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NO. 97232-0

SUPREME COURT OF THE STATE OF WASHINGTON

CARRI D. WILLIAMS,

Petitioner,

v.

JO WOFFORD, Superintendent, Washington Corrections Center for
Women, and the WASHINGTON DEPARTMENT OF
CORRECTIONS,

Respondent.

**REVISED AMICUS MEMORANDUM BY LEGAL VOICE OF
WASHINGTON**

IN SUPPORT OF PETITIONER

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I. INTRODUCTION

Amicus curiae supports Petitioner Williams' Writ of Prohibition and/or Mandamus and urges the Court to retain this case for consideration on the merits. Remand to superior court is unnecessary given the facial invalidity of Department of Correction (DOC) Policy 490.860. *Amicus* writes separately to draw the Court's attention to the importance of this case not only for Petitioner Williams, but also for all women currently incarcerated in Washington State.¹ Sexual abuse of incarcerated individuals is well-documented and often occurs at the hands of the very Corrections Officers charged with overseeing the victims. So long as the Court permits enforcement of DOC Policy 490.860 incarcerated women will suffer in silence, afraid to report sexual abuse for fear of retaliation.

II. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The identity and interest of *amicus curiae* Legal Voice is set forth in the Motion for Leave of Legal Voice to File an Amicus Curiae Memorandum, filed herewith.

¹ Sexual violence affects individuals of every gender identity and sexual orientation. *Amicus* focuses on the impact of sexual violence against women who are incarcerated in Washington State, but the risk of sexual violence is also high for incarcerated men, LGBTQ individuals, and those living with a mental illness. See Linda McFarlane & Melissa Rothstein, *Survivors Behind Bars: Supporting Survivors of Prison Rape and Sexual Assault*, CALIFORNIA COALITION AGAINST SEXUAL ASSAULT (2010), <https://www.calcasa.org/wp-content/uploads/2010/12/Survivors-Behind-Bars.pdf>; *LGBT Safety*, JUST DETENTION, <https://justdetention.org/what-we-do/lgbt-safety/>.

III. STATEMENT OF THE CASE

Amicus curiae adopts the statement of the case set forth in Petitioner Carri Williams's Original Action in the Nature of a Petition for a Writ of Prohibition and/or Mandamus.

IV. ARGUMENT

DOC Policy No. 490.860 violates incarcerated peoples' constitutional and statutory rights, including due process, the absolute right to civil immunity under RCW 4.24.515, and the right to petition for redress of grievances. *Amicus* will not repeat those arguments here as they are persuasively addressed by Petitioner Williams. Instead, *Amicus* focuses on the alarming rate of sexual violence against incarcerated women and the practical and disturbing effect of DOC Policy 490.860, which discourages victims from reporting sexual abuse for fear of retaliation. Therefore, the Court's prompt consideration of the merits of this case is necessary to protect the safety of incarcerated women in Washington State.

A. Women Experience High Rates of Sexual Harassment and Violence While Incarcerated.

Women are the fastest growing incarcerated population in the United States.² America incarcerates 30 percent of the world's female prisoners.³ While there has been a recent groundswell of support in the #MeToo era to end sexual violence, incarcerated women continue to suffer outside of the public eye.⁴ Incarcerated women are subject to "diverse and systematic forms of sexual abuse," including rape, groping, abusive searches, improper visual observation by guards, verbal harassment, quid pro quo coercion, and sexual threats.⁵

Precise rates of sexual abuse against people in detention facilities – such as prisons, jails, and immigration detention centers – are hard to pinpoint because of significant variation across institutions.⁶ But one study

² Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POLICY INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

³ Aleks Kajstura & Russ Immarigeon, *States of Women's Incarceration: The Global Context*, PRISON POLICY INITIATIVE (2011), <https://www.prisonpolicy.org/global/women>.

⁴ Jo Yurcaba, *For Survivors of Prison Rape, Saying 'Me Too' Isn't an Option*, REWIRE NEWS, Jan. 8, 2018, <https://tinyurl.com/y4v6dryn>.

⁵ Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 45-87, 45 (2007).

⁶ Melissa Rothstein and Lovisa Stannow, *Improving Prison Oversight to Address Sexual Violence in Detention*, AM. CONST. SOC'Y FOR L. & POL'Y, 2 (July 2009), <https://tinyurl.com/y4t8uf8b>.

estimated one in four women had been sexually victimized at a facility with a particularly egregious pattern of abuse.⁷

Incarcerated individuals who identify as LGBTQ are 10 times more likely than heterosexual individuals to be sexually victimized by another incarcerated person and three times as likely to be victimized by prison staff.⁸ People in prison who have been abused are also more likely to be victimized again, which, according to one study, means approximately half of all women in prison are at risk.⁹

Sexual abuse perpetrated by staff such as corrections officers is well-documented and of particular concern here. “In the United States, sexual abuse by guards in women’s prisons is so notorious and widespread that it has been described as ‘an institutionalized component of punishment behind prison walls.’”¹⁰ The power dynamic between guards and incarcerated individuals “allows guards to dominate, coerce and

⁷ *Id.*

⁸ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, at 18 (2013), available at <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

⁹ See Appendix D (The Community Justice Project, *RE: Docket No. OAG-131; AG Order No. 3244-2011, National Standards to Prevent, Detect, and Respond to Prison Rape* (April 4, 2011) (citing Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 WOMEN’S STUD. Q. 102, 113 (2004)); U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT WOMEN OFFENDERS (1999), available at <https://www.bjs.gov/content/pub/pdf/wo.pdf> (by one estimate, over half of women in state prisons have a history of physical or sexual abuse).

¹⁰ Buchanan, *supra* note 5 at 45 (citations omitted).

exploit people in prison with relative ease.”¹¹ In 2015, 42 percent of substantiated allegations of abuse were committed by staff.¹² Overall, reported incidents of sexual abuse by staff increased threefold in 2015 compared to 2011.¹³

The Washington Corrections Center for Women (WCCW) has a known history of sexual abuse by guards against women incarcerated at the facility. In 1996, a guard at WCCW raped Heather Wells, who was incarcerated at the time and later gave birth while she was still in prison.¹⁴ In 2007, several women formerly incarcerated at WCCW filed a class-action lawsuit alleging that sexual assaults by correctional staff were rampant and the Washington DOC had failed to investigate their complaints.¹⁵ The Department of Corrections eventually agreed to pay the women a settlement of \$1 million dollars.¹⁶

¹¹ M. Dyan McGuide, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46(3) CRIM. LAW BULLETIN (2010).

¹² U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREA DATA COLLECTION ACTIVITIES (2018), at 1-2, available at <https://www.bjs.gov/content/pub/pdf/pdca18.pdf>.

¹³ *Id.*; see also McGuide *supra* note 11 (another study found nearly half of all incidents reported by women were perpetrated by staff).

¹⁴ Andrew Mannix, *Prison Sex-Abuse Cases Grow, but Prosecutions Are Rare*, SEATTLE TIMES, Aug. 1, 2015, <https://tinyurl.com/y32um3dw/>.

¹⁵ *Jane Doe v. Clarke*, No. 07-2-01513-0 (Thurston Co. Super. Ct. filed July 31, 2007).

¹⁶ Jennifer Sullivan, *\$1M Awarded to 5 Washington Inmates in Sex-Assault Lawsuit*, SEATTLE TIMES, June 12, 2009, <https://tinyurl.com/y63a3v8c/>.

B. Despite the Pervasiveness of Sexual Abuse, It Remains Underreported And Rarely Prosecuted Both In and Outside of Detention Facilities.

There are many systemic, social, and psychological barriers that prevent victims of sexual violence from reporting their abusers.¹⁷ Victims fear that they will be disbelieved or blamed.¹⁸ Others fear retaliation from the offender or question whether what happened to them was in fact a crime.¹⁹

These barriers are compounded for women in prison.²⁰ Thus, any statistics on sexual abuse in prison likely represent only a fraction of all reportable sexual victimization, especially for instances of abuse by prison staff. According to one study, two-thirds of incidents involving abuse by staff were not reported to prison officials.²¹

¹⁷ See *Rape in America: A Report to the Nation*, NAT'L VICTIM CTR. AND CRIME VICTIMS RESEARCH AND TREATMENT CTR., 4 (1992) (sixty-nine percent of rape victims are somewhat or extremely concerned about "[p]eople thinking it was her fault or that she was responsible"); see also M. Anderson, *New Voices on the New Federalism: Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 928-31 (2001) (legal system responses to sexual assault complaints may discourage victims from participating in the criminal justice system).

¹⁸ *Rape in America supra* note 16 at 4.

¹⁹ Lucy Berliner, *Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women*, HARBORVIEW MED. CTR. (Oct. 2001).

²⁰ See *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH, 11-22 (June 2009), <https://tinyurl.com/y2nt7gws> (the technicalities of the grievance system may further discourage reporting).

²¹ *Id.*; Appendix D at 6 ("research makes it clear that the majority of sexual abuse in prisons remains unreported").

In 2003, Congress enacted the Prison Rape Elimination Act (PREA) in an effort to improve how prisons and jails can prevent, detect, and respond to sexual abuse. In 2012, the U.S. Department of Justice issued the first set of national standards for PREA.²² However, states have wide discretion in establishing their own PREA policies and procedures.²³ As a result, while documented reports of sexual abuse in prison have increased in the past several years, actual prosecutions have remained low and the risk of retaliation remains high for victims who report.

C. DOC Policy Chills Reporting from Women in Prison Who Fear Retaliation

1. *DOC Policy endorses retaliation against disbelieved victims who report abuse*

DOC Policy No. 490.860 purports to prohibit discipline or retaliation against incarcerated individuals who report abuse. However, an important exception to the Policy renders any alleged protection meaningless. The Policy provides, in relevant part:

Alleged victims are not subject to disciplinary action related to violating PREA policies except when . . . The Appointing Authority determines, by a preponderance of evidence, that the offender caused

²² *Nat'l Standards To Prevent, Detect, and Respond to Prison Rape*, 55 Fed. Reg. 37106, U.S. DEPT. OF JUSTICE (June 20, 2012).

²³ U.S. DEPT. OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, *Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape* (May 17, 2012), <https://tinyurl.com/yxp3jkv7>; Alysia Santo, *Prison Rape Allegations Are on the Rise*, THE MARSHALL PROJECT (July 25, 2018), <https://tinyurl.com/y3yl3trl>.

an innocent person to be accused by providing false or misleading information during any stage of the investigation. (Emphasis added.)

In short, the Policy *mandates* retaliation against a victim who reports abuse if the prison's Appointing Authority (Superintendent) determines he or she does not believe the victim's claim. In such cases, the Superintendent authorizes a 549 Violation against the incarcerated person. A 549 Violation is a serious infraction under the DOC's Disciplinary Sanction Table that causes the incarcerated person to lose good conduct time credits.²⁴ Therefore, every woman in prison who reports sexual abuse by prison staff must also accept the risk of being disciplined if the Superintendent does not believe her.²⁵

2. *Punishing women in prison who report sexual abuse discourages reporting and endangers victims.*

Victims of sexual abuse in prison identified fear of retaliation and "the feeling that staff would not believe them, would laugh at them, or would do nothing about it" as their top reasons for not reporting incidents

²⁴ See Appendix A (DOC Disciplinary Sanction Table).

²⁵ Because of the power dynamic and inherent inequities in the system where an incarcerated person brings a sexual abuse claim against prison staff, it is understandable why a victim would fear being misbelieved by the Superintendent. Additionally, there are many reasons victims are not believed. For example, the fact of the abuse may impact the victim's ability to recall, which is a diagnostic criterion of PTSD. Diagnostic and Statistical Manual of Mental Disorders, 309.81(C)(3), Fourth Edition, American Psychiatric Association, Washington, DC (2000).

of abuse.²⁶ These fears are realized in DOC Policy 490.860. Women at WCCW have attested to their reluctance to report abuse out of fear of retaliation, including receiving an infraction under DOC Policy 490.860.

For example, Sandra Weller writes:

I write this with tremendous trepidation and fear of retaliation from CO Kalieopa. I witness the 2nd time that happened to Carri. We were coming out of kitchen and she was pulled over by Kalieopa for pat. Carri had been afraid because of “How” Kalieopa had patted her down the 1st complaint . . . I left and turned around to see if she was ok. I was approx 15 feet away and saw the horror on Carri’s face. Upset and terror and she was mouthing to me “she did it again!” . . . When Carri caught up to me she was pale and shaking

Appendix B. Similar concerns are described in a statement by another woman incarcerated at WCCW and attached at Appendix C.

Fear of retaliation as described by Ms. Weller understandably chills reporting. Women in prison know that reporting abuse “is more likely to result in punishment or retaliation against the prisoner than in disciplinary consequences for the guard.”²⁷ In addition to the mandated punishment under DOC Policy 490.860, retaliation can also include threats, violence, suspension of privileges, transfer to another facility,

²⁶ Samiera Saliba, *Rape by the System: The Existence and Effects of Sexual Abuse of Women in United States Prisons*, 10 HASTINGS RACE & POVERTY L. J. 293, 305-06 (2013).

²⁷ Buchanan, *supra* note 5 at 47.

placement in solitary confinement and citations for additional infractions.²⁸

When incarcerated individuals do not report abuse, “they continue to be at the mercy of their abusers, with no opportunity for escape.”²⁹ Instead of feeling empowered and protected by the system, women learn that filing a “complaint is...not only useless but dangerous.”³⁰ Thus, continued application of DOC Policy 490.860 chills reporting and endangers incarcerated women in Washington.

V. CONCLUSION

In sum, *Amicus* agrees with Petitioner Williams that enforcement of this Policy against any incarcerated individual violates numerous constitutional and statutory rights. Furthermore, the Policy jeopardizes the safety of incarcerated individuals by dissuading them from reporting sexual abuse. For all of the foregoing reasons, *amicus* urges the Court to retain Petitioner Williams’ Writ and decide the case on the merits after full briefing by both parties.

²⁸ Saliba, *supra* note 26 at 299.

²⁹ Buchanan, *supra* note 5 at 66-67.

³⁰ *Id.* at 66.

DATED: June 14, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, I caused to be electronically filed the foregoing REVISED AMICUS MEMORANDUM BY LEGAL VOICE OF WASHINGTON with the clerk of the court using the Washington State Appellate Court Web Portal which causes participants in this matter to be served by electronic means.

Dated this 14th day of June, 2019, at Seattle, Washington.

GARVEY SCHUBERT BARER

By: 
Ann Gabu
Legal Assistant

GSB:10336450.3

Appendix A

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category A - 20 classification points

VIOLATION	SANCTION
501 Committing homicide	Loss of up to 75 days good conduct time credits
502 Committing aggravated assault against another offender	
507 Committing an act that would constitute a felony and that is not otherwise included in these rules	Loss of 76 to 150 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
511 Committing aggravated assault against a visitor or community member	
521 Taking or holding any person hostage	Loss in excess of 150 days requires Assistant Secretary approval
550 Escaping	
601 Possessing, manufacturing, or introducing an explosive device or any ammunition, or any components thereof	
602 Possessing, manufacturing, or introducing any firearm, weapon, sharpened instrument, knife, or poison, or any component thereof	
603 Introducing or transferring any unauthorized drug or drug paraphernalia	
604 Committing aggravated assault against a staff member	
611 Committing sexual assault against a staff member	
613 Committing an act of sexual contact against a staff	
635 Committing sexual assault against another offender, as defined in Department policy (i.e., aggravated sexual assault or offender-on-offender sexual assault)	
637 Committing sexual abuse against another offender, as defined in Department policy	
650 Rioting, as defined in RCW 9.94.010	
651 Inciting others to riot, as defined in RCW 9.94.010	
830 Escaping from work/training release with voluntary return within 24 hours	
831 While in work/training release, failing to return from an authorized sign out	
882 While in Prison, introducing, possessing, or using a cell phone, electronic/wireless communication device, or related equipment without authorization	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category B - 15 classification points

LEVEL 1

VIOLATION	SANCTION
633 Assaulting another offender	Loss of up to 60 days good conduct time credits
704 Assaulting a staff member	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval Loss in excess of 120 days requires Assistant Secretary approval

Category B - 10 classification points

LEVEL 1

VIOLATION	SANCTION
504 Engaging in a sex act with another person(s) within the facility that is not otherwise included in these rules, except in an approved extended family visit	Loss of up to 60 days good conduct time credits
553 Setting a fire	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
560 Possessing items or materials likely to be used in an escape without authorization	Loss in excess of 120 days requires Assistant Secretary approval
711 Assaulting a visitor or community member	
744 Making a bomb threat	
884 Urinating, defecating, or placing feces or urine in any location other than a toilet or authorized receptacle	
886 Adulterating any food or drink	
892 Giving, selling, or trading any prescribed medication, or possessing another offender's medication	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category B - 10 classification points

LEVEL 2

VIOLATION

SANCTION

505	Fighting with another offender	Loss of up to 60 days good conduct time credits
556	Refusing to submit to or cooperate in a search when ordered to do so by a staff member	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
607	Refusing to submit to a urinalysis and/or failing to provide a urine sample within the allotted time frame when ordered to do so by a staff member	Loss in excess of 120 days requires Assistant Secretary approval
608	Refusing or failing to submit to a breath alcohol test or other standard sobriety test when ordered to do so by a staff member	
609	Refusing or failing to submit to testing required by policy, statute, or court order, not otherwise included in these rules, when ordered to do so by a staff member	
652	Engaging in or inciting a group demonstration	
655	Making any drug, alcohol, or intoxicating substance, or possessing ingredients, equipment, items, formulas, or instructions that are used in making any drug, alcohol, or intoxicating substance	
682	Engaging in or inciting an organized work stoppage	
707	Introducing or transferring alcohol or any intoxicating substance not otherwise included in these rules	
716	Using an over the counter medication without authorization or failing to take prescribed medication as required when administered under supervision	
736	Possessing, manufacturing, or introducing an unauthorized keys or electronic security access device	
750	Committing indecent exposure	
752	Possessing or receiving a positive test for use of an unauthorized drug, alcohol, or intoxicating substance	
778	Providing a urine specimen that has been diluted, substituted, or altered in any way	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category B - 10 classification points

LEVEL 3

VIOLATION

SANCTION

503	Extorting or blackmailing, or demanding or receiving anything of value in return for protection against others or under threat of informing	Loss of up to 60 days good conduct time credits
506	Threatening another with bodily harm or with any offense against any person or property	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
509	Refusing a direct order by any staff member to proceed to or disperse from a particular area	
525	Violating conditions of a furlough	Loss in excess of 120 days requires Assistant Secretary approval
549	Providing false or misleading information during any stage of an investigation of sexual misconduct, as defined in Department policy	
558	Interfering with staff members, medical personnel, firefighters, or law enforcement personnel in the performance of their duties	
600	Tampering with, damaging, blocking, or interfering with any locking, monitoring, or security device	
605	Impersonating any staff member, other offender, or visitor	
653	Causing an inaccurate count or interfering with count by means of unauthorized absence, hiding, concealing oneself, or other form of deception or distraction	
654	Counterfeiting or forging, or altering, falsifying, or reproducing any document, article of identification, money, or security, or other official paper without authorization	
660	Possessing money, stamps, or other negotiable instruments without authorization, the total value of which is five dollars or more	
709	Out-of-bounds: Being in another offender's cell or being in an area in the facility with one or more offenders without authorization	
738	Possessing clothing or assigned equipment of a staff member	
739	Possessing, transferring, or soliciting any person's identification information, including current staff members or their immediate family members, when not voluntarily given. Identification information includes Social Security numbers, home addresses, telephone numbers, driver's license numbers, medical, personnel, financial, or real estate information, bank or credit card numbers, or other like information not authorized by the Superintendent	
745	Refusing a transfer to another facility	
746	Engaging in or inciting an organized hunger strike	
762	Failing to complete or administrative termination from a DOSA substance abuse treatment program. Note: This violation must be initiated by authorized staff and heard by a Community Corrections Hearing Officer in accordance with chapter 137-24 WAC	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category B - 10 classification points

LEVEL 3

VIOLATION

777	Causing injury to another person by resisting orders, assisted movement, or physical efforts to restrain	Loss of up to 60 days good conduct time credits
813	Being in the community without authorization, or being in an unauthorized location in the community	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
814	While in work/training release, violating an imposed special condition	
879	Operating or being in a motor vehicle without permission or in an unauthorized manner or location	Loss in excess of 120 days requires Assistant Secretary approval
889	Using facility phones, information technology resources/systems, or related equipment without authorization	

Category C - 5 classification points

LEVEL 1

VIOLATION

SANCTION

508	Spitting or throwing objects, materials, or substances in the direction of another person(s)	Loss of up to 30 days good conduct time credits
557	Refusing to participate in an available work, training, education, or other mandatory programming assignment	Loss of 31 to 60 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
563	Making a false fire alarm or tampering with, damaging, blocking, or interfering with fire alarms, fire extinguishers, fire hoses, fire exits, or other firefighting equipment or devices	
610	While in Prison, receiving or possessing prescribed medication without authorization	Loss in excess of 60 days requires Assistant Secretary approval
620	Receiving or possessing contraband during participation in off-grounds or outer perimeter activity or work detail	
659	Committing sexual harassment against another offender, as defined in Department policy	
661	Committing sexual harassment against a staff member, visitor, or community member	
663	Using physical force, intimidation, or coercion against any person	
702	Possessing, manufacturing, or introducing an unauthorized tool	
708	Organizing or participating in an unauthorized group activity or meeting	
717	Causing a threat of injury to another person by resisting orders, assisted movement, or physical efforts to restrain	
720	Flooding a cell or other area of the facility	
724	Refusing a cell or housing assignment	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category C - 5 classification points

LEVEL 1

VIOLATION	SANCTION
734 Participating or engaging in the activities of any unauthorized club, organization, gang, or security threat group; or wearing or possessing the symbols of an unauthorized club, organization, gang, or security threat group	Loss of up to 30 days good conduct time credits
810 Failing to seek/maintain employment or training or maintain oneself financially, or being terminated from work, training, education, or other programming assignment for negative or substandard performance	Loss of 31 to 60 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
893 Damaging, altering, or destroying any item that results in the concealment of contraband or demonstrates the ability to conceal contraband	Loss in excess of 60 days requires Assistant Secretary approval
896 Harassing, using abusive language, or engaging in other offensive behavior directed to or in the presence of another person(s) or group(s) based upon race, creed, color, age, sex, national origin, religion, sexual orientation, marital status or status as a state registered domestic partner, disability, veteran's status, or genetic information	
899 Failing to obtain prior written authorization from the sentencing court, contrary to RCW 9.94A.645, prior to commencing or engaging in any civil action against any victim or family of the victim of any serious violent crime the offender committed	

Category C - 5 classification points

LEVEL 2

VIOLATION	SANCTION
552 Causing an innocent person to be penalized or proceeded against by providing false information	Loss of up to 20 days good conduct time credits
554 Damaging, altering, or destroying any item that is not the offender's personal property, the value of which is ten dollars or more	Loss of 21 to 40 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
710 Acquiring an unauthorized tattoo/piercing/scar, tattooing/piercing/scarring another, or possessing tattoo/piercing/scarring paraphernalia	Loss in excess of 40 days requires Assistant Secretary approval
718 Using the mail, telephone, or electronic communications in violation of any law, court order, or previous written warning, direction, and/or documented disciplinary action	
726 Telephoning, sending written or electronic communication, or otherwise initiating communication with a minor without the approval of that minor's parent or guardian	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category C - 5 classification points

LEVEL 3

VIOLATION	SANCTION
606 Possessing, introducing, or transferring any tobacco, tobacco products, matches, or tobacco paraphernalia	Loss of up to 10 days good conduct time credits
657 Being found guilty of four or more general violations arising out of separate incidents within a 90-day period	Loss of 11 to 20 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
658 Failing to comply with any administrative or post-hearing sanction imposed for committing any violation	
812 Failing to report/turn in all earnings	Loss in excess of 20 days requires Assistant Secretary approval

Category D - 5 classification points

VIOLATION

VIOLATION	SANCTION
517 Committing an act that would constitute a misdemeanor and that is not otherwise included in these rules	No loss of good conduct time credits
551 Providing false information to the hearing officer or in a disciplinary appeal	No segregation
555 Stealing property, possessing stolen property, or possessing another offender's property	
559 Gambling or possessing gambling paraphernalia	
656 Giving, receiving, or offering any person a bribe or anything of value for an unauthorized favor or service	
662 Soliciting goods or services for which the provider would expect payment, when the offender knows or should know that he/she lacks sufficient funds to cover the cost	
706 Giving false information when proposing a release plan	
714 Giving, selling, purchasing, borrowing, lending, trading, or accepting money or anything of value except through approved channels, the value of which is ten dollars or more	
725 Telephoning or sending written or electronic communication to any offender in a correctional facility, directly or indirectly, without prior written approval of the superintendent/community corrections supervisor/designee	
728 Possessing any sexually explicit material(s), as defined in WAC 137-48-020	
740 Committing fraud or embezzlement, or obtaining goods, services, money, or anything of value under false pretense	
741 Stealing food, the value of which is five dollars or more	

**DISCIPLINARY SANCTION TABLE FOR
PRISON AND WORK RELEASE**

Category D - 5 classification points

VIOLATION		SANCTION
742	Establishing a pattern of creating false emergencies by feigning illness or injury	No loss of good conduct time credits
755	Misusing or wasting issued supplies, goods, services, or property, the replacement value of which is ten dollars or more	No segregation
811	Entering into an unauthorized contract	
861	Performing or taking part in an unauthorized marriage	
890	Failing to follow a medical directive and/or documented medical recommendations, resulting in injury	

Appendix B

COPY

STATEMENT (Continued)

was mouthing to me "she did it again!" I walked back towards abid as I walked Kabirga
 finish putting her down when Cuni caught up to me she was pale and shaking and said
 she did it again and Karate chopped her in the vagina. She was NOT faking it! Not
 at all! Co Kabirga has a reputation for her inappropriate acts and back bits
 cutting and Karate chops. I have been afraid to report her myself and am afraid
 of her retaliation even with this statement. When I was Kitchen Clerk 2013-15
 she would single me out to strip constantly and make me bend over repeatedly
 and hold my breasts repeatedly. At visits she'd explain and trade inmates so she'd
 get me as well walk back there for strip afterwards. It was to be a joke, inmate
 made cracks she "faked" me in a lesbian way. I'm straight and married-to-a-man.
 One visit around I can't remember now, there were lots of us packed in visit waiting to be
 stripped and a tall white male Sgt (name?) came in and counted 20 of us off to take
 to 2 building, Duran #3 and Kabirga anxiously screamed "she's mine! NO!" The
 Sgt who was speaking to us stopped and stared at her, asked what? She argued with
 him. He asked why. She said again "cause I'm his". He said she's coming w/ me. She
 argued w/ him. He suddenly told us who had chosen to live out, he said come
 come with me. I thought I was in trouble. I destroyed my nice day. I was in
 Duran #3 in trouble. He asked me what that was all about. I told him how she'd
 been singling me out in kitchen and visit room and that I was afraid to report her
 for fear of her ruthless retaliations. I liked my job and had no friends here. She
 was stalking me in a sense. She had roommates who've been back bruised and karate
 chopped and while under investigation she was still putting out in sexual w/ lawbreaker
 parts everyday. She has made a "C" w/ her index and thumb and bit my breasts
 and bruised them asking if I'm double D's, she has karate chopped my vagina and
 whipped there asking if I had a peed on. It's all true. No one is making this up.
 But we feel you'll never do anything to stop her and we get victimized further. I have
 PTSD partly from her. And to go to court I've had to endure her put downs. I'm also
 in fear of being told I'm lying about her so I haven't felt safe to report her. I've heard
 of all 4 complaints Cuni made and they were all over these byrs we've both been here.
 she's NOT making it up and this is victim bashing. And WHY some of us are afraid to report.

Witness statement of Sandra Weller 5/22/19 (transcription of her handwritten statement at Appendix B)

I write this with tremendous trepidation and fear of retaliation from CO Kalieopa. I witnessed the 2nd time that happened to Carri. We were coming out of kitchen and she was pulled over by Kalieopa for pat. Carri had been afraid because of “How” Kalieopa had patted her down at the 1st complaint. I tried to wait a bit and keep watch as Carri had asked, but I was roughly ordered to keep moving. I left and turned around to see if she was OK. I was approx. 15 feet away and saw the horror on Carri’s face. Upset and terror and she was mouthing to me “she did it again!” I walked backwards a bit as I watched Kalieopa finish patting her down. When Carri caught up to me she was pale and shaking and said she’d done it again and karate chopped her in the vagina and touched her nipples. She was NOT FAKING IT! Not at all! CO Kalieopa has a reputation for her inappropriate pats and boob lifts circlings and karate chops. I have been afraid to report her myself and am afraid of her retaliation even with this statement. When I was kitchen clerk 2013-15 she would single me out to strip constantly and make me bend over repeatedly and hold my boobs repeatedly. At visits she’d single me out, trade inmates so she’d get me as we’d walk back there for strip afterwards. It got to be a joke, inmates made cracks she “liked” me in a lesbian way. I’m straight and married – to a man. One visit or event I can’t remember now, there were lots of us packed in visit waiting to be stripped and a tall white male Sgt, dk hair (name?) came in and counted 20 or so of us to take to Z building. I was #3 and Kalieopa anxiously snapped “She’s mine! NO!” The Sgt who was speaking to us stopped and stared at her, asked what? (She had not counted me or had me in room. I was just part of crowd). She argued with him. He asked why. She said again “cause I’m her’s.” He said she’s coming w/me. She argued w/him. He suddenly told us who he’d chosen to file out, he said to me come with me. I thought I was in trouble. It destroyed my nice day. I was in fear I was in serious trouble. He asked me what that was all

about. I told him how she'd been singling me out in kitchen and visit room and that I was afraid to report her for fear of her ruthless retaliations. I liked my job and had no infractions. She was stalking me in a sense. I've had roommates who've been boob bounced and karate chopped and while under investigation she was still patting and is in school now w/law library pats every day. She has made a "c" w/her index and thumb and lifted my boobs and bounced them asking if I'm double D's. She has karate chopped my vagina and rubbed there asking if I had a pad on. It's all true. No one is making this up. But we feel you'll never do anything to stop her and we get victimized further. I have PTSD partly from her. And to go to law lib I've had to endure her pat downs. I'm also in fear of being told I'm lying about her so I haven't felt safe to report her. I've heard of all 4 complaints Carri made and they were all over these 6 yrs we've both been here. She's NOT making it up and this is victim bashing. And WHY some of us are afraid to report. Please do something to stop her from patting down inmates. Is there a job she can do that she doesn't have to do that? I have (nothing) against her – just her molestations. Please help us.

GSB:10337680.1

Appendix C



COPY

WITNESS STATEMENT

Name of Witness KNOTEK, Michelle	DOC Number 865733	Facility CCU / C119B
Position/Title of Witness		

NAME OF OFFENDER(S) TO WHICH STATEMENT REFERS	DOC NUMBER
WILLIAMS, Carri	370021

OFFENDER DESIRES WRITTEN STATEMENT CONCERNING THE FOLLOWING
549 - PROVIDING FALSE INFO/SEX MISCONDUCT INV

Name of Person Obtaining Statement <i>Sgt K. C. Eboel Sr.</i>	Date <i>5/23/19</i>	Time <i>0725</i> <input checked="" type="checkbox"/> a.m. <input type="checkbox"/> p.m.
--	------------------------	--

Note: This statement should give a factual account of the events witnessed. Of particular importance is information as to what was observed, where and when it occurred, who was involved, what other witnesses there were to the event and, if possible, any factual information relative to the possible reasons for the incident or misconduct.

STATEMENT (Use back of this page if additional space is required)
<i>Carrie was searched by Calioya - she came back to work afterwards extremely upset. She told me she'd been searched by Calioya. She was shaking + crying and told her to go to M.H. she called the hot line. She told me that this was the 2nd time Calioya had searched her improperly. That she'd touched her breasts improperly across the tops several times.</i>

I have read the above statement and affirm that it is based on personal observation of the event(s) described herein and that it is, to the best of my knowledge, a true and accurate statement of fact

Michelle Knotek
Signature of Witness

5-23-19
Date

Appendix D



GEORGETOWN LAW

THE COMMUNITY JUSTICE PROJECT

Faculty Director

Jane H. Aiken

Supervising Attorney/Fellow

Colleen F. Shanahan

Office Manager

Lakuita N. Bittle

April 4, 2011

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

Dear Attorney General Holder:

On behalf of the Community Justice Project, and the co-signers below, we submit these comments in support of the promulgation of national standards pursuant to the Prison Rape Elimination Act of 2003 (PREA). To provide more adequate consideration of the particular needs of female inmates, this comment urges clarification and strengthening of certain standards for adult prisons and jails. The comment first details the particularized needs and vulnerabilities of incarcerated women that must not be overlooked in this rulemaking. It then recommends that the proposed standards must:

1. Include an option for inmates to report sexual abuse to an outside agency;
2. Extend the timeframe for reporting an incident of sexual abuse and harassment to 180 days;
3. Deem administrative remedies exhausted regarding a claim of sexual abuse either when the agency makes a decision on the merits or after 90 days, whichever comes first;
4. Allow victims of sexual abuse and sexual harassment to bypass informal resolution requirements;
5. Allow for third-party reporting of sexual abuse and sexual harassment;
6. Define "zero tolerance" in § 115.5; and
7. Require that both staff trainings and inmate education speak to and incorporate how histories of domestic violence impact women.

As participants in The Community Justice Project at Georgetown Law, a project dedicated to promoting social justice in the legal profession, the recommendations set forth below are offered to improve the PREA standards for incarcerated women, a marginalized population of an already invisible community. Given the context that the U.S. penal system and PREA are far from perfect for the broader population of prisoners, these recommendations are intended to be feasible in the political and institutional framework in which they are offered.

Although the proposed standards address certain concerns raised by the National Prison Rape Elimination Commission (“the Commission”), they fail to implement sufficient protections for incarcerated women whose experience of prison rape and sexual assault may be considerably different from their male counterparts. According to the Commission, “PREA represents a sea change in public consciousness and in national commitment to protecting individuals under correctional supervision from sexual abuse.”¹ This comment urges the Department to ensure that women in prisons and jails are part of that change.

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¹ NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT 24 (June 2009) [hereinafter COMMISSION REPORT], available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

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I. Incarcerated Women in Context

A. The Needs of Female Inmates Are Overlooked

The particular characteristics of incarceration for female inmates provide the context for this comment on the PREA standards. As this population has been virtually invisible in the discussion surrounding PREA thus far, this comment begins by detailing that context and why it is imperative that the Department incorporate the perspective of female inmates into the PREA standards.

There are more than one million women currently incarcerated or otherwise under the control of the criminal justice system.² This figure is more than eight times what it was in 1980,³ and the number of women in prison has increased at nearly double the rate of men since 1985.⁴ Though the number of women under the control of the U.S. Department of Corrections multiplied exponentially during the last few decades, they remain but a small fraction of the overall prison population. Consequently, the particular needs and concerns of these women are underestimated, overlooked, and misunderstood.

PREA was largely inspired by the experiences of men in prison, and the regulations were written envisioning primarily male-on-male, inmate-on-inmate rape and sexual abuse. However, this context ignores the significantly different experiences of female inmates, who are victimized by guards more frequently than by other inmates.⁵ Male-guard-on-female-inmate abuse often

² THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM (2007), available at www.sentencingproject.org/doc/publications/womenincj_total.pdf.

³ American Civil Liberties Union, Facts About the Over-Incarceration of Women in the United States, <http://www.aclu.org/womens-rights/facts-about-over-incarceration-women-united-states> (last visited Mar. 25, 2011).

⁴ THE SENTENCING PROJECT, *supra* note 2.

⁵ M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 CRIM. L. BULL. 3 (2010). Studies by the Bureau of Justice Statistics paint a different picture, reporting that female inmates were more than twice as likely as male inmates to report inmate-on-inmate sexual victimization and reported lower amounts of staff-on-inmate sexual victimization. ALLEN J. BECK & PAIGE M. HARRISON ET AL., U.S. DEP’T OF JUST., NCJ 231169, BUREAU OF JUSTICE STATISTICS SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES 2008-09 5 (2010), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2202>. These numbers likely do not reflect reality, as men are more likely to feel confident reporting an incident of abuse, and more likely to complain and seek redress against female guards. McGuire, *supra*. However, skewed power dynamics and a history of abuse likely prevent women from reporting instances of abuse perpetrated by male

contains complex dynamics that differ from the dynamics inherent in inmate-on-inmate abuse. Sex acts between female inmates and guards frequently include force.⁶ However, they may just as frequently occur as an exchange — either by choice or by necessity — for highly valued items, such as food, better work assignments, telephone access, clothing, or drugs.⁷ This “strategic sex” should not be mistaken for consent. The general premise that inmates are legally incapable of consenting to sex due to highly-skewed, highly-gendered power dynamics⁸ has led every state to criminalize sexual relations between guards and inmates.⁹ Female inmates are also more likely to be subjected to verbal sexual harassment, improper visual surveillance and improper touching, threats of rape, and demands for *quid pro quo* sexual favors.¹⁰

In addition to different experiences in prison and jails, female inmates differ in history and needs from their male counterparts. Most significantly, at least 57% of women in state prisons have a history of physical or sexual abuse, according to a study by the Bureau of Justice Statistics.¹¹ Other reports, including from the U.N. Special Rapporteur on Violence Against Women, estimate as many as 85%¹² to 90%¹³ of incarcerated women have a history of domestic violence.

guards. *Id.* See also BARBARA OWEN ET AL., GENDERED VIOLENCE AND SAFETY: IMPROVING SECURITY IN WOMEN’S FACILITIES, Part I OF III 46-52 (Nov. 2008), available at

http://www.wcl.american.edu/nic/documents/GenderedViolenceandSafetyPartI_BarbOwen.pdf?rd=1; Cindy Struckman-Johnson and David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217, 225-26 (2002).

⁶ Brenda V. Smith, *Sexual Abuse Against Women in Prison*, CRIMINAL JUSTICE, Spring 2001, at 34 [hereinafter Smith, *Sexual Abuse Against Women in Prison*].

⁷ *Id.* See also Letter from Brenda V. Smith, Dir., Project on Addressing Prison Rape, to Eric Holder, Attorney Gen., U.S. Dep’t of Justice 4 (Re: Docket No. OAG-131), available at <http://www.wcl.american.edu/nic/documents/ProjectonAddressingPrisonRapeCommentsonPREAStandards.pdf?rd=1> [hereinafter Letter from Brenda V. Smith] (presenting responses from female inmates who participated in a focus group regarding the proposed PREA standards).

⁸ See, e.g., McGuire, *supra* note 5. See also Carrigan v. Davis, 70 F.Supp.2d 448, 460 (D.Del. 1999) (“Examining the totality of the Plaintiff’s circumstances as a prisoner, the control of the institution necessarily maintained over her, and the lack of control which she maintained over her own life, the Court concludes, as a matter of law, that the Plaintiff was incapable of giving a voluntary waiver”).

⁹ See BRENDA V. SMITH & JAIME M. YARUSSI, LEGAL RESPONSES TO SEXUAL VIOLENCE IN CUSTODY: STATE CRIMINAL LAWS PREVENTING STAFF SEXUAL ABUSE OF INDIVIDUALS UNDER CUSTODIAL SUPERVISION 29-52 (2009), available at

http://www.wcl.american.edu/nic/documents/LegalResponsestoSexualViolenceinCustody_StateCriminalLawsProhibitingStaffSexualAbuseofIndivi.pdf?rd=1 [hereinafter 50 STATE SURVEY]. Note, however, that the statutes in Delaware and Nevada also penalize the inmate for engaging in sexual activity with corrections staff, making consent an implied defense. See NIC/WCL Project on Addressing Prison Rape, Consent as a Defense Map, <http://www.wcl.american.edu/nic/documents/ConsentasaDefenseMap-2009Update.pdf> (last visited Mar. 27, 2011).

¹⁰ Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 55 (2007).

¹¹ LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP’T OF JUST., NCJ 175688, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT WOMEN OFFENDERS 8 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/wo.pdf>.

¹² Special Rapporteur on Violence Against Women, *Rep. of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, Comm’n on Human Rights, ¶ 16, U.N. DOC. E/CN.4/1999/68/Add.2 (Jan. 4, 1999) (prepared by Radhika Coomaraswamy).

¹³ When including emotional abuse, one study found that 90% of women inmates had been physically, sexually or emotionally abused as adults. Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 WOMEN’S STUD. Q. 102, 104 (2004). The American Civil Liberties Union found that 92% of all women in California prisons reported being “battered and abused” at some point in their life. American Civil Liberties Union, *supra* note 3.

This rate of abuse is estimated to be six to 10 times that of women in the general public¹⁴ and eight times that of men in the criminal justice system.¹⁵

Significant amounts of research show that a history of abuse can result in increased susceptibility to subsequent incidents of abuse.¹⁶ Both childhood sexual abuse and adult domestic violence are known to lead to a weak sense of self, feelings of guilt and shame, alienation, and heightened vulnerability.¹⁷ This phenomenon is compounded in a prison environment, where already-vulnerable women are placed in a highly controlled situation that may exacerbate their feelings of powerlessness and further increase their vulnerability.¹⁸ Indeed, though females represent only 7% of all inmates in federal and state prisons, they account for 21% of all victims of inmate-on-inmate sexual victimization¹⁹ and a full third of all victims of staff-on-inmate sexual victimization.²⁰ Similarly, women represent 13% of inmates in local jails, but account for 32% of all victims of inmate-on-inmate sexual violence²¹ and more than half (56%) of the victims of staff-on-inmate victimization.²²

As high as these numbers are, they fail to present the full story. A separate study by the Bureau of Justice Statistics, that relied on reports directly from inmates rather than from correctional authorities, found the overall number of incidents of sexual abuse to be more than 11 times what authorities reported.²³

The increased susceptibility to abuse of most women in prison is a critical area of concern that must be addressed, and cookie-cutter policies aimed at the general prison population are simply insufficient. Although several of the proposed standards governing reporting and grievance procedures will be relevant to incarcerated women with a history of domestic abuse, there are no provisions that directly address the specific needs of this population.²⁴ Female offenders, particularly those with a history of domestic violence, need access to effective grievance

¹⁴ Dirks, *supra* note 13, at 103.

¹⁵ WOMEN'S PRISON ASSOCIATION, WPA FOCUS ON WOMEN AND JUSTICE: A PORTRAIT OF WOMEN IN PRISON 2 (2003), available at http://www.wpaonline.org/pdf/Focus_December2003.pdf.

¹⁶ See, e.g., JANE A. SIEGEL & LINDA M. WILLIAMS, RISK FACTORS FOR VIOLENT VICTIMIZATION OF WOMEN: A PROSPECTIVE STUDY, FINAL REPORT 43 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/189161.pdf> (finding a statistically significant link between childhood sexual abuse and adult victimization); Dirks, *supra* note 13, at 106 (citing D. Finkelhor, and A. Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 5 AM.J. ORTHOPSYCHIATRY 530-541 (1985) (studying early childhood boundary violations) and L. Walker, *Battered Women Syndrome and Self-defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321-334 (1992) (studying battered women)).

¹⁷ Dirks, *supra* note 13, at 106.

¹⁸ *Id.* at 106-07.

¹⁹ PAUL GUERINO & ALLEN J. BECK, U.S. DEP'T OF JUST., NCJ 231172, BUREAU OF JUSTICE STATISTICS SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007-2008 6 (2011), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2204>.

²⁰ *Id.* at 8.

²¹ *Id.* at 6.

²² *Id.* at 8.

²³ Compare GUERINO & BECK, *supra* note 19, at 3 (finding that 5,796 allegations of sexual violence were reported to correctional authorities in state and federal prisons in 2008), with BECK & HARRISON ET AL., *supra* note 5, at 7 (estimating that 64,500 state and federal prison inmates were sexually victimized between 2008 and 2009).

²⁴ See generally National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6280 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115) [hereinafter National Standards].

procedures — including a reasonable amount of time to report and realistic access to those administrative procedures — to receive redress following in-prison assaults. Such measures will provide tangible results as well as the intangible, yet invaluable, benefits of increasing autonomy, empowerment, and humanity for female inmates.

B. The Reality of Under-Reporting and Retaliation

Regulations must more adequately address the problem of lack of reporting among female inmates. In a study by the Bureau of Justice Statistics, 6% of respondents in all-female prisons self-reported being subjected to some form of sexual victimization.²⁵ However, as mentioned above, research makes it clear that the majority of sexual abuse in prison remains unreported, and that these numbers are artificially low.²⁶ In the general population, only 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults are reported for reasons ranging from guilt and shame to fear of the perpetrator and lack of trust in the system.²⁷ These concerns are compounded in the prison environment where victims of abuse by prison guards are often forced to rely on their abusers for their most basic necessities.²⁸ Indeed, researchers have found the most significant reason inmates do not report sexual abuse is fear of retaliation from both prison staff and other inmates.²⁹

Fear of retaliation is especially significant in the context of male-guard-on-female-inmate abuse, as gendered power dynamics allow male guards to “dominate, coerce, and exploit” the women under their control.³⁰ Retaliation against any reporting inmate may come in the form of additional violent sexual and physical assaults.³¹ However, guards are uniquely positioned to retaliate by additional means, including fictional disciplinary violations used to take away privileges or to prevent visits with children.³² Inmates have also reported being subjected to extra shakedowns, extra work detail, and staff failing to protect a grievant from other inmates, who may be concerned their own reciprocal relationships with guards will be threatened by any

²⁵ BECK & HARRISON ET AL, *supra* note 5, at 10 (Table 4).

²⁶ Compare GUERINO & BECK, *supra* note 19, at 3 (finding that 5,796 allegations of sexual violence were reported to correctional authorities in state and federal prisons in 2008), with BECK & HARRISON ET AL, *supra* note 5, at 7 (estimating that 64,500 state and federal prison inmates were sexually victimized between 2008 and 2009). See also McGuire, *supra* note 5; Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 PACE L. REV. 1625, 1630 (2010).

²⁷ Nat'l Inst. of Just., Reporting of Sexual Violence Incidents, <http://www.ojp.usdoj.gov/nij/topics/crime/rape-sexual-violence/rape-notification.htm> (last visited Mar. 25, 2011) (citing CALLIE MARIE RENNISON, U.S. DEP'T OF JUST. NCJ 194530, BUREAU OF JUSTICE STATISTICS RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 1 (2002) and Janice Du Mont, Karen-Lee Miller & Terri L. Myhr, *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466-86 (2003)).

²⁸ Dirks, *supra* note 13, at 107-08.

²⁹ See Fellner, *supra* note 26, at 1630; McGuire, *supra* note 5; Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN'S L.J. 107, 126 (2010); Cindy Struckman-Johnson et al, *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 74 (1996).

³⁰ McGuire, *supra* note 5.

³¹ See, e.g., McGuire, *supra* note 5, Kupers, *supra* note 29, at 126.

³² *Id.*

subsequent investigation.³³ Prison staff members who are aware of a colleague's misconduct are also often kept silent through threats of retaliation.³⁴

C. PREA Has the Potential to Provide More Accessible and Effective Grievance Procedures

Requirements set forth by the Prison Litigation Reform Act (PLRA) also prevent inmates from receiving redress for sexual abuse. Even when women are willing and able to come forward about their abuse, they are unlikely to see a courtroom or be granted relief. Despite the fact that Congress, the District of Columbia, and all 50 states have passed legislation criminalizing sexual contact between guards and prisoners,³⁵ the PLRA severely curtails prisoners' ability to seek redress and protection from the courts.

In the case of a prison sexual assault, the combined barrier of the exhaustion and physical injury requirements is often prohibitive. The emotional trauma and fear of retaliation, combined with the frequent lack of confidentiality in grievance procedures, act to further revictimize women.³⁶ Oftentimes, being placed in solitary confinement is the only result a victim can expect, justified by prison administrators as an effort to protect the inmate.³⁷

Many prominent organizations, including the American Bar Association, have already called for reform of the PLRA to "ensure that prisoners are afforded meaningful access to the judicial process to vindicate their constitutional and other legal rights and are subject to procedures applicable to the general public when bringing lawsuits."³⁸ However, even working within the current framework of the PLRA, PREA positions the Department to provide more accessible and effective grievance procedures in order to help stop the cycle of abuse that follows many female offenders inside the penal system.

II. Responses to Questions Posed by the Notice of Proposed Rulemaking

A. 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?

³³ Letter from Brenda V. Smith, *supra* note 7, at 4 (presenting responses from female inmates who participated in a focus group regarding the proposed PREA standards). See also HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998), available at <http://www.hrw.org/legacy/reports98/women/>.

³⁴ McGuire, *supra* note 5; see also discussion *infra* III.D.

³⁵ See 50 STATE SURVEY, *supra* note 9.

³⁶ See Dirks, *supra* note 13, at 110;

³⁷ The Bureau of Justice Statistics reported that 25% of the victims of staff sexual misconduct were placed in solitary confinement. GUERINO & BECK, *supra* note 19, at 23. See also STOP PRISONER RAPE, THE SEXUAL ABUSE OF FEMALE INMATES IN OHIO 6 (2003), available at <http://www.justdetention.org/pdf/sexabuseohio.pdf>; Buchanan, *supra* note 10, at 66.

³⁸ ABA Resolution 102B, approved Feb. 12, 2007, available at www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredtwob.doc.

Section 115.51 must be amended to adopt the Commission’s recommendations regarding outside-agency reporting for abuse, as this mechanism will address the needs of female inmates and will neither conflict with state or local laws nor incur substantial costs. The Commission’s recommendations³⁹ will benefit female inmates in particular because current grievance procedures are ineffective, promote retaliation, and do not provide confidentiality — characteristics that are particularly harmful to inmates who are victims of abuse by guards.

1. Current grievance procedures are ineffective

Presently, grievance procedures for reporting sexual assaults during incarceration are ineffective because inmates fear retaliation for filing a grievance at all,⁴⁰ as discussed above. The Project on Addressing Prison Rape at American University, Washington College of Law (“The Project”) convened a focus group in April 2010 to discuss with formerly incarcerated women the PREA recommendations and, more specifically, the grievance procedures in federal prisons. Female former inmates stated during the focus group that the risk of retaliation by staff members for filing a sexual assault grievance was so high that female inmates did not feel comfortable using the grievance procedure.⁴¹ Grievance procedures frequently require inmates to confront the staff member who assaulted them, or, because confidentiality is often considered low priority,⁴² staff members become aware of the allegation anyway.

The response to filing a sexual assault grievance is often more harassment, sexual retaliation and assault, or other forms of discipline.⁴³ Thus, intra-prison reporting of sexual abuse raises several concerns. According to Human Rights Watch, “Women cannot trust that their reports will remain confidential, concerns about retaliation are very real, they feel that the process is stacked against them, and they continue to be at the mercy of their abusers, with no opportunity for escape.”⁴⁴

2. The Department must require mechanisms for outside reporting

To combat the danger of retaliation and breach of confidentiality, the Department must require prisons to provide for outside-agency reporting. The standard currently allows for unacceptable maneuvering by prisons and jails. Section 115.51(b) reads, in relevant part:

[T]he 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

³⁹ COMMISSION REPORT, *supra* note 1, at 217 (Standard RE-3).

⁴⁰ Phillip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 343 (Spring 2009).

⁴¹ Letter from Brenda V. Smith, *supra* note 7, at 2,3.

⁴² Phillip Ellenbogen, *supra* note 40, at 343.

⁴³ See *Hoskins v. Lenear*, 395 F.3d 372, 373 (7th Cir. 2005) (discussing retaliation on inmates for filing a grievance); Buchanan, *supra* note 10, at 64; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (December 1996), available at http://www.hrw.org/legacy/reports/1996/Us1.htm#_1_48.

⁴⁴ Buchanan, *supra* note 10, at 67.

receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials.⁴⁵

The language “make its best efforts” allows for prisons and jails to avoid their responsibility to victimized inmates to ensure that their grievances are received in confidence and addressed appropriately. This is particularly important to note in instances of staff-on-inmate sexual assault, as prison staff can use the vagueness of the language to ensure that confidentiality is breached or that grievances never make it to the warden or an OIG. The only reliable method of reporting that will ensure compliance with proper grievance procedures is to require prisons and jails to allow an independent, unaffiliated agency handle sexual abuse allegations. As discussed below, outside reporting has been successfully implemented in several states.

Additionally, the Department should require that inmates have access to hotlines for reporting sexual abuse pursuant to its “Report on Rape in Federal and State Prisons in the U.S.”⁴⁶ The hotline would be an additional medium for reporting sexual assault, *not* an alternative to the outside-agency reporting mechanism. This comment urges the adoption of a hotline system to an external agency because of its added value in promoting confidentiality, which internal systems cannot guarantee.⁴⁷

The Project focus group for female former inmates also explicitly discussed alternative grievance reporting options that would specifically cater to a female inmate’s particular needs. The focus group suggested that outside agencies could work with prisons by visiting facilities and speaking with a random sample of female inmates to discuss whether or not there were instances of abuse that needed to be reported.⁴⁸ The focus group’s suggestion is another viable option for generating confidentiality and reducing the risk of retaliation by staff members in instances where female inmates would want to file sexual abuse allegations that involve a staff member.

3. Implementation of outside reporting would not incur substantial costs nor conflict with applicable laws

The Commission’s cost-impact analysis indicates that outside-entity reporting is considered one of the standards that will have the *lowest* impact on cost in compliance.⁴⁹ Many states already

⁴⁵ National Standards, 76 Fed. Reg. at 6281 (emphasis added).

⁴⁶ DEP’T OF JUSTICE, REPORT ON RAPE IN FEDERAL AND STATE PRISONS IN THE U.S.: BASED ON PUBLIC HEARINGS AND REVIEW OF DOCUMENTARY EVIDENCE BY THE REVIEW PANEL ON PRISON RAPE, FINDINGS AND BEST PRACTICES 34 (2008) available at http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_080924.pdf.

⁴⁷ Currently, the Rape, Abuse and Incest National Network (RAINN) provides an online hotline that allows victims of sexual abuse to contact the organization. The online hotline does not save transcripts of conversations or IP addresses, which preserves the confidentiality of the individual. Some prisons are considering or making use of pilot programs that allow inmates to have email or internet access to specified sites. Allowing inmates to access RAINN or other organizations that provide online hotlines for victims of sexual abuse would give these individuals one more method of coping with and grieving sexual assault. In addition, DOC partners with the Missoula YWCA, which provides a sexual assault reporting hotline for inmates housed at Montana State Prison. The Department plans to eventually implement this hotline throughout the agency (Montana Department of Correction’s PREA Q&A, available at <http://www.cor.mt.gov/Facts/prea.mcp.x>).

⁴⁸ Letter from Brenda V. Smith, *supra* note 7, at 4.

⁴⁹ PRISON RAPE ELIMINATION ACT COST IMPACT ANALYSIS: FINAL REPORT i (2010) available at <http://www.ojp.usdoj.gov/programs/pdfs/preacostimpactanalysis.pdf> [hereinafter COST IMPACT ANALYSIS].

have an outside agency contracted to handle sexual assault reporting but do not utilize that mechanism, opting to continue requiring the informal grievance procedure followed by the written “confidential” grievance procedure.

California and Texas, two of the largest state prison systems in the country, offer examples of states that already mandate that their state prisons use external reporting options. The California Department of Corrections and Rehabilitation is obligated by law to have established the Office of the Sexual Abuse in Detention Elimination Ombudsperson to “ensure the impartial resolution of inmate and ward sexual abuse complaints.”⁵⁰ The law specifically notes the importance of the Ombudsperson’s role in maintaining the confidentiality of sexual abuse reporting.⁵¹ Texas is also required by law to establish an ombudsman and notify inmates of how they may confidentially grieve sexual assault and abuse to the outside entity.⁵² The Department can and ought to require outside reporting for inmates with sexual-assault grievances.

B. Question 24: Because the Department’s proposed standard addressing administrative remedies differs significantly from the Commission’s draft, the Department specifically encourages commenting on all aspects of this proposed standard.

The Department, at a minimum, should (1) amend the proposed standard to extend the timeframe for reporting an incident of sexual abuse or harassment and (2) reinstate the Commission’s recommended standard deeming administrative remedies exhausted regarding a claim of sexual abuse after the earlier of 90 days or an agency decision on the merits. Significant changes can be made to decrease the burden the PLRA places on inmates reporting sexual assault, while still remaining within the parameters of the statute. The Department should take this opportunity to implement regulations that will facilitate the reporting of sexual abuse and preserve the opportunity for inmates to receive proper redress in court.

In the general population, more than 60% of rapes are not reported for reasons including shame, fear of reprisal, and lack of trust in the system.⁵³ In prison, and particularly in the context of male-guard-on-female-inmate abuse, an even higher percentage of sexual assaults go unreported⁵⁴ because of additional factors including the very real possibility of retaliation, frequently in the form of unfounded administrative sanctions or further physical and sexual abuse, as described above.⁵⁵ A history of abuse and a familiarity with relationships with dominant men may make female inmates less likely to report abuse than their male

⁵⁰ ANN. CAL. PENAL CODE § 2641(a)(West 2011) (effective Jan. 1, 2006).

⁵¹ ANN. CAL. PENAL CODE § 2641(e)(West 2011) (effective Jan. 1, 2006)

⁵² V. T.C.A., GOV’T CODE § 501.173, 501.174 (West 2011) (effective June 15, 2007).

⁵³ Nat’l Inst. of Just., *supra* note 27.

⁵⁴ See Struckman-Johnson et al., *supra* note 29, at 67 (citing a study that found that 50% of inmates reporting sexual victimization did not tell anyone, and only 29% of inmates who admitted to researchers that they had been sexually victimized reported it to authorities). See also Brenda V. Smith, *Women as Perpetrators of Crime: Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 603 (2006); Smith, *Sexual Abuse Against Women in Prison*, *supra* note 6, at 34 (finding that sexual abuse in prison is even less likely to be reported and prosecuted than sexual abuse in the general community).

⁵⁵ See, e.g., McGuire, *supra* note 5, Fellner, *supra* note 26, at 1630, Kupers, *supra* note 29, at 126, Struckman-Johnson et al., *supra* note 29, at 74.

counterparts.⁵⁶ Additionally, female inmates may reasonably fear that any complicity in the relationship on their part may result in sanctions being brought against them, rather than the perpetrating guard.⁵⁷ These realities are inadequately addressed by the proposed standard.

1. § 115.52(a)(1): *The statute of limitations is wholly inadequate*

The 20-day timeframe for reporting an incident of sexual abuse is wholly inadequate. Victims of sexual abuse in prisons and jails are particularly vulnerable to having grievances rejected on procedural grounds because the trauma of the attack and fear of retaliation may prevent them from reporting under short deadlines, such as the one proposed by the Department.⁵⁸ The frequently overwhelming obstacles to reporting faced by any victim of sexual assault are only amplified by the power dynamics inherent in a prison setting, especially when the perpetrator is a staff member.⁵⁹

The standard should allow for an automatic 180-day period in which to report sexual abuse — similar to the statute of limitations in other civil rights cases. The Department itself noted that the proposed regulations merely adopt the standard set by the Bureau of Prisons, which is shorter than the timeframes currently provided by many state grievance procedures.⁶⁰ The short statute of limitations, combined with the ability of prison staff to control every aspect of an inmate's day, creates a perverse safe-harbor provision — if an inmate can be prevented from reporting,

⁵⁶ See, McGuire, *supra* note 5.

⁵⁷ For example, the Delaware statute prohibiting sexual relations between inmates and staff provides that inmates as well as staff can be penalized for “consensual” sexual activity. SMITH & YARUSSI, *supra* note 9, at 53. See also McGuire, *supra* note 5, Kupers, *supra* note 29, at 126.

⁵⁸ Fellner, *supra* note 26, at 1643.

⁵⁹ See, e.g., Buchanan, *supra* note 10, at 66.

⁶⁰ Alaska Dep't of Corr. Policies and Procedures No. 808.03 VII(A)(1)(a)(2), effective Oct. 13, 2006, available at <http://www.correct.state.ak.us/corrections/pnp/pdf/808.03.pdf> [hereinafter Alaska Grievance Procedures] (30 days); CAL. CODE REGS. tit. 15, § 3084.8(b) (2011) (30 days); Colorado Dep't of Corr. Admin. Reg. No. 850-04 IV(I)(1)(a), effective Oct. 15, 2010, available at http://www.doc.state.co.us/sites/default/files/ar/0850_04_0.pdf [hereinafter Colorado Grievance Procedures] (30 days); Connecticut Dep't of Corr. Admin. Dir. No. 9.6 6(C), effective Jan. 31, 2009, available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0906.pdf> (30 days); ILL. ADMIN. CODE tit. 20, § 504.810(a) (2011) (60 days); Iowa Dep't of Corr. Policies and Procedures No. IO-OR-06 IV(A)(1), effective Apr. 2006, available at http://www.wcl.american.edu/nic/policies_and_procedures/grievance/grievance_doc_iowa.pdf [hereinafter Iowa Grievance Procedures] (30 days); LA. ADMIN. CODE tit. 22, § 325(A)(2) (2011) (90 days); MD. CODE REGS. 12.07.01.05(A) (2011) (30 days); Minnesota Dep't of Corr. Policy No. 303.100 A(1), effective Aug. 3, 2010, available at http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=303.100.htm [hereinafter Minnesota Grievance Procedures] (30 days); Mississippi Dep't of Corr. Inmate Handbook Ch. VIII IV(A), available at http://www.mdcc.state.ms.us/Inmate_Handbook/CHAPTER%20VIII.pdf [hereinafter Mississippi Grievance Procedures] (30 days); Nevada Dep't of Corr. Admin. Reg. 740.05(4)(A), effective Feb. 12, 2010, available at <http://www.doc.nv.gov/ar/pdf/AR740.pdf> [hereinafter Nevada Grievance Procedures] (6 months); New Hampshire Dep't of Corr. Statement No. 1.16 IV(A)(1), effective May 15, 2007, available at <http://www.nh.gov/nhdcc/documents/1-16.pdf> (30 days); North Carolina Dep't of Corr. Policies and Procedures Ch. G § .0306(b)(2), issued Sept. 24, 2007, available at http://www.doc.state.nc.us/dop/policy_procedure_manual/G.0300_09_24_07.pdf [hereinafter North Carolina Grievance Procedures] (1 year); OR. ADMIN. R. 291-109-0150(2) (2011) (30 days); South Dakota Dep't of Corr. Policy 1.3.E.2, effective Aug. 22, 2005 (30 days); Virginia Dep't of Corr. Procedure No. DOP 866-7.14, effective Feb. 1, 1999 [hereinafter Virginia Grievance Procedures] (30 days); W.VA. CODE R. § 90-9-3.6 (2011) (“the timeliness of a grievance shall not be grounds for rejection”).

whether through threats, retaliation, or by making grievance forms inaccessible, the perpetrator will remain undetected. In promulgating what is supposed to be a new, better rule, the Department should strive for an ideal rather than settling for the lowest common denominator.

The most common form of sexual abuse in women's prisons⁶¹ — sexual contact between guards and inmates — is criminalized by the federal government, the District of Columbia, and all 50 states.⁶² State statutes of limitation for criminal sexual offenses are measured in years — not months and certainly not days. A simple administrative remedy should not have an exponentially shorter statute of limitations than a full-blown criminal action.

2. § 115.52(a)(2): The 90-day extension is also inadequate

The Department provides the possibility of a 90-day retroactive extension to inmates for whom filing a grievance in the required 20-day time limit may be "impractical."⁶³ While accurately recognizing factors that may prevent an inmate from immediately reporting, this 90-day extension does nothing to mitigate the short initial timeline because of the difficulties in obtaining the required documentation to show the extension is needed, and because discretion to grant the extension is placed in the hands of prison officials. Rather than providing for a non-mandatory extension, the Department should lengthen the general time given to report.

The proposed extension forces inmates to meet an additional evidentiary burden and once again puts the onus on the inmate to seek out the appropriate professional and get documentation demonstrating that filing sooner would have been impractical due to trauma, transfer away from the facility, or other reasons constituting "good cause." Inmates may be unable to meet this additional burden because the appropriate professional to provide documentation may not be available to the victim in time to meet that 90-day extension. Additionally, inmates are frequently charged a fee for medical care, which many inmates may not have the funds to meet, or there may be extremely long delays for a prisoner to receive specialized medical attention.⁶⁴

Even if a victim does manage to see a medical or mental-health provider and receives proper documentation demonstrating the need for an extension, the decision to grant that extension and hear the grievance is entirely up to the discretion of prison administrators and their interpretation of "good cause." In a situation in which an inmate is alleging sexual abuse by a staff member, prison officials may have incentives to prevent a woman from reporting a colleague to the authorities, or may fear retaliation from colleagues in the form of being set up to get fired or daily harassment, should they let a complaint proceed.⁶⁵

a. The comment's recommendation is consistent with state best practices

⁶¹ McGuire, *supra* note 5; see also OWEN ET AL., *supra* note 5, at 46-52; Struckman-Johnson and Struckman-Johnson, *supra* note 5, at 225-26.

⁶² See SMITH & YARUSSI, *supra* note 9.

⁶³ National Standards, 76 Fed. Reg. at 6281.

⁶⁴ AMNESTY INTERNATIONAL, WOMEN IN PRISON: A FACT SHEET, available at <http://www.amnestyusa.org/women/pdf/womeninprison.pdf>.

⁶⁵ See McGuire, *supra* note 5 (reporting that correctional officers have testified that guards are often kept silent through fear of retaliation from other guards or supervisors). See also discussion *infra* III.C.

Some states have already acknowledged the sensitive circumstances surrounding sexual abuse in prisons and jails as well as the necessity of allowing longer times to report. Nevada distinguishes between personal injury and civil rights claims and those regarding disciplinary measures, mail, and food.⁶⁶ Regarding the former, inmate grievance procedures allow inmates six months to report — about 180 days.⁶⁷ North Carolina provides for a year.⁶⁸ In Vermont, inmates alleging serious employee misconduct do not need to follow the general grievance procedure timeframes for reporting, and sexual abuse grievances will not be dismissed for administrative reasons, effectively giving victims of staff sexual assault an unlimited amount of time to report.⁶⁹

These state procedures are also more in line with the statutes of limitations for Title VII and § 1983 actions, thus working to prevent the two-tiered system of civil justice that the Department's proposed standards currently maintain. The statute of limitations under Title VII is 180 days.⁷⁰ Section 1983 does not contain a statute of limitations in its own text, however the Supreme Court has held that courts should look to the state tort statutes of limitations.⁷¹ On average, state statutes of limitations for assault and battery claims are one to two years.⁷² The Court has found state statutes that require officials to be notified of a claim within 120 days of the incident to be unenforceable in § 1983 suits, because “[c]ivil rights victims often do not appreciate the constitutional nature of their injuries ... and thus will fail to file a notice of injury or claim within the requisite time period.”⁷³

b. Concerns of frivolous or stale claims are overstated

The Department noted that, in response to the Advanced Notice of Proposed Rulemaking, some commenters expressed concern that allowing a long or indefinite timeframe for reporting would result in the filing of “stale claims” that would be difficult to investigate, or that it may encourage the filing of frivolous claims. First, concerns about investigating “stale claims” are overstated. A claim of sexual assault that does not involve penetration is unlikely to produce any physical evidence requiring prompt preservation. Even when the assault includes penetration, frequently there are no physical injuries or trauma, especially with female victims.⁷⁴ In either

⁶⁶ See Nevada Grievance Procedures, *supra* note 60, at 740.05(4).

⁶⁷ *Id.* at 740.05(4)(A).

⁶⁸ North Carolina Grievance Procedures, *supra* note 60, at Ch. G § .0306(b)(2).

⁶⁹ Vermont Dep't of Corr. Admin. No. 06006(5), (6)(b), effective Mar. 15, 2006, available at <http://www.doc.state.vt.us/about/policies/rpd/320%20Grievance%20System%20Rule.pdf> [hereinafter Vermont Grievance Procedures].

⁷⁰ 42 U.S.C. § 2000e-5(e)(1) (2006).

⁷¹ *Owens v. Okure*, 488 U.S. 235, 235 (1989).

⁷² Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 139 (2001).

⁷³ *Felder v. Casey*, 487 U.S. 131, 152 (1988).

⁷⁴ See Struckman-Johnson et al, *supra* note 29, at 74 (reporting that in one study of victims of sexual assault in prison, the female victims did not report any physical injuries). See also PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 30 (2006) (finding approximately 70% of female rape victims reported no injuries). Research also shows that staff sexual assault is often predicated by smaller acts of disrespect and invasion of privacy, such as inappropriate comments, inappropriate touching, and blatant and unnecessary inappropriate viewing. None of these acts will leave behind any evidence other than the word of the victim and the perpetrator, yet should be investigated to the fullest extent to prevent the inevitable sexual assault from taking place. See Kupers, *supra* note 29, at 110-11.

case, often the most serious injuries sustained are mental and emotional.⁷⁵ As discussed previously, in the general community it is very common for a victim of sexual abuse to take days, months, or even years to report the assault. While this may make it more difficult to investigate a claim, it is routinely done by law enforcement. Allowing for a longer time to report will also provide victims the opportunity to consult with a counselor and build up the confidence and courage to make a report — thus increasing the chances that an assault will be reported and upholding the spirit of PREA.

Second, concerns about frivolous or manipulative claims of sexual abuse are largely unfounded, particularly when dealing with female victims. The remarkably low rates of reporting by female inmates are due in large part to the very real threat of retaliation, as mentioned above.⁷⁶ Reporting abuse is a significant and difficult decision that inmates do not take lightly. The emotional trauma resulting from sexual abuse, the sensitive nature of the report, and informal reporting requirements that often force inmates to report to staff members who either perpetrated or were complicit in the abuse are among the many obstacles to reporting.⁷⁷ Once a report is made, thorough investigations will determine the facts behind and seriousness of the allegation. In light of the multitude barriers to reporting sexual abuse, the Department should be doing everything in its power to make reporting easier, rather than attempting to restrict it. The goals of PREA are undercut when victims of sexual abuse cannot receive redress because of failure to report within a short and arbitrary timeframe.

3. § 115.52(b): The Commission's exhaustion recommendation should be reinstated

The Department should not reject the Commission's exhaustion standard for sexual abuse and harassment claims. The recommended standard, finding exhaustion at the earlier of an agency's decision on the merits or after 90 days,⁷⁸ is consistent with requirements under the PLRA, analogous to many state best practices, and necessary to ensure that victims of sexual abuse are able to receive redress.

The PLRA allows prisoner suits only after administrative remedies are exhausted.⁷⁹ Allowing for a complaint to be deemed exhausted if an agency fails to render a decision on the merits after 90 days is fully consistent with the PLRA's purpose of "reduc[ing] the quantity and improve[ing] the quality of prisoner suits" and giving prison officials "time and opportunity to address complaints."⁸⁰ This exhaustion standard will increase efficiency and reduce extended and resource-consuming litigation regarding the technicalities of an inmate's compliance with grievance procedures, but still allow an agency ample time to address the complaint internally.

⁷⁵ See, e.g., McGuire, *supra* note 5 ("Victims of prison sexual assault frequently suffer from rape trauma syndrome, post-traumatic stress disorder or other psychological problems as a result of the attack"). Even the Supreme Court has acknowledged the serious injuries of rape transcend the physical. See *Coker v. Georgia*, 433 U.S. 584, 611-12 (1977) (Burger, C.J., dissenting).

⁷⁶ See discussion *supra* I.B.

⁷⁷ McGuire, *supra* note 5.

⁷⁸ COMMISSION REPORT, *supra* note 1, at 217 (Standard RE-2).

⁷⁹ 42 U.S.C. § 1997e(a) (2006).

⁸⁰ *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

In *Woodford v. Ngo*, the Supreme Court held that exhaustion of administrative remedies requires “proper” exhaustion, citing the policy concern that inmates may be able to circumvent internal grievance mechanisms by filing late and then claiming remedies are unavailable.⁸¹ However, these policy considerations are not relevant to this particular discussion regarding prison sexual abuse. Here, this comment is concerned not with the actions of the inmate, but with the actions (or inaction) of prison officials in responding to reports. The PLRA should not be interpreted so narrowly as to allow prison officials to exploit the exhaustion requirement through undue delays in responding to grievances. At a minimum, the Commission’s proposed regulation would ensure that prison officials follow their own procedures. Indeed, the Court has stated that “no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.”⁸²

Currently, many state grievance procedures allow for automatic exhaustion by permitting the inmate to proceed to the next level of appeal if no response is given within a set timeframe.⁸³ Specifically, grievance procedures in Florida, Indiana, Minnesota, and West Virginia consider a

⁸¹ *Woodford v. Ngo*, 548 U.S. 81, 91 n.2 (2006).

⁸² *Id.* at 90-91.

⁸³ Arizona Dep’t of Corr. Dep’t Order 802.01-1.11, effective July 13, 2009, *available at* <http://www.azcorrections.gov/Policies/800/0802.pdf> (stating expiration of the response time limit at any stage entitles grievant to move to the next step in the process); Arkansas Dep’t of Corr. Admin. Dir. No. 04-01 IV(F)(9), effective Feb. 1, 2004 [hereinafter Arkansas Grievance Procedures] (same); Colorado Grievance Procedures, *supra* note 60, at 850-04 IV(I)(1)(d) (stating grievant may move on to next stage in process when response is 5 days overdue); District of Columbia Dep’t of Corr. Program Statement No. 4030.1G(19)(a)(2), (24)(c)(4)(c) Mar. 9, 2010, *available at* http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/4000/PS_4030_1G_InmateGrievanceProcedures030910.pdf (stating inmate may move to formal grievance procedure if no response to informal complaint within 10 days; may move to next step in grievance process if no response received within the prescribed response time); Iowa Grievance Procedures, *supra* note 60, at IO-OR-06 IV(D)(6) (stating expiration of the response time limit at any stage entitles grievant to move to the next step in the process); Kansas Dep’t of Corr. Policy 44-15-101b, *available at* <http://www.doc.ks.gov/kdoc-policies/kar/Article15.pdf> (same); Kentucky Dep’t of Corr. Policies and Procedures No. 14.6 II(J)(5)(a) effective Sept. 5, 2008, *available at* <http://www.corrections.ky.gov/NR/rdonlyres/FFF984A4-958F-4DA2-96E8-4CD391BFCD75/160609/14991.pdf> [hereinafter Kentucky Grievance Procedures] (same); Michigan Dep’t of Corr. Policy Dir., No. 03.02.130T effective July 9, 2007, *available at* http://www.michigan.gov/documents/corrections/03_02_130_200872_7.pdf [hereinafter Michigan Grievance Procedures], (stating a grievant is entitled to move to the next stage in process when response 10 days overdue); Mississippi Grievance Procedures, *supra* note 60, at Ch. VIII IX(A) (stating expiration of the response time limit at any stage entitles grievant to move to the next step in the process); Montana Dep’t of Corr. Policy Dir. No. DOC 3.3.3 IV(A)(5)(I), revised Sept. 6, 2007, *available at* <http://www.cor.mt.gov/content/Resources/Policy/Chapter3/3-3-3.pdf> [hereinafter Montana Grievance Procedures] (stating expiration of the response time limit at any stage entitles grievant to move to the next step in the process); Nebraska Dep’t of Corr. Admin. Reg. 217.02 I(D), reviewed June 29, 2010, *available at* <http://www.corrections.nebraska.gov/pdf/ar/rights/AR%20217.02.pdf> (same); North Carolina Grievance Procedures, *supra* note 60, at Ch. G § .0307(c) (same); Tennessee Dep’t of Corr. Policies and Procedures No. 501.01 VI(D), effective Sept. 15, 2010, *available at* <http://www.tn.gov/correction/pdf/501-01.pdf> (same); Utah Dep’t of Corr. Inmate Reference Manual, FDr02/02.08(F)(2)(c), revised July 1, 2003 [hereinafter Utah Grievance Procedures] (same); Virginia Grievance Procedures, *supra* note 60, at DOP 866-7.16(4) (same); Wyoming Dep’t of Corr. Policy and Procedure No. 3.100 IV(E)(2)(iii), effective Apr. 15, 2007, *available at* <http://corrections.wy.gov/Media.aspx?mediaId=29>.

grievance dismissed on the merits if no response is given.⁸⁴ Some states even explicitly affirm that a lack of response can result in exhaustion of all administrative remedies.⁸⁵

These practices are consistent with rulings from nearly every circuit, which hold that administrative remedies are exhausted if a facility fails to respond to a grievance within the time periods set by its own procedures.⁸⁶

The Court in *Woodford* also expressed the need to give agencies a fair opportunity to resolve issues within the facility and to give inmates incentives to properly use the grievance system.⁸⁷ The 90-day timeframe proposed by the Commission provides sufficient time for an agency to investigate and respond to an inmate complaint of sexual abuse. Currently, many states explicitly maintain a 90-day timeframe for the entire grievance process, including all appeals.⁸⁸ Some states have even shorter timeframes: Utah requires the entire grievance process, including appeals, to conclude within 80 days;⁸⁹ Arkansas requires the entire grievance process to conclude within 76 days.⁹⁰ The American Bar Association has endorsed a 90-day response time as well.⁹¹

⁸⁴ FLA. ADMIN. CODE AN. R. 33-103.011(4) (2008) (stating if inmate does not agree to time extensions, she “shall be entitled to proceed with judicial remedies as [she] would have exhausted [her] remedies”); Indiana Dep’t of Corr. Policy and Admin. Procedures No. 00-02-301 XV(F)(2), effective Jan. 1, 2010, *available at* http://www.in.gov/ldoc/files/00-02-301__Grievance_Procedure_1-01-10.pdf (stating if there is a delay in responding the grievance is deemed denied and if no step of the grievance process remains the “offender has completed the grievance process”); Minnesota Grievance Procedures, *supra* note 60, at 303.100 A(2)(g) (stating if no response received, grievance is considered dismissed); Missouri Dep’t of Corr. Procedure No. IS8-2.1 III(I), effective Jan. 15, 1992 [hereinafter Missouri Grievance Procedures] (stating the grievance will be exhausted upon expiration of the time limit at any step); W.VA. CODE R. § 90-9-4.6 (2011) (stating if no response is received, grievance is considered denied).

⁸⁵ *See, e.g.*, New Mexico Dep’t of Corr. CD-150500, revised Feb. 23, 2011 [hereinafter New Mexico Grievance Procedures] (stating, “In the event the grievance is not disposed of within the time limit, the inmate shall be deemed to have exhausted administrative remedies for that specific complaint”); WIS. ADMIN. CODE DOC 310.14(3) (2011) (stating if no decision is rendered after 45 days of the final appeal, all administrative remedies are exhausted).

⁸⁶ *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004) (inability to utilize inmate appeals process due to prison officials’ conduct or the failure of prison officials to timely advance appeal may justify failure to exhaust); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (recognizing that a remedy prison officials prevent a prisoner from utilizing is not an available remedy); *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008) (“[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it”); *Wilson v. Boise*, 252 F.3d 1356, 2001 WL 422621, at *3 (5th Cir. 2001); *Boyd v. Corrections Corporation* 380 F.3d 989 (6th Cir. 2004) (“we conclude that administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance”); *Kaba v. Stepp*, 458 F.3d 678, 684 (7th Cir. 2006) (administrative remedy not available if prison employees do not respond to a properly filed grievance or use affirmative misconduct to prevent a prisoner from exhausting); *Brown v. Valoff*, 422 F.3d 926 (9th Cir. 2005) (“we refuse to interpret the PLRA so narrowly as to ... permit prison officials to exploit the exhaustion requirement through indefinite delay in responding to grievances”); *Jernigan v. Stuchell*, 304 F.3d 1030 (10th Cir. 2002) (“failure to respond to a grievance within the time limits contained in the grievance policy renders an administrative remedy unavailable”).

⁸⁷ *Woodford v. Ngo*, 548 U.S. 81, 94 (2006).

⁸⁸ LA. ADMIN. CODE tit. 22, § 325(G)(4)(a) (2011); Mississippi Grievance Procedures, *supra* note 60, at Ch. VIII IX(A); Missouri Grievance Procedures, *supra* note 84, at No. IS8-2.1; New Mexico Grievance Procedures, *supra* note 85, at CD-150500; Washington Dep’t of Corr. Offender Grievance Handout 1, revised Mar. 2009, *available at* <http://www.doc.wa.gov/policies/showFile.aspx?name=550100a1>. Note that many other states’ grievance procedure timeframes also fall within 90 days, however the grievance procedures don’t specifically state it as such.

⁸⁹ Utah Grievance Procedures, *supra* note 83, at FDr02/02.08(F)(1).

⁹⁰ Arkansas Grievance Procedures, *supra* note 83, at No. 04-01 IV(G)(5).

Additionally, requiring a decision on the merits within 90 days, or allowing for exhaustion in the event that no decision is made, will act as an incentive for inmates to use and trust the system. There is currently no incentive for inmates to use grievance systems that appear ineffective or futile exercises in bureaucratic wrangling. If inmates are assured that their reports of sexual abuse will be addressed in a timely fashion, and that they will have guaranteed access to the courts if the institution is unwilling or incapable of handling the complaint, they will likely be much more willing to utilize the internal process.

III. The Department Must Go Further to Address the Needs of Female Inmates

A. Regulations Should Allow Victims to Bypass Informal Resolution Requirements

Ideally, victims of sexual abuse should be exempt from the administrative grievance process entirely, in order to make it as easy as possible for inmates to report and perpetrators to be punished. At a minimum, the Department should explicitly state that victims of sexual assault may bypass the informal resolution requirements and proceed directly to filing a formal grievance.

Though not addressed specifically in the Department's standards, it is implied that the Department endorses the "informal" — often face-to-face — step required by nearly all state grievance systems.⁹² However, it is unclear what sort of informal resolution could be reached in cases of sexual abuse, and this step often acts as an additional barrier to reporting for female inmates. An "informal" resolution is utterly inappropriate in cases of sexual abuse, and especially unsuitable in situations of guard-on-inmate abuse.

Even if not required to confront the abuser directly, the appropriate staff person that an inmate must contact for an informal resolution may likely be someone who has been aware of, and complicit in, the abuse.⁹³ If the staff member has not taken steps to stop and prevent the abuse to date, the inmate has no reason to believe that addressing the situation "informally" will produce a different result. Given the physical and emotional trauma of a sexual assault, requiring a victim to attempt an informal resolution in as little as 20 days may not be feasible.⁹⁴ Recognizing these concerns, many states already allow a bypass of the informal complaint process in cases of sexual abuse.⁹⁵

⁹¹ AMERICAN BAR ASSOCIATION, PROPOSED ABA STANDARDS FOR CRIMINAL JUSTICE: THE LEGAL TREATMENT OF PRISONERS 95 (2007) (Standard 23-8.1(d)).

⁹² See McGuire, *supra* note 5. See also Univ. of Mich., Prison and Jail Grievance Policies, <http://www.law.umich.edu/facultyhome/margoschlangier/Pages/PrisonGrievanceProceduresandSamples.aspx> (last visited Mar. 25, 2011).

⁹³ McGuire, *supra* note 5.

⁹⁴ Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eight Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 NYU ANN. SURV. AM. L. 705, 752 (2010).

⁹⁵ Alaska Grievance Procedures, *supra* note 60, at 808.03 VII(C)(1)(a)(1) (stating grievances against staff need not go through the informal process); FLA. ADMIN. CODE AN. R. 33-103.006(3)(d), 103.015(6) (2008) (stating grievances of a "sensitive nature" can bypass the informal process and "at no time will an inmate who is alleging [she] was physically abused ... or alleging reprisal by staff ... be directed to submit [her] grievance to the staff person who is the subject of the complaint"); Kentucky Grievance Procedures, *supra* note 83, at No. 14.6

This comment urges the adoption of language that will abolish the informal grievance procedure for sexual abuse allegations and that will require prisons and jails to classify sexual abuse grievances separately from grievances relating to non-violent prison conditions. Several states have language in their grievance procedures that the Department ought to consider mirroring that allow inmates to skip the informal grievance procedure when alleging sexual-abuse grievances against staff members.⁹⁶ For example, Kentucky's grievance language states: "A grievance involving allegations of staff sexual misconduct shall not go through informal resolution or the Grievance Committee, but instead go directly to Step 3 after filing and be reviewed by the Warden."⁹⁷

An ideal standard would exempt inmates reporting sexual abuse from the administrative process and exhaustion requirement entirely. Prison grievance procedures are notoriously complex and arbitrary, often resulting in complaints being rejected on procedural grounds rather than on the merits, even when they involve serious abuse by staff.⁹⁸ While the PLRA often prevents adequate redress for prisoner grievances generally and needs to be amended, the barriers and complexities in prison grievance procedures are particularly exacerbated in situations of sexual abuse.

West Virginia's code explicitly allows for inmates to bypass the grievance procedure in cases of sexual abuse, stating: "Notwithstanding any other provision of this code, no inmate shall be prevented from filing an appeal of his or her conviction or bringing a civil or criminal action alleging past, current or imminent physical or sexual abuse"⁹⁹

II(J)(1)(b)(9) (stating allegations of staff sexual abuse need not go through the informal process or the grievance committee, but can go straight to the warden); Michigan Grievance Procedures, *supra* note 83, at No. 03.02.130Q, (stating a grievant may bypass the informal process in cases of sexual misconduct); Montana Grievance Procedures, *supra* note 83, at DOC 3.3.3 IV(C)(1)(c) (allowing use of emergency grievance procedures to report staff on inmate sexual misconduct); New Mexico Grievance Procedures, *supra* note 85, at CD-150500 (same); Oklahoma Dep't of Corr, OP-090124 VIII(A)(2), effective July 27, 2010, *available at* <http://www.doc.state.ok.us/offtech/op090124.pdf> [hereinafter Oklahoma Grievance Procedures]; (allowing grievant to bypass the informal procedure for complaints of a "sensitive nature," including staff misconduct); Vermont Grievance Procedures, *supra* note 69, at No. 06006(4) (allowing grievances alleging "serious employee misconduct" to bypass the informal procedures); W.VA. CODE R. § 90-9-3 (2011) (no informal requirement at all).

⁹⁶ Kentucky Grievance Procedures, *supra* note 83, at No. 14.6 II(J)(1)(b)(9); Michigan Grievance Procedures, *supra* note 83, at No. 03.02.130K; New Mexico Grievance Procedures, *supra* note 85, at CD-150501.A.11; Oklahoma Grievance Procedures, *supra* note 95, at OP-090124 VIII(A)(2); Vermont Grievance Procedures, *supra* note 69, at No. 06006(3).

⁹⁷ Kentucky Grievance Procedures, *supra* note 83, at No.14.6 II(J)(1)(b)(9).

⁹⁸ See GOVERNOR'S COMM'N ON CORR. REFORM, COMMW. OF MASS., STRENGTHENING PUBLIC SAFETY, INCREASING ACCOUNTABILITY, AND INSTITUTING FISCAL RESPONSIBILITY IN THE DEPARTMENT OF CORRECTION 58 (2004), *available at* http://www.mass.gov/Eeops/docs/eops/GovCommission_Corrections_Reform.pdf. See also Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 549 U.S. 199 (2007) (Nos. 05-7058 and 05-7142) (describing the system in Mississippi).

⁹⁹ W. VA. CODE. § 25-1A-2(c) (2011). See also *White v. Haines*, 618 S.E.2d 423, 431 (2005); *Peddle v. Sawyer*, 64 F.Supp.2d 12, 16 (1999).

Other states have separate directives that provide for alternative methods of reporting sexual abuse, as the Department's standards would require.¹⁰⁰ However, these state provisions, as well as the Department's proposed standards, are not sufficiently clear as to what methods of reporting will adequately trigger the grievance process. The failure to allow for all types of reports to trigger the grievance process adds another layer of complexity and confusion to procedures that are already difficult for inmates to navigate and can result in victims being barred from court even when they make a timely report.¹⁰¹ If exhausting administrative remedies through prison grievance systems is going to be mandated in cases of sexual assault, the Department should make clear that any sexual abuse report will be routed into the general grievance process for the purpose of fulfilling exhaustion requirements.¹⁰² The ideal solution of bypassing grievance procedures entirely would eliminate this confusion and make the Department's standards more in line with the spirit of PREA.

B. Agencies Must Allow for Third-Party Reporting

Section 115.54 establishes third-party reporting as an option for reporting sexual-abuse grievances by inmates in adult prisons and jails, and should be amended so that third parties can report by the same methods as victims.¹⁰³ Additionally, third parties also may have legitimate independent reasons for wanting to report sexual assault. Sexual favors may be used as a currency for receiving special treatment from staff members, which creates a system that disadvantages those who do not provide sexual favors. In these circumstances, the failure of third

¹⁰⁰ New York Dep't of Corr. Dir. No. 4028A V(B), updated June 15, 2005, *available at* <http://www.docs.state.ny.us/Directives/4028A.pdf> (allowing inmates to report sexual abuse verbally or in writing); North Carolina Dep't of Corr. Policies and Procedures Ch. F § .3406(e)(1), issued June 11, 2010, *available at* http://www.doc.state.nc.us/dop/policy_procedure_manual/F3400.pdf (allowing inmates to report sexual abuse to staff, either verbally or in writing); Oregon Dep't of Corr. Policy 40.1.13 II(B), VII(A)(2), effective Nov. 1, 2008, *available at* http://www.oregon.gov/DOC/PUBSER/rules_policies/docs/40.1.13.pdf [hereinafter Oregon PREA Policy] (allowing a sexual assault victim or an inmate with knowledge of a sexual assault to report) (providing a hotline for inmates to report abuse through and allowing a sexual assault victim or an inmate with knowledge of a sexual assault to report); TEXAS DEP'T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 25 (2004), *available at* <http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf> [hereinafter TEXAS OFFENDER HANDBOOK] (allowing either the victim of a sexual assault or an inmate who observed a sexual assault to report directly to the Office of Inspector General); Washington Dep't of Corr. Policy No. 490.800 VII, revised Feb. 12, 2010, *available at* <http://www.doc.wa.gov/policies/showFile.aspx?name=490800> [hereinafter Washington Sexual Misconduct Policy] (providing that inmates, staff, visitors, family members, or community members can report sexual abuse through a hotline, verbally, or in writing) (providing that inmates, staff, visitors, family members, or community members can report sexual abuse through a hotline, verbally, or in writing).

¹⁰¹ See *Amador v. Andrews*, 2007 WL 4326747, at *7-9 (S.D.N.Y. 2007) (dismissing case alleging systematic sexual abuse by prison staff, including forcible rape, coerced sexual activity, oral and anal sodomy, and forced pregnancies because the victims reported through informal procedures provided by the prison and thus did not adequately exhaust all remedies).

¹⁰² Another alternative can be found in the proposed Prison Abuse Remedies Act, which would allow courts to stay an action for 90 days if it is found the inmate did not properly exhaust administrative remedies, rather than dismissing the claim outright. Upon expiration of the stay, the court will proceed to hear the case unless notified that the issue was resolved internally. See Prison Abuse Remedies Act of 2007, H.R. 4109, 110th Cong. (unenacted). This approach has also been endorsed by the American Bar Association. See ABA Resolution 102B, approved Feb. 12, 2007, *available at* www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredtwob.doc.

¹⁰³ National Standards, 76 Fed. Reg. at 6282.

parties to provide sexual favors and the resulting disparate treatment is a form of third-party sexual harassment.

Third-party reporting encompasses initiating reports of sexual abuse by fellow inmates, staff members, and witnesses of sexual abuse on behalf of the abused inmate. Third-party reporting is a critical option in staff-on-inmate sexual assault because it protects victims of sexual abuse from retaliation for reporting and allows for sexual abuse to be noted in instances where the victim is unable to report.

Though it is important to note that third-party reporting can result in retaliation against the reporting inmate or staff member, the option of third-party reporting should still be available especially where the victim consents to the report. An example of this option is Oregon's PREA policy regarding sexual assault, which not only encourages victims to report attacks but also establishes that inmate third parties should report any sexual abuse or assault they witness or of which they have knowledge.¹⁰⁴ The Department should also consider the language of the Texas Department of Criminal Justice's Offender Orientation Handbook, which allows both inmates who have been attacked and inmates who *witness* the attack to report sexual abuse to the Warden or the OIG.¹⁰⁵

Section 115.54 of the proposed standard provides little guidance to facilities on how to "establish a method" for the third-party reporting. Though some states have adopted directives to allow third-party reporting, these directives are not clear regarding whether third-party reporting is to be fully integrated into the grievance procedure policies of those prisons. Because of the clear benefits of allowing third-party reporting, this comment urges the Department to adopt third-party reporting with the same mechanisms as first-person reporting, including the ability to report to outside entities or hotlines, as discussed above.¹⁰⁶

C. The Department Must Define "Zero Tolerance" in § 115.5

The Department should define "zero tolerance" to reflect more accurately the Commission's recommendation that any zero-tolerance policy have "teeth."¹⁰⁷ Additionally, this zero-tolerance stance must apply both to staff members who directly violate PREA policy and to staff members who fail to report PREA violations that they know, heard, or suspect occurred.

Failing to define "zero tolerance" allows agencies unacceptable flexibility to meet the letter of the law without abiding by the spirit of the law when implemented at the jail and prison levels. Presently, the standard would allow an agency to "discipline" a staff member with a slap on the wrist for sexual misconduct directed at a female inmate. The Department must define "zero tolerance" with the minimum acceptable sanction that can be issued for staff violations of PREA policies. The Department should also articulate what violations are considered less serious than

¹⁰⁴ Oregon PREA Policy, *supra* note 100, at 40.1.13 II(B), VII(A)(2).

¹⁰⁵ TEXAS OFFENDER HANDBOOK, *supra* note 100, at 25 (allowing either the victim of a sexual assault or an inmate who observed a sexual assault to report directly to the Office of Inspector General).

¹⁰⁶ *Id.*; Washington Sexual Misconduct Policy, *supra* note 100, at No. 490.800 VII.

¹⁰⁷ COMMISSION REPORT, *supra* note 1, at 53.

sexual harassment or sexual abuse to ensure that the more serious violations result in more serious sanctions.

The proposed standards begin with a blanket prohibition: “An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment”¹⁰⁸ The standards go on to mandate staff discipline: “Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.”¹⁰⁹ However, there is absolutely no guidance regarding what discipline is appropriate. A baseline disciplinary sanction is in theory created, but the sentiment is given no meaning. Because “zero tolerance” forms the crux of the entire implementation scheme, the Department must give it weight. At an absolute *minimum* and for the most minor infractions, the Department should take a cue from South Carolina and have § 115.76(a)’s “disciplinary sanction”¹¹⁰ mandate a permanent letter to the staff member’s file noting the violation.¹¹¹ Further, any such letter should not be subject a petition for removal from the staff member after a probation period.¹¹²

Of equal concern is the lack of clarity surrounding the requirement of staff to report other staff whom they know or suspect to be in violation of any PREA policy. Section 115.61(a) mandates the agency to “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”¹¹³ Yet there does not appear to be any disciplinary action to which the third-party officer would be subject should he or she fail to report such knowledge, suspicion, or information. The wording of § 115.61(a) also means that there is no requirement of staff to report sexual harassment. Sections 115.11(a) and 115.76(a) both include sexual abuse *and* sexual harassment in their mandates yet § 115.61(a) only requires reporting of sexual abuse with no reference to harassment.¹¹⁴ Several states already mandate that staff report any knowledge or suspicion of sexual abuse, whether the perpetrator is an inmate or a staff member.¹¹⁵ The Department should follow suit — there is simply too much ambiguity in these sections to allow promulgation as presently written.

The concerns about staff reporting staff are more than legal parsing; they reflect the reality of prison culture and the “Blue Code” that has been known to guide behavior of corrections staff. The Blue Code is often seen as the tie that binds staff and prevents them from informing on each

¹⁰⁸ National Standards, 76 Fed. Reg. at 6278.

¹⁰⁹ *Id.* at 6283.

¹¹⁰ *Id.*

¹¹¹ South Carolina Dep’t of Corrections, ADM-11.04 Employee Corrective Action 4, effective Aug. 1, 2004, available at <http://www.doc.sc.gov/Employment/Policy/ADM-11.04.2004disclaimer.htm#CORRECTIVEACTIONGUIDELINES>.

¹¹² *Id.*

¹¹³ National Standards, 76 Fed. Reg. at 6282.

¹¹⁴ *Id.* at 6278, 6283, and 6282.

¹¹⁵ See, e.g., South Carolina Dep’t of Corr., ADM-11.17 Employee Corrective Action 6, effective July 1, 2004, available at <http://www.doc.sc.gov/Employment/Policy/ADM-11.17.2004withdisclaimer.htm#6>. REPORTING INCIDENTS OF SEXUAL CONDUCT, SEXUAL ABUSE, OR SEXUAL HARASSMENT BETWEEN EMPLOYEES AND INMATES;; Tennessee Dep’t of Corr. Policies and Procedures No. 305.03 VI(L), effective May 1, 2008, available at <http://www.state.tn.us/correction/pdf/305-03.pdf>; Wyoming Dep’t of Corr. Policy and Procedure No. 3.402 II(C), effective Jan. 14, 2008, available at corrections.wy.gov/Media.aspx?mediaId=34.

other.¹¹⁶ “[I]t is widely known that in civil and criminal court proceedings it is extremely difficult to find [active-duty] officers who will testify about the illegal actions of other officers.”¹¹⁷ The Blue Code serves as a stark reality check that a common understanding of “zero tolerance” cannot be assumed. The Department must explicitly define minimum disciplinary action and ensure that it applies to both actions — sexual abuse and sexual harassment — and staff, as perpetrators and witnesses.

Some states have already begun to address zero tolerance more effectively in the context of staff misconduct. Kansas gives its zero-tolerance policy teeth by prohibiting “undue familiarity”¹¹⁸ between staff and inmates.¹¹⁹ By creating a lower-level violation subject to sanction, the disciplinary sanctions for sexual misconduct will be more strenuous than if “sexual abuse” is the lowest level of violation.

States have also effectively incorporated provisions that circumvent potential blockades caused by the Blue Code. Colorado mandates that all cases involving sexual misconduct by staff against an inmate be reported to the Office of Inspector General.¹²⁰ Mandating that all cases of staff misconduct are reported outside of the prison hierarchy increases the likelihood that meaningful sanctions will be dispensed in alignment with PREA’s requirements.

Mandating that staff report on staff counters the Blue Code most directly. Alaska imposes an “affirmative obligation” on staff “to report immediately in writing to their office or facility manager any knowledge of criminal activity or unethical action on the part of other employees while on duty or on Department premises.”¹²¹ Such an affirmative obligation truly gives teeth to a zero tolerance policy because not only does the agency not tolerate sexual misconduct, it also requires that staff maintain the same level of intolerance toward misconduct.

¹¹⁶ Kupers, *supra* note 29, at 118; Ann Mullen, *Breaking the Blue Code*, METRO TIMES (Detroit), Nov. 8, 2000, <http://www2.metrotimes.com/editorial/story.asp?id=869>

¹¹⁷ Kupers, *supra* note 29, at 119.

¹¹⁸ Kansas Dept. of Corr. Internal Management Policy & Procedure, 02-118, “Human Resources: Employee & Volunteer Rules of Conduct and Undue Familiarity,” at 2, effective Dec. 17, 2010, *available at* <http://www.doc.ks.gov/kdoc-policies/impp/chapter-2/02118.pdf> [hereinafter Kansas Undue Familiarity Policy] (“Conversation, contact, personal or business dealing between an employee and offender under the supervision of the Secretary of Corrections which is unnecessary, not a part of the employee’s duties, and related to a personal relationship or purpose rather than a legitimate correctional purpose. Undue familiarity includes horseplay, betting, trading, dealing, socializing, family contact unrelated to the employee’s duties, sharing or giving food, delivering or intending to deliver contraband, personal conversation, exchanging correspondence, including social networking via the intranet. It also includes conversations or correspondence that demonstrate or suggest a romantic or intimate relationship between an offender and the employee, sexual misconduct, or in any other manner developing a relationship with an offender which is anything other than an employee/offender relationship.”). *See also* Alaska Dep’t of Corr. Policies & Procedures, No. 202.15, VII.1.2.d, effective Jan. 9, 2008, *available at* <http://www.correct.state.ak.us/corrections/pnp/pdf/202.15.pdf> [hereinafter Alaska Standards of Conduct]; CAL. CODE REGS. tit. 15, § 3400 (2011), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/2011%20Title%2015%20English.pdf.

¹¹⁹ Kansas Undue Familiarity Policy, *supra* note 118, at IV.C.

¹²⁰ Colorado Dep’t of Corr. Admin. Reg. 100-40, “Prison Rape Elimination Procedure,” IV.A.3, effective June 1, 2010, *available at* http://www.doc.state.co.us/sites/default/files/ar/0100_40_0.pdf.

¹²¹ Alaska Standards of Conduct, *supra* note 118, at VII.E.2.

D. Staff Training and Inmate Education Must Speak to and Incorporate How Histories of Domestic Violence Impact Women

The proposed standards call for training staff and educating inmates regarding obligations and rights under PREA, but the standards should specify that attention must be given to the particularized needs of female inmates. Although § 115.31(b) says that trainings must “be tailored to the gender of the inmates at the employee’s facility,”¹²² the lack of definition of compliance means that switching the pronouns in training materials may be deemed sufficient. Trainings must speak specifically to how domestic abuse impacts women and increases their vulnerability for revictimization.¹²³ Generic educational programs cannot adequately address the needs of incarcerated women since the majority of their assailants are male staff¹²⁴ and the education is not tailored to women’s needs in this context.¹²⁵

As previously discussed in this comment, women are particularly vulnerable to abuse while incarcerated as a result of their prior history of domestic and intimate-partner abuse.¹²⁶ Many women are incarcerated as a result of convictions involving drug trafficking and their participation in a conspiracy to distribute those drugs.¹²⁷ What those trends convey is that a woman’s involvement in the conspiracy is frequently tied to her personal relationship with an abusive male who is running the trafficking operation.¹²⁸ This history of intimate involvement with men in positions of power and authority primes the 85-90% of incarcerated women with a history of abuse for revictimization while in jail or prison.¹²⁹

The fact that so few comments in the Advanced Notice of Proposed Rulemaking addressed this population speaks to just how invisible female inmates are. With women accounting for 3% of the incarcerated population and 85-90% of those women having a history of domestic abuse, more than one in 50 prisoners have particularized needs when it comes to staff training. Women must be proactively acknowledged in the proposed standards.

¹²² National Standards, 76 Fed. Reg. at 6280.

¹²³ See discussion *supra* I.A.

¹²⁴ Kupers, *supra* note 29, at 109-10.

¹²⁵ COMMISSION REPORT, *supra* note 1, at 75; *cf. Id.* at 217 (SC-1: Screening for Risk of victimization and abusiveness: “At a minimum, employees use the following criteria to screen female inmates for risk of sexual victimization: prior sexual victimization and the inmate’s own perception of vulnerability.”). Although the Department addressed SC-1 in the Notice’s “Overview of PREA National Standards” and “perceived vulnerability” is a consideration in § 115.41, the Notice specifically states: “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.” National Standards, 76 Fed. Reg. at 6257. Even in an area where the Commission had acknowledged the different experiences of male and female inmates, the Department chose to forego this opportunity. “Screening is a critical part of the classification process when trying to prevent sexual abuse by other incarcerated individuals. Unfortunately, there is not yet research on how to screen individuals to protect them from abuse by staff.” COMMISSION REPORT, *supra* note 1, at 75.

¹²⁶ See discussion *supra* I.A.

¹²⁷ See OWEN ET AL., *supra* note 5, at 6; Giovanna Shay, *Locked Up, Overlooked*, 20 PACE. L. REV. 377, 378-79 (2009) (reviewing SILJA J.A. TALVI, *WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM* (2007)).

¹²⁸ See OWEN ET AL., *supra* note 5, at 5-11; Shay, *supra* note 126, at 385.

¹²⁹ See sources cited *supra* note 8.

1. Staff training must include how histories of domestic violence can increase the potential for revictimization

Section 115.31's mandate that staff "training shall be tailored to the gender of the inmates at the employee's facility"¹³⁰ should include training regarding how a history of domestic violence can affect a female inmate's experience in prison. A history of domestic abuse increases the vulnerability of inmates.¹³¹ As mentioned previously, 85-90% of incarcerated women have such a history.¹³² Prisons and jails must take this into account in composing their trainings, and the Department must take this opportunity to mandate that staff trainings include this correlation to victimization.

In beginning to implement PREA, New Hampshire has taken a particularly pro-active position in orienting staff to the requirements of PREA generally. Staff members are trained on policies twice before beginning full-time employment at the agency, as well as annually to ensure all staff members are up-to-date on PREA policies.¹³³ However, state agencies have not yet articulated any staff training that adequately acknowledges how a history of domestic abuse increases the possibility of revictimization during incarceration.

2. The PREA education must be tailored to female inmates, the majority of whom have histories of domestic violence

The Department should also ensure that § 115.33's requirement of inmate education take into account the likelihood of female inmates' personal histories of domestic abuse and an awareness of the different profiles of the majority of sexual perpetrators in female institutions (i.e., staff) as opposed to those in male institutions (i.e., inmates). The Department should require that additional time be spent explaining inmate rights under PREA as they relate to sexual contact or sexual harassment from guards.

Maine specifically acknowledges that the experience of incarcerated women is different from that of men. For the state's women's facility, Maine aims:

to provide incarcerated women with a gender-responsive relational community.

[Maine] recognize[s] that many women offenders have life experiences that diminish their feelings of personal effectiveness and value; therefore, the goal of the Women's Center is to provide direction and incentives for positive spiritual growth.

This model will provide opportunities for work, programs, activities and relational experiences to facilitate healthy reintegration into families, places of employment and community.¹³⁴

¹³⁰ National Standards, 76 Fed. Reg. at 6280.

¹³¹ See discussion *supra* I.A.

¹³² *Id.*

¹³³ N.H. Dep't of Corr. Policies & Procedures, 5.19, "Prison Rape Elimination Act Procedures," IV.C, effective Dec. 15, 2007, available at <http://www.nh.gov/nhdcc/documents/5-19.pdf>.

¹³⁴ Maine Dep't of Corr., *Women's Center*, <http://www.maine.gov/corrections/Facilities/mcc/women/index.htm> (last visited Mar. 24, 2011).

Most women are incarcerated for non-violent crimes, as compared to men who are primarily incarcerated for violent crimes, and more incarcerated women have a history of domestic abuse than incarcerated men.¹³⁵ By acknowledging how their personal histories can shape the rehabilitation process for incarcerated women, Maine is better positioned to educate incarcerated women effectively on their rights under PREA.

This comment commends the Department for incorporating clarification on when inmates would receive education, as requested by prior commenters. Ideally, the requirements of sub-section (f) — “ensur[ing] that key information is continuously and readily available or visible to inmates through posters, inmate handbooks, or other written formats”¹³⁶ — provide an opportunity to regularly remind inmates of their rights under PREA. It is our hope that this continual access will be of additional help to female inmates in affirming their right to personal physical autonomy.

IV. Conclusion

The Department must incorporate the perspectives of female inmates in promulgating the PREA standards. Although this comment supports the efforts of Congress in enacting PREA, of the Commission in its tireless work to craft the recommendations, and of the Department for beginning the process of rule promulgation, the proposed standards must be strengthened and clarified if there is to be real hope of detecting, preventing, reducing, and punishing sexual abuse in prisons and jails.¹³⁷ Inmates are already vulnerable, and female inmates even more so, as detailed in this comment. This comment urges the Department to take this opportunity to lay a proper foundation for the protection of incarcerated women from sexual abuse.

Inmates must have access to outside-agency reporting, and informal grievance procedures must be eliminated in cases of sexual abuse. Inmates should have 180 days to report an incident of sexual abuse and harassment. The Department must reinstate the Commission’s recommended standard that administrative remedies regarding a claim of sexual abuse or harassment will be deemed exhausted when the agency makes a decision on the merits or after 90 days, whichever comes first.

Additionally, the Department must give guidance for establishing third-party reporting strategies. Further, the Department must define “zero tolerance” and clarify the requirements for staff training for those overseeing female inmates.

Respectfully,

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¹³⁵ OWEN ET AL., *supra* note 5, at 6.

¹³⁶ National Standards, 76 Fed. Reg. at 6280.

¹³⁷ Prison Rape Elimination Act of 2003, § 3(3), 42 U.S.C. § 15602(3) (2006).

[Co-Signers]

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