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950 Pennsylvania Avenue, NW., Room 4252
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RE: Docket No. OAG-131; AG Order No. 3244-2011
National Standards to Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder:

This letter is submitted on behalf of the Peter Cicchino Youth Project at the Urban Justice center (PCYP) to express support for many of the Department's proposed Prison Rape Elimination Act (PREA) regulations, respond to the questions posed in the February 3 Notice of Proposed Rulemaking, and to urge the Department to take additional steps critical to ensuring the safety of lesbian, gay, bisexual, and transgender (LGBT) youth in police custody and juvenile and adult correctional facilities.

Over the past 15 years, the Peter Cicchino Youth Project (PCYP) has been the only legal services project in the nation focusing on the needs of poor and homeless lesbian, gay, bisexual, transgender, queer and questioning (LGBTQQ) young people. We provide direct legal services to over 400 LGBT youth between the ages of 13 and 24, the vast majority of whom are homeless or at risk of homelessness. Indeed, one in four LGBTQQ teens in the United States at some point either runs away or is thrown out of their home. Between 40 and 50% of teenagers living on the streets self-identify as LGBTQQ. Once on the street, LGBTQQ young people become highly vulnerable to violence, police abuse, and arrest and incarceration for crimes of poverty, survival and self-defense.

Once in police custody, juvenile detention, or adult facilities, LGBTQQ young people are particularly vulnerable to sexual abuse. For instance, a 2010 Bureau of Justice Statistics report concluded that 12% of youth incarcerated in juvenile detention centers were sexually violated by a staff member (10.3%) or another youth within the first twelve months of their admission.[1] A 2009 report issued by the National Council on Crime and Delinquency found that LGBTQQ young people held in California juvenile facilities experience pervasive sexual assault and lack of protection from facility staff.[2]

Several colleague organizations, including the Sylvia Rivera Law Project (SRLP) and National Coalition for Lesbian Rights (NCLR) have submitted extensive and detailed comments on the proposed regulations and questions contained in the Notice of Proposed Rulemaking. We support our colleagues' thoughtful comments, and want to specifically address the following proposed regulations and questions due to their significant impact on LGBTQQ young people.

Application of the PREA standards to immigration detention facilities

The Department's limitation of PREA's application to criminal detention ignores the history and pervasiveness of sexual assault in immigration detention, is inconsistent with the intent of PREA and the administration's own efforts at detention reform, and implicates basic human rights obligations undertaken by the United States.

Any regulations promulgated to address the issue of sexual abuse in custodial facilities must therefore also apply to immigration detention facilities. Failure to offer the same protections to individuals detained for immigration violations is indefensible. Hundreds of thousands of children and young people are held each year by immigration authorities – including many immigrant LGBTQQ youth. Like all persons in custody, immigration detainees 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 a non-citizen will not feel safe reporting sexual abuse and that perpetrators will not be held accountable. LGBTQQ young people are among the most vulnerable to abuse in immigration detention, and are often exceptionally isolated. Unlike criminal defendants, immigration detainees have no right to an 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.

Immigration and Customs Enforcement (ICE) detention standards are incomplete, are not uniformly applied across ICE facilities, and lack the force of law. Final regulations promulgated pursuant to PREA should apply with equal force in full to all facilities that house immigration detainees.

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[1] Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* 99 (Boston, MA: Beacon Press 2011)

[2] Barry Krisberg, *Special Report: Breaking the Cycle of Abuse in Juvenile Facilities*, National Council on Crime and Delinquency (2009).

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…"

Application of the PREA standards to all forms of police custody

As stated in comments submitted under Docket No. Docket No. OAG-131; AG Order No. 3143-2010, National Standards to Prevent, Detect, and Respond to Prison Rape, there is considerable continuing concern regarding the lack of provisions specifically addressing sexual abuse which takes place in police custody beyond the confines of facilities understood to be "lock ups" by the Commission, thereby exacerbating the vulnerability of women and transgender, gender nonconforming and intersex individuals held in police custody to sexual abuse.

Sexual abuse by law enforcement officers all too often takes place in locations which, while not commonly understood to be "lock ups" or detention facilities, arguably fall within the PREA's definition of a "lockup" in that they are "secure enclosures that are: (1) Under the control of a law enforcement, court, or custodial officer; and (2) Primarily used for the temporary confinement of individuals who have recently been arrested, detained, or are being transferred to or from a court, jail, prison, or other agency." A significant number of our clients tell us of sexual harassment, sexual assault, and rape in police squad cars and vans, often driven to isolated locations but still within the control of a government agent. Their experiences are not unique – for instance, Amnesty International reported in its ground-breaking 2005 study, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the United States*, that in 2001 two young, Latina transgender women reported that they were approached and questioned by police officers in a patrol car, and then threatened with arrest unless they had sex with the officers. Under the circumstances, they felt compelled to perform oral sex on the officers. They did not report the incident to authorities because of their undocumented immigration status and the officers' threats of retaliation.[3]

Sexual abuse by law enforcement officers which takes place on the streets and in our homes clearly constitutes sexual assault in government custody, even it does not take place in a government controlled facility. Not only are such incidents worthy of further study, attention, and prevention in their own right, but they can be predictive of officers' conduct toward detainees in police controlled detention facilities. Often incidents of sexual abuse in police lock-ups are preceded by sexual harassment or abuse outside police facilities.

The Department is therefore urged to consider extending the protections of the recommended standards to all individuals in the custody and control of a law enforcement officer, regardless

[3] Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* 40, AMR 51/122/2005 (2005).

of whether they are ultimately deemed to have been held in a "lock-up," by rendering the recommended standards for "lockups" applicable to law enforcement agencies system-wide.

Remove Exemptions for Police Lock-Ups

The proposed regulations' specific exemption of police lockups and temporary detention facilities in the following sections presents cause for concern:

- *Response Planning: Sections 115.21, 115.221, 115.321, 115.22, 115.222, 115.322, 115.23, 115.123; 115.223, and 115.323;*
- *Training and Education: Sections 115.31, 115.231, 115.331,115.32, 115.132, 115.232, 115.332,115.33, 115.233, 115.333, 115.34,115.134, 115.234, 115.334, 115.35, 115.235, and 115.335;*
- *Screening for Risk of Sexual Victimization and Abusiveness: Sections 115.41, 115.241, 115.42, 115.242, and 115.43*

The Department's stated justification for such exemptions, namely that there is "little evidence of a significant amount of sexual abuse in lockups that would warrant such expenditure," is both unfounded and unavailing.

As an initial matter, no official data is currently collected concerning the number of rapes and sexual assaults which take place in lockups or are committed by law enforcement officers in the U.S. Therefore there is no basis for the statement that there is "little evidence of a significant amount of sexual abuse in lockups" – the fact is, we don't know how significant the problem is because we don't look for, document, or measure it. Data gathered by federal and state governments regarding the use of excessive force by law enforcement officers does not include information on the number of allegations, complaints, or incidents of rape, sexual assault or coerced sexual conduct by police officers in or out of police lock-ups. Similarly, data gathered by the federal government on rape and sexual assault fails to capture information about rapes committed by police officers and other law enforcement agents or regarding whether the rapes took place while in police custody.

Only a little over a third of *all* rapes and sexual assaults are ever reported to authorities.[4] One can only imagine that this rate is far lower among individuals who are raped or sexually assaulted by the very law enforcement agents who are charged with protecting them from violence. As Penny Harrington, former Portland Chief of Police and founder of the National Center for Women and Policing pointed out "Who are they going to call? It's the police who are

[4] *See* Bureau of Justice Statistics, *Criminal Victimization, 2004*, US Department of Justice, Office of Justice Programs, NCJ 210674, September 2005; Bureau of Justice Statistics, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, US Department of Justice, Office of Justice Programs, NCJ 194530, August 2002 (74% of completed and attempted sexual assaults against women were not reported to the police)

abusing them."[5] Threats of retribution and retaliation for reporting sexual abuse by law enforcement are all too frequent, while prosecutions are all too rare.

As a result, experiences of sexual violence in police lock-ups, such as that of a young transgender woman who told the Sylvia Rivera Law Project that a Bronx, New York court officer coerced her into performing oral sex on him in a court lock-up, often go unreported, and no data concerning such incidents is collected. Therefore, the response to the Department's *Question 41: "Are there sources of data that would allow the Department to assess the prevalence of sexual abuse lockups and community confinement facilities?*" is, unfortunately, we are unaware of any.

Yet, what research *is* available tends to suggest that sexual abuse by law enforcement agents is a silent yet systemic problem. For instance:

- Amnesty International documented numerous cases of rape and sexual assault and abuse of lesbian, gay, bisexual and transgender people by law enforcement officers in cities across the U.S. in its groundbreaking 2005 report *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the United States*;[6]
- One survey of law enforcement officials in the St. Louis, Missouri metropolitan area concluded that officers report sexual misconduct to be common, yet criminal justice officials have done little to control the problem;[7]
- Two studies of law enforcement license revocations in Missouri and Florida found that sexual misconduct was the basis for revocations in almost 25% of cases.[8]
- A 2002 report, *Driving While Female*, documented over 400 cases of sexual harassment and abuse by law enforcment officers in the context of traffic stops across the U.S. Only 100 of these cases resulted in any kind of sanction. The authors of the report concluded "there is good reason to believe that these cases represent only the tip of the iceberg. Many victims do not come forward because of humiliation and fear of reprisal. And … some police departments do not accept and investigate complaints from many victims who do come forward."[9]
- The Salt Lake City Tribune quoted the Utah Peace Officer Standards and Training Director as estimating that as many as 30% of the sexual misconduct cases his agency

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[5] Craig R. McCoy and Nancy Phillips, *Extorting Sex With a Badge*, Philadelphia Inquirer, August 13, 2006 A01.
[6] *Stonewalled, Police Abuse and Misconduct Against Lesbian, gay, Bisexual and Transgender People in the U.S.* 40, Amnesty International, 2005.
[7] R. L. Goldman and S. Puro, Revocation of Police Officer Certification , 45 St. Louis L. J. 541, 563, n.142 (2001).
[8] R. L. Goldman and S. Puro, *Revocation of Police Officer Certification*, 45 St. Louis L. J. 541, 563, n.142 (2001).
[9] Samuel Walker and Dawn Irlbeck, *Driving While Female: A National Problem in Police Misconduct*, Police Professionalism Initiative, Department of Criminal Justice, University of Nebraska at Omaha, 2002, available at http://www.policeaccountability.org/drivingfemale.htm; Press Release, *Driving While Female Report Launches UNO Police Professionalism Program*, available at: http://www.unomaha.edu/uac/releases/2002may29ppi.html

investigates are not criminally prosecuted.[10] The investigation also revealed that where prosecutions do take place, they are for misdemeanors.[11]

Accordingly, in response to Question 18, "*Do the standards adequately provide support for victims of sexual abuse in lockups upon transfer to other facilities, and if not, how should the standards be modified?*" we recommend that such exemptions be rescinded for lockup facilities.

In response to Question 20, "*Should the Department further specify training requirements for lockups and if so, how?,*" we believe training requirements concerning treatment of LGBTQQ young people, prohibitions on unlawful searches to assign gender for purposes of arrest processing and placement in sex segregated facilities, and safe placement practices for LGBTQQ and gender non-conforming young people are essential for all staff, including EMS and medical staff (in New York City, EMS staff are assigned to each of the Court Borough Sections, and screen thousands of arrestees entering lockups every year) assigned to police lockup facilities.

In response Question 21, "*Should the final rule mandate rudimentary screening requirements for lockups, and if so, in what form?"* **we emphatically urge that they should be implemented in this context, particularly where vulnerable populations such as LGBTQQ young people are concerned, and should be conducted by non-police staff.**

Sexual Harassment

Various provisions of the draft regulations exclusively address sexual abuse, but should also address sexual harassment. Under the definition of sexual harassment included in the Department's draft regulations, some behavior that most states would consider to be child abuse is termed sexual harassment. Sexual harassment is left out of the coverage of most provisions of the Department's draft regulations, even though it presents obvious harms to children. We recommend including sexual harassment in the regulations regarding: reporting duties and training of staff, guidelines for investigations, timelines for filing grievances, confidentiality requirements, protection against retaliation, agency data collection, and several others in order to clarify the responsibilities of the various stakeholders and better protect the safety of youth.

Youth in adult facilities

We applaud the Department's general recognition that youth are different from adults cognitively and socially, and therefore need special protections. The NPREC's report found that

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[10] L. Rosetta and N. Carlisle, *Sexual Misconduct by Officers: A Third Might Go Unprosecuted*, Salt Lake City Tribune, October 29, 2006.

[11] L. Rosetta and N. Carlisle, *Sexual Misconduct by Officers: A Third Might Go Unprosecuted*, Salt Lake City Tribune, October 29, 2006.

"[m]ore than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse." Adult facilities housing youth face a dangerous dilemma, forced to choose between housing them in the general adult population where they face substantial risk of sexual abuse, or in segregated settings that can exacerbate mental health problems. The Department should prohibit placing youth in adult lockups, jails and prisons to reduce the sexual abuse of youth without subjecting them to harmful segregation or isolation.

§ 115.5 General definitions

The proposed regulations fail to define the terms *transgender* and *intersex*, although these terms are used throughout the proposed regulations. Without proper definition, staff will not have a clear understanding of the terms, their distinct meanings, and the implications of the regulations on these specific populations. As we also recommend adding the term *gender nonconforming* to some of the regulations, this term should also be defined.

§ 115.113 Supervision and monitoring

While the proposed supervision and monitoring regulation for lockups requires lockups to provide heightened supervision for vulnerable detainees, it fails to provide any guidance for law enforcement on what characteristics make someone vulnerable to abuse. Without this guidance, LGBTI detainees and others vulnerable to abuse may not receive the necessary protections to keep them safe. Accordingly, the regulation should specifically include known indicators of vulnerability that law enforcement should look to when determining whether a particular detainee requires heightened supervision. In addition, these facilities should be required, at the very minimum, to ask all detainees about their own perception of vulnerability to sexual abuse *and* of where they will be most safely housed, and provide the necessary protection.

§ 115.14, § 115.114, § 115.214, & § 115.314 Limits to cross-gender viewing and searches

We are concerned the proposed search regulations fail to impose the minimum requirements necessary to prevent sexual abuse. To address this failure, we urge the Department to make the following modifications: First, the Department should prohibit non-exigent cross-gender pat-down searches and all non-emergency cross-gender viewing of inmates and residents in states of undress. Second, we strongly urge the Department to include specific guidance on how facilities should apply restrictions on cross-gender searches to transgender and intersex individuals. The determination of the gender of the staff member to search a particular transgender or intersex inmate or resident should be decided on a case-by-case basis. As individual transgender and intersex people may have different privacy and safety concerns, facility staff should ask them to indicate the gender of staff they feel most safe being searched by and such requests should be honored in non-exigent circumstances. Finally, even when conducted by medical practitioners, touching transgender or intersex individuals' genitals or requiring them to undress so a practitioner can determine their genital status is unnecessary and inherently traumatic. We strongly urge the Department to prohibit facilities from engaging

in such searches. In the very limited circumstances where this information is needed by a facility, it can readily be determined by other means.

§ 115.31 & § 115.331 Employee training

We strongly support the requirement that employee training include "[h]ow to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, or intersex inmates." If staff members are unable to communicate effectively and professionally with LGBTI inmates and residents, these individuals may be afraid to approach staff when they are threatened with or subjected to abuse out of fear that staff will mistreat them, blame them for the abuse, or not believe them. As studies indicate, LGBTI youth and adults are at very high risk of sexual abuse in facilities, underscoring the need for training focused on raising competency in this area. Including this training requirement will help decrease the unacceptably high levels of sexual abuse that LGBTI individuals experience.

The proposed employee training regulation for juvenile facilities fails to provide sufficient guidance on the particular vulnerabilities and needs of young people, and does not take into account the unique considerations of LGBTI youth or the harms associated with sexual abuse of children. Accordingly, employees should receive training on adolescent development to better understand the characteristics, limitations, and behaviors of the youth population, as well as the impact of trauma on youth in order to understand how to most effectively intervene when they are needed to detect or prevent incidents of sexual abuse. In addition, the final regulations should also require employees in juvenile facilities to receive training on how a jurisdiction's age of consent laws can create a distinction between sexual abuse – which falls under the purview of these regulations – and consensual activity between residents, which a facility cannot and should not treat as sexual abuse.

Our groundbreaking 2001 report, *Justice for All: A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System*, appended hereto in its entirety, was one of the first to examine the experiences of LGBTQQ youth in custody, particularly identified discriminatory enforcement of regulations pertaining to sexual conduct among residents of juvenile facilities against LGBTQQ young people. Additionally, we noted that LGBTQQ young people who had committed no sexual offense were nevertheless labeled as sex offenders and held in isolation out of a misplaced and discriminatory belief that they posed a danger to other residents. Identification as LGBTQQ is not a basis for such a designation. Moreover, no LGBTQQ youth should be placed in isolation or denied access to programming on the basis of such a faulty designation.

§ 115.34 & §115.334 Specialized training: investigations

The proposed regulation fails to require that investigators receive training on determining whether activity between adult inmates is consensual or abusive. This training is necessary to prevent facilities from inappropriately treating LGBTI inmates as sexual abusers for engaging in consensual sexual contact with other inmates. In addition, investigators in juvenile facilities

need training on age of consent laws to help ensure that facilities do not further penalize and pathologize same-sex sexual activity. Such training will give these investigators a proper understanding of the limited circumstances under which they may treat voluntary sexual contact between residents as abuse under these regulations and will assist them in distinguishing between actual sexual abuse and consensual sexual activity between residents.

§ 115.35, § 115.235, & § 115.335 Specialized training: medical and mental health care

This regulation should be amended to require facilities to train medical and mental health care providers on the same general topics facilities are required to train all employees on pursuant to **§** 115.31. Specifically, it is important that medical and mental health care practitioners are trained on how to communicate effectively and professionally with LGBTI individuals, because they have significant contact with sexually abused inmates and residents and LGBTI inmates and residents experience high rates of abuse.

§ 115.41 & § 115.241 Screening for risk of victimization and abusiveness

The Department has made important improvements to this proposed regulation, including requiring facilities to use the same criteria to screen male and female inmates for risk of sexual victimization and requiring rescreening of inmates when warranted due to a referral, request, or incident of sexual victimization. In addition, we strongly support the prohibition on disciplining inmates for refusing to answer screening questions or for not disclosing complete information. However, we are concerned that allowing facilities up to 30 days to complete the initial classification process will place many inmates at an unnecessarily high risk of abuse for an extended period of time. We urge the Department to substantially shorten this time period. The proposed regulation also fails to state what information, if any, agencies must gather at an intake screening to inform their temporary housing and placement decisions until the full classification process is completed. While jails and prisons may not have complete inmate records and other potentially relevant materials at the time of intake, the regulations should require facilities to attempt to gather all information related to risk of victimization and risk of abusiveness enumerated in § 115.41(c) and (d) during the intake screening process. Finally, as inmates who are gender nonconforming are often perceived to be LGBTI and are therefore vulnerable to sexual abuse, this standard should include gender nonconforming appearance as a risk factor for victimization.

§ 115.341 Obtaining Information from residents

We support the inclusion of an explicit requirement that agencies ascertain information about a juvenile resident's own perception of vulnerability during assessment. This information will help agencies to better identify vulnerable youth, including LGBTI residents who fear for their safety but are uncomfortable identifying themselves as LGBTI to staff. Unlike the standards proposed by the National Prison Rape Elimination Commission, the proposed regulation no longer states that only medical or mental health providers are permitted to talk with residents about sensitive issues during the screening process. The proposed regulation allows intake and

security staff to ask these sensitive questions, but these staff may not have the appropriate level of training to do so effectively and respectfully. We propose that the Department adopt the Commission's approach and require that only medical and mental health providers can discuss these topics with residents if the facility uses medical or mental health practitioners to conduct assessments during intake. In addition, this regulation should include gender nonconforming appearance as one of the pieces of information agencies should attempt to ascertain during assessment of residents.

§ 115.42 & § 115.242 Use of Screening Information

We strongly support the proposed regulation's requirement that facilities make individualized determinations regarding whether a transgender or intersex inmate should be placed in a male or female facility. This provision properly recognizes that, for many transgender and intersex individuals, housing in a facility aligned with their gender identity is the safest and most appropriate option. However, we are deeply concerned that, contrary to the Commission's recommendation, the proposed regulations permit facilities to make placements based solely on an inmate's LGBTI identity or status. Reports of the effectiveness of separate housing for such inmates for purposes of protection are mixed, and separate placement is just as likely to be used to punish such inmates and target them for abuse. We strongly urge the Department to adopt the Commission's prohibition of this practice. Modified language permitting separate protective housing units for gay and transgender inmates in the limited circumstance where such a separate unit is established in connection with a consent decree or legal settlement would sufficiently address the Department's stated concerns regarding this provision.

In addition, due to the extremely high risk of abuse these individuals face when forced to shower in group settings, we recommend that the final regulation require facilities to offer transgender and intersex inmates and residents the opportunity to shower separately from others.

§ 115.342 Placement of residents in housing, bed, program, education, and work assignments

We support the proposed regulation's prohibition on placing LGBTI residents in particular housing, bed, or other assignments solely on the basis of such identification or status. This prohibition is necessary to prevent facilities from inappropriately segregating or isolating LGBTI residents rather than providing them with full access to programming and services in the general population. However, we recommend the Department make three important additions to this final regulation. First, this regulation should include gender nonconforming appearance as a factor that agencies must take into account when determining housing, bed, program, education, and work assignments for residents. Second, while studies indicate that LGBTI residents are at high risk of sexual abuse, the proposed regulation fails to make clear that being LGBTI makes a resident more vulnerable to abuse and not more likely to be abusive. Without such a statement facilities may wrongly treat LGBTI status as an indication of potential sexual abusiveness based on bias or misconceptions. Finally, the proposed regulation does not provide sufficient guidance to agencies on making individualized determinations for housing

transgender or intersex residents and fails to require consideration of the resident's views of his or her own safety. Many facilities struggle with appropriate housing options for these residents and will solely look to the resident's genital status. As in §115.42, we urge the Department to include specific guidance for facilities on what to consider when assigning a transgender or intersex resident to a facility or unit for male or female residents in order to better protect these residents from sexual abuse.

§ 115.43 Protective custody

We support § 115.43's inclusion of restrictions on the use of involuntary protective custody (IPC), but believe that this section must provide clearer limitations on the use of this practice, including mechanisms for individuals to appeal their placement in IPC, and specific requirements that facilities document their reasons for such a placement and their attempts to identify more appropriate placements. We are concerned that without these additional limitations, agencies will be able to keep vulnerable inmates in involuntary segregation indefinitely, depriving them of crucial human contact, privileges, and programming that other inmates receive. Because LGBTI individuals are especially vulnerable to sexual abuse, this section allows facilities to essentially punish people for being LGBTI. Automatic, unnecessarily restrictive isolation of vulnerable inmates also creates a strong disincentive for reporting sexual abuse. In addition, as written, § 115.43 does not provide any guidance for agencies on how to handle requests from vulnerable individuals to be placed in voluntary segregation, nor does it require that individuals in voluntary segregation have equal access to programs, privileges, and human contact. We strongly urge the Department to include these important additions in the final regulations.

§ 115.76, § 115.176, § 115.276, & § 115.376 Disciplinary sanctions for staff

While the proposed regulations create a presumption of termination for a staff member who committed certain types of sexual abuse, we strongly urge the Department to expand this presumption to apply to all forms of sexual abuse, including indecent exposure and voyeurism. Retention of employees found to have committed any form of sexual abuse puts inmates and residents at unnecessary risk of further victimization.

§ 115.77, § 115.277, & § 115.377 Disciplinary sanctions for inmates/residents

We support the proposed regulation's statement that consensual inmate-on-inmate or resident-on-resident sexual activity shall not be treated as sexual abuse. This clarification is necessary to distinguish between the serious harms of sexual abuse that PREA is intended to prevent and a facility's interest in preventing sexual activity between inmates or residents. We also support the inclusion of language prohibiting facilities from treating good faith allegations of abuse that lack sufficient evidence, as false incident reports. However, we are concerned that the proposed regulation allows for the discipline of an inmate or resident for sexual contact with staff based only on a finding that the staff member did not consent to such contact. We are concerned that this exception is too broad and could be exploited by abusive

staff members in a threatening or coercive manner. The final regulation should also require a finding of force or threat of force.

In regard to juvenile facilities, we are concerned that the proposed regulation fails to require facilities to consider voluntariness as a mitigating factor in cases where residents engage in voluntary sexual conduct with each other but one or both of the residents could not legally consent under state law. Without such guidance facilities may choose to overlook the voluntary nature of this conduct and harshly discipline these residents based on disapproval of same-sex sexual activity.

§ 115.352 Exhaustion of administrative remedies

The draft regulations impose a short grievance timeline that ignores important developmental differences between adults and youth that may contribute to a child's hesitancy to report abuse. The short timeline not only prevents young victims from being protected through the administrative process; it also unreasonably restricts their ability to bring valid legal claims. We propose incorporating the recommendations of the NPREC, which would impose no time limit for young victims to report abuse and would consider administrative remedies exhausted 90 days after making a report. In the alternative, we propose extending the time for youth to 180 days to file grievances, and requiring the agency to consult with the youth and medical and mental health practitioners to determine if filing a grievance in the normal timeline would have been impractical.

§ 115.311 PREA Coordinator

The draft regulations only require that agencies and facilities appoint a full-time PREA coordinator if the resident population is greater than 1000. According to the Department's Initial Regulatory Impact Assessment, this means that only 11 state juvenile systems will fall under this requirement. As 12% of youth in juvenile facilities reported experiencing sexual abuse in 2009, the level of staffing commitment to coordinating PREA compliance required under the draft regulations would fall far below what is needed to implement the PREA standards in juvenile facilities adequately. The final regulation should require that all agencies and facilities designate a PREA coordinator and allocate sufficient staff time to ensure the standards are implemented properly.

Conclusion

We urge you to incorporate our recommendations into the Department's final regulations in order to ensure that all LGBTQQ young people receive the urgently needed protections from sexual abuse that PREA contemplated for all inmates and residents who are vulnerable to sexual abuse. Thank you for your consideration of our concerns.

Respectfully submitted,

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