

February 26, 2013

Secretary Janet Napolitano
Department of Homeland Security
U.S. Department of Homeland Security
Washington, DC 20528

Submitted via Federal eRulemaking Portal

RE: Comments Regarding Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities (DHS Docket No. ICEB-2012-0003)

Dear Secretary Napolitano:

The National Immigrant Justice Center (NIJC) submits these comments in support of the Department of Homeland Security's (DHS's) *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities* (PREA Standards). NIJC applauds the speed with which DHS responded to the President's May 2012 executive memorandum, *Implementing the Prison Rape Elimination Act*. We hope these comments will be incorporated in the final rule in May 2013.

NIJC, a national Chicago-based non-governmental organization, serves immigrants, refugees, and asylum seekers through direct legal representation, policy advocacy, impact litigation, and public education. Since its founding nearly 30 years ago, NIJC has safeguarded the rights of non-citizens, particularly those held in immigration detention. NIJC and its unparalleled network of 1,500 *pro bono* attorneys provide legal advice and representation to more than 10,000 individuals each year. NIJC also conducts regular Know Your Rights presentations in immigration detention facilities, operates a detention hotline, and responds to correspondence from detainees throughout the country.

NIJC contributed to comments submitted earlier today that reflect the priorities of immigrants' rights, women's rights, LGBT, and civil rights organizations. Based upon its experience in immigration detention facilities throughout the country, NIJC would also like to highlight several specific areas of concern, including: 1) training; 2) detainee education; 3) protections for certain populations; and 4) DHS oversight to ensure consistent implementation of these standards.

SUMMARY OF NIJC'S COMMENTS

Proper training is crucial to the overall objective of obtaining an abuse-free environment for detainees. DHS must do more to ensure that training on PREA Standards is ingrained into the work of all employees, contractors, and volunteers who have contact with detainees. To that end, participants should be required to pass an examination to ensure comprehension of the training, and refresher courses should be required annually. Finally, there is no principled basis for distinguishing between detention centers and holding facilities. While holding facilities house detainees for shorter periods of time, the volume of detainees that they process is high, and there is no evidence suggesting that detainees are less vulnerable to abuse in their first hours or days in custody.

NIJC also believes that regular detainee education is crucial to the success of PREA implementation. DHS must ensure that training is available to detainees in languages that they understand and it must be delivered in a culturally-sensitive manner. Moreover, detainee education, like officer and staff training, cannot be a one-time endeavor. Detainees are likely to feel overwhelmed by the volume of information presented to them when entering immigration custody and are thus unlikely to retain all information they receive. Detainees must be given options to receive the information in refresher sessions. Finally, NIJC expects DHS to make greater efforts to ensure that detainees are informed of their legal rights should they become a victim of sexual abuse in detention.

NIJC is deeply concerned with some of DHS's proposed provisions regarding the treatment of vulnerable populations. First, the proposed rule does not explicitly prohibit the housing of immigrant children in adult populations, contrary to the requirements of the *Flores* settlement agreement, which requires the agency to "segregate unaccompanied minors from unrelated adults" if they will be detained for more than 24 hours. Second, NIJC is also concerned that the agency does not specifically address the need to protect immigrant detainees from sexual abuse while in transport. Individuals should be transported by at least two officers and children should be separated from unrelated adults. Finally, NIJC is concerned with the excessive reliance of protective custody or administrative segregation as a means for preventing and responding to sexual abuse in detention. As NIJC's recent report¹ on solitary confinement makes clear, the use of segregation has long-term detrimental effects on the mental and physical health of detainees. Moreover, NIJC has represented detainees who have refused to report abuse out of fear that it would result in segregation. Protective custody in the form of segregation should not be used except in emergency situations and only for limited periods of time. Detainees who are identified as being particularly vulnerable to sexual abuse should be identified as candidates for alternatives to detention programs.

Finally, while NIJC appreciates the efforts that DHS has taken in promulgating these regulations, those efforts will be hollow without meaningful implementation and oversight. First, implementation of PREA as part of contract renegotiation is insufficient without an explicit requirement that all contracts be renegotiated within one year to include an explicit statement that facilities are bound by PREA Standards. This additional step is necessary because many facilities currently operate under continuing variations of old contracts without a formal renewal agreement. Once PREA Standards are in place in all facilities, DHS must ensure that facilities understand that failure to comply with these regulations will be met with negative consequences, including but not limited to the withholding of funds and termination of contracts. DHS must conduct regular audits of all facilities and require facilities to certify in writing that all incidents of abuse are properly documented and reported to both law enforcement and DHS officials. In keeping with the Administration's commitment to transparency, all audits of all facilities must be made publically available.

NIJC looks forward to working with the agency to ensure meaningful implementation of PREA, and specifies its recommended changes to the proposed rule below:

TRAINING

§115.31 Staff training

- (a) The agency shall train, or require the training of, all employees who may have contact with immigration detainees, and all facility staff, to be able to fulfill their responsibilities under these standards, including training on:

¹ *Invisible in Isolation: The Use of Segregation and Solitary Confinement* is available at www.immigrantjustice.org/invisibleinisolacion

- (1) the agency's and the facility's zero-tolerance policies for all forms of sexual abuse;
 - (2) the right of detainees and staff to be free from sexual abuse, and from retaliation for reporting sexual abuse;
 - (3) definitions and examples of prohibited and illegal sexual behavior;
 - (4) recognition of situations where sexual abuse may occur;
 - (5) recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing and responding to such occurrences;
 - (6) how to avoid inappropriate relationships with detainees;
 - (7) how to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees, detainees who do not speak English, detainees who may have survived trauma in their countries of origin, and detainees from other cultures who may have different concepts of what constitutes sexual abuse;
 - (8) ~~procedures for reporting knowledge or suspicion of sexual abuse; and~~ how to fulfill their responsibilities under agency sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures;
 - (9) how to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities; and
 - (10) the requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes.
- (b) All current facility staff, including contractors, and all agency employees who may have contact with immigration detention facility detainees, shall be trained by DHS or using training materials approved by DHS within one year of the effective date of these standards, and the agency or facility shall provide a mandatory refresher information training every two years. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.
- (c) The agency and each facility shall document that staff that may have contact with immigration facility detainees have completed and understand the training. Staff shall be required to pass an examination that ensures understanding of the materials included in the training before continuing in a capacity that could include contact with detainees.
- (d) Such training shall be tailored to the gender of the inmates at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male inmates to a facility that houses only female inmates, or vice versa.

Comments: As DHS notes in its proposed rule, "sexual abuse is not an inevitable feature of detention, and with DHS's strong commitment, DHS immigration detention and holding facilities can have a culture that promotes safety and refuses to tolerate abuse." Ongoing training, augmented by off-year refresher information, will keep staff focused on DHS's "zero tolerance" and will allow staff members to share experiences about implementation of the standards.

NIJC recommends that DHS develop comprehensive training materials, which should include information about appropriate, culturally-sensitive communication with immigrant detainees and how staff can fulfill their responsibilities under the PREA Standards. The need for culturally sensitive communication is heightened by the nature of the immigration detention system, which by definition houses detainees from various cultures. DHS must take reasonable steps to ensure that its staff is culturally sensitive, familiar with and comfortable using appropriate terms and concepts when discussing sexual abuse with a diverse population, and equipped to interact with immigration detainees who may have experienced trauma.

In addition, NIJC believes that a one-time training that is unsupported by a continuing education requirement is insufficient. In order to meaningfully combat sexual abuse in immigration detention, all employees charged with responsibilities directly related to immigrant detainees must receive regular, ongoing training on the protections afforded under the law and the unique issues presented by immigrant populations. Implementing PREA and achieving an abuse-free detention system will not happen overnight. Many of the concepts that will be covered by this training, e.g. those pertaining to sexual orientation and gender identity, reflect a substantial shift in policies. Requiring ongoing training will serve the dual purposes of ensuring that all individuals interacting with detainees appreciate DHS's commitment to an abuse-free environment while also increasing the likelihood that the training's themes will be internalized in the day to day work of those charged with interacting with detainees.

§115.32 Volunteer and contractor training

- (a) The facility shall ensure that all volunteers and contractors who have contact with detainees have been trained on their responsibilities under the agency's and the facility's sexual abuse prevention, detection, intervention, and response policies and procedures.
- (b) ~~The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with detainees, but a~~ All volunteers and contractors who have contact with detainees shall receive the same training described in 115.31(a). Additional training may be provided to volunteers and contractors based on the services they provide and level of contact they have with detainees.
- (c) All current volunteers and contractors who may have contact with immigration detention facility detainees shall be trained within one year of the effective date of these standards, and the agency or facility shall provide refresher training every two years. In years in which a volunteer or contractor does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.
- (d) Each facility shall receive and maintain written confirmation, including employee signature or electronic verification, that contractors and volunteers who may have contact with immigration facility detainees have completed and understand the training. Volunteers and contractors shall be required to pass an examination that ensures understanding of the materials included in the training before continuing in a capacity that could include contact with detainees.

Comments: To effectively protect immigrant detainees from sexual abuse, training on PREA Standards must be universally implemented and reviewed at regular intervals. Only 11% of the immigration detention population is held in ICE service processing centers, which means that roughly 89% of the immigration detention population is confined in a contract facility.² Training of volunteers and contractors is critical to the success of PREA implementation and necessary to ensure compliance under the law.

In 115.131, as applied to holding facilities, the agency clearly indicates that staff, volunteers, and contractors should receive the same training, and that these individuals should receive refreshers on PREA standards. NIJC recognizes that volunteers and contractors will have varying degrees of contact with immigration detainees; however, each must be trained to respond appropriately to sexual abuse. The agency must facilitate the same training for all employees, volunteers, and contractors in order to establish a culture of zero tolerance for any form of sexual abuse in detention facilities. Volunteers and contractors should receive regular refresher trainings and information on current policies. This requirement will go a long way in creating an environment of safety throughout the immigration detention system.

§115.34 Specialized training: Investigations

- (a) In addition to the general training provided to all facility staff and employees pursuant to §115.31, the agency or facility shall provide specialized training on sexual abuse and effective cross-agency coordination to agency or facility investigators, respectively, who conduct investigations into allegations of sexual abuse at immigration detention facilities. All investigations into alleged sexual abuse must be conducted by qualified investigators. Specialized training shall be separate from staff training and include techniques for interviewing sexual abuse victims, proper use of Miranda and Garrity warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.
- (b) The agency and facility must maintain written documentation verifying specialized training provided to investigators pursuant to this subsection.
- (c) Investigators shall also receive the training mandated for employees under §115.31 and for contractors and volunteers under §115.32.

§115.35 Specialized training: Medical and mental health care

- (a) The agency shall provide specialized training to DHS or agency employees who serve as full- and part-time medical practitioners or full- and part-time mental health practitioners in immigration detention facilities ~~where medical and mental health care is provided.~~
- (b) The training required by this section shall be separate from staff training, and cover, at a minimum, the following topics:
 - (1) how to detect and assess signs of sexual abuse;
 - (2) how to respond effectively and professionally to victims of sexual abuse;

² See <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>

- (3) how and to whom to report allegations or suspicions of sexual abuse;⁷
and
 - (4) how to preserve physical evidence of sexual abuse. If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.
- (c) Any facility that does not use DHS medical practitioners shall provide training for its own medical providers. The agency shall review and approve the facility's policy and procedures to ensure that facility medical staff is trained in procedures for examining and treating victims of sexual abuse, in facilities where medical staff may be assigned these activities. The agency shall maintain documentation that medical and mental health practitioners have received and understand the training referenced in this standard either from the agency or elsewhere.
- (d) Medical and mental health care practitioners shall also receive the training mandated for employees under §115.31 and for contractors and volunteers under §115.32.

Comments: The recommended change in (a) clarifies that all immigration detention facilities should provide access to medical and mental health care, as indicated in all versions of the agency's detention standards.

The recommended change in (c) clarifies that non-DHS medical practitioners must be trained as well. NIJC presumes DHS means for these personnel to receive training, but they are not mentioned in the proposed language. These personnel are included in (c) because this is the section that discusses individual facility's policies and procedures.

Medical personnel must be trained on basic sexual abuse prevention just as other personnel are. These professionals need to understand the totality of the facility's sexual abuse prevention efforts and their own responsibility to prevent and report abuse. Medical personnel have unique access to detainees, which positions them to receive reports of abuse. Also, given the private and potentially isolated contact between medical personnel and detainees, it is crucial that prevention of sexual abuse by medical personnel be contemplated in training and by implementing practices that foreclose situations where detainees are particularly vulnerable. For these reasons, medical personnel must receive the core prevention training along with their particularized medical training.

§115.131 Employee, contractor, and volunteer training

- (a) The agency shall train, or require the training of all employees, contractors, and volunteers who may have contact with holding facility detainees, to be able to fulfill their responsibilities under these standards, including trainings on:
- (1) the agency's and the facility's zero-tolerance policies for all forms of sexual abuse;
 - (2) the right of detainees and employees to be free from sexual abuse, and from retaliation for reporting sexual abuse;
 - (3) definitions and examples of prohibited and illegal sexual behavior;
 - (4) recognition of situations where sexual abuse may occur;
 - (5) recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing such occurrences;

- (6) how to avoid inappropriate relationships with detainees;
 - (7) procedures for reporting knowledge or suspicion of sexual abuse; how to fulfill their responsibilities under agency sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures;
 - (8) how to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees, detainees who do not speak English, and detainees who may have survived trauma in their countries of origin; and
 - (9) how to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities; and
 - (10) the requirements to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes.
- (b) All current employees, contractors, and volunteers who may have contact with holding facility detainees shall be trained within ~~two~~ one years of the effective date of these standards, and the agency shall provide refresher information ~~as appropriate~~ annually.
- (c) The agency shall document that employees, contractors, and volunteers who may have contact with detainees have completed and understand the training and receive and maintain for at least five years confirmation that contractors and volunteers have completed and understand this training. Employees, contractors, and volunteers shall be required to pass an examination that ensures understanding of the materials included in the training before continuing in a capacity that could include contact with detainees.

Comments: While detainees are not confined in holding facilities for the same length of time that they are held in immigration detention facilities, sexual abuse may still occur in this context and such abuse is no less harmful than abuse that occurs in other facilities. Indeed, it is conceivable that the risk of abuse is particularly heightened when individuals are first processed into facilities. As NIJC indicated above, all staff, volunteers, and contractors should receive the same training on PREA Standards.

NIJC is concerned that DHS proposes a two year implementation period for training of staff in holding facilities. Holding facility staff has, to date, received the least amount of training and direction in preventing sexual abuse. Therefore, initial training must take place at the earliest possible opportunity, but no later than one year from the point these rules are implemented. While follow-up training can come in the form of refresher information, it must come on an annual basis.

DETAINEE EDUCATION

§115.33 Detainee education

- (a) During the intake process, each facility shall ensure that the detainee orientation program notifies and informs detainees about the agency's and the facility's zero-tolerance policies for all forms of sexual abuse. Within 30 days of intake, the agency shall also provide comprehensive education to

- detainees either in person or through video that and includes (at a minimum) instruction on:
- (1) prevention and intervention strategies;
 - (2) definitions and examples of detainee-on-detainee sexual abuse, staff-on-detainee sexual abuse and coercive sexual activity;
 - (3) explanation of methods for reporting sexual abuse, including to any staff member, including a staff member other than an immediate point-of-contact line officer (e.g. the compliance manager or a mental health specialist), the DHS Office of Inspector General, and the Joint Intake Center;
 - (4) information about self-protection and indicators of sexual abuse;
 - (5) prohibition against retaliation, including an explanation that reporting sexual abuse shall not negatively impact the detainee's immigration proceedings; and
 - (6) the right of a detainee who has been subjected to sexual abuse to receive treatment and counseling.
- (b) Upon a detainee's transfer to another facility, s/he shall receive a refresher of the facility's standards to prevent, detect, and respond to sexual abuse.
- (c) Each facility shall repeat PREA education every 30 days, unless the detainee opts out of the program.
- (d) Each facility shall provide the detainee notification, orientation, and instruction in formats accessible to all detainees, including those who are limited English proficient, deaf, visually impaired or otherwise disabled, as well as to detainees who have limited reading skills. If a detainee cannot read or does not understand the language of the orientation and/or handbook, the facility administrator shall provide the material using audio or video tapes in a language the detainee does understand, arrange for the orientation materials to be read to the detainee, or provide a translator or interpreter within seven days.
- (e) The facility shall maintain documentation of detainee participation in the intake process orientation.
- (f) Each facility shall post on all housing unit bulletin boards the following notices;
- (1) the DHS-prescribed sexual assault awareness notice;
 - (2) the name of the Prevention of Sexual Abuse Compliance Manager; and
 - (3) the name of local organizations that can assist detainees who have been victims of sexual abuse;
- (g) The facility shall make available and distribute the DHS-prescribed "Sexual Assault Awareness Information" pamphlet.
- (h) Information about reporting sexual abuse shall be included in the agency Detainee Handbook made available to all immigration detention facility detainees.

Comments: As proposed, the detainee education provision is inadequate. Detainees cannot be expected fully to understand DHS's multi-faceted sexual abuse prevention initiative if it is only described to them during orientation. To ensure this information is relayed to detainees in a manner they will comprehend and retain, an educational plan similar to the one in the DOJ PREA standards must be adopted. By offering detainees a comprehensive education course on preventing sexual abuse within 30 days of intake, but not during intake, DHS is more likely to effectively prepare them to protect themselves and others from abuse. The intake procedure is hectic and stressful for most immigrant detainees. It is often abrupt and rife with uncertainty about the future. Expecting detainees to participate and retain information that about sexual abuse that they receive at this moment is unrealistic if intake marks the first and only time that the information is provided.

As noted in NPREC's report, the fear of reporting sexual abuse may be more severe for an immigration detainee. The report explains:

In many cultures families and communities view victims of sexual assault very unsympathetically after the abuse becomes known. Sexual abuse victims may be perceived as disgracing the family and even be at risk for retaliation by their own family members. This added danger, coupled with the unfamiliarity with the processes of reporting or even the right to report, makes it even less likely that immigration detainees will disclose sexual abuse experiences.³

It is also important that immigration detainees are consistently educated about zero-tolerance policies for sexual abuse and the rights of detainees who are victims of sexual abuse. The recommended changes ensure that all detainees can understand their rights, even if they are transferred to other facilities and/or detained at a facility for more than 30 days.

PROTECTIONS FOR CERTAIN POPULATIONS

§115.14 Juvenile and family detainees

- (a) ~~In general, juveniles~~ juveniles should be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.
- (b) The facility shall hold juveniles apart from adult detainees, minimizing sight, sound, and physical contact, unless the juvenile is in the presence of an adult member of the family unit, and provided there are no safety or security concerns with the arrangement.
- (c) In determining the existence of a family unit for detention purposes, the agency shall seek to obtain reliable evidence of a family relationship.
- (d) The agency and facility shall provide priority attention to unaccompanied alien children as defined by 6 U.S.C. 279(g)(2), including transfer to a Department of Health and Human Services Office of Refugee Resettlement facility within 72 hours, except in exigent circumstances, in accordance with 8 U.S.C. 1232(b)(3).

³ NPREC Report at 179.

- (e) If a juvenile has been convicted as an adult of crime related to sexual abuse, the agency shall provide the facility and the Department of Health and Human Services Office of Refugee Resettlement with the releasable information regarding the conviction(s) to ensure the appropriate placement of the alien in a Department of Health and Human Services Office of Refugee Resettlement facility.

Comments: This provision suggests that the use of adult facilities for the placement of minors is discouraged but not absolutely forbidden. The DHS commentary accompanying the proposed rules confirms that co-mingled housing is discouraged but not prohibited. NIJC believes that this practice should be prohibited. Contrary to the suggestion in DHS commentary, housing juveniles in adult facilities is not exceedingly rare. NIJC has received preliminary data as a result of a request under the Freedom of Information Act, and that data show that thousands of children, including many under the age of 14, have been housed in adult facilities. This practice violates the terms of the *Flores* settlement agreement, which requires the agency to “segregate unaccompanied minors from unrelated adults” and notes that “Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours.” (See Nationwide settlement regulating INS treatment of detained minors: *Flores v. Ashcroft*.⁴) Children are particularly vulnerable to sexual abuse in custody, and housing immigrant children with adults is dangerous and contrary to the safety needs of the children. PREA regulations that discourage but do not prohibit this practice are insufficient to protect this exceptionally vulnerable population from potential sexual abuse.

§115.19 Transportation

- (a) Two transportation staff members will be assigned to transport a single detainee, including at least one staff member of the same gender as the detainee, except in exigent circumstances. In instances where multiple detainees are transported together, at least two staff members shall participate in the transportation. In the event of exigent circumstances, transportation staff shall call in their time of departure and odometer reading; and then do so again upon arrival, to account for their time.
- (b) Transportation staff will document all situations in which a single staff member transports a single detainee or when two staff members of the same gender transport a detainee of another gender. The documentation shall include the nature of the exigent circumstance and all steps taken to assign two staff members, including at least one staff member of the same gender as the detainee.
- (c) If circumstances arise requiring a pat-down during transport, an assigned transportation staff member of the same gender as the detainee(s) must be present. Transportation staff may conduct cross-gender pat-down searches only in exigent circumstances. Any such search must be fully documented.
- (d) Minors shall be separated from unrelated adults at all times during transport, seated in an area of the vehicle near officers, and remain under their close supervision.

⁴ Full text of settlement agreement available at <http://centerforhumanrights.org/children/Document.2004-06-18.8124043749>

- (e) Detainees of different genders shall be transported separately. If detainees of different genders are transported together, transportation must take place in a vehicle that separates detainees of different genders. Transgender detainees shall be transported in a manner that corresponds to their gender identity.

Comments: DHS detainees are particularly vulnerable to sexual abuse when being transported by security staff. The 2010 arrest of a security staff member from the T. Don Hutto Residential Center facility is a clear example of the risks that detainees face during transportation. In that case, a male security officer was the only staff member transporting female detainees to an airport. Because these detainees were being removed from the country, the staff member believed he had little chance of being held accountable for his sexual abuse of them.

While the DOJ PREA standards do not include a transportation provision, “the unique operational and logistical circumstances encountered in the DHS confinement system” require that one be added to the DHS PREA standards.⁵ Under these “unique and logistical circumstances,” detainees are routinely housed in facilities that are hundreds of miles from the immigration court where their cases will be heard and from the immigration officers responsible for overseeing the circumstances of their detention. Thus, unlike facility staff covered by the DOJ PREA standards, facility staff who will be covered by the DHS PREA standards regularly transport detainees to and from detention centers, holding facilities, immigration court, ICE appointments, and points of departure from the United States.

The recommended language above is based on existing policy from ICE’s 2011 Performance-Based National Detention Standards.⁶ It must be included in the PREA standards so that it is seen as an integral part of preventing sexual abuse and so that its implementation in individual facilities can be assessed under the audit requirement. After all, a similar rule existed at Hutto in 2010 but was not being enforced. Without a reliable way to make sure that transportation practices comply with the terms of this provision, detainees will remain at heightened risk of sexual assault.

§115.43 Protective custody

- (a) The facility shall develop and follow written procedures consistent with the standards in this Subpart A for each facility governing the management of its administrative segregation unit. These procedures, which should be developed in consultation with the ICE Enforcement and Removal Operations Field Operations Director having jurisdiction for the facility, must require detailed documentation of the document detailed reasons for placement of placing an individual in administrative segregation and the reason why no alternative means of separation from likely abusers would effectively protect the detainee.
- (b) Use of administrative segregation by facilities to protect vulnerably detainees shall be restricted to those instances where reasonable efforts have been made to provide appropriate housing and shall be made for the least amount of time practicable, and when no other viable housing options exist, as a last

⁵ A list of PREA research conducted by the Bureau of Justice Statistics can be found at: <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=20>. In particular, those reports based on anonymous surveys of inmates and former inmates (i.e. *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-08* and *Sexual Victimization Reported by Former State Prisoners, 2008*) found high rates of abuse by staff.

⁶ 2011 Operations Manual ICE Performance-Based National Detention Standards, §1.3 Transportation by Land, found at: http://www.ice.gov/doclib/detention-standards/2011/transportation_by_land.pdf

- resort. The facility should assign such detainees to administrative segregation for protective custody only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days. The facility will report to the agency within 24 hours the placement of suspected sexual abuse victims in protective custody.
- (c) Facilities that place detainees in administrative segregation for protective custody shall provide those detainees access to programs, visitation, counsel, and other services available to the general population to the maximum extent practicable. Facilities will thoroughly document all denials of access for detainees in protective custody, the reason for such denials, and their duration, and will take all reasonable steps to remedy conditions that limit access. Access to telephones and visitation with counsel will not be denied to individuals in protective custody.
- (d) Facilities shall implement written procedures for the regular review of all detainees held in administrative segregation, as follows:
- (1) a supervisory staff member shall conduct a review within 72 hours of the detainee's placement in administrative segregation to determine whether segregation is still warranted; and
 - (2) a supervisory staff member shall conduct, at a minimum, an identical review after the detainee has spent seven days in administrative segregation, and every week thereafter for the first 30 days, and every 10 days thereafter.
- (e) Once a detainee is held in protective custody for 30 days, the facility shall contact the Field Office Director, who shall notify the Deputy Assistant Director, Detention Management Division in writing. The Deputy Assistant Director shall then consider transferring the detainee to a facility where s/he may be placed in the general population or placement in an alternatives to detention program.
- (f) Facilities must submit quarterly report to ICE Enforcement and Removal Operations regarding the number of immigration detainees held in protective custody, the reasons for placement, and the length of time each individual remained in administrative segregation. As part of the periodic audits envisioned under these regulations, the agency shall review all instances involving the use of administrative segregation, and where a facility is found to have relied on segregation for purposes other than as the least restrictive means, the facility shall be subject to appropriate remedial measures that are consistent with the overall audit scheme contemplated by these regulations.

Comments: Through orientation conducted by staff, immigration detainees understand that segregation is a punishment for violating a facility rule, and the conditions of confinement associated with administrative segregation add credence to this understanding. In NIJC's experience, many facilities that house immigrant detainees have a single segregation unit that holds individuals in disciplinary segregation, administrative segregation, and protective custody. By placing victims of sexual assault in segregation units with others who are being punished, the facility signals to many victims that they are being punished for reporting abuse. For example, NIJC currently represents

multiple clients who have explained that they are reluctant to report abuse in detention out of fear that they will be placed in segregation as a result of their actions. Placement in segregation units is especially troublesome for victims who have limited English proficiency and who may come from cultures where public knowledge of sexual abuse can lead to retaliation. For this reason, the facility must take reasonable steps to ensure that segregation of victims is a last resort.

Moreover, the agency must be informed each time a suspected sexual abuse victim is placed in protective custody. If a facility cannot safely separate a victim of sexual abuse without resorting to protective custody, the agency must consider releasing the individual from detention. Use of alternatives to detention in this circumstance affords detainee victims access to social and legal services at no cost to the agency.

DHS OVERSIGHT

§115.12 Contracting with non-DHS entities for the confinement of detainees

- (a) When contracting for the confinement of detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, including other government agencies, the agency shall:
 - (1) ~~include in any new contracts or contract renewals the entity's obligation to adopt and comply with these standards; and~~
 - (2) initiate contract modification negotiations with any existing non-DHS private or public agency or other entity within 90 days of the effective date of this rule to require adoption and compliance with these standards. Such negotiations must be completed within 270 days of the effective date of this rule. If a contract with an existing non-DHS private or public agency or other entity is scheduled to be renewed within 270 days of the effective date of this rule, that renewal process may take the place of a modification request so long as the renewed contract requires adoption and compliance with these standards.
- (b) Any new contracts, contract modifications, or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.
- (c) Any facility that fails to adopt these regulations, whether through a new contract, a contract modification, or a contract renewal, within the time frame discussed above shall not be permitted to continue the detention non-citizens until this contract deficiency is remedied.

Comments: To effectively address the crisis of sexual abuse in DHS confinement facilities, DHS must fully implement the PREA Standards within all contract confinement facilities in a timely manner. Failure to do so significantly undermines the goals of PREA and DHS's ability to protect everyone confined under its authority. As drafted, the contracting provisions are inadequate. ICE has numerous contracts that will not be renewed for up to twenty years and others that are explicitly in effect in perpetuity. Still other facilities continue to operate on an expired contract. Any requirement that PREA Standards become operational in contract facilities only upon contract renewal is therefore meaningless as to many facilities unless there is an affirmative obligation to quickly bring all facilities into compliance.

DHS must proactively apply the DHS PREA Standards to facilities run by non-DHS private or public agencies or other entities. NIJC proposes a reasonable timeline that would enable DHS to seek and secure modification of existing contracts. While this timeline would mean that thousands of detainees held in contract facilities would be without the protection of DHS PREA Standards for nine months, it is a common sense compromise between the urgency of the situation and the bureaucratic process necessary to modify existing contracts. The proposed language also takes into account that some contracts do have annual renewal dates and allows most of those dates to stand-in for the modification requirement.

§115.22 Policies to ensure investigation of allegations and appropriate agency oversight

- (a) The agency shall establish an agency protocol, and shall require each facility to establish a facility protocol, to ensure that each allegation of sexual abuse is investigated by the agency or facility, or referred to an appropriate investigative authority. The agency shall ensure that an administrative ~~or~~ and criminal investigation is completed for all allegations of sexual abuse.
- (b) The agency shall ensure that the agency and facility protocols required by paragraph (a) include a description of responsibilities of the agency, the facility, and any other investigating entities; and require the documentation of maintenance, for at least five years, of all reports and referrals of allegations of sexual abuse.
- (c) The agency shall post its protocols on its website; each facility shall also post its protocol on its website, if it has one, or otherwise make the protocol available to the public.
- (d) Each facility protocol shall ensure that all allegations are promptly reported to the agency as described in subsection (e) and (f) below, and, ~~unless the allegation does not involve potentially criminal behavior,~~ are promptly referred for investigation to an appropriate law enforcement agency with the legal authority to conduct criminal investigations. The facility head, or its assignee, must request that the law enforcement agency conduct an appropriate investigation of each allegation of abuse. A facility may separately, and in addition to the above reports and referrals, conduct its own investigations. However, this investigation will not supplant or impede a criminal investigation.
- (e) When a detainee, prisoner, inmate, or resident of the facility in which an alleged detainee victim is housed is alleged to be the perpetrator of detainee sexual abuse, the facility shall ~~ensure that the incident is promptly reported~~ to the Joint Intake Center, the ICE Office of Professional Responsibility or the DHS Office of Inspector General, as well as the appropriate ICE Field Office Director, and, if it is potentially criminal, referred to an appropriate law enforcement agency having jurisdiction for investigation.
- (f) When a staff member, contractor, or volunteer is alleged to be the perpetrator of detainee sexual abuse, the facility shall ensure that the incident is promptly reported to the Joint Intake Center, the ICE Office of Professional Responsibility or the DHS Office of Inspector General, as well as

- to the appropriate ICE Field Office Director, and to the local government entity or contractor that owns or operates the facility. If the incident is potentially criminal, the facility shall ensure that it is promptly referred to an appropriate law enforcement agency having jurisdiction for investigation.
- (g) The agency shall ensure that all allegations of detainee sexual abuse are promptly reported to the PSA Coordinator, and to the appropriate offices within the agency and within DHS to ensure appropriate oversight of the investigation.
- (h) ~~The agency~~ PSA Compliance Manager, or its assignee, shall ensure that any alleged detainee victim of sexual abuse ~~that is criminal in nature~~ is provided access to U nonimmigrant visa information in a timely fashion, but not more than two weeks following the incident. This information will include instructions on how to apply for the U visa and contact information for legal service providers with the expertise to assist the detainee. Additionally, the facility head or its assignee shall make every effort to ensure that the victim has legal counsel that can provide advice on petitions for U nonimmigrant status.
- (i) The agency shall designate an enforcement or investigative officer, such as but not limited to the PSA Compliance Manager, to complete a USCIS Form I-918, Supplement B for any detainee victim of sexual abuse who meets the certification requirements.
- (j) The agency shall ensure that any alleged detainee victim of sexual abuse is not removed from the United States while the investigation is pending, unless the detainee victim specifically and expressly waives this prohibition in writing. In situations where the detainee victim is a member of a family unit, the agency shall ensure that no family members are removed from the United States while the investigation is pending, unless that family member is the abuser. In addition, the agency shall ensure that the victim is not transferred to another facility in a way that materially interferes with the investigation of the allegation unless essential to the protection of the victim. In that case, the agency shall ensure that the victim continues to be available to cooperate with the investigation.
- (k) If the victim cooperates with the investigation and if the allegations are not found to have been unfounded, the agency will ensure that the victim is not removed from the United States if the victim indicates a wish to petition for U nonimmigrant status and moves to file such a petition within a reasonable period. In such a case, the agency will ensure the victim is not removed before obtaining necessary certified documents to apply for U nonimmigrant status.

Comments: The recommended changes to this section are critical to the successful implementation of PREA Standards. In NIJC's experience, local law enforcement officials around the country have been told not to investigate an allegation of sexual assault at DHS contract facilities because these matters are theoretically handled internally. In other cases, law enforcement or child protection services agencies refused to investigate allegations, claiming a lack of jurisdiction because the

detainee was in federal custody. The reference to allegations that do not involve “potentially criminal behavior” is deleted since any allegation of sexual abuse as defined in §115.6 is potentially criminal. The recommended language simply furthers the intent of the proposed language by giving administrators and local law enforcement agencies clear guidance and by removing the step of delegating to a front-line officer the task of determining what activities may be criminal.

Similarly, the recommendations to (h) provide additional guidance to help administrators understand who has responsibility for providing U visa information and what that information should contain. Traditionally, survivors of sexual abuse in DHS confinement facilities have received little, if any, information or assistance in applying for a U visa. Yet the benefits of the U visa to law enforcement efforts are well known. As increased attention is paid to investigating and prosecuting criminal sexual abuse that occurs in DHS confinement facilities, the U visa will become a more important law enforcement tool.

The recommended language for new subsection (i) is meant to prevent qualified agency personnel from declining to assist a detainee with a U visa application. Signing the Supplement B form is not admission of liability on the part of the agency, but simply an acknowledgement that the detainee was or is likely to be helpful in an investigation.

Additionally (j) and (k) seek to prevent detainees from being removed from the United States while the investigation is pending. The agency must also ensure that the victim is not unnecessarily transferred to a different facility. If a transfer is necessary, the victim must be given the opportunity to cooperate with the investigation. In these circumstances, where there is evidence that the agency’s preventative measures have failed to protect the victim, it is the agency’s responsibility to take appropriate legal measures to prevent the victim’s removal from the U.S. while the investigation is pending.

§115.86 Sexual abuse incident reviews

- (a) Each facility shall conduct a sexual abuse incident review at the conclusion of every investigation and sexual abuse and, where the allegation was not determined to be unfounded, prepare a written report recommending whether the allegation or investigation indicates that a change in policy or practice could better prevent, detect, or respond to sexual abuse. The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so in a written response. Both the report and response shall be forwarded to the agency PSA coordinator.
- (b) Each facility shall conduct an annual review of all sexual abuse investigation and resulting incident reviews to assess and improve sexual abuse intervention, prevention and response efforts. If the facility has not had any reports of sexual abuse or assault in the past year, the facility will indicate this in its report. The results and findings of the annual review shall be provided to the agency PSA Coordinator.

§115.188 Data review for corrective action

- (c) The agency shall review data collected and aggregated pursuant to §115.187 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including by:
 - (1) identifying problem areas;

- (2) taking corrective action on an ongoing basis; and
 - (3) preparing an annual report of its findings and corrective actions for the agency as a whole
- (d) Such report shall including a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in preventing, detecting, and responding to sexual abuse.
- (e) The agency's report shall be approved by the agency head and made readily available to the public through its website. Reports shall be updated on the website at least annually.
- (f) The agency may redact specific materials from the reports, when appropriate for safety or security, but must indicate the nature of the material redacted.

115.93 Audits of compliance

- (a) During the three-year period starting on [INSERT DATE ONE YEAR PLUS 60 DAYS AFTER EFFECTIVE DATE OF THE STANDARDS], and during each three-year period thereafter, the agency shall ensure that each of its immigration detention facilities, including those run by a non-DHS private or public entity, is audited at least once.
- (b) The agency may order an expedited audit of a DHS run facility, or request an expedited audit of a facility run by a non-DHS private or public entity if the agency has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with PREA-related issues.
- (c) Audits under this section shall be conducted pursuant to §§ 115.201-205 of Subpart C.
- (d) Audits under this section shall be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.
- (e) The DHS Office of Civil Rights and Civil Liberties will also create a process by which a member of the public may recommend an expedited audit of any facility if that person believes that the facility may be experiencing problems related to sexual abuse.

§ 115.204 Audit corrective action plan

- (a) A finding of "Does Not Meet Standard" with one or more standards shall trigger a 180-day corrective action period.
- (b) The auditor at the agency, with the facility ~~if practicable~~, shall jointly develop a corrective action plan to achieve compliance.

- (c) The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility.
- (d) After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action.
- (e) If the facility does not achieve compliance with each standard within the 180 days, the agency shall place the facility on probation for a duration of six months. At six months, the facility shall, it may (at its discretion and cost) request a subsequent audit once it believes that it has achieved compliance. If the facility again fails to achieve compliance, the agency shall withhold [INSERT APPROPRIATE PERCENTAGE] of the facility's funding. If a facility continues to fail compliance inspections, the agency shall terminate its contract and the facility shall not be allowed to detain individuals for a period of three years.

Comments: The agency must make it clear that non-compliance with PREA Standards is not tolerated. The recommended changes contemplate strict and tangible sanctions for facilities that repeatedly fail to protect immigration detainees from sexual abuse.

Thank you for your consideration of these comments.

Should you have any questions about these comments, please contact Alexis Perlmutter at aperlmutter@heartlandalliance.org or at 312.660.1363.