



National Immigrant Justice Center

April 4, 2011

Attorney General Eric Holder
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, DC 20530

Submitted on-line at www.regulations.gov/#!submitComment;D=DOJ-OAG-2011-0002-0001

RE: Docket No. OAG-131; AG Order No. 3244-2011
National Standards to Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder:

Heartland Alliance's National Immigrant Justice Center (NIJC) writes to express grave concern about the exclusion of immigration detention facilities from the proposed standards developed under the Prison Rape Elimination Act of 2003 (PREA). In February 2011, NIJC joined with other advocates to ask President Obama to ensure that immigration detention facilities are included in the proposed standards.¹ NIJC believes the Department of Justice's narrow focus, limiting PREA's application to criminal detention, is inconsistent with the intent of PREA and ignores human rights violations, including sexual assault, against detained immigrants. NIJC therefore urges the Department to respect the work of the National Prison Rape Elimination Commission (NPREC) and include immigration detention facilities in the proposed standards.

NIJC bases the following recommendations on extensive and lengthy experience with detained immigrants, particularly sexual minorities. NIJC, based in Chicago, provides direct legal services to and advocates for immigrants, refugees, and asylum seekers through policy reform, impact litigation, and public education. With a highly experienced staff of 40 attorneys and paralegals and more than 1,000 active *pro bono* partners, NIJC is one of the largest legal service providers for low-income immigrants and refugees in the country.

NIJC's National Asylum Partnership on Sexual Minorities (NAPSM) works to secure protections for lesbian, gay, bisexual, transgender (LGBT) and HIV-positive individuals who are victims of persecution in their home countries because of their sexual orientation or gender identity. NIJC's experienced immigration legal staff represent individual clients and provides trainings, technical assistance and support materials for attorneys and social service providers who serve LGBT and HIV-positive immigrants. NAPSM responds to inquiries from jails throughout the country where immigrants are detained. NAPSM clients, who often experienced persecution in their home countries based on their sexual orientation, gender identity, or HIV status, and whose status isolates them from immigrant and refugee communities, are among NIJC's most vulnerable clients – particularly when held in immigration detention.

¹ <http://www.hrw.org/node/96407>.

PREA's Intent

The intent of PREA is to protect all individuals from sexual abuse in detention. As noted in the House Judiciary Committee report, “The provisions of this legislation, including both the reporting requirements and the standards and protections developed by the Attorney General, are intended to apply to all individuals detained in the United States in both civil and criminal detentions.”² Excluding facilities run by the Department of Homeland Security (DHS) and the Department of Health and Human Services from the PREA standards is inconsistent with this intent as well as the Administration's own efforts at immigration detention reform.

Unlike the Justice Department, other federal entities charged with implementing PREA have included immigration detention in their mandate. The Bureau of Justice Statistics has collected data on sexual violence reported to immigration detention officials and surveyed immigration detainees on their experience with sexual victimization at their current facility. The National Prison Rape Elimination Commission held a public hearing focused on immigration detention, convened an expert working group on immigration detention, included a section on immigration detention in its final report, and included an immigration detention supplement in its recommended standards.

Notably, when PREA was first drafted (in 2001), DHS did not exist; its predecessor agency—the Immigration and Naturalization Service—was a division of the Department of Justice. While DHS was established by the time PREA was enacted, the transition of authority and scope of power were still being defined. Even if they had foreseen this issue, the law's drafters realistically would not have been able to amend the statutory language in time.

Effect of the Department's Decision

The Department's exclusion of immigration detention from the standards threatens the safety of the hundreds of thousands of men, women, and unaccompanied children in the custody of Immigration and Customs Enforcement (ICE), Border Patrol, and the Office of Refugee Resettlement (ORR). Like all persons in custody, detained immigrants are highly vulnerable to abuse. Language and cultural barriers, histories of state-sanctioned abuse in their home countries, and a fear that reporting abuse will result in deportation all increase the likelihood that non-citizens will not feel safe reporting sexual abuse and that perpetrators will not be held accountable. Unlike criminal defendants, detained immigrants do not have the right to an appointed attorney, and as a result may not be aware of their right to be free from sexual abuse, nor whom to contact if they are sexually assaulted.

² U.S. House Committee on the Judiciary, *Report on the Prison Rape Reduction Act of 2003*, 108th Cong., 1st sess., 2003, H. Rept. 108-219, p. 14, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr219.108.pdf (accessed February 3, 2011). PREA's lead Democratic sponsors reiterated this intent. *See id.* at 115 (statement of Rep. Bobby Scott); National Prison Rape Elimination Commission hearing, “The Cost of Victimization: Why Our Nation Must Confront Prison Rape,” June 14, 2005, http://www.cybercemetery.unt.edu/archive/nprec/20090820160727/http://nprec.us/docs/SenatorEdwardKennedyRemarks_Vol_1.pdf (accessed February 3, 2011) (statement of Sen. Edward Kennedy).

NIJC frequently receives horrific complaints from detained individuals regarding mistreatment, assault, and rape in immigration detention. Men, women and children report being inappropriately touched, forced to perform sex acts, and degraded under the guise of strip searches. Sometimes the guards are the abusers. Sometimes they are merely the enablers, as they refuse to respond to pleas for help as detained immigrants are abused by other detainees. LGBT individuals are particularly at risk for sexual abuse and assault.³ The long record of sexual abuse in immigration detention—which continues to this day—demonstrates that DHS is unable or unwilling to take steps to end prison rape in immigration detention.⁴

NIJC client "Juan"⁵ exemplifies the need for PREA protections in immigration detention facilities. ICE detained Juan, a gay man seeking asylum, in an immigration-only facility in a remote area of the Southeast. Juan faced obstacles typical of immigrants in isolated detention centers, as he lacked legal representation and has limited English proficiency. After identifying Juan as gay, a group of detainees compelled him to perform oral sex on them. Juan did not report the attack at first because the men remained detained with him and had threatened him. Once the men departed the facility, Juan reported the incident to his consulate, the only outside contact he had at that time. After consular officials reported the attack to ICE, ICE officers informed Juan that he would be transferred from the facility, but weeks passed without transfer and without any investigation by the facility. Meanwhile, Juan's depression, fear and anxiety worsened significantly. Despite the facility's knowledge of the assault, Juan did not see a psychologist until repeatedly complaining of his depression. The only alternative housing arrangement that facility staff offered Juan was a transfer to the restrictive isolation unit.

Effective application of the PREA standards would have ensured that (1) the third party reporting of Juan's abuse received follow up, (2) the creation and implementation of a mental health plan, including immediate psychological intervention and monitoring, and (3) the transfer of Juan to an appropriate, nonpunitive, setting.

ICE's "Performance Based National Detention Standards"

The Department points to ICE's Performance Based National Detention Standards (PBNDS) as evidence that PREA standards are unnecessary for immigration detention. The PBNDS, however, lack critical protections envisioned under PREA, as discussed below. Furthermore, the PBNDS are legally unenforceable and subject to modification through collective bargaining. It is not clear that even the inadequate protections contained in the PBNDS will survive the current round of union negotiations.

Regardless of the language in the final PBNDS, ICE's dismal record of ensuring compliance with applicable standards guarantees that real protection will fall far short of ICE's stated goals. For example, ICE is statutorily required to audit immigration detention centers for their compliance with its detention standards; ICE is also statutorily required to terminate contracts with detention centers that fail audits in two consecutive years. Nonetheless, internal documents

³ http://www.justdetention.org/en/factsheets/JD_Fact_Sheet_LGBTQ_vD.pdf. See also <http://www.justdetention.org/en/factsheets/immigrationfactsheet.pdf>.

⁴ See, for example, <http://www.hrw.org/node/92630>.

⁵ Pseudonym to protect client's identity.

obtained through Freedom of Information Act (FOIA) requests demonstrate that numerous facilities have repeatedly failed audits but ICE has not acted to terminate their contracts.

Even if ICE could ensure compliance with its stated guidelines, the PBNDS standards simply do not contain the same protections as PREA. For example, the PBNDS:

- Do not require written and posted instructions for reporting sexual abuse
- Do not require that facilities consider reports through third parties
- Do not provide access to confidential support services
- Do not detail staff responsibilities in the aftermath of a report
- Do not detail any efforts taken to ensure that retaliation does not occur
- Do not provide for outside audits

These protections are critical and their absence from existing protocols leaves a particularly marginalized population at heightened risk of sexual abuse.

Unjustifiable Refusal to Consider the Particular Needs of Immigrants

The Commissioners' report included extensive supplemental standards that recognized the unique needs of detained immigrants, some of which are easily foreseeable. The Commissioners recommended, for example, that facility staff receive some training in how different cultures experience acts as sexual abuse, and how cultural obstacles may interfere with the reporting of this abuse. NIJC believes the provision of such training is essential in light of our experiences with staff in immigration detention facilities. NIJC has observed that facility staff too often have stereotyped or insensitive understandings of the individuals they are detaining. This environment, where ICE officers and facility staff do not respect the human dignity of detained individuals, creates fertile ground for sexual abuse by facility staff, or apathy by staff addressing sexual abuse perpetrated by others.

The Commissioners also recommended that staff be trained to understand that many detained immigrants are victims of past sexual abuse, and may be in the United States because they are fleeing such abuse. All facility staff should understand how victims of abuse may be more vulnerable to further abuse, and that these victims may have abuse-related symptoms – such as learned helplessness – that requires heightened sensitivity to any indications of sexual abuse. The Department explained its refusal to adopt these humane and reasonable suggestions on no other basis than administrative inconvenience. Administrative inconvenience, absent a showing that the costs would truly be prohibitive, cannot justify risking the fundamental human rights of vulnerable detained immigrants.

Unjustifiable Inconsistencies

The exclusion of immigration facilities from the PREA standards would lead to anomalous and unjustifiable results. Under the proposed rules, an immigrant detained in a local jail would be protected by PREA but would lose that protection if transferred to an ICE facility. It is inconceivable that Congress intended PREA protections for immigrants to exist at certain facilities but not at others.

For these reasons, we urge the Department to ensure that its proposed standards cover immigration detention by restoring the definition of “prison” relied upon in PREA and by other agencies implementing PREA, “any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government...”

Thank you for your consideration of NIJC’s comments and concerns. Should you have any questions, please do not hesitate to contact me or Helen Harnett, NIJC’s Director of Policy, at (312) 660-1363 or via email at hharnett@heartlandalliance.org.

Sincerely,



Mary Meg McCarthy
Executive Director

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