

## DEPARTMENT OF JUSTICE

## 28 CFR Part 115

[Docket No. OAG-131; AG Order No. 3244-2011]

RIN 1105-AB34

## National Standards To Prevent, Detect, and Respond to Prison Rape

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** The Department of Justice (Department) has under review national standards for combating sexual abuse in confinement settings that were prepared by the National Prison Rape Elimination Commission (Commission) pursuant to the Prison Rape Elimination Act of 2003 (PREA) and recommended by the Commission to the Attorney General. On March 10, 2010, the Department published an Advance Notice of Proposed Rulemaking (ANPRM) to solicit public input on the Commission's proposed national standards and to receive information useful to the Department in publishing a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape, as mandated by PREA. The Department is now publishing this Notice of Proposed Rulemaking to propose such national standards for comment and to respond to the public comments received on the ANPRM.

**DATES:** Written comments must be postmarked on or before April 4, 2011, and electronic comments must be sent on or before midnight Eastern time April 4, 2011.

**ADDRESSES:** To ensure proper handling of comments, please reference "Docket No. OAG-131" on all written and electronic correspondence. Written comments being sent via regular or express mail should be sent to Robert Hinchman, Senior Counsel, Office of Legal Policy, Department of Justice, 950 Pennsylvania Avenue, NW., Room 4252, Washington, DC 20530. Comments may also be sent electronically through <http://www.regulations.gov> using the electronic comment form provided on that site. An electronic copy of this document is also available at the <http://www.regulations.gov> Web site. The Department will accept attachments to electronic comments in Microsoft Word, WordPerfect, Adobe PDF, or Excel file formats only. The Department will not accept any file formats other than those specifically listed here.

Please note that the Department is requesting that electronic comments be submitted before midnight Eastern Time

on the day the comment period closes because <http://www.regulations.gov> terminates the public's ability to submit comments at midnight Eastern Time on the day the comment period closes. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

**FOR FURTHER INFORMATION CONTACT:** Robert Hinchman, Senior Counsel, Office of Legal Policy, Department of Justice, 950 Pennsylvania Avenue, NW., Room 4252, Washington, DC 20530; telephone: (202) 514-8059. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****I. Posting of Public Comments**

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov> and in the Department's public docket. Such information includes personal identifying information (such as your name, address, *etc.*) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you still want to submit personal identifying information (such as your name, address, *etc.*) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above

will be redacted and the comment, in redacted form, will be posted online and placed in the Department's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

**II. Background**

The Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. 15601 *et seq.*, requires the Attorney General to promulgate regulations that adopt national standards for the detection, prevention, reduction, and punishment of prison rape. PREA established the National Prison Rape Elimination Commission (Commission) to carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States, and to recommend national standards to the Attorney General and to the Secretary of Health and Human Services. The Commission released its recommended national standards in a report dated June 23, 2009, and subsequently disbanded, pursuant to the statute. The Commission's report and recommended national standards are available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

The Commission set forth four sets of recommended national standards for eliminating prison rape and other forms of sexual abuse. Each set is applicable to one of the following four confinement settings: (1) Adult prisons and jails; (2) juvenile facilities; (3) community corrections facilities; and (4) lockups (*i.e.*, temporary holding facilities). The Commission recommended that its standards apply to Federal, State, and local correctional and detention facilities (excluding facilities operated by the Department of Defense and the Bureau of Indian Affairs). In addition to the standards themselves, the Commission prepared assessment checklists, designed as tools to provide agencies and facilities with examples of how to meet the standards' requirements; glossaries of key terms; and discussion sections providing explanations for the rationale of the standards and, in some cases, guidance for achieving compliance. These are available at <http://www.ncjrs.gov/pdffiles1/226682.pdf> (adult prisons and jails), <http://www.ncjrs.gov/pdffiles1/226684.pdf> (juvenile facilities), <http://www.ncjrs.gov/pdffiles1/226683.pdf> (community corrections), and <http://www.ncjrs.gov/pdffiles1/226685.pdf> (lockups).

Pursuant to PREA, the final rule adopting national standards “shall be based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission \* \* \* and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.” 42 U.S.C. 15607(a)(2). PREA expressly mandates that the Department shall not establish a national standard “that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.” 42 U.S.C. 15607(a)(3). The Department “may, however, provide a list of improvements for consideration by correctional facilities.” 42 U.S.C. 15607(a)(3).

The Attorney General established a PREA Working Group, chaired by the Office of the Deputy Attorney General, to review each of the Commission’s proposed standards and to help him prepare a draft final rule. The Working Group includes representatives from a wide range of Department components, including the Access to Justice Initiative, the Bureau of Prisons (including the National Institute of Corrections), the Civil Rights Division, the Executive Office for United States Attorneys, the Office of Legal Policy, the Office of Legislative Affairs, the Office of Justice Programs (including the Bureau of Justice Assistance, the Bureau of Justice Statistics (BJS), the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime), the Office on Violence Against Women, and the United States Marshals Service.

The Working Group conducted an in-depth review of the standards proposed by the Commission. As part of that process, the Working Group conducted a number of listening sessions in January and February 2010, at which a wide variety of individuals and groups provided preliminary input prior to the start of the regulatory process. Participants included representatives of State and local prisons and jails, juvenile facilities, community corrections programs, lockups, State and local sexual abuse associations and service providers, national advocacy groups, survivors of prison rape, and members of the Commission. The Department also consulted with the Department of Homeland Security’s Office for Civil Rights and Civil Liberties and with U.S. Immigration and Customs Enforcement (ICE).

Because PREA prohibits the Department from establishing a national standard that would impose substantial

additional costs compared to the costs presently expended by Federal, State, and local prison authorities, the Working Group carefully examined the potential cost implications of the standards proposed by the Commission. As part of that process, the Department commissioned an independent contractor to perform a cost analysis of the Commission’s proposed standards, which was received on June 18, 2010.

The Department has also worked to address those recommendations put forth by the Commission that require action outside of the context of PREA to accomplish. For example, the Department is in the process of developing a companion to the 2004 “National Protocol for Sexual Assault Medical Forensic Examinations” that will be customized to the conditions of confinement. In addition, via a separate rulemaking process, the Department intends to propose removing the current ban on Victims of Crime Act funding for treatment and rehabilitation services for incarcerated victims of sexual abuse.

### III. The Department’s Prior Request for Comments

On March 10, 2010 (75 FR 11077), the Department published an Advance Notice of Proposed Rulemaking (ANPRM) soliciting public input on the Commission’s proposed national standards. Approximately 650 comments were received on the ANPRM, including comments from current or formerly incarcerated individuals, county sheriffs, State departments of correction, private citizens, professional organizations, social service providers, and advocacy organizations concerned with issues of prison rape, sexual violence, discrimination, and juvenile justice.

The Department of Justice appreciates the interest and insight reflected in the many submissions and communications and has considered them carefully.

In general, the commenters supported the broad goals of PREA and the overall intent of the Commission’s recommendations. Some commenters, particularly those whose responsibilities involve the care and custody of inmates or juvenile residents, expressed concern that the Commission’s recommended national standards implementing PREA would impose unduly burdensome costs on already tight State and local government budgets. Other commenters, particularly advocacy groups concerned with protecting the health and safety of inmates and juvenile residents, expressed concern that the Commission’s standards did not go far enough, and, therefore, would not fully achieve PREA’s goals. In preparing its

proposed standards, the Department carefully considered each and every comment, keeping in mind both the goal of the statute and its mandate not to impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities. The following section includes additional discussion of comments relevant to particular standards.

### IV. Overview of PREA National Standards

Rape and sexual abuse are reprehensible, destructive, and illegal in any setting. Such acts are particularly damaging in the correctional environment, where the power dynamic is heavily skewed against victims and recourse is often limited. Until recently, however, this has been widely viewed as an inevitable aspect of imprisonment within the United States. This view is not only incorrect but incompatible with American values. Based on the Department’s analysis of data compiled by BJS, approximately 200,000 adult prisoners and jail inmates suffered some form of sexual abuse while incarcerated during 2008. *See BJS, Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09* (Aug. 2010).<sup>1</sup> This suggests 4.4% of the prison population and 3.1% of the jail population within the United States suffered sexual abuse during that year.<sup>2</sup> In some prisons, nearly 9% of the population reported abuse within that time; in some jails the corresponding rate approached 8%.<sup>3</sup>

In juvenile facilities, the numbers are similarly troubling. At least 17,100 adjudicated or committed youth (amounting to some 12% of the total population in juvenile detention facilities) reported having suffered sexual abuse within 12 months of arriving at their facility, with rates as high as 36% in specific facilities. *See BJS, Sexual Victimization in Juvenile Facilities Reported by Youth, 2008–09* (Jan. 2010), at 1, 4.<sup>4</sup> These numbers

<sup>1</sup> This total includes the cross-sectional number covered in BJS surveys plus the number of estimated victims released in the twelve months prior to the survey. For methodology, *see* Initial Regulatory Impact Analysis (IRIA) at 9, available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_nprm\\_iria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm_iria.pdf).

<sup>2</sup> *See id.* at 6.

<sup>3</sup> *See id.* at 8.

<sup>4</sup> This total includes the cross-sectional number covered in BJS surveys plus the number of estimated victims released in the twelve months prior to the survey. It includes adjudicated/committed youth only. For methodology, *see* IRIA at 9.

indicate that improvements can and must be made.

Neither the Commission nor the Department began its work on a blank slate. Many correctional administrators have developed and implemented policies and practices to more effectively prevent and respond to prison rape. The Department applauds these efforts, and views them as an excellent first step. However, a national effort is needed to accomplish PREA's goals. Protection from sexual abuse should not depend on where an individual is incarcerated: It must be universal.

The Commission recommended standards to the Department after several years of investigating the prevalence and nature of sexual abuse in incarceration settings and exploring correctional best practices in addressing it. The Department has built on the Commission's work and has adopted the overall structure of its standards as well as a significant majority of its specific recommendations. The Department's proposed rule echoes the Commission's recommendations in devising four sets of standards tailored to specific types of confinement facilities. Each set consists of the same eleven categories used by the Commission: Prevention planning, responsive planning, training and education, screening for risk of sexual victimization and abusiveness, reporting, official response following an inmate report, investigations, discipline, medical and mental care, data collection and review, and audits.

The scope and content of the Department's standards do differ substantially from the Commission's proposals in a variety of areas. After careful consideration, the Department has made revisions to each of the Commission's recommended standards. At all times, the Department has weighed the logistical and financial feasibility of each standard against its benefits. The Department has found invaluable the comments received on the ANPRM, and expects that comments in response to this proposed rule will provide further insights.

**Definitions.** Sections 115.5 and 115.6 provide definitions for key terms. The Department has largely relied on the Commission's definitions in the Glossary sections that accompanied the Commission's four sets of standards, but has made a variety of adjustments and has eliminated definitions for various terms that either do not appear in the Department's proposed standards or whose meaning is sufficiently clear so as not to need defining. In addition, the Department has included definitions in some of the standards themselves.

Below is an explanation for key definitions modified or added by the Department:

**Community confinement facility.** The Commission recommended a set of standards for community corrections, which it defined as follows: "Supervision of individuals, whether adults or juveniles, in a community setting as a condition of incarceration, pretrial release, probation, parole, or post-release supervision. These settings would include day and evening reporting centers." The Department believes that to the extent this definition includes supervision of individuals in a non-residential setting, it exceeds the scope of PREA's definitions of jail and prison, which include only "confinement facilit[ies]." 42 U.S.C. 15609(3), (7). Accordingly, the proposed rule does not reference community corrections, but instead refers to "community confinement facilities." The proposed rule defines this term nearly identically to the definition provided in regulations promulgated by the Department to govern the Federal Bureau of Prisons. See 28 CFR 570.20(a). The term includes a range of facilities in which offenders or defendants reside as part of a term of imprisonment or as a condition of pre-trial release or post-release supervision, while pursuing employment, education, or other facility-approved programs during non-residential hours. A similar definition appears in Federal Sentencing Guideline 5F1.1 and, incorporated by reference, in 18 U.S.C. 3621(g)(2).

**Employee, contractor, volunteer, and staff.** The proposed rule clarifies these terms to conform more closely to their traditional definitions—e.g., employees are only those persons who work directly for the agency or facility. The term "staff" is used interchangeably with "employees."

**Inmate, detainee, and resident.** The proposed standards use these three terms to refer to persons confined in the four types of covered facilities. The proposed standards for prisons and jails refer to persons incarcerated or detained therein as "inmates." For simplicity, the proposed standards for lockups refer to all persons detained therein as "detainees," including persons who have already been adjudicated. The proposed standards for juvenile facilities and for community confinement facilities refer to all persons housed therein as "residents."

**Jail and prison.** Although the Commission did not define these terms, the Department believes that definitions are necessary, especially because the Department's proposed standards modify the Commission's recommended

standards in certain respects to distinguish requirements applicable to jails from requirements applicable to prisons. The definitions provided in the proposed rule generally track the prevailing definitions of jails and prisons, based upon the primary use of each facility. If a majority of a facility's inmates are awaiting adjudication of criminal charges, serving a sentence of one year or less, or awaiting post-adjudication transfer to a different facility, then the facility is categorized as a jail, regardless of how the facility may label itself. As discussed in greater depth below, these terms do not encompass facilities that are primarily used for the civil detention of aliens pending removal from the United States.

**Question 1: The Department solicits comments regarding the application of this definition to those States that operate "unified systems"—i.e., States with direct authority over all adult correctional facilities, as opposed to the more common practice of jails being operated by counties, cities, or other municipalities. States that operate unified systems may be less likely to adhere to the traditional distinctions between prisons and jails, and may operate facilities that are essentially a mixture of the two. Do the respective definitions of jail and prison, and the manner in which the terms are used in the proposed standards, adequately cover facilities in States with unified systems? If not, how should the definitions or standards be modified?**

**Juvenile and juvenile facility.** The proposed rule defines "juvenile" as a person under the age of 18, unless defined otherwise under State law, and defines "juvenile facility" as a facility primarily used for the confinement of juveniles. Both definitions are new; the Commission did not define these terms.

**Lockup.** With small clarifying modifications, the proposed rule adopts the Commission's definition of lockup, which includes temporary holding facilities under the control of a law enforcement, court, or custodial officer.

**Sexual abuse and related terms.** In its ANPRM, the Department queried whether the standards should refer to "rape" or to "sexual abuse." Most commenters suggested that the Department refer to "sexual abuse." All advocacy groups that responded to this question recommended using "sexual abuse," and correctional agencies were split on the question. Proponents of the term sexual abuse noted that it captures a broader range of sexual victimization than rape, and noted that PREA defines rape expansively, see 42 U.S.C. 15609(9)–(12), to include a range of actions that more closely resembles the

Commission's proposed definition of sexual abuse rather than the traditional definition of rape. For example, PREA includes "sexual fondling" in its definition of rape, *see* 42 U.S.C. 15609(9), (11), even though that term is typically associated with sexual abuse rather than with rape. Proponents of the term rape argued that referring to sexual abuse more accurately captures the intent of the statute and the scope of behavior that the regulations should address.

The Department's proposed standards use the term sexual abuse, which the Department believes is a more accurate term to describe the behaviors that Congress aimed to eliminate. However, the proposed definition of sexual abuse removes sexual harassment from its scope. Several correctional agencies commented that including sexual harassment within the scope of sexual abuse would greatly expand the obligations of correctional agencies and would require responsive actions not commensurate to the harm caused by sexual harassment. The Department agrees, but has rejected the recommendation of some commenters that sexual harassment be removed entirely from the scope of the standards. Although PREA does not reference sexual harassment, it authorizes the Commission, and by extension the Attorney General, to propose standards relating to "such other matters as may reasonably be related to the detection, prevention, reduction, and punishment of prison rape." 42 U.S.C. 15606(e)(2)(M). The Department believes that it is appropriate that certain standards reference sexual harassment in order to combat what may be a precursor to sexual abuse.

With the exception of the omission of sexual harassment, the Department's proposed definition of sexual abuse substantively resembles the Commission's recommended definition. The format and wording, however, have been revised to conform more closely to the definitions used by BJS in its Survey of Sexual Violence, as several commenters suggested. The Department hopes that harmonizing these definitions, to the extent possible, will provide greater clarity to correctional agencies.

The proposed definition of sexual abuse excludes consensual activity between inmates, detainees, or residents, but does not exclude consensual activity with staff. The Department, like the Commission, believes that the power imbalance in correctional facilities is such that it is impossible to know if an incarcerated

person truly "consented" to sexual activity with staff.

*Prevention Planning: Sections 115.11, 115.111, 115.211, 115.311, 115.12, 115.112, 115.212, 115.312, 115.13, 115.113, 115.213, 115.313, 115.14, 115.114, 115.214, 115.314, 115.15, 115.115, 115.215, 115.315, 115.16, 115.116, 115.216, 115.316, 115.17, 115.117, 115.217, and 115.317* (compare to the Commission's PP standards). Like the Commission, the Department believes it is important to establish what actions facilities are expected to take to prevent sexual abuse.

Sections 115.11, 115.111, 115.211, and 115.311 (compare to the Commission's PP-1 standard), require that agencies establish a written zero-tolerance policy toward sexual abuse and harassment. The proposed standard clarifies that, in addition to mandating zero tolerance, the policy must outline the agency's approach to preventing, detecting, and responding to such conduct.

This standard also mandates that agencies employ or designate an upper-level, agency-wide PREA coordinator to oversee efforts to comply with PREA standards. In all agencies that operate facilities whose total rated capacity exceeds 1,000 inmates,<sup>5</sup> this agency-wide PREA coordinator must be a full-time position. Other agencies may designate this role as a part-time position or may assign its functions to an existing full-time or part-time employee.

Several commenters criticized that the Commission's proposed requirement that the PREA coordinator report directly to the agency head. These commenters expressed concern about setting the position at an unreasonably high level within the agency, which could require it to become a political appointment and thus subject to frequent turnover. The Department's proposed standard requires that the position be "upper-level" but does not require that the coordinator report directly to the agency head. In addition, some correctional agencies expressed concern that mandating a full-time coordinator for jails that house only 500 inmates, as the Commission proposed, would impose too great a burden. The Department's proposed standard instead mandates a full-time coordinator only for agencies that operate facilities whose

total rated capacity exceeds 1,000 inmates. In addition, agencies whose total capacity exceeds 1,000 inmates must also designate an existing full-time or part-time employee at each facility to serve as that facility's PREA coordinator.

The intent is to tailor this requirement to the varying needs and capacities of agencies and facilities: Requiring large agencies to dedicate an employee to coordinate PREA efforts full-time, while allowing smaller agencies, and individual facilities within large agencies, to assign such duties as part of an employee's broader portfolio, thus ensuring a "point person" who is responsible for PREA efforts.

*Question 2: Should the Department modify the full-time coordinator requirement to allow additional flexibility, such as by requiring only that PREA be the coordinator's primary responsibility, or by allowing the coordinator also to work on other related issues, such as inmate safety more generally?*

Sections 115.12, 115.112, 115.212, and 115.312 (compare to the Commission's PP-2 standard), require that agencies that contract with private entities for the confinement of inmates include the entity's obligation to comply with the PREA standards in new contracts or contract renewals. Several agency commenters expressed concern that the Commission's proposed requirement that an agency "monitor the entity's compliance with these standards as part of its monitoring of the entity's performance" would impose too great a financial burden. The Department's proposed standard modifies slightly the Commission's proposal by requiring only that new contracts or renewals "shall provide for agency contract monitoring to ensure that the contractor is complying with PREA standards." The revision is intended to indicate that the agency is not required to conduct audits of its contract facilities but rather must include PREA as part of its routine monitoring of compliance with contractual obligations.

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

Sections 115.13, 115.113, 115.213, and 115.313 (compare to the Commission's PP-3 and PP-7 standards) govern the supervision and monitoring of inmates. The Department has combined the Commission's proposed PP-3 and PP-7 standards into one standard, in recognition that direct staff supervision and video monitoring

<sup>5</sup> As noted above, the proposed standards refer to "inmates," "detainees," and "residents," depending upon the type of confinement facility. For simplicity, the explanation of the standards refers to all persons confined within any type of facility as "inmates" except where specifically discussing lockups, juvenile facilities, or community confinement facilities.

are two methods of achieving one goal: Reducing the opportunity for abuse to occur unseen. The Department recognizes that different agencies rely on staffing and technology to varying degrees depending upon their specific characteristics. Accordingly, the Department believes that these issues are best considered together.

The Department is mindful that staffing and video-monitoring systems are both expensive. Staff salaries and benefits are typically the largest item in a correctional agency's budget, *see, e.g.*, National Institute of Corrections, *Staffing Analysis: Workbook for Jails* (2d ed.) at 2, and economies of scale are difficult to obtain: Increasing staffing by 25% is likely to increase staff costs by 25%. Likewise, video-monitoring systems may be beyond the financial reach of some correctional agencies, although the costs of such systems may diminish in future years as technology advances.

Various agency commenters criticized the first sentence of the Commission's PP-3 standard: "Security staff provides the inmate supervision necessary to protect inmates from sexual abuse." Commenters suggested that the Commission's recommended standard did not provide appropriate guidance as to what level of supervision would be "necessary to protect inmates from sexual abuse," and that it did not indicate whether compliance would be measured *ex ante*, by reviewing staffing levels alone, or *ex post*, by determining that instances of sexual abuse could have been prevented by additional staffing.

The Department recognizes the importance of staffing levels in combating sexual abuse, and believes that the correctional community shares this view. *See, e.g.*, American Correctional Association Public Correctional Policy on Offender on Offender Sexual Assault (Jan. 12, 2005) (recommending that agencies "[m]aintain adequate and appropriate levels of staff to protect inmates against sexual assault"). Although proper supervision and monitoring cannot eliminate sexual abuse, it can play a key role in reducing opportunities for it to occur. In addition, inadequate staffing can be a contributing factor in a judicial determination that conditions of confinement violate the Constitution. *See, e.g.*, *Krein v. Norris*, 309 F.3d 487, 489-92 (8th Cir. 2002); *Ramos v. Lamm*, 639 F.2d 559, 573-74 (10th Cir. 1980). In several of the Department's investigations of correctional facilities under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, for engaging in a pattern or

practice of violating inmates' Federal rights, the terms of consent decrees and settlements have included specific remedial measures aimed at improving the adequacy of staffing.

At the same time, however, the Department recognizes that determining adequate staffing levels is a complicated, facility-specific enterprise. The appropriate number of staff depends upon a variety of factors, including (but not necessarily limited to) the physical layout of a facility, the security level and gender of the inmates, whether the facility houses adults or juveniles, the length of time inmates reside in the facility, the amount of programming that the facility offers, and the facility's population density (*i.e.*, comparing the number of inmates to the number of beds or square feet). In addition, the facility's reliance on video monitoring and other technology may reduce staffing requirements, as long as the facility employs sufficient staff to monitor the video feeds or other technologies such as call buttons or sensors. The viability of technology may depend upon, among other factors, the characteristics of the incarcerated population. Administrators of juvenile facilities, for example, are typically more reluctant to rely heavily on video monitoring given the staff-intensive needs of their residents.

Due to the complex interaction of these factors, the Department does not believe that it is possible to craft a formula that would set appropriate staffing levels for all populations—although the Department is aware that some States do set such levels for juvenile facilities. Nor is it likely that an auditor would be able to determine the appropriate staffing level in the limited amount of time available to conduct an audit. Relying on reported incidents of sexual abuse to determine appropriate staffing levels is also an imperfect method given the uncertainty as to whether an incident will be reported. Facilities where inmates feel comfortable reporting abuse, and where investigations are conducted effectively, may be more likely than other facilities to experience substantiated allegations of sexual abuse, even if the facility is no less safe than its counterparts. For this reason, the Department has opted not to adopt general across-the-board performance-based standards, as proposed by some commenters.

Accordingly, the Department is of the view that any standard that governs supervision and monitoring must protect inmates while providing sufficient clarity as to its requirements, recognizing that the adequacy of supervision and monitoring depends on

several factors that interact differently for each facility, and accounting for the costs involved in employing additional staff and in purchasing and deploying additional technology.

The Department believes that, at a minimum, such a standard must impose at least three requirements. First, an agency must make an assessment of adequate staffing levels, taking into account its use, if any, of video monitoring or other technology. The fact that multiple factors bear on the adequacy of staffing and monitoring is no barrier to requiring an agency to conduct such an assessment for each of its facilities. Second, an agency must devise a plan for how to best protect inmates from sexual abuse should staffing levels fall below an adequate level. Third, an agency must reassess at least annually such adequate staffing levels, as well as the staffing levels that actually prevailed during the previous year, and must also reassess its use of video monitoring systems and other technologies.

The Department assumes that most agencies already engage in similar inquiries; the purpose of mandating such inquiries within these standards is to institutionalize the practice of assessing staffing and monitoring in the context of considering how staffing and monitoring contribute to efforts to combat sexual abuse.

The Department is interested in receiving comments on whether and to what extent this standard should include additional or alternative requirements, and poses various questions below designed to elicit such comments. The Department has already received comments from the former Commissioners themselves regarding possible options. Following a meeting between the Department and several of the former Commissioners on August 4, 2010, that included discussion of the Commission's PP-3 and PP-7 standards, the former Commissioners sent the Department a memorandum dated September 28, 2010, that discussed possible revisions to this standard. The former Commissioners noted the possibility of replacing the first sentence of the PP-3 standard with the following: "Agency heads must establish in writing the staffing requirements for each shift at each facility to keep inmates safe from sexual abuse and must designate the priority posts at each facility that must be filled on each shift regardless of staff shortages or absences." In addition, the Commissioners noted that the PP-7 standard could be replaced with the following: "The agency uses video monitoring systems, if available, or other appropriate technology to

supplement its sexual abuse prevention, detection, and response efforts. Because video monitoring and other appropriate technology can contribute to prevention [and] detection of sexual abuse, the agency assesses at least annually the feasibility of acquiring new or additional technology. Compliance is measured by ensuring that the facility has developed a plan for securing such technology as funds become available.”

*Question 4: Should the standard require that facilities actually provide a certain level of staffing, whether determined qualitatively, such as by reference to “adequacy,” or quantitatively, by setting forth more concrete requirements? If so, how?*

*Question 5: If a level such as “adequacy” were mandated, how would compliance be measured?*

*Question 6: Various States have regulations that require correctional agencies to set or abide by minimum staffing requirements. To what extent, if any, should the standard take into account such State regulations?*

*Question 7: Some States mandate specific staff-to-resident ratios for certain types of juvenile facilities. Should the standard mandate specific ratios for juvenile facilities?*

*Question 8: If a level of staffing were mandated, should the standard allow agencies a longer time frame, such as a specified number of years, in order to reach that level? If so, what time frame would be appropriate?*

*Question 9: Should the standard require the establishment of priority posts, and if so, how should such a requirement be structured and assessed?*

*Question 10: To what extent can staffing deficiencies be addressed by redistributing existing staff assignments? Should the standard include additional language to encourage such redistribution?*

*Question 11: If the Department does not mandate the provision of a certain level of staffing, are there other ways to supplement or replace the Department’s proposed standard in order to foster appropriate staffing?*

*Question 12: Should the Department mandate the use of technology to supplement sexual abuse prevention, detection, and response efforts?*

*Question 13: Should the Department craft the standard so that compliance is measured by ensuring that the facility has developed a plan for securing technology as funds become available?*

*Question 14: Are there other ways not mentioned above in which the Department can improve the proposed standard?*

The proposed standard also adds a requirement that prisons and jails with

rated capacity in excess of 500 inmates develop a policy of requiring supervisors to conduct unannounced rounds. The Department believes that requiring such rounds is an appropriate measure to deter staff misconduct, in recognition of the great responsibility entrusted to correctional staff, who often perform their duties unaccompanied by colleagues. The proposed standard does not mandate how frequently such rounds must be conducted, in recognition that the frequency of unannounced rounds may be less important than the deterrent effect of knowing that such rounds may be conducted at any time. However, the Department believes that unannounced rounds should be conducted with reasonable frequency to ensure that such rounds have a sufficient deterrent effect, and solicits comments on this issue.

*Question 15: Should this standard mandate a minimum frequency for the conduct of such rounds, and if so, what should it be?*

Finally, the proposed standard omits language from the Commission’s recommended PP–3 standard regarding post-incident reviews and taking corrective action. Because the language in those standards cross-references two of the Commission’s recommended standards for data collection and review (DC–1 and DC–3), the Department has included comparable language in the proposed standards that correspond to the Commission’s DC–1 and DC–3 standards—*i.e.*, §§ 115.86, 115.186, 115.286, and 115.386 (DC–1) and §§ 115.88, 115.188, 115.288, and 115.388 (DC–3).

Sections 115.14, 115.114, 115.214, and 115.314 (compare to the Commission’s PP–4 standard) address the limits on cross-gender searches. The proposed standard diverges significantly from the Commission’s recommendations in its PP–4 standard. The Commission proposed strict limits on cross-gender strip searches, visual body cavity searches, pat-down searches, and viewing of inmates nude or performing bodily functions. Specifically, the Commission would permit the first two only in case of emergency, and the latter two in emergencies or “other extraordinary or unforeseen circumstances.” The Commission recommended such restrictions in order to “to protect the privacy and dignity of inmates and to reduce opportunities for staff-on-inmate sexual abuse.” Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails (“Prison/Jail Standards”), available at [http://](http://www.ncjrs.gov/pdffiles1/226682.pdf)

[www.ncjrs.gov/pdffiles1/226682.pdf](http://www.ncjrs.gov/pdffiles1/226682.pdf), at 12.

The Department received numerous comments on the Commission’s proposed limits on cross-gender pat-down searches. A large number of agencies objected to the Commission’s proposal on the ground that it would require agencies either to hire significant numbers of additional male staff or to lay off significant numbers of female staff, due to their overwhelmingly male inmate population and substantial percentage of female staff. In addition, many agencies expressed concern that the necessary adjustments to their workforce could violate Federal or State equal employment opportunities laws. Several advocacy groups, on the other hand, expressed support for the Commission’s proposal.

The Department recognizes that pat-down searches are critical to ensuring facility security and yet are often perceived as intrusive by inmates. Ideally, all pat-down searches would be conducted professionally and diligently by staff members of the same sex as the inmate. However, the Department is concerned about the high cost of imposing such a general requirement, and the concomitant effect on employment opportunities for women. The Department agrees with the Commission that “cross-gender supervision, in general, can prove beneficial in certain confinement settings.” Prison/Jail Standards at 12. Although the Commission stated that it “in no way intends for this standard to limit employment (or post assignment) opportunities for men or women,” *id.*, the Department is of the view that implementing a general prohibition on cross-gender pat-down searches cannot be achieved in many correctional systems without limiting such opportunities. In sum, the Department believes that the potential benefits of eliminating cross-gender pat-down searches do not justify the costs, financial and otherwise, of imposing such a rule across the board.

The proposed standard would retain the Commission’s recommendation as applied to juvenile facilities, which tend to conduct pat-down searches less frequently. Indeed, many juvenile facilities already ban cross-gender pat-down searches absent exigent circumstance. In addition, the Department proposes that adult prisons, jails, and community confinement facilities not allow cross-gender pat-down searches of inmates who have previously suffered cross-gender sexual abuse while incarcerated. The Department agrees with the comment of

the New York Department of Correctional Services, which has implemented such a rule in its facilities, that allowing such an exemption is a viable and proportionate approach to protecting those inmates most likely to suffer emotional harm during cross-gender pat-downs.

The proposed standard also mandates that agencies train security staff in how to conduct cross-gender pat-down searches in a professional and respectful manner, and in the least intrusive manner possible consistent with security needs. Because any pat-down search carries the potential for abuse, the Department believes that training in the proper conduct of such searches is a cost-effective approach to combating problems that might arise in either a cross-gender or same-gender pat-down search.

*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?*

Agency commenters' concerns about banning cross-gender pat-down searches absent exigent circumstances did not extend to a similar rule for strip searches and visual body cavity searches. The Department's proposed standard incorporates that aspect of the Commission's standard PP-4 as drafted, with two modifications. First, the proposed standard exempts such cross-gender searches when conducted by medical practitioners: The Department believes that a medical practitioner, even of the opposite gender, is more likely to conduct such searches with appropriate sensitivity. Second, the standard would require facilities to document all such cross-gender searches, whether conducted under emergency circumstances or by medical staff under non-emergency circumstances.

The Department received fewer comments on the Commission's proposed ban on cross-gender viewing of inmates who are nude or performing bodily functions. Some agencies expressed concern about being able to retrofit older facilities, while others commented that the Commission's language could preclude officers from making unannounced rounds in units where toilets are located within cells. To accommodate the latter concern, the proposed standard modifies the Commission's recommendation by exempting cross-gender viewing when incidental to routine cell checks. The Department believes that concerns about retrofitting can be accommodated by constructing privacy panels, reassigning

staff, or other appropriate measures in the limited circumstances where such retrofitting is not possible.

Sections 115.14, 115.114, 115.214, and 115.314 also bar examinations of transgender inmates to determine gender status unless such status is unknown and the examination is conducted in private by a medical practitioner. The Department's proposed standard adopts the Commission's restrictions, to which no commenter objected. Some commenters would impose further restrictions and ban all examinations to determine gender status, but the Department believes that a complete ban could preclude examinations where necessary to ensure the safety and security of the inmate examined and of other inmates and staff.

Sections 115.15, 115.115, 115.215, and 115.315 (compare to the Commission's PP-5 standard) govern the accommodation of inmates with disabilities and inmates with limited English proficiency (LEP). As the Commission noted, "[t]he ability of all inmates to communicate effectively and directly with staff, without having to rely on inmate interpreters, is crucial for ensuring that they are able to report sexual abuse as discreetly as possible." Prison/Jail Standards at 13. The Department's proposed standard, like the PP-5 standard, requires that agencies develop methods to ensure that LEP inmates and inmates with disabilities (e.g., inmates who are deaf, hard of hearing, or blind and inmates with low vision, intellectual, psychiatric, speech, and mobility disabilities) are able to report sexual abuse and sexual harassment to staff directly, and that agencies make accommodations to convey sexual abuse policies orally to inmates who have intellectual disabilities or limited reading skills or who are blind or have low vision. Unlike the Commission's proposal, the proposed standard allows for the use of inmate interpreters in exigent circumstances, recognizing that in certain circumstances such use may be unavoidable. Some commenters would require facilities to ensure that inmates with disabilities and LEP inmates be able to communicate with staff throughout the entire investigation and response process. The Department solicits feedback on this question.

The Department also notes that agencies receiving Federal financial assistance are required under Federal civil rights laws to meet obligations to inmates with disabilities or who are LEP. The Department encourages all agencies to refer to the relevant statutes, regulations, and guidance when

determining the extent of their obligations.

The Americans with Disabilities Act (ADA) requires State and local governments to make their services, programs, and activities, accessible to individuals with all types of disabilities. See 42 U.S.C. 12132; 28 CFR 35.130, 35.149–35.151. The ADA also requires State and local governments to ensure that their communications with individuals with disabilities affecting communication (blindness, low vision, deafness, or other speech or hearing disability) are as effective as their communications with individuals without disabilities. See 28 CFR 35.160–35.164. In addition, the ADA requires each State and local government to make reasonable modifications to its policies, practices, and procedures when necessary to avoid discrimination against individuals with disabilities, unless it can demonstrate that making the modifications would fundamentally alter the nature of the relevant service, program, or activity. See 28 CFR 35.130(b)(7). These nondiscrimination obligations apply to all correctional and detention facilities operated by or on behalf of State or local governments. See *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209–10 (1998).

Pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and implementing regulations, all State and local agencies that receive Federal financial assistance must provide LEP persons with meaningful access to all programs and activities. See *Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency*, 65 FR 50123. Pursuant to Executive Order 13166 of August 11, 2000, each agency providing Federal financial assistance is obligated to draft Title VI guidance regarding LEP persons that is specifically tailored to the agency's recipients of Federal financial assistance. The Department's guidance for its recipients includes a discussion of LEP issues in correctional and detention settings. See *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 67 FR 41455.

*Question 17: Should the final rule include a requirement that inmates with disabilities and LEP 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?*

Sections 115.16, 115.116, 115.216, and 115.316 (compare to the Commission's PP-6 standard) govern hiring and promotion decisions. Like the Commission's proposal, the proposed standard would restrict agencies' ability to hire employees who previously engaged in sexual abuse. Several commenters expressed concern about the burden that would be imposed by requiring background checks on any employee being considered for promotion. The proposed standard would not mandate such checks but instead would require agencies to conduct criminal background checks of current employees at least every five years (as the Federal Bureau of Prisons currently does) or have in place a system for otherwise capturing such information for current employees.

Sections 115.17, 115.117, 115.217, and 115.317 constitute a new standard requiring agencies to take into account how best to combat sexual abuse when designing or expanding facilities and when installing or updating video monitoring system or other technology. The Department believes that it is appropriate to require agencies to consider the impact of their physical and technological upgrades. Indeed, the American Correctional Association has recommended that, as a means of deterring sexual abuse, agencies should "[p]romote effective facility design that enables direct lines of sight within housing units." American Correctional Association Public Correctional Policy on Offender on Offender Sexual Assault (Jan. 12, 2005). The sentence in this standard regarding technology is adopted from a suggestion made in a comment by the New York Department of Correctional Services.

*Response Planning: Sections 115.21, 115.121, 115.221, 115.321, 115.22, 115.222, 115.322, 115.23, 115.123, 115.223, and 115.323* (compare to the Commission's RP standards). Like the Commission, the Department believes it is important to establish standards that address how facilities are expected to respond once an incident of sexual abuse occurs.

Sections 115.21, 115.121, 115.221, and 115.321 (compare to the Commission's RP-1 standard) set forth an evidence protocol to ensure all usable physical evidence is preserved for administrative or criminal proceedings. The standard makes clear that prompt exams are needed both to identify medical and mental health needs and to minimize the loss of evidence. In balancing these two interests, facilities should prioritize treating a victim's acute medical and mental health needs before collecting

evidence. Like the Commission, the Department believes that its Office on Violence Against Women's *National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents*, a revised version of which will be published later this year, provides the best set of guidelines for conducting these exams. The proposed standard expands the Commission's recommendation by requiring access to exams not only in cases of penetration but whenever evidentiarily or medically appropriate. For example, if an inmate alleges that she was choked in the course of a sexual assault that did not result in penetration, a forensic exam might provide evidence to support or refute her contention.

This standard takes into account the fact that some agencies are not responsible for investigating alleged sexual abuse within their facilities and that those agencies may not be able to dictate the conduct of investigations conducted by outside entities. In such situations, the proposed standard requires the agency to inform the investigating entity about the standard's requirements with the hope that the investigating entity will look to the standard as a best-practices guideline. In addition, the standard applies to any outside State entity or Department of Justice component that investigates such allegations.

In all settings except lockups, the proposed standard requires that the agency offer all sexual abuse victims access to a person either inside or outside the facility who can provide support to the victim. Specifically, the proposed standard requires that the agency make available to the victim either a victim advocate from a community-based organization that provides services to sexual abuse victims or a "qualified staff member," defined as a facility employee who has received education concerning sexual assault and forensic examination issues in general. A victim advocate or qualified staff member must be made available to accompany and support the victim through the forensic medical exam process and the investigatory process, and to provide emotional support, crisis intervention, information and referrals, as needed. This requirement is intended to ensure that victims understand the forensic exam and investigative processes and receive support and assistance at an emotionally difficult time. Several agency commenters expressed concern about the burden imposed by this requirement. The Department notes that it has revised the Commission's standard in order to clarify that an

existing employee with appropriate education can fulfill this role, thus reducing the burden on the facility while ensuring support for the victim.

Lockups are excluded from this requirement for three reasons. First, because lockups are leanly staffed, complying with this requirement could well require the hiring of an additional staff person. Second, there is little evidence of a significant amount of sexual abuse in lockups that would warrant such expenditure. Third, lockup inmates are highly transient, and thus in some cases, victims of sexual abuse already will have been transferred to a jail before the forensic exam is conducted.

*Question 18: Do the standards adequately provide support for victims of sexual abuse in lockups upon transfer to other facilities, and if not, how should the standards be modified?*

Sections 115.22, 115.222, and 115.322 (compare to the Commission's RP-2 standard) govern the agreements that facilities enter into with public service and community providers. The goal of the proposed standard is to allow inmates the opportunity to report instances of sexual abuse and sexual harassment to an entity outside of the agency. The Department's proposed standard exempts agencies that allow reporting to quasi-independent internal offices, such as inspectors general. In addition, the proposed standard requires that agencies maintain or attempt to enter into agreements with community service providers who can provide inmates confidential emotional support services related to sexual abuse. Some commenters argued that this standard should expressly mandate specific assistance for LEP inmates. The Department encourages agencies to make efforts to allow such inmates to partake in the services offered under this standard and solicits comments on whether such a mandate should be included.

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

The proposed standards do not include the Commission's recommendations that agencies attempt to enter into memoranda of understanding with outside investigative agencies (the Commission's RP-3 standard) and with prosecutorial agencies (the Commission's RP-4 standard). A number of agency commenters expressed concern that these requirements would impose significant burdens, especially in State systems

where investigations and prosecutions are conducted by numerous different agencies at the county or municipal level. The Department recognizes that such memoranda of understanding have proven to be valuable for certain agencies, and encourages agencies to explore the viability of attempting to enter into such agreements. However, due to burden concerns, the Department does not believe that agencies should be required to make such efforts. Instead, §§ 115.23, 115.123, 115.223, and 115.323 mandate that each agency must have in place policies to ensure that allegations of sexual abuse or sexual harassment are investigated by an agency with the legal authority to conduct criminal investigations. The policy must be published on the agency's Web site, and, if a separate entity is responsible for investigating criminal investigations, the Web site must delineate the responsibilities of the agency and the investigating entity. The Department's proposed standard also requires that any State entity or Department of Justice component that conducts such investigations must have policies in place governing the conduct of such investigations.

*Training and Education: Sections 115.31, 115.131, 115.231, 115.331, 115.32, 115.132, 115.232, 115.332, 115.33, 115.233, 115.333, 115.34, 115.134, 115.234, 115.334, 115.35, 115.235, and 115.335* (compare to the Commission's TR standards). Like the Commission, the Department believes that training for all individuals who have contact with inmates is a key component in combating sexual abuse. Training will create awareness of the issue of sexual abuse in facilities, clarify staff responsibilities, ensure that reporting mechanisms are known to staff and populations in custody, and provide specialized information for staff with key roles in responding to sexual abuse. These standards are substantively similar to those offered by the Commission. In addition, each standard in this category requires documentation that the required training was provided and, for staff training, that the training was understood. In order to facilitate compliance, the Department has revised the Commission's recommendations to allow electronic documentation.

Sections 115.31, 115.131, 115.231, and 115.331 (compare to the Commission's TR-1 standard) require that all employees who have contact with inmates receive training concerning sexual abuse in facilities, with refresher training to be provided on an annual basis thereafter. The proposed standard includes all training topics proposed by the Commission,

plus training in how to avoid inappropriate relationships with inmates. In addition, the Department has added a requirement that the training be tailored to the gender of the inmates at the employee's facility, that training cover effective and professional communication with lesbian, gay, bisexual, transgender, and intersex residents, and that training in juvenile facilities be tailored to the juvenile setting.

Due to the limited detention operations of lockups, § 115.131, consistent with the Commission's corresponding TR-1 standard, does not specify training requirements beyond requiring that the agency train all employees and volunteers who may have contact with lockup detainees to be able to fulfill their responsibilities under agency sexual abuse prevention, detection, and response policies and procedures, and to communicate effectively and professionally with all detainees.

*Question 20: Should the Department further specify training requirements for lockups and if so, how? Would lockups be able to implement such training in a cost-effective manner via in-person training, videos, or Web-based seminars?*

Sections 115.32, 115.232, and 115.332 (compare to the Commission's TR-2 standard) require training for contractors and volunteers concerning sexual abuse. The Department agrees with the Commission that training must not be limited to employees, given that contractors and volunteers often interact with inmates on a regular, sometimes daily, basis. With regard to lockups, the Department mandates in § 115.132 that attorneys, contractors, and any inmates who work in the lockup must be informed of the agency's zero-tolerance policy regarding sexual abuse. (As noted above, § 115.131 governs training of lockup volunteers.)

Sections 115.33, 115.233, and 115.333 (compare to the Commission's TR-3 standard) require that information about combating sexual abuse provided to individuals in custody upon intake and that comprehensive education be provided within 30 days of intake. Like the Commission, the Department believes that educating inmates concerning sexual abuse is of the utmost importance. Several agency commenters expressed concern that the Commission's recommended standard would impose a vague mandate by requiring the provision of comprehensive education to inmates within a "reasonably brief period of time" following intake. Agency commenters also requested clarification

that such education could be provided via video. The proposed standard requires the provision of comprehensive education within 30 days of intake, and provides that such education may be provided via video. Although inmates who are incarcerated for less than 30 days might not receive such comprehensive education, all inmates will have received information upon intake. In addition, the Department has added a requirement that agencies must ensure that key information is continually and readily available or visible to inmates through posters, inmate handbooks, or other written formats.

Due to the transitory nature of community confinement, the proposed standard does not mandate the provision of refresher information except upon transfer to another facility.

Sections 115.34, 115.134, 115.234, and 115.334 (compare to the Commission's TR-4 standard) requires that agencies that conduct their own sexual abuse investigations provide specialized training for their investigators in conducting such investigations in confinement settings, and that any State entity or Department of Justice component that investigates sexual abuse in confinement settings do the same. Although several agency commenters questioned the need for and cost of training tailored to confinement settings, the Department believes that such training is valuable and can be provided in a cost-effective manner. Models of such training already exist, and the Department is interested in receiving feedback on how it can provide additional assistance in developing such training.

Sections 115.35, 115.235, and 115.335 (compare to the Commission's TR-5 standard), require specialized training for all medical staff employed by the agency or facility. The proposed standard exempts lockups, which usually do not employ or contract for medical staff. The Commission found, and the Department agrees, that investigative and medical staff members serve vital roles in the response to sexual abuse, and the nature of their responsibilities require additional training in order to be effective. The Department further proposes that any agency medical staff who conduct forensic evaluations receive appropriate training.

*Screening for Risk of Sexual Victimization and Abusiveness: Sections 115.41, 115.241, 115.42, 115.242, and 115.43* (compare to the Commission's SC standards). Like the Commission, the Department believes that the proper classification of inmates

is crucial to preventing sexual abuse. Sound correctional management requires that agencies obtain information from inmates and use such information to assign inmates to housing units or specific cells in which they are likely to be safe. These proposed standards are substantively similar to those recommended by the Commission. Like the Commission's recommended standards, these standards do not apply to lockups, due to the short-term nature of lockup detention. However, the Department solicits comments on whether rudimentary screening should be mandated for lockups.

Sections 115.41 and 115.241 (compare to the Commission's SC-1 standard) require that agencies conduct screenings of inmates upon intake and during an initial classification process, pursuant to an objective screening instrument. Although the intake screening need not be as rigorous, the initial classification process for each inmate must consider, at a minimum, the existence of a mental, physical, or developmental disability; age; physical build; criminal history, including prior sex offenses and previous incarceration; whether the inmate is gay, lesbian, bisexual, transgender, or intersex; previous sexual victimization; perceived vulnerability; any history of prior institutional violence or sexual abuse; and (as added by the Department) whether an inmate is detained solely on civil immigration charges. Several commenters proposed reducing or eliminating the distinctions between the Commission's proposed screening criteria for male and female inmates. The Department has developed a set of criteria that is applicable to male and female inmates alike, although agencies may determine that the criteria should be weighed differently depending upon the inmate's gender.

*Question 21: Recognizing that lockup detention is usually measured in hours, and that lockups often have limited placement options, should the final rule mandate rudimentary screening requirements for lockups, and if so, in what form?*

The proposed standard clarifies that the initial classification screening must be conducted within 30 days of an inmate's confinement. Several agency commenters expressed concern about the cost and burden of conducting detailed screening upon an inmate's entrance into a facility. By clarifying that the detailed initial classification need only be conducted within 30 days of confinement, the Department intends to allow agencies with rapid turnover to avoid conducting a full classification, while still ensuring that an inmate is

screened appropriately upon intake. Agencies that house all inmates beyond 30 days must conduct an intake screening followed by a more detailed classification. Although the proposed standard does not specify the scope of the intake screening, the intent of the standard is that institutions should do what is feasible at intake to ensure that inmate can be housed safely for a short period of time pending either release or a more detailed classification.

*Question 22: Should the final rule provide greater guidance regarding the required scope of the intake screening, and if so, how?*

The Department's proposed standard differs from the Commission's recommended standard in several additional respects. First, the proposed standard clarifies the Commission's reference to "subsequent classification reviews" by mandating that inmates should be rescreened when warranted due to a referral, request, or incident of sexual victimization. Second, recognizing that information provided at screenings is often highly sensitive, personal, and may put an individual at risk in a correctional setting, the Department proposes that such information be subject to appropriate controls to avoid unnecessary dissemination. Third, due to the personal nature of the information, the proposed standard specifies that it must not be a disciplinary infraction to fail to provide information during this process. Fourth, although the Commission would require use of a written instrument in the classification process, the Department has not adopted this requirement in order to allow for electronic evaluations.

Sections 115.42 and 115.242 (compare to the Commission's SC-2 standard) require administrators of adult prisons and jails and community confinement facilities to use the information obtained in a classification interview in order to separate individuals who are at risk of abuse from those at high risk of being sexually abusive. The proposed regulation is substantially similar to the Commission's standard with, two exceptions.

First, the proposed standard does not include the Commission's recommended ban on assigning inmates to particular units solely on basis of sexual orientation or gender identity. One commenter discussed the success of the Los Angeles County Jail in housing gay male and transgender prisoners in a separate housing unit. At a subsequent meeting with officials of that jail, the Department learned that the jail officials believe that the occupants of that separate unit are significantly

safer than they would be in the general jail population. While the Department is not proposing a ban on such units, it urges that any agency that might be considering the creation of such a unit make every effort to ensure that its occupants receive the same access to programming and employment as inmates in the general population.

Second, the proposed standard mandates that transgender and intersex inmates, who may be especially vulnerable, receive an individualized assessment on whether the inmate should be housed in a male or female facility, to be reassessed at least twice each year to review any threats to safety experienced by the inmate.

Section 115.43 governs the use of protective custody, incorporating and expanding upon the relevant portion of the Commission's SC-2 standard. Due to the importance of protective custody, the Department believes it warrants its own standard, applicable only to adult prisons and jails, as other types of facilities usually do not have protective custody assignments of this nature. The proposed standard provides that inmates at high risk of sexual victimization may be placed in involuntary segregated housing only after an assessment of all available alternatives has been made—and only until an alternative housing arrangement can be implemented. The new standard also specifically defines the assessment process, specifies required documentation, and sets a presumptive time frame of 90 days. The Department recognizes that protective custody may be necessary in a correctional setting to ensure the safety of inmates and staff. However, the Department also notes that the prospect of placement in segregated housing may deter inmates from reporting sexual abuse. The new standard attempts to balance these concerns and ensure that alternatives to involuntary protective custody are considered and documented. In addition, the proposed standard contains the Commission's recommendation that, to the extent possible, protective custody should not limit access to programming.

*Assessment and Placement of Residents: Sections 115.341 and 115.342* (compare to the Commission's AP standards). Like the Commission, the Department refers to the categorization process in juvenile facilities as "assessment and placement" rather than "screening."

Sections 115.341 and 115.342 (compare to the Commission's AP-1 and AP-2 standards) govern screening requirements for juveniles. These two proposed standards take into account

the different practices and procedures that apply in juvenile facilities compared to adult prisons, jails, and community confinement facilities. Section 115.341 directs facilities to assess each resident's personal history and behavior upon intake and periodically throughout a resident's confinement to reduce the risk of sexual abuse. In addition to obtaining information in conversations with the resident, facilities can review court records, case files, facility behavioral records, and other relevant documentation from the resident's files. The proposed standard adds the inmate's own perception of vulnerability to the list of topics about which the facility should attempt to ascertain information.

As in the analogous adult standards, the Department has added a requirement that juveniles must be assessed and placed pursuant to an objective screening instrument, and that information obtained for this purpose be subject to appropriate controls to avoid unnecessary dissemination.

Several agency commenters expressed concern about the Commission's recommendation that only medical and mental health practitioners be allowed to talk with residents to gather information about their sexual orientation or gender identity, prior sexual victimization, history of engaging in sexual abuse, mental health status, and mental or physical disabilities. The Department has not included this limitation in its proposed standard, agreeing with commenters that appropriately trained juvenile facility staff who are not medical or mental health practitioners can engage in productive conversations on these topics with residents.

Section 115.342 directs the facility to use the information gathered under § 115.341 to make housing, bed, program, education, and work assignments. As in the analogous adult standards, the proposed standard requires individualized assessments about whether a transgender resident should be housed with males or females. Unlike the adult standards, however, the proposed standard retains the Commission's recommended ban on housing separately residents who are lesbian, gay, bisexual, transgender, or intersex. Given the small size of the typical juvenile facility, it is unlikely that a facility would house a large enough population of such residents so as to enable a fully functioning separate unit, as in the Los Angeles County Jail. Accordingly, the Department believes that the benefit of housing such residents separately is likely

outweighed by the potential for such segregation to be perceived as punishment or as akin to isolation.

Section 115.342 also addresses isolation for juveniles, allowing it only as a last resort when less restrictive means are inadequate to ensure resident safety, and then only until an alternative method of ensuring safety can be established.

*Reporting: Sections 115.51, 115.151, 115.251, 115.351, 115.52, 115.252, 115.352, 115.53, 115.253, 115.353, 115.54, 115.154, 115.254, and 115.354* (compare to the Commission's RE standards). Like the Commission, the Department believes that reporting instances of sexual abuse is critical to deterring future acts. The Department, however, has made significant changes to some of the Commission's proposed standards in this area.

Sections 115.51, 115.151, 115.251, and 115.351 (compare to the Commission's RE-1 standard) require agencies to enable inmates to privately report sexual abuse and sexual harassment and related misconduct. The Commission proposed that agencies be required to allow inmates to report abuse to an outside public entity, which would then forward reports to the facility head "except when an inmate requests confidentiality." Several commenters expressed concern that a public entity would be required to ignore reports of criminal activity if an inmate requested confidentiality. The proposed standard eliminates this exception; however, the Department solicits comments on the issue.

The Department notes that the Department of Defense provides a "restricted reporting" option that allows servicemembers to confidentially disclose the details of a sexual assault to specified Department employees or contractors and receive medical treatment and counseling, without triggering the official investigative process and, subject to certain exceptions, without requiring the notification of command officials or law enforcement. *See* Department of Defense Directive 6495.01, Enclosure Three; Department of Defense Instruction 6495.02. Under Department of Defense policy, such restricted reports may be made to a Sexual Assault Response Coordinator, a designated victim advocate, or healthcare personnel.

*Question 23: Should the final rule mandate that agencies provide inmates with the option of making a similarly restricted report to an outside public entity? To what extent, if any, would such an option conflict with applicable State or local law?*

The proposed standard also provides that, instead of enabling reports to an outside public entity, the agency may meet this standard by enabling reports to an office within the agency but that is operationally independent from agency leadership, such as an inspector general or ombudsperson. The proposed standard requires only that agencies make their best efforts to set up such systems, recognizing that it may not be possible for all agencies. However, an agency must endeavor diligently to establish such a system, and if it does not succeed, it must demonstrate that no suitable outside entity or internal office exists, and that it would be impractical to create an internal office to serve this role.

In addition, the proposed standard mandates that agencies establish a method for staff to privately report sexual abuse and sexual harassment of inmates. Finally, the proposed standard requires that juvenile residents be provided access to tools necessary to make written reports, whether writing implements or computerized reporting.

Sections 115.52, 115.252, and 115.352 (compare to the Commission's RE-2 standard) govern grievance procedures and the methods by which inmates exhaust their administrative remedies. The Commission's recommended standard would impose three requirements. First, the standard would mandate that an inmate be deemed to have exhausted administrative remedies regarding a claim of sexual abuse either when the agency makes a final decision on the merits of the report, regardless of the source, or 90 days after the report, whichever comes first. Second, the standard would mandate that the agency accept any grievance alleging sexual abuse regardless of the length of time that had passed between abuse and report. Third, the standard would provide that an inmate seeking immediate protection from imminent sexual abuse would be deemed to have exhausted administrative remedies 48 hours after notifying any agency staff member of the need for protection.

The Commission justified its standard as a means of ensuring that inmates have an effective method to seek judicial redress. The Commission noted that inmates who suffer sexual abuse are often too traumatized to comply with short time limitations imposed by many grievance systems. *See* Prison/Jail Standards at 35. In addition, the Commission noted, filing a grievance is not the typical way to report sexual abuse, and inmates who are told that they may report via other methods may not realize that they also need to file a

grievance in order to later pursue legal remedies. *See id.*

Numerous agency commenters registered several types of objections to the Commission's proposal. First, some commenters suggested that aspects of the Commission's proposals would violate the Prison Litigation Reform Act (PLRA), which provides in pertinent part that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). Commenters noted that the Commission's proposal would not mandate the exhaustion of available administrative remedies such as a grievance system but rather would deem exhaustion to have occurred 90 days after sexual abuse is reported to the agency. Second, some commenters objected to the requirement that no limitations period be imposed on grieving sexual abuse, and suggested that this would allow filing of stale claims that would be difficult to investigate due to the passage of time. Third, some commenters suggested that imposing any standard in this area would encourage the filing of frivolous claims. Fourth, commenters objected to the imminent-abuse requirement on the grounds that it would not allow sufficient time for investigations, would allow inmates to define imminence, and would permit gamesmanship by inmates seeking changes to housing or facility assignments for reasons unrelated to sexual abuse.

Numerous commenters from advocacy groups and legal organizations endorsed the Commission's proposal as a way to ensure that inmates are able to vindicate their rights. Some commenters suggested that the standard should also address the PLRA's requirement that no prisoner may recover for mental or emotional injury without a prior showing of physical injury, *see* 42 U.S.C. 1997e(e), either by deeming this requirement inapplicable to victims of sexual abuse or by deeming sexual abuse to constitute physical injury *per se*.

The Department agrees with the Commission that a standard relating to grievance procedures would be beneficial in light of strong evidence that victims of sexual abuse are often constrained in their ability to pursue grievances, for reasons discussed by the Commission and by commenters. However, the Department believes that the Commission's recommended standard devotes insufficient attention

to several policy concerns lodged by correctional agencies, regardless of whether those correctional agencies are correct that the Commission's proposal is inconsistent with the PLRA. Accordingly, the Department is proposing a standard that it believes is sensitive to legitimate agency concerns while providing inmates appropriate access to the legal process in order to obtain judicial redress where available under applicable law and to enable litigation to play a beneficial role in ensuring that agencies devote sufficient attention to combating sexual abuse.

The Department's proposed standard takes into account (1) the possibility that victims of sexual abuse may need additional time to initiate the grievance process; (2) the need for a final decision from the agency, and without undue delay; (3) the fact that such victims often report such abuse outside of the grievance system, and that the appropriate agency authorities may first learn of an allegation through a staff member or other third party; and (4) the need to provide swift redress in case of emergency. At the same time, the proposed standard recognizes (1) the need to comply with the PLRA; (2) the importance of providing agencies a meaningful amount of time to investigate allegations of sexual abuse; (3) the possibility that some inmates may fabricate claims of sexual abuse; and (4) the need to ensure accountability for grievances that are filed. The proposed standard does not address the PLRA's requirement that physical injury must be shown prior to any recovery for emotional or mental injury; the Department agrees with the Commission that the actions that commenters seek with regard to this requirement would require a statutory revision and cannot be accomplished via rulemaking.

Paragraph (a) of §§ 115.52, 115.252, and 115.352 governs the amount of time that inmates have after an alleged incident of sexual abuse to file a grievance. The proposed standard sets this time at 20 days, with an additional 90 days available if an inmate provides documentation, such as from a medical or mental health provider or counselor, that filing sooner would have been impractical due to trauma, removal from the facility, or other reasons. The 20-day limit matches the limitations period used by the Federal Bureau of Prisons (BOP) for all grievances, *see* 28 CFR 542.14(a), and according to a recent survey is shorter than the general limitations period for grievances in 18 States, *see* Appendix, Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School As

Amicus Curiae in Support of Respondent, *Woodford v. Ngo* (No. 05-416) (2006). By requiring actual documentation to obtain a 90-day extension for good cause shown, the proposed standard would reduce risk of inmate gamesmanship. The extension could be granted retroactively, thus avoiding the perverse consequence of recognizing that a victim may be too traumatized to file a grievance, while at the same time requiring the victim to file an extension request that documents such trauma.

Paragraph (b) of §§ 115.52, 115.252, and 115.352 governs the amount of time that agencies have to resolve a grievance alleging sexual abuse before it is deemed to be exhausted. The goal of this paragraph is to ensure that the agency is allotted a reasonable amount of time to investigate the allegation, after which the inmate may seek judicial redress. Paragraph (b) requires that agencies take no more than 90 days to resolve grievances alleging sexual abuse, unless additional time is needed, in which case the agency may extend up to 70 additional days. Time consumed by inmates in making appeals does not count against these time limits, in order to clarify that the agency's burden of producing timely responses applies only when a response is actually pending, and to ensure that agencies that allow generous time frames for inmates to take appeals are not penalized by receiving a commensurately shorter length of time to respond to inmate filings.

The 90-day limit and the 70-day extension period are consistent with current BOP procedures. BOP has a three-level grievance system: the Warden has 20 days to adjudicate the initial appeal, the Regional Director has 30 days to adjudicate an intermediate appeal, and the BOP General Counsel has 40 days to adjudicate a final appeal. *See* 28 CFR 542.18. BOP allows extensions at each level of 20, 30, and 20 days, respectively, if the normal time period is insufficient to make an appropriate decision. *See id.* The Department has not identified a broad survey that would allow comparison to State or local systems, but believes that the 90-day limit, extendable to 160 days, provides sufficient time for any agency to take appropriate steps to respond to allegations of sexual abuse prior to the initiation of a lawsuit.

Paragraph (c) of §§ 115.52, 115.252, and 115.352 requires that agencies treat third-party notifications of alleged sexual abuse as a grievance or request for informal resolution submitted on behalf of the alleged inmate victim for purposes of initiating the agency administrative remedy process. As the

Commission and some commenters have noted, it is inconsistent for an agency to assure inmates that it will investigate sexual abuse allegations made to any staff member and then defend against a lawsuit on the ground that the inmate failed to file a formal grievance with the proper facility official. As the Commission noted, "because grievance procedures are generally not designed as the sole or primary method for reporting incidents of sexual abuse by inmates to staff, victims who do immediately report abuse to authorities may not realize they need to file a grievance as well to satisfy agency exhaustion requirements." Prison/Jail Standards at 35. However, the Commission's recommendation that a third-party report suffice to bypass the grievance system altogether would deny correctional agencies the ability to investigate allegations of sexual abuse prior to the filing of a lawsuit. In addition, the Commission's proposal, if adopted, could require courts to adjudicate disputes over whether and when the agency in fact received such a report that would excuse the inmate from needing to file a grievance.

The proposed standard would address these concerns by requiring reports of sexual abuse to be channeled into the normal grievance system (including requests for informal resolution where required) unless the alleged victim requests otherwise. Reports from other inmates would be exempted from this requirement in order to reduce the likelihood that inmates would attempt to manipulate staff or other inmates by making false allegations. The proposed standard would permit agencies to require alleged victims to perform properly all subsequent steps in the grievance process, because at that point the rationale for third-party involvement would no longer exist. However, where the alleged victim of sexual abuse is a juvenile, the proposed standard would allow a parent or guardian to continue to file appeals on the juvenile's behalf unless the juvenile does not consent.

Paragraph (d) governs procedures for dealing with emergency claims alleging imminent sexual abuse. Many State prison systems expressly provide emergency grievance procedures where imminent harm is threatened. Such procedures usually require a speedy final agency decision, and therefore a speedy exhaustion of administrative remedies. These procedures address the possibility that some inmates may have reason to fear imminent harm from another inmate or from a staff member, in which case a lengthy grievance process would be unlikely to provide adequate relief.

However, the Department believes that the Commission's imminent-harm proposal is unworkable, because it would allow any inmate nearly instant court access based upon the inmate's mere assertion that sexual abuse is imminent. Under the Commission's proposal, an inmate could trigger these emergency exhaustion provisions by notifying any agency staff member, regardless of the staff member's authority to provide a remedy. Then, the inmate could automatically file suit within 48 hours, regardless of whether the claim of imminent harm has any merit. Such a regime could encourage the filing of frivolous claims in which sexual abuse is alleged as a vehicle to seek immediate judicial access in order to obtain an unrelated remedy, such as a change in housing assignment for reasons other than safety.

The proposed standard would require agencies to establish emergency grievance procedures resulting in a prompt response—unless the agency determines that no emergency exists, in which case the grievance may be processed normally or returned to the inmate, as long as the agency provides a written explanation of why the grievance does not qualify as an emergency. To deter abuse, an agency could discipline an inmate for deliberately alleging false emergencies. The Department believes that this provision, modeled on procedures in place in numerous States, would serve as an adequate deterrent to the filing of frivolous or strategic claims while advancing true emergencies to the head of the queue.

*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.*

Sections 115.53, 115.253, and 115.353 (compare to the Commission's RE-3 standard) require that agencies provide inmates access to outside victim advocacy organizations, similar to the Commission's recommended standard. Several commenters expressed concern that the Commission's proposal would allow inmates unfettered and unmonitored access to outside organizations, possibly enabling inmate abuse of such access. The proposed standard modifies the Commission's recommended language, which would require communications to be "private, confidential, and privileged, to the extent allowable by Federal, State, and local law." Instead, the proposed rule requires that such communications be as confidential as possible consistent

with agency security needs. The Department recognizes that allowing inmate access to outside victim advocacy organizations can greatly benefit inmates who have experienced sexual abuse yet who may be reluctant to report it to facility administrators, and notes that some agencies, such as the California Department of Corrections and Rehabilitation, have established successful pilot programs working with outside organizations. At the same time, the Department recognizes that communications with outsiders raise legitimate security concerns. The proposed standard strikes a balance by allowing confidentiality to the extent consistent with security needs.

The proposed standard also retains the Commission's recommendation that juvenile facilities be specifically instructed to provide residents with access to their attorney or other legal representation and to their families, in recognition of the fact that juveniles may be especially vulnerable and unaware of their rights in confinement. The proposed standard modifies the Commission's language by mandating that juvenile facilities provide access that is reasonable (and, with respect to attorneys and other legal representation, confidential) rather than unimpeded.

Sections 115.54, 115.154, 115.254, and 115.354 (compare to the Commission's RE-4 standard) requires that facilities establish a method to receive third-party reports of sexual abuse and publicly distribute information on how to report such abuse on behalf of an inmate. Elements of the Commission's RE-4 standard related to investigations are included in §§ 115.71, 115.171, 115.271, and 115.371.

*Official Response Following an Inmate Report: Sections 115.61, 115.161, 115.261, 115.361, 115.62, 115.162, 115.262, 115.362, 115.63, 115.163, 115.263, 115.363, 115.64, 115.164, 115.264, 115.364, 115.65, 115.165, 115.265, 115.365, 115.66, and 115.366* (compare to the Commission's OR standards). The Department proposes six standards addressing a facility's official response following a report of sexual abuse or sexual harassment. These six proposed standards are substantively similar to the five standards proposed by the Commission. This group of standards is intended to ensure coordinated, thorough, and complete agency reactions to reports of sexual abuse.

Sections 115.61, 115.161, 115.261, and 115.361 (compare to the Commission's OR-1 standard) set forth staff and agency reporting duties regarding incidents of sexual abuse.

Staff must be trained and informed about how to properly report incidents of sexual abuse while maintaining the privacy of the victim. Staff are required to immediately report (1) any knowledge, suspicion, or information regarding incidents of sexual abuse that take place in an institutional setting, (2) any retaliation against inmates or staff who report abuse, and (3) any staff neglect or violation of responsibilities that may have contributed to the abuse. The Department's proposed standard adds to the Commission's recommendations a requirement that the facility must report all allegations of sexual abuse to the facility's designated investigators, including third-party and anonymous reports.

Sections 115.62, 115.162, 115.262, and 115.362 (compare to the Commission's OR-2 standard) require that after a facility receives an allegation that one of its inmates was sexually abused at another facility, it must inform that other facility within 14 days. This standard recognizes that some victims of sexual abuse may not report an incident until they are housed in another facility. Such incidents must not evade investigation merely because the victim is no longer at the facility where the abuse occurred. The proposed standard tracks the Commission's recommendation but adds the 14-day time limit in order to provide further guidance to agencies. The standard also requires that the facility receiving the information must investigate the allegation.

Sections 115.63, 115.163, 115.263, and 115.363 (compare to the Commission's OR-3 standard) set forth staff first responder responsibilities. Staff need to be able to adequately counsel victims while maintaining security and control over the crime scene so any physical evidence is preserved until an investigator arrives. The proposed standard revises the Commission's recommendation by requesting, rather than instructing, victims not to take actions that could destroy physical evidence. This change is consistent with forthcoming revisions to the Office on Violence Against Women's *National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents*.

Sections 115.64, 115.164, 115.264, and 115.364 (compare to the Commission's OR-4 standard) require a coordinated response among first responders, medical and mental health practitioners, investigators, and facility leadership when an incident of sexual abuse takes place. This proposed standard is modeled after coordinated sexual assault response teams (SARTs),

which are widely accepted as a best practice for responding to rape and other incidents of sexual abuse. Agencies are encouraged to work with existing community SARTs or create their own plan for a coordinated response. To ensure that the victim receives the best care possible and that the investigator has the best chance of apprehending the perpetrator, the Department recommends coordination of the following actions: (1) Assessing the victim's acute medical needs, (2) informing the victim of his or her rights under relevant Federal or State law, (3) explaining the need for a forensic medical exam and offering the victim the option of undergoing one, (4) offering the presence of a victim advocate or a qualified staff member to be present during the exam, (5) providing crisis intervention counseling, (6) interviewing the victim and any witnesses, (7) collecting evidence, and (8) providing for any special needs the victim may have.

Some commenters expressed uncertainty regarding how compliance with this standard would be measured.

*Question 25: Does this standard provide sufficient guidance as to how compliance would be measured? If not, how should it be revised?*

Sections 115.65, 115.165, 115.265, and 115.365 (compare to the Commission's OR-5 standard) require that the agency protect all inmates and staff from retaliation for reporting sexual abuse or for cooperating with sexual abuse investigations. Retaliation for reporting instances of sexual abuse and for cooperating with sexual abuse investigations is a real and serious threat in correctional facilities. Fear of retaliation, such as being subjected to harsh or hostile conditions, being attacked by other inmates, or suffering harassment from staff, prevents many inmates and staff from reporting sexual abuse, which in turn makes it difficult to keep facilities safe and secure. The proposed standard requires agencies to adopt policies that help ensure that those who do report are properly monitored and protected afterwards, including but not limited to providing information in training sessions, enforcing strict reporting policies, imposing strong disciplinary sanctions for retaliation, making housing changes or transfers for inmate victims or abusers, removing alleged staff or inmate abusers from contact with victims, and providing emotional support services for inmates or staff who fear retaliation.

A few agency commenters raised concerns regarding the burdens imposed by the proposed requirement that

agencies monitor for 90 days the conduct and treatment of inmates or staff who have reported sexual abuse or cooperated with investigations. The Department believes that 90 days is an appropriate minimum amount of time to ensure that no retaliation occurs, and that such monitoring can be performed without unduly consuming agency resources. The Department has added a requirement that monitoring continue beyond 90 days where the initial monitoring conducted during the initial 90-day period indicates concerns that warrant further monitoring.

*Question 26: Should the standard be further refined to provide additional guidance regarding when continuing monitoring is warranted, or is the current language sufficient?*

The Department's proposed standard adds a requirement that the Commission discussed but did not mandate: That an agency must not enter into or renew any collective bargaining agreement or other agreement that limits its ability to remove alleged staff abusers from contact with victims pending an investigation. This requirement builds on the Commission's suggestion, in the discussion section accompanying its OR-5 standard, that "agencies should try to secure collective bargaining agreements that do not limit their ability to protect inmates or staff from retaliation." Prison/Jail Standards at 42.

Sections 115.66 and 115.366 are new standards proposed by the Department, and clarify that the use of protective custody following an allegation of sexual abuse should be subject to the same requirements as the use of protective custody as a preventative measure.

*Investigations: Sections 115.71, 115.171, 115.271, 115.371, 115.72, 115.172, 115.272, 115.372, 115.73, 115.273, and 115.373* (compare to the Commission's IN standards). Like the Commission, the Department believes it is important to set standards to govern investigations of allegations of sexual abuse. The proposed standards in these sections are substantially similar to the Commission's recommendations, with some modifications.

Sections 115.71, 115.171, 115.271, and 115.371 (compare to the Commission's IN-1 and IN-2 standards) address criminal and administrative investigations. Although criminal and administrative investigations are quite different in nature, certain elements, like evidence, are critical to both. This proposed standard addresses how to preserve the elements that are important to both. The standard requires that agencies that conduct their own investigations must do so promptly,

thoroughly, and objectively. The proposed standard requires investigations whenever an allegation of sexual abuse is made, including third-party and anonymous reports, and mandates that an investigation may not be terminated on the ground that the alleged abuser or victim is no longer employed or housed by the facility or agency.

The proposed standard requires that investigators gather and preserve all available direct and circumstantial evidence. Because sexual abuse often has no witnesses and often leaves no visible injuries, investigators must be diligent in tracking down all possible evidence, including collecting DNA and electronic monitoring data, conducting interviews, and reviewing prior complaints and reports of sexual abuse involving the alleged perpetrator. Because of the delicate nature of these investigations, investigators should be trained in conducting sexual abuse investigations in compliance with §§ 115.34, 115.134, 115.234, and 115.334.

The proposed standard also requires that administrative investigators work with criminal prosecutors in gathering certain kinds of evidence, such as compelled interviews. It is critical that such interviews not undermine subsequent criminal prosecutions. The proposed standard does not, however, require that an administrative investigation be delayed until a decision whether to prosecute has been made. To ensure an unbiased evaluation of witness credibility, the proposed standard requires that credibility assessments be made objectively rather than on the basis of the individual's status as an inmate or a staff member.

In addition, the proposed standard requires that all investigations, whether administrative or criminal, be documented in written reports. Such reports must be retained for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

Some commenters expressed concern that the Commission's proposed standard would require agencies to dictate investigative procedures to outside entities responsible for conducting investigations within agency facilities. The Department's proposed standard simply requires that a facility cooperate with any outside investigators and endeavor to remain informed about the progress of the investigation. However, the proposed standard expressly applies to any outside investigator that is a State entity or Department of Justice component.

Sections 115.72, 115.172, 115.272, and 115.372 (compare to the

Commission's IN-3 standard) set forth the evidentiary standard for administrative investigations. The Commission's proposed standard defined a "substantiated" sexual abuse allegation as one supported by a preponderance of the evidence. The Department's proposed standard allows the agency to define "substantiated" as being supported by a preponderance of the evidence or a lower evidentiary standard.

Sections 115.73, 115.273, and 115.373 address the agency's duty to report to inmates, a topic that the Commission included as part of its IN-1 standard. Specifically, upon completion of an investigation into an inmate's allegation that he or she suffered sexual abuse in an agency facility, the agency must inform the inmate whether the allegation was deemed substantiated, unsubstantiated, or unfounded. If the agency itself did not conduct the investigation, it must request the relevant information from the investigating entity in order to inform the inmate. In addition, if an inmate has alleged that a staff member committed sexual abuse, the agency must inform the inmate whenever (1) the staff member is no longer posted in the inmate's unit, (2) the staff member is no longer employed at the facility, (3) the staff member has been indicted on a charge related to the reported conduct, or (4) the indictment results in a conviction. The Department's proposed standard does not apply to allegations that have been determined to be unfounded, and (as with the Commission's recommendation) does not apply to lockups, due to the short-term nature of lockup detention.

The Commission's recommended standard would require a facility to "notify] victims and/or other complainants in writing of investigation outcomes and any disciplinary or criminal sanctions, regardless of the source of the allegation." Several agency commenters expressed concern with the Commission's proposal on security or privacy grounds. These commenters questioned the wisdom of providing written information to victims and third-party complainants, where such information could easily become widely known throughout the facility and possibly endanger other inmates or staff. In addition, commenters noted that privacy laws may restrict the dissemination of certain information about staff members. The Department believes that its proposed standard strikes the proper balance between staff members' privacy rights and the inmate's right to know the outcome of

the investigation, while protecting the security of both inmates and staff.

*Discipline: Sections 115.76, 115.176, 115.276, 115.376, 115.77, 115.177, 115.277, and 115.377* (compare to the Commission's DI standards). Like the Commission, the Department proposes two standards to ensure appropriate and proper discipline in relation to cases of sexual abuse. These standards are substantively similar to those offered by the Commission.

Sections 115.76, 115.176, 115.276, and 115.376 (compare to the Commission's DI-1 standard) govern disciplinary sanctions for staff members who violate sexual abuse or sexual harassment policies, regardless of whether they have been found criminally culpable. Imposing appropriate disciplinary sanctions against such staff members is critical not only to providing a just resolution to substantiated allegations of sexual abuse and sexual harassment but also to fostering a culture of zero tolerance for such acts. The sanction for sexually abusive conduct or penetration is presumed to be termination. Terminations for violating such policies, or resignations by staff who otherwise would have been terminated, must be reported to law enforcement agencies as well as to any relevant licensing bodies. However, the Department's proposed standard limits the Commission's recommendation by not requiring a report to law enforcement where the conduct was clearly not criminal. The proposed standard also adds the requirement—discussed but not mandated by the Commission, *see* Prison/Jail Standards at 47—that sanctions must be fair and proportional, taking into consideration the accused staff member's actions, disciplinary history, and sanctions imposed on other staff members in similar situations. Yet at the same time, such sanctions must send a clear message that sexual abuse is not tolerated.

Sections 115.77, 115.277, and 115.377 (compare to the Commission's DI-2 standard) govern disciplinary sanctions for inmates who are found to have sexually abused another inmate. Holding inmates accountable for such abuse is an essential deterrent and a critical component of a zero-tolerance policy. As with sanctions against staff, sanctions against inmates must be fair and proportional, taking into consideration the inmate's actions, disciplinary history, and sanctions imposed on other inmates in similar situations, and must send a clear message that sexual abuse is not tolerated. The disciplinary process must also take into account any mitigating

factors, such as mental illness or mental disability, and must consider whether to incorporate therapy, counseling, or other interventions that might help reduce recidivism.

The Department's proposed standard makes four changes to the Commission's recommendation, each of which was suggested by commenters. First, the proposed standard does not require therapy, but rather requires that the facility consider whether to condition access to programming or other benefits on the inmate agreeing to participate in therapy. Second, the standard does not permit disciplining inmates for sexual contact with staff without a finding that the staff member did not consent to such contact. Although agencies must not tolerate sexual contact between inmates and staff, the power imbalance between staff and inmates requires that discipline fall on the staff member unless he or she did not consent to the activity. Otherwise, inmates may be reluctant to report sexual abuse by staff for fear that they will be disciplined. Third, the standard provides that inmates may not be punished for making good-faith allegations of sexual abuse, even if the allegation is not substantiated following an investigation. Fourth, the standard provides that an agency must not consider consensual sexual contact between inmates to constitute sexual abuse. This standard is not intended to limit an agency's ability to prohibit such activity, but only to clarify that consensual sexual activity between inmates does not fall within the ambit of PREA.

Lockups generally do not hold inmates for prolonged periods of time and thus do not impose discipline. As a result, § 115.177, like the Commission's DI-2 standard for lockups, requires a referral to the appropriate prosecuting authority when probable cause exists to believe that one lockup detainee sexually abused another. If the lockup is not responsible for investigating allegations of sexual abuse, it must inform the responsible investigating entity. The proposed standard also applies to any State entity or Department of Justice component that is responsible for sexual abuse investigations in lockups.

*Medical and Mental Health Care:* Sections 115.81, 115.381, 115.82, 115.182, 115.282, 115.382, 115.83, 115.283, and 115.383 (compare to the Commission's MM standards). Like the Commission, the Department has proposed three standards to ensure that inmates receive the appropriate medical and mental health care. Each proposed standard is substantially similar to that proposed by the Commission.

Sections 115.81 and 115.381 (compare to the Commission's MM-1 standard) requires that inmates be asked about any prior history of sexual victimization and abusiveness during their intake or classification screening. Although the proposed standards do not require inmates to answer these questions, inmates should be informed that disclosing prior sexual victimization and abuse is in their own best interest as such information is used both to determine whether follow-up care is needed and where the inmate can be safely placed within the facility.

Some commenters suggested that the Commission's recommended standard would be too costly because it would require that medical or mental health practitioners conduct these interviews. Unlike the Commission's standard, the proposed standard does not specify who should conduct this inquiry, but instead requires the inmate be offered a follow-up with a medical or mental health practitioner within 14 days of the intake screening. Some commenters also suggested that the standard proposed by the Commission would impose a disproportional cost burden on smaller jails whose current staffs would not be able to meet its requirements. The proposed standard limits the inquiry required in jails by not requiring an inquiry about prior sexual abusiveness.

Neither the Commission's recommended standard nor the Department's proposed standard applies to either lockups or community confinement facilities. The proposed standard is not appropriate for lockups given the relatively short time that they are responsible for inmate care. Nor is it appropriate for community confinement facilities, which do not undertake a similar intake/classification screening process.

Sections 115.82, 115.182, 115.282, and 115.382 (compare to the Commission's MM-2 standard) require that victims of sexual abuse receive free access to emergency medical treatment and crisis intervention services if they have been a victim of sexual abuse.

Sections 115.83, 115.283, and 115.383 (compare to the Commission's MM-3 standard) require that victims of sexual abuse receive access to ongoing medical and mental health care, and that abusers receive access to care as well. This proposed standard recognizes that victims of sexual abuse can experience a range of physical injuries and emotional reactions, even long after the abuse has occurred, that can require medical or mental health attention. Thus, this standard requires facilities to offer ongoing medical and mental health care consistent with the community

level of care for as long as such care is needed. The standard also requires that known inmate abusers receive a mental health evaluation within 60 days of learning the abuse has occurred. If specific mental health concerns have contributed to the abuse, treatment may improve facility security.

Some commenters raised concerns about the cost of offering treatment to abusers, as opposed to treating only victims. The Department believes that the benefit of reducing future abuse by proven abusers justifies the additional cost, both in terms of future incidents avoided and an improved overall sense of safety within the facility. However, the proposed standard is not intended to require a specialized comprehensive sex offender treatment program, which as several commenters noted could impose a significant financial burden, and the Department believes that requiring agencies to offer reasonable treatment is justifiable in light of the anticipated costs and benefits.

*Question 27: Does the standard that requires known inmate abusers to receive a mental health evaluation within 60 days of learning the abuse has occurred provide adequate guidance regarding the scope of treatment that subsequently must be offered to such abusers? If not, how should it be revised?*

In addition, with respect to victims, this category of standards includes two recommendations from the discussion section that accompanied the Commission's MM-3 standard: where relevant, agencies must provide timely information of and access to all pregnancy-related medical services that are lawful in the community, and must provide pregnancy tests. See *Prison/Jail Standards* at 52. The Department also proposes to require the provision of timely information about and access to sexually transmitted infections prophylaxis where appropriate.

*Data Collection and Review: Section 115.86, 115.186, 115.286, 115.386, 115.87, 115.187, 115.287, 115.387, 115.88, 115.188, 115.288, 115.388, 115.89, 115.189, 115.289, and 115.389* (compare to the Commission's DC standards). Like the Commission, the Department has proposed four standards addressing how facilities should collect and review data to identify those policies and practices that are contributing to or failing to prevent sexual abuse and sexual harassment. Each of the proposed standards in the DC category is substantially similar to that proposed by the Commission.

Sections 115.86, 115.186, 115.286, and 115.386 (compare to the Commission's DC-1 standard) set forth

the requirements for sexual abuse incident reviews, including when reviews should take place and who should take part. The sexual abuse review is separate from the sexual abuse investigation, and is intended to evaluate whether the facility's policies and procedures need to be changed in light of the incident or allegation. By contrast, the investigation is intended to determine whether the abuse actually happened. A review should occur after every investigation, unless the investigation deems the allegation unfounded, and should consider (1) whether changes in policy or practice are needed to better prevent, detect, or respond to sexual abuse incidents like the one that occurred, (2) whether race, ethnicity, sexual orientation, gang affiliation or group dynamics in the facility played a role in the incident or allegation, (3) whether physical barriers in the facility itself contributed to the incident or allegation, (4) whether staffing levels need to be changed in light of the incident or allegation, and (5) whether more video monitoring is needed.

The Commission's proposed standard did not include sexual orientation in its list of issues to be considered what the review team should consider. Some commenters expressed the view that determining whether abuse is motivated by sexual orientation is just as important to an incident review as determining whether it was motivated by race. The proposed standard directs the review team to consider whether sexual orientation motivated or caused the incident or allegation.

Some commenters raised concerns about the cost of conducting sexual abuse incident reviews. There are, however, facilities that already do these reviews, and the Department believes that the required steps need not be onerous. The purpose of this requirement is not to require a duplicative investigation but rather to require the facility to pause and consider what lessons, if any, it can learn from the investigation it has conducted.

Sections 115.87, 115.187, 115.287, and 115.387 (compare to the Commission's DC-2 standard) specify the incident-based data each agency is required to collect in order to detect possible patterns and help prevent future incidents. Under this standard, the agency is required to collect data needed to completely answer all questions included in BJS's Survey on Sexual Violence. The Department has added a requirement that an agency must provide the Department with this data upon request.

Sections 115.88, 115.188, 115.288, and 115.388 (compare to the Commission's DC-3 standard) describe how the collected data should be analyzed and reported. The proposed standard mandates that agencies use the data to identify problem areas, take ongoing corrective action, and prepare an annual report for each facility as well as the agency as a whole, including a comparison with data from previous years. The report must be made public through the agency's Web site or other means to help promote agency accountability. The Department cautions, however, that an increase in reported incidents may reflect improvements in a facility's policies regarding reporting and investigation, rather than an actual increase in sexual abuse at the facility.

Sections 115.89, 115.189, 115.289, and 115.389 (compare to the Commission's DC-4 standard) provide guidance on how to store, publish, and retain the data. Data must be stored in a way that protects its integrity and must be retained for an adequate length of time, *i.e.*, at least 10 years. In addition, data must protect the confidentiality of victims and alleged perpetrators. This standard also requires that the agency make its aggregated data publicly available either through its Web site or other means.

*Audits: Sections 115.93, 115.193, 115.293, and 115.393* (compare to the Commission's AU-1 standard). Like the Commission, the Department believes that independent audits are critical to ensuring that facilities are doing all they can to eliminate prison rape. The Commission's proposed standard would require triennial audits of all facilities by independent auditors "prequalified" by the Department. The Commission explained its inclusion of this standard as follows:

Publicly available audits allow agencies, legislative bodies, and the public to learn whether facilities are complying with the PREA standards. Audits can also be a resource for the Attorney General in determining whether States are meeting their statutory responsibilities. Public audits help focus an agency's efforts and can serve as the basis upon which an agency can formulate a plan to correct any identified deficiencies. Prison/Jail Standards at 57.

Numerous agency commenters criticized the Commission's proposals on various grounds, including cost, duplication of audits performed by accrediting organizations, duplication of existing State oversight, and the possibility that disagreements in interpretation could lead to inconsistencies in auditing. Other commenters endorsed the Commission's

proposal as necessary to ensure proper oversight; some commenters suggested that audits should be more frequent than once every three years.

The Department believes that independent audits can play a key role in implementation of PREA, especially given the fact that only States, but not localities or Federal entities, are subject to financial penalties for noncompliance. Audits, however, can be time-consuming and resource-intensive. Particularly as agencies come into compliance with the substantive standards, routine audits may not contribute to improving agency performance to a degree that warrants the time and resources committed to them. The Department believes that further discussion is necessary in order to determine how frequently, and on what basis, such audits should be conducted. Accordingly, the proposed standard does not specify the frequency of audits.

The Department has identified three possible approaches to the frequency of audits, and specifically invites comment on these as well as any other options commenters may wish to propose.

One possible approach is to adopt the Commission's proposal of triennial audits for all covered facilities, possibly with a modification lowering or eliminating the burden on lockups, the smallest facilities covered by PREA. A second approach is to adopt a system of random sampling of facilities. Because no facility would know in advance whether it would be audited, all facilities would have an incentive to be in compliance. A third approach is to implement an auditing system based on information indicating concerns at a particular facility. Audits could be triggered when information was received providing reason to believe that a particular facility is significantly out of compliance with the standards. Such a trigger could be based upon facility-provided data, third-party complaints, or any other source of credible information.

The proposed audit standard clarifies the requirements for an audit to be considered independent. If the agency uses an outside auditor, it must ensure that it does not have a financial relationship with the auditor for three years before or after the audit, other than payment for the audit conducted. The proposed standard specifies that the audit may be conducted by an external monitoring body that is part of, or authorized by, State or local government, such as a government agency or nonprofit entity whose purpose is to oversee or monitor correctional facilities. In addition, the

proposed standard allows an agency to utilize an internal inspector general or ombudsperson who reports directly to the agency head or to the agency's governing board. The Department believes that allowing these entities to perform audits would ensure auditor independence while at the same time allowing the use of existing resources where available in order to reduce costs and duplication of effort.

The proposed standard further states that the Department will prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of facilities, review of documents, and interviews of staff and inmates, as well as the minimal qualifications for auditors. Although the Commission's proposal would mandate that the agency provide access to facilities, documents, and personnel "as deemed appropriate by the auditor," the Department believes that it would be prudent to set general ground rules in order to ensure that auditors are provided sufficient access without agencies incurring excessive or unpredictable expenditures or commitment of personnel.

*Question 28: Should audits be conducted at set intervals, or should audits be conducted only for cause, based upon a reason to believe that a particular facility or agency is materially out of compliance with the standards? If the latter, how should such a for-cause determination be structured?*

*Question 29: If audits are conducted for cause, what entity should be authorized to determine that there is reason to believe an audit is appropriate, and then to call for an audit to be conducted? What would be the appropriate standard to trigger such an audit requirement?*

*Question 30: Should all facilities be audited or should random sampling be allowed for some or all categories of facilities in order to reduce burdens while ensuring that all facilities could be subject to an audit?*

*Question 31: Is there a better approach to audits other than the approaches discussed above?*

*Question 32: To what extent, if any, should agencies be able to combine a PREA audit with an audit performed by an accrediting body or with other types of audits?*

*Question 33: To what extent, if any, should the wording of any of the substantive standards be revised in order to facilitate a determination of whether a jurisdiction is in compliance with that standard?*

*State Certification and Definition of "Full Compliance."* PREA mandates that

any amount that a State would otherwise receive for prison purposes from the Department in a given fiscal year shall be reduced by five percent unless the chief executive of the State certifies either that the State is in "full compliance" with the standards or assures that not less than five percent of such amount shall be used "only for the purpose of enabling the State to adopt, and achieve full compliance with" the standards "so as to ensure that a certification \* \* \* may be submitted in future years." 42 U.S.C. 15607(c)(2). This requirement goes into effect for the second fiscal year beginning after the date on which the national standards are finalized. *See* 42 U.S.C. 15607(c)(7)(A).

The Department solicits comments on the proper construction of the term "full compliance," keeping in mind Congress's view that States would be able to—and should be encouraged to—achieve full compliance. One possibility is to define "full compliance" as adoption of and compliance with each and every standard, but to provide that de minimis failures to comply with a standard will not throw a State out of compliance. In other words, a State would be required to adopt and implement every applicable standard, but would not be held to a requirement of perfection in order to be considered in full compliance. The Department is interested both in suggestions for how to define full compliance and how an assessment would be made as to whether a State is in full compliance. In crafting such a definition, the Department aims to ensure that full compliance is actually attainable for States and that States receive sufficient and timely guidance on how the term is to be interpreted.

*Question 34: How should "full compliance" be defined in keeping with the considerations set forth in the above discussion?*

*Question 35: To what extent, if any, should audits bear on determining whether a State is in full compliance with PREA?*

*Other Executive Departments.* With respect to Federal entities, the proposed rule would not apply beyond certain Department of Justice components. The Department has interpreted PREA to authorize and require the Attorney General to make the national standards binding only on the Bureau of Prisons, which houses criminal inmates. Non-PREA authorities authorize the Attorney General to make the standards binding on other Department facilities housing criminal inmates, such as U.S. Marshals Service facilities, and to make those standards that are relevant to the

conduct of investigations binding on Department components that are responsible for investigation allegations of sexual abuse in confinement settings. *See, e.g.,* 28 U.S.C. 503, 509, 561–566; 18 U.S.C. 4001(b). Thus, while the proposed standards may be considered and adopted, as appropriate, by other Federal agencies housing detainees and inmates, the proposed rule makes the standards binding only on Department facilities.

*Supplemental Immigration Standards.* The Department does not propose including the set of supplemental standards that the Commission recommended to govern facilities that house immigration detainees. As the Commission noted in its final report, immigration detainees are sometimes detained in local or State facilities or in facilities operated by the Federal Bureau of Prisons. The Commission's ID-6 standard would mandate that immigration detainees be housed separately. Several commenters expressed concern that this would impose a significant burden on jails and prisons. The Department has similar concerns about the Commission's other proposed supplemental standards, such as imposing separate training requirements, requiring agencies to attempt to enter into separate memoranda of understanding with immigration-specific community service providers, and requiring the provision of access to telephones with free, preprogrammed numbers to specified Department of Homeland Security offices. The Department expects that its proposed general training requirements, along with the general requirements to make efforts to work with outside government entities and community service providers, will serve to protect immigration detainees along with the general inmate population. In addition, the Department has included in §§ 115.41 and 115.241 a requirement that screenings for risk of victimization include a consideration of whether the inmate is detained solely on civil immigration charges. Furthermore, the Department notes that ICE has published Performance Based National Detention Standards for the civil detention of aliens pending removal from the United States by ICE detention facilities, Contract Detention Facilities, and State or local government facilities used by ICE through Intergovernmental Service Agreements to hold detainees for more than 72 hours, and that one standard specifically addresses Sexual Abuse and Assault Prevention and Intervention. *See* <http://www.ice.gov/detention-standards/2008/> and [http://](http://www.ice.gov/detention-standards/2008/)

[www.ice.gov/doclib/dro/detention-standards/pdf/sexual\\_abuse\\_and\\_assault\\_prevention\\_and\\_intervention.pdf](http://www.ice.gov/doclib/dro/detention-standards/pdf/sexual_abuse_and_assault_prevention_and_intervention.pdf).

*Additional Suggested Standard.*

Several commenters suggested that the Department should propose an additional standard to govern the placement and treatment of juveniles in adult facilities. A number of advocacy groups proposed a full ban on placing persons under the age of 18 in adult facilities where contact would occur with incarcerated adults. Others proposed instead that the standards incorporate the requirements of the Juvenile Justice and Delinquency Prevention Act (JJDP), 42 U.S.C. 5601 *et seq.*, which provides formula grants to States on the condition that States comply with certain requirements intended to, among other things, protect juveniles from harm by, subject to certain exceptions, deinstitutionalizing status offenders, separating juveniles from adults in secure facilities, and removing juveniles from adult jails and lockups. See 42 U.S.C. 5633(a)(11)–(14). States that participate in the JJDP Formula Grants Program are subject to a partial loss of funding if they are found not to be in compliance with specified requirements. The JJDP's implementing regulations limit its application to youths who are tried in juvenile courts, but some commenters suggested that the Department should propose a standard that includes youth under adult criminal court jurisdiction.

The Department's proposed standards do not include a standard on this topic. However, the Department solicits comments on whether the final rule should include such a standard.

*Question 36: Should the final rule include a standard that governs the placement of juveniles in adult facilities?*

*Question 37: If so, what should the standard require, and how should it interact with the current JJDP requirements and penalties mentioned above?*

## V. Regulatory Certifications

### *Executive Order 12866—Regulatory Planning and Review*

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and

Budget. Please see the Initial Regulatory Impact Analysis, summarized below, for a discussion of the costs and benefits of this rule.

### *Executive Order 13132—Federalism*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. This rule merely proposes regulations to implement PREA by establishing national standards for the detection, prevention, reduction, and punishment of prison rape. Further, PREA prohibits the Department from establishing national standards that would impose substantial additional costs compared to the costs presently expended by Federal, State and local prison authorities. In drafting the standards, the Department was mindful of its obligation to meet the objectives of PREA while also minimizing conflicts between State law and Federal interests. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Notwithstanding the determination that the formal consultation process described in Executive Order 13132 is not required for this rule, the Department's PREA Working Group consulted with representatives of State and local prisons and jails, juvenile facilities, community corrections programs and lockups—among other individuals and groups—during the listening sessions the Working Group conducted in January and February 2010. The Department also solicited and received input from public entities in its ANPRM.

### *Executive Order 12988—Civil Justice Reform*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

### *Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies, unless otherwise prohibited by law, to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).

The Department has assessed the probable impact of the PREA regulations and, as is more fully described in the Initial Regulatory Impact Analysis, believes these regulations will likely

result in an aggregate expenditure by State and local governments of approximately \$213 million in startup expenses and \$544 million in annual ongoing expenses.

However, the Department believes the requirements of the UMRA do not apply to the PREA regulations because UMRA excludes from its definition of "Federal intergovernmental mandate" those regulations imposing an enforceable duty on other levels of government which are "a condition of Federal assistance." 2 U.S.C. 658(5)(A)(i)(I). PREA provides that any amount that a State would otherwise receive for prison purposes from the Department in a given fiscal year shall be reduced by five percent unless the chief executive of the State certifies either that the State is in "full compliance" with the standards or that not less than five percent of such amount shall be used to enable the State to achieve full compliance with the standards. Accordingly, compliance with these PREA standards is a condition of Federal assistance.

Notwithstanding how limited the Department's obligations may be under the formal requirements of UMRA, the Department has engaged in a variety of contacts and consultations with State and local governments including during the listening sessions the Working Group conducted in January and February 2010. Further, the Department also solicited and received input from public entities in its ANPRM.

For the foregoing reasons, while the Department does not believe that a formal statement pursuant to the UMRA is required, it has, for the convenience of the public, summarized as follows various matters discussed at greater length elsewhere in this rulemaking which would have been included in a UMRA statement should that have been required:

- These national standards are being issued pursuant to the requirements of the Prison Rape Elimination Act of 2003, 42 U.S.C. 15601 *et seq.*

- A qualitative and quantitative assessment of the anticipated costs and benefits of these national standards appears below in the Regulatory Flexibility Act section;

- The Department does not believe that these national standards will have an effect on the national economy, such as an effect on productivity, economic growth, full employment, creation of productive jobs, or international competitiveness of United States goods and services;

- The Department consulted with State and local governments during the listening sessions the Working Group conducted in January and February

2010. Further, the Department also solicited and received input from public entities in its ANPRM. The Department received numerous comments on its ANPRM from State and local entities, the vast majority of which focused on the potential costs associated with certain of the Commission's recommended standards. Standards of particular cost concern included the cross-gender pat-down prohibition, the auditing standard, and standards regarding staff supervision and video monitoring. The Department has altered various standards in ways that it believes will appropriately mitigate the cost concerns identified in the comments. State and local entities also expressed concern that the standards were overly burdensome on small correctional systems and facilities, especially in rural areas. The Department's proposed standards include various revisions to the Commission's recommendations in an attempt to address this issue.

- Before it issues final regulations implementing national standards pursuant to PREA the Department will: (1) Provide notice of these requirements to potentially affected small governments, which it has done by publishing the ANPRM, by the publishing of this Notice of proposed rulemaking, by the listening sessions it has conducted, and by other activities; (2) enable officials of affected small governments to provide meaningful and timely input, via the methods listed above; and (3) work to inform, educate, and advise small governments on compliance with the requirements.

- As discussed above in the Initial Regulatory Impact Assessment summarized below, the Department has identified and considered a reasonable number of regulatory alternatives and from those alternatives has attempted to select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of PREA.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule may result in an annual effect on the economy of \$100,000,000 or more, although it will not result in a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### *Regulatory Flexibility Act*

The Department of Justice drafted this proposed rule so as to minimize its impact on small entities, in accordance with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, while meeting its intended objectives. Based on presently available information, the Department is unable to state with certainty that the proposed rule, if promulgated as a final rule, would not have any effect on small entities of the type described in 5 U.S.C. 601(3). Accordingly, the Department has prepared an Initial Regulatory Impact Analysis (IRIA) in accordance with 5 U.S.C. 604. A summary of the IRIA appears below; the complete IRIA is available for public review at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_nprm\\_iria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm_iria.pdf). Following the summary, the Department lists a set of questions upon which it specifically solicits public comment. However, the Department welcomes information and feedback concerning any and all of the assumptions, estimates, and conclusions presented in the IRIA.

In PREA, Congress directed the Attorney General to promulgate national standards for the detection, prevention, reduction, and punishment of prison rape. In doing so, Congress understood that such standards were likely to require Federal, State, and local agencies (as well as private entities) that operate inmate confinement facilities to incur costs in implementing the standards. Given the statute's aspiration to eliminate prison rape in the United States, Congress expected that some level of compliance costs would be appropriate and necessary.

Nevertheless, Congress imposed a limit on the cost of the standards. Specifically, Congress instructed the Attorney General not to adopt any standards "that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 42 U.S.C. 15607(a)(3). This statutory mandate requires that the Department evaluate costs and benefits before promulgating national standards.

Moreover, separate and apart from what PREA itself requires, the Department is required by both the RFA and Executive Order 12866, *Regulatory Planning and Review*, as amended without substantial change by Executive Order 13258, to conduct an IRIA to assess the benefits and costs of its proposed rule. An IRIA must include an assessment of both the quantitative and qualitative benefits and costs of the proposed regulation, as well as a discussion of potentially effective and

reasonably feasible alternatives, in order to inform stakeholders in the regulatory process of the effects of the proposed rule.

Some stakeholders may question whether economic analysis is even relevant to the implementation of a civil rights statute. Under this view, because PREA aims to protect the Eighth Amendment rights of incarcerated persons, regulations designed to implement its protections are necessary regardless of whether benefits can be shown to outweigh costs. Furthermore, some might argue, many expected benefits—including protecting the constitutional and dignitary rights of inmates—may defy ready identification and quantification, making a monetized benefit-cost analysis an unfair comparison.

The Department is sympathetic to these views. The destructive, reprehensible, and illegal nature of rape and sexual abuse in any setting, and its especially pernicious effects in the correctional environment, warrant the adoption of strong and clear measures. However, as noted above, PREA mandates that the Attorney General remain conscious of costs in promulgating national standards. Moreover, the statutes that require agencies to express the benefits and costs of regulations in economic terms do not distinguish between regulations that implement civil rights statutes and regulations that implement other laws.

The Department also believes that presenting a comprehensive assessment of the benefits and costs of its proposed standards, described in both quantitative and qualitative terms, will promote greater understanding of PREA and may facilitate compliance with the standards.

A summary of the major conclusions of the IRIA is set forth below. However, the Department encourages review of the complete IRIA in order to assess the Department's assumptions, calculations, and conclusions.

The IRIA begins by estimating the prevalence of sexual abuse in prisons—*i.e.*, the number of persons who experience it each year. Next, the IRIA calculates the cost of specific types of victimization, and therefore the benefit that will accrue from reducing such incidents. The IRIA then calculates the anticipated costs of the Department's proposed standards. Finally, the IRIA calculates how much of a reduction in prison rape would be necessary in order for the benefits of the proposed standards to outweigh the costs.

*Prevalence.* Table 1 sets forth the estimate of the baseline prevalence of prison rape for benefit-cost analysis

purposes, divided into four different event types (rape involving force, nonconsensual sexual acts involving pressure, abusive sexual contacts, and willing sex with staff) in three different confinement settings (adult prisons, adult jails, and juvenile facilities). (The Department is not aware of reliable data

as to the prevalence of rape and sexual abuse in lockup and community confinement settings.) For each event type, the total number of individuals who were victimized during 2008 is estimated, using figures compiled from inmate surveys by BJS,<sup>6</sup> as adjusted to account for the flow of inmates over that

period of time. Inmates who experienced more than one type of victimization during the period are included in the figures for the most serious type of victimization they reported.

TABLE 1—BASELINE PREVALENCE OF PRISON RAPE AND SEXUAL ABUSE BY TYPE OF INCIDENT AND TYPE OF FACILITY, 2008

	Adult prisons	Adult jails	Juvenile facilities
Rape involving force/threat of force .....	26,200	39,200	4,400
Nonconsensual sexual acts involving pressure/coercion .....	18,400	14,800	2,900
Abusive sexual contacts .....	19,000	23,000	3,000
Willing sex with staff .....	27,800	31,100	6,800
Total .....	91,400	108,100	17,100

*Benefits.* Table 2 sets forth a range of costs associated with one incident of each type of victimization in each of the three settings. These costs are also known as “unit avoidance benefits”—that is, the benefits that will accrue from avoiding one incident that otherwise would occur. These values have been derived from general literature assessing

the cost of rape,<sup>7</sup> with adjustments made to account for the unique characteristics of rape in the prison setting. The values are presented as a range. The lower bound is calculated using the “victim compensation model,” which aims to identify the costs of sexual abuse to the victim, both tangible (such as medical and mental health

care) and intangible (such as pain and suffering). The upper bound is calculated using the “contingent valuation model,” which assesses how much the public would be willing to pay to avoid an incident of sexual abuse.

TABLE 2—RANGE OF UNIT AVOIDANCE BENEFITS BY TYPE OF VICTIM AND TYPE OF FACILITY, IN 2010 DOLLARS

	Adult prisons	Adult jails	Juvenile facilities
Rape involving force/threat of force .....	\$200,000 to \$300,000		\$275,000 to \$400,000.
Sexual assault involving pressure/coercion .....	\$40,000 to \$60,000		\$55,000 to \$80,000.
Abusive sexual contacts .....	\$375		\$500.
Willing sex with staff .....	\$375		\$55,000 to \$80,000.

Table 3 sets forth the total monetary benefit of a 1% reduction from the baseline in the average annual

prevalence of prison rape, which is calculated by multiplying the unit

avoidance benefit by 1% of the total number of incidents for each category.

TABLE 3—TOTAL MONETARY BENEFIT OF A 1% REDUCTION FROM THE BASELINE IN THE AVERAGE ANNUAL PREVALENCE OF PRISON RAPE AND SEXUAL ABUSE IN THOUSANDS OF 2010 DOLLARS

	Adult prisons	Adult jails	Juvenile facilities	Total
Rape involving injury/force/threat of force .....	\$52,400 to \$78,600 ....	\$78,400 to \$117,600 ..	\$9,636 to \$17,600 .....	\$140,436 to \$213,800.
Nonconsensual sexual acts involving pressure/coercion .....	\$7,360 to \$11,040 .....	\$5,920 to \$8,880 .....	\$1,276 to \$2,320 .....	\$14,556 to \$22,240.
Abusive sexual contacts .....	\$71 .....	\$86 .....	\$12 .....	\$169.
Willing sex with staff .....	\$104 .....	\$117 .....	\$1,496 to \$2,720 .....	\$1,555 to \$2,779.
Total (Rounded) .....	\$60,000–\$90,000 .....	\$84,500 to \$126,500 ..	\$12,500 to \$22,500 ....	\$157,000 to \$239,000.

As noted in the bottom right cell in Table 3, the total monetary benefit of a 1% reduction in the prevalence of prison rape and sexual abuse is between \$157 and \$239 million.

However, these calculations do not include the substantial nonmonetary benefits associated with reducing the prevalence of prison rape and sexual abuse. As Executive Order 12866

instructs, a proper understanding of costs and benefits must “include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of

<sup>6</sup> See BJS, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09* (NCJ 231169) (Aug. 2010); BJS, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008–09* (NCJ 228416) (Jan. 2010).

<sup>7</sup> See, e.g., National Institute of Justice Research Report, *Victim Costs and Consequences: A New Look* (NCJ 155282) (Jan. 1996), available at <http://www.ncjrs.gov/pdffiles/victcost.pdf>; Ted R. Miller et al., *Costs of Sexual Violence in Minnesota* (Minn.

Dep’t Health July 2007), available at [http://www.pire.org/documents/mn\\_brochure.pdf](http://www.pire.org/documents/mn_brochure.pdf); Mark A. Cohen et al., *Willingness-to-Pay for Crime Control Programs*, 42 *Criminology* 89 (2004).

costs and benefits that are difficult to quantify, but nevertheless essential to consider.” Sec. 1(a), E.O. 12866.

Non-quantifiable benefits from reducing sexual abuse accrue to the victims themselves, to inmates who are not victims, to prison administrators and staff, to families of victims, and to society at large. For example, the PREA standards will yield non-quantifiable benefits to victims even with regard to abuse that the standards do not prevent. Implementation of the standards will enhance the mental well-being of victims by ensuring that they receive adequate treatment after an incident, which in turn will enhance their ability to integrate into the community and maintain stable employment upon their release from prison. Moreover, the standards will reduce the risk of re-traumatization associated with evidence collection, investigation, and any subsequent legal proceedings that take place in connection with sexual abuse and its prosecution. Victims will also benefit from the increased likelihood that their perpetrators will be held accountable for their crimes. A broader range of non-quantifiable benefits for

inmates, staff, and others is discussed in the complete IRIA.<sup>8</sup>

*Costs.* The IRIA contains a preliminary assessment of the anticipated compliance costs associated with the Department’s proposed standards. The primary source for this assessment is study conducted by Booz Allen Hamilton, a consulting firm with which the Department contracted to develop a preliminary cost analysis of the Commission’s recommended standards. The IRIA adjusts this cost analysis to estimate the compliance costs of the Department’s proposed standards, rather than the Commission’s recommendations. Other sources include assessments by the Federal Bureau of Prisons (BOP) and the United States Marshals Service (USMS) of their expected implementation costs as well as comments submitted in response to the ANPRM.

The IRIA estimates the cost of implementing each of the proposed standards, assuming that the first full year for which the standards will be applicable is 2012, with all startup expenses assigned to that year. Subsequent compliance costs are

assigned in present value terms (using both a 3% and a 7% discount rate), for 2013 through 2026. Where possible, costs are differentiated based on facility type: prisons, jails, juvenile facilities, community confinement facilities, and lockups. The IRIA assumes that the Department’s standards will apply to, and will be adopted and implemented by: 1,668 prisons; 3,365 jails; 2,810 juvenile facilities; lockups operated by at least 4,469 different agencies; and approximately 530 community confinement facilities. See BJS, 2005 *Census of State and Federal Correctional Facilities*; 2006 *Census of Jail Facilities*; and 2008 *Juvenile Residential Facility Census* (unpublished; on file with BJS).

Table 4 sets forth in summary fashion the anticipated costs of compliance on a startup, ongoing, and total (15-year) basis. No adjustment is made in the out-years for inflation or for anticipated cost savings due to innovation—that is, costs are assumed to be constant in nominal terms over the course of the 15-year period.

TABLE 4—TOTAL EXPECTED COMPLIANCE COSTS, 2012–2026 BY FACILITY TYPE, IN THOUSANDS OF DOLLARS

	Startup	Ongoing	Total 2012–2026 3% discount rate (present value)	Total 2012–2026 7% discount rate (present value)
Prisons .....	\$26,304	\$56,407	\$411,494	\$249,035
Jails .....	117,742	356,618	2,745,729	1,762,524
Juvenile Facilities .....	24,087	78,497	602,546	386,128
Community Confinement .....	300	2,358	17,680	11,177
Lockups .....	44,913	50,583	417,672	278,212
Total .....	213,346	544,463	4,195,121	2,687,076

Thus, the Department currently projects that compliance costs for the proposed standards will be approximately \$213 million in the first (startup) year, followed by an average cost of approximately \$544 million per year subsequently. Table 5 compares the

projected nationwide upfront and ongoing costs of the Commission’s recommendations to the Department’s proposed standards. The Commission’s recommended standards would cost an estimated \$6.5 billion in upfront costs plus \$5.3 billion in annual costs. As

noted in Table 5, the Department’s proposed standards, depending upon the type of facility, would require an estimated 31% to 99% less in upfront costs than the Commission’s recommended standards and 44% to 99% less in ongoing costs.

TABLE 5—COMPARISON OF PROJECTED NATIONWIDE UPFRONT AND ONGOING COSTS COMMISSION RECOMMENDATIONS VERSUS DEPARTMENT PROPOSED STANDARDS IN THOUSANDS OF DOLLARS

	Upfront costs			Ongoing costs		
	Commission	DOJ	Difference (percent)	Commission	DOJ	Difference (percent)
Prisons .....	\$2,778,770	\$26,304	99.05	\$733,166	\$56,407	92.31
Jails .....	3,151,806	117,742	96.26	1,955,154	356,618	81.76
Juvenile .....	475,562	24,087	94.94	139,417	78,497	43.70
Comm. Conf .....	20,944	300	98.57	233,735	2,358	98.99
Lockups .....	65,093	44,913	31.00	2,240,096	50,583	97.74

<sup>8</sup> As noted above, the Department is not aware of reliable data regarding the prevalence of sexual

abuse in lockups and community confinement

facilities. The IRIA accordingly classifies these as non-quantifiable benefits. See IRIA at 14–15, 27.

TABLE 5—COMPARISON OF PROJECTED NATIONWIDE UPFRONT AND ONGOING COSTS COMMISSION RECOMMENDATIONS VERSUS DEPARTMENT PROPOSED STANDARDS IN THOUSANDS OF DOLLARS—Continued

	Upfront costs			Ongoing costs		
	Commission	DOJ	Difference (percent)	Commission	DOJ	Difference (percent)
Total .....	6,492,175	213,346	96.71	5,301,568	544,463	89.73

Table 6 depicts the expected upfront and ongoing compliance costs associated with the Department’s proposed standards on a per-facility and per-inmate basis for the different facility types.

TABLE 6—EXPECTED UPFRONT AND ONGOING COMPLIANCE COSTS, NATIONWIDE, PER FACILITY AND PER INMATE

	Upfront	Ongoing
Prisons, per Facility .....	\$15,770	\$33,817
Prisons, Per Inmate .....	16.48	35.35
Jails, Per Facility .....	34,990	105,978
Jails, Per Inmate .....	96.00	292.00
Juvenile, per Facility .....	8,572	27,935
Juvenile, per Resident ..	227.00	741.00
Comm. Conf., per Per-son .....	5.36	42.12
Lockups, per Facility .....	9,843	11,086

Next, to evaluate whether the costs of the proposed PREA standards are justified in light of their anticipated benefits, the IRIA conducts a break-even analysis to determine how much the standards would need to reduce prison rape in order for benefits to exceed costs, and to assess whether it is reasonable to assume that the standards will in fact be as effective as needed for this to occur.

As elaborated in Tables 7 and 8, given that the proposed PREA standards are expected to cost the correctional community approximately \$213 million in startup costs, and that the monetary benefit of a 1% reduction in the baseline prevalence of prison rape is worth between \$157 million and \$239 million, the startup costs would be offset in the very first year of implementation, even without regard to the value of the

nonmonetary benefits, if the standards achieved reductions of between 0.9 and 1.4 percent. The breakeven point would be even lower if the analysis amortized startup costs over the entire 15 years. Moreover, because the annual ongoing costs of full compliance are estimated to be no more than \$544 million beginning in 2013, the proposed standards would have to yield approximately a 2.3–3.5% reduction from the baseline in the average annual prevalence of prison rape for the ongoing costs and the monetized benefits to breakeven, without regard to the value of the nonmonetary benefits.<sup>9</sup>

TABLE 7—BREAKEVEN ANALYSIS USING LOWER-BOUND ASSUMPTIONS OF BENEFIT VALUE BY FACILITY TYPE, IN THOUSANDS OF DOLLARS

	Value of 1% reduction	Upfront costs	Breakeven percentage	Ongoing costs	Breakeven percentage
Prisons .....	\$60,000	\$26,304	0.44	\$56,407	0.94
Jails .....	84,500	117,742	1.39	356,618	4.22
Juvenile .....	12,500	24,087	1.93	78,497	6.28
Total .....	157,000	168,133	1.07	491,522	3.13

TABLE 8—BREAKEVEN ANALYSIS USING UPPER-BOUND ASSUMPTIONS OF BENEFIT VALUE BY FACILITY TYPE IN THOUSANDS OF DOLLARS

	Value of 1% reduction	Upfront costs	Breakeven percentage	Ongoing costs	Breakeven percentage
Prisons .....	\$90,000	\$26,304	0.29	\$56,407	0.63
Jails .....	126,500	117,742	0.93	356,618	2.82
Juvenile .....	22,500	24,087	1.07	78,497	3.49
Total .....	239,000	168,133	0.70	491,522	2.06

As these tables make clear, even without reference to the nonmonetary benefits of avoiding prison rape and sexual abuse (which are numerous, and of considerable importance) the

Department’s proposed standards need only be modestly effective in order for the monetized benefits to offset the anticipated compliance costs, both as a whole and with respect to each facility

type to which they apply. With respect to prisons, a mere 0.63%–0.94% decrease from the baseline in the average annual prevalence of prison rape and sexual abuse would result in

<sup>9</sup> These figures differ slightly from those depicted in Tables 7 and 8, which include only the \$491.5 million in annual ongoing costs attributable to prisons, jails, and juvenile facilities, as opposed to the \$544 million in total annual ongoing costs

attributable to all five categories (*i.e.*, adding lockups and community confinement facilities). As noted in the preceding footnote, the IRIA does not quantify the benefits that will result from reducing sexual abuse in lockups and community

confinement facilities. For this reason, these figures are somewhat conservative because they incorporate the costs, but not the benefits, of reducing sexual abuse in lockups and community confinement facilities.

the monetized benefits of the standards breaking even with their ongoing costs. Such a decrease from the baseline would mean an average of 165–246 fewer forcible rapes per year, 116–173 fewer nonconsensual sexual acts involving pressure or coercion, 120–179 fewer abusive sexual contacts, and 175–261 fewer incidents of willing sex with staff. Even in the jail context, a 0.93% to 1.39% decrease from the baseline in the prevalence of rape would justify the startup costs, while a 2.82%–4.22% decrease would justify the ongoing costs. For jails, a 4.22% decrease from the baseline in the average annual prevalence would translate to 1654 fewer forcible rapes per year, 625 fewer nonconsensual sexual acts involving pressure or coercion, 971 fewer abusive sexual contacts, and 1312 fewer incidents of willing sex with staff.

The Department believes that it is eminently reasonable to expect that implementation of these standards will yield these decreases.

However, the Department cautions that the benefit-cost conclusions in the IRIA are meant to be preliminary and are based upon current estimates. During the comment period, and in advance of preparing the final rules for publication, these estimates will be subject to additional analysis. Moreover, the Department actively seeks the participation of stakeholders in assessing the regulatory impact of its proposed standards and invites public comment on all aspects of the IRIA, both as to the societal benefits of adopting the standards and as to the costs of compliance. Below is a list of specific questions upon which the Department seeks comment, which is not meant to limit any other comments that any interested person may wish to submit. Please note that, although this summary is meant to provide an overview of the IRIA, the questions below presume that the commenter has reviewed the complete IRIA. As noted above, the complete IRIA is available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_nprm\\_iria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm_iria.pdf).

#### Questions for Public Comment on Regulatory Impact Assessment

*Question 38: Has the Department appropriately determined the baseline level of sexual abuse in correctional settings for purposes of assessing the benefit and cost of the proposed PREA standards?*

*Question 39: Are there any reliable, empirical sources of data, other than the BJS studies referenced in the IRIA, that would be appropriate to use in determining the baseline level of prison sexual abuse? If so, please cite such*

*sources and explain whether and why they should be used to supplement or replace the BJS data.*

*Question 40: Are there reliable methods for measuring the extent of underreporting and overreporting in connection with BJS's inmate surveys?*

*Question 41: Are there sources of data that would allow the Department to assess the prevalence of sexual abuse in lockups and community confinement facilities? If so, please supply such data. In the absence of such data, are there available methodologies for including sexual abuse in such settings in the overall estimate of baseline prevalence?*

*Question 42: Has the Department appropriately adjusted the conclusions of studies on the value of rape and sexual abuse generally to account for the differing circumstances posed by sexual abuse in confinement settings?*

*Question 43: Are there any academic studies, data compilations, or established methodologies that can be used to extrapolate from mental health costs associated with sexual abuse in community settings to such costs in confinement settings? Has the Department appropriately estimated that the cost of mental health treatment associated with sexual abuse in confinement settings is twice as large as the corresponding costs in community settings?*

*Question 44: Has the Department correctly identified the quantifiable costs of rape and sexual abuse? Are there other costs of rape and sexual abuse that are capable of quantification, but are not included in the Department's analysis?*

*Question 45: Should the Department adjust the "willingness to pay" figures on which it relies (developed by Professor Mark Cohen for purposes of valuing the benefit to society of an avoided rape<sup>10</sup>) to account for the possibility that some people may believe sexual abuse in confinement facilities is a less pressing problem than it is in society as a whole, and might therefore think that the value of avoiding such an incident in the confinement setting is less than the value of avoiding a similar incident in the non-confinement setting? Likewise, should the Department adjust these figures to take into account the fact that in the general population the vast majority of sexual abuse victims are female, whereas in the confinement setting the victims are overwhelmingly male? Are such differences even relevant for purposes of using the*

*contingent valuation method to monetize the cost of an incident of sexual abuse? If either adjustment were appropriate, how (or on the basis of what empirical data) would the Department go about determining the amount of the adjustment?*

*Question 46: Has the Department appropriately accounted for the increased costs to the victim and to society when the victim is a juvenile? Why or why not?*

*Question 47: Are there available methodologies, or available data from which a methodology can be developed, to assess the unit value of avoiding a nonconsensual sexual act involving pressure or coercion? If so, please supply them. Is the Department's estimate of this unit value (i.e., 20% of the value of a forcible rape) appropriately conservative?*

*Question 48: Are there available methodologies, or available data from which a methodology can be developed, to assess the unit value of avoiding an "abusive sexual contact between inmates," as defined in the IRIA? If so, please supply them. Is the Department's estimate of this unit value (i.e., \$375 for adult inmates and \$500 for juveniles) appropriately conservative? Would a higher figure be more appropriate? Why or why not?*

*Question 49: Are there any additional nonmonetary benefits of implementing the PREA standards not mentioned in the IRIA?*

*Question 50: Are any of the nonmonetary benefits set forth in the IRIA actually capable of quantification? If so, are there available methodologies for quantifying such benefits or sources of data from which such quantification can be drawn?*

*Question 51: Are there available sources of data relating to the compliance costs associated with the proposed standards, other than the sources cited and relied upon in the IRIA? If so, please provide them.*

*Question 52: Are there available data as to the number of lockups that will be affected by the proposed standards, the number of individuals who are detained in lockups on an annual basis, and/or the anticipated compliance costs for lockups? If so, please provide them.*

*Question 53: Are there available data as to the number of community confinement facilities that will be affected by the proposed standards, the number of individuals who reside or are detained in such facilities on an annual basis, or the anticipated compliance costs for community confinement facilities? If so, please provide them.*

*Question 54: Has the Department appropriately differentiated the*

<sup>10</sup> See Cohen et al., *supra* note 7, at 89, 91. Professor Cohen's study was supported by a grant from the National Institute of Justice, a unit of the Department of Justice.

estimated compliance costs with regard to the different types of confinement facilities (prisons, jails, juvenile facilities, community confinement facilities, and lockups)? If not, why and to what extent should compliance costs be expected to be higher or lower for one type or another?

Question 55: Are there additional methodologies for conducting an assessment of the costs of compliance with the proposed standards? If so, please propose them.

Question 56: With respect to §§ 115.12, 115.112, 115.212, and 115.312, are there other methods of estimating the extent to which contract renewals and renegotiations over the 15-year period will lead to costs for agencies that adopt the proposed standards?

Question 57: Do agencies expect to incur costs associated with proposed §§ 115.13, 115.113, 115.213, and 115.313, notwithstanding the fact that it does not mandate any particular level of staffing or the use of video monitoring? Why or why not? If so, what are the potential cost implications of this standard under various alternative scenarios concerning staffing mandates or video monitoring mandates? What decisions do agencies anticipate making in light of the assessments called for by this standard, and what will it cost to implement those decisions?

Question 58: With respect to §§ 115.14, 115.114, 115.214, and 115.314, will the limitations on cross-gender viewing (and any associated retrofitting and construction of privacy panels) impose any costs on agencies? If so, please provide any data from which a cost estimate can be developed for such measures.

Question 59: Will the requirement in §§ 115.31, 115.231, and 115.331 that agencies train staff on how to communicate effectively and professionally with lesbian, gay, bisexual, transgender, or intersex residents lead to additional costs for correctional facilities, over and above the costs of other training requirements in the standards? If so, please provide any data from which a cost estimate can be developed for such training.

Question 60: Has the Department accounted for all of the costs associated with §§ 115.52, 115.252, and 115.352, dealing with exhaustion of administrative remedies? If not, what additional costs might be incurred, and what data exist from which an estimate of those costs can be developed?

Question 61: Is there any basis at this juncture to estimate the compliance costs associated with §§ 115.93, 115.193, 115.293, and 115.393,

pertaining to audits? How much do agencies anticipate compliance with this standard is likely to cost on a per-facility basis, under various assumptions as to the type and frequency or breadth of audits?

Question 62: Has the Department used the correct assumptions (in particular the assumption of constant cost) in projecting ongoing costs in the out years? Should it adjust its projections for the possibility that the cost of compliance may decrease over time as correctional agencies adopt new innovations that will make their compliance more efficient? If such an adjustment is appropriate, please propose a methodology for doing so and a source of data from which valid predictions as to “learning” can be derived.

Question 63: Are there any data showing how the marginal cost of rape reduction is likely to change once various benchmarks of reduction have been achieved? If not, is it appropriate for the Department to assume, for purposes of its breakeven analysis, that the costs and benefits of reducing prison rape are linear, at least within the range relevant to the analysis? Why or why not?

Question 64: Are the expectations as to the effectiveness of the proposed standards that are subsumed within the breakeven analysis (e.g., 0.7%–1.7% reduction in baseline prevalence needed to justify startup costs and 2.06%–3.13% reduction required for ongoing costs) reasonable? Why or why not? Are there available data from which reasonable predictions can be made as to the extent to which these proposed standards will be effective in reducing the prevalence of rape and sexual abuse in prisons? If so, please supply them.

#### Substantial Additional Cost Assessment

As noted above, PREA mandates that the Attorney General may not adopt standards “that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.” 42 U.S.C. 15607(a)(3). However, PREA does not further define this phrase, and various ANPRM commenters submitted differing views as to how it should be read.<sup>11</sup>

<sup>11</sup> The legislative history of PREA appears to contain only two mentions of the “substantial additional costs” provision. The cost estimate that was prepared by the Congressional Budget Office for the House version of PREA, H.R.1707, states the following:

“This bill would direct the Attorney General to adopt national standards for the prevention of prison rape. Though the language specifies that those standards may not place substantial additional costs on Federal, State, or local prison

A number of agency commenters in response to the ANPRM suggested that “substantial additional costs” should be considered in a vacuum—that is, in the absolute rather than in comparison to some other figure. However, such a reading is inconsistent with the plain language of the statute, which requires that compliance costs be compared against current nationwide correctional expenditures.

The Commission itself, on the other hand, proposed a very different reading in its ANPRM comment. Enclosing a letter from former Senate Judiciary Committee staffer Robert Toone, Letter for Hon. Reggie B. Walton, United States District Court for the District of Columbia, *et al.* from Robert Toone, Senate Judiciary Committee (Apr. 15, 2010) (“Toone Letter”), the Commission would interpret the phrase “substantial additional costs” in accordance with two principles. First, the Commission proposes that the Department should discount from its calculations any costs necessary to bring a particular facility into compliance with its Eighth Amendment obligations and should only subsume within “substantial additional costs” those expenses that the standards impose over and above this level. According to this argument, because Congress intended that PREA promote, not weaken, enforcement of inmates’ constitutional rights to safe conditions of confinement, “any application of Section 8(a)(3) should consider only those additional costs that a proposed national standard would impose on constitutionally compliant prisons and jails.” Toone Letter at 2.

Second, the Commission argues that “substantial additional cost” should be assessed on a per-standard rather than an aggregate basis. In other words, “[o]nly a national standard that would, on its own, impose ‘substantial additional costs’ in relation to total current correctional expenditures is prohibited under PREA.” *Id.* at 3.

In drafting its proposed rule, the Department has chosen not to adopt these interpretations. The first argument

authorities, CBO has no basis for estimating what those standards might be or what costs State and local governments would face in complying with them.”

H.R. Rep. No. 108–219, at 16 (2003). The House Judiciary Committee Report explains what would eventually become 42 U.S.C. 15607(a)(3) as follows:

“The Attorney General is required to establish a rule adopting national standards based on recommendations of the Commission, but shall not establish national standards that would impose substantial increases in costs for Federal, State, or local authorities. The Attorney General shall transmit the final rule to the governor of each State.”

*Id.* at 20.

is in tension with the plain language of the statute and is in any event impractical to apply. The PREA standards will apply to almost 13,000 facilities across the country, operated by thousands of jurisdictions and entities. It is not possible to determine which facilities are “constitutionally compliant” and which are not, in part because constitutional non-compliance often becomes apparent only after the fact—that is, after a violation. Nor is it possible to calculate what subset of the total cost of compliance with the standards is directed towards bringing facilities into compliance with the Constitution and what subset constitutes expenditures over and above the constitutional minimum.

Nor does the Department believe that the impact of the standards should be assessed individually. Admittedly, the statute uses the singular in providing that “[t]he Attorney General shall not establish a national standard under this section that would impose substantial additional costs . . . .” 42 U.S.C. 15607(a)(3) (emphasis added). However, such a reading would yield absurd results. On the Commission’s proposed reading, the Attorney General is barred from imposing one extremely expensive standard yet is allowed to promulgate myriad smaller standards that, when added together, would be just as expensive. There is no reason to assume that Congress intended such a result. A more logical assumption is that Congress was concerned with the costs of the standards as a whole.<sup>12</sup>

The Department thus interprets “substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities” as costs that impose considerable, large, and unreasonable burdens on those authorities in a given year, in comparison to the total amount spent that year by correctional authorities nationwide. The first half of the comparator—the total costs imposed on Federal, State, and local prison authorities collectively, as the result of complying with the PREA standards taken as a whole—is calculated in the IRIA and depicted in Table 4. The second half of the comparator—the total annual expenditures of Federal, State, and local prison authorities on corrections—amounted to \$74.2 billion in 2007, the most recent year for which figures are available. See BJS, Justice Expenditure and Employment Extracts 2007, “Table 1: percent distribution of expenditure for the justice system by type of government, fiscal year 2007” (Sep. 20, 2010), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2315>; Direct Expenditures by Criminal Justice Function, 1982–2006, in *Justice Expenditure and Employment Extracts*, available at <http://bjs.ojp.usdoj.gov/content/glance/tables/exptyptab.cfm>.

Tables 9A and 9B compare the cost of compliance with the standards from 2012 through 2026 to projected total national expenditures on corrections over the same period of time. During the 15 years from 1993 to 2007, correctional

expenditures grew at an annual rate of 5.43%. *Id.* Tables 9A and 9B assume growth at that same rate from 2008–2026, applying alternative discount rates of 3% (in Table 9A) and 7% (in Table 9B) so as to render, in the second column, the ensuing inflation-adjusted expenditure estimates in present value dollars. The third column shows the total expected compliance costs for each year, as adjusted for inflation and discounted to present value, and the fourth column presents expected compliance costs as a percentage of national correctional expenditures. (The figures for expected nationwide compliance costs depicted in Tables 9A and 9B differ from those in Tables 4 and 5 because the former are adjusted for inflation whereas the latter are not.)

Using a 3% discount rate (Table 9A), the ratio of total costs associated with the proposed standards to total national correctional expenditures never exceeds 0.63% in any given year and is as low as 0.16% in some years. Using a 7% discount rate (Table 9B), the range extends from 0.03% to 0.72%. Given the smallness of these percentages, we do not believe that the standards can be said to impose considerable, large, or unreasonable cost burdens on correctional authorities in any given year. Therefore, the standards do not impose “substantial additional costs compared to the costs . . . expended by Federal, State, and local prison authorities.” 42 U.S.C. 15607(a)(3).

TABLE 9A—TOTAL ANNUAL COMPLIANCE COSTS, 2012–2026 PROJECTIONS, AS A PERCENTAGE OF TOTAL ANNUAL NATIONWIDE EXPENDITURES ON CORRECTIONS ADJUSTED FOR INFLATION AT 5.4% ANNUALLY AND DISCOUNTED TO PRESENT VALUE AT 3% IN THOUSANDS OF DOLLARS

Year	Total corr. exp.	Compliance costs	%
2012	\$91,104,068	\$213,346	0.2342
2013	93,253,416	574,013	0.6155
2014	95,453,473	599,847	0.6284
2015	97,705,433	561,881	0.5751
2016	100,010,523	510,989	0.5109
2017	102,369,994	464,707	0.4539
2018	104,785,131	422,616	0.4033
2019	107,257,246	384,338	0.3583
2020	109,787,684	349,527	0.3184
2021	112,377,821	317,869	0.2829
2022	115,029,064	289,078	0.2513
2023	117,742,857	262,895	0.2233
2024	120,520,674	239,083	0.1984
2025	123,364,026	217,429	0.1762
2026	126,274,459	197,735	0.1566

<sup>12</sup> Indeed, the discussion of “substantial additional costs” in PREA’s legislative history refers in the plural to “national standards.” See *supra* n.11. The Toome Letter states that notes that “before introducing the bill, the sponsors of PREA changed

the language of Section 8(a)(3) from ‘significant additional costs’ (as originally drafted) to ‘substantial additional costs.’” However, the fact that the sponsors of a piece of legislation revised its language prior to introducing the bill does not

bear on how the remaining 8 members of Congress construed the legislation when they voted to enact it. Moreover, it is far from evident that this wording change would impact the interpretation of the statute.

TABLE 9A—TOTAL ANNUAL COMPLIANCE COSTS, 2012–2026 PROJECTIONS, AS A PERCENTAGE OF TOTAL ANNUAL NATIONWIDE EXPENDITURES ON CORRECTIONS ADJUSTED FOR INFLATION AT 5.4% ANNUALLY AND DISCOUNTED TO PRESENT VALUE AT 3% IN THOUSANDS OF DOLLARS—Continued

Year	Total corr. exp.	Compliance costs	%
Total .....	1,617,035,869	5,605,353	0.3466
Average .....	107,802,391	373,690	0.3466

TABLE 9B—TOTAL ANNUAL COMPLIANCE COSTS, 2012–2026 PROJECTIONS, AS A PERCENTAGE OF TOTAL ANNUAL NATIONWIDE EXPENDITURES ON CORRECTIONS ADJUSTED FOR INFLATION AT 5.4% ANNUALLY AND DISCOUNTED TO PRESENT VALUE AT 7% IN THOUSANDS OF DOLLARS

Year	Total corr. exp.	Compliance costs	%
2012 .....	\$84,419,867	\$213,346	0.2527
2013 .....	83,181,183	574,013	0.6901
2014 .....	81,960,674	593,650	0.7243
2015 .....	80,758,073	477,473	0.5912
2016 .....	79,573,119	358,908	0.4510
2017 .....	78,405,550	269,785	0.3441
2018 .....	77,255,114	202,792	0.2625
2019 .....	76,121,557	152,435	0.2003
2020 .....	75,004,634	114,583	0.1528
2021 .....	73,904,098	86,130	0.1165
2022 .....	72,819,711	64,742	0.0889
2023 .....	71,751,235	48,666	0.0678
2024 .....	70,698,437	36,581	0.0517
2025 .....	69,661,086	27,497	0.0395
2026 .....	68,638,956	20,669	0.0301
Total .....	1,144,153,294	3,241,270	0.2833
Average .....	76,276,886	216,085	0.2833

*Paperwork Reduction Act*

The Prison Rape Elimination Act of 2003 requires the Department of Justice to adopt national standards for the detection, prevention, reduction, and punishment of prison rape. These national standards will require covered facilities to retain certain specified information relating to sexual abuse prevention planning, responsive planning, education and training, and investigations, as well as to collect and retain certain specified information relating to allegations of sexual abuse within the facility.

The Department of Justice will be submitting the following information collection request to the Office of Management and Budget for review and clearance in accordance with the review procedures of the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies.

All comments and suggestions, or questions regarding additional information, should be directed to Robert Hinchman, Senior Counsel, Office of Legal Policy, Department of Justice, 950 Pennsylvania Avenue, NW., Room 4252, Washington, DC 20530.

Written comments and suggestions from the public and affected agencies concerning the collection of information are encouraged. Your comments on the information collection-related aspects of this rule should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

In particular, the Department requests comments on the recordkeeping cost

burden imposed by this rule and will use the information gained through such comments to assist in calculating the cost burden.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Prison Rape Elimination Act Regulations.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* No form. Component: 1105.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* State governments, local governments.

*Other:* None.

*Abstract:* The Department of Justice is publishing a notice of proposed rulemaking to adopt national standards for the detection, prevention, reduction, and punishment of sexual abuse in confinement settings pursuant to the Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. 15601 *et seq.* These national standards will require covered facilities to retain certain specified

information relating to sexual abuse prevention planning, responsive planning, education and training, and investigations, as well as to collect and retain certain specified information relating to allegations of sexual abuse within the facility. Covered facilities include: State and local jails, prisons, lockups, community confinement facilities, and juvenile facilities.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to

keep the required records is: 11,826 respondents; 158,455 hours.

The average annual burden hour per respondent is 13.4 hours, most of which is the additional time keeping required records, if such records are not already being maintained by the facility for its own administrative purposes.

(6) An estimate of the total public burden (in hours) associated with the collection: 158,455 hours.

At present, covered facilities are required to retain certain sexual abuse incident data. This data is already covered by an information collection

maintained by the Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, as part of its Survey of Sexual Violence; OMB Control No. 1121-0292. The Survey of Sexual Violence is the only national data collection for facility-reported information on sexual abuse within correctional facilities, characteristics of the victims and perpetrators, circumstances surrounding the incidents, and how incidents are reported, tracked, and adjudicated. Please see the following sections:

Subpart A—Prisons and jails	Subpart B—Lockups	Subpart C—Community corrections	Subpart D—Juvenile facilities
115.87 .....	115.187	115.287	115.387
115.88 .....	115.188	115.288	115.388
115.89 .....	115.189	115.289	115.389

In particular, please see the references in 115.87(c), 115.187(c), 115.287(c), and 115.387(c) to the existing SSV collection.

The balance of the recordkeeping requirements set forth by this rule are new requirements which will require a

new OMB Control Number. The Department is seeking comment on these new requirements as part of this NPRM. These new requirements will require covered facilities to retain certain specified information relating to sexual abuse prevention planning,

responsive planning, education and training, investigations and to collect and retain certain specified information relating to allegations of sexual abuse within the facility. Please see the following sections of the proposed rule:

Subpart A—Prisons and jails	Subpart B—Lockups	Subpart C—Community corrections	Subpart D—Juvenile facilities
115.14(b) .....	115.114(b)	115.214(b)	115.314(b)
115.22(c) .....	.....	115.222(c)	115.322(c)
115.31(d) .....	115.131(c)	115.231(d)	115.331(d)
115.32(c) .....	.....	115.232(c)	115.332(c)
115.33(e) .....	.....	115.233(e)	115.333(e)
115.35(c) .....	.....	115.235(c)	115.335(c)
115.71(h) .....	115.171(h)	115.271(h)	115.371(h)

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, U.S. Department of Justice, Two Constitution Square, 145 N Street, NE., Suite 2E-502, Washington, DC 20530.

**List of Subjects in 28 CFR Part 115**

Community correction facilities, Crime, Jails, Juvenile facilities, Lockups, Prisons, Prisoners.

Accordingly, Part 115 of Title 28 of the Code of Federal Regulations is proposed to be added as follows:

**PART 115—PRISON RAPE ELIMINATION ACT NATIONAL STANDARDS**

- Sec.
- 115.5 General definitions.
- 115.6 Definitions related to sexual abuse.

**Subpart A—Standards for Adult Prisons and Jails**

**Prevention Planning**

- 115.11 Zero tolerance of sexual abuse and sexual harassment; Prison Rape Elimination Act (PREA) coordinator.
- 115.12 Contracting with other entities for the confinement of inmates.
- 115.13 Supervision and monitoring.
- 115.14 Limits to cross-gender viewing and searches.
- 115.15 Accommodating inmates with special needs.
- 115.16 Hiring and promotion decisions.
- 115.17 Upgrades to facilities and technologies.

**Responsive Planning**

- 115.21 Evidence protocol and forensic medical exams.
- 115.22 Agreements with outside public entities and community service providers.
- 115.23 Policies to ensure investigation of allegations.

**Training and Education**

- 115.31 Employee training.
- 115.32 Volunteer and contractor training.
- 115.33 Inmate education.
- 115.34 Specialized training: Investigations.
- 115.35 Specialized training: Medical and mental health care.

**Screening for Risk of Sexual Victimization and Abusiveness**

- 115.41 Screening for risk of victimization and abusiveness.
- 115.42 Use of screening information.
- 115.43 Protective custody.

**Reporting**

- 115.51 Inmate reporting.
- 115.52 Exhaustion of administrative remedies.
- 115.53 Inmate access to outside confidential support services.
- 115.54 Third-party reporting.

**Official Response Following an Inmate Report**

- 115.61 Staff and agency reporting duties.

- 115.62 Reporting to other confinement facilities.  
 115.63 Staff first responder duties.  
 115.64 Coordinated response.  
 115.65 Agency protection against retaliation.  
 115.66 Post-allegation protective custody.

#### Investigations

- 115.71 Criminal and administrative agency investigations.  
 115.72 Evidentiary standard for administrative investigations.  
 115.73 Reporting to inmates.

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#### Discipline

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#### Medical and Mental Care

115.381 Medical and mental health screenings; history of sexual abuse.  
115.382 Access to emergency medical and mental health services.  
115.383 Ongoing medical and mental health care for sexual abuse victims and abusers.

#### Data Collection and Review

115.386 Sexual abuse incident reviews.  
115.387 Data collection.  
115.388 Data review for corrective action.  
115.389 Data storage, publication, and destruction.

#### Audits

115.393 Audits of standards.

**Authority:** 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 15601–15609.

#### § 115.5 General definitions.

For purposes of this part, the term—  
*Agency* means the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents, including the implementation of policy as set by the governing, corporate, or nonprofit authority.

*Agency head* means the principal official of an agency.

*Community confinement facility* means a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community correctional facility

(including residential re-entry centers) in which offenders or defendants reside as part of a term of imprisonment or as a condition of pre-trial release or post-release supervision, while participating in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours.

*Contractor* means a person who provides services on a recurring basis pursuant to a contractual agreement with the agency.

*Detainee* means any person detained in a lockup, regardless of adjudication status.

*Employee* means a person who works directly for the agency or facility.

*Facility* means a place, institution, building (or part thereof), set of buildings, structure, or area (whether or not enclosing a building or set of buildings) that is used by an agency for the confinement of individuals.

*Facility head* means the principal official of a facility.

*Inmate* means any person incarcerated or detained in a prison or jail.

*Jail* means a confinement facility of a Federal, State, or local law enforcement agency whose primary use is to hold persons pending adjudication of criminal charges, persons committed to confinement after adjudication of criminal charges for sentences of one year or less, or persons adjudicated guilty who are awaiting transfer to a correctional facility.

*Juvenile* means any person under the age of 18, unless otherwise defined by State law.

*Juvenile facility* means a facility primarily used for the confinement of juveniles.

*Law enforcement staff* means employees responsible for the supervision and control of detainees in lockups.

*Lockup* means a facility that contains holding cells, cell blocks, or other secure enclosures that are:

(1) Under the control of a law enforcement, court, or custodial officer; and

(2) Primarily used for the temporary confinement of individuals who have recently been arrested, detained, or are being transferred to or from a court, jail, prison, or other agency.

*Medical practitioner* means a health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A “qualified medical practitioner” refers to such a

professional who has also successfully completed specialized training for treating sexual abuse victims.

*Mental health practitioner* means a mental health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A “qualified mental health practitioner” refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

*Pat-down search* means a running of the hands over the clothed body of an inmate, detainee, or resident by an employee to determine whether the individual possesses contraband.

*Prison* means an institution under Federal or State jurisdiction whose primary use is for the confinement of individuals convicted of a serious crime, usually in excess of one year in length, or a felony.

*Resident* means any person confined or detained in a juvenile facility or in a community confinement facility.

*Security staff* means employees primarily responsible for the supervision and control of inmates, detainees, or residents in housing units, recreational areas, dining areas, and other program areas of the facility.

*Staff* means employees.

*Strip search* means a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person’s breasts, buttocks, or genitalia.

*Substantiated allegation* means an allegation that was investigated and determined to have occurred.

*Unfounded allegation* means an allegation that was investigated and determined not to have occurred.

*Unsubstantiated allegation* means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred.

*Volunteer* means an individual who donates time and effort on a recurring basis to enhance the activities and programs of the agency.

#### § 115.6 Definitions related to sexual abuse.

For purposes of this part, the term—  
*Sexual abuse* includes—

(1) Sexual abuse by another inmate, detainee, or resident; and

(2) Sexual abuse of an inmate by a staff member, contractor, or volunteer.

*Sexual abuse by another inmate, detainee, or resident* includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse:

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

(3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and

(4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of any person, excluding incidents in which the intent of the sexual contact is solely to harm or debilitate rather than to sexually exploit.

*Sexual abuse by a staff member, contractor, or volunteer* includes—

(1) Sexual touching by a staff member, contractor, or volunteer;

(2) Any attempted, threatened, or requested sexual touching by a staff member, contractor, or volunteer;

(3) Indecent exposure by a staff member, contractor, or volunteer; and

(4) Voyeurism by a staff member, contractor, or volunteer.

*Sexual touching by a staff member, contractor, or volunteer* includes any of the following acts, with or without consent:

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

(3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and

(4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of any person, with the intent to abuse, arouse or gratify sexual desire.

*Indecent exposure by a staff member, contractor, or volunteer* means the display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate.

*Sexual harassment* includes—

(1) Repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another; and

(2) Repeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.

*Voyeurism by a staff member, contractor, or volunteer* means an

invasion of an inmate's privacy by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions, and distributing or publishing them.

## **Subpart A—Standards for Adult Prisons and Jails**

### **Prevention Planning**

#### **§ 115.11 Zero tolerance of sexual abuse and sexual harassment; Prison Rape Elimination Act (PREA) coordinator.**

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.

(c) The PREA coordinator shall be a full-time position in all agencies that operate facilities whose total rated capacity exceeds 1000 inmates, but may be designated as a part-time position in agencies whose total rated capacity does not exceed 1000 inmates.

(d) An agency whose facilities have a total rated capacity exceeding 1000 inmates shall also designate a PREA coordinator for each facility, who may be full-time or part-time.

#### **§ 115.12 Contracting with other entities for the confinement of inmates.**

(a) A public agency that contracts for 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.

(b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with PREA standards.

#### **§ 115.13 Supervision and monitoring.**

(a) For each facility, the agency shall determine the adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In calculating such levels, agencies shall take into consideration the physical layout of each facility, the

composition of the inmate population, and any other relevant factors.

(b) The facility shall also establish a plan for how to conduct staffing and, where applicable, video monitoring, in circumstances where the levels established in paragraph (a) of this section are not attained.

(c) Each year, the facility shall assess, and determine whether adjustments are needed to:

(1) The staffing levels established pursuant to paragraph (a) of this section;

(2) Prevailing staffing patterns; and

(3) The agency's deployment of video monitoring systems and other technologies.

(d) Each prison facility, and each jail facility whose rated capacity exceeds 500 inmates, shall implement a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such policy and practice shall be implemented for night shifts as well as day shifts.

#### **§ 115.14 Limits to cross-gender viewing and searches.**

(a) The facility shall not conduct cross-gender strip searches or visual body cavity searches except in case of emergency or when performed by medical practitioners.

(b) The facility shall document all such cross-gender searches.

(c) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency, by accident, or when such viewing is incidental to routine cell checks.

(d) The facility shall not examine a transgender inmate to determine the inmate's genital status unless the inmate's genital status is unknown. Such examination shall be conducted in private by a medical practitioner.

(e) Following classification, the agency shall implement procedures to exempt from non-emergency cross-gender pat-down searches those inmates who have suffered documented prior cross-gender sexual abuse while incarcerated.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

**§ 115.15 Accommodating inmates with special needs.**

(a) The agency shall ensure that inmates who are limited English proficient, deaf, or disabled are able to report sexual abuse and sexual harassment to staff directly or through other established reporting mechanisms, such as abuse hotlines, without relying on inmate interpreters, absent exigent circumstances.

(b) The agency shall make accommodations to convey verbally all written information about sexual abuse policies, including how to report sexual abuse and sexual harassment, to inmates who have limited reading skills or who are visually impaired.

**§ 115.16 Hiring and promotion decisions.**

(a) The agency shall not hire or promote anyone who has engaged in sexual abuse in an institutional setting; who has been convicted of engaging in sexual activity in the community facilitated by force, the threat of force, or coercion; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) Before hiring new employees, the agency shall:

(1) Perform a criminal background check; and

(2) Consistent with Federal, State, and local law, make its best effort to contact all prior institutional employers for information on substantiated allegations of sexual abuse.

(c) The agency shall either conduct criminal background checks of current employees at least every five years or have in place a system for otherwise capturing such information for current employees.

(d) The agency shall ask all applicants and employees directly about previous misconduct in written applications for hiring or promotions, in interviews for hiring or promotions, and in any interviews or written self-evaluations conducted as part of reviews of current employees.

(e) Material omissions, or the provision of materially false information, shall be grounds for termination.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

**§ 115.17 Upgrades to facilities and technologies.**

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of

existing facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect inmates from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the agency shall consider how such technology may enhance the agency's ability to protect inmates from sexual abuse.

**Responsive Planning****§ 115.21 Evidence protocol and forensic medical exams.**

(a) To the extent the agency is responsible for investigating allegations of sexual abuse, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be adapted from or otherwise based on the 2004 U.S. Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," subsequent updated editions, or similarly comprehensive and authoritative protocols developed after 2010.

(c) The agency shall offer all victims of sexual abuse access to forensic medical exams performed by qualified medical practitioners, whether onsite or at an outside facility, without financial cost, where evidentiarily or medically appropriate.

(d) The agency shall make available to the victim a qualified staff member or a victim advocate from a community-based organization that provides services to sexual abuse victims.

(e) As requested by the victim, the qualified staff member or victim advocate shall accompany and support the victim through the forensic medical exam process and the investigatory process and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall inform the investigating entity of these policies.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to: (1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in institutional settings; and

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in institutional settings.

(h) For the purposes of this standard, a qualified staff member shall be an individual who is employed by a facility and has received education concerning sexual assault and forensic examination issues in general.

**§ 115.22 Agreements with outside public entities and community service providers.**

(a) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with an outside public entity or office that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials pursuant to § 115.51, unless the agency enables inmates to make such reports to an internal entity that is operationally independent from the agency's chain of command, such as an inspector general or ombudsperson who reports directly to the agency head.

(b) The agency also shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide inmates with confidential emotional support services related to sexual abuse.

(c) The agency shall maintain copies of agreements or documentation showing attempts to enter into agreements.

**§ 115.23 Policies to ensure investigation of allegations.**

(a) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are investigated by an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior, and shall publish such policy on its Web site.

(b) If a separate entity is responsible for conducting criminal investigations, such Web site publication shall describe the responsibilities of both the agency and the investigating entity.

(c) Any State entity responsible for conducting criminal or administrative investigations of sexual abuse in institutional settings shall have in place a policy governing the conduct of such investigations.

(d) Any Department of Justice component responsible for conducting criminal or administrative investigations of sexual abuse in institutional settings shall have in place a policy governing the conduct of such investigations.

## Training and Education

### § 115.31 Employee training.

(a) The agency shall train all employees who may have contact with inmates on:

(1) Its zero-tolerance policy for sexual abuse and sexual harassment;

(2) How to fulfill their responsibilities under agency sexual abuse prevention, detection, reporting, and response policies and procedures;

(3) Inmates' right to be free from sexual abuse and sexual harassment;

(4) The right of inmates and employees to be free from retaliation for reporting sexual abuse;

(5) The dynamics of sexual abuse in confinement;

(6) The common reactions of sexual abuse victims;

(7) How to detect and respond to signs of threatened and actual sexual abuse;

(8) How to avoid inappropriate relationships with inmates; and

(9) How to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, or intersex inmates.

(b) Such training shall be tailored to the gender of the inmates at the employee's facility.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide annual refresher information to all employees to ensure that they know the agency's current sexual abuse policies and procedures.

(d) The agency shall document, via employee signature or electronic verification, that employees understand the training they have received.

### § 115.32 Volunteer and contractor training.

(a) The agency shall ensure that all volunteers and contractors who have contact with inmates have been trained on their responsibilities under the agency's sexual abuse prevention, detection, 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 inmates, but all volunteers and contractors who have contact with inmates shall be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report sexual abuse.

(c) The agency shall maintain documentation confirming that volunteers and contractors understand the training they have received.

### § 115.33 Inmate education.

(a) During the intake process, staff shall inform inmates of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.

(b) Within 30 days of intake, the agency shall provide comprehensive education to inmates either in person or via video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such abuse or harassment, and regarding agency sexual abuse response policies and procedures.

(c) Current inmates who have not received such education shall be educated within one year of the effective date of the PREA standards, and the agency shall provide refresher information to all inmates at least annually and whenever an inmate is transferred to a different facility, to ensure that they know the agency's current sexual abuse policies and procedures.

(d) The agency shall provide inmate education in formats accessible to all inmates, including those who are limited English proficient, deaf, visually impaired, or otherwise disabled as well as to inmates who have limited reading skills.

(e) The agency shall maintain documentation of inmate participation in these education sessions.

(f) In addition to providing such education, the agency shall ensure that key information is continuously and readily available or visible to inmates through posters, inmate handbooks, or other written formats.

### § 115.34 Specialized training: Investigations.

(a) In addition to the general training provided to all employees pursuant to § 115.31, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall 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.

(c) The agency shall maintain documentation that agency investigators have completed the required specialized training in conducting sexual abuse investigations.

(d) Any State entity or Department of Justice component that investigates sexual abuse in confinement settings shall provide such training to its agents and investigators who conduct such investigations.

### § 115.35 Specialized training: Medical and mental health care.

(a) The agency shall ensure that all full- and part-time medical and mental health care practitioners who work regularly in its facilities have been trained in:

(1) How to detect and assess signs of sexual abuse;

(2) How to preserve physical evidence of sexual abuse;

(3) How to respond effectively and professionally to victims of sexual abuse; and

(4) How and to whom to report allegations or suspicions of sexual abuse.

(b) If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall maintain documentation that medical and mental health practitioners have received the training referenced in this standard either from the agency or elsewhere.

### Screening for Risk of Sexual Victimization and Abusiveness

#### § 115.41 Screening for risk of victimization and abusiveness.

(a) All inmates shall be screened during the intake process and during the initial classification process to assess their risk of being sexually abused by other inmates or sexually abusive toward other inmates.

(b) Such screening shall be conducted using an objective screening instrument, blank copies of which shall be made available to the public upon request.

(c) The initial classification process shall consider, at a minimum, the following criteria to screen inmates for risk of sexual victimization:

(1) Whether the inmate has a mental, physical, or developmental disability;

(2) The age of the inmate, including whether the inmate is a juvenile;

(3) The physical build of the inmate;

(4) Whether the inmate has previously been incarcerated;

(5) Whether the inmate's criminal history is exclusively nonviolent;

(6) Whether the inmate has prior convictions for sex offenses against an adult or child;

(7) Whether the inmate is gay, lesbian, bisexual, transgender, or intersex;

(8) Whether the inmate has previously experienced sexual victimization;

(9) The inmate's own perception of vulnerability; and

(10) Whether the inmate is detained solely on civil immigration charges.

(d) The initial classification process shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the agency, in screening inmates for risk of being sexually abusive.

(e) An agency shall conduct such initial classification within 30 days of the inmate's confinement.

(f) Inmates shall be rescreened when warranted due to a referral, request, or incident of sexual victimization. Inmates may not be disciplined for refusing to answer particular questions or for not disclosing complete information.

(g) The agency shall implement appropriate controls on the dissemination of responses to screening questions within the facility in order to ensure that sensitive information is not exploited to the inmate's detriment by staff or other inmates.

#### **§ 115.42 Use of screening information.**

(a) The agency shall use information from the risk screening to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

(d) Placement and programming assignments for such an inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

(e) Such inmate's own views with respect to his or her own safety shall be given serious consideration.

#### **§ 115.43 Protective custody.**

(a) Inmates at high risk for sexual victimization may be placed in involuntary segregated housing only after an assessment of all available alternatives has been made, and then only until an alternative means of separation from likely abusers can be arranged.

(b) Inmates placed in segregated housing for this purpose shall have access to programs, education, and work opportunities to the extent possible.

(c) The agency shall not ordinarily assign such an inmate to segregated housing involuntarily for a period exceeding 90 days.

(d) If an extension is necessary, the agency shall clearly document:

(1) The basis for the agency's concern for the inmate's safety; and (2) The reason why no alternative means of separation can be arranged.

(e) Every 90 days, the agency shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

#### **Reporting**

##### **§ 115.51 Inmate reporting.**

(a) The agency shall provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse.

(b) Pursuant to § 115.22, the agency shall also make its best efforts to provide at least one way for inmates to report abuse or harassment to an outside governmental entity that is not affiliated with the agency or that is operationally independent from agency leadership, such as an inspector general or ombudsperson, and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.

(d) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of inmates.

##### **§ 115.52 Exhaustion of administrative remedies.**

(a)(1) The agency shall provide an inmate a minimum of 20 days following the occurrence of an alleged incident of sexual abuse to file a grievance regarding such incident.

(2) The agency shall grant an extension of no less than 90 days from the deadline for filing such a grievance when the inmate provides documentation, such as from a medical or mental health provider or counselor, that filing a grievance within the normal time limit was or would likely be impractical, whether due to physical or psychological trauma arising out of an incident of sexual abuse, the inmate

having been held for periods of time outside of the facility, or other circumstances indicating impracticality. Such an extension shall be afforded retroactively to an inmate whose grievance is filed subsequent to the normal filing deadline.

(b)(1) The agency shall issue a final agency decision on the merits of a grievance alleging sexual abuse within 90 days of the initial filing of the grievance.

(2) Computation of the 90-day time period shall not include time consumed by inmates in appealing any adverse ruling.

(3) An agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision.

(4) The agency shall notify the inmate in writing of any such extension and provide a date by which a decision will be made.

(c)(1) Whenever an agency is notified of an allegation that an inmate has been sexually abused, other than by notification from another inmate, it shall consider such notification as a grievance or request for informal resolution submitted on behalf of the alleged inmate victim for purposes of initiating the agency administrative remedy process.

(2) The agency shall inform the alleged victim that a grievance or request for informal resolution has been submitted on his or her behalf and shall process it under the agency's normal procedures unless the alleged victim expressly requests that it not be processed. The agency shall document any such request.

(3) The agency may require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(4) The agency shall also establish procedures to allow the parent or legal guardian of a juvenile to file a grievance regarding allegations of sexual abuse, including appeals, on behalf of such juvenile.

(d)(1) An agency shall establish procedures for the filing of an emergency grievance where an inmate is subject to a substantial risk of imminent sexual abuse.

(2) After receiving such an emergency grievance, the agency shall immediately forward it to a level of review at which corrective action may be taken, provide an initial response within 48 hours, and a final agency decision within five calendar days.

(3) The agency may opt not to take such actions if it determines that no

emergency exists, in which case it may either:

- (i) Process the grievance as a normal grievance; or
- (ii) Return the grievance to the inmate, and require the inmate to follow the agency's normal grievance procedures.

(4) The agency shall provide a written explanation of why the grievance does not qualify as an emergency.

(5) An agency may discipline an inmate for intentionally filing an emergency grievance where no emergency exists.

**§ 115.53 Inmate access to outside confidential support services.**

(a) In addition to providing onsite mental health care services, the facility shall provide inmates with access to outside victim advocates for emotional support services related to sexual abuse by giving inmates mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and by enabling reasonable communication between inmates and these organizations, as confidential as possible, consistent with agency security needs.

(b) The facility shall inform inmates, prior to giving them access, of the extent to which such communications will be monitored.

**§ 115.54 Third-party reporting.**

The facility shall establish a method to receive third-party reports of sexual abuse and shall distribute publicly information on how to report sexual abuse on behalf of an inmate.

**Official Response Following an Inmate Report**

**§ 115.61 Staff and agency reporting duties.**

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in an institutional setting; retaliation against inmates or staff who reported abuse; and any staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse or retaliation.

(b) Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than those who need to know, as specified in agency policy, to make treatment, investigation, and other security and management decisions.

(c) Unless otherwise precluded by Federal, State, or local law, medical and

mental health practitioners shall be required to report sexual abuse pursuant to paragraph (a) of this section and to inform inmates of the practitioner's duty to report at the initiation of services.

(d) If the victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

(e) The facility shall report all allegations of sexual abuse, including third-party and anonymous reports, to the facility's designated investigators.

**§ 115.62 Reporting to other confinement facilities.**

(a) Within 14 days of receiving an allegation that an inmate was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify in writing the head of the facility or appropriate central office of the agency where the alleged abuse occurred.

(b) The facility head or central office that receives such notification shall ensure that the allegation is investigated in accordance with these standards.

**§ 115.63 Staff first responder duties.**

(a) Upon learning that an inmate was sexually abused within a time period that still allows for the collection of physical evidence, the first security staff member to respond to the report shall be required to:

- (1) Separate the alleged victim and abuser;
- (2) Seal and preserve any crime scene; and
- (3) Request the victim not to take any actions that could destroy physical evidence, including washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request the victim not to take any actions that could destroy physical evidence, and then notify security staff.

**§ 115.64 Coordinated response.**

The facility shall coordinate actions taken in response to an incident of sexual abuse, among staff first responders, medical and mental health practitioners, investigators, and facility leadership.

**§ 115.65 Agency protection against retaliation.**

(a) The agency shall protect all inmates and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment

investigations from retaliation by other inmates or staff.

(b) The agency shall employ multiple protection measures, including housing changes or transfers for inmate victims or abusers, removal of alleged staff or inmate abusers from contact with victims, and emotional support services for inmates or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) The agency shall monitor the conduct and treatment of inmates or staff who have reported sexual abuse or cooperated with investigations, including any inmate disciplinary reports, housing, or program changes, for at least 90 days following their report or cooperation, to see if there are changes that may suggest possible retaliation by inmates or staff, and shall act promptly to remedy any such retaliation. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) The agency shall not enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff abusers from contact with victims pending an investigation.

**§ 115.66 Post-allegation protective custody.**

Any use of segregated housing to protect an inmate who is alleged to have suffered sexual abuse shall be subject to the requirements of § 115.43.

**Investigations**

**§ 115.71 Criminal and administrative agency investigations.**

(a) When the agency conducts its own investigations into allegations of sexual abuse, it shall do so promptly, thoroughly, and objectively, using investigators who have received special training in sexual abuse investigations pursuant to § 115.34, and shall investigate all allegations of sexual abuse, including third-party and anonymous reports.

(b) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(c) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to

whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(d) The credibility of a victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as inmate or staff.

(e) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act facilitated the abuse; and

(2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative findings.

(f) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(g) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(h) The agency shall retain such investigative records for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

(i) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(j) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.

(k) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

#### **§ 115.72 Evidentiary standard for administrative investigations.**

The agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

#### **§ 115.73 Reporting to inmates.**

(a) Following an investigation into an inmate's allegation that he or she suffered sexual abuse in an agency facility, the agency shall inform the inmate as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.

(b) If the agency did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the inmate.

(c) Following an inmate's allegation that a staff member has committed sexual abuse, the agency shall

subsequently inform the inmate whenever:

(1) The staff member is no longer posted within the inmate's unit;

(2) The staff member is no longer employed at the facility;

(3) The agency learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or

(4) The agency learns that the staff member has been convicted on a charge related to sexual abuse within the facility.

(d) The requirement to inform an inmate shall not apply to allegations that have been determined to be unfounded.

#### **Discipline**

##### **§ 115.76 Disciplinary sanctions for staff.**

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual touching.

(c) Sanctions shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

##### **§ 115.77 Disciplinary sanctions for inmates.**

(a) Inmates shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the inmate engaged in inmate-on-inmate sexual abuse or following a criminal finding of guilt for inmate-on-inmate sexual abuse.

(b) Sanctions shall be commensurate with the nature and circumstances of the abuse committed, the inmate's disciplinary history, and the sanctions imposed for comparable offenses by other inmates with similar histories.

(c) The disciplinary process shall consider whether an inmate's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(d) If the facility offers therapy, counseling, or other interventions

designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to require the offending inmate to participate in such interventions as a condition of access to programming or other benefits.

(e) The agency may discipline an inmate for sexual contact with staff only upon a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) Any prohibition on inmate-on-inmate sexual activity shall not consider consensual sexual activity to constitute sexual abuse.

#### **Medical and Mental Care**

##### **§ 115.81 Medical and mental health screenings; history of sexual abuse.**

(a) All prisons shall ask inmates about prior sexual victimization and abusiveness during intake or classification screenings.

(b) If a prison inmate discloses prior sexual victimization or abusiveness, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up reception with a medical or mental health practitioner within 14 days of the intake screening.

(c) All jails shall ask inmates about prior sexual victimization during the intake process or classification screenings.

(d) If a jail inmate discloses prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up reception with a medical or mental health practitioner within 14 days of the intake screening.

(e) Any information related to sexual victimization or abusiveness that occurred in an institutional setting shall be strictly limited to medical and mental health practitioners and other staff, as required by agency policy and Federal, State, or local law, to inform treatment plans and security and management decisions, including housing, bed, work, education, and program assignments.

(f) Medical and mental health practitioners shall obtain informed consent from inmates before reporting information about prior sexual victimization that did not occur in an

institutional setting, unless the inmate is under the age of 18.

**§ 115.82 Access to emergency medical and mental health services.**

(a) Inmate victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment.

(b) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser.

(c) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders shall take preliminary steps to protect the victim pursuant to § 115.63 and shall immediately notify the appropriate medical and mental health practitioners.

(d) Inmate victims of sexual abuse while incarcerated shall be offered timely information about and access to all pregnancy-related medical services that are lawful in the community and sexually transmitted infections prophylaxis, where appropriate.

**§ 115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.**

(a) The facility shall offer ongoing medical and mental health evaluation and treatment to all inmates who, during their present term of incarceration, have been victimized by sexual abuse.

(b) The evaluation and treatment of sexual abuse victims shall include appropriate follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide inmate victims of sexual abuse with medical and mental health services consistent with the community level of care.

(d) All prisons shall conduct a mental health evaluation of all known inmate abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by qualified mental health practitioners.

(e) Inmate victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.

(f) If pregnancy results, such victims shall receive timely information about and access to all pregnancy-related medical services that are lawful in the community.

**Data Collection and Review**

**§ 115.86 Sexual abuse incident reviews.**

(a) The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) The review team shall include upper management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(c) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated or otherwise caused by the perpetrator or victim's race, ethnicity, sexual orientation, gang affiliation, or other group dynamics at the facility;

(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings and any recommendations for improvement and submit such report to the facility head and PREA coordinator, if any.

**§ 115.87 Data collection.**

(a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at facilities under its direct control using a standardized instrument and set of definitions.

(b) The agency shall aggregate the incident-based sexual abuse data at least annually.

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Survey of Sexual Violence conducted by the Department of Justice's Bureau of Justice Statistics.

(d) The agency shall collect data from multiple sources, including reports, investigation files, and sexual abuse incident reviews.

(e) The agency also shall obtain incident-based and aggregated data from every private facility with which it contracts for the confinement of its inmates.

(f) Upon request, the agency shall provide all such data from the previous year to the Department of Justice no later than June 30.

**§ 115.88 Data review for corrective action.**

(a) The agency shall review data collected and aggregated pursuant to § 115.87 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(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 each facility, as well as the agency as a whole.

(b) Such report shall include 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 addressing sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site or, if it does not have one, through other means.

(d) The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a facility, but must indicate the nature of the material redacted.

**§ 115.89 Data storage, publication, and destruction.**

(a) The agency shall ensure that data collected pursuant to § 115.87 are securely retained.

(b) The agency shall make all aggregated sexual abuse data, from facilities under its direct control and private facilities with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data for at least 10 years after the date of its initial collection unless Federal, State, or local law requires otherwise.

**Audits**

**§ 115.93 Audits of standards.**

(a) An audit shall be considered independent if it is conducted by:

(1) A correctional monitoring body that is not part of the agency but that is part of, or authorized by, the relevant State or local government;

(2) An auditing entity that is within the agency but separate from its normal chain of command, such as an inspector general or ombudsperson who reports directly to the agency head or to the agency's governing board; or

(3) Other outside individuals with relevant experience.

(b) No audit may be conducted by an auditor who has received financial compensation from the agency being audited within the three years prior to the agency's retention of the auditor.

(c) The agency shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the agency's retention of the auditor, with the exception of contracting for subsequent audits.

(d) All auditors shall be certified by the Department of Justice to conduct such audits, and shall be re-certified every three years.

(e) The Department of Justice shall prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of facilities, review of documents, and interviews of staff and inmates. The Department of Justice also shall prescribe the minimum qualifications for auditors.

(f) The agency shall enable the auditor to enter and tour facilities, review documents, and interview staff and inmates to conduct a comprehensive audit.

(g) The agency shall ensure that the auditor's final report is published on the agency's Web site if it has one or is otherwise made readily available to the public.

## Subpart B—Standards for Lockups

### Prevention Planning

#### § 115.111 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator, who may be full-time or part-time, to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its lockups.

#### § 115.112 Contracting with other entities for the confinement of detainees.

(a) A law enforcement agency that contracts for the confinement of its lockup detainees in lockups operated by 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.

(b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the

contractor is complying with the PREA standards.

#### § 115.113 Supervision and monitoring.

(a) For each lockup, the agency shall determine the adequate levels of staffing, and, where applicable, video monitoring, to protect detainees against sexual abuse. In calculating such levels, agencies shall take into consideration the physical layout of each lockup, the composition of the detainee population, and any other relevant factors.

(b) The lockup shall also establish a plan for how to conduct staffing and, where applicable, video monitoring, in circumstances where the levels established in paragraph (a) of this section are not attained.

(c) Each year, the lockup shall assess, and determine whether adjustments are needed to:

(1) The staffing levels established pursuant to paragraph (a) of this section;

(2) Prevailing staffing patterns; and

(3) The agency's deployment of video monitoring systems and other technologies.

(d) Any intake screening or assessment shall include consideration of a detainee's potential vulnerability to sexual abuse.

(e) If vulnerable detainees are identified, law enforcement staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.

(f) If the lockup does not perform intake screenings or assessments, it shall have a policy and practice designed to provide heightened protection to a detainee to prevent sexual abuse whenever a law enforcement staff member observes any physical or behavioral characteristics of a detainee that suggest the detainee may be vulnerable to such abuse.

#### § 115.114 Limits to cross-gender viewing and searches.

(a) The lockup shall not conduct cross-gender strip searches or visual body cavity searches except in case of emergency or when performed by medical practitioners.

(b) The lockup shall document all such cross-gender searches.

(c) The lockup shall implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of

emergency, by accident, or when such viewing is incidental to routine cell checks.

(d) The lockup shall not examine a transgender detainee to determine the detainee's genital status unless the detainee's genital status is unknown. Such examination shall be conducted in private by a medical practitioner.

(e) The agency shall train law enforcement staff in how to conduct cross-gender pat-down searches, and searches of transgender detainees, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

#### § 115.115 Accommodating detainees with special needs.

(a) The agency shall ensure that detainees who are limited English proficient, deaf, or disabled are able to report sexual abuse and sexual harassment to staff directly, or through other established reporting mechanisms, such as abuse hotlines, without relying on detainee interpreters, absent exigent circumstances.

(b) The agency shall make accommodations to convey verbally all written information about sexual abuse policies, including how to report sexual abuse and sexual harassment, to detainees who have limited reading skills or who are visually impaired.

#### § 115.116 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who has engaged in sexual abuse in an institutional setting; who has been convicted of engaging in sexual activity in the community facilitated by force, the threat of force, or coercion; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) Before hiring new employees, the agency shall:

(1) Perform a criminal background check; and

(2) Consistent with Federal, State, and local law, make its best effort to contact all prior institutional employers for information on substantiated allegations of sexual abuse.

(c) The agency shall either conduct criminal background checks of current employees at least every five years or have in place a system for otherwise capturing such information for current employees.

(d) The agency shall ask all applicants and employees directly about previous misconduct in written applications for hiring or promotions, in interviews for hiring or promotions, and in any interviews or written self-evaluations conducted as part of reviews of current employees.

(e) Material omissions, or the provision of materially false information, shall be grounds for termination.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

#### **§ 115.117 Upgrades to facilities and technologies.**

(a) When designing or acquiring any new lockup and in planning any substantial expansion or modification of existing lockups, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect detainees from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the agency shall consider how such technology may enhance the agency's ability to protect detainees from sexual abuse.

#### **Responsive Planning**

##### **§ 115.121 Evidence protocol and forensic medical exams.**

(a) To the extent the agency is responsible for investigating allegations of sexual abuse in its lockups, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be adapted from or otherwise based on the 2004 U.S. Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," subsequent updated editions, or similarly comprehensive and authoritative protocols developed after 2010. As part of the training required in § 115.131, employees and volunteers who may have contact with lockup detainees shall receive basic training regarding how to detect and respond to victims of sexual abuse.

(c) The agency shall offer all victims of sexual abuse access to forensic medical exams performed by qualified medical practitioners, whether onsite or at an outside facility, without financial cost, where evidentiarily or medically appropriate.

(d) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall inform the investigating entity of these policies.

(e) The requirements in paragraphs (a) through (d) of this section shall also apply to:

(1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in lockups; and

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in institutional settings.

##### **§ 115.123 Policies to ensure investigation of allegations.**

(a) If another law enforcement agency is responsible for conducting investigations of allegations of sexual abuse or sexual harassment in its lockups, the agency shall have in place a policy to ensure that such allegations are investigated by an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior, and shall publish such policy on its Web site, including a description of responsibilities of both the agency and the investigating entity.

(b) Any State entity responsible for conducting criminal or administrative investigations of sexual abuse in lockups shall have in place a policy governing the conduct of such investigations.

(c) Any Department of Justice component responsible for conducting criminal or administrative investigations of sexual abuse in lockups shall have in place a policy governing the conduct of such investigations.

#### **Training and Education**

##### **§ 115.131 Employee and volunteer training.**

(a) The agency shall train all employees and volunteers who may have contact with lockup detainees to be able to fulfill their responsibilities under agency sexual abuse prevention, detection, and response policies and procedures, and to communicate effectively and professionally with all detainees.

(b) All current employees and volunteers who may have contact with lockup detainees shall be trained within one year of the effective date of the PREA standards, and the agency shall provide annual refresher information to all such employees and volunteers to ensure that they know the agency's current sexual abuse policies and procedures.

(c) The agency shall document, via employee signature or electronic verification, that employees understand the training they have received.

##### **§ 115.132 Detainee, attorney, contractor, and inmate worker notification of the agency's zero-tolerance policy.**

(a) During the intake process, employees shall notify all detainees of the agency's zero-tolerance policy regarding sexual abuse.

(b) The agency shall ensure that, upon entering the lockup, attorneys, contractors, and any inmates who work in the lockup are informed of the agency's zero-tolerance policy regarding sexual abuse.

##### **§ 115.134 Specialized training: Investigations.**

(a) In addition to the general training provided to all employees and volunteers pursuant to § 115.131, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall 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.

(c) The agency shall maintain documentation that agency investigators have completed the required specialized training in conducting sexual abuse investigations.

(d) Any State entity or Department of Justice component that investigates sexual abuse in lockups shall provide such training to their agents and investigators who conduct such investigations.

#### **Reporting**

##### **§ 115.151 Detainee reporting.**

(a) The agency shall provide multiple ways for detainees to privately report sexual abuse and sexual harassment, retaliation by other detainees or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse.

(b) The agency shall also make its best efforts to provide at least one way for detainees to report abuse or harassment to an outside governmental entity that is not affiliated with the agency or that is operationally independent from agency leadership, such as an inspector general or ombudsperson.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and promptly document any verbal reports.

(d) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of detainees.

**§ 115.154 Third-party reporting.**

The agency shall establish a method to receive third-party reports of sexual abuse in its lockups. The agency shall distribute publicly information on how to report sexual abuse on behalf of a detainee.

**Official Response Following a Detainee Report**

**§ 115.161 Staff and agency reporting duties.**

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in an agency lockup; retaliation against detainees or staff who reported abuse; and any staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse or retaliation.

(b) Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than those who need to know, as specified in agency policy, to make treatment and investigation decisions.

(c) If the victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

(d) The agency shall report all allegations of sexual abuse, including third-party and anonymous reports, to the agency's designated investigators.

**§ 115.162 Reporting to other confinement facilities.**

(a) Within 14 days of receiving an allegation that a detainee was sexually abused while confined at another facility or lockup, the head of the facility or lockup that received the allegation shall notify in writing the head of the facility or lockup or appropriate central office of the agency where the alleged abuse occurred.

(b) The facility or lockup head or central office that receives such notification shall ensure that the allegation is investigated in accordance with these standards.

**§ 115.163 Staff first responder duties.**

(a) Upon learning that a detainee was sexually abused within a time period that still allows for the collection of physical evidence, the first law

enforcement staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Seal and preserve any crime scene; and

(3) Request the victim not to take any actions that could destroy physical evidence, including washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a law enforcement staff member, he or she shall be required to request the victim not to take any actions that could destroy physical evidence and then notify law enforcement staff.

**§ 115.164 Coordinated response.**

(a) The agency shall coordinate actions taken in response to a lockup incident of sexual abuse, among staff first responders, medical and mental health practitioners, investigators, and agency leadership.

(b) If a victim is transferred from the lockup to a jail, prison, or medical facility, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

**§ 115.165 Agency protection against retaliation.**

(a) The agency shall protect all detainees and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other detainees or staff.

(b) The agency shall employ multiple protection measures, including housing changes or transfers for detainee victims or abusers, removal of alleged staff or detainee abusers from contact with victims, and emotional support services for staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) The agency shall monitor the conduct and treatment of detainees or staff who have reported sexual abuse or cooperated with investigations, and shall act promptly to remedy any such retaliation.

(d) The agency shall not enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff abusers from contact with victims pending an investigation.

**Investigations**

**§ 115.171 Criminal and administrative agency investigations.**

(a) When the agency conducts its own investigations into allegations of sexual

abuse, it shall do so promptly, thoroughly, and objectively, using investigators who have received special training in sexual abuse investigations pursuant to § 115.134, and shall investigate all allegations of sexual abuse, including third-party and anonymous reports.

(b) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(c) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(d) The credibility of a victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as detainee or staff.

(e) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act facilitated the abuse; and

(2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative findings.

(f) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(g) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(h) The agency shall retain such investigative records for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

(i) The departure of the alleged abuser or victim from the employment or control of the lockup or agency shall not provide a basis for terminating an investigation.

(j) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.

(k) When outside agencies investigate sexual abuse, the agency shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

**§ 115.172 Evidentiary standard for administrative investigations.**

The agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

**Discipline****§ 115.176 Disciplinary sanctions for staff.**

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual touching.

(c) Sanctions shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

**§ 115.177 Referrals for prosecution for detainee-on-detainee sexual abuse.**

(a) When there is probable cause to believe that a detainee sexually abused another detainee in a lockup, the agency shall refer the matter to the appropriate prosecuting authority.

(b) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall inform the investigating entity of this policy.

(c) Any State entity or Department of Justice component that is responsible for investigating allegations of sexual abuse in lockups shall be subject to this requirement.

**Medical Care****§ 115.182 Access to emergency medical services.**

(a) Detainee victims of sexual abuse in lockups shall receive timely, unimpeded access to emergency medical treatment.

(b) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser.

**Data Collection and Review****§ 115.186 Sexual abuse incident reviews.**

(a) The lockup shall conduct a sexual abuse incident review at the conclusion

of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) The review team shall include upper management officials, with input from line supervisors and investigators.

(c) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated or otherwise caused by the perpetrator or victim's race, ethnicity, sexual orientation, gang affiliation, or other group dynamics at the lockup;

(3) Examine the area in the lockup where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings and any recommendations for improvement and submit such report to the lockup head and agency PREA coordinator.

**§ 115.187 Data collection.**

(a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at lockups under its direct control using a standardized instrument and set of definitions.

(b) The agency shall aggregate the incident-based sexual abuse data at least annually.

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Local Jail Jurisdictions Survey of Sexual Violence conducted by the Department of Justice's Bureau of Justice Statistics, or any subsequent form developed by the Bureau of Justice Statistics and designated for lockups.

(d) The agency shall collect data from multiple sources, including reports, investigation files, and sexual abuse incident reviews.

(e) The agency also shall obtain incident-based and aggregated data from any private agency with which it contracts for the confinement of its detainees.

(f) Upon request, the agency shall provide all such data from the previous year to the Department of Justice no later than June 30.

**§ 115.188 Data review for corrective action.**

(a) The agency shall review data collected and aggregated pursuant to section 115.187 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(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 each lockup, as well as the agency as a whole.

(b) Such report shall include 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 addressing sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site or, if it does not have one, through other means.

(d) The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a lockup, but must indicate the nature of the material redacted.

**§ 115.189 Data storage, publication, and destruction.**

(a) The agency shall ensure that data collected pursuant to § 115.187 are securely retained.

(b) The agency shall make all aggregated sexual abuse data, from lockups under its direct control and any private agencies with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data for at least 10 years after the date of its initial collection unless Federal, State, or local law requires otherwise.

**Audits****§ 115.193 Audits of standards.**

(a) An audit shall be considered independent if it is conducted by:

(1) A correctional monitoring body that is not part of the agency but that is part of, or authorized by, the relevant State or local government;

(2) An auditing entity that is within the agency but separate from its normal chain of command, such as an inspector general or ombudsman who reports

directly to the agency head or to the agency's governing board; or

(3) Other outside individuals with relevant experience.

(b) No audit may be conducted by an auditor who has received financial compensation from the agency being audited within the three years prior to the agency's retention of the auditor.

(c) The agency shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the agency's retention of the auditor, with the exception of contracting for subsequent audits.

(d) All auditors shall be certified by the Department of Justice to conduct such audits, and shall be re-certified every three years.

(e) The Department of Justice shall prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of facilities, review of documents, and interviews of staff and detainees. The Department of Justice also shall prescribe the minimum qualifications for auditors.

(f) The agency shall enable the auditor to enter and tour facilities, review documents, and interview staff and detainees to conduct a comprehensive audit.

(g) The agency shall ensure that the auditor's final report is published on the agency's Web site if it has one or is otherwise made readily available to the public.

### Subpart C—Standards for Community Confinement Facilities

#### Prevention Planning

##### **§ 115.211 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.**

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) An agency shall employ or designate an upper-level agency-wide PREA coordinator, who may be full-time or part-time, to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its community confinement facilities.

##### **§ 115.212 Contracting with other entities for the confinement of residents.**

(a) A public agency that contracts for the confinement of its residents 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.

(b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with PREA standards.

(c) Only in emergency circumstances in which all reasonable attempts to find a private agency or other entity in compliance with the PREA standards have failed, may the agency enter into a contract with an entity that fails to comply with these standards. In such a case, the public agency shall document its unsuccessful attempts to find an entity in compliance with the standards.

##### **§ 115.213 Supervision and monitoring.**

(a) For each facility, the agency shall determine the adequate levels of staffing, and, where applicable, video monitoring, to protect residents against sexual abuse. In calculating such levels, agencies shall take into consideration the physical layout of each facility, the composition of the resident population, and any other relevant factors.

(b) The facility shall also establish a plan for how to conduct staffing and, where applicable, video monitoring, in circumstances where the levels established in paragraph (a) of this section are not attained.

(c) Each year, the facility shall assess, and determine whether adjustments are needed to:

- (1) The staffing levels established pursuant to paragraph (a) of this section;
- (2) Prevailing staffing patterns; and
- (3) The agency's deployment of video monitoring systems and other technologies.

##### **§ 115.214 Limits to cross-gender viewing and searches.**

(a) The facility shall not conduct cross-gender strip searches or visual body cavity searches except in case of emergency or when performed by medical practitioners.

(b) The facility shall document all such cross-gender searches.

(c) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency, by accident, or when such viewing is incidental to routine cell checks.

(d) The facility shall not examine a transgender resident to determine the resident's genital status unless the resident's genital status is unknown. Such examination shall be conducted in private by a medical practitioner.

(e) Following classification, the agency shall implement procedures to

exempt from non-emergency cross-gender pat-down searches those residents who have suffered documented prior cross-gender sexual abuse while incarcerated.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender residents, in a professional and respectful manner, and in the least intrusive manner.

##### **§ 115.215 Accommodating residents with special needs.**

(a) The agency shall ensure that residents who are limited English proficient, deaf, or disabled are able to report sexual abuse and sexual harassment to staff directly or through other established reporting mechanisms, such as abuse hotlines, without relying on resident interpreters, absent exigent circumstances.

(b) The agency shall make accommodations to convey verbally all written information about sexual abuse policies, including how to report sexual abuse and sexual harassment, to residents who have limited reading skills or who are visually impaired.

##### **§ 115.216 Hiring and promotion decisions.**

(a) The agency shall not hire or promote anyone who has engaged in sexual abuse in an institutional setting; who has been convicted of engaging in sexual activity in the community facilitated by force, the threat of force, or coercion; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) Before hiring new employees, the agency shall:

- (1) Perform a criminal background check; and
- (2) Consistent with Federal, State, and local law, make its best effort to contact all prior institutional employers for information on substantiated allegations of sexual abuse.

(c) The agency shall either conduct criminal background checks of current employees at least every five years or have in place a system for otherwise capturing such information for current employees.

(d) The agency shall also ask all applicants and employees directly about previous misconduct in written applications for hiring or promotions, in interviews for hiring or promotions, and in any interviews or written self-evaluations conducted as part of reviews of current employees.

(e) Material omissions, or the provision of materially false information, shall be grounds for termination.

(f) Unless prohibited by law, the agency shall provide information on

substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

**§ 115.217 Upgrades to facilities and technologies.**

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of existing facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect residents from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the agency shall consider how such technology may enhance the agency's ability to protect residents from sexual abuse.

**Responsive Planning**

**§ 115.221 Evidence protocol and forensic medical exams.**

(a) To the extent the agency is responsible for investigating allegations of sexual abuse, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be adapted from or otherwise based on the 2004 U.S. Department of Justice's Office on Violence Against Women publication "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," subsequent updated editions, or similarly comprehensive and authoritative protocols developed after 2010.

(c) The agency shall offer all victims of sexual abuse access to forensic medical exams performed by qualified medical practitioners, whether onsite or at an outside facility, without financial cost, where evidentiarily or medically appropriate.

(d) The agency shall make available to the victim a qualified staff member or a victim advocate from a community-based organization that provides services to sexual abuse victims.

(e) As requested by the victim, the qualified staff member or victim advocate shall accompany and support the victim through the forensic medical exam process and the investigatory process and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency

shall inform the investigating entity of these policies.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to:

(1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in institutional settings; and

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in institutional settings.

(h) For the purposes of this standard, a qualified staff member shall be an individual who is employed by a facility and has received education concerning sexual assault and forensic examination issues in general.

**§ 115.222 Agreements with outside public entities and community service providers.**

(a) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with an outside public entity or office that is able to receive and immediately forward resident reports of sexual abuse and sexual harassment to agency officials pursuant to § 115.251, unless the agency enables residents to make such reports to an internal entity that is operationally independent from the agency's chain of command, such as an inspector general or ombudsperson who reports directly to the agency head.

(b) The agency also shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide residents with confidential emotional support services related to sexual abuse.

(c) The agency shall maintain copies of agreements or documentation showing attempts to enter into agreements.

**§ 115.223 Policies to ensure investigation of allegations.**

(a) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are investigated by an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior, and shall publish such policy on its Web site.

(b) If a separate entity is responsible for conducting criminal investigations, such Web site publication shall describe the responsibilities of both the agency and the investigating entity.

(c) Any State entity responsible for conducting criminal or administrative investigations of sexual abuse in institutional settings shall have in place a policy governing the conduct of such investigations.

(d) Any Department of Justice component responsible for conducting criminal or administrative investigations of sexual abuse in institutional settings shall have in place a policy governing the conduct of such investigations.

**Training and Education**

**§ 115.231 Employee training.**

(a) The agency shall train all employees who may have contact with residents on:

(1) Its zero-tolerance policy for sexual abuse and sexual harassment;

(2) How to fulfill their responsibilities under agency sexual abuse prevention, detection, reporting, and response policies and procedures;

(3) Residents' right to be free from sexual abuse and sexual harassment;

(4) The right of residents and employees to be free from retaliation for reporting sexual abuse;

(5) The dynamics of sexual abuse in confinement;

(6) The common reactions of sexual abuse victims;

(7) How to detect and respond to signs of threatened and actual sexual abuse;

(8) How to avoid inappropriate relationships with residents; and

(9) How to communicate effectively and professionally with residents, including lesbian, gay, bisexual, transgender, or intersex residents.

(b) Such training shall be tailored to the gender of the residents at the employee's facility.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide annual refresher information to all employees to ensure that they know the agency's current sexual abuse policies and procedures.

(d) The agency shall document, via employee signature or electronic verification, that employees understand the training they have received.

**§ 115.232 Volunteer and contractor training.**

(a) The agency shall ensure that all volunteers and contractors who have contact with residents have been trained on their responsibilities under the agency's sexual abuse prevention, detection, 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 residents, but all volunteers and contractors who have contact with residents shall be notified of the agency's zero-tolerance policy regarding

sexual abuse and sexual harassment and informed how to report sexual abuse.

(c) The agency shall maintain documentation confirming that volunteers and contractors understand the training they have received.

**§ 115.233 Resident education.**

(a) During the intake process, staff shall inform residents of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment, how to report incidents or suspicions of sexual abuse or sexual harassment, their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such abuse or harassment, and regarding agency sexual abuse response policies and procedures.

(b) The agency shall provide refresher information whenever a resident is transferred to a different facility.

(c) The agency shall provide resident education in formats accessible to all residents, including those who are limited English proficient, deaf, visually impaired, or otherwise disabled as well as residents who have limited reading skills.

(d) The agency shall maintain documentation of resident participation in these education sessions.

(e) In addition to providing such education, the agency shall ensure that key information is continuously and readily available or visible to residents through posters, resident handbooks, or other written formats.

**§ 115.234 Specialized training: Investigations.**

(a) In addition to the general training provided to all employees pursuant to § 115.231, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall 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.

(c) The agency shall maintain documentation that agency investigators have completed the required specialized training in conducting sexual abuse investigations.

(d) Any State entity or Department of Justice component that investigates sexual abuse in confinement settings shall provide such training to its agents and investigators who conduct such investigations.

**§ 115.235 Specialized training: Medical and mental health care.**

(a) The agency shall ensure that all full- and part-time medical and mental health care practitioners who work regularly in its facilities have been trained in:

(1) How to detect and assess signs of sexual abuse;

(2) How to preserve physical evidence of sexual abuse;

(3) How to respond effectively and professionally to victims of sexual abuse; and

(4) How and to whom to report allegations or suspicions of sexual abuse.

(b) If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall maintain documentation that medical and mental health practitioners have received the training referenced in this standard either from the agency or elsewhere.

**Screening for Risk of Sexual Victimization and Abusiveness**

**§ 115.241 Screening for risk of victimization and abusiveness.**

(a) All residents shall be screened during the intake process or during an initial classification process to assess their risk of being sexually abused by other residents or sexually abusive toward other residents.

(b) Such screening shall be conducted using an objective screening instrument, blank copies of which shall be made available to the public upon request.

(c) The initial classification process shall consider, at a minimum, the following criteria to screen residents for risk of sexual victimization:

(1) Whether the resident has a mental, physical, or developmental disability;

(2) The age of the resident, including whether the resident is a juvenile;

(3) The physical build of the resident;

(4) Whether the resident has previously been incarcerated;

(5) Whether the resident's criminal history is exclusively nonviolent;

(6) Whether the resident has prior convictions for sex offenses against an adult or child;

(7) Whether the resident is gay, lesbian, bisexual, transgender, or intersex;

(8) Whether the resident has previously experienced sexual victimization; and

(9) The resident's own perception of vulnerability.

(d) The initial classification process shall consider prior acts of sexual abuse,

prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the agency, in screening residents for risk of being sexually abusive.

(e) An agency shall conduct such initial classification within 30 days of the resident's confinement.

(f) Residents shall be rescreened when warranted due to a referral, request, or incident of sexual victimization.

Residents may not be disciplined for refusing to answer particular questions or for not disclosing complete information.

(g) The agency shall implement appropriate controls on the dissemination of responses to screening questions within the facility in order to ensure that sensitive information is not exploited to the resident's detriment by staff or other residents.

**§ 115.242 Use of screening information.**

(a) The agency shall use information from the risk screening to inform housing, bed, work, education, and program assignments with the goal of keeping separate those residents at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each resident.

(c) In deciding whether to assign a transgender or intersex resident to a facility for male or female residents, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the resident's health and safety, and whether the placement would present management or security problems.

(d) Such resident's own views with respect to his or her own safety shall be given serious consideration.

**Reporting**

**§ 115.251 Resident reporting.**

(a) The agency shall provide multiple internal ways for residents to privately report sexual abuse and sexual harassment, retaliation by other residents or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse.

(b) Pursuant to § 115.222, the agency shall also make its best efforts to provide at least one way for residents to report abuse or harassment to an outside governmental entity that is not affiliated with the agency or that is operationally independent from agency leadership, such as an inspector general or

ombudsperson, and that is able to receive and immediately forward resident reports of sexual abuse and sexual harassment to agency officials.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.

(d) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of residents.

**§ 115.252 Exhaustion of administrative remedies.**

(a)(1) The agency shall provide a resident a minimum of 20 days following the occurrence of an alleged incident of sexual abuse to file a grievance regarding such incident.

(2) The agency shall grant an extension of no less than 90 days from the deadline for filing such a grievance when the resident provides documentation, such as from a medical or mental health provider or counselor, that filing a grievance within the normal time limit was or would likely be impractical, whether due to physical or psychological trauma arising out of an incident of sexual abuse, the resident having been held for periods of time outside of the facility, or other circumstances indicating impracticality. Such an extension shall be afforded retroactively to a resident whose grievance is filed subsequent to the normal filing deadline.

(b)(1) The agency shall issue a final agency decision on the merits of a grievance alleging sexual abuse within 90 days of the initial filing of the grievance.

(2) Computation of the 90-day time period shall not include time consumed by residents in appealing any adverse ruling.

(3) An agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision.

(4) The agency shall notify the resident in writing of any such extension and provide a date by which a decision will be made.

(c)(1) Whenever an agency is notified of an allegation that a resident has been sexually abused, other than by notification from another resident, it shall consider such notification as a grievance or request for informal resolution submitted on behalf of the alleged resident victim for purposes of initiating the agency administrative remedy process.

(2) The agency shall inform the alleged victim that a grievance or request for informal resolution has been submitted on his or her behalf and shall

process it under the agency's normal procedures unless the alleged victim expressly requests that it not be processed. The agency shall document any such request.

(3) The agency may require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(4) The agency shall also establish procedures to allow the parent or legal guardian of a juvenile to file a grievance regarding allegations of sexual abuse, including appeals, on behalf of such juvenile.

(d)(1) An agency shall establish procedures for the filing of an emergency grievance where a resident is subject to a substantial risk of imminent sexual abuse.

(2) After receiving such an emergency grievance, the agency shall immediately forward it to a level of review at which corrective action may be taken, provide an initial response within 48 hours, and a final agency decision within five calendar days.

(3) The agency may opt not to take such actions if it determines that no emergency exists, in which case it may either:

(i) Process the grievance as a normal grievance; or

(ii) Return the grievance to the resident, and require the resident to follow the agency's normal grievance procedures.

(4) The agency shall provide a written explanation of why the grievance does not qualify as an emergency.

(5) An agency may discipline a resident for intentionally filing an emergency grievance where no emergency exists.

**§ 115.253 Resident access to outside confidential support services.**

(a) The facility shall provide residents with access to outside victim advocates for emotional support services related to sexual abuse by giving residents mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and by enabling reasonable communication between residents and these organizations, as confidential as possible, consistent with agency security needs.

(b) The facility shall inform residents, prior to giving them access, of the extent to which such communications will be monitored.

**§ 115.254 Third-party reporting.**

The facility shall establish a method to receive third-party reports of sexual abuse. The facility shall distribute

publicly information on how to report sexual abuse on behalf of a resident.

**Official Response Following a Resident Report**

**§ 115.261 Staff and agency reporting duties.**

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in an institutional setting; retaliation against residents or staff who reported abuse; and any staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse or retaliation.

(b) Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than those who need to know, as specified in agency policy, to make treatment, investigation, and other security and management decisions.

(c) Unless otherwise precluded by Federal, State, or local law, medical and mental health practitioners shall be required to report sexual abuse pursuant to paragraph (a) of this section and to inform residents of the practitioner's duty to report at the initiation of services.

(d) If the victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

(e) The facility shall report all allegations of sexual abuse, including third-party and anonymous reports, to the facility's designated investigators.

**§ 115.262 Reporting to other confinement facilities.**

(a) Within 14 days of receiving an allegation that a resident was sexually abused while confined at another community corrections facility, the head of the facility that received the allegation shall notify in writing the head of the facility or appropriate central office of the agency where the alleged abuse occurred.

(b) The facility head or central office that receives such notification shall ensure that the allegation is investigated in accordance with these standards.

**§ 115.263 Staff first responder duties.**

(a) Upon learning that a resident was sexually abused within a time period that still allows for the collection of physical evidence, the first security staff member to respond to the report shall be required to:

- (1) Separate the alleged victim and abuser;
- (2) Seal and preserve any crime scene; and

(3) Request the victim not to take any actions that could destroy physical evidence, including washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, he or she shall be required to request the victim not to take any actions that could destroy physical evidence and then notify security staff.

#### **§ 115.264 Coordinated response.**

The facility shall coordinate actions taken in response to an incident of sexual abuse, among staff first responders, medical and mental health practitioners, investigators, and facility leadership.

#### **§ 115.265 Agency protection against retaliation.**

(a) The agency shall protect all residents and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other residents or staff.

(b) The agency shall employ multiple protection measures, including housing changes or transfers for resident victims or abusers, removal of alleged staff or resident abusers from contact with victims, and emotional support services for residents or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) The agency shall monitor the conduct and treatment of residents or staff who have reported sexual abuse or cooperated with investigations, including any resident disciplinary reports, housing, or program changes, for at least 90 days following their report or cooperation to see if there are changes that may suggest possible retaliation by residents or staff, and shall act promptly to remedy any such retaliation. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) The agency shall not enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff abusers from contact with victims pending an investigation.

#### **Investigations**

#### **§ 115.271 Criminal and administrative agency investigations.**

(a) When the agency conducts its own investigations into allegations of sexual

abuse, it shall do so promptly, thoroughly, and objectively, using investigators who have received special training in sexual abuse investigations pursuant to § 115.234, and shall investigate all allegations of sexual abuse, including third-party and anonymous reports.

(b) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(c) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(d) The credibility of a victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as resident or staff.

(e) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act facilitated the abuse; and

(2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative findings.

(f) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(g) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(h) The agency shall retain such investigative records for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

(i) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(j) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.

(k) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

#### **§ 115.272 Evidentiary standard for administrative investigations.**

The agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

#### **§ 115.273 Reporting to residents.**

(a) Following an investigation into a resident's allegation of sexual abuse suffered in an agency facility, the agency shall inform the resident as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.

(b) If the agency did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the resident.

(c) Following a resident's allegation that a staff member has committed sexual abuse, the agency shall subsequently inform the resident whenever:

(1) The staff member is no longer posted within the resident's unit;

(2) The staff member is no longer employed at the facility;

(3) The agency learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or

(4) The agency learns that the staff member has been convicted on a charge related to sexual abuse within the facility.

(d) The requirement to inform the inmate shall not apply to allegations that have been determined to be unfounded.

#### **Discipline**

#### **§ 115.276 Disciplinary sanctions for staff.**

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual touching.

(c) Sanctions shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

**§ 115.277 Disciplinary sanctions for residents.**

(a) Residents shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the resident engaged in resident-on-resident sexual abuse or following a criminal finding of guilt for resident-on-resident sexual abuse.

(b) Sanctions shall be commensurate with the nature and circumstances of the abuse committed, the resident's disciplinary history, and the sanctions imposed for comparable offenses by other residents with similar histories.

(c) The disciplinary process shall consider whether a resident's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to require the offending resident to participate in such interventions as a condition of access to programming or other benefits.

(e) The agency may discipline a resident for sexual contact with staff only upon a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) Any prohibition on resident-on-resident sexual activity shall not consider consensual sexual activity to constitute sexual abuse.

**Medical and Mental Care****§ 115.282 Access to emergency medical and mental health services.**

(a) Resident victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment.

(b) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser.

(c) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders shall take

preliminary steps to protect the victim pursuant to § 115.263 and shall immediately notify the appropriate medical and mental health practitioners.

(d) Resident victims of sexual abuse while incarcerated shall be offered timely information about and access to all pregnancy-related medical services that are lawful in the community and sexually transmitted infections prophylaxis, where appropriate.

**§ 115.283 Ongoing medical and mental health care for sexual abuse victims and abusers.**

(a) The facility shall offer ongoing medical and mental health evaluation and treatment to all residents who, during their present term of incarceration, have been victimized by sexual abuse.

(b) The evaluation and treatment of sexual abuse victims shall include appropriate follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide resident victims of sexual abuse with medical and mental health services consistent with the community level of care.

(d) All prisons shall conduct a mental health evaluation of all known resident abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by qualified mental health practitioners.

(e) Resident victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.

(f) If pregnancy results, such victims shall receive timely information about and access to all pregnancy-related medical services that are lawful in the community.

**Data Collection and Review****§ 115.286 Sexual abuse incident reviews.**

(a) The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) The review team shall include upper management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(c) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated or otherwise caused by the perpetrator or victim's race, ethnicity, sexual orientation, gang

affiliation, or other group dynamics at the facility;

(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings and any recommendations for improvement and submit such report to the facility head and PREA coordinator, if any.

**§ 115.287 Data collection.**

(a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at facilities under its direct control using a standardized instrument and set of definitions.

(b) The agency shall aggregate the incident-based sexual abuse data at least annually.

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Survey of Sexual Violence conducted by the Department of Justice's Bureau of Justice Statistics.

(d) The agency shall collect data from multiple sources, including reports, investigation files, and sexual abuse incident reviews.

(e) The agency also shall obtain incident-based and aggregated data from every private facility with which it contracts for the confinement of its residents.

(f) Upon request, the agency shall provide all such data from the previous year to the Department of Justice no later than June 30.

**§ 115.288 Data review for corrective action.**

(a) The agency shall review data collected and aggregated pursuant to § 115.287 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(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 each facility, as well as the agency as a whole.

(b) Such report shall include 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 addressing sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site or, if it does not have one, through other means.

(d) The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a facility, but must indicate the nature of the material redacted.

**§ 115.289 Data storage, publication, and destruction.**

(a) The agency shall ensure that data collected pursuant to § 115.287 are securely retained.

(b) The agency shall make all aggregated sexual abuse data, from facilities under its direct control and private facilities with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data for at least 10 years after the date of its initial collection unless Federal, State, or local law requires otherwise.

**Audits**

**§ 115.293 Audits of standards.**

(a) An audit shall be considered independent if it is conducted by:

(1) A correctional monitoring body that is not part of the agency but that is part of, or authorized by, the relevant State or local government;

(2) An auditing entity that is within the agency but separate from its normal chain of command, such as an inspector general or ombudsperson who reports directly to the agency head or to the agency's governing board; or

(3) Other outside individuals with relevant experience.

(b) No audit may be conducted by an auditor who has received financial compensation from the agency being audited within the three years prior to the agency's retention of the auditor.

(c) The agency shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the agency's retention of the auditor, with the exception of contracting for subsequent audits.

(d) All auditors shall be certified by the Department of Justice to conduct such audits, and shall be re-certified every three years.

(e) The Department of Justice shall prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of

facilities, review of documents, and interviews of staff and residents. The Department of Justice also shall prescribe the minimum qualifications for auditors.

(f) The agency shall enable the auditor to enter and tour facilities, review documents, and interview staff and residents to conduct a comprehensive audit.

(g) The agency shall ensure that the auditor's final report is published on the agency's Web site if it has one or is otherwise made readily available to the public.

**Subpart D—Standards for Juvenile Facilities**

**Prevention Planning**

**§ 115.311 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.**

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) An agency shall employ or designate an upper-level agency-wide PREA coordinator to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.

(c) The PREA coordinator shall be a full-time position in all agencies that operate facilities whose total rated capacity exceeds 1000 residents, but may be designated as a part-time position in agencies whose total rated capacity does not exceed 1000 residents.

(d) An agency whose facilities have a total rated capacity exceeding 1000 residents shall also designate a PREA coordinator for each facility, who may be full-time or part-time.

**§ 115.312 Contracting with other entities for the confinement of residents.**

(a) A public agency that contracts for the confinement of its residents 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.

(b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with PREA standards.

**§ 115.313 Supervision and monitoring.**

(a) For each facility, the agency shall determine the adequate levels of staffing, and, where applicable, video monitoring, to protect residents against sexual abuse. In calculating such levels,

agencies shall take into consideration the physical layout of each facility, the composition of the resident population, and any other relevant factors.

(b) The facility shall also establish a plan for how to conduct staffing and, where applicable, video monitoring, in circumstances where the levels established in paragraph (a) of this section are not attained.

(c) Each year, the facility shall assess, and determine whether adjustments are needed to:

(1) The staffing levels established pursuant to paragraph (a) of this section;

(2) Prevailing staffing patterns; and

(3) The agency's deployment of video monitoring systems and other technologies.

(d) Each secure facility shall implement a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such policy and practice shall be implemented for night shifts as well as day shifts.

**§ 115.314 Limits to cross-gender viewing and searches.**

(a) The facility shall not conduct cross-gender strip searches or visual body cavity searches except in case of emergency or when performed by medical practitioners.

(b) The facility shall document all such cross-gender searches.

(c) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency, by accident, or when such viewing is incidental to routine cell checks.

(d) The facility shall not examine a transgender resident to determine the resident's genital status unless the resident's genital status is unknown. Such examination shall be conducted in private by a medical practitioner.

(e) The agency shall not conduct cross-gender pat-down searches except in the case of emergency or other unforeseen circumstances. Any such search shall be documented and justified.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender residents, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

**§ 115.315 Accommodating residents with special needs.**

(a) The agency shall ensure that residents who are limited English proficient, deaf, or disabled are able to report sexual abuse and sexual harassment to staff directly or through other established reporting mechanisms, such as abuse hotlines, without relying on resident interpreters, absent exigent circumstances.

(b) The agency shall make accommodations to convey verbally all written information about sexual abuse policies, including how to report sexual abuse and sexual harassment, to residents who have limited reading skills or who are visually impaired.

**§ 115.316 Hiring and promotion decisions.**

(a) The agency shall not hire or promote anyone who has engaged in sexual abuse in an institutional setting; who has been convicted of engaging in sexual activity in the community facilitated by force, the threat of force, or coercion; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) Before hiring new employees, the agency shall:

(1) Perform a criminal background check; and

(2) Consistent with Federal, State, and local law, make its best effort to contact all prior institutional employers for information on substantiated allegations of sexual abuse.

(c) The agency shall either conduct criminal background checks of current employees at least every five years or have in place a system for otherwise capturing such information for current employees.

(d) The agency shall also ask all applicants and employees directly about previous misconduct in written applications for hiring or promotions, in interviews for hiring or promotions, and in any interviews or written self-evaluations conducted as part of reviews of current employees.

(e) Material omissions, or the provision of materially false information, shall be grounds for termination.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

**§ 115.317 Upgrades to facilities and technologies.**

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of

existing facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect residents from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the agency shall consider how such technology may enhance the agency's ability to protect residents from sexual abuse.

**Responsive Planning****§ 115.321 Evidence protocol and forensic medical exams.**

(a) To the extent the agency is responsible for investigating allegations of sexual abuse, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be adapted from or otherwise based on the 2004 U.S. Department of Justice's Office on Violence Against Women publication "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," subsequent updated editions, or similarly comprehensive and authoritative protocols developed after 2010.

(c) The agency shall offer all residents who experience sexual abuse access to forensic medical exams performed by qualified medical practitioners, whether onsite or at an outside facility, without financial cost, where evidentiary or medically appropriate.

(d) The agency shall make available to the victim a qualified staff member or a victim advocate from a community-based organization that provides services to sexual abuse victims.

(e) As requested by the victim, the qualified staff member or victim advocate shall accompany and support the victim through the forensic medical exam process and the investigatory process and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall inform the investigating entity of these policies.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to:

(1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in institutional settings; and

(2) Any Department of Justice component that is responsible for

investigating allegations of sexual abuse in institutional settings.

(h) For the purposes of this standard, a qualified staff member shall be an individual who is employed by a facility and has received education concerning sexual assault and forensic examination issues in general.

**§ 115.322 Agreements with outside public entities and community service providers.**

(a) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with an outside public entity or office that is able to receive and immediately forward resident reports of sexual abuse and sexual harassment to agency officials pursuant to § 115.351, unless the agency enables residents to make such reports to an internal entity that is operationally independent from the agency's chain of command, such as an inspector general or ombudsperson who reports directly to the agency head.

(b) The agency also shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide residents with emotional support services related to sexual abuse, including helping resident sexual abuse victims during community re-entry, unless the agency is legally required to provide such services to all residents.

(c) The agency shall maintain copies of agreements or documentation showing attempts to enter into agreements.

**§ 115.323 Policies to ensure investigation of allegations.**

(a) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are investigated by an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior, and shall publish such policy on its Web site.

(b) If a separate entity is responsible for conducting criminal investigations, such Web site publication shall describe the responsibilities of both the agency and the investigating entity.

(c) Any State entity responsible for conducting criminal or administrative investigations of sexual abuse in juvenile facilities shall have in place a policy governing the conduct of such investigations.

(d) Any Department of Justice component responsible for conducting criminal or administrative investigations of sexual abuse in juvenile facilities shall have in place a policy governing the conduct of such investigations.

**Training and Education****§ 115.331 Employee training.**

(a) The agency shall train all employees who may have contact with residents on:

- (1) Its zero-tolerance policy for sexual abuse and sexual harassment;
- (2) How to fulfill their responsibilities under agency sexual abuse prevention, detection, reporting, and response policies and procedures;
- (3) Residents' right to be free from sexual abuse and sexual harassment;
- (4) The right of residents and employees to be free from retaliation for reporting sexual abuse;
- (5) The dynamics of sexual abuse in juvenile facilities;
- (6) The common reactions of juvenile victims of sexual abuse;
- (7) How to detect and respond to signs of threatened and actual sexual abuse;
- (8) How to avoid inappropriate relationships with residents;
- (9) How to communicate effectively and professionally with residents, including lesbian, gay, bisexual, transgender, or intersex residents; and
- (10) Relevant laws related to mandatory reporting.

(b) Such training shall be tailored to the unique needs and attributes of residents of juvenile facilities.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide annual refresher information to all employees to ensure that they know the agency's current sexual abuse policies and procedures.

(d) The agency shall document, via employee signature or electronic verification, that employees understand the training they have received.

**§ 115.332 Volunteer and contractor training.**

(a) The agency shall ensure that all volunteers and contractors who have contact with residents have been trained on their responsibilities under the agency's sexual abuse prevention, detection, 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 residents, but all volunteers and contractors who have contact with residents shall be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report sexual abuse.

(c) The agency shall maintain documentation confirming that volunteers and contractors understand the training they have received.

**§ 115.333 Resident education.**

(a) During the intake process, staff shall inform residents in an age-appropriate fashion of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.

(b) Within 30 days of intake, the agency shall provide comprehensive age-appropriate education to residents either in person or via video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such abuse or harassment, and regarding agency sexual abuse response policies and procedures.

(c) Current residents who have not received such education shall be educated within one year of the effective date of the PREA standards, and the agency shall provide refresher information to all residents at least annually and whenever a resident is transferred to a different facility, to ensure that they know the agency's current sexual abuse policies and procedures.

(d) The agency shall provide resident education in formats accessible to all residents, including those who are limited English proficient, deaf, visually impaired, or otherwise disabled, as well as to residents who have limited reading skills.

(e) The agency shall maintain documentation of resident participation in these education sessions.

(f) In addition to providing such education, the agency shall ensure that key information is continuously and readily available or visible to residents through posters, resident handbooks, or other written formats.

**§ 115.334 Specialized training: Investigations.**

(a) In addition to the general training provided to all employees pursuant to § 115.331, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing juvenile 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.

(c) The agency shall maintain documentation that agency investigators have completed the required specialized

training in conducting sexual abuse investigations.

(d) Any State entity or Department of Justice component that investigates sexual abuse in juvenile confinement settings shall provide such training to its agents and investigators who conduct such investigations.

**§ 115.335 Specialized training: Medical and mental health care.**

(a) The agency shall ensure that all full- and part-time medical and mental health care practitioners who work regularly in its facilities have been trained in:

- (1) How to detect and assess signs of sexual abuse;
- (2) How to preserve physical evidence of sexual abuse;
- (3) How to respond effectively and professionally to juvenile victims of sexual abuse; and
- (4) How and to whom to report allegations or suspicions of sexual abuse.

(b) If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall maintain documentation that medical and mental health practitioners have received the training referenced in this standard either from the agency or elsewhere.

**Assessment and Placement of Residents****§ 115.341 Obtaining information from residents.**

(a) During the intake process and periodically throughout a resident's confinement, the agency shall obtain and use information about each resident's personal history and behavior to reduce the risk of sexual abuse by or upon a resident.

(b) Such assessment shall be conducted using an objective screening instrument, blank copies of which shall be made available to the public upon request.

(c) At a minimum, the agency shall attempt to ascertain information about:

- (1) Prior sexual victimization or abusiveness;
- (2) Sexual orientation, transgender, or intersex status;
- (3) Current charges and offense history;
- (4) Age;
- (5) Level of emotional and cognitive development;
- (6) Physical size and stature;
- (7) Mental illness or mental disabilities;
- (8) Intellectual or developmental disabilities;
- (9) Physical disabilities;

(10) The resident's own perception of vulnerability; and

(11) Any other specific information about individual residents that may indicate heightened needs for supervision, additional safety precautions, or separation from certain other residents.

(d) This information shall be ascertained through conversations with residents during the intake process and medical and mental health screenings; during classification assessments; and by reviewing court records, case files, facility behavioral records, and other relevant documentation from the residents' files.

(e) The agency shall implement appropriate controls on the dissemination of responses to screening questions within the facility in order to ensure that sensitive information is not exploited to the resident's detriment by staff or other residents.

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

(a) The agency shall use all information obtained about the resident during the intake process and subsequently to make placement decisions for each resident based upon the objective screening instrument with the goal of keeping all residents safe and free from sexual abuse.

(b) When determining housing, bed, program, education and work assignments for residents, the agency must take into account:

- (1) A resident's age;
- (2) The nature of his or her offense;
- (3) Any mental or physical disability or mental illness;
- (4) Any history of sexual victimization or engaging in sexual abuse;
- (5) His or her level of emotional and cognitive development;
- (6) His or her identification as lesbian, gay, bisexual, transgender, or intersex; and

(7) Any other information obtained about the resident pursuant to § 115.341.

(c) Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged.

(d) Lesbian, gay, bisexual, transgender, or intersex residents shall not be placed in particular housing, bed, or other assignments solely on the basis of such identification or status.

(e) The agency shall make an individualized determination about

whether a transgender resident should be housed with males or with females.

**Reporting**

**§ 115.351 Resident reporting.**

(a) The agency shall provide multiple internal ways for residents to privately report sexual abuse and sexual harassment, retaliation by other residents or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse.

(b) Pursuant to § 115.322, the agency shall also make its best efforts to provide at least one way for residents to report abuse or harassment to an outside governmental entity that is not affiliated with the agency or that is operationally independent from agency leadership, such as an inspector general or ombudsperson, and that is able to receive and immediately forward resident reports of sexual abuse and sexual harassment to agency officials.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.

(d) The facility shall provide residents with access to tools necessary to make a written report.

(e) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of residents.

**§ 115.352 Exhaustion of administrative remedies.**

(a)(1) The agency shall provide a resident a minimum of 20 days following the occurrence of an alleged incident of sexual abuse to file a grievance regarding such incident.

(2) The agency shall grant an extension of no less than 90 days from the deadline for filing such a grievance when the resident provides documentation, such as from a medical or mental health provider or counselor, that filing a grievance within the normal time limit was or would likely be impractical, whether due to physical or psychological trauma arising out of an incident of sexual abuse, the resident having been held for periods of time outside of the facility, or other circumstances indicating impracticality. Such an extension shall be afforded retroactively to a resident whose grievance is filed subsequent to the normal filing deadline.

(b)(1) The agency shall issue a final agency decision on the merits of a grievance alleging sexual abuse within 90 days of the initial filing of the grievance.

(2) Computation of the 90-day time period shall not include time consumed

by residents in appealing any adverse ruling.

(3) An agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision.

(4) The agency shall notify the resident in writing of any such extension and provide a date by which a decision will be made.

(c)(1) Whenever an agency is notified of an allegation that a resident has been sexually abused, other than by notification from another resident, it shall consider such notification as a grievance or request for informal resolution submitted on behalf of the alleged resident victim for purposes of initiating the agency administrative remedy process.

(2) The agency shall inform the alleged victim that a grievance or request for informal resolution has been submitted on his or her behalf and shall process it under the agency's normal procedures unless the alleged victim expressly requests that it not be processed. The agency shall document any such request.

(3) The agency may require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(4) The agency shall also establish procedures to allow the parent or legal guardian of a juvenile to file a grievance regarding allegations of sexual abuse, including appeals, on behalf of such juvenile.

(d)(1) An agency shall establish procedures for the filing of an emergency grievance where a resident is subject to a substantial risk of imminent sexual abuse.

(2) After receiving such an emergency grievance, the agency shall immediately forward it to a level of review at which corrective action may be taken, provide an initial response within 48 hours, and a final agency decision within five calendar days.

(3) The agency may opt not to take such actions if it determines that no emergency exists, in which case it may either:

- (i) Process the grievance as a normal grievance; or
- (ii) Return the grievance to the resident, and require the resident to follow the agency's normal grievance procedures.

(4) The agency shall provide a written explanation of why the grievance does not qualify as an emergency.

(5) An agency may discipline a resident for intentionally filing an emergency grievance where no emergency exists.

**§ 115.353 Resident access to outside support services and legal representation.**

(a) In addition to providing onsite mental health care services, the facility shall provide residents with access to outside victim advocates for emotional support services related to sexual abuse, by providing, posting, or otherwise making accessible mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and by enabling reasonable communication between residents and these organizations, as confidential as possible, consistent with agency security needs and with applicable law.

(b) The facility shall inform residents, prior to giving them access, of the extent to which such communications will be monitored.

(c) The facility shall also provide residents with reasonable and confidential access to their attorney or other legal representation and reasonable access to parents or legal guardians.

**§ 115.354 Third-party reporting.**

The facility shall establish a method to receive third-party reports of sexual abuse. The facility shall distribute publicly, including to residents' attorneys and parents or legal guardians, information on how to report sexual abuse on behalf of a resident.

**Official Response Following a Resident Report****§ 115.361 Staff and agency reporting duties.**

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information they receive regarding an incident of sexual abuse that occurred in an institutional setting; retaliation against residents or staff who reported abuse; and any staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse or retaliation.

(b) The agency shall also require all staff to comply with any applicable mandatory child abuse reporting laws.

(c) Apart from reporting to designated supervisors or officials and designated State or local services agencies, staff shall be prohibited from revealing any information related to a sexual abuse report to anyone other than those who need to know, as specified in agency policy, to make treatment, investigation, and other security and management decisions.

(d)(1) Medical and mental health practitioners shall be required to report sexual abuse to designated supervisors

and officials pursuant to paragraph (a) of this section, as well as to the designated State or local services agency where required by mandatory reporting laws.

(2) Such practitioners shall be required to inform residents at the initiation of services of their duty to report.

(e)(1) Upon receiving any allegation of sexual abuse, the facility head or his or her designee shall promptly report the allegation to the appropriate central office of the agency and the victim's parents or legal guardians, unless the facility has official documentation showing the parents or legal guardians should not be notified.

(2) If the victim is under the guardianship of the child welfare system, the report shall be made to the victim's caseworker instead of the victim's parents or legal guardians.

(3) If a juvenile court retains jurisdiction over a juvenile, the facility head or designee shall also report the allegation to such court within 14 days of receiving the allegation, unless additional time is needed to comply with applicable rules governing ex parte communications.

(f) The facility shall report all allegations of sexual abuse, including third-party and anonymous reports, to the facility's designated investigators.

**§ 115.362 Reporting to other confinement facilities.**

(a) Within 14 days of receiving an allegation that a resident was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify in writing the head of the facility or appropriate central office of the agency where the alleged abuse occurred and shall also notify the appropriate investigative agency.

(b) The facility head or central office that receives such notification shall ensure that the allegation is investigated in accordance with these standards.

**§ 115.363 Staff first responder duties.**

Upon learning that a resident was sexually abused within a time period that still allows for the collection of physical evidence, the first staff member to respond to the report shall be required to:

(a) Separate the alleged victim and abuser;

(b) Seal and preserve any crime scene; and

(c) Request the victim not to take any actions that could destroy physical evidence, including washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

**§ 115.364 Coordinated response.**

The facility shall coordinate actions taken in response to an incident of sexual abuse among staff first responders, medical and mental health practitioners, investigators, and facility leadership.

**§ 115.365 Agency protection against retaliation.**

(a) The agency shall protect all residents and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other residents or staff.

(b) The agency shall employ multiple protection measures, including housing changes or transfers for resident victims or abusers, removal of alleged staff or resident abusers from contact with victims, and emotional support services for residents or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) The agency shall monitor the conduct or treatment of residents or staff who have reported sexual abuse or cooperated with investigations, including any resident disciplinary reports, housing, or program changes, for at least 90 days following their report or cooperation, to see if there are changes that may suggest possible retaliation by residents or staff, and shall act promptly to remedy any such retaliation. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) The agency shall not enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff abusers from contact with residents pending an investigation.

**§ 115.366 Post-allegation protective custody.**

Any use of segregated housing to protect a resident who is alleged to have suffered sexual abuse shall be subject to the requirements of § 115.342.

**Investigations****§ 115.371 Criminal and administrative agency investigations.**

(a) When the agency conducts its own investigations into allegations of sexual abuse, it shall do so promptly, thoroughly, and objectively, using investigators who have received special training in sexual abuse investigations involving juvenile victims pursuant to § 115.334, and shall investigate all allegations of sexual abuse, including third-party and anonymous reports.

(b) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(c) The agency shall not terminate an investigation solely because the source of the allegation recants the allegation.

(d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(e) The credibility of a victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as resident or staff.

(f) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act facilitated the abuse; and  
 (2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative findings.

(g) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(h) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(i) The agency shall retain such investigative records for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

(j) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(k) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.

(l) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

#### **§ 115.372 Evidentiary standard for administrative investigations.**

The agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

#### **§ 115.373 Reporting to residents.**

(a) Following an investigation into a resident's allegation of sexual abuse suffered in an agency facility, the agency shall inform the resident as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.

(b) If the agency did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the resident.

(c) Following a resident's allegation that a staff member has committed sexual abuse, the agency shall subsequently inform the resident whenever:

(1) The staff member is no longer posted within the resident's unit;

(2) The staff member is no longer employed at the facility;

(3) The agency learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or

(4) The agency learns that the staff member has been convicted on a charge related to sexual abuse within the facility.

(d) The requirement to inform the inmate shall not apply to allegations that have been determined to be unfounded.

#### **Discipline**

#### **§ 115.376 Disciplinary sanctions for staff.**

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual touching.

(c) Sanctions shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

#### **§ 115.377 Disciplinary sanctions for residents.**

(a) Residents shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the resident engaged in resident-on-resident sexual

abuse or following a criminal finding of guilt for resident-on-resident sexual abuse.

(b) Sanctions shall be commensurate with the nature and circumstances of the abuse committed, the resident's disciplinary history, and the sanctions imposed for comparable offenses by other residents with similar histories.

(c) The disciplinary process shall consider whether a resident's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to require the offending resident to participate in such interventions as a condition of access to programming or other benefits.

(e) The agency may discipline a resident for sexual contact with staff only upon a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) Any prohibition on resident-on-resident sexual activity shall not consider consensual sexual activity to constitute sexual abuse.

#### **Medical and Mental Care**

#### **§ 115.381 Medical and mental health screenings; history of sexual abuse.**

(a) All facilities shall ask residents about prior sexual victimization during the intake process or classification screenings.

(b) If a resident discloses prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the resident is offered a follow-up reception with a medical or mental health practitioner within 14 days of the intake screening.

(c) Unless such intake or classification screening precedes adjudication, the facility shall also ask residents about prior sexual abusiveness.

(d) If a resident discloses prior sexual abusiveness, whether it occurred in an institutional setting or in the community, staff shall ensure that the resident is offered a follow-up reception with a mental health practitioner within 14 days of the intake screening.

(e) Subject to mandatory reporting laws, any information related to sexual victimization or abusiveness that occurred in an institutional setting shall be strictly limited to medical and mental health practitioners and other staff, as required by agency policy and Federal, State, or local law, to inform treatment plans and security and management decisions, including housing, bed, work, education, and program assignments.

(f) Medical and mental health practitioners shall obtain informed consent from residents before reporting information about prior sexual victimization that did not occur in an institutional setting, unless the resident is under the age of 18.

**§ 115.382 Access to emergency medical and mental health services.**

(a) Resident victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment.

(b) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser.

(c) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, staff first responders shall take preliminary steps to protect the victim pursuant to § 115.363 and shall immediately notify the appropriate medical and mental health practitioners.

(d) Resident victims of sexual abuse while incarcerated shall be offered timely information about and access to all pregnancy-related medical services that are lawful in the community and sexually transmitted infections prophylaxis, where appropriate.

**§ 115.383 Ongoing medical and mental health care for sexual abuse victims and abusers.**

(a) The facility shall offer ongoing medical and mental health evaluation and treatment to all residents who, during their present term of incarceration, have been victimized by sexual abuse.

(b) The evaluation and treatment of sexual abuse victims shall include appropriate follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide resident victims of sexual abuse with medical and mental health services consistent with the community level of care.

(d) The facility shall conduct a mental health evaluation of all known resident abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by qualified mental health practitioners.

(e) Resident victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.

(f) If pregnancy results, such victims shall receive timely information about and access to all pregnancy-related medical services that are lawful in the community.

**Data Collection and Review**

**§ 115.386 Sexual abuse incident reviews.**

(a) The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) The review team shall include upper management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(c) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated or otherwise caused by the perpetrator or victim's race, ethnicity, sexual orientation, gang affiliation, or other group dynamics at the facility;

(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings and any recommendations for improvement and submit such report to the facility head and PREA coordinator, if any.

**§ 115.387 Data collection.**

(a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at facilities under its direct control using a standardized instrument and set of definitions.

(b) The agency shall aggregate the incident-based sexual abuse data at least annually.

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Survey of Sexual Violence conducted by the

Department of Justice's Bureau of Justice Statistics.

(d) The agency shall collect data from multiple sources, including reports, investigation files, and sexual abuse incident reviews.

(e) The agency also shall obtain incident-based and aggregated data from every private facility with which it contracts for the confinement of its residents.

(f) Upon request, the agency shall provide all such data from the previous year to the Department of Justice no later than June 30.

**§ 115.388 Data review for corrective action.**

(a) The agency shall review data collected and aggregated pursuant to § 115.387 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(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 each facility, as well as the agency as a whole.

(b) Such report shall include 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 addressing sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site or, if it does not have one, through other means.

(d) The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a facility, but must indicate the nature of the material redacted.

**§ 115.389 Data storage, publication, and destruction.**

(a) The agency shall ensure that data collected pursuant to § 115.387 are securely retained.

(b) The agency shall make all aggregated sexual abuse data, from facilities under its direct control and private facilities with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data for at least 10 years after the date of its initial collection unless

Federal, State, or local law requires otherwise.

#### Audits

##### § 115.393 Audits of standards.

(a) An audit shall be considered independent if it is conducted by:

(1) A correctional monitoring body that is not part of the agency but that is part of, or authorized by, the relevant State or local government;

(2) An auditing entity that is within the agency but separate from its normal chain of command, such as an inspector general or ombudsperson who reports directly to the agency head or to the agency's governing board; or

(3) Other outside individuals with relevant experience.

(b) No audit may be conducted by an auditor who has received financial compensation from the agency being audited within the three years prior to the agency's retention of the auditor.

(c) The agency shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the agency's retention of the auditor, with the exception of contracting for subsequent audits.

(d) All auditors shall be certified by the Department of Justice to conduct such audits, and shall be re-certified every three years.

(e) The Department of Justice shall prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of facilities, review of documents, and

interviews of staff and residents. The Department of Justice also shall prescribe the minimum qualifications for auditors.

(f) The agency shall enable the auditor to enter and tour facilities, review documents, and interview staff and residents to conduct a comprehensive audit.

(g) The agency shall ensure that the auditor's final report is published on the agency's Web site if it has one or is otherwise made readily available to the public.

Dated: January 24, 2011.

**Eric H. Holder, Jr.**,

*Attorney General.*

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