights of victims, and the facility's response and investigation process.

**These best practices need to be in place for a variety of penological purposes unrelated to sexual abuse prevention and interdiction, including:**

- ✓ Making classification and housing decisions.
- ✓ Providing accommodations for activities, programming and services that a facility makes available to prisoners who do not have special needs.
- ✓ Providing special education services required by the Individuals with Disabilities Education Act (IDEA).
- ✓ In connection with due process proceedings (e.g., probation/parole hearings, disciplinary proceedings, processing of grievances).
- ✓ Dental, health and mental health care.

Since these practices should already be in place in every well-run facility, extending them to preventing and responding to sexual abuse incidents is relatively simple and inexpensive.

**D. Disability and effective communication accommodations – specific special needs populations.**

Confinement facilities that have adopted and implemented the best practices outlined in Part C, above, will be well-prepared to provide accommodations on short notice to ensure effective communication with special needs prisoners when responding to sexual abuse allegations. That includes necessary accommodations identified when prisoners are first admitted to the facility (as discussed in Part C, above) as well as those that prisoners subsequently acquire while incarcerated due to aging, injury, or disease.

The proposed guidelines importantly require facilities to avoid using other prisoners as interpreters absent exigent circumstances [e.g., § 115.15(a)]. Similarly, family members and acquaintances of special needs prisoners should not be used as interpreters except in emergency situations when no viable alternative option exists. These requirements are necessary to protect the confidentiality, privacy, dignity, and safety of prisoners, and to ensure objectivity and fidelity of interpretation.

It is important to recognize that, due to the stigma of having disabilities or being perceived as “different” in our culture, **many individuals work hard to hide their communication needs.** They often adopt coping skills that are used to fake competence in communicating using English. Often eager to obtain approval and pass as competent, some persons who have communication impairments will try to guess

what the other person has said, and then respond (sometimes nods of their head to indicate “yes” or “no”) by providing an answer that they think the other person wants.<sup>15</sup>

## **1. Effective communication with prisoners who are blind or have low vision.**

Accommodations needed by prisoners who are blind or have low vision often depend on the age of onset. Some prisoners serving long sentences might develop low-vision as they age. Absent another special need (e.g., low literacy or limited English proficiency, cognitive disabilities), blind or low vision prisoners might not require any accommodations during exclusively verbal interviews – unless there is a need for the prisoner to read text, view photos or other physical items, or review and sign documents. Accommodations needed to access written materials and objects vary depending on individual needs and abilities.

### **Effective communication strategies for making forms, notices, documents, and other written materials accessible for blind or low vision prisoners**

- ✓ Providing large print versions (14 point font size or larger as needed by an individual) on plain light-colored paper using a dark-colored sans serif font (e.g., Arial, Tahoma) and providing captions to describe photos, graphs, and other non-text information as warranted, avoiding the use of Italics and justified text.
- ✓ Providing a Braille copy for those who are proficient in reading using Braille.
- ✓ Providing an electronic device that will read the document to the prisoner; e.g., a tape-recorded version, or voice recognition software on a laptop or computer (provided the document is accessible for the software to read).<sup>16</sup>
- ✓ Having another person, such as a trained staff member of the same gender, read out loud to the prisoner, taking into account whether the communication involves confidentiality, privacy, or trauma issues making this an inappropriate accommodation.
- ✓ When an outside third-party is assisting a special needs prisoner in accessing and using a grievance system [e.g., § 115.352(c)(4)], allowing that person to read and discuss it with the prisoner.
- ✓ Allow a **service animal** to accompany the prisoner,<sup>17</sup> particularly if the animal reduces anxiety and emotional distress that would interfere with effective communication.

## **2. Effective communication with prisoners who are deaf or hard of hearing**

As with other special needs, deaf prisoners are not a homogeneous group, and stereotypical assumptions about effective communication should not be made about deaf or hard of hearing prisoners.

Due to age of onset and other factors, there will be individualized differences in the accommodations needed to ensure effective communication. For example:

- ✓ Persons who were born deaf or became deaf early in life before acquiring English language skills and who use **American Sign Language (ASL)** with varying proficiency.
- ✓ Persons who do not use ASL for communication, and have learned to read lips and who voice in English with varying degrees of ability and intelligibility.
- ✓ Persons who do not use ASL but have developed a system of **home signs** – hand gestures unique to them and known only to some family members and friends.<sup>18</sup>
- ✓ Persons who became deaf or hard of hearing later in life, after having acquired English language skills. Assuming the person is proficient in English and has no other impairments that need to be accommodated, communicating with them can often be accomplished by texting or other written communication methods.
- ✓ Deaf persons from other countries who use a sign language or a mode of signing other than ASL.
- ✓ Older prisoners losing their hearing later in life may not acknowledge their hearing loss and, due to difficulty hearing, may simply answer yes or no, when they in fact have not heard the question. They also might be more withdrawn from conversations. This withdrawal and lack of communication may be misinterpreted either as tacit understanding of instruction or acceptance of the conditions around them, or as oppositional and lack of cooperation – when, in fact, their silence and lack of engagement is actually due to loss of hearing.

### **Effective communication considerations and strategies**

ASL is a language with its own vocabulary, grammar, and syntax. It is not the English language converted to hand gestures and movements. Persons who are fluent in English and also in using ASL are bilingual. When using an ASL interpreter as an accommodation, only qualified ASL interpreters should be used.<sup>19</sup> Other prisoners, staff, volunteers, and third parties should not be used as ASL interpreters without documented qualifications. Many prisoners who communicate using ASL have limited or no ability to read and write in English such that attempting to use written notes is not an effective option.

Smaller facilities are more likely to contract with an ASL service that has certified ASL interpreters available 24/7 via video teleconferencing using electronic devices. Video interpretation using a remote interpreter has some limitations, and it is critical for facility staff to have proper training on the use of the equipment.

Communication is more effective if the qualified ASL interpreter is physically present in the same room as the deaf or hard of hearing prisoner. Larger facilities might hire staff qualified to interpret ASL who are paid to be on call as needed on short notice. In some large urban areas, there are rape crisis centers that use certified ASL interpreters who go to emergency rooms, jails, and other locations on short notice.

### **3. Effective communication with prisoners who have limited English proficiency (LEP)**

Prisoners with LEP are unable to communicate effectively in English because their primary language is not English and they have not developed fluency in the English language. They may have difficulty understanding and speaking or reading and writing in English, or both. Just because prisoners can adequately communicate verbally in English, that does not mean they can read and write in English. When English is not a prisoner's primary language, vigilance is needed to identify when the prisoner is attempting to fake an ability to read and understand English - due to embarrassment, pride, or another reason.

Absent clear evidence of a prisoner's competency to communicate using English, a qualified bilingual interpreter should be used during important communication events (e.g., responding to and investigating abuse incidents, obtaining information for use in screening and classification decisions, grievance processes) to translate verbal communications, as well as written materials not already available in the prisoner's primary language.

Bilingual family members and friends of prisoners who can communicate with them in their primary language should not be used for communication absent exigent circumstances.<sup>20</sup> Other prisoners, facility staff, volunteers, and third parties should not be used as foreign language interpreters without documented qualifications.

Facilities can contract with a provider of online interpretation services for a wide range of languages. Some providers charge an affordable monthly service fee for access to their services, and also charge by the hour for interpretation services provided via video teleconferencing. Interpretation services in many languages are provided 24/7, but some languages less common in a jurisdiction might require advance notice.

It can be harder for facilities to identify non-visible communication impairments of prisoners who are LEP, such as cognitive, intellectual, and mental disabilities, and traumatic brain injury. Silence and maladaptive behaviors that are the product of communication impairments might be misperceived as malingering. Facility staff, as well as first responders and investigators, need to be trained in identifying these additional communication impairments and the accommodations necessary to ensure effective communication.

### **4. Effective communication with prisoners who have intellectual disabilities**

The caveat noted above about the broad spectrum of capabilities and disabilities in any special needs category is especially true for prisoners who have intellectual or other developmental disabilities. The causes of intellectual disabilities include brain abnormality, diseases and injuries. Some causes happen before birth (e.g., Down Syndrome, fetal alcohol syndrome, Prader-Willi syndrome, fragile X syndrome), some

occur during birth (e.g., asphyxia, hydrocephalus, cortical atrophy), and others happen during childhood (e.g., infections meningitis, serious head injuries, strokes).

Speech and language difficulties are common. Impairments in other areas of functioning (e.g., sensory and physical impairments) also can affect communication. The “moderate” and “severe” ranges of intellectual disabilities typically affect cognitive (thinking) abilities. Accommodations need to be individualized to each prisoner’s needs and abilities.

It is important not to make assumptions based one aspect of a prisoner’s language skills. The ability to communicate information to others does not necessarily correlate with receptive language skills, and language competence might vary depending on the context (e.g., the subject matter or level of emotional stress). In addition, many prisoners with intellectual disabilities also have a dual diagnosis of a co-occurring psychiatric disorder which can compromise communication.

Understanding the role of behavior as communication is especially important in helping prisoners with intellectual disabilities disclose abuse they have experienced. Out of frustration, anxiety, or an inability to express what has happened, communication might be expressed via maladaptive behaviors, including self-harm, or by shutting down. Staff with specialized training to support and communicate with prisoners who have intellectual disabilities can better understand the subtext of behaviors. Using deescalation skills to calm prisoners down, trained staff can assist them in reporting victimization.

- **Effective communication considerations and strategies**

- ✓ There are inexpensive tools that facilities can use to identify the reading, writing, and communication abilities of prisoners with intellectual disabilities on admission.
- ✓ During an interview, prisoners might tell what they think the interviewer wants to hear. To elicit accurate information, questions should be phrased in a neutral way. Responses can be verified by repeating questions in a different way.
- ✓ Information needs to be provided in a form, language and manner (verbal and non-verbal) that the prisoner can understand.
- ✓ Augmentative or alternative communication systems can be used to communicate with prisoners who are minimally verbal, and those who have extremely poor speech which is unintelligible.
- ✓ Interviewers must avoid contributing to a prisoner’s communication difficulties – essentials are patience, respect, a supportive environment, and taking the time necessary for communication to occur.
- ✓ It is often helpful to offer prisoners the option to have someone they trust to be present (e.g., a facility employee, a clergy member).

Many prisoners with intellectual disabilities do not have literacy skills. Some lack the ability to acquire them, and others have never been taught how to read and write. Effective accommodations for prisoners who cannot read or write vary depending on

their skills and abilities. Some can understand written information by listening to a recorded version or having it read to them. Others need the information to be paraphrased for them -- some requiring information to be explained in simplistic terms - speaking slowly, using short sentences and short words, one idea at a time, and continuously testing comprehension by asking open ended questions.

## **5. Effective communication with prisoners who have psychiatric disabilities**

There is enormous variability in mental health and psychiatric problems that present themselves in individual prisoners. Symptoms affecting communication for the same individual can vary in intensity and kind at different times. Brain disorders can affect cognition, comprehension, and coherent expression of thoughts, especially when symptoms are acute. Prisoners who had been stabilized through the use of particular medications before confinement often have their medications discontinued or abruptly changed after confinement. Over time, this can lead to decompensation and the emergence of psychiatric symptoms. Some symptoms are not visible and cannot be detected based on external appearance. This variability in symptoms can lead to erroneous assumptions that a prisoner is malingering or faking symptoms, and incorrect conclusions about the quality of receptive communication at a particular time.

People with psychiatric disabilities in general have average to above average intelligence in comparison to the general population. Mental illness is not related to intellectual disabilities and vice-versa, although some individuals are dually diagnosed with co-occurring disorders. It should not be assumed that someone who has a psychiatric disability is violent – they typically are more likely to be victims than perpetrators of violence.

Specialized training should be provided to first responders, investigators, grievance coordinators, and other designated staff in order to equip them to communicate effectively with prisoners who have mental health problems.

### **• Effective communication considerations and strategies**

- ✓ Some mental health issues can cause confusion or sensory overload. It can be helpful to conduct the interview in a space free of extraneous noise and distractions. Accommodations include: speaking slowly and softly in a calm and normal voice; keeping communications simple, clear, and brief; ask or state one thing at a time; verifying comprehension of what has been said by using open ended questions.
- ✓ Other accommodations include: not rushing the interview, giving the prisoner time to collect their thoughts and express themselves, repeating information several times, and explain things that might seem obvious.
- ✓ If a prisoner says things that are superfluous or makes bizarre statements, it's best to let such comments pass without disagreeing, redirecting the prisoner to keep them on topic.
- ✓ Persons with psychiatric disabilities often know what is best for them and can demonstrate good judgment, including how to cope with stress. If prisoners seem

stressed or agitated, it can be helpful to calmly ask if there is anything you can do to help them.

- ✓ If paranoia appears to be a factor, interviewers should keep a respectful distance, avoid invading the prisoner's space or making unnecessary movements, and conduct the interview in a supportive environment to help the prisoner feel comfortable and safe in responding to questions.
- ✓ It might be helpful to offer the prisoner the opportunity to have someone present (other than another prisoner) who the individual knows and trusts (e.g., a facility employee or volunteer, a mental health case manager, the Grievance Coordinator).
- ✓ If the interview is not resulting in productive information due to the prisoner's mental state at the moment, ending the interview and resuming it awhile later in time can help. Several approaches might be needed before the prisoner is ready to communicate about the reported incident.

## **6. Effective communication with prisoners who have speech disabilities**

A number of disabilities that affect a prisoner's receptive communication skills or ability to speak. Some prisoners with speech disabilities are individuals who have cerebral palsy (CP) affecting their ability to control speech production.<sup>21</sup> When this is the reason for the speech impairment, the problem typically is unrelated to intellectual functioning or hearing abilities. Persons living with CP typically have average to above average intellectual functioning. Interviewers should speak with them as normally as possible without treating them as if they are deaf or hard of hearing (e.g., by not talking louder) or as if they have intellectual or cognitive disabilities (e.g., by not talking unnecessarily slowly) unless an accommodation is indicated.

Patience is needed in giving the individual as much time as needed to physically express themselves. The person should be allowed to speak for themselves and complete the communication, without the interviewer doing it for them. When the interviewer is unsure about having understood what has been said, it is appropriate to ask the person to repeat themselves, or to check understanding by repeating what the person has said to verify it is correct.

### **• Effective communication considerations and strategies**

- ✓ Using an augmentative or alternative communication system consistent with the individual prisoner's needs and abilities.
- ✓ Using as an interpreter someone competent to understand the person's speech and qualified to repeat it accurately, and asking the person being interviewed to affirm the accuracy of the interpreter's understanding, sentence by sentence if needed.
- ✓ Using another effective accommodation suggested by the individual, a family member or other person who knows the individual well enough to provide useful information, or a qualified expert who has evaluated the individual's effective communication needs.

Other prisoners have speech impairments due to brain damage from a stroke, an illness (e.g., encephalitis, bacterial meningitis), or external trauma that has affected their ability to communicate (e.g., a traumatic brain injury). The damage might have impaired their receptive language abilities (i.e., to receive and understand messages) or their expressive language abilities (i.e., to clearly verbalize and articulate what they want to say), or both. Having these types of speech disabilities can cause a prisoner to be especially vulnerable to abuse by others.

Accommodations that they need to communicate often are highly individualized, often requiring the involvement of appropriate experts. Accommodations for some persons with only an impairment in expressive abilities might include giving them more time to express themselves, allowing them the opportunity to write down what they want to say, or using one of the accommodations indicated above for individuals whose speech is impaired due to CP.<sup>22</sup>

## **7. Effective communication with prisoners who have traumatic brain injuries (TBI)**

Any injury to the head can result in a traumatic brain injury (TBI). The incidence of TBI is rising among prisoners due to the increase in the number of military veterans with service-related injuries coming into contact with the criminal justice system. Other frequent causes of TBI are domestic violence and sports injuries prior to incarceration, and altercations and physical abuse while incarcerated.

Individuals living with a brain injury can have significant cognitive and communication impairments depending on the location of the injury in the brain and how severe it is.

Survivors of a brain injury might have trouble finding words they need to express an idea or explain something, especially under stress or when rushed, and they might experience difficulty with writing and reading as well. Communication problems that facilities might encounter with prisoners who have a TBI include: trouble taking turns during a conversation, difficulty staying on a topic, using an inappropriate tone of voice, and an inability to interpret conversation subtleties or facial expressions.<sup>23</sup> In addition, their reactions and affect might be disproportionate to the situation – either being overemotional and overreacting, or having a flat emotionless affect. Persons with TBI might have little to no awareness of their communication difficulties. Those with trauma histories often exhibit unusually high anxiety during a restraint, which can trigger a “flight or fight” syndrome.

Cognitive problems experienced by Individuals who have had a TBI often include: attention to tasks, memory, reasoning, problem solving, planning, an awareness of surroundings, trouble concentrating when there are distractions, slower processing or “taking in” of new information, completing tasks, and reacting impulsively.

- **Effective communication strategies**

- ✓ Removing distractions (e.g., noises, other people and activities in the area).



- ✓ Breaking information down into smaller pieces.
- ✓ Talking about one thing at a time.
- ✓ Giving the prisoner time to process crucial information.
- ✓ Slowing down the rate of speech, having patience and giving them time to respond to questions,
- ✓ Redirecting them when they stray from the topic.
- ✓ Not making assumptions based on the prisoner's visible affect or body language.
- ✓ Deescalating overly emotional and inappropriate reactions.

## E. Disability and effective communication accommodations – reporting and responding considerations

When a correctional facility receives a report that a prisoner might have been the victim of sexual abuse – whether the report comes from the victimized prisoner or someone else with knowledge of the incident --, it is important to promptly obtain vital information and forensic evidence. There might be safety issues that need immediate attention (e.g., the reporting prisoner might have immediate health and mental health needs; accused staff might need to be suspended pending an investigation or reassigned to a non-prisoner contact position; or an accused prisoner might need to be sequestered pending the investigation). Potential eyewitnesses need to be promptly identified and interviewed in a timely manner before memories fade, or collusion or coercion can take place.

The prisoner alleged to have been victimized (“the alleged victim”), eyewitnesses, collateral witnesses, and the accused (whether staff or prisoners) need to be interviewed in a manner most likely to result in **obtaining accurate and complete information** without contaminating their memories or causing them to feel coerced into recanting or concealing critical information. In correctional settings that have appropriate policies and procedures in place as described in Part C, above, first responders can have immediate access to necessary information about the disability and effective communication needs of each prisoner to be interviewed.

### **Best practices during the initial response include three basic elements**

1. The initial responder needs to promptly identify from the facility's records and database whether the alleged victim is a special needs prisoner, and make immediate arrangements for the **accommodations and supports needed for effective communication**.
2. Interviews with the alleged victim and other prisoners and staff take place in a **private and confidential space** to ensure persons being interviewed are not adversely affected by outside influences – such as fear of retaliation by staff or other prisoners – or placed in harm's way by being marked as a “victim” or a “snitch.”
3. There needs to be **enough time for the interview to take place without being rushed**. Communicating with special needs prisoners often requires great patience by trained staff who will take the time needed for accurate and complete communication. First responders and other staff who are not experienced in using

alternative forms of communication and other accommodations might become annoyed by the slow pace of the communication process with some special needs prisoners. Prisoners who sense that irritation or who feel hurried can become flustered, agitated, or upset. This can result in prisoners rushing over important details, losing their train of thought, shutting down, or communicating via maladaptive behaviors. All of which is counterproductive to obtaining the accurate information needed for a sexual abuse investigation.

- **Accommodation issues**

Most facilities place the burden on prisoners to request accommodations. They have a process in place for requesting reasonable accommodations, which begins with the prisoner obtaining, filling out, and submitted a form to the ADA Coordinator. If the request is denied, the prisoner has a right to appeal. These processes can take months to complete. They also require a degree of sophistication and cognitive functioning on the part of prisoners to know what accommodations to request and how to request them. For this reason, it is a best practice for facilities to initiate the accommodation identification process, and to do so shortly after a prisoner's admission to a facility.

When this has not been done in advance, a facility might not be able to ascertain on short notice what effective communication approaches might be needed to quickly obtain crucial information during the initial response to a sexual abuse incident. In those situations, a facility's formal process for requesting ADA accommodations should be superseded when time is of the essence. The first responders should have completed appropriate disability sensitivity training to help them identify when accommodations are needed, and what immediate accommodations can be provided in order to obtain needed information when time is of the essence. However, the accuracy and completeness of the information so obtained is likely to be compromised. The better practice is for the facility to already have needed accommodations identified and in place as described in Part C above.

- **Confidentiality issues**

When special needs prisoners have been victimized, it is especially important to protect the confidentiality of written information generated during the initial response and investigation of alleged sexual abuse. This includes how documents are handled, where they are stored, and who has access to them. Alleged victims and eyewitnesses (staff as well as prisoners) can be placed in harm's way if information and documentation is available to those who do not have a need to know. In addition to adopting appropriate confidentiality precautions and educating staff about them, as required by the Proposed Standards, the final rules should require confidentiality violations to be promptly investigated and appropriate disciplinary actions taken as warranted.

- **Cross-gender considerations**

The same-gender and cross-gender considerations relating to pat downs and body searches [e.g., § 115.314] should apply to non-medical first responders and those who investigate reported incidents of sexual abuse or harassment. They also should apply in general to interpreters and persons who provide communication supports for effective communication purposes. For example, when a female LEP prisoner who has experienced sexual victimization in a correctional setting is interviewed using a video-conferencing interpreter service, the interpreter should presumptively be a female.

Research shows that the overwhelming majority of female prisoners have trauma histories.<sup>24</sup> Similarly, most individuals with intellectual and other developmental disabilities have been victims of physical and sexual abuse.<sup>25</sup> Female prisoners are more vulnerable to victimization in general, and special-needs female prisoners can be especially vulnerable. These dynamics make it less likely that female prisoners will report sexual victimization, and will more easily feel coerced into recanting or not cooperating with an investigation absent effective communication. Given these demographics, it is a best practice to presume that same-gender staff should be used to effectively communicate with female prisoners when responding to sexual abuse incidents (except for health and mental health professionals, or family members and others who a prisoner specifically is allowed to request to assist with communication) [see, e.g., § 115.352(c)(4)]. The final rules or implementing regulations should so provide.

## **F. Question 17**

Your notice and request for comments regarding the Proposed Standards include 64 specific questions, some of which directly or indirectly relate to special needs prisoners. Question 17 asks the following:

### **QUESTION 17**

**Should the final rule include a requirement that inmates with disabilities and LEP inmates be able to communicate with staff throughout the entire investigation and response process?**

**If such a requirement is included, how should agencies ensure communication throughout the process?**

With the assumption that this question pertains to all special needs prisoners (not just “inmates” as defined by the Proposed Standards), our response is in the affirmative – the final rules should require disability and effective communication accommodations through the entire investigation and response process. This is not only a best practice in efficient operation of correctional facilities; it is legally required by state and federal laws.

The purpose of a response and investigation is to obtain accurate information as swiftly as possible in order to reach the most accurate finding possible. Accurate findings:

- ✓ identify the guilty and protect the innocent (whether they be prisoners or staff);
- ✓ identify dangerous conditions in order to rectify them rather than increasing the risk of further victimization; and
- ✓ protect victims from being retraumatized and giving them the opportunity to have their needs addressed (whether emotional, psychological, health, or mental health).

Meeting the disability and effective communication needs of prisoners (whether victims, accused, or witnesses) promotes swift access to accurate information needed for a fair resolution of sexual abuse allegations.

In response to your query about how to accomplish this, we refer you to the information provided in Parts C, D, and E, above, as a starting place.

**Special needs prisoners need and are entitled to the same access to the response and investigation process that prisoners without special needs have.**

Equal access requires disability and effective communication accommodations, some of which are described above. Not only is equal access needed for the response and investigation process, it is also needed with regard to every other aspect of sound sexual abuse elimination (e.g., screening, prisoner education, reporting, and prevention).

In order to meet their legal and Constitutional obligations, **confinement facilities need to provide effective communication accommodations known to them to exist** based on requests from individual prisoners as well other information sources. Facilities cannot ignore effective communication needs known to them. There are many compelling reasons why the final rules should explicitly require facilities to adopt and implement effective practices to identify special needs prisoners and their communication needs and abilities, and ensure that effective communication accommodations are in place for use on an as needed basis.

The problem of sexual abuse of prisoners by other prisoners and correctional staff is of such a magnitude, and the potential collateral consequences to the victims and society so significant and life-long, that the costs of doing nothing can substantially outweigh the costs of having policies, processes, and accommodations in place

Important note: **While prisoners should be provided the accommodations and supports necessary to effectively report and assist in a sexual abuse investigation, they should not be required to do so.** Facilities should not be allowed to discipline and punish prisoners for not reporting or assisting (e.g., in the guise of writing the prisoner up for “disobeying an order.” etc.), given the dynamics of the prison culture and the very real danger of retaliation by staff or fellow prisoners. However, prisoner fears of repercussions might be attenuated if the initial response and

investigation is handled by an independent entity and accompanied by necessary confidentiality safeguards.

## **G. Exhaustion of administrative remedies**

Several accommodations need to be added to the exhaustion of administrative remedies provisions in the Proposed Standards as necessary protections for special needs prisoners who have experienced sexual abuse by other prisoners or staff. Special needs prisoners face many barriers to filing and processing of grievances in general, without the added challenges of using a grievance system for sexual abuse and harassment incidents.

### **➤ FIRST ALTERNATIVE: Exempt all sexual abuse and sexual harassment allegations from being processed by a facility's grievance system to exhaust administrative remedies**

There are numerous valid reasons for this exemption. The most compelling is the danger that the grievance process will contaminate the “administrative investigations” conducted by the facility [e.g., § 115.71(f)], whether handled internally or referred to an independent entity (such as an Internal Affairs Office), and “criminal investigations” [e.g., § 115.71(g)] conducted by state or local law enforcement agencies, or the Department of Justice.<sup>26</sup> Research has shown that memories are not stable, and that there is potential for contamination of memories every time individuals are questioned about or talk about an event.<sup>27</sup>

Additional reasons for exempting sexual abuse allegations from being processed as grievances, as opposed to being investigated independently of the grievance system, include:

- ✓ When staff are implicated as perpetrators, many facilities are likely to refer the investigation to a specialized internal or external governmental entity such as Office of Public Integrity, Office of Inspector General, an Internal Affairs Office, or other appropriate entity. As noted above, it is detrimental to process a grievance simultaneously with an ongoing separate investigation.
- ✓ The near impossibility of filing a grievance privately. Grievance boxes often are located in common areas. Grievance forms often are only available on request, and requests often have to be made in common areas or otherwise within earshot of others.
- ✓ The number of staff involved in processing and responding to a grievance, and the various levels of appeal, make confidentiality challenging if not impossible.
- ✓ It is not uncommon for facilities to use prisoners to assist with the processing of grievances, which gives them access to sensitive information.
- ✓ The well-founded fears of further victimization or retaliation, and the danger to prisoners of filing grievances against staff using a staff-managed grievance system – which act as a disincentive to victimized prisoners from filing grievances.<sup>28</sup>
- ✓ The many obstacles to filing a timely grievance that exist in many facilities.

- ✓ The absence of national standards and guidance regarding effective correctional grievance systems and practices, resulting in many facilities having arbitrary, discriminatory, and grossly inadequate grievance practices.
- ✓ The barriers that some facility staff pose to processing particular grievances, such as grievances mysteriously becoming lost and appeals taking years to process.

If sexual abuse and sexual harassment claims are exempted from the grievance system, administrative remedies can be considered exhausted upon the conclusion of the administrative or criminal investigation, or 120 days from the facility's receipt of the first verbal or written report about the incident, whichever comes first.

➤ **SECOND ALTERNATIVE: Exempt all sexual abuse or sexual harassment complaints of special needs prisoners from using the facility's grievance system to exhaust administrative remedies**

Reasons listed above for supporting a broader exemption are incorporated in support of this more narrow exemption. Other support includes the following.

- ✓ Many special needs prisoners face enormous challenges in understanding a facility's grievance system, complying with time frames and other procedural requirements, and accessing it in a way that maximizes confidentiality and privacy.
  - ✓ Many special needs prisoners need effective communication accommodations (see Part C, above, for examples) in order to meaningfully understand and access the facility's grievance system.
  - ✓ Due to the nature of their special needs, coupled with their confinement and the resulting lack of access to families and third parties to assist them, special needs prisoners are particularly disadvantaged, compared to other prisoners without special needs, in their ability to exhaust administrative remedies via a grievance system.
- **THIRD ALTERNATIVE: Grievances involving a sex abuse or harassment allegation should be expedited by immediately advancing them to the final-level or step in a facility's grievance process (i.e., treated as a grievance to the highest authority).**

Reasons for eliminating lower level grievance steps include the following.

- ✓ Given that lower level decisionmakers do not have the authority to offer a meaningful response, the earlier steps are unnecessary. When sexual abuse allegations are involved, the generic response of lower level decisionmakers typically is: "The matter has been referred for investigation."
- ✓ The fewer the steps or levels in a grievance process, the fewer the number of staff and prisoners who handle the grievance, which reduces the risks of confidentiality violations that place the alleged victim at risk of retaliation.
- ✓ Simplifying the grievance system for these kinds of allegations, especially when the alleged victim is a special needs prisoner – coupled with the traumatic after-effects

of sexual victimization --, is a necessary accommodation to protect due process and related rights. Grievance systems with multiple levels, varying deadlines, different forms and processes, frequent extensions of time (which can occur without notice to the grievant), etc., can be challenging and overwhelming – making it difficult or impossible for individual prisoners to know exactly when exhaustion of remedies has occurred.

- ✓ Without this type of effective accommodation, an important component of a meaningful rape elimination system is rendered invalid: judicial review.

➤ **FOURTH ALTERNATIVE: The time frame for filing a grievance involving sexual abuse or sexual harassment should be tolled**

As a less effective accommodation alternative, the time frame for filing a grievance regarding sexual abuse should be tolled until after a prisoner has received notification that the primary internal or external investigation has been concluded, and the results of that investigation have been reported to the prisoner. This will eliminate the danger of contamination of evidence due to overlapping and conflicting dual investigations.

- **FIFTH ALTERNATIVE:** Extend the proposed **20 days** (presumably calendar days) time limit for the filing a grievance [e.g., §115.52(a)]: (a) for all sexual abuse and sexual harassment claims by or on behalf of any prisoner; or (b) for such claims made by special needs prisoners.

The proposed 20 calendar days is far too short for all prisoners, and particularly prisoners who are vulnerable and likely have communication deficits due to age (young or elderly), disabilities, or another special need. It is especially true with regard to prisoners who have just experienced the trauma of being sexually abused, and even more so for those who have trauma histories before their incarceration. Additionally, 20 days is far too short for juveniles and special needs prisoners who might be too scared to disclose victimization until released from confinement.

At a minimum, **longer time frames** should be provided for filing grievances by prisoners with documented special needs, including those who are juveniles at the time of the abuse. Longer time frames generally are also needed for sexual abuse incidents due to, inter alia:

- ✓ The enormous pressure from staff and other prisoners to not report these incidents.
- ✓ The emotional and psychological effects of sexual victimization (particularly for juveniles, special needs prisoners, and those who have trauma histories).
- ✓ Mistaken beliefs by depressed victims in denial that the abuse was an isolated incident that will not reoccur, prompting them to think that reporting the incident is unnecessary.
- ✓ The longer processing time that many vulnerable prisoners need to be ready to disclose the incident.

- ✓ For juveniles, the lack of privacy in speaking with family and guardians by phone, and, for juveniles confined long distances from home, the infrequency of visits with family.

## **OTHER NECESSARY ACCOMMODATIONS FOR SPECIAL NEEDS PRISONERS**

As with the requirement that training for prisoners be provided in accessible formats [e.g., 115.33(d)], the final standards should specify that information about grievance systems, grievance forms, and responses to grievances should be made available in accessible formats. Accessible formats are discussed in Part E, above, and include universal accommodations for reading levels, and accommodations provided for LEP prisoners, illiterate prisoners, and other special needs prisoners.

The Proposed Standards appropriately recognize that juveniles have an impaired ability to use a facility's grievance system, and therefore allow "parents or legal guardians" to file a grievance on their behalf [§ 115.52(c)(4), 115.252(c)(4) & 115.352(c)(4)]. However, many special needs adult prisoners also are unable to effectively understand and use a facility's grievance system. The revised rules should specify designated persons (e.g., attorneys, legal advocates, clergy, or other third parties) who are allowed to file grievances on behalf of any special needs prisoner. This would be consistent with the requirements that facilities accept third-party reports of sexual abuse [e.g., § 115.254], and that all reports should be treated as a grievance [e.g., § 115.52(c)].

Additionally, time frames for filing a grievance as well as for every step in the process should be tolled when it is not feasible for a prison to access a facility's grievance system, such as when a prisoner is on suicide watch; has been transferred to an outside in-patient facility for medical or mental health treatment; is unconscious or in a coma; or is moved to a mental health unit at the facility due to an acute psychiatric episode.

Time frames should be restarted from the date that a prisoner discovers new and material information about the role of staff in contributing to the occurrence of the incident (e.g., neglect of supervisory obligations creating opportunities for abuse to occur, actively encouraging the perpetrator to engage in the abuse).

To the extent the final rules require special needs prisoners to exhaust administrative remedies regarding sexual abuse, the facility should be required to prioritize processing sexual abuse grievances. The final rules can promote prioritizing such grievances by specifying maximum time frames for the facility to process and respond to the initial grievance (e.g., 60 days), and each subsequent step in the process (e.g., 20 days), and the grievance deemed denied when no response is received by the prisoner by a specified deadline (and no notice is received that the facility has extended the deadline for cause).

Grievances involving sexual abuse need to be prioritized in order to prevent evidence from being lost or becoming stale (e.g., memories becoming corrupted, witnesses



becoming unavailable), and ensuing swift access to state and federal courts as needed to secure immediate orders. Swift justice is also needed to protect other prisoners from risk of victimization by the perpetrator, whether staff or another prisoner.

In addition, without hard deadlines for the facility to respond to a grievance at each step in the process, there will be ambiguity and confusion about when administrative remedies have been exhausted. That forces prisoners to choose between waiting for a response well past the deadline for a response at the risk of the statute of limitations expiring, or proceeding to initiate litigation that might be dismissed for failure to exhaust. Either of these scenarios sabotages efforts to eliminate sexual abuse of prisoners by staff or other prisoners.

In addition to all of the foregoing, the final rules should indicate which time frames are calendar days or business days and, if used, business days should be defined.

#### **H. Disability and effective communication accommodations do not impose “substantial additional costs”**

As described in Part C, above, there are a number of routine activities, services, and events for which confinement facilities need qualified interpreters and other effective communication accommodations for special needs prisoners. Responding to sexual abuse incidents is just one of many other activities that require quality communication with special needs prisoners. Any additional costs to appropriately respond to and investigate sexual abuse are not substantial in comparison to the many other daily effective communication needs in confinement facilities.

Facilities should already have in place disability and effective communication accommodations as required by various state and federal laws. These include the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, as well as the due process and equal protection guarantees of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The Proposed Standards do not impose any new burdens or mandates, but rather reaffirm the applicability of existing accommodations to this urgently needed Federal effort to eradicate a well-documented blight on the United States human rights record.

In addition, sexual victimization of prisoners is already prohibited in confinement facilities. It is inconsistent with accepted penological goals and Constitutional guarantees applicable to prisoners, including safety and freedom from cruel and unusual punishment. The Proposed Standards fill in the gaps in current efforts of some facilities to protect prisoners, prevent sexual abuse, and appropriately respond to incidents. Filling those gaps does not involve substantial additional costs in comparison to the costs of meeting existing obligations.

Sexual victimization bears costs of its own, which are eliminated when steps are taken to prevent it. In addition to eliminating victimization costs, providing prisoners with safe environments reduces the potential for expensive litigation. It also can reduce

maladaptive behaviors by prisoners and increase morale for both prisoners and staff. Improved working conditions for staff reduces staff use of sick leave and turnover, and the costs of hiring and training new staff.

Furthermore, the costs of implementing the Proposed Standards can be minimized by initiatives at the national level to provide confinement facilities with resources via grants and contracts, including generic resources that facilities can adapt for their use, such as:

- Questionnaires and checklists for use in identifying special needs prisoners, including those who have individualized communication needs.
- A series of guiding principles and fact sheets on effective communication with specific special needs prisoners (such as the categories discussed below);
- Informational materials, training curricula for specific staff, and train the trainer modules.
- Best practices toolkits, and implementation technical assistance.

While beyond the scope of the Proposed Standards, it merits mentioning that one of the most effective ways to reduce the costs of implementing the Proposed Standards is to maximize the opportunities to divert special needs populations to home and community-based alternatives proven to be consistent with holding offenders accountable while protecting public safety.

## **I. Additional Observations about the Proposed Standards**

As noted in our introduction to these comments, above, there is a Protection & Advocacy agency with disability expertise in every state, the District of Columbia, and five U.S. Territories. **P&A agencies are a resource for facilities on disability issues**, including accessible formats for providing prisoner education [115.33(d)] and effective communication accommodations during responses to and investigations of sexual abuse or harassment reports. In addition to being available for consultation regarding disability issues in general, P&As also can provide training for facility staff and contractors on a range of disability and effective communication issues, including: state and federal disability laws and requirements (e.g., the Americans with Disabilities Act, the Rehabilitation Act, the Individuals with Disabilities Education Act, the Hate Crime Act); signs and symptoms of disabilities; communicating with persons who have disabilities; and disability and effective communication accommodations. They can also consult on discharge planning and aftercare services for prisoners with disabilities.

Every P&A agency has an intake unit for receiving reports and complaints about violations of disability rights. Some P&As might serve as independent reporting mechanisms for some special needs prisoners and others making reports on their behalf.

P&As are authorized to conduct abuse and neglect investigations and secondary investigations involving individuals with disabilities, and have considerable experience

doing so. Facilities can enter into agreements with the P&A in their jurisdiction to conduct independent investigations involving prisoners with disabilities on request by the facility. P&As also are authorized to monitor state and local correctional facilities for dangerous conditions and rights violations, and are available to consult with confinement facilities about implementation of the final rules after they have been issued.

External scrutiny is vitally important to safety in any institution providing congregate care – and juvenile and adult correctional facilities are no exception. Sound oversight, conducted by a qualified independent entity, can identify non-compliance issues that can then be corrected before incidents might occur. By identifying areas of noncompliance with the final rules and related legal requirements, facilities can address potential hazards proactively, ineffective and dangerous practices will be corrected, and abuse will be prevented -- resulting in fiscal savings, improved safety for staff and prisoners, and reduced risks of liability.

Adoption of the final rules will represent an important step forward in efforts to ensure that special needs prisoners are spared the trauma of experiencing sexual abuse during their confinement. We strongly urge you to give due consideration to our comments, and to promulgate the final rules without undue delay.

If our offices can be of any assistance in providing further information, please do not hesitate to contact me, or NDRN's staff attorney for juvenile and criminal justice issues, Judith Storandt (202-567-3518, [judith.storandt@ndrn.org](mailto:judith.storandt@ndrn.org)).

Respectfully,



Curtis L. Decker, JD  
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**Attachments:**

- [The National P&A/CAP System at a Glance](#) (NDRN, 2008)
- [History of NDRN and the P&A/CA System](#) (NDRN, 2008)
- [Federal Grant Programs Supporting the National P&A/CAP System](#) (NDRN, 2009)
- [Addressing Sexual Assaults in Juvenile Justice Facilities: The Need for a National P&A Program](#) (NDRN, 2011)

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<sup>1</sup> In these comments, we use “prisoner” and “prisoners” to refer collectively to persons of any age who are confined in any type of correctional facility, including “inmates”, “detainees” and “residents” as defined in the Proposed Standards. We also use “facility” to refer collectively to jails, prisons, community confinement facilities, and juvenile facilities as defined in the Proposed Standards.

<sup>2</sup> See, e.g.: *Prevalence of Youth with Disabilities in the Juvenile Justice System* (NDRN, 2007), at: [http://www.ndrn.org/images/Documents/Issues/Juvenile\\_Justice/NDRN\\_JDAI\\_handout\\_prevalence\\_92607.pdf](http://www.ndrn.org/images/Documents/Issues/Juvenile_Justice/NDRN_JDAI_handout_prevalence_92607.pdf)

<sup>3</sup> See, e.g.: *Neurobiology and the Law: A Role in Juvenile Justice?*, by S. A. Gruber & D.A. Yurgelun-Todd (2006), Ohio State Jo. of Crim. Law, vol. 3:321, available at: <http://stiglerlawoffice.us/public/gruber%20and%20yurgelen-todd-2006.pdf>

<sup>4</sup> For additional information, see *The National P&A/CAP System at a Glance* (NDRN, 2008), and *History of NDRN and the National P&A/CAP System* (NDRN, 2008) – both of which are attached. A list of the Protection & Advocacy agency in each state, D.C., and U.S. territories is available at [www.NDRN.org](http://www.NDRN.org) using the map under “Find Help in Your State.”

<sup>5</sup> For a list of the eight federal grant programs supporting the P&A/CAP system, see the attached resource: *Federal Grant Programs Supporting the National P&A/CAP System* (NDRN, 2009).

<sup>6</sup> We note in particular that most offenders convicted and sentenced in the District of Columbia are incarcerated in federal prisons located throughout the country, and many states transfer prisoners for confinement in other jurisdictions. These dynamics underscore the importance of uniformity in protections throughout the nation.

<sup>7</sup> For example, many jurisdictions hold in secure juvenile facilities children who are waiting for mental health services (until bed space opens in residential facilities) who are not accused of delinquent or criminal acts. Two thirds of detention facilities have reported holding children, sometimes as young as seven, who are there just waiting for a mental health placement. A 2004 report to Congress documented that about 7 percent of youth in detention were being held simply awaiting an appropriate treatment placement. See: “Incarceration of youth who are waiting for community mental health services in the United States” (2004), Washington, DC: House of Representatives Committee on Governmental Reform, at: <http://www.senate.gov/~govt-aff/ files/040707juvenilereport.pdf>.

<sup>8</sup> For example, Oklahoma has a Community Services Worker Registry, 56 O.S. § 1025.1 et seq., listing caretakers found, after investigation and due process based on clear and convincing evidence, to have engaged in abuse of vulnerable populations. It also maintains a Certified Nurse Aide Registry that notes which ones have abuse or criminal convictions, 310 O.S. § 677.1 et seq. In addition, it has a Child Abuse and Neglect Central Registry Statewide Central Registry for Child Abuse, Sex Abuse, and Neglect, 10 O.S. § 7111. By asking correctional agencies and contractors to check abuse registries maintained in their jurisdiction, it becomes harder for predators to move from one type of employment to another in search of vulnerable populations to victimize.

<sup>9</sup> See, e.g., [The Psychiatric Effects of Solitary Confinement](#) (2006), Stuart Grassian, MD, Wash. Univ. Journal of Law & Policy, Vol. 22:325 (prepared from a statement given to the [Commission on Safety and Abuse in America's Prisons](#)).

<sup>10</sup> By statute in Oklahoma, for example, failure to report is a misdemeanor. 10 O.S. § 7103(C).

<sup>11</sup> The average adult reading level in the United States is 8th to 9th grade. However, nearly 1 in 5 adults read at or below the 5th grade level; and nearly 2 out of 5 older individuals and minorities read at or below that level. See: *Adult Literacy in America*. National Center for Education Statistics, U.S. Dept of Education, Office of Educational Research and Improvement (NCES 1993-275), April 2002.

<sup>12</sup> A substantial number of youth in juvenile facilities read below the fourth-grade level, and are deemed to be functionally illiterate. According to a study conducted by Project READ, a national program designed to improve reading skills, youth that are confined to correctional facilities at the median age of 15.5 years and in the ninth grade read, on average, at the fourth grade level. More than one-third of all juvenile offenders of this age group read below the fourth grade level. *Education as Crime Prevention* (1997), at: [http://www.prisonpolicy.org/scans/research\\_brief\\_2.pdf](http://www.prisonpolicy.org/scans/research_brief_2.pdf). See also, Brunner, M.S. (1993). *National survey of reading programs for incarcerated juvenile offenders*. (NCJ Publication No. 144017). Washington, DC: Office of Juvenile Justice and Delinquency Prevention.

<sup>13</sup> Universal design refers to products, buildings, environments, activities and services that are usable and accessible by the largest universe of individuals feasible including those who do or do not have disabilities or other special needs.

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<sup>14</sup> Persons who have expressive aphasia know what they want to say but have difficulty communicating it to others. See, e.g., American Speech-Language-Hearing Association (ASHA), at: <http://www.asha.org/public/speech/disorders/aphasia.htm>.

<sup>15</sup> Research also indicates that people who have mental retardation are especially likely to confess falsely because of their tendency to acquiesce to authority figures even when the resulting statements are inaccurate and detrimental to their interests. *The Death Penalty in Florida* (2009), by Christopher Slobogin, *Elon Law Review*, vol. 1:17, 22, available at: [http://www.elon.edu/docs/e-web/law/law\\_review/Issues/Slobogin.pdf](http://www.elon.edu/docs/e-web/law/law_review/Issues/Slobogin.pdf)

<sup>16</sup> More information about accessibility of documents for persons who are blind or have low visions is available from NDRN as well as other advocacy organizations that serve or advocate on behalf of persons with these special needs.

<sup>17</sup> This is a logical accommodation in light of the increasing number of correctional facilities that now have programs for prisoners to train guide dogs. This emerging best practice has the potential of reducing the vulnerability of blind and low vision prisoners to being exploited and abused physically and sexually, thereby increasing prison safety in general.

<sup>18</sup> There are specialized communication practices when using interpreters to interview deaf prisoners who primarily rely on a “home sign” system for communication.

<sup>19</sup> Qualification and certification standards vary by jurisdiction; see, e.g.: State Regulations Governing Interpreter Requirements, State-by-State <http://www.360translations.com/burnsat/stateregs.htm> .

<sup>20</sup> Qualification and certification standards for foreign language interpreters vary by jurisdiction; see, e.g.: Limited English Proficiency (LEP) on HHS.gov available at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/index.html>

<sup>21</sup> Cerebral palsy (CP) is a group of disorders that can involve brain and nervous system functions such as movement, learning, hearing, seeing, and thinking. There are several different types of cerebral palsy, including spastic, dyskinetic, ataxic, hypotonic, and mixed. CP is caused by injuries or abnormalities of the brain. Most of these problems occur as the baby grows in the womb, but they can happen at any time during the first years of life, while the baby's brain is still developing. In some people with cerebral palsy, parts of the brain are injured due to low levels of oxygen ([hypoxia](#)) in the area. It is not known why this occurs. PubMed website at: <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001734/>

<sup>22</sup> See, e.g.: *In re: McDonough*, \_\_\_ N.E.2d \_\_\_, 457 Mass.512, 2010 WL 3124062, a case involving the rape of a nursing home resident by a nurse aide. After criminal charges were filed against the aide, the trial court denied the victim's request for accommodations when testifying, and then dismissed the criminal charges due to lack of evidence. The victim petition for relief in the Supreme Judicial Court of Massachusetts. Exercising its general supervisory power, the Court set out procedures to be followed when a witness' accommodation request is denied, thereby precluding the witness from testifying.

<sup>23</sup> See, e.g.: *Traumatic Brain Injury (TBI)*, on the American Speech-Language-Hearing Association (ASHA) website: <http://www.asha.org/public/speech/disorders/tbi.htm> and *Communication Facts: Special Populations: Traumatic Brain Injury* (2010 Edition) at: <http://www.asha.org/research/reports/tbi.htm>

<sup>24</sup> See, e.g.: *Survivors of Abuse in Prison Fact Sheet* (2008), Women in Prison Project, available at: [http://sistersinc.org/Resources/documents/Survivors\\_Prison.pdf](http://sistersinc.org/Resources/documents/Survivors_Prison.pdf)

<sup>25</sup> The sexual abuse of people with developmental disabilities is unusually common because of the greater risk of victimization of such people. More than 90 percent of people with developmental disabilities will experience sexual abuse at some point in their lives. See, e.g., “Retardation and Abuse” by Leigh Ann Reynolds, at: <http://www.wsf.org/behavior/guidelines/sexualabuse.htm>.

<sup>26</sup> By way of example, the grievance system for adjudicated juveniles confined in correctional facilities operated by the Oklahoma Office of Juvenile Affairs provides for grievances about reportable incidents of abuse, neglect or exploitation to be investigated by an outside independent agency, the Oklahoma Office of Client Advocacy. Okla. Admin. Code § 340:2-3-45 (2011).

<sup>27</sup> See, e.g.: *Our changeable memories: legal and practical implications* (2003), by Elizabeth Loftus, available at: <http://faculty.washington.edu/eloftus/Articles/2003Nature.pdf> .

<sup>28</sup> The danger of retaliation also applies to whistleblowers – prisoners who expose sex rings that staff allow to exist in correctional facilities; see, e.g.: “Massachusetts Prison Whistleblower Is Punished and Silenced” (2-25-2011), at: <http://solitarywatch.com/2011/02/15/massachusetts-prison-whistleblower-is-punished-and-silenced/>.