WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

April 4, 2011

Eric H. Holder, Jr., Attorney General of the United States
Robert Hinchman, Senior Counsel
U.S. Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue N.W., Room 4252
Washington, DC 20530

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

Dear Attorney General Holder:

On behalf of the D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights & Urban Affairs ("WLC"), we present the following response to the Notice of Proposed Rulemaking: National Standards to Prevent, Detect, and Respond to Prison Rape, 28 CFR Part 115, February 3, 2001, Docket No. OAG-131; AG Order No. 3244-2011.

WLC is a non-profit legal organization. For more than forty years, it has litigated hundreds of civil rights cases in employment, housing, public accommodations, prisoners' rights, and other aspects of urban life. The D.C. Prisoners' Legal Services Project was founded in 1986 to serve the civil legal needs of men and women incarcerated, at that time, in the local jails and prisons. In a transition designed to better address the needs of DC prisoners, this organization merged with the WLC to form the D.C. Prisoners' Legal Services Project of WLC. The new Prisoners' Project client base includes more than 3,200 people held in local DC jail facilities, which are run by the DC. Department of Corrections; over 300 people living in local halfway house programs; and almost 6,000 DC prisoners held in over 100 federally-run Bureau of Prisons ("BOP") facilities throughout the country. We are the only advocacy organization in the United States that systematically looks at conditions in the BOP.

The responses and comments below include our responses to questions and proposed standards where we feel we have something to add to the discussion. For the proposed standards for which we have not submitted specific responses or comments, we wholeheartedly endorse the comprehensive comments submitted by Just Detention International.

As an introductory point, we applaud the Department's decision to use the term sexual abuse throughout the standards and to reference sexual harassment in specific standards. We agree that sexual abuse is the most accurate term to

encompass the horrors that Congress sought to prevent. We also agree that it is important to address all the factors that support environments tolerant of sexual harassment *and* abuse.

SPECIFIC RESPONSES AND COMMENTS

Response to Question 3: Should the final rule provide greater guidance as to how agencies should conduct such [contract] monitoring? If so, what guidance should be provided?

REQUIREMENTS FOR CONTRACT MONITORING MUST BE SPECIFIC AND SUBSTANTIVE

There must be significantly more guidance provided on monitoring. Private facilities particularly suffer from lack of transparency. Without clear guidance, the monitoring will not be enough to ensure that standards imposed in the Prison Rape Elimination Act ("PREA") are implemented properly. As they stand now, Sections 115.12, 115.112, 115.212, and 115.312 only provide that agencies that contract for the confinement of BOP inmates with private agencies or other entities shall include in any new contracts or contract renewals the entity's obligation to adopt and comply with the PREA standards.

Generally, prisoners have no third party beneficiary standing to enforce a contract between a governmental entity and a private company. There is no vehicle for bringing constitutional claims against private prison companies that contract with the federal government. The Fourth and Tenth Circuit Courts have ruled that prisoners are also unable to bring constitutional causes of action against the employees of such companies. For private entities contracting with state governments, some appellate courts have held that Title II of the ADA does not apply, and it is an open question as to whether Title III does. Within this context, contract monitoring is a vital tool for eliminating custodial sexual harassment and abuse. Without explicit standards, there is nothing ensure that a contractor will implement these regulations. Moreover, there is no reason to assume that all contracting agencies have a quality system for monitoring contract compliance.

In the medical care context, the BOP has long-argued that prisoners may not bring complaints about care provided by contractors to the BOP via the administrative remedy process, nor the federal courts. The BOP has argued that: "The BOP administrative claims process is limited to issues 'directly related to BOP matters' such as sentence computation and transfer issues…[T]he BOP well may reject claims regarding medical care simply because complaints by individual inmates on such issues are handled internally by [the contractor]. (*See* BOP Motion to Dismiss in *Mathis et al v. GEO Group et al,* 2:08-CT-0021 (2010).) Under the

proposed regulations, it is all but certain that the BOP will take a similar approach to complaints about sexual abuse in contract facilities, opting to have these complaints handled "internally," that is, by the contractor and not by the BOP. After all, sexual abuse is not "directly related to BOP matters" as envisioned by the BOP, and therefore the agency asserts no responsibility for monitoring compliance nor even to review complaints of sexual misconduct in contract facilities.

When the contractor is another governmental actor otherwise mandated to follow these regulations, compliance monitoring can be limited. However, when the contractor is a private corporation, specific standards are needed.

We suggest looking to the BOP's Contract Facility Quality Assurance Plan (Q7700.07) for one possible way of structuring the guidance.

At a minimum, the government agencies must be required to:

1. Conduct annual on-site compliance monitoring;
2. Review all contractor policies, procedures, and post orders to confirm compliance with these standards;
3. Review all grievances submitted by inmates and complaints submitted by third parties implicating sexual abuse, and review the investigation and follow up to ensure appropriate actions were taken;
4. Directly observe some amount of both staff training and policy implementation to verify compliance;
5. Prioritize bringing contracting agency into compliance where any deficiencies are found; and
6. Aggressively employ remedies for non-compliance, including a system of financial sanctions.

Additional Comments on Sections 115.12, 115.112, 115.212, and 115.312

ALL CONTRACTORS AND SUBCONTRACTORS, NOT JUST CONTRACTORS PROVIDING CONFINEMENT, MUST BE INCLUDED

Many of the proposed standards apply not only to security staff, but also to staff performing other duties within the system. However, as now written, none of these standards are required of contractors providing services other than confinement. Significant numbers of correctional agencies and facilities use subcontractors to provide services such as medical care, meal service, technological support, construction, and maintenance services. Obviously, not every standard will apply to every contractor or subcontractor. However, many are directly relevant. As one example, Sections 115.16, 115.116, 115.216, and 115.316 restrict hiring of employees who have previously engaged in sexual abuse. These standards, however

ultimately formulated, should be applied to all contractors and subcontractors that have any chance of inmate contact. To continue the example, there would be no sense in allowing a private medical provider to hire an employee known to have previously engaged in sexual abuse. As another, Sections 115.35, 115.235, and 115.335 require specialized medical training. many facilities subcontract medical services to private companies which manage their own personnel training. These standards would become meaningless if contractors were not obligated to fulfill them.

However, Sections 115.12, 115.112, 115.212, and 115.312 only require agencies to mandate adoption of PREA standards by contractors who provide confinement. All contractors and subcontractors, no matter what services they provide, should be required to adopt all standards relevant to the work, and the contracting agencies must be required to monitor those contract provisions.

We recommend changing the language of the standards to read, "A public agency that contracts for <u>any services related to</u> the confinement of its inmates with private agencies or other entities, including other government agencies, shall include in any new contracts or contract renewals the entity's obligation to adopt and comply with the PREA standards."

Response to Question 16: Should the final rule contain any additional measures regarding oversight and supervision to ensure that pat-down searches, whether cross-gender or same-gender, are conducted professionally?

THE ALLOWANCE OF CROSS-GENDER PAT DOWNS SHOULD BE REMOVED.

We support Just Detention International's thorough comments that the ban on cross-gender pat-down searches should be maintained. As more state agencies are moving to limit cross-gender pat-down searches, the Department should not be lowering the bar. There is growing recognition that when these types of searches become commonplace, opportunities for sexual abuse abound. The Department should ban cross-gender pat-down searches, except in exigent circumstances.

Response to Question 17: Should the final rule include a requirement that inmates with disabilities and LEP [limited English proficient] 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?

STAFF MUST ENGAGE IN EFFECTIVE COMMUNICATION WITH INMATES WHO HAVE DISABILITIES OR WHO ARE LEP THROUGHOUT ALL STAGES OF THE INVESTIGATION AND RESPONSE PROCESS. QUALIFIED INTERPRETERS AND TRANSLATORS MUST BE USED.

This requirement is absolutely necessary since private agencies contracted with the BOP currently argue that they are neither subject to the Rehabilitation Act nor the ADA. For private entities contracting with state governments, Title II of the ADA does not apply, and it is an open question as to whether Title III does. Without this requirement, we fear that private agencies might not provide *any* interpretation services, much less ensure effective communication throughout the investigation and response process. The Department must ensure that inmates with disabilities and LEP inmates are able to communicate with staff during the entire sexual abuse investigation. Failure to communicate can only lead to incomplete investigations and unresponsive agencies.

The standards must specify what agencies must do to ensure effective communication. Unfortunately, our experience has been that, despite the well established standards in the implementation regulations for the ADA and the Rehabilitation Act, correctional facilities often do not provide qualified translators and interpreters. For example, in 2010, WLC had to sue the commonwealth of Virginia to obtain interpreters for and to establish effective communication with inmates who are deaf. To this day, the BOP refuses to provide interpreters for inmates who are deaf, despite clear legal obligations to do so.

All orientation and educational information presented in English, whether in written, audio, or video format, must also be available in any language used by more than one percent of the facility residents. For residents that use a language not covered by the prepared materials, the materials must be explained by a qualified interpreter (sign language) or translator (spoken language).

Throughout the investigation and response process, staff must ensure effective communication with disabled and LEP inmates to the same extent it communicates with all other inmates. For example, staff may not choose to forgo interviews with deaf or LEP witnesses based on a belief that sufficient evidence has been obtained from English-proficient witnesses. Where the agency does not already employ staff fluent in the inmate's language, the primary means of communication must be qualified interpreters or translators in-person. In exigent circumstances only, facilities may use telephonically available translators or video remote interpreting. Agencies must make the arrangements to have such services available at all times.

Additional Comments on Sections 115.16, 115.116, 115.216, and 115.316

FORMER STAFF WHO HAVE RESIGNED RATHER THAN FACE INVESTIGATION INTO ALLEGATIONS OF SEXUAL ABUSE CANNOT BE HIRED OR REHIRED

We concur with the commonsense regulation that agencies may not hire or promote anyone who previously has engaged in sexual abuse. We suggest adding a requirement that no agency may hire a staff member who has previously resigned from that or another agency or contractor in lieu of facing an investigation.

Response to Question 19: Should this standard expressly mandate that agencies attempt to enter into memoranda of understanding that provide specific assistance for LEP inmates?

AGENCIES MUST SPECIFICALLY INCLUDE ASSISTANCE TO LEP INMATES IN ANY MEMORANDA OF UNDERSTANDING

If the Department intends for LEP inmates to be served, Sections 115.22, 115.222, and 115.322 must specifically require a provision to that effect in all memoranda of understanding. The legal requirements on outside entities are too varied and compliance with those requirements are too spotty for the Department to assume LEP inmates will be otherwise served. There is essentially no cost to this requirement and no reason not to do so.

Response to Question 24: Because the Department's proposed standard addressing administrative remedies differs significantly from the Commission's draft, the Department specifically encourages comments on all aspects of this proposed standard.

THE DEPARTMENT MUST PROMULGATE STANDARDS TO HELP SURVIVORS, NOT TO PROTECT AGENCIES FROM LITIGATION

These standards conflate the purposes of PREA and of the PLRA. The PLRA was intended to deter lawsuits. PREA was intended to eliminate custodial sexual abuse. The Department's statement that the standard recognizes "the need to comply with the PLRA" simply makes no sense. There is no "need to comply with the PLRA" in designing sexual abuse standards. The PLRA does not create requirements for administrative remedy systems. It merely creates an affirmative defense government agencies may raise in litigation: if there is a grievance system available to an inmate, he or she must exhaust those remedies prior to filing suit.

As a preliminary matter, underlying the proposed standards are assumptions that the grievance systems generally and the BOP administrative process in particular work well, are manageable by inmates, do not prevent the filing of

otherwise non-frivolous law suits, and solve problems. Those assumptions are completely false.

Our office is the only organization that works with inmates throughout the BOP. We also work and have worked with inmates in the District of Columbia, Virginia, Maryland, and New Jersey state systems and in private facilities run by Corrections Corporation of America, GEO Group, and Cornell Industries. In that work, we regularly try to help inmates navigate the administrative remedy process and review their attempts to use the process. Our collective staff cannot think of a single time where an inmate submitted a grievance reporting a violation of federal law or policy where the response addressed and solved the lapse.

The idea that the grievance policy is used by the BOP to fix serious problems is almost laughable. Two ongoing lawsuits in which our office is counsel are demonstrative. Although neither case involves sexual abuse, both highlight the futility of using the administrative remedy system to solve serious problems, even when abuses are apparent.

The first case is *Womack v. Smith*, ongoing, Middle District of Pennsylvania 1:06-cv-0234, and 310 Fed. App'x 547 (3d Cir. 2009). As the litigation is continuing, there are obviously facts and conclusions still in dispute. Generally, however, the parties agree on the outline of what happened. Mr. Womack was held in restraints for twenty-six days without even breaks to use the bathroom. It is important to stress that there has been almost five years of active litigation, and yet there still has been no ultimate conclusion as to whether even the grievances filed here were timely. Although the trial court recently ruled the grievances were timely and otherwise comported with published regulations, the BOP has notified us that it will be appealing the decision. This will be the second time that the Third Circuit has ruled on the properness of this exhaustion. In this case, our client has been subjected to gross violations of his constitutional rights in a federal prison, violations about which the facility and the BOP regional and central offices received ample notice. Rather than addressing the substance of the obvious constitutional issues, the BOP has focused efforts on contesting the competency of the administrative remedies the victim filed.

In another case, *Bryant v. United States Bureau of Prisons*, ongoing, Middle District of California, CV11 0254, a Deaf man has been housed in several BOP facilities without access to basic interpreting services. A failure to provide interpreting services is an obvious violation of the Rehabilitation Act of 1973. There is no factual question that the inmate is Deaf and that the BOP had not provided him interpreters or other required accommodations.

Despite having retained counsel who hired a sign language interpreter to help him exhaust the grievance process at least twice, multiple letters from counsel

to three wardens, three regional counsels, and an assistant general counsel, the BOP has not complied with the law. Instead, responses have explicitly refused to comply with the law, claimed the BOP had a policy of not following the law, accused him of engaging in bad faith abuse of process by hiring counsel, ruled that he is not entitled to any accommodation, and claimed grievances did not conform to policy that is not available. Now, under pressure from a federal court challenge, the BOP is allegedly reconsidering its recalcitrant stance. It is notable, however, that this long series of administrative remedies, filed over a course of years in three different BOP facilities, three different BOP regional offices, and the national office failed to compel the agency to comply with clearly-established and obviously-applicable federal law. The BOP system is no model.

The Department must step back to first principles and note that there are two purposes to administrative remedy systems. One is to allow facilities to be notified of problems they may wish to solve. The other is to limit the otherwise meritorious claims that may be brought by inmates in court. Restrictions on time and form in which remedies must be presented do not stop facilities from addressing any problems raised. Facilities are always free to address problems whenever they become aware of them. The Department's proposed timelines, in fact, conflict with the stated goal that *all* reports of sexual misconduct will be investigated.

Restrictions are not necessary to prevent non-meritorious claims from prevailing in court. Standard civil procedure and other portions of the PLRA allow courts to screen out frivolous claims and to quickly resolve non-meritorious ones. Restrictions on presentment of grievances therefore serve *only* to prevent inmates from presenting otherwise meritorious cases in court.

Rather than design a complicated new grievance system, the Department should promulgate regulations that ensure agencies that create grievance systems do so in a way that ensures that inmates are protected from sexual abuse and that they are able to present non-frivolous claims in court. In keeping with the purposes of PREA, these regulations must not create obstacles to addressing sexual abuse or allowing inmates to seek redress for abuse in federal court.

For agencies that choose to have administrative remedies available, these standards must ensure that for complaints about sexual abuse and harassment, the following conditions are met:

1. There must be only one level of required administrative remedy, without required appeals. Agencies must be required to treat all of these remedy requests as serious and give them the investigation necessary to address the underlying problems.
2. It must be impermissible to deny such administrative remedy requests on technical grounds, such as using the wrong color ink, descriptions that are

too long or too short, lack of specific requested response, failure to check the right boxes, etc.

3. Every report, from any source, must be treated as a request for an administrative remedy, unless the purported victim specifically requests that it not be.
4. Juveniles should not have the option of requesting that any report from any source not be treated as an administrative remedy request.
5. There must be clear and enforceable time frames in which an agency must respond.
6. There must be a specific system for processing remedy requests from residents who have moved to different facilities, been transferred to other agencies, or who have been released from custody.
7. There must be a means of submitting a sensitive remedy request, should the inmate believe that the remedy request cannot be submitted at his or her institution without compromising safety.

Additional Comments on Sections 115.76, 115.176, 115.276, and 115.376

ANY SANCTIONS MUST BE REPORTED TO POTENTIAL FUTURE EMPLOYERS

When agencies or contractors are contacted by future potential employers, such as those complying with Sections 115.16, 115.116, 115.216, and 115.316, entities must disclose any sanctions imposed. Future collective bargaining agreements must allow for this disclosure. This is critical to ensure abusers are not able to simply transfer to other agencies rather than switch to a career that does not give them further opportunities for abuse.

We commend the Department for promulgating these standards, and again completely endorse the comprehensive comments submitted by JDI. We look forward to the final rule making, and remain available should any further input be desired.

Sincerely,

Rod Boggs

Roderic V.O. Boggs
Executive Director