May 10, 2010

BY ELECTRONIC TRANSMISSION

Robert Hinchman, Senior Counsel
Office of Legal Policy
Department of Justice
950 Pennsylvania Avenue, NW
Room 4252
Washington, DC 20530

Re: Department of Justice
National Standards to Prevent, Detect, and Respond to Prison Rape
Docket No. OAG-131

Dear Mr. Hinchman:

The Center for HIV Law and Policy ("CHLP"), on behalf of the undersigned organizations, submits these comments on the Department of Justice's Proposed National Standards to Prevent, Detect, and Respond to Prison Rape, Docket No. OAG-131. We appreciate the opportunity to provide these comments to address the specific needs of young people who are confined in detention facilities, jails, and prisons across the country.

CHLP is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV. For the past two years, CHLP and a coalition of community based organizations, medical professionals, and juvenile justice officials have been working on Teen SENSE (Sexual health and Education Now in State Environments), an initiative that promotes comprehensive sexual health care for juveniles in state custody, including detention and foster care facilities. Teen SENSE emphasizes that sexual health education, sexual medical care, and training for staff on sexuality, sexual orientation and appropriate conduct with youth is central to healthier lives for at-risk youth and reduces the risk of sexual abuse and harassment in these facilities.

Introduction

We commend the DOJ for tackling the very serious matter of rape and sexual abuse in detention and correctional facilities. Towards that end, we believe the DOJ's Bureau of

Justice Statistics Special Report on Sexual Victimization in Juvenile Facilities from January 2010 ("BJS Report") on the sexual assault experiences of young people in detention was an important, if sobering, step in calling attention to the extent of the violence that youth in custody, particularly lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") youth, suffer.[1]

Youth in state custody are particularly vulnerable to sexual victimization. According to the BJS Report, from 2008 to 2009 at least one in ten youth was sexually abused; at least one in ten youth experienced staff sexual misconduct; and LGBTQ youth were ten times more likely to be sexually victimized than heterosexual youth.[2] The NPRE Commission has also found that "juveniles in confinement are much more likely than incarcerated adults to be sexually abused [...] [and] [t]o be effective, sexual abuse prevention, investigation, and treatment must be tailored to the developmental capacities and needs of youth."[3]

According to a National Institute of Health longitudinal study of morbidity and mortality over a twenty-four year period, "childhood experiences often set-up cascading events over life that have dramatic effects on adult health."[4] Therefore, "economic and education policies that are targeted at children's well-being are implicit health policies with effects that reach far into the adult life course."[5] It is well documented that sexual abuse and trauma have life-long effects that can result in post-traumatic stress disorder, violence, prostitution, depression, and suicide well after the initial abuse took place.[6] Failure to address the crisis of sexual assault to which youth in detention and correctional facilities are subjected has far-

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[1] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 2008-2009 (2010)
[2] Bureau of Justice Statistics, *supra* note 1 at 3, 1, 11.
[3] NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 16 (2009). At least one federal district court has already held that a state violated the rights of youth in its custody by failing to develop policies, procedures, and staff training necessary for understanding and protecting LGBTQ youth. In *R.G. v. Koller*, the District Court of Hawaii examined the conditions at the Hawaii Youth Correction Facility (HYCF), where youth who identified as or were perceived to be LGBT were subject to pervasive verbal and physical harassment by guards and other youth. 415 F. Supp. 2d.1129 (D. Haw. 2006). The court found that the pervasive verbal abuse in the form of homophobic slurs harmed the youth in HYCF's care. *Id*. at 1143-44. The court noted that, because youth in custody "cannot retreat to the safety of their home and family at the end of the day [. . .] name-calling and other identity-based harassment based on actual or perceived sexual orientation or gender identity by guards at HYCF often is acutely damaging to wards who have been entrusted to the state's care by the family court." *Id.* The court held that HYCF violated the Due Process Clause by failing to maintain policies and training to protect LGBT youth, adequate staff and supervision, a functioning grievance system, and a classification system to protect vulnerable youth. *Id.* 1156-57. While the court stated that it did not suggest that the constitution requires particular policies or safeguards, it made clear that "failure to adopt any professionally acceptable methods of maintaining order and safety," including "failure to adopt policies and procedures and to provide training regarding how to ensure the safety of LGBT wards" violated the due process rights of the youth in HYCF custody. *Id*. at 1157.
[4] MARK. D. HAYWARD, THE LONG ARM OF CHILDHOOD: THE INFLUENCE OF EARLY LIFE CONDITIONS ON ADULT MORBIDITY AND MORTALITY, PENN. STATE UNIVERSITY (2004) *available at* http://www.rand.org/labor/aging/rsi/rsi_papers/2004_hayward4.pdf.
[5] *Id.*
[6] Bureau of Justice Statistics, *supra* note 1 at 14; Frank Putnum, *Ten Year Research Update Review: Child Sexual Abuse*, 42 JOURNAL AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 269, 271 (2003).

reaching consequences for these young people and the communities to which they eventually return.

We endorse the standards now proposed by the National Prison Rape Elimination Commission ("NPRE Commission") to address and eliminate sexual assault in these facilities and believe their adoption is essential if unwanted sexual contact and abuse of vulnerable detainees is to be eliminated. Clearly, there is a need for dramatic change in the policies and programs to put an end to the epidemic of sexual abuse of youth in state custody. No change will happen without clear standards that set the course for new services and protections for these youth

However, we believe that for the standards to be effective, they must also address in a positive, proactive way the connection between implementation of routine, comprehensive sexual health care programs and the elimination of sexual assault.

Provision of sexual health care for youth in detention and correctional facilities is not only an ethical imperative, it is the affirmative legal obligation of these facilities. When the state takes a young person into its custody, the due process clause of the federal Constitution requires the state to take affirmative steps to ensure the well-being of that individual, including provision of medical services, mental health services, and staff training adequate to preserve his or her physical and psychological health and safety.[7] Comprehensive sexual health care is a key part of essential medical services for young people who must rely on the state for all aspects of their care and education, and who are at a demonstrably significant risk, by virtue of their detention, for sexual assault and abuse.

To most effectively protect the sexual health and safety of young detainees, the proposed standards must recognize the unique vulnerability and needs of these young people and the importance of addressing sex and sexual health in a broader, more affirmative way. By proposing standards for health screenings, education, and training that focus on sex exclusively through the prism of sexual abuse and its prevention, the standards proposed by the NPRE Commission, while extraordinary in many respects, simply do not go far enough. Prevention of sexual abuse should occur in a broader framework of respect for and cultivation of long-term sexual health. The standards should explicitly recognize the critical connection between access to sexual health care – including medical services that go beyond admission screening, sexual education programs for youth, and staff training that ensures understanding of sexuality, sexual orientation, and healthy sexual expression – and the prevention of sexual abuse.

[7] In *A.M. v. Luzerne County Juvenile Detention Center*, for example, the Third Circuit allowed a youth's suit against a detention center to go forward on the theory that the detention center had insufficient policies to ensure the physical safety and psychological well-being of those in its custody. 372 F.3d 572, 583-85 (3rd Cir. 2004). Similarly, in *Alexander S. v. Boyd*, the federal district court for the District of South Carolina held that a state detention center's policies violated the Fourteenth Amendment by failing to provide adequate education to special-needs youth, adequate medical services due to a shortage of nurses, and adequate programming geared toward correcting the behavior of youth in custody. 876 F.Supp. 773, 787-89, 790, 797 (D. S.C. 1995).

I. The Standards for Medical Services to Prevent Sexual Abuse Should be Broadened to Include Regular Access to a More Complete Array of Sexual Health Care Services

While the NPRE Commission provides standards focused on medical care screenings, we recommend expanded medical care services and programs that, by routinizing sexual health care and education, will more effectively deter and detect sexual abuse. Standards AP-1[8] and MM-1[9] discuss screening youth to determine past sexual victimization, sexual and gender identity, and any potential information that may require a need for heightened supervision. While such screenings are important, they are only part of the preventive medical care needed to reduce sexual abuse.

Because LGBTQ youth are ten times more likely to experience sexual abuse than heterosexual youth, the standards need to substantively address the heightened vulnerability of these young people in readily-available medical services.[10] Because LGBTQ youth are traditionally quite marginalized in these facilities, it is particularly important that there be a medical staff and a medical support system that recognizes the existence and needs of these youth if they are to safely report and be treated for instances of sexual misconduct.[11] To ensure that youth have reasonable, regular access to the range of sexual health and medical related services needed in this context, we recommend that the sections of the standards related to the medical care of youth in custody include the following language:

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[8] Nat'l Prison Rape Elimination Comm'n, *supra* note at 6, 226. ("AP-1: Obtaining information about residents: During intake and periodically throughout a resident's confinement, employees obtain and use information about each resident's personal history and behavior to keep all residents safe and free from sexual abuse. At a minimum, employees attempt to ascertain information about prior sexual victimization or abusiveness; sexual orientation and gender identity; current charges and offense history […] and any other specific information about individual residents that may indicate a heightened need for supervision, additional safety precautions, or separation from certain residents.")

[9] Nat'l Prison Rape Elimination Comm'n, *supra* note at 1, 228. ("MM-1: Medical and mental health intake screenings: During medical and mental health reception and intake screenings, qualified medical or mental health practitioners talk with residents to ascertain information regarding the resident's sexual orientation, gender identity, prior sexual victimization or history of engaging in sexual abuse […].")

[10] LGBTQ youth face distinct health challenges, in addition to sexual abuse, including an increased risk for substance abuse, sexually transmitted infections, and eating disorders. Due to the societal discrimination and isolation, these youth commonly suffer from the effects of chronic stress as a result of this discrimination which can lead to increased levels of depression and anxiety. SHANNEN WILBER ET AL., THE MODEL STANDARDS PROJECT: CREATING INCLUSIVE SYSTEMS FOR LGBTQ YOUTH IN OUT-OF-HOME CARE 6 (2006). Puberty is a particularly difficult time for transgender youth due to a lack of a support system to make sense of their physical changes. These changes may shame or repulse transgender youth, prompting them to attempt to alter their appearance by concealing or injuring unwanted body parts, or purchasing homes drugs. Fear of ridicule, rejection, or harassment prevents many transgender youth from seeking services in the health care system. As a result, transgender youth may not receive health care on a consistent basis, much less care that addresses their individual health needs. Due to the lack of social, medical, and societal support LGBTQ are two to three times more likely to attempt suicide than their heterosexual peers and account for up to 30% of all completed suicides among teens. REGION II MALE INVOLVEMENT ADVISORY COMMITTEE, GUIDELINES FOR MALE SEXUAL AND REPRODUCTIVE HEALTH SERVICES: A TOOL FOR FAMILY PLANNING PROVIDERS 25 (2005).

[11] Nat'l Prison Rape Elimination Comm'n, *supra* note 6 at 73-74, 145-148.

> All youth must receive a complete sexual health assessment and health maintenance examination ("initial examination"). The initial examination must include a medical history; social history; physical examination; sexual transmitted infection ("STI") and HIV counseling; offer of STI and HIV testing; contraception counseling; pregnancy counseling and offer of pregnancy test; and assessment of potential abuse, including sexual abuse. The initial examination and subsequent annual examinations of youth from age 11 and up must include a discussion of the youth's involvement in sexual behaviors, in connection with STI, HIV, history of abuse, and pregnancy counseling and recommendations. Inquiries and discussion should include: sexual orientation, gender identity, age of initiation into sexual activity, frequency of sexual activity, gender of partners, type of sexual activity, use of contraception and motivation for use, use of prophylaxis and motivation for use, history of forced or coerced sex, and history of STI and HIV testing. Staff should discuss these topics in a confidential, non-judgmental manner during the course of the examination, in a way that is accepting and normalizing of the full spectrum of sexual identity and behavior. Youth who identify as gay, lesbian, bisexual, transgender, or questioning should be asked about feelings of social acceptance or isolation. This especially applies to adolescents who are in the process of coming out. Providers should be aware of the health concerns facing lesbian, gay, bisexual, transgender, and questioning youth, and should be aware of the relevance of sexual orientation and gender identity on the youth's health status.

The initial examination serves as a true assessment of the youth's health status and initial indicators of risk for sexual abuse. Youth who have been sexually victimized, whether prior to or after enrollment in corrections or detention facilities, may experience fear and anger and present with a history of or current STIs, pregnancy, or other health and mental health related issues that need to be addressed. It also is important for medical staff to have a full sexual health history for the youth in their care at the outset, in part because such a history may help to identify subsequent sexual abuse that a youth might be afraid or unwilling to disclose.

Many youth may be initially unwilling to discuss current or past sexual victimization because they do not trust the medical providers or are fearful of retribution. Therefore, it is important that medical providers not only conduct a thorough medical, sexual, and social history, but also establish a rapport and trust with youth that can require multiple visits, medical evaluations, and counseling.

II. The Standards Should Require Comprehensive Sexuality Education That Fosters Understanding of Sexuality, Sexual Orientation, and Gender Expression

To provide youth with an effective sexual abuse prevention program, the standards should explicitly affirm that sex abuse education programs in these facilities provide youth with a basic understanding of sexual anatomy and development; sexuality and healthy relationships;

sexual orientation; and gender roles and gender identity.[12]

The NPRE Commission standard TR-3 focuses on youth education in relationship to sexual abuse but the standards need to include more information covering the basic concepts of sexual education and sexual health. Standard TR-3 asserts that all residents should receive age appropriate education about identifying sexual abuse and how to report any abuse.[13] However, to prevent sexual abuse, these facilities must focus on routinizing discussions on a variety of sexual health issues with frequent and continual programs. Therefore, we encourage that the following language be incorporated into the standards:

> Sexual health education programs for youth should include, but not be limited to, comprehensive, scientifically accurate, and age-appropriate information on anatomy and development; STI and HIV prevention, transmission, and treatment; sexuality and healthy relationships; sexual orientation; gender and gender identity; pregnancy and pregnancy options; prevention skills related to sexual relationships; contraception; sexual violence and abuse; and access to facility and community resources available for additional information on all issues discussed. These programs should be conducted on a regular basis.

The United States Department of Education has noted that "sex education ideally should provide every adolescent with full information about the entire gamut of sexual activities and outcomes and their social-emotional components."[14] Effective sexual education programs in these facilities need to include a curriculum that goes beyond the narrow focus of sexual abuse, and instead addresses a range of important topics not only on sexual development but also on the way youth think and communicate about their bodies, their sexual identity, and how they respect the sexual identity and bodies of others. This is particularly relevant in terms of LGBTQ youth who are often abused because of their sexual orientation due to bigotry and a lack of understanding of other youth and staff.

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[12] UNICEF, CHILD PROTECTION: A HANDBOOK FOR PARLIAMENTARIANS 72 (2004) *available at* www.ipu.org/PDF/publications/childprotection_en.pdf ("Sexual health education […] enables the child to understand the nature of sexual activity and helps safeguard against sexual abuse based on misrepresentation of the nature of the act."); JAMES KRIVACKSA, CHILD ABUSE PREVENTION PROGRAMS AND ACCUSATIONS OF CHILD SEXUAL ABUSE: AN ANALYSIS, INST. FOR PSYCHOLOGICAL THERAPIES (1989) *available at* www.ipt-forensics.com/journal/volumne1/j1_1_2.htm ("A more sensible approach [to preventing child abuse] would be a primary prevention approach geared toward improving the overall mental health and probably-solving skills among children ... Such a program may include some exposure to the concept of sexual abuse but only after some general sexual education.").

[13] Nat'l Prison Rape Elimination Comm'n, *supra* note at 6, 226 ("TR-3: Resident Education: Within a reasonably brief period of time following the intake process, the agency provides comprehensive age-appropriate education to residents regarding their right to be free from sexual abuse and to be free from retaliation for reporting abuse, the dynamics of sexual abuse in confinement, and the common reactions of sexual abuse victims, and agency sexual abuse response policies and procedures.").

[14] U.S. HEALTH CARE FINANCING ADMINISTRATION, A GUIDE TO ADOLESCENT HEALTH CARE: EPSDT 51 (1980)

An education program for youth in state custody cannot ignore how homophobia relates to sexual violence. A consistent, serious problem common in most youth detention facilities is the routine acceptance of negative treatment, harassment, and abuse of LGBTQ youth. These individuals are more likely to be sent through the juvenile justice system due to abandonment by their family and using risk survival skills, such as prostitution, to cope.[15] They are routinely the target of discrimination, harassment, sexual assault, and violence from peers and staff at custodial facilities.[16] The NPRE Commission has noted that LGBTQ youth are targeted by staff and other youth more often than heterosexual youth; "[r]esearch on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations and transgender individuals."[17] To prevent sexual violence against LGBTQ youth it is absolutely imperative that there are sexual education standards that bring greater sensitivity and awareness to the issues faced by these particularly vulnerable young detainees.

Sexual education can eliminate sexual abuse in routinizing discussions on sex and providing youth with the ability to understand and communicate about sexual issues in a positive and proactive way.[18] Research and experience show that sex education programs result in increased levels of disclosure when abuse occurs and a decrease in self-blame by the victim of abuse in these situations.[19] The standards should reflect this fact through explicit reference to the role of comprehensive sexual health education programs in reducing sexual abuse.

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[15] Peter A. Hahn, *The Kids are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities*, 14 B.U. PUB. INT. L.J. 117 (2005) 121 -24.
[16] CHILD WELFARE LEAGUE OF AMERICA, CWLA BEST PRACTICE GUIDELINES: SERVING LGBT YOUTH IN OUT-OF-HOME CARE 6, 49-50 (2006).
[17] Nat'l Prison Rape Elimination Comm'n, *supra* note at 6, 7
[18] UNICEF, *supra* note at 12; James Krivacksa, *supra* note at 12; Gretchen Overstolz, Prevent Child Sexual Abuse *available at* http://www.darkness2light.org/KnowAbout/articles_prevent_abuse.asp (finds that children will be better able to discuss and report sexual abuse once they are educated with the descriptive language and knowledge about sex); Patricia C. Wass, Sex Education Helps Keep Children Safe From Abuse, *available at* http://www.smith-lawfirm.com/sex_ed.html ("The focus of the discussion has been about keeping children and teens safe from unwanted pregnancy and disease, especially important in light of the increasing spread of HIV and AIDS. As usual, opinions range across the spectrum, from no sex education in the schools to the schools should start as early as possible. But there is a piece of the debate which does not seem to be taking place at all: the importance of educating children about healthy sexuality in order to help kids keep themselves safe from sexual abuse."); *See also* Unitarian Universalist Association of Congregations, Lifespan Sexuality Education Curricula, *available at* http://www.uua.org/religiouseducation/curricula/ourwhole/; The American Psychological Association on Understanding Child Sexual Abuse: Education, Prevention, and Recovery (Protecting Children from Sexual Abuse) *available at* http://www.apa.org/pubs/info/brochures/sex-abuse.aspx.
[19] David Finkelhor, *The Prevention of Childhood Sexual Abuse*, 19 FUTURE OF CHILDREN 169, 181 (2009); David Finkelhor et al., *Victimization Prevention Programs for Children: A Follow-Up,* 85 AM. JOURNAL. OF PUB. HEALTH 1684, 1688 (1995).

III. Staff Training Standards Should Require That All Youth Detention and Corrections Staff Are Trained and Competent in the Areas of Sexuality, Sexual Orientation, and the Needs of LGBTQ Youth

Staff play an elemental role in maintaining the safety of youth in state custody. Standards T-1[20] and T-5[21] focus on staff and medical staff training, but restrict the area of competence to recognizing sexual abuse. It is critical that these standards also require that all staff have training in a basic understanding of sexuality, sexual orientation, and the particularized needs of LGBTQ youth.

Staff at every level, including all administrative staff, medical and mental health providers, direct care staff, social workers, security personnel, and other employees or volunteers who have regular contact with youth in custody must have comprehensive sexual education training in addition to background checks and screenings. The training should include law and policy; diversity, cultural awareness, and vocabulary; identity, sexuality, and gender formation; and the effects of homophobia, transphobia, and heterosexism.

We recommend that the following language be included in the standards for staff training:

> All staff and medical personnel must have training and education that addresses the particular sexual health needs of youth in their care. This includes, but is not limited to, training on sex; sexual anatomy; sexual identity; sexual orientation; gender identity; the particular health care needs of LGBTQ youth; sexual violence, abuse, and harassment; and transphobia, homophobia, and heterosexism.

Training for staff at every level in the facility should help staff protect the rights and provide for the safety of all youth in their care. Staff should demonstrably understand the detrimental effect that homophobia and transphobia have on health outcomes for LGBTQ youth; understand the reasons that may have lead LGBTQ youth to be in their care; and use appropriate and respectful terms to identify youth of all sexual orientations and gender identities. Training should encourage better communication and understanding between staff and youth, and LGBTQ youth should not have to fear harassment by staff based on

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[20] Nat'l Prison Rape Elimination Comm'n, *supra* note at 6, 225 ("TR-1: Employee Training: The agency trains all employees to be able to fulfill their responsibilities under agency sexual abuse prevention, detection, and response policies and procedures […] The agency trains all employees to communicate effectively and professionally with all residents. Additionally, the agency trains all employees on a resident's right to be free from sexual abuse, the right of residents and employees to be free from retaliation for reporting sexual abuse, the dynamics of sexual abuse in confinement, and the common reactions of sexual abuse victims.")

[21] Nat'l Prison Rape Elimination Comm'n, *supra* at 6, 226 ("TR-5: Specialized training: Medical and mental health care: The agency ensures that all full and part-time medical and mental health care practitioners working in its facilities have been trained in how to detect assess signs of sexual abuse and that all medical practitioners are trained in how to preserve physical evident of sexual abuse. All medical and mental health practitioners must be trained in how to respond effectively and professionally to young victims of sexual abuse and how and to whom to report allegations or suspicions of sexual abuse.")

their sexual orientation, or staff tolerance of sexual orientation-based harassment by other facility residents.

It is particularly important for medical staff to be trained to the sensitivities of youth in juvenile justice facilities. Medical professionals in the juvenile justice system must be aware that an insensitive attitude, a lack of knowledge and skills in reproductive and sexual health, poor communication, and discomfort on the part of medical providers can prevent a young person from disclosing vital health information, including information on past or current sexual abuse.[22] Medical staff, like all other facility staff, must be competent in cultural and sexual orientation and gender identity issues due to their particular responsibility to look for and address possible sexual abuse and sexual abuse victims.

IV. Conclusion

The national endorsement of standards that address the right to be free of all sexual abuse is a critically important step in protecting the health and lives of vulnerable youth in state custody. Standards must address the problem of rape on multiple levels – in medical care and counseling services, sexual education programs, and mandated staff training.

We appreciate the opportunity to provide these comments, and look forward to working with the Department of Justice to finalize and implement the standards.

Very truly yours,

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[22] Michelle Staples-Horne, Kaityi Duffy, & Michelle Rorie, *Juvenile Corrections and Public Health Collaborations: Opportunities for Improved Health Outcomes, in* PUBLIC HEALTH FROM BEHIND BARS: FROM PRISONS TO COMMUNITIES 302, 307 (Robert Greifinger ed., 2007).

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