The following is the text of the rule signed by the Attorney General on May 16, 2012, which has been sent to the Federal Register for publication. The Federal Register will update this document to include dates that are keyed to the date of Federal Register publication.

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DEPARTMENT OF JUSTICE
28 CFR Part 115
Docket No. OAG-131; AG Order No.
RIN 1105-AB34

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

AGENCY: Department of Justice.

ACTION: Final rule; request for comment on specific issue.

SUMMARY: The Department of Justice (Department) is issuing a final rule adopting national standards to prevent, detect, and respond to prison rape, pursuant to the Prison Rape Elimination Act of 2003 (PREA). The Department is requesting comment on one issue relating to staffing in juvenile facilities.

DATES: This rule is effective [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. Comments on the juvenile staffing ratios set forth in § 115.313 must be submitted electronically or postmarked no later than 11:59 p.m. on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

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

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

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

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

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

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

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the Department's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the "FOR FURTHER INFORMATION" paragraph.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Overview

The goal of this rulemaking is to prevent, detect, and respond to sexual abuse in confinement facilities, pursuant to the Prison Rape Elimination Act of 2003. For too long, incidents of sexual abuse against incarcerated persons have not been taken as seriously as sexual abuse outside prison walls. In popular culture, prison rape is often the subject of jokes; in public discourse, it has been at times dismissed by some as an inevitable—or even deserved—consequence of criminality.

But sexual abuse is never a laughing matter, nor is it punishment for a crime. Rather, it *is* a crime, and it is no more tolerable when its victims have committed crimes of their own. Prison rape can have severe consequences for victims, for the security of correctional facilities, and for the safety and well-being of the communities to which nearly all incarcerated persons will eventually return.

In passing PREA, Congress noted that the nation was "largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates." 42

U.S.C. 15601(12). The legislation established a National Prison Rape Elimination Commission (NPREC) to "carry out a comprehensive legal and factual study of the penalogical [*sic*], physical, mental, medical, social, and economic impacts of prison rape in the United States" and to recommend to the Attorney General "national standards for enhancing the detection, prevention, reduction, and punishment of prison rape." 42 U.S.C. 15606(d)(1), (e)(1). The statute defines "prison" as "any confinement facility," including jails, police lockups, and juvenile facilities, and defines "rape" to include a broad range of unwanted sexual activity. 42 U.S.C. 15609(7) & (9). After over four years of work, the NPREC released its recommended national standards in June 2009 and subsequently disbanded, pursuant to the statute.

The statute directs the Attorney General to publish a final rule adopting "national standards for the detection, prevention, reduction, and punishment of prison rape . . . based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission . . . and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider." 42 U.S.C. 15607(a)(1)-(2). However, the standards may not "impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 42 U.S.C. 15607(a)(3).

The standards are to be immediately binding on the Federal Bureau of Prisons. 42 U.S.C. 15607(b). A State whose Governor does not certify full compliance with the standards is subject to the loss of five percent of any Department of Justice grant funds that it would otherwise receive for prison purposes, unless the Governor submits an assurance that such five percent will be used only for the purpose of enabling the State to achieve and certify full compliance with the standards in future years. 42 U.S.C. 15607(c). The final rule specifies that the Governor's certification applies to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch.

In addition, any correctional accreditation organization that seeks Federal grants must adopt accreditation standards regarding sexual abuse that are consistent with the national standards in this final rule. 42 U.S.C. 15608.

In drafting the final rule, the Department balanced a number of competing considerations. In the current fiscal climate, governments at all levels face budgetary constraints. The Department has aimed to craft standards that will yield the maximum desired effect while minimizing the financial impact on jurisdictions. In addition, recognizing the unique characteristics of individual facilities, agencies, and inmate populations, the Department has endeavored to afford discretion and flexibility to agencies to the extent feasible.

The success of the PREA standards in combating sexual abuse in confinement facilities will depend on effective agency and facility leadership, and the development of an agency culture that prioritizes efforts to combat sexual abuse. Effective leadership and culture cannot, of course, be directly mandated by rule. Yet implementation of the standards will help foster a change in culture by institutionalizing policies and practices that bring these concerns to the fore.

Notably, the standards are generally not outcome-based, but rather focus on policies and procedures. While performance-based standards generally give regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way, it is difficult to employ such standards effectively to combat sexual abuse in confinement facilities, where significant barriers exist to the reporting and investigating of such incidents. An increase in incidents reported to

facility administrators might reflect increased abuse, or it might just reflect inmates' increased willingness to *report* abuse, due to the facility's success at assuring inmates that reporting will yield positive outcomes and not result in retaliation. Likewise, an increase in substantiated incidents could mean either that a facility is failing to protect inmates, or else simply that it has improved its effectiveness at investigating allegations. For these reasons, the standards generally aim to inculcate policies and procedures that will reduce and ameliorate bad outcomes, recognizing that one possible consequence of improved performance is that evidence of more incidents will come to light.

The standards are not intended to define the contours of constitutionally required conditions of confinement. Accordingly, compliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse. Furthermore, while the standards aim to include a variety of best practices, they do not incorporate every promising avenue of combating sexual abuse, due to the need to adopt national standards applicable to a wide range of facilities, while taking costs into consideration. The standards consist of policies and practices that are attainable by all affected agencies, recognizing that agencies can, and some currently do, exceed the standards in a variety of ways. The Department applauds such efforts, encourages agencies to adopt or continue best practices that exceed the standards, and intends to support further the identification and adoption of innovative methods to protect inmates from harm. As described in the Background section, the Department is continuing its efforts to fund training, technical assistance, and other support for agencies, including through a National Resource Center for the Elimination of Prison Rape.

Because the purposes and operations of various types of confinement facilities differ significantly, there are four distinct sets of standards, each corresponding to a different type of facility: Adult prisons and jails (§§ 115.11–.93); lockups (§§ 115.111–.193); community confinement facilities (§§ 115.211–.293); and juvenile facilities (§§ 115.311–.393). The standards also include unified sections on definitions (§§ 115.5–.6) and on audits and State compliance (§§ 115.401–.405, 115.501). [1]

The standards contained in this final rule apply to facilities operated by, or on behalf of, State and local governments and the Department of Justice. However, in contrast to the proposed rule, the final rule concludes that PREA encompasses all Federal confinement facilities. Given their statutory authorities to regulate conditions of detention, other Federal departments with confinement facilities (including but not limited to the Department of Homeland Security) will work with the Attorney General to issue rules or procedures that will satisfy the requirements of PREA. 42 U.S.C. 15607(a)(2).

B. Summary of Major Provisions

This summary of the major provisions of the standards does not include every single aspect of the standards, nor does it capture all distinctions drawn in the standards on the basis of facility type or size. Agencies that are covered by each set of standards should read them in full rather than rely exclusively on this summary.

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[1]The standards themselves refer to persons confined in prisons and jails as "inmates," persons confined in lockups as "detainees," and persons confined in juvenile facilities or community confinement facilities as "residents." For simplicity, however, the discussion and explanation of the standards refer collectively to all such persons as "inmates" except where specifically discussing lockups, juvenile facilities, or community confinement facilities.

General Prevention Planning. To ensure that preventing sexual abuse receives appropriate attention, the standards require that each agency and facility designate a PREA point person with sufficient time and authority to coordinate compliance efforts. Facilities may not hire or promote persons who have committed sexual abuse in an institutional setting or who have been adjudicated to have done so in the community, and must perform background checks on prospective and current employees, unless a system is in place to capture such information for current employees. A public agency that contracts for the confinement of its inmates with outside entities must include in any new contracts or contract renewals the entity's obligation to adopt and comply with the PREA standards.

Supervision and Monitoring. The standards require each facility to develop and document a staffing plan, taking into account a set of specified factors, that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. The staffing standard further requires all agencies to annually assess, determine, and document whether adjustments are needed to the staffing levels or deployment of monitoring technologies.

Due to the great variation across facilities in terms of size, physical layout, and composition of the inmate population, it would be impractical to require a specified level of staffing. Likewise, mandating a subjective standard such as "adequate staffing" would be extremely difficult to measure. Instead, the final standard requires that prisons and jails use their best efforts to comply with the staffing plan on a regular basis and document and justify any deviations. Given that staffing increases often depend on budget approval from an external legislative or other governmental entity, this revision is designed to support proper staffing without discouraging agencies from attempting to comply with the PREA standards due to financial concerns.

The "best efforts" language encourages agencies to compose the most appropriate staffing plan for each facility without incentivizing agencies to set the bar artificially low in order to avoid non-compliance. But if the facility's plan is plainly deficient on its face, the facility is not in compliance with this standard even if it adheres to its plan.

In addition, the standards contained in the final rule require that supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment.

Staffing of Juvenile Facilities. The standards set minimum staffing levels for certain juvenile facilities. As discussed in greater detail in the appropriate section below, the Department seeks additional comment on this aspect of the standards, and may make changes if warranted in light of public comments received. Specifically, the standards require secure juvenile facilities—*i.e.*, those that do not allow residents access to the community—to maintain minimum security staff ratios of 1:8 during resident waking hours, and 1:16 during resident sleeping hours, except during limited and discrete exigent circumstances; deviations from the staffing plan in such circumstances must be documented. Because increasing staffing levels takes time and money, this requirement does not go into effect until October 2017 except for facilities that are already obligated by law, regulation, or judicial consent decree to maintain at least 1:8 and 1:16 ratios.

Juveniles in Adult Facilities. The final rule, unlike the proposed rule and the NPREC's recommended standards, contains a standard that governs the placement of juveniles in adult facilities. The standard applies only to persons under the age of 18 who are under adult court supervision and incarcerated or detained in a prison, jail, or lockup. Such persons are, for the purposes of this standard, referred to as "youthful inmates" (or, in lockups, "youthful

detainees"). By contrast, youth in the juvenile justice system are already protected by the Juvenile Justice and Delinquency Prevention Act (JJDPA), 42 U.S.C. 5601 *et seq.*, which provides formula grants to States conditioned on (subject to minimal exceptions) separating juveniles from adults in secure facilities and removing juveniles from adult jails and lockups.

This standard imposes three requirements. First, no inmate under 18 may be placed in a housing unit where contact will occur with adult inmates in a common space, shower area, or sleeping quarters. Second, outside of housing units, agencies must either maintain "sight and sound separation"—*i.e.*, preventing adult inmates from seeing or communicating with youth—or provide direct staff supervision when the two are together. Third, agencies must make their best efforts to avoid placing youthful inmates in isolation to comply with this provision and, absent exigent circumstances, must afford them daily large-muscle exercise and any legally required special education services, and must provide them access to other programs and work opportunities to the extent possible.

While some commenters asserted that, in addition to increasing risk of victimization, confining youth in adult facilities impedes access to age-appropriate programming and services and may actually increase recidivism, the Department is cognizant that its mandate in promulgating these standards extends only to preventing, detecting, and responding to sexual abuse in confinement facilities. In addition, imposing a general prohibition on the placement of youth in adult facilities, or disallowing such placements unless a court finds that the youth has been violent or disruptive in a juvenile facility, would necessarily require a fundamental restructuring of existing State laws that permit or require such placement. Given the current state of knowledge regarding youth in adult facilities, and the availability of more narrowly tailored approaches to protecting youth, the Department has decided not to impose a complete ban at this time through the PREA standards. The Department has supported, however, congressional efforts to amend the JJDPA to extend its jail removal requirements to apply to youth under adult criminal court jurisdiction awaiting trial, unless a court specifically finds that it is in the interest of justice to incarcerate the youth in an adult facility.

Cross-Gender Searches and Viewing. In a change from the proposed standards, the final standards include a phased-in ban on cross-gender pat-down searches of female inmates in adult prisons, jails, and community confinement facilities absent exigent circumstances—which is currently the policy in most State prison systems. However, female inmates' access to programming and out-of-cell opportunities must not be restricted to comply with this provision.

For juvenile facilities, however, the final standards, like the proposed standards, prohibit cross-gender pat-down searches of both female and male residents. And for all facilities, the standards prohibit cross-gender strip searches and visual body cavity searches except in exigent circumstances or when performed by medical practitioners, in which case the searches must be documented.

The standards also require facilities to implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. In addition, facilities must require staff of the opposite gender to announce their presence when entering an inmate housing unit.

Training and Education. Proper training is essential to combating sexual abuse in correctional facilities. The standards require staff training on key topics related to preventing, detecting, and responding to sexual abuse. Investigators and medical practitioners will receive training tailored to their specific roles.

Inmates, too, must understand a facility's policies and procedures in order to know that they will be kept safe and that the facility will not tolerate their committing sexual abuse. The standards require that facilities explain their zero-tolerance policy regarding sexual abuse and sexual harassment educate inmates on how to report any such incidents.

Screening. The standards require that inmates be screened for risk of being sexually abused or sexually abusive and that screening information be used to inform housing, bed, work, education, and program assignments. The goal is to keep inmates at high risk of victimization away from those at high risk of committing abuse. However, facilities may not simply place victims in segregated housing against their will unless a determination has been made that there is no available alternative means of separation, and even then only under specified conditions and with periodic reassessment.

Reporting. The standards require that agencies provide at least two internal reporting avenues, and at least one way to report abuse to a public or private entity or office that is not part of the agency and that can allow inmates to remain anonymous upon request. An agency must also provide a way for third parties to report such abuse on behalf of an inmate.

In addition, agencies are required to provide inmates with access to outside victim advocates for emotional support services related to sexual abuse, by giving inmates contact information for local, State, or national victim advocacy or rape crisis organizations and by enabling reasonable communication between inmates and these organizations, with as much confidentiality as possible.

Responsive Planning. The standards require facilities to prepare a written plan to coordinate actions taken among staff first responders, medical and mental health practitioners, investigators, and facility leadership in response to an incident of sexual abuse. Upon learning of an allegation of abuse, staff must separate the alleged victim and abuser and take steps to preserve evidence.

The standards also require agencies to develop policies to prevent and detect any retaliation against persons who report sexual abuse or who cooperate with investigations. Allegations must be investigated properly, thoroughly, and objectively, and documented correspondingly, and must be deemed substantiated if supported by a preponderance of the evidence. No agency may require an inmate to submit to a polygraph examination as a condition for proceeding with an investigation. Nor may an agency enter into or renew any agreement that limits its ability to remove alleged staff abusers from contact with inmates pending an investigation or disciplinary determination.

Investigations. Investigations are required to follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions. The agency must offer victims no-cost access to forensic medical examinations where evidentiarily or medically appropriate. In addition, the agency must attempt to make available a victim advocate from a rape crisis center. If that option is not available, the agency must provide such services through either (1) qualified staff from other community-based organizations or (2) a qualified agency staff member.

Discipline. The standards require that staff be subject to discipline for violating agency policies regarding sexual abuse, with termination the presumptive discipline for actually engaging in sexual abuse. Terminations or resignations linked to violating such policies are to be reported to law enforcement (unless the conduct was clearly not criminal) and to relevant licensing bodies.

Inmates also will be subject to disciplinary action for committing sexual abuse. Where an inmate is found to have engaged in sexual contact with a staff member, the inmate may be disciplined only where the staff member did not consent. Where two inmates have engaged in sexual contact, the agency may (as the final rule clarifies) impose discipline for violating any agency policy against such contact, but may deem such activity to constitute sexual abuse only if it determines that the activity was not consensual. In other words, upon encountering two inmates engaging in sexual activity, the agency cannot simply assume that both have committed sexual abuse.

Medical and Mental Health Care. The standards require that facilities provide timely, unimpeded access to emergency medical treatment and crisis intervention services, whose nature and scope are determined by practitioners according to their professional judgment. Inmate victims of sexual abuse while incarcerated must be offered timely information about, and timely access to, emergency contraception and sexually transmitted infections prophylaxis, where medically appropriate. Where relevant, inmate victims must also receive comprehensive information about, and timely access to, all lawful pregnancy-related medical services. In addition, facilities are required to offer a follow-up meeting if the initial screening at intake indicates that the inmate has experienced or perpetrated sexual abuse.

Grievances. If an agency has a grievance process for inmates who allege sexual abuse, the agency may not impose a time limit on when an inmate may submit a grievance regarding such allegations. To be sure, a grievance system cannot be the only method—and should not be the primary method—for inmates to report abuse. As noted above, agencies must provide multiple internal ways to report abuse, as well as access to an external reporting channel.

This standard exists only because the Prison Litigation Reform Act, 42 U.S.C. 1997e, requires that inmates exhaust any available administrative remedies as a prerequisite to filing suit under Federal law with respect to the conditions of their confinement. The final standard contains a variety of other provisions aimed at ensuring that grievance procedures that cover sexual abuse provide inmates with a full and fair opportunity to preserve their ability to seek judicial review, without imposing undue burdens on agencies or facilities. However, agencies that exempt sexual abuse allegations from their remedial schemes are exempt from this standard, because their inmates may proceed directly to court.

Audits. The final rule resolves an issue left undecided in the proposed rule by including standards that require that agencies ensure that each of their facilities is audited once every three years. Audits must be conducted by: (1) a member of a correctional monitoring body that is not part of, or under the authority of, the agency (but may be part of, or authorized by, the relevant State or local government); (2) a member of an auditing entity such as an inspector general's or ombudsperson's office that is external to the agency; or (3) other outside individuals with relevant experience. Thus, the final standards differ from the proposed standards in that audits may not be conducted by an internal inspector general or ombudsperson who reports directly to the agency head or to the agency's governing board.

The Department will develop and issue an audit instrument that will provide guidance on the conduct of and contents of the audit. All auditors must be certified by the Department, pursuant to procedures, including training requirements, to be issued subsequently.

Lesbian, Gay, Bisexual, Transgender, Intersex (LGBTI) and Gender Nonconforming Inmates. The standards account in various ways for the particular vulnerabilities of inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations. The standards require training in effective and professional communication with LGBTI and

gender nonconforming inmates and require the screening process to consider whether the inmate is, or is perceived to be, LGBTI or gender nonconforming. The standards also require that post-incident reviews consider whether the incident was motivated by LGBTI identification, status, or perceived status.

In addition, in a change from the proposed rule, the final standards do not allow placement of LGBTI inmates in dedicated facilities, units, or wings in adult prisons, jails, or community confinement facilities solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates. As in the proposed standards, such placement is not allowed at all in juvenile facilities.

The standards impose a complete ban on searching or physically examining a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. Agencies must train security staff in conducting professional and respectful cross-gender pat-down searches and searches of transgender and intersex inmates.

In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, an agency may not simply assign the inmate to a facility based on genital status. Rather, the agency must consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems, giving serious consideration to the inmate's own views regarding his or her own safety. In addition, transgender and intersex inmates must be given the opportunity to shower separately from other inmates.

Inmates with Disabilities and Limited English Proficient (LEP) Inmates. The standards require agencies to develop methods to ensure effective communication with inmates who are deaf or hard of hearing, those who are blind or have low vision, and those who have intellectual, psychiatric, or speech disabilities. Agencies also must take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to inmates who are LEP. Agencies may not rely on inmate interpreters or readers except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the inmate's safety, the performance of first-response duties, or an investigation.

C. Costs and Benefits

The anticipated costs of full nationwide compliance with the final rule, as well as the benefits of reducing the prevalence of prison rape, are discussed at length in the Regulatory Impact Assessment (RIA), which is available at *http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf* and is summarized below in section IV, entitled "Executive Orders 13563 and 12866 - Regulatory Planning and Review." As shown in Table 1, the Department estimates that the costs of these standards to all covered facilities, assuming full nationwide compliance, would be approximately $6.9 billion over the period 2012-2026, or $468.5 million per year when annualized at a 7 percent discount rate. The average annualized cost per facility of compliance with the standards is approximately $55,000 for prisons, $50,000 for jails, $24,000 for community confinement facilities, and $54,000 for juvenile facilities. For lockups, the average annualized cost per agency is estimated at $16,000.

Table 1: Estimated Cost of Full State and Local Compliance with the PREA Standards, in the Aggregate, by Year and by Facility Type, in Millions of Dollars

Year	Prisons	Jails	Lockups	CCF	Juveniles	Total All Facilities
2012	$87.2	$254.6	$180.1	$27.8	$196.0	$745.8
2013	$55.2	$161.0	$122.0	$16.8	$93.3	$448.5
2014	$58.3	$157.9	$106.6	$14.2	$92.1	$429.2
2015	$59.2	$154.6	$93.7	$12.1	$94.9	$414.5
2016	$61.3	$153.5	$87.3	$11.1	$109.3	$422.6
2017	$61.5	$152.4	$83.6	$10.6	$151.9	$460.1
2018	$62.9	$151.3	$80.1	$10.1	$147.3	$451.8
2019	$63.1	$150.7	$77.5	$9.8	$144.7	$445.8
2020	$64.3	$150.1	$75.0	$9.4	$142.2	$441.0
2021	$65.7	$149.9	$73.2	$9.2	$140.4	$438.3
2022	$65.9	$150.1	$72.0	$9.0	$139.2	$436.2
2023	$67.1	$150.1	$70.8	$8.9	$138.0	$434.9
2024	$67.1	$149.9	$69.6	$8.7	$136.7	$432.0
2025	$67.9	$149.5	$68.4	$8.5	$135.5	$429.8
2026	$67.6	$148.8	$67.2	$8.4	$134.3	$426.3
15-yr Total	$974.2	$2,384.6	$1,327.3	$174.8	$1,995.8	$6,856.7
Present Value	$591.2	$1,488.4	$869.8	$116.6	$1,201.4	$4,267.4
Annual	$64.9	$163.4	$95.5	$12.8	$131.9	$468.5

However, these figures are potentially misleading. PREA does not require State and local facilities to comply with the Department's standards, nor does it enact a mechanism for the Department to direct or enforce such compliance; instead, the statute provides certain incentives for such confinement facilities to implement the standards. Fiscal realities faced by confinement facilities throughout the country make it virtually certain that the total actual outlays by those facilities will, in the aggregate, be less than the full nationwide compliance costs calculated in the RIA. Actual outlays incurred will depend on the specific choices that State and local correctional agencies make with regard to adoption of the standards, and correspondingly on the annual expenditures that those agencies are willing and able to make in choosing to implement the standards in their facilities. The Department has not endeavored in the RIA to project those actual outlays.

With respect to benefits, the RIA conducts what is known as a "break-even analysis," by first estimating the monetary value of preventing various types of prison sexual abuse (from incidents involving violence to inappropriate touching) and then, using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of full nationwide compliance.

This analysis begins by estimating the current levels of sexual abuse in covered facilities. The RIA concludes that in 2008 more than 209,400 persons were victims of sexual abuse in prisons, jails, and juvenile facilities, of which at least 78,500 prison and jail inmates and 4,300

youth in juvenile facilities were victims of the most serious forms of sexual abuse, including forcible rape and other nonconsensual sexual acts involving injury, force, or high incidence.

Next, the RIA estimates how much monetary benefit (to the victim and to society) accrues from reducing the annual number of victims of prison rape. This is, of course, an imperfect endeavor, given the inherent difficulty in assigning a dollar figure to the cost of such an event. Executive Order 13563 states that agencies "may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts." Each of these values is relevant here, including human dignity, which is offended by acts of sexual violence. While recognizing the limits of monetary measures and the difficulty of translation into dollar equivalents, the RIA extrapolates from the existing economic and criminological literature regarding rape in the community. On the basis of such extrapolations, it finds that the monetizable benefit to an adult of avoiding the highest category of prison sexual misconduct (nonconsensual sexual acts involving injury or force, or no injury or force but high incidence) is worth $310,000 to $480,000 per victim; for juveniles, who typically experience significantly greater injury from sexual abuse than do adults, the corresponding category is assessed as worth $675,000 per victim. Lesser forms of sexual abuse have correspondingly lower avoidance benefit values. The RIA thus determines that the maximum monetizable cost to society of prison rape and sexual abuse (and correspondingly, the total maximum benefit of eliminating it) is about $46.6 billion annually for prisons and jails, and an additional $5.2 billion annually for juvenile facilities.

The RIA concludes that the break-even point would be reached if the standards reduced the annual number of victims of prison rape by 1,671 from the baseline levels, which is less than 1 percent of the total number of victims in prisons, jails, and juvenile facilities. The Department believes it reasonable to expect that the standards, if fully adopted and complied with, would achieve at least this level of reduction in the prevalence of sexual abuse, and thus the benefits of the rule justify the costs of full nationwide compliance.

As noted, this analysis inevitably excludes benefits that are not monetizable, but still must be included in a cost-benefit analysis. These include the values of equity, human dignity, and fairness. Such non-quantifiable benefits will be received by victims who receive proper treatment after an assault; such treatment will in turn enhance their ability to re-integrate into the community and maintain stable employment upon their release from prison. Furthermore, making prisons safer will increase the general well-being and morale of staff and inmates alike. Finally, non-quantifiable benefits will accrue to society at large, by ensuring that inmates re-entering the community are less traumatized and better equipped to support their community. Thus, the true break-even level would likely be lower and perhaps significantly lower than 1,671, if it were possible to account for these non-quantifiable benefits.

II. Background

The Prison Rape Elimination Act of 2003, 42 U.S.C. 15601 *et seq.*, requires the Attorney General to promulgate regulations that adopt national standards for the detection, prevention, reduction, and punishment of prison rape. PREA established the National Prison Rape Elimination Commission to carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States, and to recommend national standards to the Attorney General and to the Secretary of Health and Human Services. The NPREC released its recommended national standards in a report dated

June 23, 2009, and subsequently disbanded, pursuant to the statute. The NPREC's report and recommended national standards are available at *http://www.ncjrs.gov/pdffiles1/226680.pdf*.

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

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

The Attorney General established a PREA Working Group, chaired by the Office of the Deputy Attorney General, to review each of the NPREC's proposed standards and to assist him in preparing rulemaking materials. The Working Group included representatives from a wide range of Department components, including the Access to Justice Initiative, the Bureau of Prisons (including the National Institute of Corrections), the Civil Rights Division, the Executive Office for United States Attorneys, the Office of Legal Policy, the Office of Legislative Affairs, the Office of Justice Programs (including the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime), the Office on Violence Against Women, and the United States Marshals Service.

The Working Group conducted an in-depth review of the standards proposed by the NPREC. As part of that process, the Working Group conducted a number of listening sessions in 2010, at which a wide variety of individuals and groups provided preliminary input prior to the start of the regulatory process. Participants included representatives of State and local prisons and jails, juvenile facilities, community corrections programs, lockups, State and local sexual abuse associations and service providers, national advocacy groups, survivors of prison rape, and members of the NPREC.

Because, as noted above, PREA prohibits the Department from establishing a national standard that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities, the Working Group carefully examined the potential cost implications of the standards proposed by the NPREC. As part of that process, the

Department commissioned an independent contractor to perform a cost analysis of the NPREC's proposed standards.

On March 10, 2010 (75 FR 11077), while awaiting completion of the cost analysis, the Department published an Advance Notice of Proposed Rulemaking (ANPRM) soliciting public input on the NPREC's proposed national standards. Approximately 650 comments were received on the ANPRM, including comments from current or formerly incarcerated individuals, county sheriffs, State correctional agencies, private citizens, professional organizations, social service providers, and advocacy organizations concerned with issues involving inmate safety and rights, sexual violence, discrimination, and juvenile justice.

In general, commenters supported the broad goals of PREA and the overall intent of the NPREC's recommendations. However, comments were sharply divided as to the merits of a number of standards. Some commenters, particularly those whose responsibilities involve the care and custody of inmates or juvenile residents, expressed concern that the NPREC's recommended national standards implementing PREA would impose unduly burdensome costs on already tight State and local government budgets. Other commenters, particularly advocacy groups concerned with protecting the health and safety of inmates and juvenile residents, expressed concern that the NPREC's standards did not go far enough, and, therefore, would not fully achieve PREA's goals.

After reviewing the comments on the NPREC's proposed standards, and after receiving and reviewing the cost analysis of those standards, the Department published a Notice of Proposed Rulemaking (NPRM) on February 3, 2011 (76 FR 6248). The scope and content of the Department's standards differed substantially from the NPREC's proposals in a variety of areas. The Department revised each of the NPREC's recommended standards, weighing the logistical and financial feasibility of each standard against its anticipated benefits. At the same time, the Department published an Initial Regulatory Impact Analysis (IRIA), which presented a comprehensive assessment of the benefits and costs of the Department's proposed standards in both quantitative and qualitative terms. The IRIA was summarized in the NPRM and was published in full on the Department's website at *http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm_iria.pdf*.

The NPRM solicited comments on the Department's proposed standards, and posed 64 specific questions on the proposed standards and the IRIA. In response, the Department received over 1,300 comments, representing the same broad range of stakeholders as comments on the ANPRM. Commenters provided general assessments of the Department's efforts as well as specific and detailed recommendations regarding each standard. The Department also received a range of comments responding to the 64 questions posed in the NPRM and on the assumptions, calculations, and conclusions contained in the IRIA. As in the comments on the ANPRM, the changes recommended by commenters reflected a diverse array of views. Many commenters asserted that the proposed standards provided insufficient protection against sexual abuse, while others expressed the view that the proposed standards would be too onerous for correctional agencies.

Following the public comment period, the Department carefully reviewed each comment and deliberated internally on the revisions that the commenters proposed and on the critiques of the IRIA's benefit-cost analysis. In addition, the Department once again commissioned an independent contractor to assist the Department in assessing the costs of revisions to the standards.

The final standards reflect a considered analysis of the public comments and a rigorous assessment of the estimated benefits and costs of full nationwide compliance with the standards. The Department has revised the IRIA correspondingly; the final Regulatory Impact Analysis is available at *http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf.*

This is a final rule; however, the Department has identified one provision for which it is considering making changes to the final rule, if warranted by public comments received. The discrete provision open for additional comment does not affect the finality of the rule.

To assist agencies in their compliance efforts, the Department has funded the National Resource Center for the Elimination of Prison Rape to serve as a national source for online and direct support, training, technical assistance, and research to assist adult and juvenile corrections, detention, and law enforcement professionals in combating sexual abuse in confinement. Focusing on areas such as prevention strategies, improved reporting and detection, investigation, prosecution, and victim-centered responses, the Resource Center will identify promising programs and practices that have been implemented around the country and demonstrate models for keeping inmates safe from sexual abuse. It will offer a full library, webinars, and other online resources on its website, and will provide direct assistance in the field through skilled and experienced training and technical assistance providers. The Department also funds the National Center for Youth in Custody, which will partner closely with the Resource Center to assist facilities in addressing sexual safety for youth.

The Department is also continuing its grantmaking, through its Bureau of Justice Assistance, to support State and local demonstration projects aimed at combating sexual abuse in confinement facilities. In addition, the Department's National Institute of Corrections, which has provided substantial PREA-related training and technical assistance since passage of the Act, will be developing electronic and web-based resource materials aimed at reaching a broad audience.

III. Overview of PREA National Standards.

Scope of Standards: Application to Other Federal Confinement Facilities

The proposed rule interpreted the statute to bind only facilities operated by the Bureau of Prisons, and extended the standards to United States Marshals Service facilities under other authorities of the Attorney General. In light of comments on the proposed rule, the Department has re-examined whether PREA extends to Federal facilities beyond those operated by the Department of Justice. The Department now concludes that PREA does, in fact, encompass *any* Federal confinement facility "whether administered by [the] government or by a private organization on behalf of such government," 42 U.S.C. 15609(7).

With respect to Bureau of Prisons facilities, the Act explicitly provides that the national standards apply immediately. 42 U.S.C. 15607(b). However, the statute does not address how it will be implemented at other Federal confinement facilities. In general, each Federal agency is accountable for, and has statutory authority to regulate, the operations of its own facilities and, therefore, is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody. For example, the Department of Homeland Security possesses great knowledge and experience regarding the specific characteristics of its immigration facilities, which differ in

certain respects from Department of Justice, State, and local facilities with regard to the manner in which they are operated and the composition of their populations. Indeed, the NPREC expressly recognized these distinctions by including a supplemental set of 15 standards applicable only to facilities with immigration detainees. Similarly, the Department of the Interior's Bureau of Indian Affairs (BIA) possesses expertise regarding the various confinement facilities in Indian country, which are owned and operated pursuant to numerous different arrangements by BIA and the tribes, and which also differ in certain respects from Department of Justice, State, and local facilities.

Given their statutory authorities to regulate conditions of detention, other Federal departments with confinement facilities will work with the Attorney General to issue rules or procedures that will satisfy the requirements of PREA. 42 U.S.C. 15607(a)(2).

Scope of Standards: Pretrial Release, Probation, Parole, and Related Programs

In the proposed rule, the Department declined to adopt the NPREC's recommendation that the Department adopt a set of standards for community corrections, which the NPREC had recommended defining as follows: "Supervision of individuals, whether adults or juveniles, in a community setting as a condition of incarceration, pretrial release, probation, parole, or post-release supervision. These settings would include day and evening reporting centers."[2] The Department determined that to the extent this definition included supervision of individuals in a non-residential setting, it exceeded the scope of PREA's definitions of jail and prison, which include only "confinement facilit[ies]." 42 U.S.C. 15609(3), (7). Accordingly, the proposed rule did not reference community corrections, but instead proposed adopting a set of standards for "community confinement facilities," defined as

> a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community correctional facility (including residential re-entry centers) in which offenders or defendants reside as part of a term of imprisonment or as a condition of pre-trial release or post-release supervision, while participating in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during nonresidential hours.

Several commenters criticized the proposed rule for excluding individuals who are not incarcerated but are subject to pretrial release, probation, parole, or post-release supervision. These commenters included advocacy groups, certain former members of the NPREC, and two trade organizations, the American Probation and Parole Association and the International Community Corrections Association. Commenters observed that parole and probation officers play a significant role in the lives of their charges, and that such power includes the potential for abuse. Some suggested that the Department should adopt all of the NPREC's recommendations with regard to pretrial release, probation, parole, or post-release supervision, while others proposed including only certain training requirements related to handling disclosures of sexual abuse and avoiding inappropriate relationships with probationers and parolees.

[2] NPREC, *Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Community Corrections*, 5, available at *http://www.ncjrs.gov/pdffiles1/226683.pdf*.

The final rule does not include these suggested changes and instead retains the definition quoted above. The Department recognizes, of course, that staff involved in pretrial release, probation, parole, or post-release supervision exert great authority. The same is true, however, of numerous other government officials, including police officers who operate in the community, law enforcement investigators, and certain categories of civil caseworkers. While any abuse by law enforcement officials or other government agents is reprehensible, PREA appropriately addresses the unique vulnerability of incarcerated persons, who literally cannot escape their abusers and who lack the ability to access community resources available to most victims of sexual abuse.

One commenter observed that PREA defines "prison rape" as including "the rape of an inmate in the actual or constructive control of prison officials," 42 U.S.C. 15609(8), and suggested that a probationer or parolee should be considered to be under the constructive control of correctional officials. This suggestion, however, neglects the statute's definition of "inmate" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. 15609(2). An inmate by definition is "incarcerated or detained in [a] facility"; the inclusion of inmates who are "under the constructive control of correctional officials" presumably refers to inmates who are temporarily supervised by others, such as inmates on work details. Furthermore, the reference to parole, probation, and related programs in the definition of "inmate" indicates that only a person who "violate[s] . . . the terms and conditions" of such a program, rather than any person who is subject to such terms and conditions, qualifies as an inmate. Indeed, with the exception of an unrelated grant program to safeguard communities,[3] the statute makes no other reference to parole, probation, pretrial release, or diversionary programs.

The same commenter noted that PREA instructed the NPREC to recommend to the Attorney General national standards on, in addition to specifically enumerated topics, "such other matters as may reasonably be related to the detection, prevention, reduction, and punishment of prison rape." 42 U.S.C. 15606(e)(2)(M). The Department agrees with the commenter that this language, by extension, provides the Attorney General with a broad scope of authority to combat sexual abuse in confinement facilities. However, this language does not necessitate the adoption of standards to govern probation, parole, pretrial release, or diversionary programs. To be sure, former inmates may report to a parole officer sexual abuse that occurred while they were in a confinement facility. However, former inmates—unlike current inmates—generally possess ample ability to report abuse through the same channels as any other person living in the community.

Still, the Department encourages probation and parole departments to take active steps to ensure that any information they learn about sexual abuse in confinement facilities is transmitted to law enforcement authorities or correctional agencies, as appropriate. The Department recommends that such departments train their officers as needed to facilitate proper investigation of allegations.

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[3] The statute authorizes the Attorney General to make grants to States to "safeguard the communities to which inmates return" by, among other things, "preparing maps demonstrating the concentration, on a community-by-community basis, of inmates who have been released, to facilitate the efficient and effective . . . deployment of law enforcement resources (including probation and parole resources)," and "developing policies and programs that reduce spending on prisons by effectively reducing rates of parole and probation revocation without compromising public safety." 42 U.S.C. 15605(b)(2)(C), (E).

Finally, one commenter suggested that probation departments should be included because some probation departments operate residential facilities, including juvenile detention facilities. No change is warranted, because the proposed rule already included any agency that operates residential facilities. For example, to the extent that a probation department operates a juvenile detention facility, it is covered by the Standards for Juvenile Facilities, § 115.311 *et seq.*

Scope of Standards: Categorization of Prisons and Jails

The Department received a significant number of comments from jails regarding the ways in which their operations differ from prisons. Jail commenters noted that prisons, unlike jails, generally receive individuals after sentencing. Thus, prison inmates have already been stabilized medically and been searched before being transported to the prison. Commenters noted that the prison intake unit or facility, unlike its jail counterpart, will often have received information from the sentencing court, and may have received records documenting medical and mental health conditions, criminal and institutional histories, and in some cases, program or treatment histories.

The American Jail Association (AJA), plus several sheriffs and jail administrators, recommended that the Department develop separate standards for jails and prisons, due to differences in facility size, mission, length of stay, and operational considerations.

The Department recognizes the various differences between jails and prisons, but concludes that these differences do not warrant a separate set of standards. Rather, the Department has endeavored to provide sufficient flexibility such that the standards can be adopted by both prisons and jails. Where appropriate, various standards impose different requirements upon prisons and jails, while others differentiate on the basis of facility size.

General Definitions (§ 115.5)

Community confinement facility. Several commenters expressed uncertainty as to whether group homes that house juveniles would be governed by the standards for community confinement facilities, the standards for juvenile facilities, or both. For clarity, the final rule revises the definition of community confinement facility to expressly exclude juvenile facilities. All juvenile facilities, including group homes and halfway houses, are governed by the Standards for Juvenile Facilities, § 115.311 *et seq.*

Exigent circumstances. The final rule adds a definition of this term, which is used in several standards. The term is defined to mean "any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility." Such circumstances include, for example, the unforeseen absence of a staff member whose presence is indispensible to carrying out a specific standard, or an outbreak of violence within the facility that requires immediate action.

Full compliance. The final rule adds a definition of this statutory term. As discussed above in the Executive Summary and below in the section titled Executive Order 13132 – Federalism, PREA provides that the Governor of each State must certify "full compliance" with the standards or else forfeit five percent of any Department of Justice grant funds that the State would otherwise receive for prison purposes, unless the Governor submits an assurance that such

five percent will be used only for the purpose of enabling the State to achieve and certify full compliance with the standards in future years. 42 U.S.C. 15607(c).

NPRM Question 34 solicited comments on how the final rule should define "full compliance." Several commenters recommended that full compliance be measured by a percentage of each standard complied with. These recommendations were generally between 80 and 100 percent. One commenter suggested that each standard be designated as either mandatory or non-mandatory, with differential percentages for each category. A number of comments recommended that full compliance mean complete compliance, with exceptions for *de minimis* violations.

A number of commenters recommended that "full compliance" be fully or partially contingent on certain outcome measures. In other words, "full compliance" could only be achieved if a certain objective level of safety and security is achieved in a facility.

Other commenters suggested that, instead of relying on "full compliance," the standards should be measured using a multi-tiered approach, such as "substantial compliance," "partial compliance," "non-compliance with progress," and "non-compliance." One commenter recommended that "full compliance" be regarded as achieved when the facility meets the spirit of the standard. Another suggested that "full compliance" be regarded as achieved when an agency adopts adequate policies and procedures, and has demonstrated its intention to comply with those policies.

Finally, a number of comments suggested that the standards be "fully" complied with, and two suggested that "full compliance" mean complete compliance with the critical elements of the standard.

The final rule defines "full compliance" as "compliance with all material requirements of each standard except for *de minimis* violations, or discrete and temporary violations during otherwise sustained periods of compliance." The Department concludes that a requirement for specific outcome measures would be impractical to implement across a broad spectrum of facility types, and further notes that compliance with procedural mandates is usually more within the control of a facility than achieving specific outcome measures. Furthermore, a definition that allows for some standards to be non-mandatory, or that defines full compliance as a percentage or by reference to substantial compliance, is not compatible with the plain meaning of the statutory term "full compliance." Accordingly, the Department lacks the discretion to adopt such a definition.

Below is a nonexhaustive set of examples of violations that would be consistent with full compliance:

- A temporary vacancy in the PREA coordinator's position that the agency is actively seeking to fill;
- A small number of instances in which an agency fails by a number of days to meet a 14-day deadline imposed by the rule;
- Occasional noncompliance with staffing ratios in juvenile facilities due to disturbances in other housing units or staff illnesses;
- A short-term telephone malfunction that prevents inmate access to a confidential reporting hotline, which the agency acts promptly to restore once the malfunction is brought to its attention.

Generally speaking, the intent of this definition is to make clear that a Governor may certify "full compliance" even if, in circumstances that are not reasonably foreseeable, certain of the State's facilities are at times unable to comply with the letter of certain standards for some short period of time, but then act promptly to remedy the violation. This definition is in keeping with Congress's view that States would be able—and should be encouraged—to achieve full compliance.

The final rule also provides, in § 115.501(b), that the Governor's certification applies to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch. The certification, by its terms, does not encompass facilities under the operational control of counties, cities, or other municipalities.

Gender nonconforming. The final rule adds a definition of this term, which is used in several standards. The term is defined to mean "a person whose appearance or manner does not conform to traditional societal gender expectations."

Intersex. Various commenters, including both correctional agencies and advocates, requested a definition of this term, and several advocates suggested definitions. The final rule defines the term as "a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female." The definition also notes that "[i]ntersex medical conditions are sometimes referred to as disorders of sex development."

Juvenile. Several commenters criticized the proposed rule's definition of juvenile as any person under the age of 18 unless otherwise defined by State law. One commenter noted that State law may be inconsistent, defining a person as a juvenile for some purposes and as an adult for others. For clarity, the final rule revises the definition by changing "unless otherwise defined by State law" to "unless under adult court supervision and confined or detained in a prison or jail." For reasons explained at greater length below, the Department has rejected the suggestion by some commenters to define juvenile as any person under the age of 18.

Some commenters recommended that the definition of juvenile include persons over the age of 18 who are currently in the custody of the juvenile justice system, because some State juvenile justice systems hold persons beyond that age who were originally adjudicated as juvenile delinquents. The final rule does not make that change. The set of standards for juvenile facilities refers throughout to "residents." A "resident" is defined as "any person confined or detained in a juvenile facility." Thus, the standards already cover over-18 persons confined in a facility that is primarily used for the confinement of under-18 persons, and the commenters' proposed change is not needed. In the rare instance that an over-18 person in the custody of the juvenile justice system is confined in an adult facility, it is appropriate for that person to be treated the same as others of similar age.

Juvenile facility. For clarifying purposes, the final rule adds language to make clear that a juvenile facility is one that is primarily used to confine juveniles "pursuant to the juvenile justice system or criminal justice system." A facility that confines juveniles pursuant to a social services system, or for medical purposes, is beyond the scope of these regulations, regardless of whether it is administered or licensed by a Federal, State, or local government or a private organization on behalf of such government.

One commenter suggested amending the definition of juvenile facility to clarify that it includes all youth confined in juvenile facilities, not just those who are accused of, or have been adjudicated for committing, a delinquent act or criminal offense. The commenter noted that, as a result of shortages in residential mental health facilities, juvenile facilities may temporarily hold youth who are not accused of delinquent or criminal acts, while waiting for bed space to open up in residential mental health facilities. The Department has not made this change, because such youth are already covered to the extent that they are housed in a facility that primarily confines juveniles pursuant to the juvenile justice system or criminal justice system.

A State juvenile agency requested that the standards exempt community-based facilities that are not "physically restricting" and that serve juvenile delinquents as well as non-delinquent youth. The Department has not made this change. As stated above, the definition of juvenile facility includes any facility "primarily used for the confinement of juveniles pursuant to the juvenile justice system or criminal justice system." If a non-secure residential facility fits this definition, it will fall within the scope of the standards, even if it also holds some non-delinquent youth. Youth who are legally obligated to return to a facility in the evening are at risk of sexual abuse and therefore warrant protection under these standards. Furthermore, where a facility is primarily used to confine juvenile delinquents, it would be illogical to exempt from coverage those facilities that happen to confine some non-delinquent youth as well.

Transgender. As with "intersex," both agency and advocacy commenters requested that the final rule define this term. The definition adopted in the final rule—"a person whose gender identity (*i.e.*, internal sense of feeling male or female) is different from the person's assigned sex at birth"—reflects the suggestions of numerous advocacy commenters.

Other terms. The Department has not adopted the suggestion of one commenter to define a variety of additional terms including jail booking, intake, initial screening, and risk assessment. These terms are in common usage in correctional settings and have meanings that are generally understood, even if facility practices may vary in certain respects. To define these terms would risk confusion by imposing a one-size-fits-all definition on facilities that employ these terms in slightly different ways.

Definitions Related to Sexual Abuse (§ 115.6)

The final rule makes various changes to terms related to sexual abuse that were defined in the proposed rule.

Sexual abuse. Various commenters criticized the proposed definition for referencing the intent of the abuser. These commenters expressed the view that including an intent element would, in the words of one, "require agencies to engage in a complicated time- and labor-intensive inquiry into the intent of the perpetrator." The final rule revises the definition to limit the relevance of intent.

With regard to sexual abuse by an inmate, the proposed rule had excluded "incidents in which the intent of the sexual contact is solely to harm or debilitate rather than to sexually exploit." The purpose of that language was to exclude physical altercations that incidentally resulted in injuries to an inmate's genitalia. While correctional agencies should, of course, endeavor to protect inmates from physical harm of all sorts, such incidental injury is beyond the

scope of PREA. To eliminate the intent element while still preserving this exclusion, the final rule replaces the language quoted above with "contact incidental to a physical altercation."

With regard to abuse by staff, the proposed rule included contact between the penis and the vulva or anus; contact between the mouth and the penis, vulva, or anus; penetration of the anal or genital opening; and "[a]ny other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of any person with the intent to abuse, arouse, or gratify sexual desire." The final rule replaces the intent clause with the following language: "that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse or gratify sexual desire." Thus, if the touching is unrelated to official duties, no finding as to intent is necessary. If the touching *is* related to official duties—such as a strip search—the touching qualifies as sexual abuse only if it is performed in a manner that evidences an intent to abuse, arouse, or gratify sexual desire.

One agency recommended replacing "sexual abuse" with "rape." The Department has not made this change. PREA defines "rape" broadly, in a manner that is more consistent with the customary definition of sexual abuse. For example, PREA includes "sexual fondling" in its definition of rape, *see* 42 U.S.C. 15609(9), (11), even though that term is typically associated with sexual abuse rather than with rape. The Department concludes that sexual abuse is a more accurate term to describe the behaviors that Congress aimed to eliminate.

An advocate for disability rights recommended that the Department define what it means for an inmate to be "unable to consent," due to variations in State law on this issue. The Department has not done so, concluding that correctional agencies should use their judgment, taking into account any applicable State law.

One advocacy organization recommended that kissing be added to the definition of sexual abuse or sexual harassment, due to the possibility that kissing could be used as a "grooming" technique leading to other sexual activities. The Department concludes that it is appropriate to consider kissing to constitute sexual abuse in certain contexts where committed by a staff member. Accordingly, the final rule adds to the definition of sexual abuse by a staff member "[c]ontact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire."

Finally, the Department has made various nonsubstantive changes to the definition of sexual abuse, including simplifying its structure. In addition, the final rule provides that sexual abuse is not limited to incidents where the staff member touches the inmate's genitalia, breasts, anus, groin, inner thigh, or buttocks, but also includes incidents where the staff member induces the inmate to touch the staff member in such a manner.

Sexual harassment. Several correctional agencies recommended that the final rule remove sexual harassment from the scope of the standards. The Department has not done so. Although PREA does not reference sexual harassment, it authorized the NPREC to propose, and by extension authorized the Attorney General to adopt, standards relating to ''such other matters as may reasonably be related to the detection, prevention, reduction, and punishment of prison rape.'' 42 U.S.C. 15606(e)(2)(M). Certain standards reference sexual harassment in order to combat what may be a precursor to sexual abuse.

One commenter took issue with the categorization of "repeated verbal comments or gestures of a sexual nature . . . including demeaning references to gender, sexually suggestive or derogatory comments" as sexual harassment rather than sexual abuse. The commenter suggested that this categorization inappropriately downplayed the harm associated with such conduct,

especially because many of the standards in the proposed rule referenced only sexual abuse and not sexual harassment. The Department has not made this change, largely because such activities fit the textbook definition of sexual harassment. To label comments and gestures as sexual harassment is not meant to belittle the harm that may ensue. (The question of whether specific standards should include sexual harassment as well as sexual abuse is a separate issue and is discussed below in reference to specific standards.) However, similar activity, when performed by a staff member, *does* constitute sexual abuse. This distinction recognizes that staff exert tremendous authority over every aspect of inmates' lives—far more authority than employers exert over employees in a workplace context. An attempt, threat, or request to engage in sexual contact, even if it does not result in actual sexual contact, may lead to grave consequences for an inmate, and deserves to be treated seriously. Indeed, in many States, such contact is considered to be a crime.[4]

The same commenter also recommended defining sexual harassment to include all comments of a sexual nature, not just repeated comments. One correctional agency made the same recommendation with regard to comments made by staff. The Department has not made this change. Various standards require remedial action in response to sexual harassment; while correctional agencies may take appropriate action in response to a single comment, a concern for efficient resource allocation suggests that it is best to mandate such action only where comments of a sexual nature are repeated.

Voyeurism. Some correctional agencies recommended removing voyeurism from the scope of the standards, fearing that its inclusion would result in groundless accusations against staff members merely for performing their jobs. This change has not been made. The Department notes that voyeurism is limited to actions taken "for reasons unrelated to official duties"—which constitutes a significant limitation. A staff member who happens to witness an inmate in a state of undress while conducting rounds has not engaged in voyeurism. The risk of false accusations is an inevitable consequence of imposing limits upon staff members' actions, and is neither limited to, nor unusually problematic in, the context of voyeurism.

One correctional agency recommended that voyeurism be considered as a subset of sexual harassment and be limited to repeated actions, as with sexual harassment. The Department has not made this change. Voyeurism is appropriately considered to be a more serious offense than sexual harassment, and indeed is often a crime. The same commenter suggested that by placing voyeurism within the category of sexual abuse, "there is no differentiation between incidences of voyeurism and rape." This is incorrect; sexual abuse appropriately encompasses a broad range of incidents of varying degrees of severity. The standards oblige correctional agencies to take certain actions in response to all incidents of sexual abuse, but the appropriate response will vary greatly depending upon the nature of the incident.

Some advocacy commenters, and one sheriff's office, criticized the proposed rule for providing that taking images of all or part of an inmate's naked body, or of an inmate performing bodily functions, constituted voyeurism only if the staff member also distributed or published

[4] *See* National Institute of Corrections/Washington College of Law Project on Addressing Prison Rape, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody*, available at *http://www.wcl.american.edu/endsilence/documents/50StateSurveyofSSMLawsFINAL2009Update.pdf.*

them. The final rule removes that limitation. Under the revised definition, taking such images constitutes voyeurism regardless of what the staff member does with the images afterwards.

Zero Tolerance; PREA Coordinator (§§ 115.11, 115.111, 115.211, 115.311)

Summary of Proposed Rule

The standard contained in the proposed rule required that agencies establish a zero-tolerance policy toward sexual abuse and harassment that outlines the agency's approach to preventing, detecting, and responding to such conduct. The Department also proposed that agencies employ or designate an upper-level, agency-wide PREA coordinator to oversee efforts to comply with the standards. The proposed standard specified that the agency-wide PREA coordinator would be a full-time position in all agencies that operate facilities whose total rated capacity—*i.e.*, an objective determination of available bed space in a facility—exceeds 1,000 inmates, but could be a part-time position in other agencies. The proposed standard also required that agencies whose total capacity exceeds 1,000 inmates must designate an existing full-time or part-time employee at each facility to serve as that facility's PREA coordinator.

Changes in Final Rule

The final standard no longer requires that the agency-wide PREA coordinator be a full-time position for large agencies. Instead, the standard provides that the PREA coordinator must have "sufficient time and authority" to perform the required responsibilities, which have not been changed from the proposed standard.

The final standard also requires that any agency that operates more than one facility (regardless of agency size) designate a PREA compliance manager at each facility with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

Comments and Responses

Comment. Numerous commenters criticized the proposed standard for requiring that the PREA coordinator be a full-time position. Such commenters indicated that establishing a full-time position would be cost-prohibitive and would inappropriately divert resources from other important efforts. Some recommended that agencies be given discretion in how to structure their PREA oversight and that coordinators be given flexibility to work on related tasks. One commenter suggested that the standard mandate that the PREA coordinator devote a specified minimum percentage of time to PREA-related work. Another commenter proposed that a full-time PREA coordinator be required only if a threshold level of verified sexual abuse incidents is reached.

Response. Designating a specific staff person to be accountable for PREA development, implementation, and oversight will help ensure the success of such efforts. However, agencies should have discretion in how to manage their PREA initiatives. Therefore, the final standard does not require that the PREA coordinator be a full-time position. Similarly, mandating a minimum percentage of staff time to be spent on PREA would be too stringent, and would not provide sufficient flexibility. Rather, the final standard requires that the agency designate a

PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards.

As for the suggestion that a full-time coordinator be required only if verified incidents exceed a specified threshold, it is important to note that a low level of verified incidents does not necessarily mean that sexual abuse is not a concern. If an agency is not appropriately investigating allegations of sexual abuse, or if victims do not feel comfortable reporting such incidents, the level of verified incidents may not accurately reflect the agency's success at combating sexual abuse.

Comment. Various agency commenters requested additional flexibility with respect to the requirement that agencies with aggregate rated capacities of over 1,000 inmates designate facility-level PREA coordinators. Some commenters suggested raising or lowering the population threshold for this requirement.

Response. Where an agency operates multiple facilities, the final standard requires that all such facilities, regardless of size, designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards. Having a "point person" at each facility will be beneficial regardless of the size of the agency or facility. (The PREA coordinator would serve as the "point person" at single-facility agencies.) The language in the final standard appropriately balances the need for accountability with the flexibility that sound correctional management requires.

Comment. One commenter inquired as to whether separate smaller facilities could share one PREA coordinator, to accommodate workload and cost concerns.

Response. With the additional flexibility provided in the final standard, such arrangements should not be necessary. Facilities are encouraged to collaborate on PREA efforts to the extent feasible, but ultimately each facility will need to ensure that effective practices and procedures are in place. For this reason, the final standard requires each facility in a multi-facility agency to have its own PREA compliance manager.

Comment. One commenter requested clarification as to the requirement that the PREA coordinator be an "upper-level" staff member.

Response. While it is not possible to define "upper-level" with precision, the PREA coordinator should have access to agency and facility leadership on a regular basis, and have the authority to work with other staff, managers, and supervisors to effectuate change if necessary. By contrast, the facility-specific PREA compliance manager need not be "upper-level," but should have access to facility staff, managers, and supervisors in order to guide implementation.

Contracting With Other Entities for Confinement of Inmates (§§ 115.12, 115.112, 115.212, 115.312)

Summary of Proposed Rule

The standard contained in the proposed rule required that agencies that contract with outside entities include in any new contract or contract renewal the entity's obligation to comply with the PREA standards.

Changes in Final Rule

No substantive changes have been made to the proposed standard.

Comments and Responses

Comment. Numerous advocates urged that the standard be revised to require government agencies to impose financial sanctions on private contractors that fail to comply with the standards. These commenters also argued that contract entities should be held to the same auditing standards as agency-run facilities.

Response. As discussed below, the auditing standard (§ 115.401) requires that every facility operated by an agency, or by a private organization on behalf of an agency, be audited for PREA compliance at least once in every three-year auditing cycle. The auditing requirements are the same, as are the effects of such audits: The Governor of each State is required to consider the audits of facilities within the operational control of the State's executive branch, including the audits of private facilities operated by a contract entity on behalf of such agencies, in determining whether to certify that the State is in full compliance with the PREA standards. However, the final standard does not require agencies to impose financial sanctions on non-compliant private contractors. The standard requires that new contracts or contract renewals include a provision that obligates the entity to adopt and comply with the PREA standards. Beyond that, the Department sees no need to specify the manner in which an agency enforces such compliance.

Supervision and Monitoring (§§ 115.13, 115.113, 115.213, 115.313)

Summary of Proposed Rule

The standard in the proposed rule contained four requirements. First, it required the agency to make an assessment of adequate staffing levels, taking into account its use, if any, of video monitoring or other technology, and the physical layout and inmate population of the facility. Second, it required agencies to devise a plan for how to best protect inmates from sexual abuse should staffing levels fall below an adequate level. Third, it required agencies to reassess at least annually the identified adequate staffing levels, as well as the staffing levels that actually prevailed during the previous year, and the facility's use of video monitoring systems and other technologies. Fourth, it required prisons, juvenile facilities, and jails whose rated capacity exceeds 500 inmates to implement a policy of unannounced rounds by supervisors to identify and deter staff sexual abuse and sexual harassment.

Changes in Final Rule

The final standard requires each prison, jail, and juvenile facility to develop and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities must consider several factors, including: (1) generally accepted detention and correctional practices; (2) any judicial findings of inadequacy; (3) any findings of inadequacy from Federal investigative agencies; (4) any findings of inadequacy from internal or external oversight bodies; (5) all components of the facility's physical plant (including "blind spots" or areas where staff or inmates may be isolated); (6) the composition of the inmate population; (7) the number and placement of supervisory staff; (8)

institution programs occurring on a particular shift; (9) any applicable State or local laws, regulations, or standards; (10) the prevalence of substantiated and unsubstantiated incidents of sexual abuse; and (11) any other relevant factors. Prisons and jails must use "best efforts to comply with the staffing plan on a regular basis" and are required to document and justify deviations from the staffing plan.

Like the proposed standard, the final standard requires all agencies to annually assess, determine, and document for each facility whether adjustments are needed to (1) the staffing levels established pursuant to this standard; (2) prevailing staffing patterns; and (3) the facility's deployment of video monitoring systems and other monitoring technologies. The final standard also adds a requirement that the annual assessment examine the resources the facility has available to commit to ensure adequate staffing levels.

The final standard requires lockups and community confinement facilities to develop and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In circumstances where the staffing plan is not complied with, lockups and community confinement facilities must document and justify all deviations from the plan. The final standard, like the proposed standard, requires lockup and community confinement agencies to consider the facility's physical layout, the composition of its population, the prevalence of substantiated and unsubstantiated incidents of sexual abuse, and any other relevant factors. If vulnerable detainees are identified pursuant to the lockup screening process set forth in § 115.141, security staff must provide such detainees with heightened protection, including continuous direct sight and sound supervision, single-cell housing, or placement in a cell that is actively monitored, unless no such option is determined to be feasible.

The final standard sets specific minimum staffing levels for certain juvenile facilities. *As set forth below at the end of the discussion of the Supervision and Monitoring standard, the Department seeks additional comment on this aspect of the standard.* Specifically, the final standard requires secure juvenile facilities to maintain minimum security staff ratios of 1:8 during resident waking hours, and 1:16 during resident sleeping hours, except during limited and discrete exigent circumstances, and to fully document deviations from the minimum ratios during such circumstances. However, any secure juvenile facility that, as of the date of publication of the final rule, is not already obligated by law, regulation, or judicial consent decree to maintain the required staffing ratios shall have until October 1, 2017, to achieve compliance. A secure facility is one that typically does not allow its residents to leave the facility without supervision.[5] Group homes and other facilities that allow residents access to the community to achieve treatment or correctional objectives, such as through educational or employment programs, typically will not be considered to be secure facilities. For juvenile facilities, the final standard omits the requirement to plan for staffing levels that do not meet the identified adequate levels.

The final standard also extends to all jails (rather than, as in the proposed standards, only those jails whose rated capacity exceeds 500 inmates) the requirement of unannounced

[5] The full definition is as follows: "*Secure juvenile facility* means a juvenile facility in which the movements and activities of individual residents may be restricted or subject to control through the use of physical barriers or intensive staff supervision. A facility that allows residents access to the community to achieve treatment or correctional objectives, such as through educational or employment programs, typically will not be considered to be a secure juvenile facility." § 115.5.

supervisory rounds to identify and deter staff sexual abuse and sexual harassment. In order to address concerns that some staff members might prevent such rounds from being "unannounced" by providing surreptitious warnings, the final standard adds a requirement that agencies have a policy to prohibit staff members from alerting their colleagues that such supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

Comments and Responses

The NPRM posed several questions regarding staffing. Below is a summary of all comments received regarding this standard, keyed to the question to which they correspond, and the Department's responses.

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

Comment. Commenters were nearly unanimous in opposing a quantitative staffing requirement for adult facilities. Numerous adult correctional agencies expressed a strong preference for deference to agency decisions on staffing issues, given the varied and intricate factors that affect staffing levels, such as facility type, layout, population, classification levels, and whether and how the facility uses video surveillance. Many agency commenters expressed support for the proposed standard as written; some noted that many facilities already employ mandatory and minimum post/staffing criteria, which they can tailor to meet specific needs, such as by increasing staffing levels in particular units that have experienced an increase in victimization. Other commenters noted that some facilities are already bound by State-mandated staffing ratios, and that additional or different PREA ratios could conflict with State law. Jail administrators suggested the absence of any national model or best practice that supports a specific staffing ratio in local jails, due to extreme differences in facility size, age, architectural design, and population. Agency commenters emphasized that facility leadership is best positioned to determine "adequate" staffing levels. In general, advocacy groups agreed that, due to these concerns, the final standard should not mandate staffing ratios in adult facilities.

In addition to feasibility, many correctional commenters stated that the costs of establishing a specific staffing requirement would be prohibitive. These commenters noted that the ability to increase staffing levels at a facility is often beyond the control of either the facility or the agency. Staffing increases require additional funding, which usually must be legislatively appropriated. The commenters also noted that budget increases are unlikely in the current fiscal climate and would require a significant amount of lead time for approval. Several correctional stakeholders, joined by some advocacy groups, commented that specific staffing ratios in adult facilities would constitute an "unfunded mandate," which might compel some agencies to choose not to attempt compliance with the PREA standards in general. In addition, commenters observed that increased costs imposed by a staffing mandate could result in elimination of programming for inmates due to funding limitations.

On the other hand, one local correctional agency commented that, given current fiscal conditions, some agencies will have difficulties expanding staffing unless the final standard mandates minimum staffing levels. In addition, some advocates noted that courts have held that

cost is not an excuse for failing to provide for the safety of persons in custody, and argued that if an agency cannot provide adequate staffing to ensure inmate safety, then it should reduce its inmate population.

Response. The Department recognizes the many factors that affect adequate staffing and therefore does not promulgate a standard with concrete staffing requirements for adult facilities. The final standard enumerates a broader set of factors to be taken into consideration in calculating adequate staffing levels and determining the need for video monitoring: Generally accepted detention and correctional practices; any judicial findings of inadequacy; any findings of inadequacy from Federal investigative agencies; any findings of inadequacy from internal or external oversight bodies; all components of the facility's physical plant (including "blind-spots" or areas where staff or inmates may be isolated); the composition of the inmate population (such as gender, age, security level, and length of time inmates reside in the facility); the number and placement of supervisory staff; institution programs occurring on a particular shift; any applicable State or local laws, regulations, or standards; and the prevalence of substantiated and unsubstantiated incidents of sexual abuse. In addition, the final standard requires facilities to take into account "any other relevant factors."

Given the intricacies involved in formulating an adequate staffing plan, the Department does not include specific staffing ratios for adult facilities in the final standard. The final determination as to adequate staffing levels remains in the discretion of the facility or agency administration. In addition, the facility is encouraged to reassess its staffing plan as often as necessary to account for changes in the facility's demographics or needs.

With regard to the cost of staffing, the Department notes that the Constitution requires that correctional facilities provide inmates with reasonable safety and security from violence, *see Farmer v. Brennan*, 511 U.S. 825, 832 (1994), and sufficient staff supervision is essential to that requirement. However, the Department is sensitive to current fiscal conditions and the inability of correctional agencies to secure budget increases unilaterally. The Department is also cognizant of the fact that staffing is the largest expense for correctional agencies, and recognizes that the costs involved in increasing staffing could make compliance difficult for some facilities. While adequate staffing is essential to a safe facility, the Department wishes to avoid the unintended consequence of decreased programming and other opportunities for inmates as a result of budgetary limitations.

The final standard also requires the agency to reassess, determine, and document, at least annually, whether adjustments are needed to resources the facility has available to commit to ensure adherence to the staffing plan. This language accounts for the fact that resource availability will affect staffing levels and provides agencies an incentive to request additional staffing funds as needed. The Department considered including a requirement for the agency to request additional funds from the appropriate governing authority, if necessary, but determined that this decision best remained within the discretion of the agency.

The final standard requires agencies to use "best efforts to comply on a regular basis" with the staffing plan. Facilities must document and justify deviations from the staffing plan, but full compliance with the plan is not required to achieve compliance with the standard. The Department considered including in the standard a specific mandate to comply with the staffing plan, but determined that requiring "best efforts" is more appropriate, to avoid penalizing agencies that unsuccessfully seek to obtain additional funds. Lockups and community confinement facilities are exempt from the "best efforts" language, but must document deviations from the staffing plan. Juvenile facilities, however, must comply with their staffing

plans except during limited and discrete exigent circumstances, and must fully document deviations from a plan during such circumstances.

The Department reiterates, however, that this standard, like all the standards, is not intended to serve as a constitutional safe harbor. A facility that makes its best efforts to comply with the staffing plan is not necessarily in compliance with constitutional requirements, even if the staffing shortfall is due to budgetary factors beyond its control.

Comment. Numerous advocates expressed concern that the proposed standard did not require the facilities to adhere to a specific staffing plan. These commenters noted that the proposed standard required agencies to develop a staffing plan but did not require that agencies safely staff the facilities. In addition, because the proposed standard required agencies to plan for what to do if they failed to comply with their staffing goals, commenters suggested that it could be read to permit or condone unsafe supervision levels. These advocates proposed requiring agencies to comply with their initial staffing goals and eliminating the requirement that agencies plan for suboptimal staffing. Former members of the NPREC, and an advocacy organization, recommended that the Department revise its proposed supervision standard to require agencies to annually review staffing and video monitoring to assess their effectiveness at keeping inmates safe in light of reported incidents of sexual abuse, identify the changes it considers necessary, and actually implement those changes.

Response. The Department recognizes the tension in the proposed standard between requiring an agency to identify adequate staffing levels, but then implicitly allowing the facility to operate without requisite staffing in accordance with a "backup plan." Therefore, the final standard requires each prison, jail, and juvenile facility to develop, implement, and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse, taking into account the relevant factors affecting staffing needs. In addition, the final standard requires that, at least annually, the agency must assess, determine, and document whether adjustments are needed to the staffing plan, but does not require implementation of such adjustments. Because the Department recognizes that staffing levels are often dependent on budget approval from an external legislative or other governmental entity, the final standard requires each adult prison and jail to use its "best efforts to comply on a regular basis" with its staffing plan. Given the costs involved and the lack of control correctional agencies may have with regard to budgetary issues, the final standard is designed to encourage adequate staffing without discouraging agencies from attempting to comply with the PREA standards due to financial concerns.

Comment. Advocates expressed concern that the proposed standards failed to provide sufficient guidance with respect to how staffing levels should be established. One advocate suggested that, in determining safe staffing ratios, facilities should start with any State requirements and standards promulgated by the American Correctional Association and the American Jail Association. Several comments suggested including as factors any blind spots within the facility, including spaces not designated for residents, such as closets, rooms, and hallways; high traffic areas within the facility; the ease with which individual staff members can be alone with individual residents in a given location; the potential value of establishing and retaining video and other evidence of sexual misconduct; the need to provide enhanced supervision of inmates who have abused or victimized other inmates; the need to ensure that vulnerable inmates receive additional protections without being subjected to extended isolation or deprived of programming; previous serious incidents and the staffing and other circumstances that existed during those incidents; the need for increased or improved staff training; the number

of special needs or vulnerable inmates; the number and placement of supervisory staff; grievances from inmates, staff, visitors, family members, or others; compliance with any applicable laws and regulations related to staffing requirements; individual medical and mental health needs; availability of technology; custody level; management level; capacity; and peripheral duty requirements.

Response. The Department considered each suggestion and adopted a final standard that requires facilities to consider the following factors: (1) generally accepted detention and correctional practices; (2) any judicial findings of inadequacy; (3) any findings of inadequacy from Federal investigative agencies; (4) any findings of inadequacy from internal or external oversight bodies; (5) all components of the facility's physical plant (including "blind-spots" or areas where staff or inmates may be isolated); (6) the composition of the inmate population; (7) the number and placement of supervisory staff; (8) institution programs occurring on a particular shift; (9) any applicable State or local laws, regulations, or standards; (10) the prevalence of substantiated and unsubstantiated incidents of sexual abuse; and (11) any other relevant factors. The factors enumerated in the final standard are broadly applicable across different types of facilities, allow for comprehensive analysis without prescribing every single detail to be considered, and provide sufficient guidance as to how to plan for staffing levels that will provide adequate supervision to protect inmates from sexual abuse. The listed factors are not exclusive; facilities should consider additional issues that are common across correctional facilities and pertinent to the characteristics of each specific facility, and findings from reports and empirical studies relevant to sexual abuse issued by the Department, academia, or professional sources. As an example of one finding from a Department report that would be relevant to determining adequate staffing, as well as the need for increased video monitoring or the frequency of rounds, the Department encourages facilities to consider that inmate-on-inmate sexual abuse is most likely to occur in the evening, when inmates are awake but often confined to their cells and staffing levels are generally lower than during the day.[6] In addition, the National Resource Center for the Elimination of Prison Rape will develop guidance to help facilities compose an adequate staffing plan, and the Department's National Institute of Corrections is available to provide technical assistance on developing an adequate staffing plan.

Comment. One correctional agency interpreted the proposed standard to require direct supervision of inmates, which it asserted would have major cost implications.

Response. This comment is based on a misinterpretation of the proposed standard, which did not require direct supervision. Nor does the final standard.

Comment. Some correctional agency commenters argued that it is not appropriate for the Federal government, or for State governments, to set staffing standards for a facility run by an independently elected constitutional officer at the local level.

Response. The Department is sensitive to concerns regarding interference with local government. However, Congress mandated in PREA that the Attorney General adopt standards that would apply to local facilities as well as Federal and State facilities, as evidenced by the statute's definition of "prison" as "any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of

[6] *See* Allen J. Beck and Paige M. Harrison, Bureau of Justice Statistics ("BJS"), *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*, at 22 (Table 16) (Aug. 2010).

such government." 42 U.S.C. 15609.[7] The application of the staffing standard to local correctional agencies is consistent with Congress's mandate to the Department. Indeed, it is not uncommon for State staffing standards, especially for juvenile facilities, to apply to facilities that are under the purview of an independently elected county or municipal official. For these reasons, the Department does not view the imposition of this standard as inappropriately intruding upon the prerogatives of local elected officials.

Comment. One correctional agency commented that hiring more staff does not necessarily eliminate sexual abuse.

Response. The Department recognizes that adequate staffing levels alone are not sufficient to combat sexual abuse in a corrections setting. However, adequate staffing is essential to providing sufficient supervision to protect inmates from abuse.

NPRM Question 5: If a level such as ''adequacy'' were mandated, how would compliance be measured?

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

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

Comment. The Department received numerous suggestions from agency commenters on proposed methods for measuring adequacy. Some stakeholders expressed concern that a subjective "adequacy" standard would be difficult to audit. Many commenters requested a better definition of "adequacy." Various advocacy and correctional groups commented that agencies would benefit from a more detailed description of what they must consider when conducting the staffing and technology analyses that PREA requires. Others suggested that "adequate," while subjective, is the most appropriate term to use in this context.

Response. The final standard does not include a specific definition for "adequate staffing" but does provide greater guidance as to the factors that should be considered in developing an adequate staffing plan. The Department intends to develop, in conjunction with the National Resource Center for the Elimination of Prison Rape, auditing tools that will guide PREA auditors regarding the various factors affecting the adequacy of staffing. The final standard contains additional documentation requirements, which will aid the auditor in reviewing the adequacy of the plan and the facility's efforts at complying with it. The auditor will review documentation showing that the agency or facility conducted a proper staffing analysis taking into account all enumerated and relevant factors included in the standard. In addition, the National Resource Center for the Elimination of Prison Rape will develop guidance to help facilities compose an adequate staffing plan. And, as noted above, the Department's National Institute of Corrections can provide technical assistance on developing an adequate staffing plan.

Comment. Some correctional commenters, including the American Jail Association, requested best-practice tools for achieving "adequate" staffing. They suggested that the Federal

[7] In addition, the cost limitation language in the statute expressly references local institutions. *See* 42 U.S.C. 15607(a)(3) ("The Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.").

government develop appropriate tools, model policies, and training materials that address the basic principles of PREA and focus on adequate supervision in order to provide facilities with "a greater chance of meaningful implementation of this standard."

Response. As discussed above, the National Resource Center for the Elimination of Prison Rape will develop guidance both for facilities in composing an adequate staffing plan and for auditors in evaluating adequacy of staffing during a PREA audit. These materials will be available to aid agencies in achieving compliance with the final standard.

Comment. Some correctional agencies and advocacy groups recommended assessing the adequacy of staffing by reviewing any incidents related to sexual or physical abuse at a facility to determine if inadequate staffing played a role. One juvenile justice agency suggested that daily monitoring of PREA-related incidents could help identify staffing needs. Another agency commenter suggested reviewing incident reports of rule violations at particular posts.

Response. Reviewing incidents of abuse and rule violations can provide information as to whether staffing is adequate in a particular facility or unit of a facility. However, incidents of abuse should not be the only factor. As discussed above, many factors affect adequacy of staffing. In addition, the reliability of the record of prior incidents may depend upon the facility's diligence at investigating allegations and its ability to create a culture in which inmate victims feel comfortable reporting incidents without fear of reprisal. Accordingly, it is not possible to define adequacy solely in these terms. Of course, if a review of incident reports indicates that insufficient staffing is a contributing factor in sexual abuse, such a finding is clearly relevant to the ultimate determination as to the adequacy of staffing.

Comment. One State correctional agency suggested that adequacy could be defined by determining the minimum staffing levels at which a facility is able to operate within constitutional requirements and determining whether a facility is adhering to such staffing levels.

Response. Adequate staffing is essential to providing constitutional conditions within a correctional facility. However, it is not feasible for the Department to determine, at every Federal, State, and local facility, the level of staffing required to comport with the Constitution, especially given that the level may change over time as the size and nature of the facility's population changes. The PREA audit with regard to this standard will focus on whether the facility has developed and utilized best efforts to comply on a regular basis with an adequate staffing plan to protect inmates from sexual abuse.

Comment. Some correctional commenters suggested that "adequate" staffing levels be measured by the facility's ability to perform required functions, such as feeding inmates, conducting routine checks, holding outdoor recreation, and generally maintaining the facility schedule without requiring significant periods of lockdown.

Response. A facility's inability to perform required functions and operate in accordance with the institutional schedule without significant periods of lockdown may have a direct bearing on the adequacy of staffing. However, deviations from the schedule and performance deficiencies may signal deeper problems unrelated to the number of staff. In addition, the ability to stay on schedule and perform routine functions does not necessarily indicate a safe or adequately staffed facility. While this information may be relevant to an auditor's review of the facility's staffing plan, it cannot be the sole determinant of staffing adequacy.

Comment. Many commenters, including correctional agencies and advocacy groups, suggested that adequacy be measured by assessing whether a facility complies with its written staffing plan. One agency suggested that compliance should be measured by determining whether the facility is complying with the plan rather than by reviewing the level or nature of

incidents of abuse. Former NPREC members recommended that staffing level compliance be measured during the baseline audit, and that actual staffing patterns should be compared with the levels determined by the facility needs assessment. If the audit outcome reveals that current staffing levels are inadequate, facilities should be required to develop a corrective action plan, a timeline for implementation, and regularly scheduled assessments to monitor progress toward achieving safe staffing levels.

Response. The final standard requires agencies to develop, document, and use "best efforts" to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse, taking into account the relevant, enumerated factors. A more stringent mandate would unfairly penalize agencies that do not have budgetary authority or funds to increase staffing. In addition, if faced with a specific mandate to comply with the staffing plan, agencies would have an incentive to formulate plans that undercount the number of staff needed in order to facilitate compliance with the plan. The final standard encourages agencies to compose the most appropriate staffing plan for each facility without concern that the agencies will be overly conservative in their staffing analysis in order to avoid non-compliance with the PREA standards. To be sure, if the facility's plan is plainly deficient on its face, the facility is not in compliance with this standard even if it adheres to the plan.

In addition, a failure to comply with identified adequate staffing levels may affect a facility's ability to comply with other standards. Pursuant to the auditing standards, facilities that receive a finding of "Does Not Meet Standard" with regard to any of the PREA standards will have a 180-day corrective action period in which the auditor and the agency shall jointly develop a corrective action plan to achieve compliance and the auditor will take necessary and appropriate steps to verify implementation of the corrective action plan before issuing a final determination as to whether the facility has achieved compliance.

Comment. Some correctional stakeholders suggested that the Department require each facility to conduct incident mapping and set performance goals, and then measure adequacy based on the facility's ability to meet these goals.

Response. The Department recognizes that incident mapping and performance goals are important quality improvement measures, and encourages all facilities to implement a system to set goals, collect and review data, identify trends, and chart progress towards performance goals. However, because incident reporting is an imperfect measurement of adequate staffing, the results of such a system cannot provide an ultimate assessment of compliance.

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

Comment. Agency commenters felt strongly that compliance with a State minimum staffing requirement should lead to a presumption that staffing is adequate. Some stakeholders commented that concrete staffing requirements should apply only if a facility is not already subject to staffing mandates set by an outside agency or commission. Various correctional commenters noted that some accreditation entities honor compliance with State staffing regulations, and suggested that the PREA standards do the same. On the other hand, some advocacy groups argued that State-mandated minimum staffing ratios may not be sufficient to establish adequacy and that many facilities are not in compliance with such ratios. One advocate

recommended that the standards require compliance with any applicable State or Federal laws, unless the PREA standards offer increased protection.

Response. The final standard directs agencies to take into account any applicable State or local laws, regulations, or standards in formulating an adequate staffing plan for jails, prisons, and juvenile facilities. While regulations setting a minimum staffing level may be instructive, they do not necessarily equate to adequate staffing for each unit of each facility. Applicable State laws are a factor to consider, but in developing adequate staffing plans, an agency must take into account all relevant factors that bear on the question of adequacy.

Comment. Some correctional stakeholders commented that it would violate the Tenth Amendment if the PREA standards required compliance with a specific staffing standard other than that set by the State.

Response. The Department understands the concerns submitted by State agencies regarding the impact of PREA standards, and has welcomed the opportunity to consult with the Department's partners at the State level to develop effective standards that minimize costs, maximize flexibility, and, to the extent feasible, minimize conflict with State and local laws and regulations. However, the Department concludes that PREA is consistent with the Federal government's responsibilities to protect the constitutional and civil rights of all persons in custody. Moreover, PREA is an appropriate exercise of Congress's power to condition Federal funding upon grantees' compliance with relevant conditions. The application of the staffing standard to State and local correctional agencies is consistent with Congress's mandate to the Department. Indeed, Federal regulations frequently impose requirements that exceed requirements imposed by specific States. Accordingly, the Department does not view the imposition of this standard as inappropriately intruding on State prerogatives.

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

Comment. Many advocacy groups commented that specific staffing ratios are appropriate and commonly utilized for juvenile facilities, and specifically proposed establishing a minimum 1:6 ratio for supervision during hours when residents are awake and a 1:12 ratio during sleeping hours. These commenters stated that minimum juvenile staffing ratios fall within the guidelines established by various States and correctional organizations, and that two jurisdictions already require the 1:6 and 1:12 staffing ratios. In contrast to adult correctional agencies, juvenile agencies were less opposed to mandatory staffing ratios for juvenile facilities. However, some juvenile justice administrators expressed the same concerns raised with regard to adult facilities—that specific ratios would constitute a cost-prohibitive, unfunded mandate and that it would be impractical to establish one ratio to fit all facilities. Multiple agency commenters noted that they were already subject to mandatory staffing ratios and that any such ratios in the PREA standards would be duplicative or conflicting.

Response. The Department adopts a standard requiring a minimum staffing ratio in secure juvenile facilities of 1:8 for supervision during resident waking hours and 1:16 during resident sleeping hours. Unlike for adult facilities, it is relatively common for juvenile facilities to be subject to specific staffing ratios by State law or regulation. The Department's research indicates that over 30 States already impose staffing ratios on some or all of their juvenile facilities.

The standard's ratios include only security staff. Of the States identified as requiring specific staffing ratios, approximately half count only "direct-care staff" in these ratios.[8] (For most of the remaining States requiring specific staffing ratios, the Department has not been able to determine precisely which categories of staff are included.) In addition, the National Juvenile Detention Association's position statement, "Minimum Direct Care Staff Ratio in Juvenile Detention Centers," which recommends respective day and night minimum ratios of 1:8 and 1:16, specifically limits the included staff to direct-care staff.[9]

The 1:8 and 1:16 staffing ratios adopted by the final standard match or are less stringent than the ratios currently mandated by twelve States, plus the District of Columbia and Puerto Rico, for their juvenile detention facilities, juvenile correctional facilities, or both. The Department's Civil Rights Division has consistently taken the position that sufficient staffing is integral to keeping youth safe from harm and views minimum staffing ratios of 1:8 during the day and 1:16 at night as generally accepted professional standards in secure juvenile facilities. For this reason, the Civil Rights Division has entered into multiple settlement agreements that require jurisdictions to meet minimum staffing ratios in order to ensure constitutional conditions of confinement for juveniles. In addition, as noted above, the National Juvenile Detention Association's 1999 position statement on "Minimum Direct Care Staff Ratio in Juvenile Detention Centers" supports a minimum ratio of 1:8 during the day and 1:16 at night.

Given the widespread practice of setting minimum staffing ratios for juvenile facilities, the Department believes these ratios accord with national practice, are an integral measure for protecting juveniles from sexual assault, and can be implemented without excessive additional costs. In order to provide agencies with sufficient time to readjust staffing levels and, if necessary, request additional funding, any facility that, as of the date of publication of the final rule, is not already obligated by law, regulation, or judicial consent decree to maintain the required staffing ratios shall have until October 1, 2017, to achieve compliance.

The standard excludes non-secure juvenile facilities from this requirement. Juveniles in non-secure facilities typically have less acute violent and abusive characteristics than those in secure facilities. Many jurisdictions utilize a risk screening instrument to determine whether a juvenile requires a secure placement; juveniles who are identified as having a high likelihood for assaultive behavior and re-offense are generally held in secure facilities. Accordingly, many non-secure and community-confinement-type facilities do not require as intensive staffing levels to protect residents from victimization.

Comment. Many correctional stakeholders suggested that, if a staffing ratio is set for juvenile facilities, the standards should differentiate between long-term juvenile correctional facilities and short-term juvenile detention facilities.

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[8] For juvenile facilities, the term "direct-care staff" is often used in a manner that approximates this rule's definition of "security staff." While the precise definition varies across jurisdictions, it is generally meant to include staff whose exclusive or primary duties include the supervision of residents.

[9] *See* National Juvenile Detention Association, *Minimum Direct Care Staff Ratio in Juvenile Detention Centers*, at 6 (June 8, 1999), available at *http://npjs.org/docs/NJDA/NJDA_Position_Statements.pdf*. The NJDA position statement is generally more restrictive than the requirement in the PREA standard. Specifically, while the PREA standard defines "security staff" as "employees *primarily* responsible for the supervision and control of . . . residents in housing units, recreational areas, dining areas, and other program areas of the facility," the NJDA position statement defines "direct care staff" as "[e]mployees whose *exclusive* responsibility is the direct and continuous supervision of juveniles" *Id.* (emphases added).

Response. The Department recognizes that long-term placement facilities have different types of staffing needs than short-term detention facilities. For example, short-term detention facilities serve less stable populations, residents without comprehensive housing classification information, and residents awaiting placement in other residential facilities—usually for shorter stays but sometimes for extended periods of time. These populations tend to be more unpredictable and more likely to engage in disruptive behavior requiring higher levels of staffing. On the other hand, long-term placement facilities often have significantly higher levels of programming requiring continuous movement throughout various areas of the facility. Such increased movement requires higher levels of security staffing to maintain security. Accordingly, the Department has determined that the same staff ratios are appropriate for both types of facilities, but for different reasons.

Some States currently mandate higher levels of staff supervision in their long-term residential facilities, while others require higher levels of staff supervision for their short-term detention facilities. A number of States currently require high levels of staff supervision for both facility types. Agencies are encouraged to exceed the ratios set forth in the standard where the unique characteristics of the facility and youth require more intensive supervision levels.

Comment. One juvenile correctional agency commented that stringent staffing levels will not ensure the safety of youth if staff do not remain vigilant and provide active supervision. This commenter posited that if a facility has high numbers of incidents, it is most likely due to facility culture rather than staff size.

Response. The Department recognizes that adequate staffing levels alone are not sufficient to combat sexual abuse and that developing a healthy facility culture is a key component in this effort. However, adequate staffing is essential to providing sufficient supervision to protect residents from abuse. In addition to the staffing requirements, the final rule contains comprehensive standards on a broad range of topics related to preventing abuse. While a healthy facility culture cannot be mandated directly, the adoption and implementation of the standards will assist greatly in developing such a culture, by requiring agencies and facilities to institutionalize a set of policies and practices that, among other things, will elevate the importance of agency and facility responsibilities to protect against sexual abuse.

Comment. Some juvenile agencies suggested that, if adequate staffing levels are mandated, there will be a need for guidelines for auditors so that sporadic deficiencies in staff levels may be excused, while long-term patterns of non-compliance are dealt with fairly.

Response. In the final rule, the Department adopts a definition of "full compliance" that requires "compliance with all material requirements of each standard except for *de minimis* violations, or discrete and temporary violations during otherwise sustained periods of compliance." § 115.5. However, when conducting an audit of a particular facility, the PREA auditor will assess, with regard to each specific standard, whether the facility exceeds the standard, meets the standard, or requires corrective action. The Department intends to develop, in conjunction with the National Resource Center for the Elimination of Prison Rape, auditing tools that will guide PREA auditors through these assessments.

Comment. Some juvenile justice agencies commented that, in States that currently require a minimum staffing ratio for juvenile facilities, additional PREA staffing ratio requirements will result in agencies and facilities being audited on the same standards by two different auditing teams—one to determine compliance with the State requirements and one to determine compliance with the PREA standards. These commenters remarked that such double

auditing would be an unnecessary duplication of effort and should not be required by the PREA standards.

Response. The staffing analysis conducted by a PREA auditor will be just one aspect of the PREA audit, which will examine a facility's compliance with all applicable standards. While this may result in some duplication of efforts, facilities may be able to schedule their triennial PREA audits so as to combine the PREA audit with other accreditation proceedings. In addition, while the PREA audit will encompass the facility's compliance with all of the PREA standards, it will be focused on issues related to sexual abuse and thus likely will be narrower in scope than other audits to which the facility is subjected.

Comment. Many advocacy groups recommended that the juvenile standard recognize the value of continuous, direct supervision in preventing sexual misconduct in juvenile facilities.

Response. The Department supports the use of continuous, direct supervision and notes that many juvenile facilities already employ direct supervision as a matter of course. However, some physical plants are not conducive to direct supervision. In those facilities, a mandate for direct supervision would require major renovations at a high cost. For this reason, the final standard does not require direct supervision. With regard to under-18 inmates held in adult facilities, § 115.14 requires such facilities to provide direct staff supervision if the under-18 inmates have contact with adult inmates.

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

Comment. Correctional stakeholders, while remaining opposed to mandated staffing levels, supported an extended timeframe, if such requirements were included, in order to allow for the local governments to allocate additional staffing funding. Some suggested a two-year timeframe; others requested up to five years; and some suggested that extensions should be granted where necessary. One agency proposed tying the timeframe to the growth rate of the State's annual per capita gross domestic product. Although advocacy groups did not promote specific ratios for adult facilities, they did state that if specific staffing levels are required, there should be no extension of the timeframe because, in one commenter's words, "adequate staffing to prevent risk of harm to incarcerated individuals is already required by the Constitution and reinforced through case law requiring protection from harm."

Response. The Department adopts specific staffing ratios only with regard to secure juvenile facilities. Many of these facilities are already subject to the ratios required by the final standard and therefore will not need additional time to comply. However, in order to provide agencies with sufficient time to readjust staffing levels and, if necessary, request and obtain additional funding, any secure juvenile facility that, as of the date of publication of the final rule, is not already obligated by law, regulation, or judicial consent decree to maintain the required staffing ratios shall have until October 1, 2017, to achieve compliance. The Department recognizes that increasing staffing often requires additional legislative appropriations, as well as time needed to recruit and train appropriate new staff.

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

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

Comment. In general, correctional stakeholders and advocacy groups agreed that it would be difficult to establish priority posts or regulate staff redistribution, given the vast differences in facility layout and inmate composition. Many comments stated that establishing priority posts and redistributing staff require detailed knowledge of the facility's needs in order to best determine how staff should be allocated. Other commenters suggested that the Department encourage but not mandate this practice. One State correctional agency recommended that the standard omit language regarding redistribution to avoid conflict with existing collective bargaining agreements and State laws governing such agreements.

Some advocates argued that staffing in medical units, work release programs, and other opportunities for seclusion should be considered priority posts. One advocacy group recommended that the staffing plan identify those posts that must be filled in every shift, regardless of unexpected absences or staff shortages.

Response. Given the variation in facilities and their operational needs, the Department concludes that priority posts and staff distribution are best left to the agency's discretion. By requiring agencies to reassess their staffing plans at least once per year, the final standard requires agencies to determine whether and to what extent priority posts should be established, or existing staff redistributed, to account for changed circumstances and facility needs.

Comment. The American Jail Association commented that few jails are sufficiently similar in layout, classification systems, and supervision methods to allow for any universal definition of priority posts. Therefore, the AJA and other correctional stakeholders requested that the Federal government provide a tool for local jails to use in determining risk, thereby helping jails to identify priority posts.

Response. The National Resource Center for the Elimination of Prison Rape will be available to provide technical assistance to agencies who seek resources and training. The Department encourages agencies to contact the Center with requests of this type.

Comment. Some correctional agencies suggested that staff redistribution should be connected to filed and substantiated complaints related to sexual abuse, but that the ultimate decision should be a management activity.

Response. The Department agrees that staff redistribution may be an appropriate response to a complaint of sexual abuse. The agency retains the discretion as to how to handle such staff redistribution.

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

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

Comment. Correctional stakeholders strongly opposed any mandate for increased technology, which they emphasized would be cost-prohibitive. Some advocates strongly encouraged mandates for cameras throughout the facilities, which they viewed as the best deterrent against abuse, especially by staff, and important to substantiating incidents of abuse.

Other advocates cautioned that cameras in certain locations can intrude upon inmate privacy. Several advocacy groups emphasized that technology should supplement, not substitute for, adequate staff supervision. These advocates opposed a technology mandate when the funds could better be spent on additional or higher-quality staffing, believing that cameras are most productive as investigatory tools to confirm abuse, rather than as a means to prevent abuse. Most commenters were receptive to a standard encouraging increased use of technology to augment supervision.

Response. The final standard requires each facility to develop, implement, and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. Given the costs associated with video monitoring technology, the Department concludes that the issue is best left to the agency's discretion. The facility is in the best position not only to determine the need for such technology but also to determine how and where to place cameras.

The Department recognizes that technology is best utilized to supplement, but not replace, staff supervision. Camera surveillance is a powerful deterrent and a useful tool in post-incident investigations. But it cannot substitute for more direct forms of staff supervision (in part because blind spots are inevitable even in facilities with comprehensive video monitoring), and cannot replace the interactions between inmates or residents and staff that may prove valuable at identifying or preventing abuse. In addition, cameras generally do not translate into a reduction of staff levels—additional staff may be required to properly monitor the new cameras. Indeed, many cameras in correctional facilities are currently not continuously monitored.

While the Department encourages increased use of video monitoring technology to supplement sexual abuse prevention, detection, and response efforts, the agency is in the best position to determine if current or future funds are best directed at increasing the agency's use of technology.

Comment. Former members of the NPREC recommended that the Department reinstate two distinct standards for inmate supervision and use of monitoring technology. They expressed concern that the Department's decision to incorporate inmate supervision and monitoring technology into a single standard unintentionally emphasizes the use of technology to the detriment of the level of supervision that is essential to protect inmates from sexual abuse. They recommended that the Department encourage and facilitate, but not mandate, the use of technology to supplement sexual abuse prevention, detection, and response efforts.

Response. The final standard does not mandate the use of video monitoring technology but instructs agencies to take such technology into consideration, where applicable, in evaluating staffing needs. The Department did not intend for the combined standard to emphasize the use of technology over supervision, and based upon comments received, does not believe that it was received as such. The Department believes it is appropriate to consider the technology available to a facility, but does not consider video monitoring a substitute for staff supervision. The National Resource Center for the Elimination of Prison Rape can provide technical assistance for agencies seeking input on how to introduce or enhance monitoring technology in their facilities.

Comment. One advocacy group commented that the proposed standard should provide guidance on who should monitor cameras, especially in cross-gender circumstances.

Response. Section 115.15 requires that all facilities implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency (now reworded as "exigent circumstances") or when such viewing is

incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit (for jails and prisons) or an area where detainees or residents are likely to be showering, performing bodily functions, or changing clothing. Accordingly, no staff should monitor a camera that is likely to view inmates of the opposite gender while they are showering, performing bodily functions, or changing clothing.

Comment. One advocacy group commented that the proposed standard should provide guidance on how long recordings should be retained.

Response. The Department encourages sufficient retention policies to support an appropriate investigations system. Because the final standard does not mandate the use of video, it is best to leave the specifics to agency discretion.

Comment. Some juvenile justice agencies suggested that any mandate regarding video monitoring technology should be tied directly to a facility's compliance with the PREA standards and its overall rate of substantiated sexual abuse incidents. A plan for securing additional technology funding should only be necessary, in their view, if a facility is found to have a higher than average rate of sexual abuse cases. Facilities would then draft a corrective active plan that may or may not include the need for additional technology. Mandated technology expenditures would occur only after a facility has demonstrated a continued failure to reduce a higher-than-average rate of sexual abuse incidents.

Response. While the Department encourages the use of video monitoring technology to deter sexual abuse and aid in the investigatory process, the final standard does not require any facility to install camera systems. However, an agency may determine that the addition of cameras is an appropriate response to incidents of sexual abuse at a particular facility or specific areas within a facility. The Department encourages all agencies to assess the potential value of such technology in combating sexual abuse. As discussed elsewhere, the Department does not believe that the overall rate of substantiated sexual abuse incidents can serve as a useful trigger for the imposition of additional requirements, because the rate is itself dependent not only upon a facility's success at combating sexual abuse, but its diligence in investigating allegations and in creating a culture in which victims are comfortable reporting incidents without fear of retaliation.

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

Comment. Correctional stakeholders generally agreed that unannounced supervisory rounds should be conducted and are standard correctional practice. However, they recommended that the frequency of such rounds be left to agency discretion. One sheriff's office noted that flexibility in meeting the requirement would reduce resistance by supervisors. Advocacy groups made relatively few proposals regarding the frequency of such rounds, ranging from every 30 minutes, to weekly, to monthly, to "often enough to prevent abuse." Some comments noted that frequency should vary so as to preserve the element of surprise. Other comments stated that the requirement should apply to all facilities, not just those with more than 500 beds.

Response. The final standard expands the requirement for unannounced supervisory rounds to all prisons, jails, and juvenile facilities. The Department recognizes the value in this practice and believes it is appropriate for all facilities. The Department concludes that the precise frequency of such rounds is best left to agency discretion. The standard requires that facilities implement a policy and practice requiring "unannounced rounds to identify and deter

staff sexual abuse and sexual harassment," document the rounds, and conduct the rounds on night shifts and day shifts. Thus, rounds should be conducted on a regular basis in a manner intended to discourage staff sexual abuse and sexual harassment.

Comment. Two advocacy groups commented that the standard expressly should prohibit so-called "trip calls,"—*i.e.*, actions by staff to tip off their colleagues that a supervisor is en route. These commenters asserted that allowing trip calls would defeat the purpose of unannounced rounds.

Response. The final standard adds a requirement that agencies maintain a policy prohibiting staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

Comment. One law student commented that the standards should require a minimum frequency of unannounced supervisory rounds because the proposed standard could be satisfied by one unannounced round in a decade.

Response. The final standard requires prisons, jails, and juvenile facilities to implement a policy and practice of having intermediate level or higher-level supervisors conduct and document unannounced rounds. While the final standard does not specify a minimum frequency, a policy of one round per decade would clearly not serve as "unannounced rounds *to identify and deter staff sexual abuse and sexual harassment*" (emphasis added).

Comment. One sheriff's office commented that any standard should contain wording that would exempt random supervisory checks in emergency and staffing shortage situations.

Response. Because the final standard does not mandate a specific time or frequency of such rounds, facilities may implement a reasonable policy that does not require such rounds during an emergency or temporary staffing shortage.

Comment. Another sheriff's office commented that establishing a reasonable minimum frequency is advisable to prevent disagreements between facility administrators and auditors as to whether the frequency of a facility's rounds is adequate. The commenter cautioned, however, that great care must be taken to ensure the requirement is reasonable, given the vast differences in facilities, and suggested that the minimum frequency should be once per month.

Response. While the final standard does not set a minimum frequency for unannounced supervisory rounds, it requires facilities to implement a policy and practice requiring "unannounced rounds to identify and deter staff sexual abuse and sexual harassment." As such, the facilities may set the practice with regard to frequency of rounds, but rounds should be conducted on a regular basis in order to have an effect on staff sexual abuse and sexual harassment. The Department submits that once per month is unlikely to be frequent enough to have the intended effect.

Solicitation of Additional Comments Regarding the Juvenile Staffing Ratios Set Forth in § 115.313(c).

While this final rule is effective on the date indicated herein, the Department believes that further discussion is warranted regarding the aspect of this standard that requires secure juvenile facilities to maintain minimum staffing ratios during resident waking and sleeping hours. The standard contained in the final rule requires, in pertinent part, that "[e]ach secure juvenile facility shall maintain staff ratios of a minimum of 1:8 during resident waking hours and 1:16 during resident sleeping hours, except during limited and discrete exigent circumstances, which shall be

fully documented. Only security staff shall be included in these ratios." § 115.313(c). Accordingly, the Department solicits additional comments limited to this issue.

Commenters are encouraged to address (1) whether the provision, as written, is appropriate; (2) whether the specific ratios enumerated in the provision are the appropriate minimum ratios, or whether the ratios should be higher or lower; (3) whether the provision appropriately allows an exception from the minimum ratios during "limited and discrete exigent circumstances" (as "exigent circumstances" is defined in § 115.5), or whether that exception should be broadened, limited, or otherwise revised; (4) whether certain categories of secure juvenile facilities should be exempt from the minimum ratio requirement or, conversely, whether certain categories of non-secure juvenile facilities should also be included in the minimum ratio requirement; (5) the extent to which the provision can be expected to be effective in combating sexual abuse; (6) the expected costs of the provision; (7) whether the required ratios may have negative unintended consequences or additional positive unintended benefits; (8) whether empirical studies exist on the relationship between staffing ratios and sexual abuse or other negative outcomes in juvenile facilities;[10] (9) whether specific objectively determined resident populations within a secure facility should be exempt from the minimum ratios; (10) whether additional categories of staff, beyond security staff, should be included in the minimum ratios; (11) whether the standard should exclude from the minimum ratio requirement facilities that meet a specified threshold of resident monitoring through video technology or other means, and, if so, what that threshold should include; and (12) whether the standard appropriately provides an effective date of October 1, 2017, for any facility not already obligated to maintain the staffing ratios.

Youthful Inmates (§§ 115.14, 115.114)

Sections 115.14 and 115.114 regulate the placement of persons under the age of 18 in adult prisons, jails, and lockups. The final rule refers to under-18 persons in such facilities as "youthful inmates" (in adult prisons and jails) and "youthful detainees" (in lockups).

The proposed rule did not contain a standard that governed the placement of under-18 inmates in adult facilities. Rather, the proposed rule noted, and solicited input regarding, ANPRM commenters' recommendations that the NPREC's recommended standards be supplemented with an additional standard to govern the placement and treatment of juveniles in adult facilities.

Some ANPRM commenters had proposed a full ban on placing persons under the age of 18 in adult facilities where contact would occur with incarcerated adults, while others proposed instead that the standards incorporate the requirements of the Juvenile Justice and Delinquency Prevention Act (JJDPA), 42 U.S.C. 5601 *et seq.* As the NPRM discussed, the JJDPA provides formula grants to States conditioned on (subject to minimal exceptions) deinstitutionalizing juveniles who are charged with or who have committed an offense that would not be criminal if

[10] While the Department has not identified studies that address the relationship between negative outcomes and *specific* staffing ratios, the Department has reviewed studies that address the relationship between negative outcomes and the quantity of staffing more generally. *See* New Amsterdam Consulting, *Performance-based Standards for Youth Correction and Detention Facilities: 2011 Research Report* (unpublished study; available in rulemaking docket); Aaron Kupchik and R. Bradley Snyder, *The Impact of Juvenile Inmates' Perceptions and Facility Characteristics on Victimization in Juvenile Correctional Facilities*, 89 The Prison Journal 265 (2009), available at *http://tpj.sagepub.com/content/89/3/265*.

committed by an adult (often referred to as "status offenders"), separating juveniles from adult inmates in secure facilities, and removing juveniles from adult jails and lockups. *See* 42 U.S.C. 5633(a)(11)-(14). States that participate in the JJDPA Formula Grants Program are subject to a partial loss of funding if they are found not to be in compliance with specified requirements.

Generally speaking, the JJDPA applies to juveniles who are in the juvenile justice system, as opposed to those who are under the jurisdiction of adult criminal courts. The JJDPA's separation requirement applies only to juveniles who are alleged to be or are found to be delinquent, juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, or juveniles who are not charged with any offense at all. *See* 42 U.S.C. 5633(a)(11)-(12). The JJDPA defines "adult inmate" as "an individual who . . . has reached the age of full criminal responsibility under applicable State law; and . . . has been arrested and is in custody for or awaiting trial on a criminal charge, or is convicted of a criminal charge offense." 42 U.S.C. 5603(26).

Accordingly, the NPRM expressly solicited comments on whether the final rule should include a standard that governs the placement of juveniles in adult facilities, and if so, what the standard should require, and how it should interact with current JJDPA requirements and penalties.

After reviewing the comments in response to the questions posed in the NPRM, the Department has chosen to adopt a new standard that restricts, but does not forbid, the placement of juveniles in adult facilities. The standard applies only to persons under the age of 18 who are under adult court supervision and incarcerated or detained in a prison, jail, or lockup. Such persons are, for the purposes of this standard, referred to as "youthful inmates" (or, in lockups, "youthful detainees").

The standard imposes three requirements for juveniles placed in adult prisons or jails. First, it mandates that no youthful inmate may be placed in a housing unit in which he or she will have contact with any adult inmate through use of a shared day room or other common space, shower area, or sleeping quarters. Second, it requires that, outside of housing units, agencies either maintain "sight and sound separation" between youthful inmates and adult inmates—*i.e.*, prevent adult inmates from seeing or communicating with youth—or provide direct staff supervision when youthful inmates and adult inmates are together. Third, it requires that agencies make their best efforts to avoid placing youthful inmates in isolation to comply with this provision and that, absent exigent circumstances, agencies comply with this standard in a manner that affords youthful inmates daily large-muscle exercise and any legally required special education services, and provides access to other programs and work opportunities to the extent possible.

In lockups, the standard requires that juveniles and youthful detainees be held separately from adult detainees.

Comments and Responses

Comment. In response to the questions posed in the NPRM, comments varied widely.

Many commenters from advocacy organizations recommended a complete ban on incarcerating persons under the age of 18 in adult facilities, citing statistics indicating that youth in adult facilities face an increased risk of sexual abuse. Some advocates expressed concern that attempts to protect youth in adult facilities by housing them in segregated settings often cause or

exacerbate mental health problems. Furthermore, advocates asserted, correctional agencies lack sufficient expertise in treating the unique needs of the underage population.

Some advocates proposed, as a fallback option, that the standard require a presumption that all youth be housed in juvenile facilities, unless a hearing determines that the interests of justice require housing in an adult facility.

Former members of the NPREC—whose final report did not include a recommended standard that would govern the placement of youth in adult facilities—submitted a comment that supported a standard that would require individuals below the age of 18 to be held in juvenile facilities, with some exceptions. Specifically, the former members recommended that a person under 18 be transferred to an adult facility only upon court order following a finding that the juvenile was violent or disruptive. If such a juvenile is transferred, the facility would need to comply with the standards governing juvenile facilities, separate the juvenile by sight and sound from adult inmates, ensure that the juvenile receives daily visits from health care providers and other staff, and visually check the juvenile every 15 minutes.

With regard to the intersection with the JJDPA, advocates indicated that the PREA standards could and should overlap with the conditions applied to formula grants under the JJDPA.

A significant number of correctional agency commenters opposed restricting the placement of youth in adult facilities. Some commenters noted that State law governs placement options for youth, and recommended that the Department not mandate a standard that would contravene such State laws. Other comments suggested that any such standard might improperly intrude into judicial functions by infringing on judges' discretion in making placement decisions. One comment suggested that a national standard governing the placement of juveniles in adult facilities would be impractical due to variation in facility size, layout, and staffing; another recommended against a standard regarding the placement of youth in adult facilities because the zero-tolerance mandate of § 115.11 already provides adequate protections to this population.

Some agency commenters recommended intermediate approaches. One commenter suggested that the final standard should allow youth to be placed in adult facilities only where there is "total separation" between the two populations. Another commenter suggested that adult facilities be required (1) to develop and implement a plan to provide additional protections for juvenile inmates, and (2) to report separately instances of abuse involving juvenile victims.

A number of agency commenters expressed concerns about importing JJDPA requirements into the PREA standards. Some remarked that this would result in "double-counting" and would result in undue weight being placed on this standard.

Response. After reviewing the comments received on this issue, the Department has decided to adopt a standard that restricts the placement of youth in adult facilities to the extent that such placement would bring youth into unsupervised contact with adults.

The Department recognizes that the statistical evidence regarding the victimization of youth in adult facilities is not as robust as it is for juvenile facilities, in large part because of the small number of under-18 inmates in adult facilities and the additional difficulties in obtaining consent to survey such inmates.[11]

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[11] The Department does not rely on Congress's finding in PREA that "[j]uveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities," 42 U.S.C. 15601(4), because insufficient data exist to support that assessment. Congress's finding appears to derive from a study based on interviews with youth adjudicated or tried for violent offenses in four cities between 1981 and 1984. *See* Martin Frost, *et al.*, *Youths in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 Juv. &

The Department's Bureau of Justice Statistics (BJS) previously reported that, based on its surveys of facility administrators, 20.6 percent of victims of substantiated incidents of inmate-on-inmate sexual violence in adult jails in 2005 were under the age of 18, and 13 percent of such victims in 2006 were under 18,[12] despite the fact that under-18 inmates accounted for less than one percent of the total jail population in both years.[13] These findings derived from facility responses to BJS's *Survey of Sexual Violence* (SSV), which was administered to a representative sampling of jail facilities in addition to all Federal and State prison facilities. However, upon further review, BJS has determined that these figures are not statistically significant due to the small number of reported incidents and the small number of jails contained in the sample. Indeed, in reporting data from the 2007 and 2008 SSVs, BJS determined that the standard errors around the under-18 estimates for adult jails were excessively large, and consequently did not report the estimates separately, but rather reported combined figures for inmates under the age of 25. BJS has now determined that it should have done the same for 2005 and 2006.

However, this conclusion does not impact the findings of the same BJS surveys performed in State prisons, which surveyed all State prisons, in contrast to the jails surveys, which included only a sampling of jails. According to SSV reports, from 2005 through 2008, 1.5 percent of victims of substantiated incidents of inmate-on-inmate sexual violence in State prisons were under 18, even though under-18 inmates constituted less than 0.2 percent of the State prison population. While the number of such substantiated incidents is small—a total of 10—the combined data indicate that State prison inmates under the age of 18 are more than eight times as likely as the average State prison inmate to have experienced a substantiated incident of sexual abuse. Furthermore, the true prevalence of sexual abuse is undoubtedly higher than the number of substantiated incidents, due to the fact that many incidents are not reported, and some incidents that are reported are not able to be verified and thus are not classified as "substantiated." Indeed, it is quite possible that prison inmates under 18 are more reluctant than the average inmate to report an incident because of their age and relative newness to the prison system.

BJS is currently in the middle of its third National Inmate Survey collection, which is expected to provide better data regarding victimization of under-18 inmates in adult prisons and jails. This extensive survey will reach inmates in 600 prisons and jails and is designed to specifically address this issue by oversampling for facilities that house under-18 inmates, and oversampling such inmates within those facilities. BJS expects to provide national-level estimates in early 2013.

The Department's review of State procedures indicates that at least 28 States have laws, regulations, or policies that restrict the confinement of youth in adult facilities to varying degrees. Some jurisdictions house these youth in juvenile facilities until they reach a threshold age and then transfer them to an adult facility. Other jurisdictions require physical separation or sight and sound separation between these youth and adult offenders. Yet other jurisdictions

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Fam. Ct. J. 1, 4 (1989). The study noted that 7 of 81 youth sentenced to adult facilities, or 8.6%, reported experiencing sexual assault, as compared to 2 of 59 youth sent to juvenile facilities, or 1.7%. *Id.* at 4, 10. While suggesting that this discrepancy, and discrepancies regarding other types of victimization, "illustrate the increased danger of violence for juveniles sentenced to adult prisons," the authors noted that "the victimization results are not statistically significant." *Id.* at 9.

[12] *See* Beck, BJS, *Sexual Violence Reported by Correctional Authorities, 2005*, Table 4 (2006); and Beck, BJS, *Sexual Violence Reported by Correctional Authorities, 2006*, Appendix Table 5 (2007).

[13] *See* Minton, BJS, *Jail Inmates at Midyear 2010 – Statistical Tables*, Table 7 (2011).

maintain dedicated programs, facilities, or housing units for youth in the adult system. Overall, there appears to be a national trend toward limiting interaction between adult and under-18 inmates. In recent years, a number of States have imposed greater restrictions on the placement of youth in adult facilities or have passed legislation to allow youth tried as adults to be housed in juvenile facilities.[14]

Furthermore, several accrediting and correctional associations have formulated position statements, issued standards, or provided comments urging either that all persons under 18 be held in juvenile facilities only, or that the youth be housed separately from adult inmates. For example, the National Commission on Correctional Healthcare, the American Jail Association, the National Juvenile Detention Association, and the National Association of Juvenile Correctional Agencies all support separate housing or placement for youth.[15]

Although many jurisdictions have moved away from incarcerating adults with juveniles, a significant number of youth continue to be integrated into the adult inmate population. The Department estimates that in 2009, approximately 2,778 juveniles were incarcerated in State prisons and 7,218 were held in local jails.[16]

As a matter of policy, the Department supports strong limitations on the confinement of adults with juveniles. Under the Federal Juvenile Justice and Delinquency Prevention Act (a

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[14] *See* 42 Pa. Cons. Stat. Ann. 6327 (under-18 Pennsylvania inmates awaiting trial as adults may be detained in juvenile facilities until reaching 18); Va. S.B. 259, 2010 Gen. Assem., Reg. Sess. (eff. July 1, 2010) (presumption that under-18 Virginia inmates awaiting trial as adults be held in juvenile facilities); Colo. Rev. Stat. 19-2-517 (2012) (preventing 14- and 15-year-olds from being tried as adults except in murder and sexual assault cases; requires prosecutors to state reasons and hear from defense counsel before exercising discretion to try 16- and 17-year-olds as adults); Ariz. S.B. 1009, 49th Leg., 2d Reg. Sess. (2010) (eliminating eligibility of some juveniles to be tried as adults by requiring a criminal charge brought against the juvenile to be based on their age at the time the offense was committed and not when the charge was filed); Utah H.B. 14, Gen. Sess. (2010) (granting justice court judge discretion to transfer a matter at any time to juvenile court if it is in the best interest of the minor and the juvenile court concurs); Miss. S.B. 2969, 2010 Leg., Reg. Sess. (2010) (limiting the types of felonies that 17-year-olds can be tried for as an adult); Wash. Rev. Code 13.04.030(1)(e)(v)(E)(III) (2012) (allowing juveniles to be transferred back to juvenile court upon agreement of the defense and prosecution.); Wash. Rev. Code 13.40.020(14) (providing that juveniles previously transferred to adult court are not automatically treated as adults for future charges if found not guilty of original charge); 2009 Nev. Stat. 239 (raising the age a juvenile may be presumptively certified as an adult from 14 to 16); Me. Rev. Stat. Ann. tit. 17-A 1259 (2011) (providing that juveniles under 16 who receive adult prison sentence must serve sentence in juvenile correctional facility until their 18th birthday); 2008 Ind. Acts 1142-1144 (limiting juvenile courts' ability to waive jurisdiction to felonies and requiring access for Indiana criminal justice institute inspection and monitoring of facilities that are or have been used to house or hold juveniles); Conn. Gen. Stat. 54-76b-c (2012) (creating presumption that 16- and 17-year-olds are eligible to be tried as youthful offenders unless they are charged with a serious felony or had previously been convicted of a felony or adjudicated a serious juvenile offender); 75 Del. Laws 269 (2005) (limiting Superior Court's original jurisdiction over robbery cases involving juveniles to crimes committed by juveniles who had previously been adjudicated delinquent for a felony charge and thereafter committed a robbery in which a deadly weapon was displayed or serious injury inflicted); 705 Ill. Comp. Stat. 405/5-130 (2011) (eliminating the requirement that 15- to 17-year-olds charged with aggravated battery with a firearm and violations of the Illinois Controlled Substances Act, while on or near school or public housing agency grounds, be tried as adults).

[15] *See* Letter from Campaign for Youth Justice, *et al.*, to Attorney General Holder, 4 (April 4, 2011), available at *http://www.campaignforyouthjustice.org/documents/PREA_sign-on_letter.pdf*; NCCHC Position Statement, *Health Services to Adolescents in Adult Correctional Facilities*, adopted May 17, 1998, available at *http://www.ncchc.org/resources/statements/adolescents.html*.

[16] *See* West, Prison Inmates at Midyear 2009–Statistical Tables, Table 21, BJS (Rev. 2011); Minton, Jail Inmates at Midyear 2010–Statistical Tables, Table 6, BJS (Rev. 2011).

separate statute from the JJDPA), 18 U.S.C. 5031 *et seq.*, "[n]o juvenile committed, whether pursuant to an adjudication of delinquency or conviction for an offense, to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges." 18 U.S.C. 5039. Accordingly, the Federal Bureau of Prisons contracts with juvenile facilities to house the few juvenile inmates in its custody. The United States Marshals Service endeavors to place juveniles in juvenile facilities; where that is not possible, the juvenile is placed in an adult facility, separated by sight and sound from adult inmates. In addition, the Department endorsed the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2009, which, had it been enacted, would have (among other changes) extended the JJDPA's sight and sound separation and jail removal core requirements to youth under adult criminal court jurisdiction awaiting trial, unless a court specifically finds that it is in the interest of justice to incarcerate the youth in an adult facility.

For a variety of reasons, however, the Department has decided against adopting a standard that would generally prohibit the placement of youth in adult facilities. Most importantly, the Department is cognizant that its mandate in promulgating these standards extends only to preventing, detecting, and responding to sexual abuse in confinement facilities. While some commenters asserted that confining youth in adult facilities impedes access to age-appropriate programming and services and may actually increase recidivism, the PREA standards cannot include a ban on those bases. Rather, the Department must focus on the extent to which such a ban would enhance the ability to prevent, detect, and respond to sexual abuse. To be sure, implicit in PREA is the authority to regulate and restrict well-intentioned interventions aimed at preventing sexual abuse that inadvertently lead to other forms of harm. Thus, the Department may adopt a standard that governs the placement of inmates in isolation, and the concomitant denial of programming, where such placement is used as a means of protecting vulnerable inmates against sexual abuse.

In addition, imposing a general ban on the placement of youth in adult facilities, or banning such placements unless a court finds that the youth has been violent or disruptive in a juvenile facility, would necessarily require a fundamental restructuring of existing State laws that permit such placement. For example, many States would require legislation redefining the age of criminal responsibility, eliminating or amending youthful offender statutes, making changes to direct-file and transfer laws, or limiting judicial discretion to determine where a youth should be placed. Given the current state of knowledge regarding youth in adult facilities, and the availability of more narrowly tailored approaches to protecting youth, the Department has decided not to impose a complete ban at this time through the PREA standards. As noted above, BJS is currently collecting additional data regarding this issue, and the Department reserves the right to reexamine this question if warranted.

Juveniles in adult facilities can be protected from sexual abuse by adult inmates by preventing unsupervised contact with adult inmates. The Department adopts a final standard aimed at preventing such unsupervised contact without inadvertently causing other harm to youth.

First, the standard bans the placement of youth in housing units where they interact with adults. Youth are vulnerable to abuse not only by cellmates, but also by adults in their unit who may have contact with them. To be sure, if youth have their own cells, and if the housing unit lacks a common day room or shower area, then such dangers are sufficiently mitigated. Thus, the standard requires that no youthful inmate be placed in a housing unit in which he or she will

have sight, sound, or physical contact with any adult inmate through use of a shared day room or other common space, shower area, or sleeping quarters.

Second, the standard limits interactions between youthful and adult inmates in other areas of the facility. The most basic way to limit such interaction is to ensure sight and sound separation. However, some facilities may find it infeasible to achieve total sight and sound separation without resorting to the use of isolation and denial of programming, which raise significant concerns of their own, as discussed below. Thus, the standard provides additional flexibility by allowing youthful inmates to commingle with adult inmates as long as direct staff supervision is provided. Such supervision must be sufficient to ensure that youth are within sight at all times.

Third, the standard restricts the use of isolation of youth as a means of compliance with the requirements discussed above. While confining youth to their cells is the easiest method of protecting them from sexual abuse, such protection comes at a cost. Isolation is known to be dangerous to mental health, especially among youth. Among other things, isolation puts youth at greater risk of committing suicide. A recent survey of juvenile suicides in confinement found that 110 suicides occurred in juvenile facilities between 1995 and 1999. Analyzing those suicides for which information was available, the survey determined that 50.6 percent of the suicides occurred when inmates were confined to their rooms outside of traditional nonwaking hours as a behavioral sanction.[17] (To be sure, the suicide risk may be higher among juveniles who are committed to isolation as punishment, rather than among juveniles isolated for protection from the general population, as is more common in adult facilities.)

Youth appear to be at increased risk of suicide in adult facilities, although the extent to which isolation is a contributing factor is unknown. Based on the BJS Deaths in Custody Reporting Program, 2000-2007, 36 under-18 inmates held in local jails died as a result of suicide (with the number varying from 3 to 7 each year). The suicide rate of youth in jails was 63.0 per 100,000 under-18 inmates, as compared to 42.1 per 100,000 inmates overall, and 31 per 100,000 inmates aged 18-24. (By contrast, in the general population, the suicide risk is twice as high for persons aged 18-24 than for persons under 18.) The suicide rate of youth was approximately six times as high in jails than among 15- to 19-year-olds in the U.S. resident population with a comparable gender distribution (10.4 per 100,000 in 2007).[18]

Accordingly, the standard requires that agencies make their best efforts to avoid placing youth in isolation in order to comply with this standard. For example, rather than relying on the use of isolation, agencies should attempt to designate dedicated units, wings, or tiers for confined youth; enter into inter-agency, inter-facility, or cooperative agreements for the common placement of youth; temporarily house youth in a juvenile facility; construct partitions or other low-cost facility alterations; or explore alternatives to detention or incarceration for youth in the

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[17] *See* Lindsay Hayes, *Juvenile Suicide in Confinement: A National Survey* at 10, 28-29 (Feb. 2004).

[18] *See* Margaret E. Noonan, BJS, *Deaths in Custody: Local Jail Deaths*, Table 9 (Oct. 28, 2010); Margaret E. Noonan, BJS, *Mortality in Local Jails, 2000-2007*, Table 9 (July 2010); BJS, *2002 Survey of Inmates in Local Jails* (unpublished data); BJS, *Annual Survey of Jails, 2007* (unpublished data); Melonie Heron, Ph.D., National Vital Statistics System, *Deaths: Leading Causes for 2007*, 59 National Vital Statistics Reports, No. 8, table 1 (Aug. 26, 2011); BJS, *Deaths in Custody Reporting Program, 2002-2005*, available at *http://bjs.ojp.usdoj.gov/content/dcrp/juvenileindex.cfm*; *Census of Juveniles in Residential Placement, 2001, 2003, and 2006*, data available at *http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/selection.asp*. Although the rate among 15- to 19-year-olds in the U.S. resident population was 6.9 per 100,000, the estimated rate for a comparable gender distribution is higher after adjusting for the fact that 92.3% of youth held in jails were male.

agency's custody and care. If isolation is unavoidable, the final standard requires that, absent exigent circumstances, agencies provide youth with daily large-muscle exercise and any special education services otherwise mandated by law. Youth also shall have access to other programs and work opportunities to the extent possible. The Department believes it is not necessary to impose the additional requirements suggested by former NPREC members. Requiring a facility to abide by the standards for juvenile facilities in addition to the standards for adult prisons and jails could lead to confusion and is unlikely to have an impact on the safety of the youth. Nor is it likely that mandating visits by staff or visual checks would provide enhanced protection beyond the basic sight and sound separation.

The Department is mindful of agency concerns regarding cost, feasibility, and preservation of State law prerogatives. The final standard affords facilities and agencies flexibility in devising an approach to protecting youth. Compliance may be achieved by (1) confining youth to a separate unit, (2) transferring youth to a facility within the agency that enables them to be confined to a separate unit, (3) entering into a cooperative agreement with an outside jurisdiction to enable compliance, or (4) ceasing to confine youth in adult facilities as a matter of policy or law. Agencies may, of course, combine these approaches as they see fit.

The Department has decided not to incorporate into the standards for adult prisons and jails the JJDPA requirements that apply to juveniles who are *not* tried as adults. As noted above, § 115.14 applies only to juveniles under the jurisdiction of adult courts, whereas the JJDPA's separation requirement applies only to juveniles who are alleged to be or are found to be delinquent, juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, or juveniles who are not charged with any offense at all. *See* 42 U.S.C 5633(a)(11)-(12).

The high degree of compliance with the JJDPA indicates that the incentives and penalties under the Act are operating successfully to ensure that juveniles who are tried as juveniles are not intermingled with adults except under the narrow circumstances the JJDPA allows. As discussed above, the purposes of the two statutes are different: The JJDPA aims to protect youth and discourage delinquency, whereas PREA is more narrowly limited to preventing sexual abuse. Thus, only a portion of the requirements that States must fulfill in order to receive JJDPA grants is relevant to protecting youth from sexual abuse. The Department concludes that to import such requirements in a piecemeal manner could risk confusion and would not materially increase the protection of youth in the juvenile justice system.

Limits to Cross-Gender Viewing and Searches (§§115.15, 115.115, 115.215, 115.315)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.14, 115.114, 115.214, and 115.314) prohibited cross-gender pat-down searches in juvenile facilities, but did not impose a general ban in other facilities. The proposed standard did, however, require agencies to exempt from non-emergency pat-down searches those inmates who have suffered prior cross-gender sexual abuse while incarcerated. That provision attempted to address the possibility that an inmate who has experienced prior sexual abuse would experience a cross-gender pat-down search as particularly traumatizing, even if the search was conducted properly.

The proposed standard also prohibited cross-gender strip searches absent an emergency situation or when conducted by a medical practitioner, and required documentation for cross-gender strip searches.

Recognizing that transgender inmates may be traumatized by genital examinations, the proposed standard prohibited examining a transgender inmate to determine genital status, unless genital status is unknown, in which case such an examination would be conducted in private by a medical practitioner. The proposed standard also required facilities to minimize opposite-gender viewing of inmates as they shower, perform bodily functions, or change clothes. The standard provided an exception for such viewing where incidental to routine cell checks.

The proposed standard also required agencies to train security staff in properly conducting cross-gender pat-down searches, and searches of transgender inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

Changes in Final Rule

The most significant change in this standard is the inclusion of a ban on cross-gender pat-down searches of female inmates in adult prisons and jails and in community confinement facilities, absent exigent circumstances. To facilitate compliance, most facilities will have three years to comply. Recognizing that this requirement may be more difficult for smaller facilities to implement, facilities with a rated capacity of less than 50 inmates are provided five years in which to implement the ban. The final standard also clarified that women's access to programming or out-of-cell opportunities should not be restricted to comply with this provision. In addition, the final standard requires facilities to document all cross-gender searches of female inmates.

The final standard retains the general rule against cross-gender strip searches and body cavity searches and clarifies that "body cavity searches" means searches of the anal or genital opening. The exception for medical practitioners has been retained; the emergency exception has been replaced with an exception for "exigent circumstances" to be consistent with similar changes from "emergency" to "exigent" throughout the final standards.

The final standard imposes a complete ban on searching or physically examining a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. Rather, if the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner. The final standard also retains the requirement for agencies to train security staff in conducting professional and respectful cross-gender pat-down searches and searches of transgender inmates, in the least intrusive manner possible, consistent with security needs. The final standard extends these protections to intersex inmates as well.

The final standard retains the requirement that each facility implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in the case of emergency (now reworded as "exigent circumstances"), or when such viewing is incidental to routine cell checks. The final standard removes "by accident" from the list of exceptions, and adds a requirement that staff of the opposite gender announce their presence when entering an inmate housing unit.

The final standard retains the ban on cross-gender pat-down searches for all residents in juvenile facilities, and narrows the exceptions to the ban to include only exigent circumstances.

Comments and Responses

Comments on cross-gender pat-down searches. The issue of cross-gender pat-down searches generated a substantial number of comments. In general, advocates strongly supported a ban on all cross-gender pat-down searches, as did two members of Congress. Some correctional commenters also noted that same-gender pat-down searches are accepted practice, but emphasized the need for an exception that would permit cross-gender pat-down searches in exigent circumstances. Advocates suggested that a ban on cross-gender pat-down searches could be accomplished with minimal expense by limiting pat-down searches to areas with a high contraband risk, or assigning a roving officer to various posts. Most current and former inmates also supported a ban on all cross-gender pat-down searches. Other commenters stated that cross-gender searches contribute to a sexualized environment. Two commenters went further by proposing limits to cross-gender supervision, not just cross-gender searches.

A number of advocates strongly recommended that, at a minimum, the final standard prohibit cross-gender pat-down searches of women. Citing a 1999 study conducted by the National Institute of Corrections, advocates suggested that numerous States currently ban cross-gender pat-down searches of female inmates. A handful of commenters recommended that such a ban be phased in over a period of two or three years to ease the transition.

In general, agency commenters supported the proposed standard as written regarding cross-gender searches. Several State correctional agencies remarked that prohibiting cross-gender pat-down searches of female inmates was feasible, but that it would be difficult to extend a cross-gender ban to male inmates. Other agency commenters stated that the training requirement would address any problems with cross-gender searches.

Commenters noted that gender-based requirements could implicate laws that bar discrimination in employment on the basis of sex. Of these commenters, most expressed concern regarding the possibility of a standard that prohibited both male-on-female pat-down searches and female-on-male cross-gender pat-down searches. A smaller number of commenters expressed similar concerns with regard to the possibility of a standard that prohibited only male-on-female searches. A larger number, however, expressed confidence that a ban on cross-gender pat-down searches of female inmates could be implemented in a manner that would not violate employment laws. Several correctional agency commenters observed that requiring same-gender pat-down searches of female inmates, except in exigent circumstances, is already an accepted practice in adult prisons and jails.

Multiple agency commenters expressed concern that a complete prohibition on cross-gender pat-down searches could violate collective bargaining agreements, which affect staff assignments, if the prohibition prevented staff of a particular gender from retaining a particular assignment.

Both advocacy and agency commenters strongly criticized the exemption from cross-gender pat-down searches for inmates who have suffered documented prior cross-gender sexual abuse while incarcerated. Commenters expressed concern that inmates who avail themselves of the exemption would be labeled and ostracized, and would possibly be putting themselves at greater risk for further abuse. Commenters expressed doubt that inmates would be willing to reveal their sexual abuse history in such a manner, which would likely become known to a

significant number of staff and inmates if only victims of prior abuse were exempted from cross-gender pat-down searches. A number of former inmates also expressed skepticism that requests for exemptions would actually be honored.

Response. The Department is persuaded that adopting a standard that generally prohibits cross-gender pat-down searches of female inmates in prisons and jails will further PREA's mandate of preventing sexual abuse without compromising security in corrections settings, infringing impermissibly on the employment rights of officers, or adversely affecting male inmates. The final standard prohibits cross-gender pat-down searches of female inmates and residents in adult prisons, jails, and community confinement facilities, absent exigent circumstances, but does not prohibit such searches of male inmates. With regard to juvenile facilities, the final standard retains the proposed standard's prohibition on all cross-gender pat-down searches of either male or female residents, absent exigent circumstances.

Pat-down searches are a daily occurrence in corrections settings and, when performed correctly, require staff to have intimate bodily contact with inmates. Although most pat-down searches are conducted legitimately by conscientious staff, it can be difficult to distinguish between a pat-down search conducted for legitimate security purposes and one conducted for the illicit gratification of the staff person, which would constitute sexual abuse.

Female inmates are especially vulnerable owing to their disproportionate likelihood of having previously suffered abuse. A BJS survey conducted in 2004 found that 42 percent of female State prisoners and 28 percent of female Federal prisoners reported that they had been sexually abused before their current sentence, as compared to 6 percent of male State prisoners and 2 percent of male Federal prisoners. A BJS survey of jail inmates, conducted in 2002, found that 36 percent of female inmates reported sexual abuse prior to incarceration, compared to 4 percent of male inmates.[19] According to studies, women with histories of sexual abuse—including women in prisons and jails—are particularly traumatized by subsequent abuse.[20] In addition, even a professionally conducted cross-gender pat-down search may be traumatic and perceived as abusive by inmates who have experienced past sexual abuse. *See Jordan v. Gardner*, 986 F.2d 1521, 1526 (9th Cir. 1993) (*en banc*) (striking down cross-gender pat-downs of female inmates as unconstitutional "infliction of pain" where there was evidence that a high percentage of the female inmate population had a history of traumatic sexual abuse by men and

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[19] BJS, unpublished data, *2004 Survey of Inmates in State and Federal Correctional Facilities* and *2002 Survey of Inmates in Local Jails*.

[20] *See* Catherine C. Classen, Oxana Gronskaya Palesh, & Rashi Aggarwal, *Sexual Revictimization: A Review of the Empirical Literature*, 6 Trauma, Violence, & Abuse 103, 117 (2005) ("There is considerable evidence that sexual revictimization is associated with more distress compared to one incident of sexual victimization. . . . The general finding appears to be that women who are revictimized suffer more PTSD symptoms"); Barbara Bloom, Barbara Owen, and Stephanie Covington, *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders*, at 37, NIC (2003) ("In addition, standard policies and procedures in correctional settings (e.g., searches, restraints, and isolation) can have profound effects on women with histories of trauma and abuse, and often act as triggers to retraumatize women who have post-traumatic stress disorder (PTSD)."); Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 Women's Stud. Q. 102, 102 (2004) ("For women with previous histories of abuse, prison life is apt to simulate the abuse dynamics already established in these women's lives, thus perpetuating women's further revictimization and retraumatization while serving time."). In 2009, the Department's Office of the Inspector General, in a report on BOP's efforts at combating sexual abuse by staff, noted that "because female prisoners in particular often have histories of being sexually abused, they are even more traumatized by further abuse inflicted by correctional staff while in custody." OIG, United States Department of Justice, *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates* at 1 (2009).

were being re-traumatized by the cross-gender pat-down searches). Thus, even a professionally conducted male-on-female pat-down search increases the risk of harm to female inmates, who have a high prevalence of past prior abuse. *See id.* at 1525 (affirming district court holding that there "is a high probability of great harm, including severe psychological injury and emotional pain and suffering, to some inmates, from these searches, even if it was properly conducted").

Most staff sexual abuse of female inmates is committed by male staff. The BJS National Inmate Survey found that 71.8 percent of female prisoners who were victims of sexual abuse by staff reported that the staff perpetrator was male in every instance, compared to 9.3 percent who reported that the staff perpetrators were exclusively female.[21] Furthermore, 36.7 percent of female inmates who reported sexual touching indicated that they experienced sexual touching during a pat-down search.

An analysis of allegations reported by BOP inmates to BOP's Office of Internal Affairs, conducted by the Department's Office of the Inspector General (OIG), provides further indication of vulnerability of female inmates to sexual abuse at the hands of male staff. OIG found that, from fiscal year 2001 through 2008, 45.6 percent of all allegations of criminal cross-gender sexual abuse committed by BOP staff were lodged by female prisoners, even though women made up less than 7 percent of the BOP population.[22] BOP did not prohibit cross-gender pat-down searches of female inmates during this time period, and OIG reported that "BOP officials believed that male staff members were most often accused of sexual misconduct stemming from pat searches."[23]

A thorough pat-down search requires staff to engage in intimate touching of the inmate's clothed body, including the breasts, buttocks, and genital regions. Given that female inmates are significantly more likely to be sexually abused by male officers than by female officers, the Department determined that it would be prudent, as a prophylactic measure to decrease the risk of sexual abuse, to prohibit the necessarily intimate touching that occurs during routine cross-gender pat-down searches and that may inadvertently contribute to the development of a sexualized environment within a facility. A ban on cross-gender pat-down searches of female inmates, absent exigent circumstances, is consistent with effective corrections policy, as evidenced by the fact that a significant number of State and local corrections systems already abide by such a restriction, as discussed below.

Currently, as a matter of law or policy, most State prison systems do not conduct cross-gender pat-down searches of female inmates, absent exigent circumstances. At the request of the Department's PREA Working Group, the National Institute of Corrections (NIC) conducted a survey of State corrections systems and found that at least 27 States ban the practice, and that it is common practice in several other States for male officers to perform pat-down searches of female prisoners only under exigent circumstances. While comparable data from jails are unavailable, representatives of twelve large jail agencies who attended a PREA listening session convened by the Department all stated that they do not permit cross-gender pat-down searches of females. The Department is not aware of any cases successfully challenging the practice of

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[21] *See* BJS, *Sexual Victimization in Prisons and Jails Reported by Inmates, National Inmate Survey, 2008-09*, at 24. Corresponding figures in jails were 62.6% and 27.6%, respectively. Numbers do not sum to 100% because some inmates reported being victimized by both male and female staff.

[22] *See* OIG, United States Department of Justice, *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates* at 26-28 (2009). Three hundred and twenty-five allegations of criminal sexual abuse were made by female inmates against male staff, as compared to 382 allegations by male inmates against female staff.

[23] *See id.* at 26.

banning only cross-gender pat-down searches of female prisoners, despite the widespread prevalence of these restrictions.

The Department believes that laws that prohibit employment discrimination on the basis of sex pose no obstacle to the implementation of this standard. Rather, the prohibition of cross-gender pat-down searches of female inmates can (and must) be implemented in a manner consistent with Federal laws prohibiting sex discrimination in employment, to ensure that implementation has only a *de minimis* impact on employment opportunities, or, if the impact is more than *de minimis*, that any sex-based limitations on employment opportunities satisfy the *bona fide* occupational qualification requirement of Federal employment law.

Notably, female inmates make up a very small proportion of the total number of incarcerated individuals.[24] The small proportion of female inmates provides further support for agencies' ability to implement a ban on cross-gender pat-down searches of female inmates without negatively impacting employment opportunities.

Title VII of the Civil Rights Act of 1964 states that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . where . . . sex . . . is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e)(1).[25] However, employment decisions that have only a *de minimis* effect on the employment opportunities of correctional employees do not trigger or require a BFOQ analysis.

To establish a BFOQ defense, a facility must show that a gender-based job qualification is related to the essence or central function of the facility, and that the qualification is reasonably necessary to the normal operations of the facility. *See Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977) (holding that exclusion of females in contact positions in Alabama's violent male maximum security prisons may satisfy BFOQ requirement). However, the requirement that only female staff perform pat-down searches on female inmates is unlikely to require a BFOQ for single-sex employment positions in a facility because, as shown by nationwide experience, facilities will almost always be able to implement the requirement in a minimally intrusive way that has only a *de minimis* effect on employment opportunities. *See Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223, 226 (8th Cir. 1995) (en banc) (holding that a prison employer's reasonable gender-based job assignment policy, particularly a policy that is favorable to the protected class of women employees, will be upheld if it imposes only a minimal restriction on other employees, and therefore a BFOQ analysis was unnecessary).

Sex-based assignment policies in correctional facilities often impose only a *de minimis* restriction on the employment opportunities of male officers when facilities preclude male employees from working only a small percentage of certain shifts or job posts at particular facilities but make numerous comparable shifts or posts available to males. *See Robino v.*

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[24] *See* BJS, *Annual Survey of Jails* (2010) (12% of jail inmates are female); BJS, *Prisoners in 2009* (7% of prison inmates are female).

[25] The BFOQ language is found in the section of Title VII that pertains to private employers and State and local government employers. The section of Title VII that applies to executive branch agencies such as BOP does not expressly set forth a BFOQ defense. *See* 42 U.S.C. 2000e-16(a). While the Department is not aware of any case law on the issue, the Equal Employment Opportunities Commission has applied the Title VII BFOQ defense in petitions against Federal employers. *See, e.g.*, *Gray v. Nicholson*, EEOC DOC 0720050093 (Feb. 9, 2007). Accordingly, the Department believes that the defense would be available to BOP and other Federal employers on the same terms as other employers.

Iranon, 145 F.3d 1109, 1110-11 (9th Cir. 1998) (restricting six out of 41 guard positions to women had a *de minimis* effect). When only minor adjustments of staff schedules and job responsibilities are at issue, the effect on employment rights is *de minimis*. *See Jordan*, 986 F.2d at 1539 (Reinhardt, J. concurring); *Tipler v. Douglas Cnty.*, 482 F.3d 1023, 1025-27 (8th Cir. 2007) (temporary reassignments with no effect on promotional opportunities had a *de minimis* effect); *Tharp*, 68 F.3d at 225-27 (policy requiring female residential advisors to staff a women's unit in a mixed-gender minimum security had a *de minimis* effect because the prison's male employees did not suffer termination, demotion, or a reduction in pay). Agencies may implement a ban on cross-gender pat-down searches of female inmates in the manner most appropriate for each facility.

Facilities and agencies should strive to implement this provision in a manner that has a *de minimis* effect so that a BFOQ inquiry is not required. If a facility or agency implements the cross-gender pat-down ban in a way that creates materially adverse changes in the terms and conditions of employment by precluding staff of either sex from certain positions entirely, thereby affecting their promotions, additional pay, seniority, or future eligibility for senior positions, then the facility would be required to conduct a BFOQ inquiry. As noted above, such an inquiry must demonstrate that the manner of implementation is both related to the central function of the facility and reasonably necessary for the successful operation of the facility. *See Dothard*, 433 U.S. at 335-37. There are numerous ways in which facilities can eliminate cross-gender pat-down searches of female inmates, in conformance with employment laws. For example, agencies can assign or rotate female staff to certain key posts within the facility, so long as female staff are not limited in their opportunities for advancement as compared to similarly situated male staff; provide for female float staff who can conduct searches as necessary; allow staff to transfer between agency facilities to achieve better gender balance; or implement institutional schedules that maximize availability of female staff for pat-down searches of female inmates.

It is important to note that the standard prohibiting cross-gender pat-down searches does not, in and of itself, create or establish a BFOQ defense to claims of sex discrimination in employment. If a correctional facility cannot implement this standard in a manner that imposes only a *de minimis* impact on employment opportunities for either sex, it must undertake an individualized assessment of its particular policies and practices and the particular circumstances and history of its inmates to determine whether altering or reserving job duties or opportunities to one sex would justify a BFOQ defense with respect to each particular employment position or opportunity potentially affected by the agency's implementation of the standards.

Female-preference sex-based employment assignments in correctional facilities can meet the BFOQ standard if such assignments are reasonably necessary to the normal operation of the particular facilities at which they are used. This is a high standard. For example, one agency used its history of rampant sexual abuse of female prisoners to justify a BFOQ and designate 250 corrections officer and residential unit officer positions in the housing units of State female prisons as "female only." The facially discriminatory plan, which affected a significant number of male officers, was permissible because sex was a BFOQ for these particular facilities based on the facilities' histories. *See Everson v. Michigan Dep't of Corr.*, 391 F.3d 737, 747-61 (6th Cir. 2004). Additionally, based on the totality of the circumstances at a specific facility, sex may be a BFOQ for all positions in the living units of a women's maximum security prison where the practice of employing only female guards in these positions is reasonably necessary to the goal

of female prisoner rehabilitation. *See Torres v. Wisconsin Dep't of Health & Human Servs.*, 859 F.2d 1523, 1530-32 (7th Cir. 1988) (en banc).

However, female-preference sex-based staffing polices do not meet the high standard necessary to establish a BFOQ defense without a high correlation between sex and ability to perform a particular position. *See Breiner v. Nevada Dep't of Corr.*, 610 F.3d 1201, 1213 (9th Cir. 2010). For example, being female was not a BFOQ for all three lieutenant positions at a women's correctional facility because the facility did not demonstrate that precluding men from serving in supervisory positions in women's prisons was necessary to meet its goal of reducing instances of sexual abuse of female inmates by male correctional officers. *See id*. at 1210-16. A policy banning male officers from all posts in female housing units also did not meet the requirements necessary to establish a BFOQ defense when it was predicated on a few unspecified past incidents of sexual misconduct and generalized arguments that the mere presence of males caused distress to past victims of sexual abuse. *See Westchester Cnty. Corr. v. Cnty. of Westchester*, 346 F. Supp. 2d 527, 533-36 (S.D.N.Y. 2004).

In addition, the final standard allows all facilities with more than 50 beds three years from the effective date of the PREA standards for implementation, and five years for facilities smaller than 50 beds. This extended time frame provides facilities of all sizes and security levels with ample opportunity to develop and implement a practice that will protect female prisoners without undue burden on the operations of the facility. Furthermore, to the extent that agencies want to increase their percentage of female staff to facilitate compliance with the standards, agencies can take advantage of natural attrition to recruit and hire additional female staff without terminating male staff. Most agencies will be able to implement the ban in a manner that has only a *de minimis* effect on employment opportunities and assignments for male employees. And given the lengthy time period allowed to come into compliance, and the level of discretion retained by agencies, the Department believes that the standard can be implemented in accordance with collective bargaining agreements.

The Department has chosen not to include in the final standard a similar prohibition on female staff conducting pat-down searches of male inmates. The Department concludes that the benefit of prohibiting cross-gender pat-down searches of male inmates is significantly less than the benefit of prohibiting cross-gender pat-down searches of female inmates, whereas the costs of the former are significantly higher than the costs of the latter. A ban on cross-gender pat-down searches only of female prisoners does not violate the Equal Protection Clause of the Fourteenth Amendment because male and female prisoners are not similarly situated with respect to bodily searches. Male inmates are far less likely than female inmates to have a history of traumatic sexual abuse and are less likely to experience the retraumatization that may affect female inmates due to a cross-gender pat-down search. *See Laing v. Guisto*, 92 Fed. Appx. 422, 423 (9th Cir. 2004); *Timm v. Gunter*, 917 F.2d 1093, 1102-03 (8th Cir. 1990); *Jordan*, 986 at 1525-27; *Tipler*, 482 F.3d at 1027-28; *Colman v. Vasquez*, 142 F. Supp. 2d 226, 232 (D. Conn. 2001).

With regard to cost, the Department reaffirms its assessment, as stated in the proposed rule, that a ban on cross-gender pat-down searches of male inmates would impose significant financial costs and could limit employment opportunities for women. The correctional population remains overwhelmingly male: 88 percent of jail inmates and 93 percent of prison inmates are men. Correctional staff, by contrast, are considerably more balanced by sex: according to BJS data, 25 percent of Federal and State correctional officers were female as of

2005, and 28 percent of correctional officers in local jails were female as of 1999.[26] Female participation in the correctional workforce has been increasing over the past two decades, and it is likely that the disparity between the percentage of female correctional staff and the percentage of female inmates will continue to grow. In addition, there is significant variation across States: The percentage of female correctional officers in State prisons ranges from 9 percent in Rhode Island to 63 percent in Mississippi. Jurisdiction-level data are not available for local jails, but statewide data indicate that the comparable aggregate percentages range from 8 percent in Massachusetts to 43 percent in Nebraska. In the growing number of correctional agencies where the percentage of female correctional staff is substantial, but the female inmate population is (as in most places) quite small, it could be difficult to implement a ban on female staff patting down male inmates without a significant adverse impact on employment opportunities for women, who would be unable to occupy correctional positions that involve patting down male inmates, and whose prospects for advancement could suffer as a result. *See Madyun v. Franzen*, 704 F.2d 954, 962 (7th Cir. 1983) (gender-based distinctions allowing women to serve as guards in male prisons and perform tasks that are not open to men in female prisons serves the important governmental objective of equal job opportunity for women in fields traditionally closed to them). In addition, in facilities with a high percentage of female staff, there could be an insufficient number of male staff to perform pat-down searches on male inmates, given the overwhelmingly male nature of the inmate population.

To be sure, in adopting a one-way ban, the Department does not suggest that male inmates are less likely to have experienced cross-gender sexual abuse while incarcerated than female inmates. In the most recent BJS survey, male inmates were somewhat more likely to report having experienced staff sexual misconduct than female inmates (in prisons, 2.9 percent vs. 2.1 percent; in jails, 2.1 percent vs. 1.5 percent), and were about as likely as female inmates to report that the perpetrator was always of the opposite sex (in prisons, 68.8 percent vs. 71.8 percent; in jails, 64.3 percent vs. 62.6 percent).[27] The Department also acknowledges that the same survey indicated that male inmates were nearly as likely as female inmates to report sexual touching in a pat-down search: 36.3 percent of male inmates who reported sexual touching indicated that it had occurred at least once during a pat-down search, compared to 36.7 percent of the corresponding set of female inmates.[28] However, when evaluating the prevalence of cross-gender sexual abuse of female inmates, this statistic could be misleading in light of the fact that, as noted above, many facilities nationwide—which may well collectively house a majority of all inmates—already prohibit cross-gender pat-down searches of female inmates absent exigent circumstances. Therefore, a large percentage of female inmates are currently not subject to cross-gender pat-down searches as a matter of course. This discrepancy may well explain why male and female inmates are roughly equally likely to report sexual touching in a pat-down search.

The experience of BOP, which has not prohibited cross-gender pat-down searches, is illustrative. As noted above, female inmates lodged 45.6 percent of all allegations of criminal cross-gender sexual abuse committed by BOP staff, even though less than 7 percent of the BOP population was female. Unlike a majority of State correctional agencies, BOP allowed male

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[26] *See* James J. Stephan, BJS, *Census of State and Federal Correctional Facilities, 2005*, Appendix Table 12 (Oct. 2008); James J. Stephan, BJS, *Census of Jails, 1999*, at 9, 26 (Aug. 2001).

[27] *See* Allen J. Beck and Paige M. Harrison, BJS, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*, at 12, 24.

[28] *See id.* at 24.

correctional staff to perform pat-down searches of female inmates, which may explain why BOP experienced a gender imbalance in allegations that was not shared nationwide. Indeed (as also noted above), according to the OIG report, BOP officials believed that pat-down searches were the most common source of allegations of sexual misconduct against male staff members.

The final rule does not include a similar restriction on cross-gender pat-down searches of female detainees in lockups due to the smaller size, limited staffing numbers, lack of data on incidence of sexual abuse in these institutions, and minimal number of comments directed at lockups. In addition, a pat-down search of a lockup detainee is often conducted by the same police officer who performed a similar search of the detainee upon arrest in the field. Therefore, it would be impractical to impose different search rules once the officer and detainee reach the lockup doors. While recognizing that a blanket restriction would be unworkable, the Department encourages lockups to avoid cross-gender pat-down searches of female detainees, to the extent feasible.

Finally, the Department has removed the provision that mandated a specific exemption from cross-gender pat-down searches for inmates who have suffered documented prior cross-gender sexual abuse while incarcerated. The prohibition of cross-gender pat-down searches of female inmates largely obviates the need for this exemption, and the Department concludes that the potential benefits of retaining the exemption only for male inmates are outweighed by the disadvantages noted by commenters.

Comments regarding juvenile cross-gender pat-down searches. Agencies generally agreed with the gender-neutral ban on pat-down searches in juvenile facilities, so long as exceptions were permitted in certain circumstances. One large State expressed significant concern regarding the cost of implementing the part of the ban that prohibits female staff from conducting pat-down searches of male juveniles. Some organizations supported strengthening the standard to limit the exceptions to exigent circumstances only.

Response. The Department concludes that a gender-neutral cross-gender pat-down search ban in juvenile facilities is required to help protect youth from staff sexual misconduct.

The percentage of staff-on-resident victimization that involves female staff and male residents is much higher than the analogous percentage in adult facilities. A recent BJS survey indicated that 92 percent of all youth reporting staff sexual misconduct were males reporting victimization exclusively by female staff, compared to 65 percent in adult prisons and 58 percent in jails.[29] The Department agreed with commenters who recommended allowing such searches only in "exigent circumstances." The Department removed the exception for "other unforeseen circumstances" because the phrase is too vague and could lead to excessive reliance on the exception. The Department intends the exception to the cross-gender pat-down search ban to be limited to rare instances where truly emergent conditions exist.

Comments regarding searches of transgender and intersex inmates. A number of advocates urged that transgender and intersex inmates be allowed to state a preference regarding the gender of the staff searching them, or that a presumption be created that transgender or intersex inmates be searched by female staff, because transgender and intersex persons are often perceived as female and are at high risk of being targeted by male staff for sexual violence and

[29] Beck, BJS, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-2009* (Jan. 2010), available at *http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf*; Beck & Harrison, BJS, *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2008-09, at 24.

harassment. Numerous commenters, including both advocates and agency commenters, requested guidance on this issue.

Many advocates urged the Department to prohibit examinations of transgender and intersex inmates, even by medical professionals, solely to determine genital status. Such examinations can be highly traumatic, commenters asserted, whereas the information regarding genital status can be obtained by questioning the person or by review of medical files. Commenters noted that transgender and intersex juveniles are particularly likely to be traumatized by such examinations.

Response. The Department agrees that guidance is needed on properly searching transgender and intersex inmates. This guidance should be detailed and workable for facilities, should adequately protect transgender and intersex people, and is best provided by the National Resource Center for the Elimination of Prison Rape.

The final standard does not include a provision allowing individual inmates to state a preference for the gender of their searcher, because such requests have the potential to be arbitrary and disruptive to facility administration. Rather, the Department believes that the concerns that prompted such a proposal can be addressed by properly assigning (or re-assigning) transgender and intersex inmates to facilities or housing units that correspond to their gender identity, and not making housing determinations based solely on genital status. Agencies should also recognize that the proper placement of a transgender inmate may not be a one-time decision, but may need to be reevaluated to account for a change in the status of the inmate's gender transition. For example, an inmate who is initially assigned to a male facility or unit may subsequently merit a move to a female facility or unit (or vice versa) following hormone treatment or surgery. Finally, searches of both transgender and intersex inmates at intake, before a housing determination has been made, may present special challenges. In such cases, facilities should make individual assessments of inmates who may be transgender or intersex and consult with the inmate regarding the preferred gender of the staff member who will perform the search.

The final standard does include additional safeguards to protect transgender and intersex inmates from examinations solely to determine genital status. Such targeted examinations will rarely be warranted, as the information can be gathered without the need for a targeted examination of a person's genitals. Accordingly, the final standard states that, if an inmate's genital status is unknown, a facility should attempt to gain the information by speaking with the inmate or by reviewing medical records. In the rare circumstances where a facility remains unable to determine an inmate's genital status, the Department recognizes that the facility may have to conduct a medical examination. Any such medical examination, however, should be conducted as part of a regular medical examination or screening that is required of or offered to all inmates. Transgender and intersex inmates should not be stigmatized by being singled out for specific genital examinations.

Comments regarding privacy. Advocates expressed concern that the standard allowed nonmedical staff of the opposite gender to view inmates as they shower, perform bodily functions, or change clothing, as long as such viewing is incidental to routine cell checks. These commenters feared that this exception would diminish the effectiveness of the Department's intended limitation on cross-gender viewing. Some advocates proposed strengthening this limitation by requiring staff of the opposite gender to announce their presence when entering a housing unit.

Some agency commenters expressed concern that privacy screens would be an unnecessary expense, and others feared that such screens would create blind spots and therefore

security risks. Other commenters approved of privacy screens as a cost-effective means of protecting inmates' privacy.

Response. The final standard maintains the exception to the cross-gender viewing prohibition, if the viewing is incidental to routine cell checks. However, the Department has addressed concerns that this exception would lead to widespread cross-gender viewing by adding to the standard a requirement that staff of the opposite gender announce their presence when entering a housing unit.

The Department is sensitive to cost concerns and clarifies that the rule is not intended to mandate the use of privacy screens. Rather, privacy screens may be a safe and cost-effective way to address privacy concerns in certain facilities.

Comments regarding training. Advocates generally supported the inclusion of the requirement to train staff in conducting cross-gender searches. However, some commenters, especially juvenile advocacy commenters, found the requirement confusing because the juvenile standard bans cross-gender searches.

Response. The Department has retained this provision, even for juvenile facilities, due to the likelihood that cross-gender searches of women and juveniles may occur in exigent circumstances.

Comments regarding cross-gender strip searches. Few commenters discussed the prohibition on cross-gender strip searches and body cavity searches. One commenter was concerned that the prohibition, as written, may extend to visual examinations of the mouth and ear, areas that are commonly inspected by members of the opposite sex. Several agency commenters recommended that all strip searches, not just cross-gender strip searches conducted under exigent circumstances, be documented.

Response. The final standard clarifies that a body cavity search refers to a search of the anal or genital opening, and adopts the exigent circumstances language proposed by advocates. The Department declined to revise the standard to require documentation of all strip searches, out of concern that such a requirement could impose a heavy burden on some agencies for no good purpose. The standard aims to ensure documentation of those strip searches that carry the greatest potential for abuse; agencies may, of course, document all strip searches if they so choose.

Inmates with Disabilities and Inmates Who Are Limited English Proficient (§§ 115.16, 115.116, 115.216, 115.316)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.15, 115.115, 115.215, and 115.315) governed the accommodation of inmates with disabilities and inmates with limited English proficiency (LEP). The proposed standard required that agencies develop methods to ensure that inmates who are LEP, deaf, or disabled can report sexual abuse and sexual harassment to staff directly, and that agencies make accommodations to convey sexual abuse policies orally to inmates with limited reading skills or visual impairments. The proposed standard allowed for the use of inmate interpreters in exigent circumstances.

Changes in Final Rule

The final rule revises this standard to be consistent with the requirements of relevant Federal civil rights laws: Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101, 12131 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*.

The final standard requires an agency to take appropriate steps to provide inmates with disabilities an equal opportunity to participate in and benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under Title II of the ADA. *See* 28 CFR 35.164.

The final standard clarifies that the category of "inmates with disabilities" includes, for example, inmates who are deaf or hard of hearing, those who are blind or have low vision, and those with intellectual, psychiatric, or speech disabilities. It specifies that agencies shall provide access to interpreters when necessary to ensure effective communication with inmates who are deaf or hard of hearing, consistent with the ADA and its implementing regulations. The standard clarifies that such interpreters shall be able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

Similarly, with respect to inmates who are LEP, the final standard requires agencies to take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment, consistent with the requirements of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Executive Order 13166 of August 11, 2000, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

Further, the final standard specifies that an agency cannot rely on inmate interpreters, inmate readers, or other types of inmate assistants "except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the inmate's safety, the performance of first-response duties under § 115.64, or the investigation of the inmate's allegations." The quoted phrase replaces "exigent circumstances," which has been removed in light of the final rule's definition of that term as "any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility." § 115.5.

Note on Intersection with Existing Statutes and Regulations

The Department emphasizes that the requirements in this standard are not intended to relieve agencies of any preexisting obligations imposed by the ADA, the Rehabilitation Act of 1973, or the meaningful access requirements set forth in Title VI of the Civil Rights Act of 1964 and Executive Order 13166. The Department continues to encourage all agencies to refer to the relevant statutes, regulations, and guidance when determining the extent of their obligations.

The ADA requires State and local governments to make their services, programs, and activities accessible to individuals with all types of disabilities. *See* 42 U.S.C. 12132; 28 CFR 35.130, 35.149-35.151. The ADA also requires State and local governments to take appropriate steps to ensure that their communications with individuals with disabilities (including, for example, those who are deaf or hard of hearing, those who are blind or have low vision, and those with intellectual, psychiatric, or speech disabilities) are as effective as their

communications with individuals without disabilities. *See* 28 CFR 35.160-35.164. In addition, the ADA requires each State and local government entity to make reasonable modifications to its policies, practices, and procedures when necessary to avoid discrimination against individuals with disabilities, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the relevant service, program, or activity. *See* 28 CFR 35.130(b)(7). These nondiscrimination obligations apply to all correctional and detention facilities operated by or on behalf of State or local governments. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209-10 (1998).

Similar requirements apply to correctional and detention facilities that are federally conducted or receive Federal financial assistance. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination against persons with disabilities by entities that receive Federal financial assistance. Discrimination includes denying persons with disabilities the opportunity accorded others to participate in the program or activity, or denying an equal opportunity to achieve the same benefits that others achieve in the program or activity. *See* 28 CFR 42.503 (implementing Section 504 with respect to recipients of Federal financial assistance from the Department of Justice); 28 CFR 39.160 (implementing Section 504 with respect to programs or activities conducted by the Department of Justice, and providing specifically that auxiliary aids and services be furnished where necessary to afford an equal opportunity to participate).

Pursuant to Title VI of the Civil Rights Act of 1964 and its implementing regulations, all State and local agencies that receive Federal financial assistance must provide LEP persons with meaningful access to all programs and activities. *See Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance*, 65 FR 50123 (2000). Pursuant to Executive Order 13166, each agency providing Federal financial assistance is obligated to draft Title VI guidance regarding LEP persons that is specifically tailored to the agency's recipients of Federal financial assistance. The Department's guidance for its recipients includes a discussion of LEP issues in correctional and detention settings. *See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 67 FR 41455 (2002). For further information, agencies are encouraged to review *Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs* (Aug. 2011), available at *http://www.lep.gov/resources/081511_Language_Access_CAQ_TA_Guidance.pdf*.

In NPRM Question 17, the Department solicited feedback on whether the standards should require facilities to ensure that inmates with disabilities and LEP inmates be able to communicate with staff throughout the entire investigative and response process. The final standard clarifies that an agency must take appropriate steps to ensure equal opportunity to participate in and benefit from all aspects of its efforts to prevent, detect, and respond to sexual abuse and sexual harassment for inmates with disabilities, and take reasonable steps to ensure meaningful access to inmates who are LEP. These requirements are consistent with agencies' obligations under the ADA and related regulations, and provide sufficient protection to individuals with disabilities and individuals who are LEP.

Under the ADA, the nature, length, and complexity of the communication involved, and the context in which the communication takes place, are factors for consideration in determining which "auxiliary aids and services," including interpreters, are necessary for effective communication. The ADA title II regulation lists a variety of auxiliary aids and services,

including "video remote interpreting," which may potentially afford effective communication. Under the ADA title II regulation, however, in determining which types of auxiliary aids and services are necessary for effective communication, the public entity is to give primary consideration to the request of individuals with disabilities. *See* 28 CFR 35.160(b)(2); 35.160(b)(2)(d); 35.104 (Definitions – Auxiliary aids and services); Appendix A to Part 35, Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services.

Comments and Responses

Comment. The comments in response to the proposed standard were generally positive. Most correctional agency commenters expressed support for the standard as written. Many correctional stakeholders and inmate advocacy groups answered affirmatively to Question 17, but other commenters observed that the ADA already requires facilities to accommodate inmates with disabilities and therefore suggested that additional requirements were unnecessary.

Response. The Department recognizes the importance of ensuring that all inmates, regardless of disability or LEP status, can communicate effectively with staff and are included in each facility's efforts to prevent sexual abuse. The final standard, in conjunction with the ADA, Section 504, Title VI, and Federal regulations protecting the rights of individuals with disabilities and LEP individuals, protects all inmates while providing agencies with discretion over how to provide the requisite information and interpretation services. The final standard does not, nor is intended to, go beyond what is required by the ADA, Section 504, or Title VI, but the standard clarifies the agencies' specific responsibilities with regard to PREA-related matters and individuals who are LEP or who have disabilities.

Comment. One State correctional agency commended the goals of the proposed standard, but expressed concern that ensuring implementation would be difficult due to the vast range of communication issues that might present themselves.

Response. The Department appreciates that a range of communication issues are implicated by this standard. With respect to inmates with disabilities, agencies are encouraged to review the ADA Title II regulations and associated technical assistance materials for more information addressing the broad spectrum of communication needs. *See* 28 CFR 35.160(b)(2); 35.160(b)(2)(d); and 35.104 (Definitions – Auxiliary aids and services); and *The Americans with Disabilities Act, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services* (1993), available at *http://www.ada.gov/taman2.html*, at II - 7.0000-II-7.1200. The agency can exercise its discretion regarding how to provide the required information or interpretation for individuals who require additional communication services with regard to PREA-related issues, including by choosing to provide services directly or working with an outside entity to ensure effective communication with inmates with disabilities and meaningful access for LEP inmates.

Comment. Some correctional agency commenters stated that the availability of technology, internet services, and interpreters makes compliance with the standard very reasonable, except in many rural facilities. The commenters further noted that major metropolitan corrections facilities may detain people from 100 different cultures or countries. These commenters requested that the Department offer interpretation services 24 hours a day, rather than placing the burden on each facility individually. Many correctional stakeholders stated that contracting with interpreters can be time-consuming and costly; some requested that

agencies be required to comply only to the best of their abilities. On the other hand, several State correctional agencies and local facilities noted that these services are already in place, and as such there will be no additional costs associated with compliance.

Response. Numerous interpretation services are available throughout the country, including telephone and internet providers that can accommodate the needs of small and rural facilities. While the Department cannot provide these services to all agencies, the National Resource Center for the Elimination of Prison Rape can provide technical assistance to help agencies connect with an appropriate provider.[30] Agencies retain the discretion to provide the requisite services in the most appropriate manner for the specific facility and incident. With regard to cost, the Department notes that all prisons and jails are subject to the ADA, and that all State Departments of Corrections and many jails are subject to Title VI due to receipt of Federal financial assistance. The requirements of this standard are informed by the ADA and Title VI; to the extent entities are in compliance with those requirements, the Department does not anticipate that additional costs will arise.

Comment. Some juvenile justice administrators suggested that the agency document the actions it takes, including notes taken by interpreters. These commenters noted that agencies can keep notes and records of their efforts, but cannot ensure that perfect communication has occurred, even between a victim and investigator speaking the same language. An advocacy group also recommended that the standards require documentation of the agencies' efforts to comply.

Response. The Department encourages agencies to keep accurate documentation of their efforts to implement and comply with all of the PREA standards. Such documentation will facilitate the auditing process and ensure accurate compliance assessments. While an agency cannot ensure error-free communication in all instances, a valid policy that has clearly been implemented to guide investigation protocols with regard to ensuring effective communication for individuals with disabilities and meaningful access for individuals who are LEP should satisfy the requirements of this standard, assuming that the agency keeps accurate documentation.

Comment. Some advocacy groups recommended that the final standard include a requirement to enter into a memorandum of understanding with agencies providing specific assistance for LEP inmates, who may face significant language-related obstacles in navigating facilities' grievance and reporting processes.

Most correctional commenters who addressed this issue stated that the Department should not require agencies to enter into formal agreements with outside entities to provide the required services, but should allow agencies to determine for themselves whether such an agreement would help ensure compliance. Other correctional commenters noted that such agreements could be beneficial and should be encouraged, in order to ensure adequate communication with LEP inmates; a few suggested such agreements, or attempts to enter into them, should be mandated.

Response. The Department recognizes that many facilities would benefit from a formal agreement or memorandum of understanding to ensure that LEP inmates can effectively

[30] Some services may be available free of charge. For example, Video Relay Service (VRS) is a form of Telecommunications Relay Service (TRS) that enables persons with hearing disabilities who use American Sign Language to communicate with voice telephone users through video equipment, rather than through typed text. Like all TRS calls, VRS is free to the caller. VRS providers are compensated for their costs from the Interstate TRS Fund, which the Federal Communications Commission oversees. *See http://www.fcc.gov/guides/video-relay-services*.

communicate. Indeed, many State correctional agencies noted that they already have these types of agreements in place. Other facilities provide many communication services in-house or through the agency; some rarely have a need for such services. Given the varying needs of different facilities throughout the country, the Department determined that it is prudent to grant the agencies the discretion to provide the requisite services in the manner most appropriate for the specific facility or incident at issue.

Comment. A State correctional agency criticized the proposed standard for referencing abuse hotlines as a possible method for LEP, deaf, or disabled inmates to report abuse without relying on inmate interpreters. The commenter noted that such a hotline would do little for deaf, hearing impaired, or LEP inmates, and further noted that, in its experience, inmate hotlines prove expensive to operate and generate a large number of unfounded calls.

Response. The final standard no longer references abuse hotlines, and does not require an agency to provide any specific type of interpretation or communication services. Agencies retain the discretion to provide the requisite services in the manner most appropriate for the specific facility or incident at issue, so long as agencies provide effective communication for inmates with disabilities and meaningful access for LEP inmates.

Comment. Many advocacy groups stated that the standards should allow inmate interpreters in adult facilities only in "exigent circumstances and with the expressed voluntary consent of the inmate victim," and should never allow resident interpreters to be used in juvenile facilities. Some agency commenters, by contrast, suggested that inmate interpreters be allowed if the inmate consents.

Response. The final standard requires that agencies not rely on inmate interpreters, readers, or assistants "except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the inmate's safety, the performance of first-response duties under § 115.64, or the investigation of the inmate's allegations." The intent of this provision is to discourage the use of inmate assistance in investigations unless no other option is available in a reasonable timeframe, and where timing is critical to prevent physical harm or to reveal the facts. An inmate's consent to utilizing another inmate as an interpreter does not guarantee the accuracy of the interpretation. While the use of inmate interpreters ordinarily is not an appropriate practice, the Department recognizes that in certain circumstances such use may be unavoidable.

Comment. One State correctional agency recommended removing the term "sexual harassment" from this standard, because it would apply to interactions between inmates. The commenter suggested that because staff are trained in sexual violence in correctional settings, and therefore recognize the influence such verbalizations play, instances of inmate-on-inmate sexual harassment are best addressed through each facility's reporting and investigation processes, and should not be subject to additional regulations.

Response. To the extent that incidents are to be reported, as sexual harassment is, inmates must be able to communicate effectively throughout the process, regardless of disability or LEP status.

Comment. The American Jail Association, an association of county wardens, and a local sheriff's department recommended that the Department encourage jails without resources to provide the required services to enter into memoranda of agreement with larger facilities to house victims with disabilities or victims who are LEP.

Response. Given the varying needs of different facilities throughout the country, agencies should be afforded discretion to provide the requisite services in the manner most

appropriate for the specific facility or incident at issue. If an agency cannot provide the necessary services to an inmate within its custody, the agency is not precluded from contracting to house such an inmate in another, more appropriate facility. However, agencies should be aware that ADA regulations provide that, "[u]nless it is appropriate to make an exception, a public entity . . . [s]hall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed." 28 CFR 35.152(b)(2)(iv).

Comment. The National Disability Rights Network (NDRN), a nonprofit membership organization consisting of federally mandated Protection and Advocacy (P&A) Systems and Client Assistance Programs (CAP), provided extensive comments suggesting effective methods for agencies to comply with the proposed standards. NDRN noted that the proposed standards did not impose any new burdens or mandates on facilities, but rather reaffirmed the applicability of existing accommodations. In order to meet their legal and constitutional obligations, NDRN stated, confinement facilities must provide effective communication accommodations when a need for such accommodations is known, based on requests from individual inmates as well as other information sources. NDRN suggested several best practices for communicating with special needs inmates, and recommended adopting "universal precautions" for communicating with all inmates, such as using a sixth-grade reading level for written materials intended for adults, and a third-grade reading level for confined juveniles. NDRN suggested, in addition to restricting the use of other inmates as interpreters, that family members and acquaintances should not be used as interpreters, except in emergency situations when no viable alternative option exists, in order to protect the confidentiality, privacy, dignity, and safety of inmates, and to ensure objectivity and fidelity of interpretation. NDRN also noted that each State has a designated Protection & Advocacy office, which can be a resource for facilities on disability issues, including how to provide accessible formats for inmate education and effective communication accommodations during responses to and investigations of sexual abuse or harassment reports.

Response. The Department appreciates the detailed suggestions for best practices included in NDRN's comment and encourages all agencies to consider implementing a variety of strategies to ensure effective communication with all inmates. The National Resource Center for the Elimination of Prison Rape will develop training modules and provide technical assistance to help agencies educate staff concerning communication with inmates who are LEP and inmates who have disabilities. While the Department allows the agencies the discretion to provide the requisite services in the most appropriate manner for the specific facility or incident at issue, the Department encourages agencies to reach out to community providers and State offices as resources. As NDRN notes, each State has a federally mandated Protection & Advocacy office, initially created pursuant to Developmental Disabilities Assistance and Bill of Rights Act of 1975, codified as amended at 42 U.S.C. 15001 *et seq*. These offices can serve as valuable resources in helping facilities comply with the standards and with disability law more generally.

Comment. One State correctional agency recommended that the facilities establish an early identification system as part of the reception process to "flag" inmates with disabilities and inmates who are LEP, and then develop a tracking mechanism that ensures the designation follows the inmate throughout his or her incarceration.

Response. In order to ensure proper communication for inmates who have disabilities or are LEP, facilities will need to know which individuals require additional assistance. A formal early identification system, as suggested by the commenter, is a promising method of managing

this information. Under the final standards, however, the agencies retain the discretion to develop a system to provide the requisite services in the most appropriate manner for the specific facility or individuals at issue, so long as effective communication for inmates with disabilities and meaningful access for LEP inmates are provided.

Comment. One State correctional agency suggested extra time should be allotted for agencies to come into compliance.

Response. The final standard requires each agency to provide communication and information services that are consistent with the agency's responsibilities pursuant to the ADA and applicable regulations. Agencies may exercise discretion in how to provide such services, but the Department declines to afford additional time to comply with an obligation that, in large part, is already mandated by Federal law.

Comment. A group that advocates for people with mental illness noted that the proposed standard was limited to protecting individuals with sensory disabilities but did not include protections for individuals with psychiatric or intellectual disabilities. The commenter recommended that the Department consider clarifying the proposed standard to ensure that administrators understand that they must provide auxiliary aids and services to inmates with a broader range of disabilities.

Response. The final standard clarifies that agencies must take appropriate steps to ensure equal opportunity to participate in and benefit from all aspects of their efforts to prevent, detect, and respond to sexual abuse and sexual harassment for inmates with disabilities, including those with intellectual or psychiatric disabilities.

Hiring and Promotion Decisions (§§ 115.17, 115.117, 115.217, 115.317)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.16, 115.116, 115.216, and 115.316) prohibited the hiring of anyone who has engaged in sexual abuse in an institutional setting; who has been convicted of engaging in sexual activity in the community facilitated by force, the threat of force, or coercion; or who has been civilly or administratively adjudicated to have engaged in such activity. The proposed standard also required agencies to perform a criminal background check on new hires and to run checks on current employees at least every five years or have in place a system for otherwise capturing such information for current employees. The proposed standard required agencies to ask about previous misconduct in any applications, interviews, or self-evaluations, and provided that material omissions would be grounds for termination. The proposed standard also provided that, unless prohibited by law, the agency must provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

Changes in Final Standard

The final standard is largely similar to the proposed standard, but makes several changes. First, the final standard narrows its application to employees who may have contact with inmates, but expands it to include contractors within its scope. Second, the final standard encompasses attempts to engage in improper sexual activity, which is now defined more

expansively as sexual activity that is "facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse." Third, the final standard requires agencies to consider any incidents of sexual harassment in making decisions regarding employees and contractors, and to provide information regarding such incidents to possible future institutional employers unless prohibited by law. Fourth, the final standard clarifies that an agency need only ask applicants about their prior abuse history in applications *or* interviews, rather than in both. Fifth, for juvenile facilities, the final standard requires a check of any child abuse registry maintained by the State or locality in which the employee would work.

Comments and Responses

Comment. Several commenters noted that the prohibition of hiring and promoting anyone with a history of sexual abuse may be too burdensome to implement, and may not be necessary for staff who have no contact with inmates.

Response. The final standard exempts staff who do not have contact with inmates, in order to focus agencies' efforts on the relevant set of employees.

Comment. Several commenters noted that contractors were not included in this standard.

Response. The Department agrees that this standard should address contractors who have contact with inmates and has revised it accordingly.

Comment. Several commenters recommended adding convictions or restraining orders for domestic violence offenses to this list of prior actions that would preclude employment.

Response. The Department agrees that agencies should have policies addressing a history of domestic violence in relation to employment and promotions. However, given the wide range of factual circumstances, varied State and local statutory definitions, and the lack of a clear nexus to sexual abuse in correctional settings, the Department has declined to expand the prohibition as suggested. By contrast, the Department has added to the final standard a requirement that the agency check any child abuse registry maintained by the State or locality in which the employee would work. This added requirement is appropriate for applicants to work in juvenile facilities due to the unique nature of these facilities, and the particular need to safeguard this population.

Comment. One commenter noted that sexual abuse can occur in institutional settings other than corrections or detention facilities, and that the standard should clarify that such abuse is covered.

Response. The Department agrees that sexual abuse that occurs in other custodial situations should be included in this standard. Accordingly, the final standard refers to sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other "institution," as that term is defined in the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq*. Beyond correctional and pretrial detention facilities, CRIPA defines "institution" to include State facilities for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped; residential care or treatment facilities for juveniles; and facilities that provide skilled nursing, intermediate or long-term care, or custodial or residential care. *See* 42 U.S.C. 1997(1).

Comment. Several commenters recommended that the standard's prohibition on hiring include prior incidents of sexual harassment as well as sexual abuse.

Response. Sexual harassment can include a wide range of behaviors, and incidents are often addressed without criminal, civil, or administrative adjudication, making verification

difficult. Therefore, the Department has not revised the standard to include an absolute prohibition on hiring or promotions of persons who have engaged in sexual harassment. The final standard does, however, require that an agency consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with inmates. For similar reasons, the Department has also added a requirement that agencies provide other institutional employers with information on substantiated incidents of sexual harassment—the proposed standards referenced only sexual abuse—unless prohibited by law.

Comment. One commenter requested clarification regarding the scope of the "criminal background check" referenced in the proposed standard.

Response. At a minimum, agencies should access the standardized criminal records databases maintained and widely used by law enforcement agencies. The final standard clarifies this requirement by referring to a "criminal background records check."

Comment. One commenter recommended that the standard require contacting prior institutional employers not only to learn about substantiated allegations of sexual abuse, but also to inquire about resignations during a pending investigation into an allegation of sexual abuse.

Response. The Department agrees with this suggestion, and has incorporated the requirement into the standard.

Comment. Several commenters suggested that criminal background record checks for employees should occur more frequently than once every five years and should be required for promotions as well. Correctional agency commenters, however, expressed concern that increasing criminal background record checks would impose an excessive burden. One commenter suggested that if criminal background record checks are not required to occur more frequently than once every five years, then the final standard should mandate that agencies require staff members to report any incident of sexual abuse that they have committed.

Response. The Department concludes that the proposed standard appropriately balanced the need for criminal background record checks with the concerns regarding the burden of carrying out this requirement. The Department agrees that an affirmative staff reporting requirement would be beneficial, and has revised the standard accordingly.

Upgrades to Facilities and Technologies (§§ 115.18, 115.118, 115.218, 115.318)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.17, 115.117, 115.217, and 115.317) required agencies to take into account how best to combat sexual abuse when designing or expanding facilities and when installing or updating video monitoring systems or other technology.

Changes in Final Rule

The Department is adopting the regulation as proposed.

Comments and Responses

Comment. One commenter suggested that the regulation should affirmatively prohibit an agency from making any changes that would diminish its ability to protect inmates from sexual abuse.

Response. Improving agency performance in combating sexual abuse should be an important goal when making any physical changes or adopting new technology. However, a change may be offset by an agency intending to use other methods to combat sexual abuse (*e.g.*, a physical change made in conjunction with increased staff supervision). The commenter's concern is further addressed in the requirements in §§ 115.13, 115.113, 115.213, and 115.313 to conduct assessments of physical layout and technology as part of an overall review of supervision and monitoring in conjunction with other contributing factors.

Comment. A commenter requested clarification as to the documentation requirements concerning this regulation.

Response. The regulation does not entail a regular separate reporting requirement, but issues concerning physical layouts and technology should be addressed as appropriate in assessments required under §§ 115.13, 115.113, 115.213, 115.313, and §§ 115.88, 115.188, 115.288, 115.388. Agencies may demonstrate compliance through a variety of means—*e.g.*, through planning meeting minutes, statements of work, design specifications, or contracting documents.

Comment. One commenter would have the regulation require agencies to use video-monitoring as a deterrent to sexual abuse and an aid to prosecutions. Another commenter noted that a mandate to use video technology would be cost-prohibitive.

Response. As discussed in greater depth in its responses to comments regarding § 115.13, the Department agrees that video technology can be extremely helpful, yet is also sensitive to the cost of mandating such technology.

Evidence Protocol and Forensic Medical Examinations (§§ 115.21, 115.121, 115.221, 115.321)

Summary of Proposed Rule

The standard contained in the proposed rule required agencies responsible for investigating allegations of sexual abuse to adopt an evidence protocol to ensure all usable physical evidence is preserved for administrative or criminal proceedings, based on the Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents" (SAFE Protocol), or similarly comprehensive and authoritative protocols published after 2011.

The proposed standard expanded the NPREC's recommendation by requiring access to exams not only in cases of penetration but whenever evidentiarily or medically appropriate. For example, if an inmate alleges that she was strangled in the course of a sexual assault that did not result in penetration, a forensic exam might provide evidence to support (or refute) her contention.

The proposed standard took into account the fact that some agencies are not responsible for investigating alleged sexual abuse within their facilities and that those agencies may not be able to dictate the conduct of investigations conducted by outside entities. In such situations, the proposed standard required the agency to inform the investigating entity about the standard's requirements with the hope that the investigating entity will look to the standard as a best-

practices guideline. In addition, the standard applied to any outside State entity or Department of Justice component that investigates such allegations.

In all settings except lockups, the proposed standard required that the agency offer all sexual abuse victims access to a person either inside or outside the facility who can provide support to the victim. Specifically, the proposed standard required that the agency make available to the victim either a victim advocate from a community-based organization that provides services to sexual abuse victims or a "qualified agency staff member," defined as a facility employee who been screened for appropriateness to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

Changes in Final Rule

The final standard instructs facilities to use a Sexual Assault Nurse Examiner (SANE) or Sexual Assault Forensic Examiner (SAFE) where possible to perform the exams. Facilities in areas where there is not a SANE or SAFE available must document their efforts to provide SAFEs or SANEs and then provide other qualified medical professionals.

The final standard specifies the use of a developmentally appropriate protocol where the victim is a prepubescent minor, and clarifies that the protocol used in adult facilities shall be developmentally appropriate for youth, where applicable.

The final standard also recognizes the unique role of rape crisis center advocates in supporting victims throughout the forensic examination and investigatory interviews. Recognizing that many facilities are in rural areas where there may not be a rape crisis center available or where the rape crisis center may lack the resources to assist the facility, the standard requires an agency to document its efforts to secure advocacy services from a rape crisis center. If it fails to obtain such services in spite of reasonable efforts, it may provide either a qualified agency staff member or a qualified community-based organization staff member. Particularly in rural areas, there often are community-based organizations that, while not focused on rape crisis services, may provide similar social services, such as general counseling services or advocacy, counseling, and supportive services to victims of domestic violence. Individuals from these organizations may not have the training and expertise that individuals from a rape crisis center have to serve victims, but in the absence of available rape crisis services, they may still be a useful source of outside support for victims, some of whom may be reluctant to trust agency staff. In the case of community-based organizations or agency staff, the final standard requires that the staff person serving in the support role be screened for appropriateness and receive education concerning sexual assault and forensic examination issues in general. Ideally, the staff person would receive the same training as that required for victim advocates in the State, which is usually a forty-hour training and is offered by many State sexual assault coalitions, usually several times throughout the year and at a reasonable cost. A list of coalitions is available on the website of the Department's Office on Violence Against Women at *http://www.ovw.usdoj.gov/statedomestic.htm*.

To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the final standard requires the agency to request that the investigating entity follow the relevant investigatory requirements set out in the standard.

For lockups, the final standard adds a requirement that if the victim is transported to an outside hospital for forensic examinations and that hospital offers advocacy services, the

detainee shall be allowed to use the services to the extent available, consistent with security needs.

Comments and Responses

Comment. Many advocacy groups commented that the SAFE Protocol is not appropriate for prepubescent minors.

Response. For this reason, the final standard specifies the use of a protocol that is "developmentally appropriate for youth" and based on the National Protocol only "as appropriate."

Comment. Some groups recommended specifying in the standard that the protocol for prepubescent minors must include such specific topics as policies and procedures for mandatory reporting, consent to treatment, parental notification, and scope of confidentiality.

Response. The Department recognizes that these topics are important in responding to sexual abuse in all settings. However, the Department believes that knowledge of these topics, which are often governed by State laws, should be a prerequisite for qualification as an examiner rather than a mandatory part of the protocol. Accordingly, the Department has not made this change.

Comment. Many victim advocacy groups recommended that the Department require the use of SANEs or SAFEs because they are best qualified to provide a proper forensic examination. Some specifically recommended a protocol that includes transport to facilities that perform exams through SANEs or SAFEs or a requirement that an agency document its decision whether to transport victims outside or perform the examination internally.

Response. The final standard recognizes that the state of the art in sexual assault forensic examinations is to utilize a specially trained and certified examiner, such as a SANE or SAFE, to perform the exams. SANEs and SAFEs have specialized training and experience so that they are more sensitive to victim needs, and are highly skilled in the collection of evidence, resulting in more successful prosecutions. Accordingly, the final standard instructs facilities to use SANEs or SAFEs where possible, while recognizing that they may not always be available. The Department does not believe it is necessary to dictate to facilities how to utilize SANEs or SAFEs or to impose additional documentary requirements beyond documenting their efforts to make SANEs or SAFEs available.

Comment. Two other such groups specifically recommended the Sexual Assault Response Team (SART) model for response during the exam as well as the use of SANEs/SAFEs.

Response. As discussed above, the final standard instructs facilities to use SANEs or SAFEs where possible. Although the final standard does not specifically require the SART model for response, § 115.64 requires agencies to follow specific first responder duties to protect the victim and preserve evidence and § 115.65 requires agencies to develop a written institutional plan to coordinate actions taken in response to an incident of sexual abuse among staff first responders, medical and mental health practitioners, investigators, and facility leadership. These standards will help ensure an appropriate response to sexual assault incidents, while preserving agency discretion to coordinate such responses in the manner best suited to the particular situation.

Comment. One inmate commented that the exams should be performed by an outside medical practitioner.

Response. The Department believes that the choice of an internal or outside practitioner is less important than making an effort to obtain the services of a SANE/SAFE and otherwise providing a qualified medical practitioner. Accordingly, the Department does not mandate the use of an outside practitioner.

Comment. One correctional association and one State sheriffs' association expressed concerns about the cost of paying for the exams, particularly for jails that would have to pay an outside entity.

Response. Under the Violence Against Women Act (VAWA) of 1994, as reauthorized in 2006, all States must certify as a condition of certain formula grant funding that victims of sexual assault have access to a forensic medical examination regardless of the decision to cooperate with the criminal justice system and that the State or another governmental entity bears the full out of pocket costs of such exams. *See* 42 U.S.C. 3796gg-4. This certification requirement applies throughout the entire State, including to victims who are incarcerated. All States, pursuant to their receipt of funds through the STOP Violence Against Women formula grant program, are required to cover the costs of the exams, including exams for victims in correctional facilities. The Department encourages States and correctional agencies to work together to craft effective strategies for funding and administering these examinations. A list of the administering agencies for each State for the formula grant funding, which should have information about the payment mechanism, is available on the Department's website at *http://www.ovw.usdoj.gov/stop-contactlist.htm*.

Comment. One State correctional agency noted that it is in compliance with the current SAFE Protocol, but that it is a guideline for suggested practices, rather than a list of requirements.

Response. This is the correct understanding of the SAFE Protocol, which is a tool to be used for developing individual protocols. The Department will be soon issuing a companion to the SAFE Protocol that will specifically assist correctional facilities in adapting the SAFE Protocol to their needs.

Comment. One sheriff's office expressed concern that the use of the SAFE Protocol could be a moving target if agencies were required to comply with updates.

Response. As discussed above, the SAFE Protocol is a guideline for best practices, rather than a list of requirements.

Comment. A number of advocacy organizations and inmates expressed concerns with the use of "qualified staff" to serve in an advocacy role. Concerns included lack of inmate trust in staff, including fear of staff bias against inmates who are lesbian, gay, bisexual, transgender, or intersex (LGBTI); conflict between security and support roles; lack of sufficient time to spend with the victim; and confidentiality. Specific recommendations included using a qualified staff member only when no rape crisis center is available; documenting efforts to enter into agreements with rape crisis centers; screening staff for appropriateness to serve in the role of a support person, including assessing whether the staff member has a nonjudgmental attitude toward sexual assault victims and LGBTI individuals; ensuring round-the-clock coverage; providing the staff member the full forty hours of training that most rape crisis center advocates are required to receive; and providing the staff member opportunities to debrief experts in the victim advocacy field. Some advocacy groups suggested that it was inconsistent for this standard to allow the use of qualified staff members to perform these functions, given that a separate standard required agencies to attempt to enter into memoranda of understanding with community groups to provide confidential emotional support services related to sexual abuse.

These commenters recommended that a "qualified staff member" be allowed to serve as a victim advocate only where the agency has not been able to enter into an agreement with a community-based agency to provide such services.

Some correctional agencies supported the decision to allow for a qualified staff person, but others expressed concerns over the cost of training and supervising such staff.

Response. After considering the wide range of comments, the Department has decided to require agencies to attempt to make available a rape crisis center advocate, which the final standard defines as "an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages."[31] The Department is sensitive to concerns that inmate victims may be reluctant to confide in a "qualified staff member" from the agency due to real or perceived bias and fear of retaliation. In addition, the Department believes that an advocacy organization that is specifically dedicated to providing assistance to victims of sexual abuse is best suited to address victims' needs. A victim will most benefit from a trained, confidential support person, who can focus on the victim and to whom the victim will feel safe talking. However, the Department recognizes that a rape crisis center advocate will not always be available, whether due to geographic distance or simply because the local rape crisis center lacks sufficient resources to serve the facility. If so, the agency has the option of using either staff from other community-based agencies or qualified agency staff, as long as such persons have been screened for appropriateness to serve in this role and the agency has documented its attempts to secure services from a rape crisis center. Other "community-based agencies" may include any entity—such as faith-based groups, non-profit organizations, or community counseling services—that can provide appropriate victim assistance when a rape crisis center is not available. In addition, although the final standard does not mandate a specific number of training hours, it requires that agencies ensure that the victim advocate has received education concerning sexual assault and forensic examination issues in general. The Department recognizes that these precautions will not allay all concerns regarding use of a person who is not a rape crisis center advocate, but anticipates that these safeguards will help ensure that these options are available as a backstop where such an advocate is truly unavailable. In providing two fallback options, the Department entrusts agencies with discretion to utilize whichever option provides the most effective and timely assistance to the victim.

With regard to training, the Department encourages agencies to draw upon outside expertise. Even in the absence of local rape crisis centers, each State has a State Sexual Assault Coalition, which may be a useful resource in developing screening tools and training. Many coalitions will be able to provide the forty-hour advocate training for a reasonable cost to facility

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[31] 42 U.S.C. 14043g(b)(2)(C) specifies the following services:

> (i) 24-hour hotline services providing crisis intervention services and referral;
> (ii) accompaniment and advocacy through medical, criminal justice, and social support systems, including medical facilities, police, and court proceedings;
> (iii) crisis intervention, short-term individual and group support services, and comprehensive service coordination and supervision to assist sexual assault victims and family or household members;
> (iv) information and referral to assist the sexual assault victim and family or household members;
> (v) community-based, linguistically and culturally specific services and support mechanisms, including outreach activities for underserved communities; and
> (vi) the development and distribution of materials on issues related to the services described in clauses (i) through (v).

personnel. A list of coalitions is available on the website of the Department's Office on Violence Against Women at *http://www.ovw.usdoj.gov/statedomestic.htm*.

Comment. One agency commenter construed the draft standard to require a qualified staff person to be employed by the facility where the incident occurred.

Response. The final standard refers to a "qualified agency staff member," making clear that the staff member need not work at the facility where the incident occurred.

Comment. One commenter suggested that the National Resource Center for the Elimination of Prison Rape make available an approved curriculum to assist individuals in becoming qualified staff members.

Response. The Resource Center will do so.

Comment. Some commenters expressed uncertainty regarding the meaning of the phrase "during the investigatory process."

Response. For clarification, this phrase has been changed to "during investigatory interviews."

Comment. One correctional agency expressed concern that the standard would hold it responsible for the actions of an outside individual over whom they have no authority.

Response. This concern is misplaced: The agency is not responsible for the actions of the victim advocate—only for making one available to the victim. The Department recommends that agencies enter into an agreement with a rape crisis center that describes the scope of the services and the terms of their relationship.

Comment. One sheriff's office suggested separating this standard into separate components for criminal and administrative investigation.

Response. The Department has not made this change, because the references to investigations in the standard apply to either criminal or administrative investigations. If the agency is responsible for either type of investigation, it would be required to follow this standard. If it is not responsible for any investigations, and the responsible entity is a State agency or Department component, the State entity or Department component would be responsible. If the agency is not responsible for any type of investigation and the responsible entity is not a State agency or Department component—*i.e.*, another local entity is responsible—then the agency would notify the responsible entity of the requirements of this standard.

Comment. Some correctional agencies expressed concern about the requirements in paragraphs (f) and (g) regarding outside entities that investigate sexual assault cases because the agencies do not control such entities.

Response. This standard does not require agencies to exert control over such outside entities. Paragraph (g) separately regulates State agencies that investigate these crimes; paragraph (f) requires only that correctional agencies that do not conduct such investigations notify the entity that does. Other than the obligation to notify, the standard does not require a local agency to take any affirmative steps to ensure the compliance of the other entities.

Comment. One correctional agency requested clarification regarding the provision that this standard applies to any "State entity" outside of the correctional agency that is responsible for investigating allegations of sexual abuse in institutional settings.

Response. The reference to "State entity" is meant to include any relevant division of the State government, as opposed to local government entities.

Comment. One correctional agency requested clarification regarding the meaning of "these policies" referenced in paragraph (f).

Response. The final standard clarifies that this refers back to the requirements of paragraphs (a) through (e).

Comment. Numerous victim advocacy organizations and organizations advocating for the rights of inmates recommended that the proposed standard be revised to require lockups to provide a victim advocate or qualified staff member. These commenters stated that victims in lockups should have the same access to advocates as victims in the other types of facilities.

Response. The Department declines to amend the proposed standard to mandate this requirement for lockups, largely for reasons stated in the NPRM. First, because lockups are leanly staffed, complying with this requirement could well require the hiring of an additional staff person. Second, there is little evidence of a significant amount of sexual abuse in lockups that would warrant such expenditure. Third, lockup inmates are highly transient, and thus, in some cases, victims of sexual abuse already will have been transferred to a jail before the forensic exam can be conducted.

Because lockups do not have on-site medical services, a victim would be taken to the hospital for exams. In § 115.121(d), the final standard includes language specifying that, after reaching the hospital, such victims must have the same access to advocates as other victims, barring any security risks.

Comment. NPRM Question 18 asked whether the standards adequately provide support for victims of sexual abuse in lockups upon transfer to other facilities, and if not, how the standards should be modified. The majority of correctional organizations were satisfied that the standards addressed the needs of victims in lockups. Additional comments are discussed below.

Comment. One State correctional agency noted that some tribes use lockups for longer-term court orders, which may raise additional concerns.

Response. Except to the extent that tribes contract with State or local facilities to house non-tribal inmates, this rule does not apply to tribal facilities. With regard to confinement facilities in Indian country, BIA, like other Federal agencies whose operations involve confinement facilities, will work with the Attorney General to issue rules or procedures that will satisfy the requirements of PREA.

Comment. Some correctional organizations recommended that the standard specify that the processing of the inmate to a larger facility should be expedited in order to ensure access to the services available at the larger facility.

Response. While the Department certainly supports this goal, such expedited treatment may not always be feasible—and should not be attempted if doing so delays the provision of medical care at hospitals or other offsite treatment centers.

Comment. One State expressed the view that a lockup should be responsible for aiding a detainee who is victimized in the lockup, even if the victim has been subsequently transferred to another facility.

Response. As a practical matter, it is not feasible to require a lockup to provide support to a victim who is confined elsewhere. To the extent the concern is over who pays for the victim's care, it is best left to the individual States and localities to determine whether and how to require a shifting of costs.

Policies to Ensure Referrals of Allegations for Investigations (§§ 115.22, 115.122, 115.222, 115.322)[32]

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.23, 115.123, 115.223, and 115.323) mandated that each agency have in place a policy to ensure that allegations of sexual abuse or sexual harassment are investigated by an agency with the legal authority to conduct criminal investigations. The standard mandated that the policy be published on the agency's website, or otherwise made available, and, if a separate entity is responsible for investigating criminal investigations, that the publication delineate the responsibilities of the agency and the investigating entity. The standard also required that that any State entity or Department of Justice component that conducts such investigations have in place policies governing the conduct of such investigations.

Changes in Final Rule

The final standard contains no substantive changes, although it adds language that makes explicit what was implicit in the proposed standard: "The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment."

Comments and Responses

Comment. Some commenters recommended that the Department restore the NPREC's recommendations that agencies attempt to enter into memoranda of understanding with outside investigative agencies and with prosecutorial agencies.

Response. The Department recognizes that such memoranda of understanding have benefited certain agencies, and encourages agencies to explore the viability of attempting to enter into such agreements. However, due to burden concerns, the Department does not believe that the standard should require agencies to make such efforts. In comments submitted in response to the ANPRM, a number of agency commenters expressed concern that a standard requiring agencies to enter into memoranda, as the NPREC had recommended, would impose significant burdens, especially in State systems where investigations and prosecutions are conducted by numerous different agencies at the county or municipal level. In light of these concerns, the Department declines to revise the standard to mandate attempts to enter into such memoranda.

Comment. A few agencies commented that the requirement to ensure completion of an investigation is duplicative because many agencies already require the investigation of any crime that occurs.

Response. To the extent that an agency has such a policy, the requirement should not require extra effort to implement.

[32] The standard numbered in the proposed rule as §§ 115.22, 115.222, and 115.322, titled "Agreements with outside public entities and community service providers," has been deleted and its contents, as modified, have been moved to §§ 115.51, 115.53, 115.251, 115.253, 115.351, and 115.353.

Comment. Some agency commenters expressed concern that the standard required allegations of sexual harassment to be forwarded on to an outside agency to conduct criminal investigations even if the allegation does not rise to the level of criminal conduct.

Response. This concern is misplaced. As stated in paragraph (b) of the relevant sections, there is no need to refer an investigation to an outside criminal investigation agency if the allegation does not involve potentially criminal behavior.

Comment. One commenter asserted that local agencies must be allowed to promptly address sexual harassment complaints and not send complaints to outside agencies.

Response. As noted above, agencies need not refer an investigation to an outside criminal investigation agency if the allegation does not involve potentially criminal behavior. And even if criminal behavior is alleged, the agency may still take administrative action during the pendency of a criminal investigation.

Comment. Some agency commenters objected to the requirement that agency websites describe the responsibilities of both the confining agency and (where different) the agency investigating allegations of abuse. A small number of such commenters noted that they did not have a website and lacked the resources or support to develop one, and some asked if the policy must be presented in full.

Response. The final standard allows agencies without a website to make the information available by other means, which should facilitate full publication of the policy.

Comment. A few agencies objected that it was outside their agency's authority to publish any information describing the responsibilities of another agency.

Response. The Department does not agree with the assertion that an agency lacks the authority to explain what responsibilities it bears, and what investigatory responsibilities will be carried out by an outside agency.

Comment. A commenter recommended revising the standard from "[t]he agency shall have in place a policy to ensure that allegations of sexual abuse . . . are investigated by an agency with the legal authority to conduct criminal investigations" to "[t]he agency shall have in place a policy to ensure that allegations of sexual abuse . . . are *referred to* an agency with the legal authority to conduct criminal investigations."

Response. The Department has adopted this change, and § 115.22(b) now requires agencies to have a policy to ensure that allegations are "referred for" investigation by an agency with the legal authority to conduct criminal investigations.

Comment. Some agencies expressed concern that they would be responsible for monitoring the compliance of an outside entity's investigation, noting that they did not typically have control over the manner in which law enforcement conducts investigations.

Response. As the amended text makes clear, agencies are responsible only for referring the investigation to the outside entity, not for monitoring the outside entity's investigation.

Comment. One State correctional agency commented that proposed standard § 115.23(a) would be impossible to implement because criminal investigation entities in its State lack sufficient funding to take on the volume of investigations. The commenter asserted that it would be impossible to divide investigations between law enforcement and the correctional agency at the beginning of a case because it is often difficult to predict, at the outset of an investigation, whether evidence of criminal behavior will be obtained. Another agency commenter objected to the requirement that it determine whether behavior was "potentially criminal" because, in its view, such a determination can be made only by prosecutors and courts.

Response. As the amended standard makes clear, a correctional agency's sole responsibility is to refer allegations of potentially criminal behavior to entities with the authority to investigate criminal matters. An agency need not definitively determine whether behavior is actually criminal; it need only refer allegations of *potentially* criminal behavior to the appropriate law enforcement agency. The Department is confident that the ability to determine whether an allegation might involve criminal acts is well within the competence of agency officials.

Comment. A private individual recommended that criminal investigations be conducted by outside agencies, and that inmates have the opportunity to appeal the results of these investigations.

Response. The standard requires agencies to refer investigations regarding potentially criminal behavior involving sexual abuse or sexual harassment to an agency with the legal authority to conduct criminal investigations. State or local law may dictate which entity has the legal authority to conduct such investigations, and it would not be appropriate for the standards to require that an outside jurisdiction conduct such investigations. With regard to criminal investigations, alleged victims of crimes do not ordinarily have the right to appeal the results of criminal investigations, and the Department declines to revise the standard to mandate such a right here.

Comment. A number of advocates noted that delay can result where multiple investigations are not well coordinated, and recommended requiring that facilities establish clear responsibilities when overlapping investigations occur, so that staff members understand their roles and how to collaborate with other agencies to ensure timely resolution of all investigations. Specifically, they recommended adding the following language to the standard: "The agency shall coordinate internal investigations of alleged sexual abuse and sexual harassment with any external investigations by law enforcement, child protective services, or other entities charged with investigating alleged abuse. The agency shall establish an understanding between investigative bodies with overlapping responsibilities so that staff have a clear understanding of their roles in evidence collection, interviewing, taking statements, preserving crime scenes, and other investigative responsibilities that require clarification."

Response. The Department recognizes the importance of coordinating investigations. However, the Department concludes that details of how to coordinate investigative efforts most effectively are best left to the agencies involved, and do not warrant specific reference within the standards.

Comment. One stakeholder suggested removing sexual harassment from the ambit of this standard, while a number of other commentators suggested adding sexual harassment to sections of the proposed standards that referenced only sexual abuse.

Response. Although PREA does not reference sexual harassment, it authorizes the NPREC, and by extension the Attorney General, to propose standards relating to "such other matters as may reasonably be related to the detection, prevention, reduction, and punishment of prison rape." 42 U.S.C. 15606(e)(2)(M). Referencing sexual harassment in certain standards is appropriate to combat what may be a precursor to sexual abuse. Upon reconsideration, the Department has added sexual harassment to the portions of the standard that reference policies of State entities and Department of Justice components, in order that these provisions parallel the remainder of the standard.

Comment. Two agencies expressed uncertainty as to the meaning of "State entity" in the proposed standard, and suggested adding a specific definition.

Response. The reference to "State entity" is meant to refer to any division of the State government, as opposed to local government. The Department does not believe that a definition is necessary.

Employee Training (§§ 115.31, 115.131, 115.231, 115.331)

Summary of Proposed Rule

The standard contained in the proposed rule required that all employees who have contact with inmates receive training concerning sexual abuse in facilities, including specified topics, with refresher training to be provided on an annual basis thereafter. The proposed standard included all training topics proposed by the NPREC, and added requirements that training be provided on how to avoid inappropriate relationships with inmates, that training be tailored to the gender of the inmates at employees' facilities, that training cover effective and professional communication with LGBTI residents, and that training in juvenile facilities be tailored to the juvenile setting.

The proposed standard required that agencies document that employees understand the training they have received, and that all current employees be trained within one year of the effective date of the PREA standards.

In lockups, the proposed standard, consistent with the NPREC's corresponding standard, did not specify training requirements beyond requiring that the agency train all employees and volunteers who may have contact with lockup detainees to be able to fulfill their responsibilities under agency sexual abuse prevention, detection, and response policies and procedures, and to communicate effectively and professionally with all detainees.

Changes in Final Rule

The Department has added language in §§ 115.31(a)(10), 115.131(a)(6), and 115.231(a)(10), and made conforming changes to § 115.331(a)(10), to require relevant staff training in all facilities on laws related to the mandatory reporting of sexual abuse to outside authorities.

The final standard adds sexual harassment to paragraphs (a)(2),(a)(4), (a)(5), and (a)(6), which previously referenced only sexual abuse, and adds "gender nonconforming inmates" to paragraph (a)(9), which previously referenced only LGBTI inmates.

In an effort to reduce the costs associated with providing training, the Department has reduced the required frequency of staff "refresher training" from annual to every two years, while adding a requirement that "refresher information" be provided to staff in the years in which they do not receive training.

Comments and Responses

Comment. Most agency commenters responded positively to the staff training standards, with some stating that that they were already in compliance. A number of agency commenters identified concerns with the cost of development and the frequency of required training. Other commenters expressed concern specifically with regard to the costs associated with providing training on effective communication with LGBTI inmates.

Response. The Department's National Resource Center for the Elimination of Prison Rape intends to develop training tools for use by all types of correctional agencies. Therefore, costs for training development should not be burdensome, and agencies should be able to integrate this training into their training protocols in a cost-effective manner. In response to comments regarding the frequency of refresher training, the Department modified the requirement so that agencies need provide such training only every two years, which will reduce the cost of such training. However, the Department notes that such refresher training is quite valuable: In addition to helping ensure that staff know their responsibilities and agency policies, the periodic repetition of this training will foster the development of an agency and facility culture that prioritizes efforts to combat sexual abuse.

Comment. Advocate and former inmate commenters requested increased and specific training for staff on effective and professional communication with all inmates, and specifically with LGBTI and gender nonconforming inmates.

Response. The final standard requires staff to receive training in effective and professional training with inmates in general, and specifically with respect to LGBTI and gender nonconforming inmates. The Department does not believe that the standard itself need provide greater detail regarding the precise contours of such training. Rather, the Department expects that agencies will learn from each other and will adapt the Resource Center's training materials as needed.

Comment. Some commenters recommended that the standard require training of all employees rather than, as in the proposed standard, only employees who may have contact with inmates.

Response. While agencies are free to train all employees, the Department reaffirms its determination that it would not be appropriate for the standard to require agencies to train employees who have no documentable inmate contact.

Comment. Some commenters requested that training be expanded to include sexual harassment in addition to sexual abuse.

Response. The Department has added sexual harassment to certain training requirements, where particularly relevant. Specifically, the final standard requires training on inmates' right to be free from retaliation for reporting sexual harassment, the dynamics of sexual harassment in confinement, and the common reactions of sexual abuse and sexual harassment victims. Adding sexual harassment to these training categories, which in the proposed standard referenced only sexual abuse, is unlikely to increase costs and may help combat what is often a precursor to sexual abuse.

Comment. An advocate commenter recommended that staff receive training on how histories of sexual abuse and domestic violence affect women. Additionally, one agency commenter suggested that all training should be "gender informed." Various other commenters expressed concern that gender-specific training would be interpreted to mean that training should be tailored solely to the gender of the inmates in the employee's current work assignment, which these commenters stated could be problematic if the employee is later reassigned. Instead, they requested that all staff be trained on the gender-specific needs of both genders with regard to sexual abuse.

Response. The proposed standard already mandated training on these topics, by requiring training on the dynamics of sexual abuse in confinement and the common reactions of sexual abuse victims, and by requiring that training be tailored to the gender of the inmates at the employee's facility. The final standard retains these requirements, and clarifies the last provision

by requiring that staff transferring between gender-specific facilities receive gender-appropriate training. Requiring gender-specific training is unlikely to complicate employee transfers; it should not prove burdensome for an employee transferring from a male facility to a female facility, or vice versa, to undergo a training module related to the needs of the population at the staff member's new facility.

Comment. Some advocate commenters recommended that agencies be required to use the incident review process to make adjustments to training curriculums.

Response. While the Department agrees that incident reviews may be instructive as to training needs, it does not believe it is necessary to mandate such a connection. Instead, the Department leaves the issue to the discretion of agency officials.

Comment. A rape crisis center recommended that agencies partner with local rape crisis centers to provide the most current training materials regarding sexual abuse.

Response. The Department encourages such linkages, but declines to mandate them. Such a mandate could be difficult for certain agencies to comply with, depending upon the availability and interest of local rape crisis centers.

Comment. Several advocacy groups proposed requiring that staff be trained in State mandatory reporting laws.

Response. The Department agrees, and has added a requirement in §§ 115.31(a)(10), 115.131(a), and 115.231(a)(10) that staff be trained in how to comply with relevant laws relating to mandatory reporting of sexual abuse to outside authorities. The Department has modified the analogous requirement under § 115.331(a)(10) for consistency. Jurisdictions must determine their responsibilities under applicable laws and train staff accordingly.

Comment. Many commenters expressed concern that the proposed standard for lockups specified a smaller set of training topics than the proposed standards for other categories of facilities.

Response. The final standard expands the training requirements for lockups, adding requirements that training be provided on the agency's zero-tolerance policy; detainees' right to be free from sexual abuse and sexual harassment; the dynamics of sexual abuse and harassment in confinement settings, including which detainees are most vulnerable in lockup settings; the right of detainees and employees to be free from retaliation for reporting sexual abuse or harassment; how to detect and respond to signs of threatened and actual abuse; and how to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

Comment. Juvenile justice agencies and juvenile advocacy groups recommended that the final standard require staff training specific to age of consent laws and how to distinguish between consensual and abusive sexual contact between residents.

Response. The Department recognizes that juveniles may have sexual development issues that are distinct from adult behaviors. Accordingly, the final standard includes these training topics in § 115.331(a)(7) and (11). Juvenile facilities will need to identify applicable State laws regarding age of consent and train staff accordingly.

Comment. A significant number of commenters requested the inclusion of staff training in adolescent development, behavioral manifestations of trauma, the particular needs and vulnerabilities of juveniles, sexual health, sexual development, healthy staff-youth relationships, and other topics.

Response. Many of these topics are covered in the final standard, which requires training on, among other topics, the dynamics of sexual abuse and sexual harassment in juvenile facilities, the common reactions of juvenile victims of sexual abuse and sexual harassment, how

to detect and respond to signs of threatened and actual sexual abuse and how to distinguish between consensual sexual contact and sexual abuse between residents, and how to avoid inappropriate relationships with residents. While staff may benefit from training on sexual health and sexual development, such training is not essential to combating sexual abuse in juvenile facilities.

Comment. Some commenters recommended that the agencies be required to train all employees within one year, rather than 90 days, upon enactment of the final standards.

Response. The Department believes that one year is a suitable amount of time, in consideration of the wide variety in facility sizes, population, and resources.

Comment. Some commenters criticized the Department for not including the NPREC's recommended supplemental immigration standard ID-2, which would require additional training for employees at facilities that hold immigration detainees. These commenters requested that the final standards require specific training regarding cultural sensitivity and issues unique to immigration detainees.

Response. The Department recognizes that State and local facilities often confine very diverse populations, as do BOP facilities, even if they do not hold immigration detainees. The Department believes that the final standard requires training that is appropriate and responsive to this diversity. By mandating that agencies train their employees, for example, on how to detect and respond to signs of threatened and actual sexual abuse and to communicate effectively and professionally with inmates, the standard implicitly contemplates training to account for any relevant linguistic, ethnic, or cultural differences . Because the requirement is broad and inclusive, the Department concludes that it is not necessary to require additional training regarding cultural sensitivity to particular populations. Instead, the Department leaves the issue to the discretion of agency officials.

Volunteer and Contractor Training (§§ 115.32, 115.132, 115.232, 115.332)

Summary of Proposed Rule

The standard contained in the proposed rule mandated that all volunteers and contractors who have contact with inmates be trained on their responsibilities under the agency's sexual abuse and prevention, detection, and response policies and procedures, in recognition of the fact that contractors and volunteers often interact with inmates on a regular, sometimes daily, basis. The level and type of training provided to volunteers and contractors would be based on the services they provide and level of contact they have with inmates; at the very least, all volunteers and contractors who have contact with inmates would be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report such incidents.

With regard to lockups, the proposed standards mandated, in § 115.132, that attorneys, contractors, and any inmates who work in the lockup must be informed of the agency's zero-tolerance policy regarding sexual abuse. (As noted above, § 115.131 governs training of lockup volunteers.)

Changes in Final Rule

The final standard adds sexual harassment to the scope of training for volunteers and contractors. For lockups, the final standard removes attorneys from the scope of persons to be notified of the agency's zero-tolerance policy. The proposed standard did not require such notification of attorneys in any other type of facility, and upon reconsideration the Department concludes that the purposes of notification are not served by requiring notification of attorneys in lockups.

Comments and Responses

Comment. Commenters supported training for volunteers; some requested greater specificity in the categories of training required.

Response. The Department believes that the training categories included in the final standard are sufficient for agencies to identify training as appropriate for each type of volunteer.

Inmate Education (§§ 115.33, 115.233, 115.333)

Summary of Proposed Rule

The proposed standard required that information about combating sexual abuse be provided to individuals in custody upon intake and that comprehensive education be provided within 30 days of intake in person or through video. In addition, the proposed standard required that agencies ensure that key information is continually and readily available or visible to inmates through posters, inmate handbooks, or other written formats. The proposed standard required annual refresher information, except for community confinement facilities, which were required to provide refresher information only when a resident is transferred to a different facility.

Changes in Final Rule

The final standard replaces the requirement that inmates receive annual refresher information with a requirement that inmates receive additional education upon transfer to a different facility to the extent that the policies and procedures of the inmate's new facility differ from those of the previous facility. In addition, juvenile facilities are now required to provide comprehensive education within 10 days of intake, rather than 30 days, which remains the timeframe for other facilities.

Comments and Responses

Comment. Jail agency commenters were most critical of the requirement for inmate education, indicating that the training of a population with rapid turnover was difficult to deliver and document. Jail agency commenters also criticized the requirement to provide inmate education during the intake process; some noted that jail booking processes were not equivalent to intake in prisons, because jail inmates are more likely to be suffering from increased stress, to be less stable emotionally, and to be under the influence of drugs or alcohol at the time of intake. These commenters also remarked that smaller jails are not equipped to provide inmate education.

Response. The Department recognizes that jails have a unique population and rapid turnover rate. The final standard clarifies that information can be provided at intake through a handout or other written material. The documentation requirement has not been changed, as this can be easily added to an intake/admission checklist or other form of documentation. Indeed, several agency commenters, including jails, stated that they already do so.

Comment. Agency commenters criticized the yearly refresher requirement as unwieldy, citing the difficulty of delivery, documentation, and tracking of this activity.

Response. The Department has removed the annual refresher requirement, substituting language requiring that inmates receive education upon transfer between facilities to the extent that the policies and procedures differ. This revision is better tailored to the goal of ensuring that inmates are always aware of relevant procedures, consistent with the requirement in § 115.33(f) that agencies ensure that key information is continuously and readily available or visible to inmates through posters, inmate handbooks, or other written formats.

Comment. One former inmate stated that inmates do not take video education seriously. The commenter recommended that inmate training be tailored to the type of inmate, including separate trainings for first-time inmates, who may need more information than is currently provided.

Response. The Department encourages agencies to offer in-person education and tailored trainings to the extent that resources allow, but concludes that the standard need not mandate either in order to serve the purpose of educating inmates. The National Resource Center for the Elimination of Prison Rape intends to develop training tools for use by all types of correctional agencies and may be able to provide such tailoring.

Comment. Juvenile justice advocates criticized as too long the 30-day timeframe in § 115.333(b) for providing comprehensive education regarding sexual abuse and harassment in juvenile facilities.

Response. The Department agrees, and has shortened the timeframe for comprehensive education in juvenile facilities to "within 10 days of intake." The Department notes that § 115.333(a) separately requires that residents receive information upon intake explaining the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.

Comment. Some commenters requested inclusion of a lengthy list of additional topics for juveniles, such as basic sexual education, sexual anatomy, sexual orientation, and gender roles.

Response. While juvenile residents may benefit from learning about such topics, these topics appear to be better suited for inclusion in a facility's school curriculum rather than in a set of mandated topics aimed at combating sexual abuse.

Comment. Some advocate commenters requested that the Department mandate "peer-to-peer education" for inmates.

Response. The Department recognizes that some correctional systems, including the California Department of Corrections and Rehabilitation, have instituted pilot peer-to-peer education programs. While the Department encourages further development of such programs, it believes that at this point in time the nationwide imposition of such a requirement would be too resource-intensive.

Comment. Some commenters proposed that the Department include the NPREC's recommended supplemental immigration standard ID-3, which would require that education regarding sexual abuse be culturally appropriate and given to immigration detainees separately from information regarding their immigration cases.

Response. The Department believes that the final standard is sufficient to address concerns that immigration detainees in State, local, and BOP facilities receive meaningful education regarding combating sexual abuse. The final standard requires that education be accessible to all inmates, including those who do not speak English, and that educational materials be continuously and readily available to inmates regardless of their immigration status. The Department believes that facilities need not be required to tailor such education to the culture of the detainees, or deliver it separately from case-related information, in order to ensure that it is meaningful.

Comment. Several commenters suggested that agencies be required to distribute an ICE Detainee Handbook, as recommended by the NPREC in its supplemental immigration standard ID-4.

Response. The final rule does not include this change. The NPREC recommended that the handbook include information regarding the agency's sexual abuse policies, as well as information regarding how to contact community services organizations, consular officials, and DHS officials. These issues are already addressed in this standard as well as in the final standards on Inmate Reporting (§§ 115.51, 115.151, 115.251, 115.351) and Access to Outside Confidential Support Services (§§ 115.53, 115.253, 115.353), which collectively provide appropriate guidance to State, local, and BOP facilities that hold immigration detainees.

Specialized Training: Investigations (§§ 115.34, 115.134, 115.234, 115.334)

Summary of Proposed Rule

The proposed standard required that agencies that conduct their own sexual abuse investigations provide specialized training for their investigators in conducting such investigations in confinement settings, in addition to the general training required for all employees, and that any State entity or Department of Justice component that investigates sexual abuse in confinement settings do the same.

Changes in Final Rule

No changes have been made.

Comments and Responses

Comment. Advocate commenters generally supported revising the standard to require training on distinguishing between abusive and consensual sexual contact. Some advocates identified this training as essential to determining whether what may appear to be consensual activity is in fact coercive, while others expressed an opposite concern: that too many incidents would be considered abusive unless investigators were properly trained.

Response. While not specifically mentioned, this topic should be considered part of the relevant training in conducting sexual abuse investigations in confinement settings as mandated by § 115.34(a). The same paragraph requires that investigators receive the general training provided to all inmates pursuant to § 115.31, which includes training on the dynamics of sexual abuse in confinement. Additionally, with regard to juvenile facilities, § 115.331 specifically

mandates training in how to distinguish between consensual sexual contact and sexual abuse between residents.

The question of whether sexual contact was consensual is a threshold determination in investigating any allegation of sexual abuse between inmates. The investigator is unlikely to have observed direct contact between the victim and alleged abuser, but will need to make this determination based on interviews and the evidence collected. The final standard requires investigators to have specialized training in conducting sexual abuse investigations in confinement settings, including training on techniques for interviewing sexual abuse victims and the evidence required to substantiate a case. Such training will help enable investigators to assess whether sexual contact was abusive. The National Resource Center for the Elimination of Prison Rape will develop training modules that will assist the provision of such specialized training to investigators.

Comment. Advocate commenters also requested a requirement that investigators receive specialized instruction in accessing LEP resources.

Response. Sections 115.16, 115.116, 115.216 and 115.316 address LEP inmates and, as revised, require equal access to all aspects of efforts to prevent, detect, and respond to sexual abuse and sexual harassment for inmates who are LEP. The Department has not specified within individual standards how agencies are to implement this standard, preferring to leave it to agency discretion.

Specialized Training: Medical and Mental Health Care (§§ 115.35, 115.235, 115.335)

Summary of Proposed Rule

The standard contained in the proposed rule required specialized training, and documentation thereof, for all medical staff employed by the agency or facility. The standard exempted lockups, which usually do not employ or contract for medical staff. The proposed standard also required that any agency medical staff who conduct forensic evaluations receive appropriate training.

Changes in Final Rule

The final standard clarifies that medical and mental health care practitioners shall also receive the training mandated for employees under § 115.31 or for contractors and volunteers under § 115.32, depending upon the practitioner's status at the agency. The final standard also adds a requirement that medical staff receive training in how to detect, respond to, and report sexual harassment.

Comments and Responses

Comment. Many comments regarding paragraph (b) of the proposed standard, which required that any agency medical staff who conduct forensic evaluations receive appropriate training, appeared to misunderstand the intent of this requirement. Agency commenters expressed concern about the potential expense of providing advanced forensic training, whereas advocate commenters criticized the notion that agency medical staff would conduct forensic examinations, and seemed to assume that any training provided to them would be inadequate.

Response. Paragraph (b) is meant to direct agencies to obtain appropriate and proper training for in-house medical staff if they decide to perform forensic examinations on-site. This direction is not intended to encourage agencies to create in-house forensic programs, but rather to call attention to the specialized training required to perform adequate examinations. The Department recommends that on-site medical staff conducting forensic examinations meet or exceed the training guidelines found in the Department's National Training Standards for Sexual Assault Medical Forensic Examiners.

Comment. Advocate commenters suggested that medical and mental health care practitioners should receive the same training as all other staff.

Response. The Department agrees, and has added language accordingly.

Comment. One agency commenter stated that specialized training for medical and mental health contractors would be costly and burdensome.

Response. The Department does not find this comment persuasive. Many medical and mental health contractors will already have such training, in which case the agency need not supplement it (beyond the standard training for staff and contractors). To the extent medical and mental health contractors do not have such training, it is essential that they receive it. The National Resource Center for the Elimination of Prison Rape is able to develop training modules that will assist the provision of such training.

Screening for Risk of Sexual Victimization and Abusiveness (§§ 115.41, 115.141 115.241, 115.341)

Summary of Proposed Rule

The standard contained in the proposed rule required that prisons, jails, and community confinement facilities screen inmates during intake and during an initial classification process for risk of being sexually abused by other inmates or being sexually abusive toward other inmates. The standard required that such screening be conducted using an objective screening instrument, taking into account a list of enumerated factors, and mandated that blank copies of the screening instrument be made available to the public upon request,

The proposed standard further required that the screening be conducted within 30 days of intake, and required re-screening when warranted. The standard prohibited discipline of inmates who refuse to answer specific questions during the screening process, and required protection of sensitive inmate information.

With regard to juveniles, the proposed standard did not include a timeframe, except to state that the facility should attempt to ascertain such information during intake and periodically throughout the resident's confinement.

The proposed standard did not include a screening requirement for lockups.

Changes in Final Rule

Rather than require a screening during intake and again during an initial classification process, the final standard requires an initial intake screening to occur ordinarily within 72 hours of intake in prisons, jails, and community confinement facilities, and requires that the facility reassess the inmate's risk of victimization or abusiveness within a set time period, not to exceed 30 days from the inmate's arrival at the facility, based upon any additional, relevant information

received by the facility subsequent to the intake screening. For juvenile facilities, the standard requires the initial screening to occur within 72 hours.

In the list of factors to consider, the requirement to assess whether the inmate is LGBTI has been revised by adding consideration of whether the inmate would be perceived to be so, and whether the inmate is or would be perceived to be "gender nonconforming," which is defined in § 115.5 as "a person whose appearance or manner does not conform to traditional societal gender expectations."

The final standard eliminates the requirement that a facility's screening instrument be made publicly available, and clarifies that the prohibition on disciplining inmates who refuse to answer screening questions applies only to specific sensitive questions required by the standard.

For lockups, the final standard adds an abbreviated risk screening process for facilities that do not hold detainees overnight, and a more extensive risk screening process for detainees in lockups that do hold inmates overnight.

Comments and Responses

Comment. Advocates and correctional agencies alike expressed concern over the requirement in the proposed standard that the initial classification occur within 30 days of the inmate's confinement. Advocates feared that allowing facilities up to 30 days to complete an initial classification would place many inmates at unnecessarily high risk of abuse for an extended period of time. Advocates preferred that information be gathered during the intake process to the extent possible, and expressed the view that much of the required information should be readily available.

Agency commenters expressed the concern slightly differently, noting that a large percentage of jail inmates are released within 30 days, and thus 30 days was too long to allow an inmate to wait until an initial classification. Some jail commenters, including the American Jail Association, also expressed concern about conducting screening at intake, when inmates are often under the influence or under great stress. In addition, these commenters stated that a high percentage of those arrested are released directly from the "booking floor" and suggested that a jail intake screening should look similar to those conducted at lockup facilities until a determination has been made that the arrestee will not be released. The National Sheriffs Association, plus several State sheriffs' associations, commented that the standard in the proposed rule would be difficult to implement in a jail. Several commenters suggested that jail booking operations are more similar to processes in lockup facilities than to prison intake.

Response. Upon reconsideration, including a review of comments submitted in response to NPRM Question 22, which asked whether the final rule should provide greater guidance regarding the required scope of the intake screening, the Department has decided to make significant changes to this standard.

In order to protect all inmates regardless of when they arrive at a facility or where they are located within the facility, at least minimal information must be collected quickly to inform decisions about where the arrestee should be held awaiting the intake procedure and where he or she will be housed initially.

The Department recognizes that some jail inmates spend limited time in the booking area, at a time when certain information needed for appropriate classification may not be immediately available. However, the brevity of the booking process and the possible lack of background information do not obviate the need to identify potentially vulnerable or abusive individuals and

ensure they do not become victims or perpetrators. The final standard addresses jails' concerns by making a clearer distinction between the initial process of collecting risk information upon intake to make provisional decisions about protection and placement, and the subsequent reassessment of the inmate's risk after receiving fuller information.

The final standard uses the term "intake screening" to describe the collecting of information from a person brought to a facility. Facilities should be able to readily obtain the information referenced in the enumerated criteria, and this intake screening can and should occur within 72 hours of the person's arrival at the facility. Facilities are strongly encouraged to conduct the intake screening sooner, to the extent circumstances permit. The ten criteria enumerated in the standard usually will be available through staff observation, direct questioning, or records checks within the 72-hour timeframe.

Inmates who are unable to post a bond or are held subsequent to other warrants or court orders usually remain in custody pending a court appearance. The final standard requires that inmates who remain in custody undergo a more extensive classification process. Within a set period of time, not to exceed 30 days, the facility is to reassess the inmate's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening. This requirement recognizes that information relevant to the risk and classification needs will become available as staff interview, assess, and observe the inmate, and as the facility receives information from other agencies and sources.

These revisions take into account the differences between—and among—prisons and jails, as well as the fact that information relevant to a more comprehensive inmate classification may not be immediately accessible. The Department recognizes that the time limits in this standard imply that some inmates will be screened twice, some once, and some—hopefully very few—not at all. These variations are inevitable when crafting a system with sufficient structure and flexibility to ensure that classifications are both effective and efficient.

Comment. Some jail commenters noted that certain inmates are "frequent flyers" who rotate in and out of the jail on a regular basis. The commenters stated that an inmate screening would be unnecessary for such inmates, given that the jail would already possess a significant amount of information from their prior admissions.

Response. A facility is free to rely on information previously gathered with regard to a returning inmate; however, the facility should ensure that its assessment captures any changes in risk factors that may have occurred subsequent to the facility's prior gathering of information regarding that inmate.

Comment. Some agency commenters recommended that the final standard defer to State or local laws regarding the screening of inmates.

Response. The final standard provides a set of requirements that can be implemented in a manner consistent with State and local laws; to defer entirely to such laws would abdicate the Department's responsibility to ensure that the standard is satisfied only by screening procedures that provide sufficient protection against abuse.

Comment. Some advocacy commenters recommended that the standard add gender nonconformance to the list of risk factors, on the ground that gender nonconformance gives rise to the same risk of victimization as the inmate's internal identification.

Response. The Department agrees, and has made two additions to this standard. First, the final standard includes consideration of whether the inmate is "gender nonconforming," which is defined in § 115.5 as "a person whose appearance or manner does not conform to

traditional societal gender expectations." Second, the standard instructs agencies to take into account not only whether the inmate is LGBTI, but whether the inmate is perceived to be so.

Comment. Some agency commenters feared confusion between § 115.41, which in the proposed rule required that all inmates be screened during the intake process *and* during initial classification, and § 115.81, which required that inmates be asked about prior victimization and abusiveness during intake *or* classification screenings. One jail stated that implementing the standards as written would require the hiring of one additional officer per shift, at an additional annual cost of $840,000. Other agency commenters also expressed budget concerns; some stated that requiring two separate screenings is overly burdensome and that the two standards should be combined.

Response. The Department agrees that, as written, the two standards could cause confusion, and has amended § 115.81 accordingly. Instead of requiring a separate interview to collect information about sexual victimization and abusiveness, the requirements of § 115.81 are triggered only if the screening mandated by § 115.41 indicates that an inmate has experienced prior sexual victimization or perpetrated sexual abuse. This adjustment should eliminate the need for additional staff to conduct separate interviews.

Comment. One agency commenter expressed uncertainty over whether the "PREA screening" should be incorporated into the initial classification instrument, and suggested that such incorporation could be problematic because the agency requires inmates to answer questions during its classification process, in contravention of the proposed standard, which provided that "[i]nmates may not be disciplined for refusing to answer particular questions or for not disclosing complete information." The agency therefore recommended that the "PREA screening" be separate and distinct from the initial classification process.

Response. This comment indicates that the proposed standard was worded too broadly and inadvertently caused confusion. The intent of the no-discipline phrase was not to grant immunity from discipline for failure to cooperate with intake, but rather to ensure that inmates who are fearful of disclosing sensitive information about risk factors are not punished for failing to disclose such information. Accordingly, the final standard revises this language to clarify that it applies only to questions about disabilities, LGBTI status, gender nonconformance, previous sexual victimization, and the inmate's self-perception of vulnerability.

Comment. A small number of State correctional agencies expressed concern that staffing levels may need to increase to manage additional intake interviews.

Response. As noted above, the clarification of the distinction between intake screening and classification should negate the need for additional classification staff.

Comment. A few agency commenters also expressed concerns that making blank copies of their screening instruments available to the public could compromise their operations; one suggested that if the blank forms were made available, inmates could manipulate the information. The commenter recommended that the standard instead require agencies to identify and publicize the general types of information collected.

Response. Upon reconsideration, the Department concludes that it is unnecessary to require agencies to make available blank copies of their screening instruments, and has removed this requirement from the standard.

Comment. A State correctional agency expressed concern that the screening instrument would collect and rely on items that have not been validated as predictors of risk. The commenter recommended that any instrument used to classify inmates be validated and that

funding be provided to develop such an instrument and to revalidate the instrument after three years of use.

Response. To account for the range of agency types and available resources, the Department has chosen not to include a validation requirement. Pre-implementation validation and follow-up validation of risk screening instruments is a commendable practice and, in State systems and other large jurisdictions, comports with generally accepted professional standards. However, some agencies, such as small county jails, may lack sufficient resources to engage in a comprehensive validation study. Because risk factors may have varying degrees of predictive correlation in different jurisdictions, small agencies may need to rely upon reasonable assumptions in developing an objective screening instrument and classification process. Although research into risk factors for institutional sexual victimization and abusiveness remains ongoing, the factors listed in the standard have sufficient bearing upon the risk of victimization or abusiveness to warrant their use when assessing inmates. A validation process, where used, can assist in determining the weight of each identified factor for purposes of informing the housing classification process.

Comment. Some advocates expressed concern that the proposed standard would allow intake and security staff to ask sensitive questions of residents without requiring the appropriate level of training to conduct such interviews. Several commenters urged the Department to adopt the NPREC's recommendation that only medical or mental health providers be allowed to ask such questions, at least in a facility where such providers work on-site. One agency remarked that its screening instrument was developed by a mental health professional, and suggested that an accurate determination of a resident's level of emotional and cognitive development, intellectual capabilities, and self-perception of vulnerability would not be possible without the involvement of such professionals.

Response. The Department remains of the view that appropriately trained intake staff may be competent to ask residents sensitive questions in a professional and effective manner, and thus the final standard leaves to agency discretion how to use staff resources most effectively at intake. The Department expects that the training required in these standards will benefit intake staff who are tasked with such responsibilities.

Comment. One juvenile detention association expressed concern over the lack of distinction between short-term juvenile detention facilities and long-term juvenile correctional facilities. The commenter noted that in detention settings, the facility may have no information about the inmate other than a court order. The commenter warned that asking questions about sexual victimization or abusiveness upon the resident's arrival at the facility could be viewed as intrusive, could produce anxiety, and could "set the wrong tone for the stay in detention."

Response. The Department recognizes that an agency will not always be able to ascertain information about each of the enumerated factors. For example, the resident may choose not to answer certain screening questions, or the facility may not otherwise have access to certain criteria. The standard accounts for these considerations by making clear that the agency shall only "attempt to ascertain" the information. The Department expects that an agency will make necessary and reasonable efforts to obtain information. For example, an agency can work cooperatively with law enforcement and social service agencies to obtain information about the resident.

The Department disagrees with the commenter that it is inappropriate to inquire about the resident's prior sexual victimization or abusiveness. First, this information is important in informing housing and programming decisions with the goal of keeping residents safe from

abuse. Second, as discussed above, appropriately trained staff can make the inquiries in a professional and sensitive manner. Third, the standard makes clear that residents are not required to provide this information and may not be punished for refusing to provide this information.

Comment. The same commenter indicated that unless the screening instrument is developed by a mental health professional, it will be difficult to assess accurately the resident's level of emotional and cognitive development, intellectual capabilities, and the resident's own perception of vulnerability, and that the development of such a screening instrument could be expensive.

Response. The Department encourages agencies to develop their risk screening instrument and process utilizing a multi-disciplinary team, including input from an appropriate mental health professional. Because agencies and facilities typically employ or contract with mental health professionals, the Department does not believe that such input would be cost prohibitive. In addition, the National Resource Center for the Elimination of Prison Rape and other agencies and technical assistance providers can assist with the development of a risk-screening program that may be applicable or adaptable across systems.

Comment. NPRM Question 21 asked whether, given that lockup detention is usually measured in hours, and that lockups often have limited placement options, the final standard should mandate rudimentary screening requirements for lockups. Advocates strongly favored screening requirements, and suggested that that many police lockups already employ basic measures aimed at protecting inmates from sexual abuse. Noting that a full classification process may not be necessary, advocates recommended that lockups be required to collect information similar to what the proposed standard required longer-term facilities to gather, especially if lockups hold multiple inmates in the same cell. Commenters also recommended that lockups conduct a basic screening to ensure that highly vulnerable inmates are not left alone with likely perpetrators even for short periods of time.

Advocates proposed adding a list of known indicators of vulnerability, including mental and physical disability, young age, slight build, nonviolent history, identification as LGBTI, gender nonconforming appearance, and prior victimization. Some also proposed requiring lockups to ask detainees about their own perception of vulnerability and to provide heightened protection to detainees who perceive themselves to be vulnerable.

Few agency commenters responded to the question; those that did mostly supported requiring lockups to administer some type of screening instrument or process. Some remarked that lockups were so small, and lengths of stay so brief, that the standards should not mandate a screening, and that any such standard should allow maximum flexibility.

Response. The Department has added screening requirements for lockup facilities, distinguishing between lockups that hold detainees for a few hours, such as court holding facilities, and lockups where individuals may be held overnight, such as police stations. This revision adds protections for lockup detainees while recognizing that lockups are situated very differently from prisons and jails and often do not conduct intake as that term is traditionally understood.

In lockups that are not used to house detainees overnight, before placing any detainees together in a holding cell, staff must consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused and, when appropriate, must take necessary steps to mitigate any such danger to the detainee.

In lockups that are utilized to house detainees overnight, all detainees must be screened to assess their risk of being sexually abused by other detainees or sexually abusive toward other detainees, and all detainees must be asked about their own perception of vulnerability. The screening process in such lockups shall also consider—to the extent that the information is available—whether the detainee has a mental, physical, or developmental disability; the age of the detainee; the physical build and appearance of the detainee; whether the detainee has previously been incarcerated; and the nature of the detainee's alleged offense and criminal history. In an effort to minimize the number of screening requirements in lockups, given that there may be no privacy to ask individuals screening questions, the standard does not explicitly include identification as LGBTI, gender nonconforming appearance, or prior victimization in its list of known indicators of vulnerability. However, these indicators may be ascertainable through other listed factors, such as physical build and appearance, and the detainee's own perception of risk.

Use of Screening Information (§§ 115.42, 115.242, 115.342)

Summary of Proposed Rule

The standard contained in the proposed rule required that agencies use the risk screening process to inform housing, bed, work, education, and program assignments with the goal of keeping inmates determined to be at risk of sexual victimization separate from inmates at risk of being sexually abusive. The proposed standard provided that agencies shall make individualized determinations about how to ensure the safety of each inmate, and required that, in placing transgender or intersex inmates, the agency consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems. The proposed standard also provided that transgender and intersex inmate placement be reassessed at least twice each year, and that such inmates' own views as to their safety be given serious consideration.

For community confinement facilities, the proposed standard generally mirrored the standard for prisons and jails, but omitted the requirement that transgender and intersex residents be reassessed twice per year.

For juvenile facilities, the proposed standard required the use of the risk screening process and additional information in order to determine appropriate placement to keep the residents safe from sexual abuse. The proposed standard also limited the use of isolation for purposes of protecting residents, and provided that LGBTI residents may not be placed in a particular housing location based solely on such identification.

The standard in the proposed rule did not apply to lockups.

Changes in Final Rule

The final standard makes two changes applicable to prisons, jails, and community confinement facilities. First, transgender and intersex inmates must be given the opportunity to shower separately from other inmates. Second, the final standard prohibits placing LGBTI inmates in a dedicated unit or facility solely on the basis of LGBTI identification unless such placement is pursuant to a legal requirement for the purpose of protecting such inmates.

The final standard makes multiple changes for juvenile facilities. First, to avoid duplication and confusion, the final standard for juvenile facilities no longer enumerates placement factors but requires the facility to use the types of information obtained pursuant to § 115.341(c) to make housing, bed, program, education, and work assignments for residents, with the goal of keeping all residents safe and free from sexual abuse. Second, the final standard contains added protections for residents who are isolated for purposes of protection. During any period of isolation, agencies shall not deny residents daily large-muscle exercise or any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician, and shall have access to other programs and work opportunities to the extent possible. Third, agencies may not consider a resident's LGBTI identification as a predictor of likelihood of being sexually abusive. Fourth, the final standard replaces the requirement that agencies make individualized determinations about the placement of transgender and intersex residents with language identical to corresponding language in the standard for adult facilities: That agencies determine, on a case-by-case basis, housing and programming assignments for transgender and intersex residents for purposes of ensuring the residents' health and safety, as well as any management or security concerns, that such placement decisions shall be reassessed at least twice per year, and that the views of transgender and intersex residents regarding their own safety be given serious consideration. Finally, if a resident is isolated for protective purposes, the agency shall be required to document its justification, and review the continued need for isolation at least every 30 days.

Comments and Responses

Comment. Some agency commenters requested definitions of "transgender" and "intersex."

Response. As noted above, the final rule includes definitions of these terms in § 115.5.

Comment. Many advocacy commenters urged the inclusion of "gender nonconforming" and "perceived to be" LGBTI as screening factors.

Response. As discussed above, the Department has made this change.

Comment. Many advocate commenters opposed the omission from the proposed standard of the NPREC's recommended ban on assigning inmates to particular units based solely on their sexual orientation or gender identity. Commenters noted that it is impossible to state categorically that such units are safer and expressed concern that occupants might not be afforded programs and services equal to those of other inmates. Commenters also worried that such units could be used to punish inmates for their sexual orientation or gender identity.

Several commenters remarked that these designated units can be successful only in certain circumstances. Some asserted that the unit operated by the Los Angeles County Jail for gay male and transgender inmates, specifically mentioned in the discussion of this standard in the proposed rule, is the exception rather the norm. These commenters stated that inmates in this unit retain access to substantial programming—often more than what is available in the general population—and that the jail has a sufficiently large gay male and transgender population to fill multiple wings, thus allowing these inmates to be segregated without experiencing isolation. The commenters suggested that successfully maintaining a unit based solely on sexual orientation or gender identity requires a demonstrated need, sufficient facility size and LGBTI

inmate population, a basic level of cultural competence among staff, and an institutional commitment to safety and fairness toward these populations.

Many commenters proposed language that would allow such units only under narrowly defined circumstances, such as where placement is based on a finding made by a judge or outside expert or is pursuant to a consent decree, legal settlement, or legal judgment—an exception apparently designed to encompass the Los Angeles County Jail.

Other commenters supported including the NPREC's recommendation that the standard prohibit such units entirely; one law professor disputed the notion that the Los Angeles County Jail was effective at protecting inmates or otherwise worthy of emulation.

Response. Upon reconsideration, the Department concludes that agencies should retain the option of using dedicated facilities, units, or wings to house LGBTI inmates. However, the Department agrees that to do so carries its own risk, and that it should be undertaken only in limited contexts. Because it would not be feasible for the Department to anticipate every case or circumstance that might warrant such placements, the Department has chosen to adopt a final standard that allows use of this practice only where the dedicated facility, unit, or wing is established in connection with a consent decree, legal settlement, or legal judgment.

Comment. By contrast, the proposed standard did not allow such placements in juvenile facilities. One juvenile agency expressed concern about this prohibition, asserting that it would present operational challenges and might put residents at risk.

Response. The Department respectfully disagrees with this assessment, which was not shared by advocacy groups. Despite good intentions, the practice of using dedicated facilities, units, or wings to house LGBTI inmates may result in youth being unable to access the same privileges and programs as others in general population housing, effectively punishing youth for their LGBTI status. The Department adheres to the assessment expressed in the NPRM: "Given the small size of the typical juvenile facility, it is unlikely that a facility would house a large enough population of such residents so as to enable a fully functioning separate unit, as in the Los Angeles County Jail. Accordingly, the Department believes that the benefit of housing such residents separately is likely outweighed by the potential for such segregation to be perceived as punishment or as akin to isolation." 76 FR 6258. While some LGBTI residents may require protective measures, such an assessment should occur only after a holistic assessment of the risk confronting the specific inmate, and should not be implemented automatically as a matter of facility policy.

Comment. Some advocates recommended that the final standard ensure that transgender and intersex inmates have an opportunity to shower separately, owing to the unique risks that such inmates face in facilities.

Response. The final standard adds such a requirement.

Comment. Some commenters suggested several additional safeguards to protect against excessive use of isolation, including reviewing the status of a youth in isolation every 24 hours, limiting use of isolation to no more than 72 hours, and ensuring that isolated residents are provided access to programs and services.

Response. The Department agrees that long periods of isolation have negative and, at times, dangerous consequences for confined youth. However, in limited situations, protective isolation longer than 72 hours may be necessary to keep youth safe from sexual abuse, especially in small facilities with limited housing options and programming space. While not imposing a specific limit on the duration of any such protective isolation, the final standard contains a number of provisions limiting the use of isolation and providing enhanced protections for youth

when they are isolated. First, the final standard prohibits the use of protective isolation except as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative housing option can be arranged. Second, for any such placement, agencies must document the need for isolation, and reassess its use at least every 30 days. In addition to requiring the agency to justify the use of isolation and to periodically reassess it, this provision will provide a mechanism for the PREA auditor to examine whether the use of isolation is being used appropriately. Third, the final standard provides that any youth in protective isolation must receive daily large-muscle exercise, any legally required education and special education programming and services, and daily visits from medical care or mental health care clinicians. In addition, agencies must provide isolated youth with access to other programming to the extent possible.

Comment. One State juvenile justice agency expressed strong concerns about proposed standard § 115.342(b), arguing that the specification of information that agencies are required to consider exceeds PREA's scope and improperly dictates agency placement policy. The comment recommended that the standard provide only that the risk of abuse upon or by a resident be considered when making placement decisions.

Response. The risk-screening factors enumerated in § 115.341 (and incorporated by reference into § 115.342) may yield information that is predictive of a resident's risk of sexual victimization or sexual abusiveness. Requiring consideration of such factors in no way dictates agency placement policy; the standard does not require that a resident meeting specific screening criteria be housed in a specific placement. Nor does the standard mandate the weight to be assigned to any of the enumerated factors in making placement or classification decisions. Rather, the standard provides that the agency shall attempt to ascertain specific information about the resident, and that the agency develop an objective, rather than subjective, process for using that information with the goal of keeping residents safe from sexual abuse.

Comment. Juvenile justice advocates requested that the final standards clarify that being LGBTI is a risk factor for being victimized by sexual abuse, not for committing sexual abuse.

Response. The Department is not aware of any evidence to suggest that LGBTI identification or status is a risk factor for perpetrating sexual abuse. For this reason, and to prevent negative stereotypes of such juveniles from affecting placement decisions, the final standard specifically prohibits considering LGBTI identification or status as a predictor of sexual abusiveness in juvenile facilities.

Comment. Some advocates criticized the Department for failing to adopt NPREC supplemental immigration standard ID-6, which would require immigration detainees to be housed separately from other inmates.

Response. The final standards addressing screening (§§ 115.41, 115.141, 115.241, 115.341) require that agencies develop a screening instrument that measures risk of sexual victimization according to numerous criteria, including whether the inmate is detained solely for civil immigration purposes. The Department believes that the requirement that agencies use that screening information to make individualized determinations regarding housing, bed, work, education, and program assignments is sufficient to protect immigration detainees in State, local, and BOP facilities without a specific requirement that they be housed separately in every instance, particularly when weighed against the substantial burden that such a mandate would impose.

Protective Custody (§§ 115.43, 115.68, 115.368)

Standards in Proposed Rule

Section 115.43 in the proposed rule provided that inmates at high risk of sexual victimization, or who are alleged to have suffered sexual abuse, may be placed in involuntary segregated housing only after an assessment of all available alternatives has been made—and only until an alternative housing arrangement can be implemented. The proposed standard also specifically defined the assessment process, specified required documentation, and set a presumptive timeframe for placement in protective custody. In addition, the proposed standard provided that, to the extent possible, involuntary protective custody should not limit access to programming.

Section 115.66 in the proposed rule (now renumbered as § 115.68) provided that any use of segregated housing to protect an inmate who is alleged to have suffered sexual abuse shall be subject to the requirements of § 115.43.

Changes in Final Rule

The standard contained in the final rule clarifies that inmates shall not be placed involuntarily in protective custody, unless an assessment of available alternatives has been made, and a determination has been made that no other alternative means of separating the inmate from the abuser exist. The final standard adopts a 24-hour timeframe to make this initial assessment.

The final standard also adds a requirement that if the facility restricts access to programs, privileges, education, or work opportunities, it must document the opportunities that have been limited, the duration of the limitation, and the reasons for such limitations.

Finally, the final standard shortens the presumptive time limit for involuntary protective custody from 90 days to 30 days, and shortens the timeframe for periodic reviews for the need for continued separation from 90 days to 30 days.

Comments and Responses

Comment. One advocacy group commented that, although the proposed standard required programming to be provided to inmates in protective custody to the extent possible, such programming could still be routinely denied. The commenter suggested that agencies be required to document the programming opportunities that have been limited, the duration of the limitation, and the reasons for the limitation.

Response. The Department agrees that a documentation requirement will assist in auditing this standard, and would provide agencies a formal mechanism to use in making programming assessments, and has amended the standard accordingly.

Comment. Several commenters criticized as too lengthy the 90-day presumptive time limit for productive custody, as well as the requirement for periodic reviews every 90 days. Commenters suggested changing both to 30 days.

Response. Upon reconsideration, the Department concludes that 30 days should ordinarily suffice to arrange for alternate means of separation from likely abusers. In addition, the final standard requires that a review be provided at least every 30 days thereafter, in order to ensure that the situation is being actively monitored should the initial placement in protective custody be extended.

Comment. A number of inmate, advocate, and individual commenters indicated that involuntary protective custody was, in effect, punitive, because inmates subject to this type of classification are sometimes isolated or otherwise denied essential programming and services. These commenters suggested that the conditions of protective custody housing may deter the reporting of sexual abuse or the threat of sexual abuse.

Response. In certain circumstances, involuntary protective custody may be necessary to keep inmates safe from sexual abuse. However, the final standard makes clear that this type of housing should only be used when, pursuant to an administrative assessment, no better alternative is available. The standard also requires that any denial of programming to inmates in protective custody be documented and justified.

Comment. A number of advocates commented that an inmate's gender identity should not be the sole basis for placement of the inmate in involuntary protective custody.

Response. Sections 115.42, 115.242, and 115.342 provide that housing placement determinations for LGBTI inmates shall be made on a "case-by-case" basis. This would preclude automatic placement in involuntary protective custody on the basis of gender identity.

Inmate Reporting (§§ 115.51, 115.151, 115.251, 115.351)

Summary of Proposed Rule

In the proposed rule, §§ 115.22(a), 115.222(a), and 115.322(a) stated that agencies should maintain or attempt to enter into memoranda of understanding or other agreements with an outside public entity or office that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials pursuant to §§ 115.51, 115.251, or 115.351 unless the agency enables inmates to make such reports to an internal entity that is operationally independent from the agency's chain of command, such as an inspector general or ombudsperson who reports directly to the agency head. The proposed standards also required agencies to maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide inmates with confidential emotional support services related to sexual abuse. Finally, agencies were required to maintain copies of agreements or documentation showing attempts to enter into agreements.

Sections 115.51, 115.151, 115.251, and 115.351 required agencies to enable inmates to privately report sexual abuse and sexual harassment and related misconduct. Specifically, this standard required that agencies provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to sexual abuse. The proposed standard also required that agencies make their 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.

The proposed standard also mandated that agencies establish a method for staff to privately report sexual abuse and sexual harassment of inmates.

Finally, the proposed standard required that juvenile residents be provided access to tools necessary to make written reports, whether writing implements or computerized reporting.

Changes in Final Rule

The final standard requires prisons, jails, and juvenile facilities to provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials. By contrast, the proposed standard required only that facilities make their "best efforts" to provide such access, and did not allow a private entity to serve this function. By expanding the outside reporting option to include private entities, the final standard allows an agency, in its discretion, to utilize a private rape crisis center or similar community support service for these purposes, as appropriate.

The final standard also specifies that the outside entity must allow the victim to remain anonymous upon request.

Consistent with these revisions, the final standard no longer requires agencies to maintain or attempt to enter into agreements with an outside public entity that is able to receive and immediately forward inmate reports of sexual abuse. Such a requirement is no longer necessary now that agencies are required to provide reporting access to an outside entity, which may be public or private.

In lockups and community confinement facilities, the "best efforts" requirement of the proposed standard has been replaced with a requirement that agencies inform detainees or residents of at least one way to report abuse or harassment to a public or private entity or office that is not part of the agency.

The standard no longer contemplates the use of an internal entity that is operationally independent from the agency's chain of command. If the agency designates a government office to accept reports for the purposes of this standard, it must be outside of and completely independent from the correctional agency.

Finally, for inmates detained solely for civil immigration purposes in jails, prisons, and juvenile facilities operated by States, localities, and BOP, the final standard requires that the facility also provide information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security.

Comments and Responses

Comment. Section 115.22 appeared to engender some confusion because it covered agreements for the purpose of outside reporting as well as agreements for the purpose of providing support services for victims. In addition, commenters were unclear as to how § 115.22 interacted with §§ 115.51 and 115.53, given the topical overlap.

Response. For clarity, the subject matter covered by proposed standard § 115.22 has been moved into §§ 115.51 and 115.53, as appropriate.

Comment. The proposed standards evoked a strong response from current and former inmates, who expressed the view that an outside reporting mechanism is essential to encourage reporting incidents of sexual abuse, because inmates often do not feel comfortable reporting to staff and may fear retaliation, especially when the abuser is a staff member. Thus, inmates may be reluctant to trust any internal entity, even if it is "operationally independent" from the agency's chain of command. Various advocacy groups and rape crisis centers, as well as a United States Senator, agreed with this reasoning. Many stated that some inmates are unlikely to

understand or trust the distinction between an operationally independent entity, including an internal inspector general's office, and other agency offices. These commenters expressed the view that a reporting entity that answers to the same agency head could be perceived as part of the system that failed to protect the inmate in the first place. Many inmates commented that reports to allegedly independent entities, such as an ombudsperson, were routinely ignored.

Some correctional agencies argued that requiring an outside reporting mechanism would constitute an unfunded mandate. Commenters stated that local support services may not be available to county jails in rural areas, and that staffing a hotline can be expensive. They also asserted that BJS data demonstrate that sexual abuse is less likely in rural jails, and that they would be paying for a service to respond to an event that rarely occurs. One correctional agency stated that an internal hotline to a facility investigator should be sufficient given improvements in staff training and increased focus on combating sexual abuse within facilities.

Response. The final standard requires all prisons, jails, and juvenile facilities to provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency. The standard no longer allows compliance by relying on an internal entity that is operationally independent from the agency's chain of command. However, an agency may designate a government office that is outside of and completely independent from the correctional agency. For example, if a State has an inspector general's office that sits outside of, and does not report to, the State correctional agency, the agency may satisfy this standard by designating that office as the external reporting entity. An inspector general's office within the agency would not qualify under these standards, even if it is "operationally independent" from the facility administration. While this change may increase the burden on some agencies, inmates must feel comfortable reporting any incident of sexual abuse and may be loath to do so if their only option is reporting to an entity they view as part of the agency in which they suffered the abuse.

The Department does not believe that this will impose a significant cost burden. The final standard does not require a hotline or a formal agreement between the facility and any specific outside entity. Rather, the agency need only establish an avenue for inmates to make contact with an outside entity—whether public or private—that can receive and forward reports of sexual abuse or sexual harassment to the agency. For example, an agency may choose to provide access to an external reporting hotline, or may provide a method for inmates to send confidential correspondence to an external entity. The standard thus provides flexibility for a facility to choose or develop the most appropriate external reporting mechanism to fit its needs.

To be sure, the Department recognizes the value of internal hotlines and encourages their use. Indeed, the final standards require multiple internal ways for inmates to privately report sexual abuse and sexual harassment. However, the Department agrees with advocates and inmates who argued that an external reporting mechanism is necessary to address situations in which victims do not feel safe reporting to anyone inside the correctional system.

The standard requires lockups and community confinement facilities to inform detainees or residents of at least one way to report abuse or harassment to a public or private entity or office that is not part of the agency, but does not require them affirmatively to provide detainees and residents with access, as is the case for prisons, jails, and juvenile facilities. Unlike adult prisons and jails and juvenile facilities, lockups typically hold inmates briefly before release or transfer to a jail, and community confinement facility residents usually are able to leave the facility during the day for various reasons and generally have greater access to community

resources. Hence, the populations of the latter facilities will generally have greater access to make contact outside these of these facilities.

Comment. Many advocates, as well as former and current inmates, commented that the standards must allow confidential reporting because some inmates may be too afraid of retaliation to report otherwise, even when reporting to an outside entity. One inmate recommended that allegations be forwarded to the facility only with the victim's consent. Many rape crisis centers and other community support groups commented that confidential reporting is important because, in their experience, victims are much more likely to report sexual abuse and cooperate with the investigation when they feel safe in doing so.

A number of inmates and advocates suggested that some victims would not report an incident if the facility would learn of the report, even if the victim's identity was not revealed, and therefore requested complete confidentiality as an option. In contrast, many correctional agencies expressed concern that such an option would prevent them from learning about problems within their facilities and would preclude thorough investigations into allegations, in tension with the goals of a zero-tolerance policy.

One commenter recommended that, in case agency officials are not responsive, the outside entity should have the option to take information to outside law enforcement if deemed in the victim's best interest and should be allowed not to disclose that information to the agency.

Response. The Department recognizes the potential tension between encouraging inmates to report sexual abuse and ensuring that facilities have sufficient information to investigate allegations and address safety concerns. The final standard includes language requiring the outside reporting entity to allow the victim to remain anonymous upon request and retains the language from the proposed standard that requires facility staff to accept anonymous reports. Allowing anonymity protects the inmate's identity, but still provides the facility with basic information about the allegation. Ideally, a facility would receive complete information about every alleged incident of sexual abuse, including a first-hand report from the victim. But an anonymous report about an incident is preferable to no report at all. As many commenters noted, reports made anonymously are otherwise unlikely to be reported; thus, providing this avenue should actually increase the amount of information available to the facility. In addition, even if such a report may not allow for a full investigation into the incident, providing information about an incident generally, without the identity of the victim, will alert staff to potential concerns and may help reveal unsafe areas within the facility.

With regard to reporting to law enforcement, nothing precludes an outside reporting entity from reporting allegations of abuse to the relevant law enforcement authorities or other entities, as appropriate. The outside entity should also have the discretion to report specific incidents at different administrative levels within a facility. If, for example, the facility investigator is the subject of an inmate report, the outside entity should forward that report to the facility superintendent or other agency administrator, instead of to the investigator.

Comment. Some advocacy groups requested that the standards mandate entering into a memorandum of understanding with an outside agency to serve as a third-party reporting entity, and allow reliance on an independent, internal reporting option only if documented attempts to enter into such agreements are unsuccessful. On the other hand, many correctional agencies opposed any requirement for a formal agreement with an outside entity as unnecessary, expensive, and burdensome. Some facilities noted that finding a third party to provide such a service might be difficult in rural areas.

Response. Many facilities would benefit from a formal agreement or memorandum of understanding to ensure that inmates can effectively report allegations of sexual abuse and sexual harassment. Indeed, some correctional agencies noted that they already have in place these types of agreements. Other facilities are able to provide outside services without such an agreement, whether through a private entity or through a government office that is external to and independent from the correctional agency. Given the varying needs and abilities of different facilities, the Department has opted to grant agencies discretion to provide the requisite external reporting mechanism in the most appropriate manner for the specific facility or incident at issue.

Comment. Some correctional agencies expressed concern that the proposed standard would conflict with applicable State law. For example, the Florida Department of Corrections stated that, under Florida law, it maintains authority over investigations within the prison system, and that requiring inmates to report allegations to an entity that has no jurisdiction would conflict with a State statute.

Response. The standard does not require the external reporting entity to investigate the allegations of sexual abuse. Rather, the external entity should receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials, keeping the name of the inmate anonymous upon request.

Comment. A juvenile justice agency and the Council of Juvenile Correctional Administrators requested that § 115.351(e) be revised to require agencies to provide a method for staff to "officially" report sexual abuse and sexual harassment of residents, instead of allowing for staff to report "privately." These commenters stated that because staff are legally obliged to report sexual abuse and harassment of youth, there should be no provision for "private" reporting.

Response. The Department does not believe that private reporting conflicts with the obligation to comply with mandatory reporting laws. In requiring agencies to provide a method for staff to report sexual abuse and sexual harassment "privately," the Department means that agencies must enable staff to report abuse or harassment directly to an investigator, administrator, or other agency entity without the knowledge of the staff member's direct colleagues or immediate supervisor. A private reporting mechanism may provide a level of comfort to staff who are concerned about retaliation, especially where the staff member reports misconduct committed by a colleague. As some advocates noted, a private reporting option, partnered with zero tolerance for sexual abuse, may encourage staff who would otherwise remain silent, despite mandatory reporting laws, to report sexual abuse and sexual harassment.

Comment. In the NPRM, the Department noted that the Department of Defense provides a "restricted reporting" option that allows service members to confidentially disclose the details of a sexual assault to specified employees or contractors and receive medical treatment and counseling without triggering the official investigative process and, subject to certain exceptions, without requiring the notification of command officials or law enforcement. *See* Department of Defense Directive 6495.01, Enclosure Three; Department of Defense Instruction 6495.02. NPRM Question 23 asked whether the final standards should mandate that agencies provide inmates with the option of making a similarly restricted report to an outside public entity, and to what extent, if any, such an option would conflict with applicable State or local law.

Correctional agencies that responded to this question were generally opposed to a reporting option that would prohibit an official investigation. Agencies stressed the need to adequately investigate any potential abuse in order to ensure inmate safety and compliance with other standards. Some stated that a restricted reporting option would conflict with the goals of a

zero-tolerance policy; others suggested it could conflict with State laws requiring mandatory reporting. One commented that a restricted reporting option would be contrary to the intent of the Prison Litigation Reform Act, which seeks to encourage issues to be brought to the attention of prison administrators before litigation occurs. Advocacy groups generally did not focus on Question 23, but many advocate comments recommended that the standards return to the NPREC's proposed language that allowed inmates to request confidentiality or permit confidential reports "to the extent allowable by law." One law student stated that inmates should be entitled to separate their need for medical care from the investigation process, particularly if the inmate believes an investigation is unlikely to positively affect the situation or may lead to danger.

Response. Restricted reporting represents a tradeoff between the victim's interest in privacy and preventing retaliation and, on the other hand, the institution's interest in identifying the abuser for purposes of discipline and preventing further abuse. In some cases, a victim will be too fearful to report if he or she knows that the information will be disseminated beyond medical staff. The Department recognizes that, in the absence of a restricted reporting policy, some victims will not seek needed care.

The cost of a restricted reporting policy, however, is that the institution cannot take steps to prevent the recurrence of the abuse. The dynamics of sexual abuse in correctional facilities make it quite likely that an abuser will subsequently abuse other inmates. An agency that learns of such abuse is far better equipped to prevent future incidents.

Given the competing costs and benefits of restricted reporting policies, the Department chooses not to include in the standards a requirement to adopt a restricted reporting option. Instead, provisions in other standards are designed to mitigate the risks that inmates may be too fearful to come forward. The final standard requires each prison, jail, and juvenile facility to provide multiple ways for inmates to report sexual abuse and sexual harassment, including at least one external reporting mechanism. Anonymous reports must be accepted, but all reports will be forwarded to the facility for investigation. These requirements will enable some inmates who are reluctant to report to facility authorities some ability to find support, and may lead them to reconsider their initial decision not to come forward. In addition, this system should ensure that the facility is made aware of allegations of abuse, while protecting the identities of those inmates who would not come forward if they were not permitted to report anonymously. Finally, §§ 115.82 and 115.83 provide that facilities may not condition any medical or mental health care on the victim's cooperation with any ensuing investigation. A victim who needs care but is reluctant to name the perpetrator of the abuse—or who may not even admit that the injury occurred as result of a sexual assault—must be offered the same level of care as any other inmate presenting similar injuries. Given these requirements, the Department has determined it is not necessary to include a restricted reporting option.

Comment. Some advocacy organizations recommended that the Department include NPREC supplemental immigration standard ID-7, which would require agencies to provide contact information for relevant consular and DHS officials to immigration detainees. These commenters noted that, for these detainees, the DHS Office of the Inspector General and the Office for Civil Rights and Civil Liberties, as well as consular offices, serve the ombudsperson function that is contemplated in the final standard and thus should be made available to immigration detainees who complain of sexual abuse.

Response. The final standard requires that individuals detained solely for civil immigration purposes in State, local, or BOP facilities be provided with information on how to contact relevant consular officials as well as relevant DHS officials.

Exhaustion of Administrative Remedies (§§ 115.52, 115.252, 115.352)

Summary of Proposed Rule

Paragraph (a) of the standard contained in the proposed rule governed the amount of time allotted inmates to file a request for administrative remedies (typically known as grievances) following an incident of sexual abuse. The proposed standard set this time at 20 days, with an additional 90 days available if an inmate provides documentation, such as from a medical or mental health provider or counselor, that filing sooner would have been impractical due to trauma, removal from the facility, or other reasons.

Paragraph (b) of the proposed standard governed the amount of time that agencies have to resolve a grievance alleging sexual abuse before it is deemed to be exhausted, in order to ensure that the agency is allotted a reasonable amount of time to investigate the allegation, after which the inmate may seek judicial redress. Paragraph (b) required that agencies take no more than 90 days to resolve grievances alleging sexual abuse, unless additional time is needed, in which case the agency may extend up to 70 additional days. The proposed standard did not count time consumed by inmates in making appeals against these time limits.

Paragraph (c) required that agencies treat third-party notifications of alleged sexual abuse as a grievance or request for informal resolution submitted on behalf of the alleged inmate victim for purposes of initiating the agency administrative remedy process. The proposed standard required reports of sexual abuse to be channeled into the normal grievance system (including requests for informal resolution where required) unless the alleged victim requested otherwise. This requirement exempted reports from other inmates in order to reduce the likelihood that inmates would attempt to manipulate staff or other inmates by making false allegations. The proposed standard permitted agencies to require alleged victims to perform properly all subsequent steps in the grievance process, unless the alleged victim of sexual abuse is a juvenile, in which case a parent or guardian could continue to file appeals on the juvenile's behalf unless the juvenile does not consent.

Paragraph (d) governed procedures for dealing with emergency claims alleging imminent sexual abuse. The proposed standard required agencies to establish emergency grievance procedures resulting in a prompt response—unless the agency determined that no emergency exists, in which case the grievance could be processed normally or returned to the inmate, as long as the agency provides a written explanation of why the grievance does not qualify as an emergency. To deter abuse, the proposed standard provided that an agency could discipline an inmate for intentionally filing an emergency grievance where no emergency exists.

Changes in Final Rule

The final standard includes numerous changes.

First, the final standard requires that agencies not impose any deadline on the submission of a request for administrative remedies regarding sexual abuse incidents.

Second, the final standard no longer requires agencies to treat third-party notifications of alleged sexual abuse as a grievance or request for informal resolution submitted on behalf of the alleged inmate victim for purposes of initiating the agency administrative remedy process. Rather, the final standard requires agencies to allow third parties to submit grievances on behalf of inmates. If a third party submits such a request on behalf of an inmate, the facility may require as a condition of processing the request that the alleged victim agree to have the request submitted on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process. The final standard also provides that third parties, including fellow inmates, staff members, family members, attorneys, and outside advocates, shall be permitted to assist inmates in filing requests for administrative remedies relating to allegations of sexual abuse.

Third, the final standard revises the emergency-grievance provision, which allows an inmate to seek an expedited response where the inmate alleges that he or she is subject to a substantial risk of imminent sexual abuse. As in the proposed standard, the final standard requires an initial agency response within 48 hours and a final decision within five days. However, the standard no longer requires that, if the agency determines that no emergency exists, it must process the grievance as a non-emergency grievance.

The final standard forbids agencies from requiring inmates to seek informal resolution of a grievance alleging sexual abuse as a prerequisite to submitting a formal request for administrative remedies.

The final standard provides that agencies shall ensure that inmates may submit requests for administrative remedies without needing to submit the request to the alleged abuser, and that no request will be referred to an alleged abuser.

The final standard states expressly that an agency that lacks administrative procedures to address inmate grievances regarding sexual abuse need not create such procedures in order to comply with the standard.

Comments and Responses

Comment. Several State correctional agencies asserted that imposing a standard governing the exhaustion of administrative remedies would undermine or violate the Prison Litigation Reform Act (PLRA).

Response. The final standard is not inconsistent with the PLRA. The PLRA does not require a State to impose any particular administrative exhaustion requirements. Rather, the PLRA requires that an inmate exhaust "such administrative remedies as are available" before bringing an action under Federal law. 42 U.S.C. 1997e(a). The PLRA thus affords States a procedural defense in court by requiring inmates with grievances to satisfy such administrative exhaustion requirements as States may adopt. Providing a State with an incentive to structure an administrative remedy in a particular manner would not relieve an inmate of the PLRA's requirement that he or she exhaust whatever administrative remedies a State ultimately chooses to make available. Furthermore, the PLRA does not immunize from change any exhaustion requirements that States may adopt, nor does it bar the use of Federal financial incentives, such as the incentives provided by PREA, to induce States to revise their requirements.

Comment. Several correctional agency commenters noted that they either do not have administrative remedy proceedings at all, or otherwise do not apply their administrative remedy proceedings to allegations or grievances involving sexual abuse. Some such commenters, joined

by a number of advocacy organizations, suggested that administrative remedy procedures are not appropriate for grievances involving sexual abuse.

Response. Paragraph (a) of the final standard clarifies that an agency need not create administrative procedures to address grievances involving allegations of sexual abuse if it currently lacks such procedures. This standard is meant to govern only the contours of administrative remedy procedures, due to the fact that under the PLRA, exhaustion of any such procedures is a prerequisite to access to judicial remedies. The Department leaves to agency discretion whether to utilize such administrative remedies as part of its procedures to combat sexual abuse. As noted in § 115.51 and its counterparts, agencies must provide multiple internal ways to report abuse, as well as access to an external reporting channel. A grievance system cannot be the only method—and should not be expected to be the primary method—for inmates to report abuse. Agencies should remain aware that inmates' concern for confidentiality and fear of retaliation, whether or not well-founded, may discourage inmates from availing themselves of administrative remedies.

An inmate in an agency that lacks any administrative remedies may proceed to court directly. Accordingly, this standard is inapplicable to agencies that lack administrative remedy schemes. Likewise, if an agency exempts sexual abuse allegations from its administrative remedies scheme, an inmate who alleges sexual abuse may proceed to court directly with regard to such allegations, and this standard would not apply. Some agencies exempt sexual abuse allegations from their remedial schemes entirely, such as the West Virginia Division of Corrections,[33] while others exempt only such allegations against staff, such as the City of New York Department of Correction.[34] In the latter case, this standard would continue to apply to allegations against inmates.

Comment. Many advocates recommended that the final standard require that agencies not impose any time limit for submitting administrative grievances alleging sexual abuse. These commenters opined that inmates may take months or even years to report sexual abuse, perhaps waiting until their abuser is no longer housed or posted in their vicinity. Commenters stressed that the time limits would pose particular difficulties for juveniles, who may be more hesitant than adults to report abuse. Some advocates recommended eliminating the deadline altogether, while others suggested that if a deadline were required, it should be 180 days.

The 90-day extension provision received significant criticism. Advocates asserted that obtaining the documentation required by the proposed standard to justify such an extension would be difficult at best and often impossible. Many correctional agency commenters agreed with advocates that the 90-day extension was unworkable. One State correctional agency commented that such a requirement might well subject its counselors and mental health providers to complaints and lawsuits for failing to provide requested documentation in a timely manner.

Response. After considering the many comments on this issue, the Department has revised the standard to require that agencies not impose any time limit on the filing of a grievance alleging sexual abuse. While some inmates will submit false grievances, it is unlikely that the number of such false grievances will rise appreciably if an inmate is granted more time to submit a grievance regarding sexual abuse. Even in an agency with a 20-day limit, an inmate

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[33] *See* W.Va. Code 25-1A-2(c); *White v. Haines*, 618 S.E.2d 423, 431 (W. Va. 2005).

[34] *See* City of New York Department of Correction, Directive 3375R-A, at 2 (2008), available at *http://www.nyc.gov/html/doc/downloads/pdf/3375R-A.pdf*.

who is inclined to invent an incident of sexual abuse could simply allege that it occurred within 20 days. The Department found merit in comments that expressed concern that inmates may require a significant amount of time in order to feel comfortable filing a grievance, and might need to wait until their abuser is no longer able to retaliate. Requiring the removal of time limits increases the ability of such inmates to obtain legal redress and increases the chance that litigation will play a beneficial role in ensuring that correctional systems devote sufficient attention to combating sexual abuse.

The Department considered revising the standard to allow a lengthy time limit, such as 180 days, but concluded that no interest is served by allowing the filing of grievances up until that point but not beyond. Importantly, one key time limit will still apply: The statute of limitations. Federal suits filed against State officials under 42 U.S.C. 1983 are governed by the general State personal injury statute of limitations, *see Owens v. Okure*, 488 U.S. 235 (1989), which in the vast majority of States is three years or less.[35] Paragraph (b)(4) clarifies that this standard does not restrict an agency's ability to defend a lawsuit on the ground that any applicable statute of limitations has expired. Thus, if the applicable State statute of limitations is three years, an inmate who files a grievance alleging that abuse occurred four years ago will be unable to seek judicial redress after exhausting administrative remedies if the agency asserts a statute of limitations defense. The statute of limitations provides a backstop against the filing of stale claims, as it does for analogous claims of sexual abuse experienced in the community at large.

Paragraph (b)(2) has been added to make clear that paragraph (b)(1) applies only to those portions of a grievance that actually involve allegations of sexual abuse. In other words, if an agency applies time limits to grievances that do not involve allegations of sexual abuse, inmates may not circumvent those timelines by including such allegations in a grievance that also alleges sexual abuse.

Comment. Several advocacy groups recommended that the final standard mandate that agencies allow inmates to submit a formal grievance without first requiring them to avail themselves of informal grievance processes. Commenters noted that, in cases where an inmate alleges sexual abuse by a staff member, informal resolution may require the inmate to interact with the perpetrator or with a person who may be complicit in the abuse.

Response. The final standard prohibits requiring inmates to seek informal resolution of a grievance alleging sexual abuse as a prerequisite to submitting a formal request for administrative remedies. Informal resolution typically requires the inmate to discuss the subject of the grievance with staff. In the case of sexual abuse, this process is unlikely to resolve the grievance, and may force the inmate to discuss the grievance with the abuser or with a staff member who works closely with the abuser.

Comment. Several advocates recommended that the final standard require that agencies ensure that inmates may file grievances without having contact with their alleged abusers.

Response. The final standard makes clear that agencies shall establish procedures pursuant to which inmates can submit grievances alleging sexual abuse to staff members who are

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[35] *See* Martin A. Schwartz, 1 Section 1983 Litigation § 12.02[B][5] (2007 ed.). Several courts of appeals have held that the same statute of limitations should apply to actions against Federal officials filed under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996) (citing cases).

not subjects of the complaint, and that such grievances may not be referred to any subject of the complaint. These explicit protections will help ensure that inmates are not dissuaded from submitting grievances following sexual abuse, and that staff members who are subjects of such grievances cannot influence the administrative process that ensues.

Comment. Few comments were received on the elements of the proposed standard that governed the amount of time to resolve administrative grievances involving allegations of sexual abuse. A few commenters believed the timeframe was too long, while one State correctional agency recommended extending the presumptive time limit from 90 days to 100.

Response. The final standard retains the basic structure of this provision, with certain changes. Paragraph (d)(2) clarifies that the 90-day time period does not include time consumed by inmates "in preparing any administrative appeal," rather than merely "in appealing any adverse ruling." The revised language is more accurate and inclusive, because in some cases inmates may appeal rulings that are not necessarily or entirely "adverse," but that do not afford the inmate the full remedy sought.

The Department added paragraph (d)(4) in the final standard to address comments that the proposed standard, as written, could be interpreted to mean that a grievance might not be considered exhausted if a correctional agency adopted the 90/160-day time limits but nevertheless failed to timely respond to a grievance alleging sexual abuse. Paragraph (d)(4) makes clear that, when an agency fails to respond to an administrative grievance alleging sexual abuse according to its guidelines, an inmate may consider that failure a denial at the corresponding level of administrative review, including at the final level (in which case, the inmate may consider the absence of a timely response as the final agency decision for purposes of exhaustion).

Comment. Several agency commenters stated that the proposed standard's requirement that an agency treat any notification of an alleged sexual assault as a grievance, regardless of the method by which notification was made (other than by notification by a fellow inmate), would pose administrative difficulties, particularly when such notification came from a third party. Commenters suggested that it would be burdensome and impracticable to require staff to complete a grievance form on behalf of an inmate whenever staff learns of an allegation of sexual abuse.

Conversely, several commenters supported a requirement that agencies treat any notification of alleged sexual assault as a grievance, including notifications by other inmates. These commenters stated that complicated administrative processes could frustrate the ability of victims of sexual abuse to exhaust their remedies and seek redress in court. Commenters noted that difficulties in filing and exhausting grievances were particularly acute for complaints involving sexual abuse. Further, many commenters (including correctional agency commenters) noted that juveniles may be more susceptible to peer pressure or other factors that might dissuade them from pursuing a valid grievance alleging sexual abuse. These commenters expressed concern over the provision in the proposed standard that allowed agencies not to treat a notification as a grievance if the alleged victim requests that it not be processed as such.

Response. The final standard does not require agencies to treat any notification as a grievance. Rather, paragraph (e)(1) provides that third parties shall be allowed to submit such grievances on behalf of inmates (and to assist inmates in submitting grievances alleging sexual abuse). If a third party files such a request on behalf of an inmate, the facility may require as a condition of processing the request that the inmate agree to have the request filed on his or her behalf, and may also require the inmate to pursue personally any subsequent steps in the

administrative remedy process. If the inmate declines to have the request processed on his or her behalf, the standard requires that the agency document the inmate's decision.

With regard to juvenile facilities, the final standard requires that agencies accept third-party grievances submitted by parents or guardians regardless of the juveniles' acquiescence. This revision addresses concerns that juveniles may be particularly reluctant to agree to the filing of a grievance by a third party. Because parents and guardians represent reliable sources for such complaints, it is appropriate to require their complaints to be treated as grievances, even where the juvenile requests otherwise.

The Department is sympathetic to agency concerns that the requirement in the proposed standard was impractical. In light of other changes to the proposed standard, there is less need to require that a third-party notification be treated as a grievance. By requiring that agencies not impose a deadline on submitting an administrative grievance alleging sexual abuse, allowing third parties to submit grievances on an inmate's behalf, allowing third parties to assist inmates in filing their own grievances, and requiring agencies to implement procedures to avoid the submission or referral of complaints to their subjects, the Department has made it significantly easier for sexual abuse grievances to be filed by the victim or by someone acting expressly on the victim's behalf. As a result of these changes, the Department concludes that it is no longer worthwhile to require agency staff to file grievances whenever they hear of an allegation.

Comment. Some commenters expressed concern that inmates may attempt to circumvent otherwise applicable rules by piggybacking grievances that are governed by those rules onto allegations involving sexual abuse, which may be treated differently.

Response. The final standard addresses this concern in three places. As noted above, paragraph (b)(2) states that the agency may apply otherwise applicable time limits on any portion of a grievance that does not allege an incident of sexual abuse. The addition of "any portion of" in paragraph (d)(1) makes clear that the 90-day time limit applies only to those portions of grievances that actually allege sexual abuse. These changes ensure that inmates cannot circumvent stricter deadlines for grievances that do not involve sexual abuse by bootstrapping such grievances onto a grievance that also alleges sexual abuse. Finally, paragraph (f)(2) clarifies that only the portion of a grievance that involves an allegation of substantial risk of imminent sexual abuse need be treated as an emergency grievance.

Comment. Some correctional agency commenters remarked that the emergency procedures required in these standards will be difficult to implement.

Response. The Department believes that the time limits in the emergency procedures provision are reasonable. As noted in the NPRM, these procedures are modeled on emergency procedures already in place in several State correctional agencies. Numerous correctional agencies (and many other commenters) emphasized the need for an immediate response to serious allegations of imminent sexual abuse, and this provision should assist such efforts.

Comment. The proposed standard, in paragraphs (d)(3) and (d)(4), would have permitted agencies to make an initial determination that an emergency grievance did not involve a substantial risk of imminent sexual abuse, and thereafter treat the grievance not as an emergency grievance but rather as an ordinary grievance. Numerous commenters objected to this provision of the proposed standard, noting that agencies could make such an initial determination and thus not be required to provide an initial response within 48 hours or a final agency decision within 5 calendar days. These commenters expressed concern that this escape valve for agencies could essentially swallow the entire rule by allowing agencies to make an initial determination in response to any emergency grievance and thereafter ignore the truncated timelines designed to

address such grievances. In cases in which the agency's initial determination was erroneous, these commenters argued, the consequences could be disastrous for the inmate involved.

Response. The final standard requires the agency to treat all grievances alleging the substantial risk of imminent sexual abuse as emergency grievances, even if the agency determines that no such risk exists. In the event the agency makes that determination, it shall document that decision, but it must do so within the timeframes required by the emergency grievance procedure.

Comment. Numerous commenters objected to paragraph (d)(5) of the proposed standard, noting that it would permit agencies to discipline inmates who submitted emergency grievances while fearing imminent sexual abuse, but where the agency determined that no such danger existed. Commenters stated that such a rule would have a chilling effect on valid grievances, because inmates would fear reprisal if an agency made a factual determination that the grievance did not meet the threshold required for an emergency grievance, even where the inmate believed he or she was in danger. Some commenters recommended that no disciplinary measures should be allowed.

Response. Paragraph (g) of the final standard provides that an agency may discipline an inmate for submitting a grievance alleging sexual abuse only where the agency can demonstrate that the inmate submitted the grievance in bad faith. Upon reconsideration, the Department agrees that the proposed standard erred in allowing discipline whenever an emergency was found not to exist, without requiring a showing of bad faith.

However, the Department declines to revise the standard to disallow disciplinary measures entirely. Agencies should have the discretion to discipline inmates who are not victims of sexual abuse but who attempt to circumvent agency rules by making intentionally frivolous allegations. Such allegations not only waste agency time and resources but also may make correctional officials more dubious about allegations of sexual abuse in general, which could lead to valid allegations receiving insufficient attention.

Access to Outside Support Services (§§ 115.53, 115.253, 115.353)

Summary of Proposed Rule

In the standard contained in the proposed rule, paragraphs (b) and (c) of §§ 115.22, 115.222, and 115.322 required agencies to maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that could provide inmates with confidential emotional support services related to sexual abuse. The proposed standard also required agencies to maintain copies of agreements or documentation showing attempts to enter into agreements.

Sections 115.53, 115.253, and 115.353 required agencies to provide inmates access to outside victim advocacy organizations for emotional support services related to sexual abuse, similar to the NPREC's recommended standard. The proposed standard required that such communications be as confidential as possible consistent with agency security needs. In addition, the proposed standard required that juvenile facilities be instructed specifically to provide residents with access to their attorneys or other legal representation and to their families, in recognition of the fact that juveniles may be especially vulnerable and unaware of their rights in confinement. The proposed standard mandated that juvenile facilities provide access that is

reasonable (and, with respect to attorneys and other legal representation, confidential) rather than unimpeded.

Changes in Final Rule

The final standard includes several small changes.

First, the language from § 115.22(b) and (c) and its counterparts has been moved into § 115.53(c) and the latter's counterparts. Only one substantive change has been made in this area: The final standard requires all juvenile agencies to maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide residents with emotional support services related to sexual abuse. The proposed standard had exempted juvenile agencies that were legally required to provide such services to all residents.

Second, the final standard includes, in the standards for prisons/jails and juveniles, access to immigrant services agencies for persons detained solely for civil immigration purposes in State, local, and BOP facilities.

Third, where the proposed standard required that the facility enable reasonable communications with such organizations "as confidential as possible, consistent with agency security needs," the final standard requires that such communication be "in as confidential a manner as possible." The facility is also required to inform the victim of the extent to which communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

Comments and Responses

Comment. As noted above, § 115.22 of the proposed standards appeared to cause confusion because it covered both agreements regarding outside reporting and agreements regarding support services for victims. In addition, commenters were unclear as to how § 115.22 interacted with § 115.53, given the topical overlap.

Response. For clarity, the subject matter covered by proposed standard § 115.22 has been moved into §§ 115.51 and 115.53, as appropriate.

Comment. Numerous nonprofit organizations and some inmates supported the requirement in the proposed standard that agencies maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that could provide inmates with confidential emotional support services related to sexual abuse. These organizations recommended that the agreements between correctional agencies and victim advocacy organizations clarify the services that the organizations can provide and the limits to confidentiality.

Response. The Department agrees that such clarifications are a best practice and will assist the facilities in meeting their obligation to inform victims of the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws. As many service providers noted, affording victims the opportunity for confidential discussions with advocates will help them feel more supported and thus more likely to report abuse and cooperate with its investigation and prosecution.

Comment. A few service providers recommended expanding this standard to include sexual harassment. One organization also recommended requiring agreements with agencies that "help victims of sexual abuse during their transition from incarceration into the community."

Response. The Department welcomes agencies' participation in these activities. However, the need is greatest with regard to victims of sexual abuse who are currently incarcerated. Transitioning into the community is, of course, extremely important, but other programs currently exist to serve the needs of reentry more generally.

Comment. Some correctional agencies expressed concern that this standard could threaten the Victims of Crime Act (VOCA) funding of victim services organizations.

Response. Through a separate rulemaking process, the Department intends to propose removing the current ban on VOCA funding for treatment and rehabilitation services for incarcerated victims of sexual abuse. In addition, even under current requirements, victim services organizations can use other funding to serve incarcerated victims without violating the VOCA requirements.

Comment. The AJA noted that many jails are in rural areas and do not have local agencies to assist.

Response. In such cases, the jail would need only to document its efforts to obtain such assistance and show that there are no local programs that can help.

Comment. One State juvenile justice agency recommended expanding the exception in proposed standard § 115.322, which required juvenile facilities to attempt to enter into memoranda of understanding with community service providers to provide residents with emotional support services related to sexual abuse. The proposed standard contained an exception for facilities that were already legally required to provide such services; the commenter recommended excepting all agencies that in fact provide such services, whether or not they are legally required to do so.

Response. The final standard removes this exception. A facility's own support services may be helpful, but are inherently limited in this context—through no fault of their own—by being situated in and run by the facility in which the abuse occurred, and in which the abuser either lives or works. Whether or not a facility provides such services, therefore, does not affect the need to allow access to outside support.

Comment. Most commenters, including some correctional agencies, expressed support for the requirement that agencies provide inmates with access to outside victim advocates for emotional support services related to sexual abuse. Many advocates, inmates, and a United States Senator expressed concern regarding language in the proposed standard requiring confidentiality only if "consistent with agency security needs." These commenters noted that victims who receive confidential support are more likely to report their assault and cooperate with the investigation. Some advocacy organizations proposed replacing that phrase with "to the extent allowed by the law." On the other hand, one sheriff's department expressed concern about allowing confidential communications, because it might lead to incidents being reported to outside organizations without enabling the facility to learn of the incidents.

Response. The Department believes that it is important for victims to have access to confidential services. The Department concludes that "consistent with agency security needs" should be removed because the broad phrasing could create a significant potential for overuse by agencies. The final standard requires agencies to "enabl[e] reasonable communication between inmates and these organizations, in as confidential a manner as possible." The final standard does not add the phrase "to the extent allowed by law," because it may be difficult for agencies

to ensure complete confidentiality with all forms of communication due to factors such as the physical layout of the facility or the use of automatic phone monitoring systems, which may be difficult to suspend for support calls without requiring the inmate to make a specific request.

Comment. Some advocacy groups also recommended that the juvenile standard include access to family members and opportunities for family involvement.

Response. While the Department welcomes agencies and victims service organizations who are able to integrate family members into the counseling process, the logistical challenges of doing so counsel against adding such a requirement to the standard.

Comment. Various inmates and one sheriff's office expressed concerns with the logistics of allowing victims to contact outside support services. Many facilities are set up with open phone banks in common day rooms, and the inmate would have to specifically request to use a private phone in order to make a completely confidential phone call.

Response. Providing access to outside support services may involve surmounting logistical hurdles, but the potential benefits of such access should make the effort worthwhile. The National Resource Center for the Elimination of Prison Rape is available to help facilities develop ways to provide such access.

The Department encourages agencies to establish multiple avenues for inmate victims of sexual abuse to contact external victim services agencies. While not ensuring optimal privacy, phones may provide the best opportunity for inmates to seek help in a timely manner. Privacy concerns may be allayed through other methods of contacting outside organizations, such as allowing confidential correspondence, opportunities for phone contact in more private settings, or the ability of the inmate to make a request to contact an outside victim advocate through a chaplain, clinician, or other service provider.

Comment. Another inmate stated that, because he is incarcerated for a sex crime, he was not able to receive assistance from a sexual assault services provider.

Response. The Department expects that organizations that enter into such memoranda of understanding should help victims of sexual abuse without regard to whether they may have perpetrated sexual abuse in the past.

Comment. One inmate expressed a preference for in-person counseling.

Response. The Department is aware that some correctional systems have been able to offer in-person counseling, and encourages systems to consider doing so. However, logistical challenges militate against making this a requirement in the standard.

Comment. One State juvenile justice agency recommended that contact with outside services be at the discretion of agency mental health staff.

Response. The purpose of this standard is for victims to be able to reach out for help without seeking staff approval, which may require disclosing information to staff that the resident may prefer, at least for the time being, to remain confidential.

Comment. A regional jail association recommended providing specific actions or checklists to help guide auditors.

Response. The National Resource Center for the Elimination of Prison Rape will do so.

Comment. Some advocacy organizations commented that the Department should adopt NPREC supplemental immigration standard ID-8, which would require agencies with immigration detainees to provide those individuals with access to community service providers that specialize in immigrant services, as well as supplemental standard ID-1, which would mandate agreements or memoranda of understanding with these organizations. These

commenters noted that immigration detainees who suffer from sexual abuse may have unique needs that only specialized service providers can meet.

Response. The Department agrees that agencies covered by these standards should provide immigration detainees with access to service providers that can best meet their needs. The final standards require that State, local, or BOP facilities that detain individuals solely for civil immigration purposes provide those individuals with access to immigrant services agencies. It also requires agencies to enter into, or attempt to enter into, agreements with organizations that provide these services.

Third-Party Reporting (§§ 115.54, 115.154, 115.254, 115.354)

Summary of Proposed Rule

The standard contained in the proposed rule required facilities to establish a method to receive third-party reports of sexual abuse and to distribute publicly information on how to report sexual abuse on behalf of an inmate. In addition, the proposed standard required juvenile facilities to distribute such information to residents' attorneys and parents or legal guardians.

Changes in Final Rule

The final standard includes the proposed requirements and adds sexual harassment to its scope. The final standard also references "agency" instead of "facility."

Comments and Responses

Comment. A State association of juvenile justice agencies commented that the requirement to distribute information on reporting to the residents' attorneys and their parents or legal guardians would significantly increase postage expenses and suggested instead that the information could be posted on a facility's website.

Response. This standard does not require mailings. The agency may, in its discretion, make such information readily available through a website, postings at the facility, printed pamphlets, or other appropriate means.

Comment. Some advocacy groups for juveniles recommended adding other family members to the list of people who will receive this information, because it is common for youth in juvenile facilities to have been raised by grandparents or other family members.

Response. The Department encourages facilities to provide notice to other family members at its discretion, but believes that requiring the provision of such notice to parents and legal guardians, plus attorneys, is sufficient for the purposes of a national standard.

Comment. Some advocacy organizations recommended adding sexual harassment to this standard.

Response. Because sexual harassment can lead to further abusive behavior, the Department agrees that it is appropriate to allow third parties to report incidents of sexual harassment, as well as sexual abuse, and has made this change.

Staff and Agency Reporting Duties (§§ 115.61, 115.161, 115.261, 115.361)

Summary of Proposed Rule

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

Changes in Final Rule

The final standard includes several small changes. In paragraph (a), the staff reporting requirements have been expanded to add sexual harassment, in addition to sexual abuse. This paragraph no longer refers to incidents that occur in an "institutional setting," but rather refers to incidents that occurred in a "facility, whether or not it is part of the agency." In §§ 115.61(e), 115.261(e), and 115.361(f), the final standard requires that the facility report all allegations of sexual harassment, as well as sexual abuse, to the facility's designated investigators.

In paragraph (b) of §§ 115.61, 115.161, and 115.261, and in paragraph (c) of § 115.361, the Department has clarified the exception that allowed staff to reveal information relating to a report of sexual abuse to "those who need to know, as specified in agency policy, to make treatment, investigation and other security and management decisions." The Department has replaced "those who need to know" with "to the extent necessary" in order to clarify that staff should not share information relating to a sexual abuse report unless necessary for the limited purposes listed in the rule.

In §§ 115.61(c) and 115.261(c), the final standard requires medical and mental health practitioners to inform inmates and residents of "the limitations of confidentiality," as well as of their duty to report.

For precision and consistency, the Department has qualified "victim" with "alleged" in §§ 115.61(d), 115.161(c), 115.261(d), and 115.361(d).

Finally, the Department has made several changes to § 115.361(e)(3). The final standard no longer requires that courts retaining jurisdiction over a juvenile be notified of any allegations of sexual abuse. Rather, it requires that, where a court retains jurisdiction over an alleged juvenile victim, the juvenile's attorney or other legal representative of record be notified within 14 days of receiving the allegation.

Comments and Response

Comment. Several commenters recommended that the standard apply to reports relating to sexual harassment as well as sexual abuse.

Response. Sexual harassment can be a predictor of and precursor to sexual abuse, and should be brought to the attention of agency and facility leadership who can determine the appropriate response, if any. The final standard therefore mandates that staff be required to report any knowledge, suspicion, or information regarding an incident of sexual harassment that occurred in a facility, retaliation against inmates or staff who reported such an incident, and any

staff neglect or violation of responsibilities that may have contributed to an incident of sexual harassment. In addition, the final standard requires that facilities report allegations of sexual harassment to their designated investigators.

Comment. A State juvenile justice agency noted that the phrase "institutional setting" is undefined and recommended replacing it with "facility."

Response. The Department agrees, and has changed §§ 115.61(a), 115.261(a), and 115.361 to clarify that staff must report any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency.

Comment. Several commenters requested that the standard allow for greater confidentiality between inmates and medical and mental health staff. A State child services agency observed that the requirement that clinicians disclose their duty to report before providing services could have a chilling effect on youth's willingness to report, and may prevent necessary investigation and treatment. An advocacy group recommended that the standards afford inmates an opportunity to speak confidentially with medical and mental health staff about sexual abuse. Other advocacy groups recommended removing the requirement under §§ 115.61(c), 115.161(c), and 115.261(c) that medical and mental health practitioners report sexual abuse unless otherwise precluded by State or Federal law. Instead, these commenters would require practitioners to determine whether, consistent with Federal, State, or local law and the standards of their professions, they are required to report sexual abuse and to disclose these reporting requirements to patients. In addition, these groups requested that the standards compel providers to inform patients of any duty to report, as well as the limits of confidentiality, both at the initiation of services "and each time the practitioner makes the determination that he or she is required or permitted to breach confidentiality." Finally, these organizations would add language requiring that the agency specify in a written policy the extent of health care providers' obligations to report sexual abuse.

Response. The Department agrees with commenters that it is essential that victims of sexual abuse feel comfortable seeking medical and mental health care services, and recognizes that some individuals may choose not to do so upon learning of their provider's duty to report. However, it is also critical that incidents of sexual abuse be brought to the attention of facility and agency staff to enable the appropriate response measures detailed elsewhere in these standards. The Department has therefore maintained the reporting requirement for medical and mental health practitioners, unless otherwise precluded by law. Because this language is preserved, a requirement that the agency specify in a written policy the extent of health care providers' obligations to report sexual abuse is unnecessary. The Department has, however, accepted the commenters' recommendation that practitioners be required to inform patients of "the limitations of confidentiality," as well as of the practitioners' duty to report, in order to emphasize that, while inmates should never be discouraged from reporting abuse, they must understand that correctional medical and mental health practitioners cannot ensure complete confidentiality.

Comment. Advocates also recommended adding language to §§115.61(b), 115.161(b), and 115.261(b) to clarify that personnel who need to receive information related to a sexual abuse report in order to make treatment, investigation, and other security and management decisions shall receive only the information necessary for them to perform their job functions safely and effectively. These commenters stated that the fact that a staff member needs some

information about a sexual abuse report does not mean that all such information must, or should, be shared.

Response. The Department agrees that it is important to limit, to the extent possible, the information shared relating to a sexual abuse report. An individual who needs to know certain information relating to a sexual abuse report should receive only the information necessary to make treatment, investigation, and other security and management decisions—and no more. The Department has therefore replaced the phrase "other than those who need to know" under §§ 115.61(b), 115.161(b), 115.261(b), and 115.361(c) with "other than to the extent necessary." This revision makes clear that the standard requires facilities to prohibit the sharing of any more information than is necessary to make treatment, investigation, or other security and management decisions.

Comment. One State correctional agency recommended clarifying that the facility head is the person responsible for ensuring that all allegations of sexual abuse, including third-party and anonymous reports, are reported to appropriate investigative staff.

Response. The Department does not believe clarification is necessary. To the extent the facility head is responsible for all facility operations, he or she is responsible for ensuring that allegations are reported appropriately. The facility head may, of course, delegate responsibilities to other supervisory staff who ultimately report to the facility head.

Comment. An inmate and an advocacy organization recommended that agencies be required to take disciplinary action against staff who do not report their knowledge, suspicion, or information relating to sexual abuse.

Response. The Department agrees that discipline may be warranted in such contexts, but believes that is adequately addressed under §§ 115.76, 115.176, 115.276, and 115.376, which govern disciplinary sanctions for staff. That standard provides, in paragraph (a), that "[s]taff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies."

Comment. A State office of juvenile justice suggested replacing "promptly" with "immediately" under §115.361(e)(1), because "promptly" is ambiguous and subject to interpretation.

Response. The Department trusts that facilities will accurately interpret "promptly" to mean "without delay."

Comment. One commenter recommended that States pursue and investigate allegations of violence against children through the relevant agency, such as child welfare agencies, that investigate analogous allegations in the community.

Response. Each State has its own reporting system for allegations of child abuse and neglect, and the final standard requires agencies and staff to comply with the State's child abuse reporting laws. The final standard allows States appropriate discretion in determining which agency conducts the investigation; a bright-line rule requiring a child welfare agency to conduct the investigation would not necessarily ensure that investigations are conducted optimally.

Comment. Several commenters raised concerns about § 115.361(e)(3). State juvenile justice agencies urged clarification that notice to the court is required only where the court retains jurisdiction over an alleged juvenile victim, rather than jurisdiction over an alleged juvenile perpetrator, in order to avoid undermining the alleged perpetrator's due process rights. The same commenters questioned the value of court notification of unsubstantiated allegations. One agency asked whether notice to a juvenile's attorney is required; an advocacy group recommended that such notification be required to facilitate post-dispositional representation.

Response. The final standard clarifies that the notification requirement in § 115.361(e)(3) applies only to alleged victims, not alleged perpetrators. The Department agrees that where a court retains jurisdiction over an alleged juvenile victim, notifying the juvenile's attorney or other legal representation of record of the allegation is appropriate, and has added this requirement. Given this revision, the Department concludes that court notification is no longer necessary. The Department has therefore replaced the court notification requirement under § 115.361(e)(3) with a requirement that, where a juvenile court retains jurisdiction over an alleged juvenile victim, the facility must report an allegation of sexual abuse to the juvenile's attorney or other legal representative of record within 14 days of receiving the allegation.

Comment. A coalition of juvenile advocacy organizations proposed revising the parent/guardian notification exception in § 115.361(e)(1) from "unless the facility has official documentation showing the parents or legal guardians should not be notified" to "unless the facility has official documentation of parental termination, or has notice of other circumstances related to a youth's physical or emotional well-being which indicate that parents or legal guardians should not be notified."

Response. The Department concludes that requiring "official documentation" appropriately defines the scope of agency discretion, and helps ensure that decisions will be objective and not influenced by a desire to withhold information that could reflect poorly upon the facility.

Comment. A number of advocates expressed concern that the proposed standard fails to provide guidance regarding age of consent laws as they relate to how juvenile facilities should handle the reporting of incidents of voluntary sexual contact between residents.

Response. The Department believes these concerns are addressed under the staff training requirements of § 115.331, which requires specific training on, among other topics, distinguishing between consensual sexual contact and sexual abuse between residents, relevant laws regarding the applicable age of consent, and how to comply with relevant laws related to mandatory reporting of sexual abuse to outside parties.

Agency Protection Duties (§§ 115.62, 115.162, 115.262, 115.362)

The Department has added this standard, which did not appear in the proposed rule, in order to make explicit what was implicit in the proposed rule: That an agency must act immediately to protect an inmate whenever it learns that he or she faces a substantial risk of imminent sexual abuse.

Reporting to Other Confinement Facilities (§§ 115.63, 115.163, 115.263, 115.363)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.62, 115.162, 115.262, and 115.362) required that a facility that receives an allegation that one of its inmates was sexually abused at another facility must inform that other facility of the allegation within 14 days. The proposed standard also required the facility receiving the information to investigate the allegation.

Changes in Final Rule

The Department has made several small changes to this standard. In order to ensure that facilities report allegations promptly, the Department has removed reference to the 14-day timeframe in paragraph (a) and has added a new paragraph (b) requiring that such notification be provided as soon as possible, but no later than 72 hours after receiving the allegation. The final standard no longer requires that notification be in writing.

In paragraph (a), the Department has removed the word "central" from the phrase, "the head of the facility or appropriate central office of the agency." In the paragraph formerly designated as (b), now designated as (d), the Department has replaced "central office" with "agency office."

The Department intends for all facilities, including community confinement facilities, to report allegations of sexual abuse occurring at any other facility. Accordingly, in § 115.263, the Department has replaced the phrase "while confined at another community corrections facility" with "while confined at another facility."

In § 115.163, the Department has replaced the phrase "while confined at another facility or lockup" with "while confined at another facility," to clarify that the definition of facility includes lockups.

Comments and Responses

Comment. Numerous commenters, including both advocacy groups and correctional agencies, recommended shortening the 14-day timeframe. Several commenters suggested replacing "Within 14 days of . . ." with "Immediately upon . . ." One advocacy group recommended requiring that verbal notice be provided within one business day, followed by notice in writing within three business days. However, one county probation department recommended extending the timeframe by allowing for a written report within 30 days, noting that there may be occasions where the initial fact-gathering takes additional time, especially if the complaint is against the facility manager.

Response. The Department is persuaded that a 14-day timeframe for reporting to other facilities is too long, and that facilities should be required to report allegations of sexual abuse occurring at other facilities to those facilities as soon as possible to encourage and facilitate a prompt investigation. The Department has therefore revised the standard to require that facilities provide notification as soon as possible, but no later than 72 hours after receiving an allegation. Because written notification may not be as prompt as other means of notification, the Department has removed the requirement that notification be in writing. Facilities are encouraged, however, to document such notification in writing as a supplement to other notification.

Comment. Several commenters expressed concern about the logistics of the notification requirement in paragraph (a). A juvenile detention center and an association of juvenile justice administrators remarked that they would not necessarily be able to identify the appropriate investigative staff at the other facility, and did not believe they should have to attempt to do so. A county sheriff's office suggested clarifying that notification be made to the other facility's PREA coordinator.

Response. Commenters' confusion about whom to contact may stem from the reference to the "appropriate central office." The Department has therefore removed the term "central"

from the phrase "appropriate central office of the agency" in paragraph (a), and has replaced "central" with "agency" in paragraph (c). The Department has also removed the word "central" from § 115.61(e)(1).

The Department does not expect facilities to be able to identify the appropriate investigative staff, especially at facilities operated by other agencies. Where a facility is uncertain about whom to contact, it may simply contact the facility head.

Staff First Responder Duties (§§ 115.64, 115.164, 115.264, 115.364)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.63, 115.163, 115.263, and 115.363) set forth staff first responder responsibilities, recognizing that staff must be able to adequately counsel victims while maintaining security and control over the crime scene so that any physical evidence is preserved until an investigator arrives. Specifically, the standard required that the first responder separate abuser and victim, seal and preserve any crime scene, and request that the victim not take any actions that could destroy physical evidence. Where the first staff responder is not a security staff member, the proposed standard required that the responder be required to request that the victim not take any actions that could destroy physical evidence, and then notify security staff.

Changes in Final Rule

The Department has made several clarifying changes to this standard. The Department has removed the phrase "within a time period that still allows for the collection of physical evidence" from paragraph (a) and added language to paragraphs (a)(3) and (a)(4) stating: "If the abuse occurred within a time period that still allows for the collection of physical evidence."

The Department has replaced "seal and preserve any crime scene" in paragraph (a)(2) with "preserve and protect any crime scene," which is more appropriate for non-law-enforcement staff members, and has clarified that any evidence must be preserved until appropriate steps can be taken to collect it. In paragraph (a)(3), the Department has clarified that victims must be instructed to avoid actions that could destroy physical evidence, such as urinating or defecating, only where appropriate given the incident alleged. The Department has also added a new paragraph (a)(4), which requires the responder to ensure that the abuser not take any actions that could destroy physical evidence.

Finally, the Department has clarified that the standard applies after learning "of an allegation" that an inmate was sexually abused, and, as elsewhere in the final standards, has qualified "victim" with "alleged."

Comments and Responses

Comment. Two advocacy groups expressed concern over the phrase "within a time period that still allows for the collection of physical evidence," noting that physical evidence may persist for a long time and urging that staff assume that evidence may still be available in all cases.

Response. The Department agrees that paragraph (a)(1), which requires the first responder to separate the alleged victim and the alleged abuser, and paragraph (a)(2), which requires that any crime scene be protected until appropriate steps can be taken to collect any evidence, should not be contingent upon the amount of time that has passed between the alleged incident of sexual abuse and the allegation. However, the Department remains of the view that it is appropriate to request that the alleged victim, and ensure that the alleged abuser, not take certain actions—such as brushing teeth, urinating, or drinking—only when the abuse occurred within a time period that still allows for the collection of physical evidence. Accordingly, the Department has removed the phrase "within a time period that still allows for the collection of physical evidence" from paragraph (a) and has added comparable language to paragraphs (a)(3) and (a)(4).

Comment. An inmate recommended that the final standard require that first responders make arrangements to have the victim transported within 4-6 hours of notification for screening, evidence collection, and treatment for sexually transmitted diseases.

Response. The Department agrees that it is critical that victims receive emergency medical care after an incident of sexual abuse, but believes that this need is adequately addressed under §§ 115.82, 115.182, 115.282, and 115.382.

Comment. A State juvenile justice agency recommended that § 115.364(c) remove smoking from the list of activities that victims should be requested to avoid post-incident. The commenter suggested that references to smoking would be inapplicable in juvenile facilities.

Response. Because juveniles are sometimes able to smuggle contraband cigarettes into facilities, the Department has retained language requiring first responders to request alleged juvenile victims and abusers not to take any actions that could destroy physical evidence, including smoking.

Comment. A county juvenile justice agency suggested that this standard conflicts with § 115.351(e), which requires agencies to provide a method for staff to privately report sexual abuse and sexual harassment of residents. The commenter inquired whether a staff member could choose to abandon the responsibilities outlined in this standard and privately report the matter instead.

Response. The requirement that agencies provide a method for staff to privately report sexual abuse and sexual harassment of residents is consistent with the staff first responder duties outlined in this standard. By "first responder," the Department means the first security staff member to respond to a report of sexual abuse. The first responder need not be the same staff member who initially reports the allegation. For example, if a staff member privately reports alleged sexual abuse to an investigator pursuant to §§ 115.51, 115.151, 115.251, or 115.351, the investigator would then initiate protocols for responding to the allegation, including assigning appropriate staff to fulfill the requirements set out in §§ 115.64, 115.164, 115.264, and 115.364.

Coordinated Response (§§ 115.65, 115.165, 115.265, 115.365)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.64, 115.164, 115.264, and 115.364) required a coordinated response among first responders, medical and mental health practitioners, investigators, and facility leadership whenever an incident of sexual abuse occurs.

Changes in the Final Rule

The final standard requires the development of a written institutional plan to coordinate responses.

Comments and Responses

Comment. NPRM Question 25 asked whether the proposed standard provided sufficient guidance as to how compliance would be measured. Many commenters, including both agency commenters and advocacy organizations, suggested that having a written plan would be a good way to assess compliance. Other suggestions included documentation of responses or meeting minutes.

Response. After reviewing the responses to this question, the Department concludes that requiring a written plan would be the simplest and most effective way to document compliance, and has revised the standard accordingly.

Comment. Former members of the NPREC recommended that specific details be added to the standard, such as a list of actions to be coordinated, and that victim advocates be included where the victim is a juvenile.

Response. The Department believes that it is not necessary to specify the set of actions to be coordinated. As a general guide to ensuring that the victim receives the best possible care and that investigators have the best chance of apprehending the perpetrator—and as noted in the discussion of this standard in the NPRM—the Department recommends, but does not mandate, coordination of the following actions, as appropriate: (1) assessing the victim's acute medical needs, (2) informing the victim of his or her rights under relevant Federal or State law, (3) explaining the need for a forensic medical exam and offering the victim the option of undergoing one, (4) offering the presence of a victim advocate or a qualified staff member during the exam, (5) providing crisis intervention counseling, (6) interviewing the victim and any witnesses, (7) collecting evidence, and (8) providing for any special needs the victim may have. The use of victim advocates is discussed in response to the comments on § 115.21 and its counterparts.

Comment. Other advocate commenters recommended that the Department specifically require formal coordinated response teams and that the written plan include a specific list of staff positions that make up the teams and their duties.

Response. While facilities are encouraged to formalize the composition of their response teams, the Department believes that it is not necessary to mandate a specific list of staff positions and duties, which may change based upon experience and personnel adjustments.

Comment. Many agency commenters supported the standard, but some expressed concerns. One agency commenter suggested that the eight actions to be coordinated might fall exclusively within the purview of the outside criminal investigating agency.

Response. This standard would not require any agency to take actions outside the scope of its own authority, but only to coordinate with all responders involved.

Comment. Another agency commenter requested a definition of "first responder."

Response. The Department intends for this term to have its usual meaning: the staff person or persons who first arrive at the scene of an incident.

Comment. One correctional agency stated that the use of a sexual assault response team should be a recommendation rather than a mandate.

Response. As noted in the NPRM, this standard was modeled after coordinated sexual assault response teams (SARTs), which are widely accepted as a best practice for responding to rape and other incidents of sexual abuse. However, whether a facility formally designates its responders as a SART is at its discretion. As noted in the NPRM, agencies are encouraged to work with existing community SARTs or may create their own plan for a coordinated response.

Comment. In response to NPRM Question 25, which asked whether this standard provided sufficient guidance as to how compliance would be measured, many commenters, including agency commenters and advocacy organizations, suggested that the existence of a written plan should constitute compliance. Other suggestions recommended using documentation of responses or meeting minutes as proof of compliance.

Response. The final standard requires facilities to develop a written institutional plan to coordinate responsive actions. An auditor will measure compliance by ensuring that a facility has such a plan in place and that the plan is sufficient to ensure a coordinated response. For example, the auditor will assess whether the plan includes appropriate personnel or whether additional facility staff should be involved.

Preservation of Ability to Protect Inmates from Contact with Abusers (§§ 115.66, 115.166, 115.266, 115.366)

Summary of Proposed Rule

A paragraph within a standard contained in the proposed rule (numbered as §§ 115.65(d), 115.165(d), 115.265(d), and 115.365(d)) prohibited agencies from entering into or renewing any collective bargaining agreements or other agreements that limit the agency's ability to remove alleged staff abusers from contact with victims pending an investigation.

Changes in Final Rule

The final rule breaks out this provision as a separate standard, and strengthens the standard by (1) covering the agency's ability to limit contact with any inmate, not only alleged victims; and (2) extending the period of time within which the agency may remove staff from contact with victims to include the pendency of a determination of whether and to what extent discipline is warranted. In addition, the final standard extends to any government agency negotiating collective bargaining agreements on the correctional agency's behalf, in recognition of the fact that correctional agencies often do not conduct their own collective bargaining.

The final standard adds language to clarify that this standard is not intended to restrict agreements that govern the conduct of the disciplinary process or that address whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

Comments and Responses

Comment. One county sheriff's office suggested that this provision be converted into a separate standard.

Response. The Department agrees that it is more appropriate to treat this requirement as a separate standard, as it is a precursor to the requirement in § 115.67 that the agency take protective measures against retaliation.

Comment. Two State correctional agencies and a county sheriff's office commented that correctional agencies typically are not responsible for negotiating employee contracts.

Response. The Department has revised the standard to apply to any governmental entity responsible for collective bargaining on an agency's behalf.

Comment. One advocacy group recommended amending the proposed standard to make clear that agencies may not enter into or renew contracts with private prison companies that limit the agency's ability to remove the alleged staff abusers from contact with victims pending an investigation.

Response. While the standard emphasizes collective bargaining agreements, the standard also expressly includes any "other agreement that limits the agency's ability to remove alleged staff abusers from contact with inmates pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted." The Department intends the standard to preclude agencies from entering into any agreements that would limit the agency's ability to place alleged staff abusers on no-contact status during the investigatory or disciplinary process.

Comment. One sheriff's office predicted that this standard will limit collective bargaining agreements.

Response. The Department does not believe that this standard will impede agencies and unions from reaching agreements. To the extent that it does, such an (unlikely) outcome is necessary in order to ensure that alleged staff abusers are kept out of contact with alleged victims.

Comment. A State juvenile justice agency recommended that the contract language in collective bargaining agreements include the following specific language: "prohibit alleged staff abusers from contact with residents pending the results of an investigation or placing a staff abuser on administrative leave pending the results of the investigation."

Response. The Department does not find it necessary to require agencies to adopt specific contract language in order to meet their obligations under this standard.

Comment. A legal services organization asserted that the proposed standard would be ineffective because it aimed only at preserving agencies' ability to protect inmates from contact with abusers pending an investigation. In the commenter's view, investigations are often little more than whitewashes and only a small fraction of complaints are substantiated. Moreover, the commenter asserted that corrections officials will still claim that they cannot remove staff from a bid position unless an arbitrator agrees with their position. The commenter recommended that the standard require facilities to prevent contact between staff and an inmate when the administrator has an objectively reasonable belief that the staff member poses a risk to the inmate's safety. If the facility cannot do so because of an employment contract, the commenter recommended that the agency be required to take all legal steps to re-negotiate that contract during its term and, at a minimum, be directed not to enter again into such a contract.

Response. Upon reconsideration, the Department concludes that the proposed standard was insufficiently broad in that it applied only "pending an investigation." In addition, the proposed standard did not appropriately address agencies' ability to provide such protection to all inmates. The Department has therefore extended the standard to prohibit agencies, or governmental entities negotiating on the agency's behalf, from entering into or renewing

agreements that limit the agency's ability to remove alleged staff abusers from contact with any inmate pending the outcome of an investigation or a disciplinary determination.

This standard does not mandate that an agency take any specific action against alleged staff abusers; rather, it requires that the agency not tie its hands by entering into a collective bargaining agreement that limits the agency's ability to remove a staff member from a post that involves contact with inmates, as a prophylactic measure, while the agency determines what happened and what measure of discipline is warranted. An agency may determine, consistent with the standard, that it is best to decide on a case-by-case basis, taking into account the gravity and credibility of the allegations, whether to place a staff member in a no-contact status pending such determinations. The Department notes that placing staff accused of sexual misconduct or other serious inmate abuse on no-contact status is a common practice in many facilities and is consistent with best practices. This is particularly true in the context of juvenile justice facilities, where it would be extremely unusual to permit staff accused of serious resident abuse to continue supervising residents pending the outcome of an administrative assessment and, if appropriate, an internal or criminal investigation.

This standard is limited in scope in that it does not purport to govern agreements regarding the conduct of the disciplinary process, as long as such agreements are consistent with §§ 115.72, 115.172, 115.272, and 115.372, which forbid imposition of a standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse or sexual harassment are substantiated, and with §§ 115.76, 115.176, 115.276, and 115.376, which generally govern disciplinary sanctions for staff and which provide that termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse. In addition, the standard does not restrict entering into agreements that address whether and in what form the record of the staff member's no-contact assignment will be retained in the employee's personnel file if the allegations against the employee are not substantiated.

The Department declines to impose further restrictions on the use of arbitration in discipline determinations. What is crucial is establishing proper ground rules to govern the disciplinary process, pursuant to §§ 115.72, 115.172, 115.272, and 115.372, and §§ 115.76, 115.176, 115.276, and 115.376, and ensuring that the agency has the ability to take prophylactic action while the disciplinary process runs its course. With those conditions in place, the Department does not believe that the final standards need restrict the use of arbitrators to review factual findings or disciplinary determinations in order to ensure that the interests of inmates are protected.

Agency Protection Against Retaliation (§§ 115.67, 115.167, 115.267, 115.367)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.65, 115.165, 115.265, and 115.365) required that the agency protect all inmates and staff from retaliation for reporting sexual abuse or for cooperating with sexual abuse investigations, in recognition of the fact that retaliation for reporting instances of sexual abuse and for cooperating with sexual abuse investigations is a serious concern in correctional facilities. The proposed standard required agencies to adopt policies that help ensure that persons who report sexual abuse are properly monitored and protected, including but not limited to providing information in training sessions, enforcing strict reporting policies, imposing strong disciplinary sanctions for retaliation, making

housing changes or transfers for inmate victims or abusers, removing alleged staff or inmate abusers from contact with victims, and providing emotional support services for inmates or staff who fear retaliation.

The proposed standard also required that agencies monitor the conduct and treatment of inmates and staff who have reported sexual abuse or cooperated with investigations for at least 90 days to see if there are changes that may suggest possible retaliation by inmates or staff, and act promptly to remedy any such retaliation. In addition, the proposed standard required that monitoring continue beyond 90 days if the initial monitoring conducted during the initial 90-day period indicated concerns that warranted further monitoring.

Changes in Final Rule

In paragraph (a), the final standard specifies that an agency shall "establish a policy" to protect against retaliation, "and shall designate which staff members or departments are charged with monitoring retaliation."

In paragraph (c), the final standard clarifies that the agency must monitor the conduct and treatment of inmates who have been reported to have suffered sexual abuse, in addition to inmates and staff who have reported sexual abuse directly. The final standard adds language in §§ 115.67(d), 115.267(d), and 115.367(d) requiring that monitoring of inmates include periodic status checks.

In addition, the final standard specifies that an agency need not continue monitoring if it determines that an allegation is unfounded.

The final standard also includes various clarifying changes. In paragraph (b), the phrase "including housing changes or transfers" has been changed to "such as housing changes or transfers," and in §§ 115.67(c), 115.267(c), and 115.367(c), "including any inmate disciplinary reports, housing or program changes" has been changed to "[i]tems the agency should monitor include any inmate disciplinary reports . . ." In §§ 115.67(c), 115.267(c), and 115.367(c), the list of actions that should be considered possible evidence of retaliation now includes examples of retaliation against staff.

Comments and Responses

Comment. A few correctional agencies recommended replacing "[t]he agency shall protect all inmates and staff who report" with "the agency shall reasonably protect" or "shall establish an adequate level of protection against retaliation." Two advocacy organizations recommended requiring that the agency establish a written policy on retaliation and designate who is responsible for monitoring.

Response. In order to make the requirements of this standard more concrete, the Department has revised this language to require agencies to establish a policy to protect all inmates and staff, including designating which staff members or departments are charged with monitoring retaliation.

Comment. While many correctional agencies expressed general satisfaction with the proposed standard, several expressed concern that the requirement that agencies monitor for 90 days all individuals who have cooperated with an investigation was excessively burdensome, particularly in large prison systems where hundreds of people could be involved in investigations

at any given time. One sheriff's office stated that identifying for monitoring purposes all inmates who have cooperated with an investigation could raise confidentiality concerns.

Commenters offered a range of suggestions for limiting the scope of monitoring requirements. Some correctional agencies recommended that monitoring not be required where allegations are determined to be unfounded; another agency recommended that monitoring not be required either for unfounded or unsubstantiated allegations. Some agency commenters suggested that monitoring be required only of persons who "materially" cooperate with investigations, and recommended clarifying that the provision applies to inmates who report abuse during their present term of incarceration. Another agency would limit the monitoring requirement to the inmate or staff member who made the report, or, if the report was made by a third party, to the alleged victim if he or she cooperated with the investigation.

Response. Upon reconsideration, the Department has modified the monitoring requirements in order to focus resources where monitoring is likely to be most important.

First, the Department has removed the requirement that agencies automatically monitor all individuals who cooperate with an investigation. Instead, the final standard requires agencies to take appropriate measures to protect any individual who has cooperated with an investigation and expresses a fear of retaliation. The final standard retains the requirement to monitor inmates and staff who have reported sexual abuse, and adds a requirement to monitor victims who have been reported to have suffered sexual abuse.

Second, the Department has added language terminating the agencies' obligation to monitor if the agency determines that the allegation is unfounded. Monitoring remains appropriate where an agency has classified an allegation as "unsubstantiated"—which means, as defined in § 115.5, that the investigation produced insufficient evidence to enable the agency to make a final determination as to whether or not the event occurred.

The Department understands the concern that identifying individuals for monitoring may raise confidentiality issues, but believes that this risk can be managed. The Department encourages agencies, in developing their policies, to limit the number of staff with access to the names of individuals under monitoring and to be mindful of situations in which a staff member who poses a threat of retaliation may also be entrusted with monitoring responsibilities.

Comment. Several commenters suggested adding the NPREC's recommended language requiring that the agency discuss any changes in treatment of inmates or staff with the appropriate inmate or staff member as part of its efforts to determine if retaliation is occurring.

Response. The Department agrees that monitoring of inmates who have reported sexual abuse or who have been reported to have suffered sexual abuse should also include periodic status checks, and has revised the standard accordingly.

Comment. A few agencies, joined by the AJA, recommended that the standards account for the physical limitations of smaller jails and juvenile detention centers. The AJA recommended adding language to clarify that housing changes would occur "to the extent the physical layout of the jail will allow." Another commenter suggested substituting "such as" for "including" in paragraph (b), to account for facilities that cannot make housing changes.

Response. The Department recognizes that, because of space constraints, some facilities will not be able to accommodate housing changes, and may need to employ alternative protection measures. To clarify that the measures included in the standard are examples rather than requirements, the final standard replaces "including" with "such as."

Comment. Several agency commenters recommended clarifying how staff should be protected from retaliation. One suggested that negative performance reviews or reassignment could indicate retaliation against cooperating staff.

Response. To better clarify what monitoring of staff should entail, the Department has added "negative performance reviews or reassignments of staff" to §§ 115.67(c), 115.267(c), and 115.367(c) as examples of conduct or treatment that might indicate retaliation against staff. Of course, these are merely examples; agencies should be mindful that retaliation may be manifested in other ways.

Comment. The Department received numerous responses to NPRM Question 26, which asked whether the standard should be revised to provide additional guidance regarding when continuing monitoring is warranted. Most commenters found the current language sufficient, including many agency commenters. However, several State correctional agencies requested additional guidance. Specific requests included: clarification of what monitoring consists of and how it differs from general monitoring of offenders and staff; examples of what level of monitoring would be acceptable to meet the standard and what incidents would warrant continued monitoring; and detailed training on how to monitor. In addition, an advocacy organization suggested that agencies restart the 90-day clock after each new incident of retaliation; an inmate recommended that monitoring be mandated for eight months; an anonymous commenter proposed that the standard require that monitoring continue until the agency is reasonably certain that retaliation has ceased; and an agency asked whether the 90-day monitoring needed to be documented in any particular way.

Response. In light of the fact that most commenters expressed satisfaction with the level of detail included in this standard, and in order to afford agencies flexibility to develop a monitoring policy consistent with their existing operations and professional judgment, the Department declines to provide a detailed definition of monitoring or to list scenarios in which continuing monitoring would be warranted. However, the Department expects that the final standards' addition of examples of how staff might experience retaliation, as well as the new requirement that monitoring for certain individuals include periodic status checks, will assist agencies in developing their policies to protect against retaliation.

The Department does not find it necessary to specify that a new incident of retaliation must restart the 90-day clock, as the final standard requires agencies to continue monitoring beyond 90 days if the initial monitoring indicates a continuing need. The Department trusts that agencies will recognize that an incident of retaliation indicates a continuing need for monitoring. Finally, in light of the requirement that agencies continue monitoring beyond 90 days if the initial monitoring indicates a continuing need, as well as agencies' concerns about the cost and burden of a monitoring requirement, the Department declines to revise the standard to require agencies to monitor for eight months.

Criminal and Administrative Agency Investigations (§§ 115.71, 115.171, 115.271, 115.371)

Summary of Proposed Rule

The standard contained in the proposed rule required that agencies that conduct their own investigations do so promptly, thoroughly, and objectively. The proposed standard required investigations whenever an allegation of sexual abuse is made, including third-party and

anonymous reports, and prohibited the termination of an investigation on the ground that the alleged abuser or victim is no longer employed or housed by the facility or agency.
The proposed standard required that investigators gather and preserve all available direct and circumstantial evidence.

The proposed standard required that investigators be trained in conducting sexual abuse investigations in compliance with §§ 115.34, 115.134, 115.234, and 115.334.

To ensure an unbiased evaluation of witness credibility, the standard required that credibility assessments be made objectively rather than on the basis of the individual's status as an inmate or a staff member.

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

Changes in Final Rule

The final standard contains several small changes.

In paragraph (a), the duty to investigate allegations promptly, thoroughly, and objectively has been extended to sexual harassment in addition to sexual abuse.

In paragraph (e) of §§ 115.71, 115.171, and 115.271, and paragraph (f) of § 115.371, the final standard provides that no agency shall require an inmate who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

In paragraph (f) of §§ 115.71, 115.171, and 115.271, and paragraph (g) of § 115.371, the final standard provides that administrative investigations should endeavor to determine whether staff actions or failures to act "contributed to" the abuse, rather than "facilitated to" as in the proposed standard.

In paragraph (i) of §§ 115.71, 115.171, and 115.271, the final standard provides that the duty to retain documents applies to "all written reports referenced in paragraphs (f) and (g)," rather than "such investigative records" as in the proposed standard. The final standard for juvenile facilities makes a similar change in § 115.371(j).

In paragraph (j) of the standard for juvenile facilities, the final standard allows for a shorter retention period for written reports regarding abuse committed by residents where the retention for the time period otherwise required by the standard is prohibited by law.

Comments and Responses

Comment. One commenter expressed concern that the restriction on conducting compelled interviews until prosecutors are consulted failed to account for the fact that it is not always known if a criminal prosecution is a possibility when an investigation begins.

Response. This standard requires consultation with prosecutors before conducting compelled interviews when the quality of existing evidence would support a criminal prosecution. The standard would not prohibit an administrative investigation when evidence does not support a criminal prosecution. If that assessment changes during the course of an administrative investigation due to new evidence, prosecutors should be consulted at that time. In case of doubt at any point in the investigation, prosecutors should be consulted.

Comment. Some advocates suggested strengthening this standard in various ways, including by requiring consultation with prosecutors to determine whether the quality of evidence appears to support criminal prosecution.

Response. While the Department recommends consultations with prosecutors in case of doubt, it is not necessary to require such consultation during all investigations. Agencies usually will be able to determine whether the contours of an incident indicate that criminal wrongdoing may have occurred, and are encouraged to consult with prosecutors in case of doubt.

Comment. Some advocates suggested requiring that a preliminary investigation commence immediately upon receiving an allegation of sexual abuse.

Response. The standard requires investigations to be conducted "promptly," which is intended to emphasize the importance of investigating without delay.

Comment. Some advocates suggested requiring agencies to rely on available, accepted sexual assault protocols.

Response. Section 115.21 requires that agencies responsible for investigating allegations of sexual abuse follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions. Section 115.21 requires that the protocol be adapted from or otherwise based on the Department's SAFE Protocol, or similarly comprehensive and authoritative protocols developed after 2011.

Comment. Some advocates recommended requiring a comprehensive written plan—including a memorandum of understanding—to guide the coordination of administrative and criminal investigations.

Response. In the interest of affording agencies flexibility in implementing these standards, the Department declines to mandate such a plan or memorandum, although it encourages agencies to consider whether doing so will help coordinate its investigatory efforts.

Comment. A number of inmates stressed the importance of the provision requiring that credibility be assessed on an individual basis, as opposed to the person's status as inmate or staff, given that, in their view, agencies inappropriately favor staff over inmates when their statements conflict. One agency commenter recommended that this standard be removed, on the grounds that it is not measurable and constitutes a best practice.

Response. Objective assessments of credibility are crucial in investigations of sexual abuse in correctional settings, especially when abuse by staff is alleged. While this standard is not easily quantifiable, it is quite possible that a blatant failure to abide by it will be readily evident. For example, when an inmate makes an allegation of staff abuse, and there is no objective evidence that the allegation is false, the investigator should attempt to find other avenues to corroborate or disprove the allegation rather than assessing the allegation in a vacuum. In such cases, indications in the investigative file as to whether the investigator interviewed witnesses, reviewed the staff member's disciplinary history, and reviewed the inmate's history of lodging complaints would assist the auditor in determining whether the accuser's status as an inmate compromised the investigation's objectivity.

Comment. An inmate recommended that the standards be amended to allow victims the opportunity to take a polygraph test to prove the truth of their statements. However, many advocates opposed polygraph testing because it often yields inaccurate results and can be traumatizing for a victim. They also noted that the Department prohibits States receiving grants under the STOP (Services, Training, Officers, Prosecutors) Violence Against Women Formula Grant Program from using polygraph testing for victims of sexual violence. These advocates

recommended that the standard be amended to explicitly prohibit polygraph testing for inmates who report abuse.

Response. The Department has amended the standard so that it prohibits agencies from requiring inmates who allege sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation. This requirement corresponds to a similar condition on the receipt of certain VAWA grants awarded by the Department. *See* 42 U.S.C. 3796gg-8. The Department recognizes that polygraph examinations are imperfect assessors of credibility. Given that States are precluded from receiving certain funds if they condition investigations upon the alleged victim's agreement to submit to a polygraph test, the Department concludes that a corresponding requirement is appropriate in the PREA context. However, this does not prohibit the administration of such tests to victims who request them.

Comment. A few inmates recommended that the standard be strengthened by adding language expressly prohibiting staff from attempting to coerce inmates into not reporting sexual abuse.

Response. A prohibition against coercion of inmates is implicit in the standards, including in the requirement in this standard to investigate all inmate accusations of sexual abuse, and in the standard that provides for protection against retaliation.

Comment. A number of advocates recommended that the standard also encompass investigations into allegations of sexual harassment.

Response. The Department agrees that the requirement to investigate allegations promptly, thoroughly, and objectively should apply to allegations of sexual harassment as well, and has amended paragraph (a) accordingly.

Comment. Some stakeholders commented that the use of the word "facilitated" in §§ 115.71(f)(1), 115.171(f)(1), 115.271(f)(1), and 115.371(g)(1) appears to require a determination of whether staff acted in a manner that encouraged or directly resulted in the occurrence of the abuse.

Response. The final standard clarifies this provision by replacing "facilitated" with "contributed to."

Comment. A State correctional agency commented that its administrative investigations determine facts, but do not result in "findings."

Response. For clarity, the Department has amended §§ 115.71(f)(2), 115.171(f)(2), 115.271(f)(2), and 115.371(g)(2) to include both investigative "facts" as well as "findings."

Comment. A number of correctional commenters asserted that the record retention requirements in paragraph (h) of the proposed standard (paragraph (i) in the juvenile standard) conflicted with applicable State or local law, including State or local records retention schedules. One noted that records may not be under the full control of the agencies. In some States, the commenter noted, juvenile records are under the control of the juvenile court and can be purged at the request of the juvenile offender. Another commenter suggested that this requirement would be difficult to implement, as the juvenile facility would not know when or if a person incarcerated in an adult facility is released. A number of such commenters recommended allowing agencies to retain records in a manner consistent with State law. One commenter expressed concern about the cost and administrative burden of maintaining all investigative records beyond the period of employment or incarceration, and recommended that it should suffice to retain the final report. Another recommended that the standard require that such

records be kept confidential and not be subject to public inspection under the Freedom of Information Act or similar State laws.

Response. The recordkeeping requirement of this standard, now contained in paragraph (i) (paragraph (j) in the juvenile standard) applies only to records generated pursuant to paragraphs (f) and (g) (paragraphs (g) and (h) in the juvenile standard), which are within the agencies' control. There is no barrier to retaining these records beyond the length of time mandated by this standard if required by State or local regulation (or if the agency chooses to do so for its own reasons). To the extent that State or local laws mandate the disposal of these records within a shorter period, agencies are encouraged to seek revisions of such laws to the extent necessary in order to retain these documents. To reduce potential conflicts, the Department has amended the standard to allow for a shorter retention span when the abuser is a juvenile resident and when retention of records for the time period mandated by the standard is prohibited by law.

The Department does not believe that the requirement of maintaining the records generated pursuant to paragraphs (f) and (g) will prove overly burdensome, especially in light of the clarification in the final standard that only the written reports documenting investigations need be retained.

Finally, the Department lacks the authority to determine whether these records should be subject to public inspection under freedom of information laws, which will depend upon the relevant laws of the jurisdiction in which the custodian of the records is located.

Comment. One agency recommended defining "State entity" in § 115.71(k) to make clear to which specific entity this requirement applies.

Response. As noted above, the use of "State entity" in this context refers to any division of the State government, as opposed to local government.

Evidentiary Standard for Administrative Investigations (§§ 115.72, 115.172, 115.272, 115.372)

Summary of Proposed Rule

The standard contained in the proposed rule required that agencies not impose a standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

Changes in Final Rule

The final standard encompasses allegations of sexual harassment.

Comments and Responses

Comment. Correctional agencies and advocates generally supported this standard, though a few agencies expressed uncertainty as to whether it applied to criminal investigations as well as administrative investigations.

Response. As the title of the standard indicates, this standard applies only to administrative investigations.

Comment. Some advocates recommended that sexual harassment be added to this standard, noting that allegations of sexual harassment typically would be dealt with through administrative investigations.

Response. Upon reconsideration, the Department agrees with this recommendation and has amended the standard to include sexual harassment.

Reporting to Inmates (§§ 115.73, 115.273, 115.373)

Summary of Proposed Rule

The standard contained in the proposed rule required that, upon completion of an investigation into an inmate's allegation that he or she suffered sexual abuse in an agency facility, the agency must inform the inmate whether the allegation was deemed substantiated, unsubstantiated, or unfounded. If the agency itself did not conduct the investigation, the proposed standard required that the agency request the relevant information from the investigating entity in order to inform the inmate. The proposed standard further provided that, if an inmate alleges that a staff member committed sexual abuse, the agency must inform the inmate whenever (1) the staff member is no longer posted in the inmate's unit, (2) the staff member is no longer employed at the facility, (3) the staff member has been indicted on a charge related to the reported conduct, or (4) the indictment results in a conviction. The proposed standard did not apply to allegations that have been determined to be unfounded, and did not apply to lockups, due to the short-term nature of lockup detention.

Changes in Final Rule

The final standard adds a requirement that all such notification or attempted notification must be documented. The final standard also expands the requirement to inform the inmate if his or her abuser is indicted or convicted to apply where the abuser is a fellow inmate. In addition, the final standard clarifies that the agency's duty to report to an alleged victim terminates if the victim is released from the agency's custody, and terminates with regard to notifications regarding staff reassignments, departures, indictments, or convictions if the allegation is determined to be unfounded.

Comments and Responses

Comment. Several agency commenters expressed concern with the proposed standard on human resource practice, security, or privacy grounds. These commenters questioned the wisdom of providing written information to victims and third-party complainants given that, in their view, such information could easily become widely known throughout the facility, possibly endangering other inmates or staff.

Response. The Department does not believe that notifying an inmate that a staff member is no longer posted within the unit or facility would imperil other inmates or staff.

Comment. Some agency commenters asserted that privacy laws may restrict the dissemination of certain information about staff members.

Response. The Department does not believe that the disclosure of information referenced in this standard implicates any privacy interests. Importantly, this standard does not require that

the facility disclose the reason why the staff member is no longer posted within the inmate's facility or unit. Thus, the facility need not reveal whether the staff member's absence is due to a voluntary departure or an adverse employment action. Indictments and convictions, of course, are public facts in which an employee or former employee has no privacy interest.

Comment. Other agency commenters suggested that gathering this information would impose administrative difficulties, and some recommended that the investigating or prosecuting agency be tasked with informing the inmate about indictments or convictions. One commenter recommended that the information reported to the inmate be limited to information that was publicly available.

Response. It is highly unlikely that an indictment or conviction would result without the agency learning about it. Even so, the standard does not impose any affirmative burden upon agencies to gather information for the purpose of informing inmates. Rather, it requires that the agency inform the inmate whenever "[t]he agency *learns*" that a staff member has been indicted or convicted on a charge related to sexual abuse within the facility (emphasis added).

Comment. A number of advocates recommended that the standard be amended to provide additional information to inmates. They recommend requiring that the agency, in the case of substantiated claims, inform the victim what the agency has done in response to the abuse, whether administrative sanctions have been imposed, whether the agency has reported the abuse to prosecutors, and the results of any criminal proceeding. These advocates also recommended requiring disclosure to third-party complainants.

Response. The final standard does not incorporate these suggestions. First, while the Department encourages agencies to communicate with victims regarding remedial action taken, it would be an inappropriate intrusion upon agency operations to require agencies to disclose the actions they have taken. Second, disclosing the imposition of administrative sanctions may implicate employees' privacy rights under governing laws. The victim's interests in safety are served by requiring disclosure of whether the staff member is no longer posted on the victim's unit or in the victim's facility, and the victim's interest in justice is served by requiring disclosure of any indictments or convictions. Third, for similar reasons, the Department declines to revise the standard to mandate disclosure of whether the agency has reported the abuse to prosecutors, or of the results of criminal proceedings beyond the fact of a conviction. Fourth, such interests do not support requiring disclosure to third-party complainants, who are not similarly situated to the victim. Of course, agencies may choose to disclose additional information, even if such disclosure is not covered by this standard.

Comment. Advocates recommended requiring documentation, signed by the inmate, that he or she received the required information.

Response. The Department finds merit in the suggestion that such notifications be documented and has incorporated this into the final standard. However, the Department does not believe it is necessary to require that the inmate sign such notifications.

Comment. Some commenters expressed concern that the standard could be read to require that information be reported to the accuser as the investigation unfolds.

Response. The final standard requires an agency to report to an inmate who has alleged sexual abuse when the allegation has been determined to be substantiated, unsubstantiated, or unfounded, if the abuser has been indicted or convicted on a charge related to sexual abuse within the facility, and, if the alleged abuse was committed by a staff member, when the staff member is no longer posted within the inmate's unit or is no longer employed at the facility. While agencies may determine it is prudent to provide an inmate with additional updates if an

investigation is prolonged, the standard does not require an agency to provide information during the course of the investigation.

Comment. Some commenters recommended that the standard define "unfounded" and "unsubstantiated."

Response. Section 115.5 contains definitions of "unfounded allegation" and "unsubstantiated allegation."

Comment. Some commenters asserted that the terms "substantiated" and "unsubstantiated" apply only to administrative investigations and therefore recommended that paragraph (a) be amended to apply only to administrative investigations.

Response. These terms, as defined in the final rule, are applicable to all types of investigations. Indeed, the BJS Survey of Sexual Violence, which for several years has been collecting data from agencies regarding substantiated, unsubstantiated, and unfounded allegations, does not limit its inquiries to administrative investigations.

Comment. Some commenters recommended that staff be required to explain to inmates the meaning of substantiated, unsubstantiated, and unfounded.

Response. The Department believes that the reporting requirement implicitly requires staff to ensure that inmates understand the result of the investigation.

Comment. Other commenters recommended that the Department adopt a standard requiring juvenile facilities to report this information to parents and legal guardians of juvenile victims.

Response. The Department encourages juvenile facilities to share such information with parents and legal guardians in accordance with the facility's general policies regarding communication with parents and legal guardians. However, because the interests implicated in these disclosures most directly impact the victim, the Department declines to require agencies to do so.

Comment. Some advocates recommended requiring notifications analogous to those required by paragraph (c) when the perpetrator is another inmate.

Response. Because staff members exert complete authority over inmates, safety interests compel the notification of inmates regarding the transfer or departure of a staff member. Because fellow inmates lack such authority over other inmates, the Department has chosen not to require similar notification when the perpetrator is another inmate. However, the final standard expands the indictment/conviction notification requirement to cover cases in which the defendant abuser is an inmate.

Comment. One correctional commenter recommended that the standard require only "reasonable efforts" to inform an inmate, because the inmate may be released while an investigation is still ongoing and may be difficult to locate.

Response. The final standard states that an agency has no obligation to report to inmates who have been released from its custody.

Comment. A few correctional commenters recommended that this standard exempt allegations that have been determined to be unsubstantiated.

Response. The Department disagrees with this recommendation. By definition, an unsubstantiated allegation is one in which there is insufficient evidence to determine whether or not the event occurred. The possibility that the event occurred justifies the minimal burden of informing the inmate that the staff member is no longer posted within the inmate's unit. In addition, an inmate who is informed that his or her allegation is unsubstantiated may wish to provide, or attempt to obtain, additional evidence that would benefit the investigation.

Disciplinary Sanctions for Staff (§§ 115.76, 115.176, 115.276, 115.376)

Summary of Proposed Rule

The standard contained in the proposed rule provided that staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies, and that termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual touching.

The proposed standard further provided that sanctions be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories. If a staff member is terminated for violating such policies, or if a staff member resigns in lieu of termination, the proposed standard required that a report be made to law enforcement agencies (unless the activity was clearly not criminal) and to any relevant licensing bodies.

Changes in Final Rule

The final standard provides that termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse, not only sexual touching.

Comments and Responses

Comment. Several advocate commenters stated that termination should be the mandatory sanction for employees that have engaged in sexual abuse, rather than a presumptive sanction.

Response. The Department believes that a change is not warranted, for the reasons stated by the NPREC in the discussion section that accompanied its corresponding standard, labeled as DI-1:

> This standard requires that termination be the "presumptive" but not the mandatory sanction for certain types of sexual abuse in recognition of the fact that disciplinary sanctions must be determined on a case-by-case basis. Establishing termination as a presumption places a heavy burden on the staff person found to have committed the abuse to demonstrate why termination is not the appropriate sanction. This presumption also requires that termination should be the rule for the referenced types of sexual abuse, with exceptions made only in extraordinary circumstances.[36]

Comment. A number of agency commenters expressed concern that collective bargaining agreements may limit their ability to assure termination.

Response. The Department is aware that, pursuant to collective bargaining agreements, final decisions regarding termination may rest in the hands of an arbitrator. This standard is

[36] NPREC, *Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails*, 47, available at *http://www.ncjrs.gov/pdffiles1/226682.pdf*.

intended to govern the sanction sought by the agency, recognizing that, in some circumstances, the agency may not have the authority to make the final determination.

Comment. A large number of commenters across all commenter types requested that the standard be revised to provide that termination shall be the presumptive disciplinary sanction not only for staff who have engaged in sexual touching, but also for staff who have engaged in other types of sexual misconduct such as indecent exposure and voyeurism.

Response. The Department has changed the term "sexual touching" to "sexual abuse."

Comment. Some advocate commenters expressed concern that the range of discipline contemplated in paragraph (c) was too broad. In addition, one agency commenter suggested that the inclusion of a range of discipline was not consistent with a zero-tolerance policy.

Response. The Department has revised paragraph (c) to make clear that it refers to policy violations that do not constitute sexual abuse. Coupled with the shift from "sexual touching" to "sexual abuse" in paragraph (b), the final standard draws a line between sexual abuse by staff, for which termination is the presumptive sanction, and other policy violations, for which agencies are afforded discretion to impose discipline as warranted. Such violations may include, for example, a failure to take required responsive actions following an incident, negligent supervision that led to or could have led to an incident, or willfully ignoring evidence that a colleague has abused an inmate.

Comment. An advocate commenter suggested that the final standard mandate disciplinary sanctions for staff who regularly work on shifts when incidents of sexual abuse occur, noting that "standing by while assaults happen is a violation of staff responsibility."

Response. The Department agrees that a staff member's failure to act to prevent sexual abuse merits discipline. However, a blanket rule mandating sanctions for staff who work on shifts when incidents occur would not be appropriate. Rather, a determination whether to impose discipline should be made on a case-by-case basis.

Comment. Commenters in all categories requested that this standard be expanded to include volunteers and contractors.

Response. The final rule adds a new standard, discussed immediately below, to address this concern.

Corrective Action for Contractors and Volunteers (§§ 115.77, 115.177, 115.277, 115.377)

The final rule adds a new standard requiring that an agency or facility prohibit from contact with inmates any contractor or volunteer who engages in sexual abuse. The standard also requires that any incident of sexual abuse be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies. With regard to any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer, the new standard requires that the facility take appropriate remedial measures and consider whether to prohibit further contact with inmates.

The wording of this standard takes into account that contractors and volunteers are not employees and thus are not subject to termination or discipline as those terms are typically construed. However, the consequences set forth in this standard parallel the consequences for staff members, with discretion left to agencies and facilities to take appropriate remedial measures commensurate with the nature of the violation.

Disciplinary Sanctions, Interventions, and Prosecutorial Referrals for Inmates (§§ 115.78, 115.178, 115.278, 115.378)

Summary of Proposed Rule

The standard contained in the proposed rule (numbered as §§ 115.77, 115.177, 115.277, and 115.377) mandated that inmates be subject to disciplinary sanctions pursuant to a formal disciplinary process following a finding that the inmate sexually abused another inmate. The standard mandated that sanctions be appropriate for the offense, taking into account the inmate's history and whether any mental disabilities or mental illness contributed to the behavior.

As with sanctions against staff, the proposed standard required that sanctions against inmates be fair and proportional, taking into consideration the inmate's actions, disciplinary history, and sanctions imposed on other inmates in similar situations. The proposed standard also required that the disciplinary process take into account any mitigating factors, such as mental illness or mental disability, and that it consider whether to incorporate therapy, counseling, or other interventions that might help reduce recidivism.

The proposed standard provided that inmates shall not be disciplined for sexual contact with staff without a finding that the staff member did not consent to such contact. The standard further provided that inmates may not be punished for making good-faith allegations of sexual abuse, even if the allegation is not substantiated following an investigation. Finally, the standard provided that an agency must not consider consensual sexual contact between inmates to constitute sexual abuse.

With regard to lockups, which generally do not hold inmates for prolonged periods of time and thus do not impose discipline, the proposed standard required a referral to the appropriate prosecuting authority when probable cause exists to believe that one lockup detainee sexually abused another. If the lockup is not responsible for investigating allegations of sexual abuse, the standard required that it inform the responsible investigating entity. The proposed standard also applied to any State entity or Department of Justice component that is responsible for investigating sexual abuse in lockups.

Changes in Final Rule

The final standard makes clear that it does not limit an agency's ability to prohibit sexual activity among inmates, or to discipline inmates for violating such a prohibition.

Comments and Responses

Comment. A large number of advocate commenters objected to the provision that allowed discipline of inmates for sexual contact with staff "upon a finding that the staff member did not consent to such contact." Commenters criticized this language as easily exploitable by an abusive staff member, who could coerce an inmate into sexual activity and then falsely claim that she or he did not consent to sex with the inmate. Fearing that the language in the proposed standard could discourage inmates from reporting staff sexual abuse, several advocate commenters recommended allowing discipline of inmates for sexual contact with staff only if the inmate used or threatened to use force against the staff member.

Response. As stated in the NPRM, the responsibility for preventing inmate-staff sexual contact presumptively rests with the staff member, due to the vast power imbalance between staff and inmates. Even if it appears that a staff member and an inmate willingly engaged in sexual activity, the very real possibility that the inmate was coerced into doing so militates against automatically disciplining both parties for such behavior. Otherwise, inmates may be reluctant to report being coerced into sexual activity by staff, for fear of discipline. For this reason, the proposed standard required the facility to make a finding that the staff member did not consent, rather than merely taking the word of the staff member.

However, exempting from discipline non-consensual activity that did not involve force or threat of force would tilt too far in the opposite direction. Such a rule would exempt from discipline, for example, a large and muscular inmate who did not use or threaten force but who coerced a physically slight staff member into sexual activity by trapping her in a confined space. Likewise, an inmate who drugged a staff member and sexually abused her while she was unconscious would be immune from discipline. Finally, it is doubtful that the language suggested by advocates would eliminate the risk of false allegations by staff members. A staff member who would falsely allege that he or she did not consent to sexual activity with an inmate could, if this language were adopted, instead falsely assert that the inmate had threatened to use force. For these reasons, the Department rejects this proposed change.

Comment. Many commenters, of various types, expressed confusion over the requirement in the proposed standard that "[a]ny prohibition on inmate-on-inmate sexual activity shall not consider consensual sexual activity to constitute sexual abuse." A number of commenters appeared to interpret the use of "consensual" in the proposed standard as indicating a permissive attitude toward inmates engaging in sexual activity.

Response. The Department did not intend to limit agencies' ability to prohibit or otherwise restrict inmate sexual activity. Rather, the Department meant to ensure that such activity is not automatically classified as "sexual abuse." The Department recognizes that it may be difficult to discern whether sexual activity between inmates is truly consensual; activity that may seem to be voluntary may actually be coerced. Yet it is essential that staff make individualized assessments regarding each inmate's behavior, and not simply label as an abuser every inmate caught having sex with another inmate. The Department has revised this language to make clear that the standard does not limit an agency's ability to prohibit sexual activity among inmates, or to discipline inmates for violating such a prohibition. However, while consensual sexual activity between inmates may be prohibited, it should not be viewed as sexual abuse unless the activity was coerced.

Comment. Many commenters, including advocates and agencies alike, criticized the proposed standard for juveniles as setting an inappropriately punitive tone. Some comments interpreted the proposed standard to require disciplinary sanctions for residents.

Response. Unlike many adult correctional systems, juvenile agencies typically operate on a rehabilitative model, and focus on positive programming and treatment rather than punishment. The Department agrees that juvenile agencies should have discretion as to the types of interventions they find most appropriate in responding to sexually abusive behavior. For example, rather than imposing a disciplinary sanction, the agency might choose to direct the juvenile perpetrator to a sex offender treatment program aimed at rehabilitation.

In consideration of these concerns, § 115.378 is now titled "Interventions and disciplinary sanctions for residents." Further, the Department has reworded § 115.378 to make clear that the standard does not require any particular type of intervention or discipline, and that juvenile

agencies retain discretion to determine the most appropriate response. When agencies choose to impose discipline, the sanction must be commensurate with the nature of the offense and must take into consideration other relevant factors.

Comment. Advocate commenters strongly objected to the lack of restrictions on the use of isolation in disciplining juveniles in the proposed standards. Some specifically requested a 72-hour time limit on the use of isolation in juvenile facilities.

Response. The final standard requires that residents in isolation shall not be denied daily large-muscle exercise or access any to legally required education programming or special education services. In addition, such residents must receive daily visits from a medical or mental health care clinician, as well as access to other programs and work opportunities to the extent possible.

The Department did not incorporate a time limit into the final standard, recognizing that agencies must balance the wellbeing of sexually abusive youth with that of other youth in its custody. In rare cases, a facility may find it necessary to isolate youth beyond 72 hours due to safety and security concerns. However, isolated youth remain subject to the protections discussed above. The Department encourages facilities to minimize their reliance on isolation for juveniles to the greatest extent possible.

Comment. Advocate commenters also objected to language in § 115.378(d) of the proposed standards regarding a facility's ability to limit access to programming for abusers who refuse to participate in therapy, counseling or interventions designed to address or correct underlying reasons for the abuse.

Response. In recognition of the fact that some sex offender treatment programs require admission of the underlying act, and that such an admission could have consequences for any subsequent criminal case, the Department believes that youth should not be punished for failing to participate. Accordingly, the Department has revised § 115.378(d) to clarify that a facility may limit an abuser's access to rewards-based management or behavior-based incentives due to their failure to participate in therapeutic interventions, but may not limit access to general programming and education. This revision is consistent with a rehabilitative approach to juvenile corrections.

Comment. Many advocate commenters expressed concern with the Department's lack of guidance to juvenile agencies regarding adherence to and interpretation of State age of consent laws and mandatory reporting requirements.

Response. The Department believes it has appropriately addressed these concerns by expanding and specifying the training requirements in § 115.331, which now mandates training on how to distinguish between abusive and non-abusive sexual contact between residents and on how to comply with relevant age of consent laws and mandatory reporting. The Department intends for these standards to be read in conjunction with, rather than to supersede, existing State laws regarding mandatory reporting and age of consent.

Medical and Mental Health Screenings (§§ 115.81, 115.381)

Summary of Proposed Rule

The standard in the proposed rule required that inmates be asked about any prior history of sexual victimization and abusiveness during intake or classification screenings. The proposed standard further required that inmates be offered a follow-up meeting with a medical or mental

health practitioner within 14 days of the intake screening. The proposed standard also limited the inquiry required in jails by not requiring an inquiry about prior sexual abusiveness.

The proposed standard did not apply to lockups, given the relatively short time that they are responsible for inmate care, or to community confinement facilities, which do not undertake a similar screening process.

Changes in Final Rule

The final standard no longer requires that facilities make these inquiries during intake screenings. Rather, the Department has replaced this language with a reference to the screening conducted pursuant to §§ 115.41 and 115.341. The Department has also revised the standard to require that inmates be offered a follow-up meeting when screening indicates that they have experienced prior sexual victimization or perpetrated sexual abuse, rather than only when the inmate discloses such information. Finally, for clarity, the Department has changed "follow-up reception" to "follow-up meeting."

Comments and Responses

Comment. Numerous commenters, including correctional agencies and advocacy organizations, asserted that the screening requirements under §§ 115.81(a) and 115.381(a) were duplicative of—and inconsistent with—the screening requirements under §§ 115.41 and 115.341. These commenters requested that the two standards be consolidated.

Response. The Department is persuaded that the separate screening requirement under §§ 115.81(a) and 115.381(a) is unnecessary in light of §§ 115.41 and 115.341. Accordingly, the Department has replaced this screening requirement with a reference to screenings conducted pursuant to §§ 115.41 and 115.341.

Comment. Several commenters criticized the 14-day timeframe for a follow-up meeting where there is an indication of prior sexual victimization or abusiveness. Several advocates and a State council on juvenile detention suggested that 14 days was too long for victims and abusers to wait for treatment; some commenters requested that, at a minimum, the timeframe be shortened in juvenile facilities because of the urgency of addressing these issues among juveniles and because of the shorter average length of stay at juvenile facilities. A State juvenile justice agency recommended that, for youth in short-term facilities, the standard mandate a follow-up meeting within 10 days of release from the facility or within 14 days of intake for youth that remain in the facility. A State correctional agency recommended that treating victims receive priority, and criticized the proposed standard for providing the same 14-day timeframe for victims and abusers, without distinguishing between the two.

Finally, some juvenile justice agencies asserted that the 14-day timeframe under §§ 115.81 and 115.381 is inconsistent with the requirement under §§ 115.83 and 115.383 that facilities conduct a mental health evaluation of all known abusers within 60 days of learning of such abuse history.

Response. The Department agrees that an inmate with a history of victimization or abuse should receive a follow-up meeting with a health care practitioner as soon as possible. However, some facilities, particularly smaller facilities, have limited access to medical and mental health practitioners. While the Department encourages facilities to arrange for follow-up meetings as

soon as possible, the final standard preserves the 14-day deadline in order to accommodate these staffing challenges.

The requirement that prisons provide *follow-up meetings* within 14 days for inmates whose intake screenings indicate prior abusiveness is distinct from—and consistent with—the requirement that prisons attempt to conduct mental health *evaluations* within 60 days. The follow-up meeting is intended to emphasize immediate mental health needs and security risks, while the evaluation is a comprehensive mental health assessment intended to inform future treatment plans.

Comment. A State correctional agency argued that it is appropriate to require facilities to offer a follow-up meeting to an inmate with a history of victimization but that it should be left to the facility's discretion to determine whether to offer a follow-up meeting to an inmate whose screening indicates prior abusiveness.

Response. The Department believes that the potential for reducing future incidents of sexual abuse and creating an improved overall sense of safety within a facility justifies the burden of requiring the facility to offer a follow-up meeting to an inmate whose screening indicates prior abusiveness. However, as reflected in §§ 115.83, 115.283, and 115.383, the Department agrees that it should be left to the discretion of a mental health practitioner to determine, following a mental health evaluation, whether treatment is appropriate for a known inmate-on-inmate or resident-on-resident abuser.

Comment. Advocacy organizations and a county sheriff's office questioned the Department's decision to exclude jails from the requirement to inquire about past sexual abusiveness. The sheriff's office asserted that, in light of the safety risks posed by an individual who has previously perpetrated abuse, it is especially critical that jails consider that history. By contrast, several juvenile justice agencies and advocacy groups requested an analogous carve-out for short-term juvenile facilities.

Response. The Department has preserved the exemption for jails from the requirement under § 115.81 that inmates whose screenings indicate prior sexual abusiveness be offered a follow-up meeting with a medical or mental health practitioner within 14 days, as well as the requirement under § 115.83 that known inmate-on-inmate abusers be offered a mental health evaluation and treatment, where deemed appropriate. Because of the smaller capacity of many jails and high inmate turnover, it would be overly burdensome to require jails to provide mental health follow-up meetings or evaluations for individuals whose screenings indicate prior sexual abusiveness.

In light of the importance of providing mental health support to youth who have reported sexual abusiveness—a point underscored by numerous commenters who requested that the 14-day timeframe for a follow-up meeting be reduced for juveniles—the final standard does not exempt any juvenile facilities from the medical and mental health care requirements for abusers.

Comment. Two State juvenile justice agencies raised concerns about the standard's interaction with mandatory reporting laws. One recommended that the standard require staff members conducting screenings to provide appropriate notice regarding the agency's mandatory reporting obligations under State law; another suggested that the standards offer guidance on following such laws.

Response. The Department recognizes the importance of providing staff with guidance on how to comply with State-mandated reporting laws. However, given the range of State mandatory reporting laws and agency policies for complying with such laws, the Department is not in a position to provide detailed instructions for compliance. Instead, the Department has

revised §§ 115.31, 115.131 and 115.231 to require that staff receive training on how to comply with relevant laws relating to mandatory reporting of sexual abuse.

Comment. A State juvenile justice agency recommended adding language to the standard to specify the distinction between previously reported and never-before-reported sexual victimization.

Response. The Department does not find it necessary to distinguish in the standard between new reports of sexual victimization and previously reported sexual victimization. A resident's history of prior sexual victimization or abusive behavior may contribute to medical or mental health concerns, regardless of whether such victimization was previously reported upon a prior admission to the facility. The resident should be offered a follow-up meeting with a medical or mental health practitioner within 14 days of the new intake screening, but if the practitioner determines through such follow-up meeting that treatment is not warranted, the facility need not provide such services. The requirements relating to mandatory reporting laws, confidentiality, and informed consent under the paragraphs newly designated as § 115.381(c) and (d) adequately address any legal issues that could arise pertaining to a new report of sexual victimization.

Comment. Two commenters raised concerns about confidentiality. A State juvenile justice agency recommended modifying the confidentiality provisions (designated in the final rule as §§ 115.81(c) and 115.381(c)) to specify that any information relating to sexual victimization or abusiveness may be provided to staff only on a need-to-know basis to inform treatment plans and security and management decisions. A county sheriff argued that an inmate should not be able to maintain confidentiality regarding his or her prior abusiveness in institutional settings, as it could imperil other inmates.

In addition, a State sheriffs' association raised concerns that inquiring about an inmate's sexual history in a public setting, where intake screenings are currently conducted, would violate the inmate's privacy. The association expressed apprehension that facilities would be required to build private screening rooms, which the association suggested would raise issues of cost and space.

Response. The final standard requires that dissemination of information related to sexual victimization or abusiveness be "strictly limited" to medical and mental health practitioners and other staff, as necessary, to inform treatment plans and security and management decisions, or as otherwise required by Federal, State, or local law. The Department interprets this to mean that such information shall be shared only to the extent necessary to ensure inmate safety and proper treatment and to comply with the law. The facility retains discretion in how to provide the necessary degree of confidentiality while still accounting for safety, treatment, and operational issues.

Sections 115.41, 115.141, 115.241, and 115.341 do not require that intake screenings occur in private rooms. However, the Department expects that screening will be conducted in a manner that is conducive to eliciting complete and accurate information.

Comment. A State juvenile probation commission requested that the Department define the terms "abusiveness" and "victimization."

Response. In light of the rule's detailed definition of sexual abuse, the Department does not find it necessary to define sexual abusiveness or sexual victimization.

Comment. A State juvenile justice agency recommended replacing "follow-up reception" with "follow-up appointment," and suggested adding a requirement to paragraph (b) that staff

ensure that the inmate or resident is offered a follow-up appointment with a medical or mental health provider "and is referred to a medical practitioner when indicated."

Response. The Department agrees that the phrase "follow-up reception" is unclear and has changed "reception" to "meeting." As discussed above, the Department intends for a "follow-up meeting," in contrast to an evaluation, to entail an interaction between a health care provider and inmate or resident in which the provider focuses on mitigating immediate mental health concerns and assessing security risks, as well as informing decisions with regard to further treatment. In light of the requirements for ongoing medical and mental health care under §§ 115.83 and 115.383, the Department does not find it necessary for the standard to require that inmates or residents be referred to a medical practitioner when indicated.

Access to Emergency Medical and Mental Health Services (§§ 115.82, 115.182, 115.282, 115.382)

Summary of Proposed Rule

The standard contained in the proposed rule required that victims of sexual abuse receive free access to emergency medical treatment and crisis intervention services.

Changes in Final Rule

The Department has added a requirement for prisons, jails, community confinement facilities, and juvenile facilities that victims of sexual abuse while incarcerated be offered timely information about and timely access to emergency contraception, in accordance with professionally accepted standards of care.

In addition, the Department has made four clarifying changes. First, the Department has specified that sexually transmitted infections prophylaxis must be offered where "medically" appropriate, to clarify that the assessment of whether to offer prophylaxis should be based solely on a medical judgment. Second, the final standard specifies that such prophylaxis must be offered in accordance with professionally accepted standards of care. Third, the final standard clarifies that a victim cannot be charged for any of the services described in this standard, or required to name the abuser as a condition of receipt of care. Finally, the Department has qualified the word "access" with "timely" to underscore the time-sensitive nature of emergency contraception and sexually transmitted infections prophylaxis and to ensure that drugs are provided within their window of efficacy.

Comments and Responses

Comment. A number of advocacy organizations commented that major medical organizations and sexual assault treatment guides recommend the provision of emergency contraception as a standard part of treatment for rape victims. These commenters requested (1) that the standards provide specific guidance regarding the provision of emergency contraception at no cost to inmate victims who may be at risk of pregnancy, and (2) in light of the contraceptive's time-sensitive nature, that the standards explicitly require facilities to stock an adequate supply of emergency contraception so that it will be immediately available. In addition, an advocacy organization requested that the Department clarify that pregnancy-related

services and sexually transmitted infections prophylaxis be offered without cost, and recommended that the phrase "where appropriate" be replaced with "where medically appropriate." Finally, one commenter remarked that the requirement that female victims be given access to pregnancy-related services is duplicative of §§ 115.83, 115.283, and 115.383.

Response. The Department agrees that it is essential that inmates at risk of pregnancy following an incident of sexual abuse be given timely access to emergency contraception. Accordingly, the Department has modified the standard to specify that such inmates shall be offered timely information about and timely access to emergency contraception, in accordance with professionally accepted standards of care, where medically appropriate. The Department declines to specify that facilities must stock a particular drug, but has clarified that access to emergency contraception must be "timely"; certainly, timeliness is achieved only if the contraceptive is provided within its window of efficacy. To ensure that emergency contraception and sexually transmitted infections prophylaxis are available at no cost to the victim, the Department has moved to the end of the standard the clause requiring that treatment services be provided to the victim without financial cost; the Department intends for the phrase "treatment services" to encompass the provision of medical drugs. The Department has also clarified that the determination of whether emergency contraception or sexually transmitted infections prophylaxis should be offered to a victim must be based solely on whether the drug is "medically" appropriate. Finally, to avoid duplication of §§ 115.83, 115.283, and 115.383, the Department has eliminated the reference to pregnancy-related services in this standard.

Comment. Some advocacy groups recommended expanding the lockup standard to require facilities to offer detainee victims of sexual abuse timely information about and access to all pregnancy-related services and sexually transmitted infections prophylaxis, where appropriate.

Response. In light of the very short-term nature of lockup detention, the Department does not believe that it is necessary to require lockups to provide emergency contraception or sexually transmitted infections prophylaxis. Consistent with its obligation to provide appropriate emergency care, a lockup would transfer such a detainee to an appropriate emergency medical provider, which would be expected to provide such care as appropriate.

Comment. One State correctional agency remarked that "unimpeded access" is nearly impossible to ensure, even in the community.

Response. The Department has preserved the requirement that access to emergency medical and mental health care services for sexual abuse victims be "unimpeded" to make clear that agencies may not impose administrative hurdles that could delay access to these critical services.

Comment. A State correctional agency recommended that the Department define the term "sexually transmitted infections prophylaxis."

Response. The Department intends for "sexually transmitted infections prophylaxis" to encompass appropriate post-incident treatment to reduce the risk of sexually transmitted diseases resulting from an incident of sexual abuse, and does not find it necessary to include a definition for that term in the final rule.

Ongoing Medical and Mental Health Care for Sexual Abuse Victims and Abusers (§§ 115.83, 115.283, 115.383)

Summary of Proposed Rule

The standard contained in the proposed rule required that victims of sexual abuse receive access to ongoing medical and mental health care, and that abusers receive access to care as well. The standard required facilities to offer ongoing medical and mental health care consistent with the community level of care for as long as such care is needed.

The standard also required that known inmate abusers receive a mental health evaluation within 60 days of the facility learning that the abuse had occurred.

In addition, with respect to victims, the standard required that agencies provide, where relevant, pregnancy tests and timely information about and access to all pregnancy-related medical services that are lawful in the community. The Department also proposed requiring the provision of timely information about and access to sexually transmitted infections prophylaxis where appropriate.

Changes in Final Rule

The Department has expanded the duty to provide non-emergency medical and mental health care to victims of sexual abuse by requiring care for individuals who were victimized in any prison, jail, lockup, or juvenile facility rather than only for those who were victimized "during their present term of incarceration." However, the Department has clarified that such care need not be "ongoing" but need be provided only "as appropriate."

The final standard adds a requirement that victims of sexual abuse while incarcerated be offered tests for sexually transmitted infections as medically appropriate, and clarifies that information about pregnancy-related medical services must be "comprehensive" and access to pregnancy-related medical services must be "timely."

For clarity, the Department has replaced the reference to access to "all pregnancy-related medical services that are lawful in the community" with "all lawful pregnancy-related medical services."

The Department has also added language, identical to a provision in § 115.82, that requires that all treatment services under this standard be made available without financial cost to the victim and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

Finally, the Department has made several clarifying changes to the requirement that facilities conduct mental health evaluations of inmate abusers and offer treatment when deemed appropriate: The final standard specifies that facilities need only "attempt" to conduct mental health evaluations; indicates that this clause applies only to inmate-on-inmate abusers; and no longer requires that only "qualified" mental health practitioners be permitted to determine whether it is appropriate to offer treatment. The final standard also clarifies the wording of references to sexual abuse victims.

Comments and Responses

Comment. A State juvenile justice agency noted that the phrase "resident victims" could refer to individuals who were victimized prior to placement in the facility. For clarity, the commenter also requested that the standard uniformly refer to victims of sexual abuse as "residents who, during their term of incarceration, have been victimized."

Response. The Department intends for the standard to encompass individuals who were victimized while in another facility. Accordingly, the final standard clarifies that medical and mental health evaluation and, as appropriate, treatment must be offered to all inmates or residents who have been victimized by sexual abuse in any facility.

Comment. A county sheriff predicted that a large percentage of inmates will claim to have been victimized, which would overload the system and impose substantial additional costs.

Response. The final standard requires an evaluation and treatment "as appropriate." To the extent that an inmate falsely alleges prior victimization, such treatment would not be appropriate. Furthermore, all facilities are already obligated to provide adequate care to meet inmates' serious mental health needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). By providing evaluation and treatment to sexual abuse victims "as appropriate," facilities are simply providing constitutional conditions of care.

Comment. Numerous commenters expressed support for the requirement that women who become pregnant as a result of rape receive access to pregnancy tests and timely information about and access to pregnancy-related services. Several commenters requested that the standard be clarified to reflect the fact that female inmates retain the right to an abortion. These commenters recommended modifying the standard to ensure that victims who become pregnant as a result of sexual abuse receive adequate information to make decisions about their pregnancy as well as any assistance necessary to carry out those decisions.

In particular, a group of women's rights organizations requested that a woman who becomes pregnant as a result of sexual abuse while incarcerated be provided with comprehensive and unbiased counseling on options, including information on how pregnancy will affect the conditions of her confinement and information on the full spectrum of her parental rights and responsibilities.

These commenters also requested that the standards specify that an incarcerated rape victim be able to terminate her pregnancy at no financial cost, and that counseling include an explanation that she will not have to pay for her medical care, whether she chooses to terminate the pregnancy or carry to term. In addition, these commenters requested that facilities be required to protect from coercion and retaliation women who accuse staff members of rape and then choose to carry to term, and that the standards specify that facilities must provide transportation for abortion care, distance and cost notwithstanding.

Finally, the commenters criticized as excessively vague the proposed standard's requirement that pregnant rape victims receive timely information about and access to all pregnancy-related medical services "that are lawful in the community." Commenters expressed concern that facility staff may take an unduly narrow view in evaluating which services are "lawful in the community," possibly concluding that because there is no abortion provider in the county, abortion services are not "lawful in the community." These commenters requested that the standard be revised to clarify that victims have access to all pregnancy-related medical services, including the right to terminate a pregnancy or carry to term.

Response. The Department agrees that women who are sexually abused while incarcerated and become pregnant as a result must receive comprehensive information about and meaningful access to all lawful pregnancy-related medical services at no financial cost. The final standard includes several clarifying revisions. First, the Department has specified that such victims must receive timely and comprehensive information about all lawful pregnancy-related medical services, and that access to pregnancy-related medical services must be timely. Second, the Department has removed the phrase "that are lawful in the community" and instead required

facilities to provide information about and access to "all lawful" pregnancy-related medical services. Third, the Department has added a requirement that treatment services provided under this standard be made available without financial cost and regardless of whether the victim names the abuser. This provision mirrors the requirement under §§ 115.82, 115.282, and 115.382 that emergency services must be made available at no financial cost to the victim.

The Department believes that the commenters' requests regarding the provision of specific information are encompassed by the requirement that facilities provide "comprehensive" information about all lawful pregnancy-related medical services, and that additional guidance on transportation is unnecessary given the requirement that victims be provided "timely access" to all lawful pregnancy-related medical services—which necessarily includes transportation. Finally, while the Department appreciates commenters' concern about the risk of coercion or retaliation by staff members accused of sexual abuse in cases where a victim becomes pregnant, the Department believes that the protections against retaliation provided in §§ 115.67, 115.167, 115.267, and 115.367 are adequate to address this risk.

Comment. A national coalition of LGBTI advocacy organizations recommended that the standards expressly require facilities to offer testing for HIV and other sexually transmitted infections, accompanied by counseling before and after the test and contingent upon written consent from the inmate. However, they urged that victims should not be required to undergo testing and not be punished for declining testing. A State juvenile justice agency also recommended testing for sexually transmitted infections.

Response. The Department agrees that the standards should expressly require that facilities offer testing for sexually transmitted infections, and has added a new paragraph (f) that requires facilities to offer such tests, as medically appropriate, to victims of sexual abuse while incarcerated. The language stating that victims "shall be offered" tests makes clear that victims are not required to undergo such testing. The Department trusts that medical practitioners administering such tests will adhere to professionally accepted standards for pre- and post-test counseling and written consent.

Comment. Several State correctional agencies, sheriff's offices, and sheriff's associations asserted that conducting a mental health evaluation of abusers and offering treatment where deemed appropriate would be prohibitively costly. A State correctional agency stated that the mental health care requirements for abusers could be burdensome and that victims should remain the top priority. However, an advocacy organization agreed with the Department's statement in the NPRM that the benefit of reducing future abuse by known abusers justifies the additional costs.

Response. The Department remains of the view that the benefit of reducing future abuse by known inmate-on-inmate or resident-on-resident abusers—by avoiding incidents and improving the perception of safety within the facility—justifies the cost of mental health evaluations and, where appropriate, treatment. However, the Department underscores that, as stated in the NPRM, the standard is not intended to require a specialized comprehensive sex offender treatment program, which could impose a significant financial burden. The Department believes that requiring agencies to offer reasonable treatment, when deemed appropriate by a mental health practitioner, is justifiable in light of the anticipated costs and benefits.

The Department agrees that mental health care for victims should be the priority and accordingly has provided more detail on the minimum standards of care for victims than for abusers. The standard specifies that evaluation and treatment of sexual abuse victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for

continued care following their transfer to, or placement in, other facilities, or their release from custody. The standard further requires that facilities provide victims of sexual abuse with medical and mental health services consistent with the community level of care.

Comment. Numerous commenters expressed concern over the requirement that facilities provide a mental health evaluation of all known inmate-on-inmate abusers within 60 days. Several correctional agency commenters suggested that 60 days is too long, and recommended reducing the timeframe to 30 days, 14 days, 7 days, or 72 hours. An advocacy organization stated that the 60-day requirement is incompatible with the shorter average length of stay in juvenile facilities and recommended a seven-day timeframe for juveniles, which the commenter asserted is in line with the relevant standards established by the National Commission on Correctional Healthcare.

Several commenters took the opposite position, and recommended extending the timeframe or removing it all together. A State correctional agency observed that this requirement might pose difficulties for smaller agencies, which may lack in-house staff capable of conducting a mental health evaluation; as a compromise, the commenter recommended requiring agencies to arrange for an evaluation within 60 days and to conduct the evaluation as soon as practicable thereafter.

One State correctional agency suggested that conducting an evaluation within 60 days is unrealistic due to a State law requirement that, where a determination that an inmate is a sex offender is made pursuant to procedures established by the State department of corrections, such determination must be made following an adversarial hearing conducted by a licensed attorney serving as an administrative hearing officer.

Response. The Department has preserved the 60-day requirement as the best balance of the various concerns noted by commenters. The Department acknowledges that certain inmates with a history of abusiveness will be transferred or released from the facility before undergoing a mental health evaluation or receiving treatment. However, smaller facilities may find it challenging to find a practitioner equipped to provide treatment to abusers, and very short-term treatment is likely to be ineffective. The Department has therefore constructed the standard so as to afford facilities some flexibility.

The 60-day clock starts only upon the agency's "learning of such abuse history"; thus, where an agency is required to hold a hearing in order to determine whether an inmate is an abuser, the treatment need not be offered until the determination is made.

Comment. Two State correctional agencies recommended that facilities be required only to perform mental health assessments, rather than evaluations, on known inmate-on-inmate abusers.

Response. An assessment is unlikely to provide a mental health practitioner with sufficient information on which to base a determination about future treatment. Thus, the final standard retains the evaluation requirement.

Comment. Several agency commenters raised concerns about the requirement that known abusers be offered treatment where deemed appropriate by a mental health practitioner, asserting that many facilities lack the time or expertise to provide effective treatment to abusers. One agency suggested that "supportive therapy" would be a better requirement than "treatment." Another State correctional agency worried about the legal implications of compelling an alleged abuser with a criminal case pending to participate in this program.

Response. The final standard requires only that the facility offer an evaluation and, if the inmate consents to that evaluation, offer treatment "when deemed appropriate by mental health

practitioners." The standard does not mandate the type or extent of treatment, but leaves it to the discretion of the mental health practitioner to recommend therapy, a structured treatment program, medication, or whatever course of action is best suited for the needs of the specific inmate and the capabilities of the facility. The standard does not require that abusers be compelled to participate in treatment.

The Department notes that the standard only requires that a known inmate-on-inmate or resident-on-resident abuser be offered treatment where deemed appropriate by a mental health practitioner. The standard does not require the agency to compel participation.

Comment. A county correctional agency asked how long a facility would be required to provide treatment.

Response. The standard's reference to treatment that is "appropriate" leaves it to the facility's mental health practitioners to determine the length of treatment.

Comment. A State sheriff's association and a county correctional agency asked whether the standard requires the agency to provide treatment for abuse that did not occur in the facility. A State juvenile justice agency observed that the standard does not distinguish between abuse that occurred prior to incarceration and abuse that occurred during incarceration.

Response. The final standard clarifies that facilities must offer medical and mental health evaluation and, as appropriate, treatment to all inmates or residents who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.

Comment. A State correctional agency suggested that the standard refer to "inmate-on-inmate" and "resident-on-resident abusers" rather than "inmate abusers" and "resident abusers". One State correctional agency wondered why the standard seemingly applied to staff members who have abused inmates or residents. An individual commenter proposed classifying individuals as "known resident abusers" by three measures: Criminal history indicating that the resident has been found guilty of a felony sex offense or a misdemeanor sex offense involving sexual abuse; an admission at any time to having committed sexual abuse regardless of prosecution; or a finding of abuse following a sexual abuse allegation and subsequent investigation. A State department of corrections asked whether "known inmate abuser" includes someone who committed inmate-on-inmate abuse many years ago. An organization that advocates for disability rights proposed adding a statement that the relevant abuse be defined as having occurred within the past two years in the facility in which the individual is currently confined, and two State juvenile justice agencies requested revising the standard to define "known resident abusers" as residents who have committed sexual abuse or sexual harassment during their present term of incarceration.

Response. The final standard clarifies that evaluation and treatment for abusers is intended for "known inmate-on-inmate abusers" or "known resident-on-resident abusers." It does not encompass inmates or residents who committed a sex offense in the community, or staff who have abused inmates or residents. However, the Department declines to impose a time limit on classification as an inmate-on-inmate or resident-on-resident abuser, or a requirement that the abuse must have occurred in the facility in which the individual is currently confined. The safety risks posed by an individual who has previously committed sexual abuse while in a confinement facility, and the need for mental health care, may persist regardless of where or when the incident occurred.

Finally, in light of the unfortunate reality that sexual harassment is pervasive among inmates and residents, the Department believes that a requirement to provide mental health

evaluations and treatment for all inmates and residents who have committed sexual harassment would impose an excessive burden upon facilities.

Comment. A State correctional agency requested that the standard allow for mental health evaluations to be conducted by staff other than medical and mental health practitioners.

Response. While the standard does not specify that only medical and mental health practitioners may conduct the mental health evaluation, generally accepted professional standards dictate that only a qualified and trained medical or mental health practitioner can adequately evaluate an individual's mental health needs and determine when it is appropriate to offer treatment.

Comment. A company that owns and manages prisons and detention centers asserted that the requirement that mental health practitioners have special qualifications is too great a burden to meet. A State correctional agency recommended expanding the definition of "qualified mental health practitioner" to include a provider "who has also successfully completed specialized training for treating sexual abusers."

Response. The Department agrees that it may be challenging for smaller facilities to employ mental health practitioners with documented expertise in sexual victimization or sexual abuse, and has removed the phrase "qualified mental health practitioner." The final standard requires facilities to offer treatment to an inmate-on-inmate or resident-on-resident abuser when deemed appropriate by "mental health practitioners."

Comment. The AJA and a State jail wardens' association commented that it would be difficult for small, rural jails to provide treatment to abusers. They stated that jails are unlikely to have on-site mental health services, and that the nearest mental health facility may object to treating inmates on their premises due to the lack of a secure area. On the other hand, a county sheriff's office questioned why jails were excluded from the provision relating to the evaluation and treatment of abusers.

Response. The Department agrees it may be difficult for some jails to evaluate and treat abusers. Accordingly, the final standard preserves the exemption for jails from the provision requiring facilities to attempt to conduct a mental health evaluation for known abusers and to offer treatment when deemed appropriate by mental health practitioners.

Comment. A State juvenile justice agency recommended that treatment of resident-on-resident abusers in juvenile facilities not be identified as sex offender treatment unless the resident has been adjudicated for the offense.

Response. The Department trusts that facilities will refer to the treatment of known resident-on-resident abusers in a manner that is accurate and considerate of the resident's privacy needs.

Comment. A juvenile detention center recommended that the Department promulgate separate standards for short- and long-term juvenile facilities.

Response. The Department concludes that it is essential that all juvenile facilities comply with the standard for ongoing medical and mental health care, including the provisions relating to treatment for known resident-on-resident abusers. The final standard requires agencies to attempt to conduct a mental health evaluation of known abusers within 60 days, recognizing that facilities that house inmates for shorter periods of time may not be able to provide such an evaluation. While ideally all known abusers would be offered such evaluations, the Department notes also that those who are confined for shorter periods of time present a smaller risk of committing further abuse.

Sexual Abuse Incident Reviews (§§ 115.86, 115.186, 115.286, 115.386)

Summary of Proposed Rule

The standard contained in the proposed rule set forth requirements for sexual abuse incident reviews, including when reviews should take place and who should participate. Unlike the sexual abuse investigation, which is intended to determine whether the abuse occurred, the sexual abuse incident review is intended to evaluate whether the facility's policies and procedures need to be changed in light of the alleged incident. The Department proposed that a review occur at the conclusion of every investigation of an alleged incident, unless the investigation concludes that the allegation was unfounded. The Department further required the review to consider: (1) whether changes in policy or practice are needed to improve the prevention, detection, or response to sexual abuse incidents similar to the alleged incident; (2) whether race, ethnicity, sexual orientation, gang affiliation, or group dynamics in the facility played a role; (3) whether physical barriers in the facility contributed to the incident; (4) whether staffing levels need to be changed in light of the alleged incident; and (5) whether more video monitoring is needed.

Changes in Final Rule

In order to ensure that an incident review results in timely action, the final standard includes a new paragraph (b) specifying that the review should ordinarily occur within 30 days of the conclusion of the investigation. In the paragraph formerly designated as (b), now designated as (c), the Department has replaced "upper" with "upper-level." In what was paragraph (c)(2), now (d)(2), the Department has revised the list of factors to be considered during the review by replacing "sexual orientation" with "gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status." In what was paragraph (c)(6), now (d)(6), "PREA coordinator, if any" has been changed to "PREA compliance manager," and the Department has clarified that the review team's report must include any determinations made pursuant to paragraphs (d)(1)-(d)(5). In addition, the final standard requires the facility either to implement the review team's recommendations for improvement or document its reasons for not doing so.

Comments and Responses

Comment. Several commenters recommended that the standard specify a timeline for the review. Two advocacy organizations suggested, in particular, that the Department implement measurable benchmarks, including a timeline, in order to ensure that the results of an incident review translate into action and to assist the auditor in measuring compliance with the review provision.

Response. The final standard states that the sexual abuse incident review shall ordinarily occur within 30 days of the conclusion of the sexual abuse investigation.

Comment. An advocacy group recommended requiring the facility head and PREA coordinator to determine, after receiving the report, which recommendations to carry out and to document benchmarks and a timeline for doing so as an addendum to the report.

Response. The Department believes that the timeline added as the new paragraph (b) will suffice to ensure timely compliance with the standard. The required submission of the report of the review team's findings and any recommendations to both the facility head and the PREA compliance manager also ensures effective oversight. In addition, facilities must either implement the recommendations for improvement or document the reasons for not doing so, which will encourage thoughtful reform. While the Department encourages facilities to develop a plan for implementing any revisions to their policies, the Department concludes that it is not necessary to require documentation of benchmarks and a timeline.

Comment. Some commenters recommended that the Department add sexual harassment to this standard, because sexual harassment is often a precursor to sexual abuse.

Response. The Department has incorporated coverage of sexual harassment into the final standards where feasible. The Department concludes that adding sexual harassment to the incidents requiring review would needlessly complicate the process by introducing a separate process for sexual harassment incidents. Under § 115.11, facilities are already required to maintain a written zero-tolerance policy toward sexual harassment. The Department believes that the cost of requiring review of sexual harassment incidents, which may be far more numerous than incidents of sexual abuse, could impose an unnecessary burden upon facilities and make compliance with the standard more difficult.

Comment. Commenters recommended defining "substantiated," "unsubstantiated," and "unfounded" to ensure that the meaning of the findings is understood.

Response. Section 115.5 contains definitions of "substantiated allegation," "unfounded allegation," and "unsubstantiated allegation."

Comment. Some commenters recommended that the Department require review teams to consider, in addition to the areas listed in the standard, whether training curricula should be modified or expanded. A juvenile advocacy organization also recommended that incident reviews include input from victims, witnesses, family members, and guardians on how to improve the investigation and response processes.

Response. The Department concludes that the limited benefits from these recommended revisions would be outweighed by the additional burdens that would be imposed by adding such requirements for every post-incident review. Of course, the Department encourages facilities to reexamine training curricula periodically based upon accumulated knowledge gleaned from the facilities' experience in combating sexual abuse. And, as the commenter suggests, facilities may wish to solicit input from victims and witnesses as a guide to improving their practices.

Comment. Several commenters recommended that the Department clarify who constitutes an "upper-level management official" for purposes of participating in a sexual abuse incident review.

Response. This term cannot be defined with precision; it properly affords facilities discretion to make reasonable judgments as to which officials should participate.

Comment. A victim services organization recommended requiring that the upper-level management responsible for review be independent from the investigation and have authority to make agency-level changes in response to information received from the reviews.

Response. The Department believes that it is unnecessary for the standard to regulate at this level of detail. Rather, it is preferable to leave sufficient flexibility to the facility to organize its staff and resources to conduct an effective review. In particular, it is impractical to require the involvement of an administrator with the authority to make agency-level changes, given that the review is intended to occur at the facility level.

Comment. Commenters suggested that, in order to ensure compliance with the review's findings, the review team should include the facility's PREA coordinator, and the report should be submitted to the agency head for review and implementation of recommended changes.

Response. The Department declines to revise the relevant provision, which requires that the review team's findings and recommendations for improvement be submitted to the facility head and to the PREA coordinator (renamed as the PREA compliance manager in the final standards). The Department believes that oversight by the facility head and PREA compliance manager will ensure implementation without needlessly micromanaging the facility's review process.

Comment. Some commenters questioned whether the consideration of race, ethnicity, sexual orientation, gang affiliation, and other group dynamics as possible motivations for an alleged incident may require special training and, if so, whether the cost of that training would hinder compliance.

Response. The Department believes that additional training is unnecessary in light of the range of training topics already required in § 115.31.

Comment. A juvenile justice agency questioned whether the review should make such a determination if a criminal investigation is proceeding at the same time.

Response. The final standard states that the incident review should occur at the conclusion of every sexual abuse investigation, unless the allegation has been determined to be unfounded. If the facility's investigation is put on hold during a criminal investigation, the facility can wait to conduct the incident review until the investigation has concluded. Furthermore, the incident review required by this standard is intended to allow the facility to identify systemic problems in policies, practices, dynamics, physical barriers, staffing levels, and monitoring that may have contributed to an incident or allegation of sexual abuse, so that the facility can improve conditions to avoid future incidents or allegations. Such a review should not interfere with a criminal investigation.

Comment. Several advocates recommended that gender identity be included in the list of possible motivating factors to be considered.

Response. The Department has added gender identity to the list of possible motivating factors to be considered.

Data Collection (§§ 115.87, 115.187, 115.287, 115.387)

Summary of Proposed Rule

The standard contained in the proposed rule specified the incident-based data that each agency is required to collect in order to detect possible patterns and to help prevent future incidents. The Department proposed that the agency be required to collect, at a minimum, sufficient data to answer fully all questions in the most recent revision of the Survey of Sexual Violence (SSV) conducted by BJS. The Department further proposed that the agency collect data from multiple sources (*e.g.*, reports, investigation files, and sexual abuse incident reviews), that it aggregate the data at least annually, that it obtain the corresponding data from all private facilities with which it contracts for confinement, and that it make this data available to the Department upon request.

Changes in Final Rule

The final standard includes three small changes. Paragraph (c) now refers to the Department as whole rather than BJS. In paragraph (d), "collect data from multiple sources" has been changed to "maintain, review, and collect data as needed from all available incident-based documents." In paragraph (f), "calendar" has been added before "year."

Comments and Responses

Comment. Several commenters asserted that the data collection and review requirements in this standard, and in §§ 115.88 and 115.89, would be overly burdensome. Some State correctional agencies and a county sheriffs' association suggested that the large collection of data would require significant hiring of new staff or staff reallocation. A State juvenile justice agency stated that meeting the standard would require it to redesign its computer systems and purchase data collection software.

A county juvenile justice agency suggested that this standard would be especially burdensome for smaller juvenile facilities such as group homes and private placement facilities. The commenter remarked that if those facilities are deemed non-complaint with the PREA standards due to an inability to provide data under § 115.387, the agency would likely need to cancel contracts with those facilities in order to protect itself and the county from liability. The commenter suggested that canceling contracts with such facilities would exacerbate difficulties in placing minors ordered removed from parents' custody. Furthermore, the commenter stated, delays could result in longer waits in juvenile detention facilities and in the occupation of beds needed for pre-adjudication minors, and the cost of having to provide more beds long-term would be substantial. Two State correctional agencies objected that the standard would require the agencies to increase or realign staff, without funding to match.

Response. The Department acknowledges that facilities may need to incur costs to comply with the standards for data review and collection. Yet these costs should be manageable, and exceeded by the benefits that will accrue from managing and publishing the data in accordance with these standards. Many, if not all, of these agencies have existing reporting requirements and may, therefore, have existing support staff that can be trained to fulfill the functions outlined in these standards. The Department is not persuaded that this standard will impose a disproportionate cost on smaller agencies and facilities—which, in keeping with their size, should have correspondingly fewer allegations to document and report.

Comment. Several commenters recommended adding sexual harassment to this standard.

Response. The Department declines to make this change, largely for the same reasons discussed above with respect to § 115.86. While sexual harassment may be a precursor to sexual abuse, it is both more frequent and less damaging than sexual abuse. Requiring the collection of incident-based data on sexual harassment would therefore impose a greater burden and result in fewer benefits than requiring the same data for incidents of sexual abuse.

Comment. Some commenters expressed concern that because the data collection requirement applies to all allegations regardless of legitimacy, it could overburden facilities. One juvenile agency recommended restricting the requirement to substantiated allegations.

Response. For allegations that are not substantiated, the data collection burden is minimal: to collect data necessary to answer all questions from the most recent version of the

SSV.[37] The SSV requests detailed information only for substantiated incidents; for incidents that are determined to be unsubstantiated or unfounded, or subject to an ongoing investigation, the current SSV requires only that the facility list the number of each type of allegation, divided into sexual abuse and sexual harassment.

Comment. A few juvenile agencies questioned the requirement in paragraph (d) that data be collected from multiple sources, because multiple sources may not always be needed to compile the requisite aggregate data.

Response. The Department agrees and has revised paragraph (d) accordingly.

Comment. An administrative office of the courts suggested that "Survey of Sexual Violence" should read "Survey on Sexual Violence."

Response. The Department has not made this change; the BJS data collection is titled "Survey of Sexual Violence."

Comment. Some commenters suggested broadening the scope of who is deemed in compliance with the regulation. A State juvenile justice agency recommended, in particular, that jurisdictions that currently use standardized instruments such as the Performance-based Standards (PbS) and Community-based Standards (CbS) should be deemed automatically in compliance for purposes of data collection. The commenter noted that standardized instruments and uniform sexual abuse definitions are already used by PbS and CbS programs operating in 28 States and the District of Columbia and suggested that States participating in PbS or CbS programs should be considered to be in compliance with this standard by virtue of their participation.

Response. The Department sees no reason for States that have PbS and CbS programs to be deemed automatically in compliance. However, such States, like all entities that currently compile data, may not need to make significant adjustments to their data collection policies if their collections currently include, as required by the standard, data necessary to answer all questions from the most recent version of the SSV.

Comment. A county sheriff's office noted that paragraph (e) requires agencies to collect data from private facilities with which they contract for confinement, whereas the most recent revision to the SSV excludes contracted facilities because BJS contacts these facilities directly.

Response. The Department believes that making public agencies responsible for collecting data from facilities that they supervise directly and from private facilities with whom they contract for confinement is the best way to ensure compliance. Centralizing data collection in this way will maximize the likelihood of effective oversight by the agency and the Department.

Comment. The same commenter requested clarification as to whether paragraph (f) requires a separate report or the information will be provided by BJS to the relevant Department components. The commenter also inquired as to whether, if the Department intends to contact agencies directly, it will request information different from the information required by the SSV.

Response. Pursuant to the wording of the standard, the Department reserves the right to request all data compiled by the agency. The data will not be obtained from BJS. Under its authorizing legislation, BJS is not allowed to release publicly information that could identify victims or perpetrators. In addition, PREA provides that BJS must ensure the confidentiality of participants in the PREA-related surveys that it conducts. *See* 42 U.S.C. 15603(a)(1).

[37] The latest version of the SSV can be found at *http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=406*.

Comment. A State juvenile justice agency recommended deleting paragraph (f) as duplicative of reporting requirements in other standards. If the paragraph is retained, the commenter recommended that the Department define "all such data" and clarify facilities' reporting obligations by specifying how far in advance and under what circumstances a request for data may be made (*e.g.*, annually or only in connection with an audit). The commenter further proposed amending the paragraph to provide a specific timeframe for an agency to prepare and provide its responses. Additionally, the commenter recommended that the Department require that (as in § 115.89(c)) "when data is aggregated, confidential information shall be redacted and personal identifiers shall be removed."

Response. The Department does not believe that paragraph (f) is duplicative. Rather, it serves an additional function in requiring that the agency make its data available to the Department upon request. By "all such data," the Department references all data collected pursuant to this standard. The Department declines to create a separate framework for the timing of requests from the Department, which could unnecessarily hamper the Department's flexibility in obtaining data as needed. Furthermore, pursuant to § 115.88, each agency will be required to review the data, prepare an annual report of its findings, and make that report available to the public through the agency's website. Finally, the Department declines to add a redaction requirement—the interest in confidentiality regarding a release of data to the public does not apply to the release of information to the Department.

Comment. The same agency recommended that the Department add "calendar" after "previous" in paragraph (f) to clarify the meaning of "previous year." Because the SSV requires aggregated data for the previous calendar year, the commenter suggested that the Department use the same period for data collection.

Response. The Department agrees and has revised paragraph (f) accordingly.

Comment. A State juvenile justice agency asked that data collected by the State agency from private facilities be limited to those that are in the same jurisdiction, because allegations of abuse reported from an out-of-State provider will be investigated by that jurisdiction's law enforcement. The commenter further recommended that data requested by the Department be limited to information provided in the SSV and that the Department provide sufficient advance time to submit this information.

Response. The Department believes that proper oversight of the collection and review of data must come through the agencies, in conjunction with the Department. Because agencies contract with private entities for confinement, they are responsible for reviewing the data from these entities, even where a private facility may belong to a different jurisdiction. The Department further observes that limiting the information that the Department can seek to what is required by the SSV, and limiting the timeframe in which this information can be sought, would diminish the Department's effectiveness in assessing data collected by agencies under this standard.

Comment. Several advocates recommended that the Department adopt NPREC supplemental immigration standard ID-11, which would require that, for each incident of alleged sexual abuse, data be collected regarding whether the alleged perpetrator or victim is an immigration detainee.

Response. The most recent version of the SSV does not contain "immigration detainee" as a data point, and the Department declines to impose this additional burden on correctional agencies.

Data Review for Corrective Action (§§115.88, 115.188, 115.288, 115.388)

Summary of Proposed Rule

The standard contained in the proposed rule described how the collected data should be analyzed and reported. The Department proposed that agencies be required to use the data to identify problem areas, to take ongoing corrective action, and to prepare an annual report for each facility and for the agency as a whole. In order to promote agency accountability, the proposed standard further mandated that the report compare the current year's data with data from prior years and provide an assessment of the agency's progress in addressing sexual abuse. The proposed standard required that the agency make its report publicly available through its website or other means. The proposed standard allowed agencies to redact specific material when publication would present a clear and specific threat to the safety and security of a facility, as long as the nature of the redacted material is indicated.

Changes in Final Rule

The Department has reviewed and considered commenters' suggested changes to this standard but has made no substantive changes.

Comments and Responses

Comment. A State sheriffs' association contended that making agencies include an annual comparison would be labor-intensive; the association recommended that, instead, the Department set a broader timeframe for evaluating an agency's progress in addressing sexual abuse. The commenter noted that annual reports may be appropriate for agencies with higher incidence of sexual abuse, but would be impracticable for smaller facilities.

Response. The Department has weighed the costs and benefits of various timelines for reporting and believes that an annual report will best fit the various purposes of the reporting requirements, including effective oversight, transparency in making information regularly available to the public, and uniformity across agencies and facilities. Because data collection is keyed to the calendar year, it is appropriate for the reporting requirement to be annual as well. To vary the timelines of the reporting requirement on the basis of facility size would introduce needless complexity and make it more difficult for agencies that supervise facilities of varying sizes to perform the essential task of reviewing data to implement needed improvements in policies and practices. Additionally, facilities of all sizes already have annual review requirements in a wide range of other areas. Requiring an annual report will ensure consistency with other reporting requirements and will help assess progress in meeting the goals of PREA.

Comment. A State juvenile justice agency suggested that the Department specify what "other means" would be acceptable for making the annual report readily available to the public. A State sheriffs' association also noted that the preparation of the annual report would impose extra costs for support staffing and that additional funds would be needed to cover the cost of changing the website and adding material to it.

Response. Posting the annual report online will maximize public visibility and accessibility. Only agencies that lack a website may make the report available to the public

through other means. Such means might include, for example, submitting the report to the relevant legislative body.

The Department recognizes that the preparation of the report will incur support staff time and effort, but believes that the cost of adding material to the website will be minimal and outweighed by the benefits of public accessibility.

Comment. Various commenters recommended that the Department revise the standard to encourage facilities to implement changes in response to sexual abuse incidents in an ongoing manner, rather than in response to data aggregated annually. An advocacy organization stated that if agencies are required to compile aggregate data only once per year, they might miss critical opportunities to implement changes to practices, policies, staffing, training, and monitoring. Accordingly, the commenter recommended that paragraph (a) be revised by adding at the beginning "[a]nnually and after significant incidents." A juvenile advocacy organization suggested deleting "and aggregated" and encouraging facilities to make appropriate changes to policies and practices on an ongoing, rather than yearly, basis.

Response. The requirement that data be collected and aggregated annually is a floor, not a ceiling. Requiring an annual report will properly facilitate compliance with the data reporting and review requirements without overly burdening agencies. Mandating a more frequent review could prove costly for some agencies and may be of little additional benefit. The standard appropriately leaves to agency discretion whether to collect aggregate data more frequently and how to respond to incidents and concerns in an ongoing way. Implementing the commenters' proposals would restrict agencies' ability to comply with the standard in a manner that most effectively utilizes their limited resources.

Data Storage, Publication, and Destruction (§§ 115.89, 115.189, 115.289, 115.389)

Summary of Proposed Rule

The standard contained in the proposed rule provided guidance on how to store, publish, and retain data. The Department proposed that data must be securely retained for at least ten years after the date of initial collection unless Federal, State, or local law requires otherwise. In addition, the proposed standard required that agencies make aggregated data publicly available through their websites or other means, after removing all personal identifiers.

Changes in Final Rule

The Department has added language to clarify that "sexual abuse data" in paragraph (d) refers to data collected pursuant to §§ 115.87, 115.187, 115.287, and 115.387.

Comments and Responses

Comment. A county sheriff's office questioned whether "sexual abuse data" refers to the sexual abuse incident review, the data reported to BJS through the SSV, or the public reports published on the agency's website. The commenter noted that if "sexual abuse data" refers to all records created during the sexual abuse investigation, then the standard would conflict with the record-retention requirement of § 115.71.

Response. The Department has revised the standard to clarify that "data" refers to data that the agency collects pursuant to § 115.87. Section 115.71 covers a different set of records and therefore does not conflict with § 115.87. Specifically § 115.71 requires that agencies retain written reports that document administrative and criminal investigations for the duration of the alleged abuser's incarceration or employment by the facility, plus five years. Section 115.89, by contrast, requires that the agency retain for at least ten years after the date of its initial collection (unless otherwise required by law) accurate uniform data for each allegation, using a standardized instrument and set of definitions, including at a minimum the data necessary to answer all questions from the most recent version of the SSV. Put differently, § 115.71 covers written reports and the associated records; § 115.89 covers statistics. While it is true that the agency can consult investigative findings as part of its review and collection of incident-based and aggregate data, the latter data are separate from the investigative records themselves and give rise to the different reporting requirements contained in this standard. The differing retention requirements, therefore, do not conflict.

Comment. Two juvenile justice agencies recommended deleting paragraph (b) on the basis that the requirement in § 115.388 to publish an annual report and to make the report available on the agency's website already includes a requirement to publish the aggregated sexual abuse data.

Response. Section 115.388 requires agencies to create an annual report documenting their findings and corrective actions based on the aggregated data, but does not require publication of the actual data. The instant standard, by contrast, governs the retention and publication of the data. Specifying a separate requirement for the publication of the data will ensure that agencies can be held accountable for their findings and corrective actions by allowing the public to inspect the data on which these findings and actions were based.

Auditing and State Compliance (§§ 115.93, 115.193, 115.293, 115.393, 115.401, 115.402, 115.403, 115.404, 115.405, 115.501)

Summary of Proposed Rule

In the proposed rule, the Department declined to resolve how frequently, and on what basis, audits should be conducted. Determining that further discussion was necessary in order to assess these issues, the Department included in the NPRM several questions regarding the nature and scope of audits.

The standard contained in the proposed rule did specify the requirements for an audit to be considered independent. If an agency uses an outside auditor, the proposed standard required that the agency ensure that it not have a financial relationship with the auditor for three years before or after the audit, other than payment for the audit conducted. The proposed standard also specified that the audit may be conducted by an external monitoring body that is part of, or authorized by, State or local government, such as a government agency or nonprofit entity whose purpose is to oversee or monitor correctional facilities. In addition, the proposed standard allowed an agency to utilize an internal inspector general or ombudsperson who reports directly to the agency head or to the agency's governing board.

The proposed standard further stated that the Department will prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of

facilities, review of documents, and interviews of staff and inmates, as well as the minimal qualifications for auditors.

The proposed standard provided that an agency shall enable the auditor to enter and tour facilities, review documents, and interview staff and inmates to conduct a comprehensive audit.

Finally, the proposed standard provided that an agency shall ensure that the auditor's final report is published on the agency's website if it has one, or is otherwise made readily available to the public.

Changes in Final Rule

In the final rule, the Department creates a single, unified auditing system for all facilities, except for lockups that do not hold detainees overnight, such as court holding facilities. The final standard addresses the frequency and scope of audits, required auditor qualifications, audit report contents and findings, audit corrective action plans, the audit appeals process, and the effect of the audit results on the Governor's certification of compliance.

The final standard provides that audits shall be conducted on a three-year cycle, with the first auditing period commencing one year after the effective date of the standards. Each year, the agency shall ensure that at least one-third of each facility type operated by the agency, or by a private organization on behalf of the agency, is audited. During the three-year cycle, the agency shall ensure that each facility operated by the agency, or by a private organization on behalf of the agency, is audited at least once. In some cases, the Department may recommend that an agency conduct an expedited audit if the Department has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with PREA-related issues.

The Department will develop and issue an audit instrument that will provide guidance on the conduct of and contents of the audit.

The auditor shall review all relevant agency-wide policies, procedures, reports, internal and external audits, and accreditations for each facility type, as well as, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period. The auditor shall be permitted to request and receive copies of any relevant documents (including electronically stored information), and shall retain and preserve all documentation (such as video tapes and interview notes) relied upon in making audit determinations. Such documentation shall be provided to the Department upon request. The auditor shall interview a representative sample of inmates, staff, supervisors, and administrators, and shall have access to and observe all areas of the audited facilities.

The auditor shall be permitted to conduct private interviews with inmates, and inmates shall be permitted to send confidential information or correspondence to the auditor in the same manner as if they were communicating with legal counsel. Auditors shall attempt to communicate with community-based or victim advocates who may have insight into relevant conditions in the facility.

The final standard provides that an audit shall be conducted by: (1) a member of a correctional monitoring body that is not part of, or under the authority of, the agency (but may be part of, or authorized by, the relevant State or local government); (2) a member of an auditing entity such as an inspector general's or ombudsperson's office that is external to the agency; or (3) other outside individuals with relevant experience. Thus, the final standard differs from the proposed standard in that it does not allow audits to be conducted by an internal inspector

general or ombudsperson who reports directly to the agency head or to the agency's governing board.

Auditors shall be certified by the Department, pursuant to procedures to be developed, including training requirements.

For each standard, the auditor shall determine whether the audited facility reaches one of the following findings: "Exceeds Standard" (substantially exceeds requirement of standard); "Meets Standard" (substantial compliance; complies in all material ways with the standard for the relevant review period); or "Does Not Meet Standard" (requires corrective action). The audit summary shall indicate, among other things, the number of provisions the facility has achieved at each grade level.

A finding of "Does Not Meet Standard" with one or more standards shall trigger a 180-day corrective action period. The auditor and the agency shall jointly develop a corrective action plan to achieve compliance. The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility. After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action. If the agency does not achieve compliance with each standard, it may (at its discretion and cost) request a subsequent audit once it believes that it has achieved compliance.

An agency may lodge an appeal with the Department regarding any specific audit finding that it believes to be incorrect. If the Department determines that the agency has stated good cause for a re-evaluation, the agency may commission a re-audit by an auditor mutually agreed upon by the Department and the agency, at the agency's cost. The findings of the re-audit shall be final.

Section 115.501(a) provides that, in determining pursuant to 42 U.S.C. 15607(c)(2) whether the State is in full compliance with the PREA standards, the Governor shall consider the results of the most recent agency audits. Section 115.501(b) provides that the Governor's certification shall apply to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch.

Comments and Responses

Comment. A wide range of comments were received on the question of whether audits should be conducted at set intervals or, alternatively, whether audits should be conducted only for cause, based upon a reason to believe that a particular facility or agency is materially out of compliance with the standards. Many comments recommended audits be conducted at set intervals; most such comments recommended audits occur on a three-year cycle, as the NPREC had recommended. A number of comments proposed a combination of automatic periodic audits plus for-cause audits. Two commenters recommended that audits be conducted both at random intervals and for cause. A number of comments recommended that audits be performed for cause only, or where a facility has received a large number of complaints regarding sexual abuse.

Several comments recommended various hybrid thresholds and timeframes for required audits. Some suggested a combination of "streamlined" audits and full audits, more frequent or less frequent audits depending upon prior audit results or reasons to suspect noncompliance, and different audit timelines for smaller agencies.

Several comments recommended audits only for a random sampling of all facilities, or of facilities not otherwise subject to accreditation. Several comments suggested that all facilities be audited. A number of other comments suggested various hybrid approaches, including: statistical reporting with random audits to confirm data; auditing of all large facilities and random sampling of small facilities; differential auditing cycles for large and small facilities; auditing of all facilities during the first auditing cycle with various triggers or random selection for subsequent audits; or annual internal audits with random sampling for external PREA audits or as requested by the agency.

A comment submitted by former members of the NPREC recommended that all facilities be audited within the first three years to establish a "baseline" that would guide future audits. Performance on the baseline audit would determine when the next regular audit would occur. The members suggested that if an agency or facility's compliance with the standards was determined to exceed 85 percent, the subsequent audit would occur five years later. If compliance was between 50 and 85 percent, the next audit would be in three years, and if compliance was less than 50 percent the next audit would be one year later. Former NPREC members further recommended that a random sample of agencies and facilities receive unscheduled audits after the initial baseline audit. In addition, the members recommended for-cause audits based upon reasons to suspect problems in specific agencies or facilities.

Response. The Department has determined that all facilities should be subject to audits, and that audits should occur at all facilities at least every three years, and at least one third of the facilities operated by an agency must be audited every year. The standard thus allows agencies substantial flexibility in scheduling audits within each three-year cycle while ensuring that facility audits occur regularly.

The Department has chosen not to require audits only for cause, as this would make it difficult to determine whether a broad range of facilities are complying with the standards, and would make it harder to assess whether a State is in full compliance with the statute. Under PREA, certification of full compliance by the Governor of a State is necessary in order to avoid a reduction in certain grant funding from the Department, unless the Governor commits to using the amount that otherwise would be forfeited for the purpose of enabling the State to achieve full compliance in future years. *See* 42 U.S.C. 15607(c)(2). In addition, requiring audits to be conducted only for cause could discourage agencies from strengthening their reporting and investigating procedures, for fear that revelation of incidents could result in an audit that the facility would otherwise escape.

The final standard does incorporate the concept of a for-cause audit by providing a mechanism through which the Department can recommend to an agency that an expedited audit be conducted on any facility if the Department has reason to believe that the facility is experiencing problems related to sexual abuse. However, the Department concludes that a hybrid audit scheme would prove unnecessarily complex and would lack the required predictability and flexibility to permit agencies to budget and plan for the audits.

The Department believes that audits conducted through random sampling would be insufficient to assess the scope of compliance with the PREA standards. The Department is cognizant of the burden that audits pose on institutions but believes that the triennial cycle appropriately balances the level of effort and resources that will need to be expended. In addition, the Department anticipates that the actual audit complexity and duration will be scaled to the size and type of facility.

Comment. Many agency commenters recommended that agencies be allowed to audit themselves; by contrast, many advocacy commenters criticized the proposed standard for allowing internal inspectors general or ombudspersons to conduct audits, out of concern that permitting agency employees to audit the agency's facilities could compromise the objectivity and credibility of the auditing process. One commenter suggested that audits performed by an auditor within the agency should be subject to review by an independent agency or elected body.

Response. While internal audits may prove helpful in assessing an institution's performance, the Department believes that external audits are necessary to ensure that the audits are conducted, and are perceived to be conducted, independently and objectively. Accordingly, the final standard requires that the audit be performed by an auditor external to the agency. An audit may, however, be conducted by a sister governmental agency, including by an entity that ultimately reports to the same overarching department as the agency under audit.

Comment. Comments varied in response to NPRM Question 32, which asked to what extent, if any, agencies should be able to combine a PREA audit with an audit performed by an accrediting body or with other types of audits. A number of comments recommended that audits not be combined with other types of audits. Several comments suggested that PREA audits should be incorporated with accreditation or other audit types. A number of comments stated that State bodies that inspect local jails should be able to include PREA audits in the inspection process.

Response. The final standard places no restriction on auditor certification for individuals who are employed by an accrediting or oversight entity that is separate and independent from the agency. For example, a qualified individual within a State office of inspector general (if outside the agency) or a member of an accrediting body could obtain Department certification and, if not otherwise conflicted, would be permitted to conduct the PREA audit, or incorporate the PREA audit as part of a more comprehensive facility inspection program.

Comment. NPRM Question 33 asked whether the wording of any of the substantive standards should be revised in order to facilitate a determination of whether a jurisdiction is in compliance with the standard. Some comments suggested that the standards be expressed using objective criteria. Other comments recommended that the standards be written in a performance-based format, or subject to specific outcome measures. Still others suggested a combination of qualitative and quantitative standards. A number of comments suggested requiring that agencies fully document their efforts to comply with the standards. Finally, one comment recommended that the auditor have discretion to determine whether a facility is complying with the standard.

Response. The Department has attempted to incorporate objective criteria and written documentation requirements wherever practicable, although auditors will necessarily have some discretion to determine compliance regarding certain standards. The Department intends to jointly develop, with the National Resource Center for the Elimination of Prison Rape, comprehensive auditing instruments for the various facility types and sizes that will provide guidance to the auditor on determining compliance. In addition, the Department will develop uniform training and certification requirements for individual auditors, and may periodically issue interpretive guidance regarding the PREA standards.

The Department declines to incorporate into the standards specific outcome measures. While performance-based standards facilitate compliance assessments, it is difficult to employ such standards effectively to combat sexual abuse in confinement facilities. An increase in incidents reported to facility administration may reflect increased abuse due to the facility's inability to protect inmates from harm. Alternatively, it might reflect inmates' increased

willingness to report abuse, due to the facility's success at assuring inmates that reporting abuse will yield positive outcomes and not result in retaliation.

Comment. Several commenters recommended that auditors have expertise in, or receive specialized training in, such topics as working with victims of sexual abuse, applicable civil rights laws, adolescent and child development, and crisis counseling.

Response. The Department intends to develop and issue auditor training requirements, and will work with the National Resource Center for the Elimination of Prison Rape (or other contracted entity) to develop an audit training curriculum.

Comment. A number of comments recommended that the auditor receive unfettered facility access, including access to inmates, full access to a facility's physical plant and documents, the ability to consult with the PREA coordinator, access to facility personnel, and the ability to conduct unannounced inspections.

Response. The final standard incorporates many of these elements to enable thorough audits. However, the Department declines to require that auditors be permitted to conduct unannounced facility audits, as this could prove inordinately burdensome for facility and agency personnel.

Comment. Former NPREC members recommended that the Department's Office of the Inspector General conduct audits of BOP facilities.

Response. BOP facilities will be audited pursuant to the auditing standard. However, the Department declines to mandate in the standard the specific entity that will conduct BOP audits.

Comment. Two commenters recommended that the audit reports describe the auditor's methodology, the evidence used to support each audit finding, and recommendations for any required corrective action.

Response. The final standard includes these elements.

Comments. NPRM Question 35 asked to what extent, if any, audits should bear on determining whether a State is in full compliance with PREA. Several comments recommended that the audits be the primary basis for determining "full compliance." A number of other comments suggested that the audit results be one of a number of factors in determining "full compliance." Some comments suggested that audit results have only a marginal bearing on the determination, or be relevant to determining only State-level compliance. A number of comments suggested that audit results, combined with appropriate and verified corrective action, determine State-level "full compliance." One comment suggested that the audit results, combined with an appropriate explanation from the Governor, enable the State to certify "full compliance."

Response. The Department intends the audits to be a primary factor in determining State-level "full compliance." Accordingly, the final rule requires the Governor to consider the most recent audit results in making his or her certification determination, which shall apply to facilities under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch.

IV. Regulatory Certifications

Executive Orders 13563 and 12866 - Regulatory Planning and Review

This final rule has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," as recently reaffirmed and supplemented by Executive Order 13563, "Improving Regulation and Regulatory Review." The Department has determined that this final rule is a "significant regulatory action" under Executive Order 12866, § 3(f)(1), and accordingly has submitted it to the Office of Management and Budget (OMB) for review.

Executive Order 12866 requires Federal agencies to conduct a regulatory impact assessment (benefit-cost analysis) for any "significant regulatory action" likely to result in a rule that may have an annual impact on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. *See* Executive Order 12866, § 6(a)(3)(C).

The Department has concluded that the economic impact of its adoption of the final rule, if complied with by all entities to which it applies, is likely to exceed this $100 million threshold. Assuming full nationwide compliance, the standards would affect the management of all State, local, privately operated, and Department of Justice confinement facilities, which collectively house over 2.4 million individuals at any given time and which spent more than $79.5 billion in 2008. *See* BJS, Justice Expenditure and Employment Extracts 2008, advance estimate (unpublished).

The final rule, moreover, "materially alters . . . the rights and obligations of grant recipients," and "raise[s] novel legal or policy issues." Executive Order 12866, §§ 3(f)(3), (4). Accordingly, in compliance with OMB Circular A-4, the Department has prepared a Regulatory Impact Assessment (RIA) to accompany the final rule.

Regulatory Impact Assessment

The RIA is available in full at *http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf* and is summarized here. The RIA assesses, and monetizes to the extent feasible, the benefits of combating rape and sexual abuse in America's prisons, jails, lockups, community confinement facilities, and juvenile facilities, and the costs of full nationwide compliance with the final rule. It also summarizes the comments relating to the costs and benefits of the standards that the Department received in response to the NPRM and the Initial Regulatory Impact Assessment (IRIA).

The cost estimates set forth in the RIA are the costs of full nationwide compliance with all of the standards and their implementation in all covered facilities. The Department concludes that full nationwide compliance with the standards would cost the correctional community, in the aggregate, approximately $6.9 billion over the period 2012-2026, or $468.5 million per year when annualized at a 7 percent discount rate. The average annualized cost per facility of compliance with the standards is approximately $55,000 for prisons, $50,000 for jails, $24,000 for community confinement facilities, and $54,000 for juvenile facilities. For lockups, the average annualized cost per agency is estimated at $16,000.

However, these figures are potentially misleading. PREA does not require full nationwide compliance with the Department's standards, nor does it enact a mechanism for the Department to direct or enforce such compliance; instead, the statute provides certain incentives for State (but not local or privately operated) confinement facilities to implement the standards. Fiscal realities faced by confinement facilities throughout the country make it virtually certain that the total actual outlays by those facilities will, in the aggregate, be less than the full

nationwide compliance costs calculated in this RIA. Actual outlays incurred will depend on the specific choices that State, local, and private correctional agencies make with regard to adoption of the standards, and correspondingly on the annual expenditures that those agencies are willing and able to make in choosing to implement the standards in their facilities. The Department has not endeavored in the RIA to project those actual outlays.

Summary of Cost Justification Analysis

In developing the final rule, the Department was constrained by two separate and independent limitations relating to the potential costs of the standards. The first was the requirement, set forth in Executive Order 12866, that each agency "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs," recognizing that some benefits and costs are difficult to quantify. Executive Order 12866, § 1(b)(6). Executive Order 13563, moreover, directs agencies "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." Executive Order 13563, § 1(c). The second was the provision, set forth in PREA itself, prohibiting the Attorney General from adopting any standards "that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 42 U.S.C. 15607(a)(3). The RIA addresses both sets of limitations and concludes that the final rule does not contravene either constraint, and is in fact fully justified under both analyses.

With respect to the analysis called for by the Executive Orders, the RIA undertakes a break-even analysis to demonstrate that the anticipated costs of full nationwide compliance with the PREA standards are amply justified by the anticipated benefits. The results of this break-even analysis are summarized in Table 2. As shown there, using the Department's preferred estimation method, for the costs of full nationwide compliance to break even with the monetized benefits of avoiding prison rape, the standards would have to be successful in reducing the annual number of prison sexual abuse victims by about 1,671, for a total reduction from the baseline over fifteen years of about 25,000 victims.[38] As a comparison, the RIA estimates that in 2008 more than 209,400 persons were victims of sexual abuse in America's prisons, jails, and juvenile centers, of which at least 78,500 prison and jail inmates and 4,300 youth in juvenile facilities were victims of the most serious forms of sexual abuse, including forcible rape and other nonconsensual sexual acts involving injury, force, or high incidence.

[38] These figures include all facility types and all types of sexual abuse (from the most to the least severe), and take into account the fact that many victims are victimized multiple times (*i.e.*, an avoided victim subsumes all of the incidents of sexual abuse that victim experiences). In the RIA, the Department calculates the break-even figures in six different ways corresponding to different methods of calculating the baseline prevalence of prison sexual abuse and different approaches to monetizing the value of avoiding prison sexual abuse. The figures in Table 2 reflect the Department's preferred approach among these six alternatives. When reflected as a range, the six approaches collectively provide that, for the costs of full nationwide compliance to break even with the monetized benefits of avoiding prison rape, the standards would have to be successful in reducing the annual number of prison sexual abuse victims by between 1,667 and 2,329, for a total reduction from the baseline over fifteen years of about 25,000-35,000 victims.

Table 2: Summary of Break-Even Analysis for PREA Standards[39]
(in millions of dollars)

	Prisons	Jails	Lockup	Community Confinement Facilities	Juvenile	Total
Prevalence	89,688	109,181	Unknown	Unknown	10,553	209,422
Value of 1% Reduction	$206.4	$260.1	Unknown.	Unknown	$52.4	
Value of 1 Victim Avoided			$0.25	$0.25		
Cost	$64.9	$163.4	$95.5	$12.8	$131.9	$468.5
Breakeven Percent	0.32%	0.64%	Unknown.	Unknown.	2.55%	
Breakeven Number of Victims	**282**	**686**	**385**	**52**	**266**	**1671**

The Department believes it reasonable to expect that the standards, if fully adopted and complied with, would achieve at least this level of reduction in the prevalence of prison sexual abuse. Taking into account the considerable non-monetized benefits of avoiding prison rape, the justification for the standards becomes even stronger. Of course, if the nation's confinement facilities spend less annually than full nationwide compliance is estimated to require, then the annual reduction in the number of prison sexual abuse victims that would need to be achieved in order for actual outlays to break even with benefits would be correspondingly lower.

With respect to the analysis that Congress required in PREA, the RIA concludes that the costs of full nationwide compliance do not amount to "substantial additional costs" when compared to total national expenditures on correctional operations. In the most recent tabulation, correctional agencies nationwide spent approximately $79.5 billion on correctional operations in 2008. As noted, the RIA estimates that full nationwide compliance with the final standards would cost these agencies approximately $468.5 million per year, when annualized over 15 years at a 7 percent discount rate, or a mere 0.6 percent of total annual correctional expenditures in 2008. The Department concludes that this does not amount to substantial additional costs.

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[39] Prevalence figures reflect the Department's "principal" approach to determining prevalence (among the three alternative approaches discussed below) and include all forms of sexual abuse. As explained in the RIA, prevalence figures for lockups and community confinement facilities are unknown; the total for prisons, jails, and juvenile centers under the principal approach is 209,422.

The "value of 1% reduction" row sets forth the RIA's estimate of the monetizable value (in millions of dollars) of the benefit of a 1% reduction from the baseline annual prevalence of sexual abuse in prisons, jails, and juvenile centers, using the Department's preferred methodology, the victim compensation model, and taking into account the fact that many victims of prison rape are victimized multiple times. The "value of 1 victim avoided" row sets forth the corresponding estimate for lockups and community confinement facilities, but sets forth the value (again in millions) of avoiding a single victim of abuse.

Cost figures represent the cost of full nationwide compliance with all of the PREA standards, in the aggregate, in millions of dollars. "Breakeven percent," for prisons, jails, and juvenile centers, shows the total percentage reduction from the baseline annual prevalence of prison sexual abuse that the standards would have to achieve in each sector in order for their annual benefits, in monetary terms, to break even with their annual costs, again assuming full nationwide compliance. "Breakeven Number of Victims" shows how many individual victims of prison sexual abuse the standards would have to be successful in preventing each year, in each sector (again taking into account the phenomenon of serial victimization), for the standards' annual benefits, in monetary terms, to break even with the annual costs of full nationwide compliance.

Measuring the Relevant Baseline

As a starting point, the RIA measures the baseline level of prison rape and sexual abuse in prisons, jails, and juvenile facilities. It estimates the annual prevalence of six categories of inappropriate sexual contact in adult prisons and jails, and five different categories in juvenile facilities. The precise definitions of these categories are set forth in detail in the RIA, but these types of sexual contact are essentially differentiated based on the existence and nature of force or threat of force, the nature and intrusiveness of the physical contact, and how often the victim has experienced abuse (*i.e.*, whether the victim has experienced a low or high incidence of contact), among other factors.

Relying largely on tabulations made by BJS and the Office of Juvenile Justice and Delinquency Prevention, the RIA examines the available statistics on the prevalence of each type of inappropriate sexual contact[40] and addresses a number of issues with those statistics, including the problem of serial victimization (prevalence vs. incidence),[41] cross-section vs. flow,[42] underreporting of sexual victimization (false negatives), and false allegations (overreporting). The RIA also describes difficulties in measuring the prevalence of sexual abuse in community confinement facilities and lockups.[43]

The RIA presents three alternatives for estimating the prevalence of sexual abuse, each relying on different assumptions to account for the possibility of underreporting (false negatives) and overreporting (false positives) of sexual abuse. Under the "principal" method—the one the Department prefers among the three—no adjustment is made to the prevalence estimates to account either for false negatives (sexual abuses that occurred but were never reported) or false positives (sexual abuses that were reported by inmates but that did not actually occur). The "adjusted" approach uses an upper bound assumption as to the number of false negatives and a conservative approach to the adjustment for false positives; the "lower bound" approach uses a

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[40] *See* BJS, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09* (NCJ 231169) (Aug. 2010); BJS, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09* (NCJ 228416) (Jan. 2010).

[41] Prevalence essentially measures the number of victims of sexual abuse over a period of time, whereas incidence refers to the number of discrete victimizations over that period. The difference between the two arises from the fact that many prison rape victims are victimized many times.

[42] The estimates of prevalence are based on surveys of inmates, who are asked to state whether, as of the date the survey is administered, they have experienced sexual abuse in that facility during the previous twelve months. If the answer is affirmative, the inmate is asked follow-up questions about the nature and frequency of the abuse. In a cross-section (also known as "stock") approach to estimating prevalence, the estimates are based on the responses given by the inmates who happen to be at the facility on the day the survey was administered. However, this approach risks significantly understating the actual prevalence, especially in jails, because the majority of inmates remain in their facility for less than one year, and there will have been many inmates who were at the facility earlier during the twelve-month survey period but who are no longer there when the survey is administered. A flow approach to estimating prevalence compensates for this phenomenon by extrapolating from the cross-sectional figures an estimate of the total number of victims among the total population of inmates who flowed through the facility during the twelve-month period.

[43] At the time the RIA was prepared, the Department lacked data regarding the prevalence of sexual abuse in community confinement facilities. A BJS study of former State prisoners that was finalized in May 2012, too late for incorporation into the prevalence assessments of the RIA, provides for the first time some data regarding such prevalence. *See* BJS, *Sexual Victimization Reported by Former State Prisoners, 2008* (NCJ 237363) (May 2012). The Department remains unaware of any data regarding the prevalence of sexual abuse in lockups.

lower bound assumption as to the number of false negatives and a less conservative approach to adjusting for false positives. Under the principal approach, the RIA concludes that in 2008 more than 209,400 persons were victims of sexual abuse in America's prisons, jails, and juvenile centers. Of these, at least 78,500 were prison and jail inmates and 4,300 were youth in juvenile facilities who were victims of the most serious forms of sexual abuse, including forcible rape and other nonconsensual sexual acts involving injury, force, or high incidence.

Table 3 shows the estimated baseline prevalence of rape and sexual abuse in adult prison and jail facilities under each of the RIA's prevalence estimation methods. Table 4 shows the corresponding estimates for juvenile facilities, and Table 5 shows the composite prevalence estimates among all facility types.[44]

Table 3: Baseline Prevalence of Sexual Abuse, Adult Prison and Jail Facilities, Using Alternative Prevalence Estimation Approaches, by Type of Incident, 2008

	Adult Prisons			Adult Jails		
	Principal	Adjusted	Lower Bound	Principal	Adjusted	Lower Bound
Nonconsensual Sexual Acts - High	32,900	33,100	25,600	45,600	43,000	26,000
Nonconsensual Sexual Acts – Low	11,300	11,600	8,800	8,900	7,900	5,000
"Willing" Sex with Staff	17,600	17,800	13,500	15,500	14,800	10,400
Abusive Sexual Contacts - High	7,300	7,000	6,100	8,500	7,800	6,300
Abuse Sexual Contacts – Low	10,900	11,200	9,000	14,400	13,600	10,700
Staff Sexual Misconduct Touching Only	9,700	9,400	7,500	16,300	14,200	10,800
TOTAL	89,700	90,100	70,500	109,200	101,300	69,200

[44] For the definitions of the various types of sexual conduct listed in these tables, see Tables 1.1 and 1.2 in the RIA.

Table 4: Baseline Prevalence of Sexual Abuse, Juvenile Facilities, Using Alternative Prevalence Estimation Approaches, by Type of Incident, 2008

	Principal	Adjusted	Lower Bound
Serious Sexual Acts - High	4,300	4,600	3,800
"Willing" Sex With Staff – High	2,800	2,700	2,500
Serious Sexual Acts – Low	2,000	2,700	1,800
Other Sexual Acts – High	600	600	500
Other Sexual Acts – Low	900	1,000	900
TOTAL	10,600	11,600	9,500

Table 5: Baseline Prevalence of Sexual Abuse, Summary Chart

	Principal	Adjusted	Lower Bound
Prisons	89,700	90,100	70,500
Jails	109,200	101,300	69,200
Juveniles	10,600	11,600	9,500
TOTAL	209,400	203,000	149,200

Estimating the Monetized Unit Benefit of Avoiding a Prison Rape or Sexual Abuse

As a number of commenters observed, placing a monetary value on avoided sexual abuse confronts considerable methodological difficulties. One commenter remarked that "estimating the monetary 'costs' of crime is at best a fraught and imperfect effort, particularly when dealing with crimes such as sexual abuse whose principal cost is due to the pain, suffering, and quality of life diminution of the victims." Executive Order 12866 nevertheless instructs agencies to measure quantifiable benefits "to the fullest extent that [they] can be usefully estimated." Executive Order 12866, § 1(a); *see also* Executive Order 13563, § 1(c) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."). Some uncertainty in such estimates is not itself reason to abandon the effort.

The RIA estimates the monetary value of certain benefits of avoiding prison sexual abuse using values derived from general literature assessing the cost of rape,[45] with adjustments made to account for the unique characteristics of sexual abuse in the prison setting. Using an approach known as the willingness to pay (WTP) model, the RIA first monetizes the benefit of avoiding sexual abuse in a confinement facility by consulting studies that have estimated how much society is willing to pay for the reduction of various crimes, including rape, and then assessing whether the conclusions of those studies would be different in the specific context of sexual abuse in confinement facilities. This approach yields a reliable estimate of the costs of the most

[45] *See, e.g.*, National Institute of Justice Research Report, *Victim Costs and Consequences: A New Look* (NCJ 155282) (Jan. 1996), available at *http://www.ncjrs.gov/pdffiles/victcost.pdf*; Ted R. Miller *et al.*, Minn. Dep't of Health, *Costs of Sexual Violence in Minnesota* (July 2007), available at *http://www.pire.org/documents/mn_brochure.pdf;* Mark A. Cohen et al., *Willingness-to-Pay for Crime Control Programs*, 42 Criminology 89 (2004).

serious categories of sexual abuse assessed in the RIA,[46] but because of limitations in the way the underlying studies were conducted, it cannot be effectively used to monetize the cost of the less serious categories of sexual abuse.

In part because of these limitations, the RIA also uses an alternative approach known as the victim compensation or willingness-to-accept (WTA) model, which estimates how much the average victim of prison rape would be willing to accept as compensation for injuries suffered in the assault, including intangible injuries such as pain, suffering, and diminished quality of life. To do this, the RIA assesses certain monetizable costs of prison rape to the victim, such as the costs of medical and mental health care, and adds an element, drawn primarily from jury verdicts, to cover the intangible costs associated with pain and suffering. All of these costs were identified by reviewing the literature on the cost of rape generally, and then extrapolating the analogous costs in confinement facilities. Although the RIA calculates avoidance benefits on a per victim basis, it accounts for the fact that many victims of prison rape are victimized multiple times.

Thus, the RIA essentially uses a hybrid approach that combines the WTP and WTA elements: For the one category of sexual conduct as to which an estimate using the WTP was possible (the most serious category for adult victims), it identifies a range of avoidance benefit values, with the WTP estimate at one bound and the WTA estimate on the other; for the remaining categories of conduct, as to which a WTP estimate was not possible, the RIA uses only the WTA estimate. Using this approach, the RIA derives monetized values for avoiding each of the six types of sexual contact (five for juveniles), depending upon whether the victim is a juvenile or an adult. These values are depicted in Tables 6 and 7. The RIA estimates the monetizable benefit to an adult of avoiding the highest category of prison sexual misconduct (nonconsensual sexual acts involving injury or force, or no injury or force but high incidence) as worth about $310,000 per victim using the willingness to pay model and $480,000 per victim under the victim compensation model. For juveniles, who typically experience significantly greater injury from sexual abuse than adults, the corresponding category is assessed as worth $675,000 per victim under the victim compensation model. (A willingness to pay estimate was not calculated for juveniles.) These estimates are higher than in the IRIA because of changes the Department made, in response to public comments, to the definitions of the different types of sexual abuse and to the methodologies for monetizing the benefit of avoiding each type.

[46] These *costs* translate to *benefits* for the purpose of the RIA—*i.e.*, the benefits that would accrue from avoiding such incidents.

Table 6: Avoidance Benefit Values for Sexual Abuse, Adult Prison and Jail Facilities, by Victimization Type and Valuation Method

	WTP	Victim Compensation (WTA)
Nonconsensual Sexual Acts – High	$310,000	$480,000
Nonconsensual Sexual Acts – Low		$160,000
"Willing" Sex With Staff		$160,000
Abusive Sexual Contacts – High		$5,200
Abusive Sexual Contacts – Low		$600
Staff Sexual Misconduct Touching Only		$600

Table 7: Unit Avoidance Values for Sexual Abuse, Juvenile Facilities, by Victimization Type

	Victim Compensation (WTA)
Serious Sexual Acts - High	$675,000
"Willing" Sex With Staff – High	$672,000
Serious Sexual Acts – Low	$225,000
Other Sexual Acts – High	$7,300
Other Sexual Acts – Low	$900

The RIA next calculates the maximum monetizable benefit to society of totally eliminating each of the types of inappropriate sexual contact, by multiplying the baseline prevalence of such events by the unit benefit of an avoided victim. As depicted in Table 8, under the Department's principal approach for estimating prevalence, and using the victim compensation model, the RIA determines that the maximum monetizable cost to society of prison rape and sexual abuse (and correspondingly, the total maximum benefit of eliminating it) is about $46.6 billion annually for prisons and jails, and an additional $5.2 billion annually for juvenile facilities.[47]

It bears cautioning, however, that the Department has not estimated in the RIA the expected monetized benefit of the standards themselves but has instead opted for a break-even approach that estimates the number of victims that would need to be avoided (taking into account the fact that many victims are victimized multiple times) for the benefits of the standards to break even with the costs of full nationwide compliance. Thus, the RIA does not estimate that the standards will actually yield an annual monetized benefit of $52 billion, except in the hypothetical scenario where the standards would, by themselves, lead to the complete elimination of prison rape and sexual abuse. The actual monetized benefit of the standards will certainly be less than this hypothetical figure and will depend on a number of factors, including the extent to which facilities comply with the standards, and the extent to which the standards are effective in achieving their goals.

[47] The RIA calculates these figures six different ways, using the three different prevalence estimation approaches (principal, adjusted, and lower bound), and the two different approaches to monetizing avoidance benefit values (WTP and WTA). Expressed as a range that captures all six approaches, the RIA determines that the maximum monetizable cost to society of rape and sexual abuse in prisons, jails, and juvenile facilities (and correspondingly, the total maximum benefit of eliminating it from those facilities) ranges from $26.9 billion to $51.9 billion. These figures exclude the cost to society of rape and sexual abuse in community confinement facilities and lockups because of the unavailability of data regarding the prevalence of sexual abuse in those facilities.

Table 8: Total Cost of Sexual Abuse, Across Prisons, Jails, and Juvenile Facilities, Victim Compensation Method, by Prevalence Approach (In Millions of Dollars)

	Principal	Adjusted	Lower Bound
Prisons	$20,637	$20,814	$16,051
Jails	$26,011	$24,493	$15,083
Juveniles	$5,239	$5,532	$4,654
TOTAL	$51,887	$50,839	$35,788

Non-Monetizable Benefits

Executive Order 13563 states that, "[w]here appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts." Executive Order 13563, § 1(c). Under Executive Order 12866, costs and benefits must "include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify but nevertheless essential to consider." Executive Order 12866, § 1(a). Benefits of regulatory action include "the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias." *Id.*

In concluding its assessment of the benefits of prison rape avoidance, the RIA identifies a number of benefits that cannot be monetized. These are some of the most important and consequential benefits of the final rule, and the discussion in the RIA describes both the nature and scale of those benefits so that they can be appropriately factored into the analysis. For example, the RIA examines benefits for rape victims, for inmates who are not rape victims, for families of victims, for prison administrators and staff, and for society at large. These benefits include those relating to public health and public safety, as well as economic benefits and existence value benefits. The RIA also describes benefits to inmates in lockups and community confinement facilities, as to which information was lacking relating to the baseline prevalence of sexual abuse.

Additionally, Congress predicated PREA on its conclusion—consistent with decisions by the Supreme Court—that "deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishment Clause of the Eighth Amendment." 42 U.S.C. 15601(13) (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). The individual rights enshrined in the Constitution express our nation's deepest commitments to human dignity and equality, and American citizens place great value on knowing that their government aspires to protect those rights to their fullest extent. In thinking about the qualitative benefits that will accrue from the implementation of the final rule, these values carry great weight.

Cost Analysis

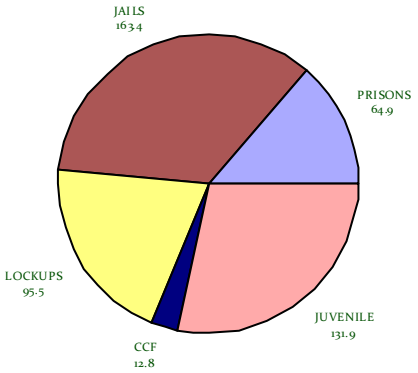
The RIA presents a detailed analysis of the costs of full nationwide compliance with the standards in the final rule. The RIA concludes that full nationwide compliance with the standards would cost the correctional community approximately $6.9 billion over the period

2012-2026, or $468.5 million per year when annualized at a 7 percent discount rate. The details of the RIA's cost estimates are summarized in Tables 9-14:

Table 9: Number of Facilities Assumed to Adopt and Implement the Standards, for Cost Analysis Purposes[48]

Type	Number of Facilities
Prisons (Federal)	117
Prisons (State)	1,190
Jails	2,860
Lockups (Police)	3,753
Lockups (Court)	2,330
Community Confinement	529
Juvenile	2,458

Table 10: Estimated Annualized Cost of Full Compliance with Aggregated Standards, in Millions of Dollars, by Facility Type



[48] For detailed sources, *see* RIA, at p. 70, n. 108.

Table 11: Estimated Cost of Full State and Local Compliance with the PREA Standards, in the Aggregate, by Year and by Facility Type, in Millions of Dollars

Year	Prisons	Jails	Lockups	Community Confinement Facilities	Juveniles	Total All Facilities
2012	$87.2	$254.6	$180.1	$27.8	$196.0	$745.8
2013	$55.2	$161.0	$122.0	$16.8	$93.3	$448.5
2014	$58.3	$157.9	$106.6	$14.2	$92.1	$429.2
2015	$59.2	$154.6	$93.7	$12.1	$94.9	$414.5
2016	$61.3	$153.5	$87.3	$11.1	$109.3	$422.6
2017	$61.5	$152.4	$83.6	$10.6	$151.9	$460.1
2018	$62.9	$151.3	$80.1	$10.1	$147.3	$451.8
2019	$63.1	$150.7	$77.5	$9.8	$144.7	$445.8
2020	$64.3	$150.1	$75.0	$9.4	$142.2	$441.0
2021	$65.7	$149.9	$73.2	$9.2	$140.4	$438.3
2022	$65.9	$150.1	$72.0	$9.0	$139.2	$436.2
2023	$67.1	$150.1	$70.8	$8.9	$138.0	$434.9
2024	$67.1	$149.9	$69.6	$8.7	$136.7	$432.0
2025	$67.9	$149.5	$68.4	$8.5	$135.5	$429.8
2026	$67.6	$148.8	$67.2	$8.4	$134.3	$426.3
15-yr Total	$974.2	$2,384.6	$1,327.3	$174.8	$1,995.8	$6,856.7
Present Value	$591.2	$1,488.4	$869.8	$116.6	$1,201.4	$4,267.4
Annual	$64.9	$163.4	$95.5	$12.8	$131.9	$468.5

Table 12: Estimated Average Annualized Compliance Cost Per Unit Facility, By Type

Type	Cost Per Unit Facility
Prisons	$54,546
Jails	$49,959
Lockups (per Agency)	$15,700
Community Confinement Facilities	$24,190
Juvenile Facilities	$53,666

Table 13: Estimated Cost of Full Nationwide Compliance with PREA Standards, Total Across All Facility Types, by Standard and by Year, in Thousands of Dollars

Year	115.11	115.13	115.14	115.16	115.17	115.21-.22	Training	115.41-.42	115.51, 115.53	115.52	115.71	Audits	Total
2012	$165,711	$85,980	$16,202	$29,298	$11,031	$12,803	$310,128	$67,302	$11,774	$4,163	$24,431	$6,937	$745,760
2013	$159,083	$79,991	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$448,454
2014	$149,405	$70,430	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$429,215
2015	$137,076	$68,027	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$414,484
2016	$125,278	$87,948	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$422,606
2017	$111,358	$139,334	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$460,073
2018	$98,234	$144,176	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$451,790
2019	$88,291	$148,092	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$445,763
2020	$78,879	$152,738	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$440,997
2021	$72,118	$156,816	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$438,314
2022	$67,610	$159,253	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$436,244
2023	$63,103	$162,373	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$434,857
2024	$58,596	$164,029	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$432,005
2025	$54,088	$166,337	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$429,806
2026	$49,581	$167,336	$0	$29,285	$11,031	$12,474	$55,702	$59,765	$6,263	$3,688	$24,236	$6,937	$426,297
Total	**$1,478,411**	**$1,952,859**	**$16,202**	**$439,290**	**$165,466**	**$187,442**	**$1,089,957**	**$904,007**	**$99,455**	**$55,794**	**$363,731**	**$104,049**	**$6,856,664**
NPV	**$999,406**	**$1,094,915**	**$15,142**	**$266,738**	**$100,470**	**$113,921**	**$745,111**	**$551,376**	**$62,193**	**$34,034**	**$220,919**	**$63,178**	**$4,267,403**
Ann.	**$109,729**	**$120,216**	**$1,663**	**$29,286**	**$11,031**	**$12,508**	**$81,809**	**$60,538**	**$6,828**	**$3,737**	**$24,256**	**$6,937**	**$468,538**

Table 14: Relative Cost of Full Nationwide Compliance with Various Standards

Again, these tables reflect the estimated costs of full nationwide compliance, which will occur only if all State, local, and private confinement facilities adopt the standards contained in the final rule and then immediately and fully implement them. In this sense, the cost impact of the final rule, as represented here, is essentially theoretical—in effect treating the standards as if they were binding regulations on State and local confinement facilities.

The true cost impact (which the RIA does not purport to assess), like the true impact of the final rule on preventing, detecting, and minimizing the effects of sexual abuse, will depend

on the specific choices and expenditures that State, local, and private correctional agencies make with regard to adoption and implementation of the standards.

In assessing the nationwide compliance costs for many of the standards, the RIA relies on work performed by the consulting firm Booz Allen Hamilton, with which the Department contracted to undertake cost analyses, first of the standards recommended by the NPREC, then of the standards proposed in the NPRM, and finally of the standards contained in the final rule. Booz Allen's initial cost analysis was based on a field study in which it surveyed 49 agencies of various types from across the country about the costs they would incur to comply with various aspects of the NPREC's recommended standards. Each of the final standards is examined in detail in the RIA to determine the full implementation costs of that standard. Where possible, the RIA distinguishes among costs applicable to prisons, jails, juvenile facilities, community confinement facilities, and lockups.

Many of the standards are assessed as likely having minimal to no associated compliance costs, including §§ 115.15, 115.215, and 115.315, which, among other things, impose a general ban on cross-gender pat-down searches of female inmates in adult prisons and jails and in community confinement facilities, and of male and female residents in juvenile facilities; and §§ 115.83, 115.283, and 115.383, which requires agencies to provide medical and mental health care assessments and treatment to victims and to certain abusers. The conclusion of zero cost for these standards is predicated on a high level of baseline compliance and on the expectation that agencies will adopt the least costly means of complying with requirements when given flexibility to determine how to apply those requirements to the specific characteristics of their agencies.

On an annualized basis, the most expensive standards, by the RIA's estimate, are: §§ 115.13, 115.113, 115.213, and 115.313, which relate to staffing, supervision, and video monitoring and would impose annual compliance costs of $120 million per year if fully adopted; §§ 115.11, 115.111, 115.211, and 115.311, which establish a zero-tolerance policy and require agencies to designate an agency-wide PREA coordinator and facilities to designate a PREA compliance manager, and would cost $110 million annually if fully adopted; the training standards (§§ 115.31–.35, 115.131–.132, 115.134, 115.231–.235, and 115.331–.335), which the RIA estimates would cost $82 million per year if fully adopted; and the screening standards (§§ 115.41–.42, 115.141, 115.241–.242, and 115.341–.342), which would have an estimated $61 million in annual costs if there were full nationwide compliance. Together, full nationwide compliance with these four sets of standards would cost $372 million annually, or about 80 percent of the total for all of the standards.

Booz Allen's analyses assessed only the costs that State, local, and private agencies would incur if they adopted and implemented the standards in their own facilities. Thus, Booz Allen's analyses do not include the compliance costs of those Federal facilities to which the final rule applies. The RIA supplements these analyses with the Department's own internal assessments of the costs that its two relevant components—the Bureau of Prisons and the United States Marshals Service—would incur in implementing the standards in the facilities they operate or oversee. As shown in Table 15, these two components expect to spend approximately $1.75 million per year over fifteen years to comply with the standards.

Table 15: Estimated Cost of Compliance with PREA Standards for Department of Justice Entities, by Standard, Annualized Over 2012-2026 at 7% Discount Rate

Standard	BOP	USMS
115.11 Zero Tolerance	$797,000	$445,000
115.21 Evidence Protocol	$37,000	$0
115.31-.35 Training	$20,000	$103,000
115.41 Screening	$500	$0
115.53 Inmate Reporting	$9,500	$0
115.93, .402-.405 Audits	$312,000	$0
Total	**$1,176,000**	**$548,000**

Comparison to Alternatives

Executive Order 13563 calls upon agencies, "in choosing among alternative regulatory approaches," to select "those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)." Executive Order 13563, § 1(b)(3). The Attorney General has concluded that, among the available alternatives, the standards in the final rule define measures and programs that, when implemented, will prove effective in accomplishing the goals of the statute while also promoting flexible decisions by the affected agencies on how to achieve compliance in a manner that works best given their unique circumstances and environments. Standards that could potentially maximize net benefits in the abstract would risk actually being less effective, either due to the failure of States and localities to adopt them at all, or due to the damaging consequences that the full costs of compliance could have on funding available for other critical correctional programs.

The RIA examines the cost implications of the two most obvious alternatives to the final standards—the NPREC's recommended standards, which are more stringent than the final rule in many respects, and the standards proposed in the NPRM, which by and large are less stringent—and finds that the standards in the final rule are the most effective and cost-effective among the three alternatives. As shown in Table 16, the final standards are the least expensive of the three alternatives.

Table 16: Comparison of Projected Nationwide Full Compliance Costs, Final Rule vs. NPRM vs. NPREC Recommendations, in Thousands of Annualized Dollars

	NPREC	NPRM	Final Rule
Prisons	$1,018,301	$53,318	$64,910
Jails	$2,278,566	$332,106	$163,416
Lockups	$2,246,775	$72,914	$95,504
Community Confinement Facilities	$235,884	$2,147	$12,797
Juvenile Facilities	$188,215	$50,002	$131,912
Total	$5,967,741	$510,487	$468,539

Executive Order 13132 – Federalism

In drafting the standards, the Department was mindful of its obligation to meet the objectives of PREA while also minimizing conflicts between State law and Federal interests. In

accordance with Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Notwithstanding the determination that the formal consultation process described in Executive Order 13132 is not required for this final rule, the Department's PREA Working Group consulted with representatives of State and local prisons and jails, juvenile facilities, community confinement programs, and lockups—among other individuals and groups—during the listening sessions the Working Group conducted in 2010. The Department also solicited and received input from numerous public entities at several levels of government in both the ANPRM and the NPRM stages of this rulemaking.

Insofar as it sets forth national standards that apply to confinement facilities operated by State and local governments, this final rule has the potential to affect the States, the relationship between the national government and the States, and the distribution of power and responsibilities among the various levels of government. However, with respect to the thousands of State and local agencies, and private companies, that own and operate confinement facilities across the country, PREA provides the Department with no direct authority to mandate binding standards for their facilities. Instead, PREA depends upon State and local agencies to make voluntary decisions to adopt and implement them.

For State agencies that receive grant funding from the Department to support their correctional operations, Congress has provided that the Department shall withhold 5 percent of prison-related grant funding to any State that fails to certify that it "has adopted, and is in full compliance with, the national standards," or that fails to alternatively provide "an assurance that not less than 5 percent" of the relevant grant funding "shall be used only for the purpose of enabling the State to adopt, and achieve full compliance with, those national standards, so as to ensure that a certification [of compliance] may be submitted in future years." 42 U.S.C. 15607(c)(2). For county, municipal, and privately run agencies that operate confinement facilities, PREA lacks any corresponding sanctions for facilities that do not adopt or comply with the standards.[49]

Despite the absence of statutory authority to promulgate standards that would bind State, local, and private agencies, other consequences may flow from the issuance of national standards, which could provide incentives for voluntary compliance. For example, these standards may influence the standard of care that courts will apply in considering legal and constitutional claims brought against corrections agencies and their employees arising out of allegations of sexual abuse. Moreover, agencies seeking to be accredited by the major accreditation organizations may need to comply with the standards as a condition of accreditation.[50]

Nevertheless, pivotal to the statutory scheme is a voluntary decision by State, county, local, and private correctional agencies to adopt the standards and to comply with them (or alternatively, for States, to commit to expending 5 percent of Department of Justice prison-

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[49] A small number of States operate unified correctional systems, in which correctional facilities typically administered by counties or cities—such as jails—are operated instead by State agencies. *See* Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems* (Sept. 1997), available at *http://static.nicic.gov/Library/014024.pdf*. In such States, an assessment of whether the State is in full compliance would encompass those facilities as well.

[50] The statute provides that an organization responsible for the accreditation of Federal, State, local, or private prisons, jails, or other penal facilities may not receive any new Federal grants unless it adopts accreditation standards consistent with the standards in the final rule. 42 U.S.C. 15608.

related grant funds to come into compliance in future years). In deciding whether to adopt these standards, agencies will of necessity conduct their own analyses of whether they can commit to adopting the standards in light of other demands on their correctional budgets.

The Department cannot assume that all agencies will choose to adopt and implement these standards. An agency assessing whether to do so may choose not to based upon an assessment that, with regard to that specific agency, the costs outweigh the benefits. Such a course of action would be regrettable. The Department certainly hopes that it will not be common, and that agencies will instead consider the benefits of prison rape prevention not only to the agencies themselves but also to the inmates in their charge and to the communities to which the agencies are accountable.

Nevertheless, the Department cannot ignore the straitened fiscal realities confronting many correctional agencies. Congress was acutely aware of these circumstances in passing PREA, which authorized the Department to make grants to States "to assist those States in ensuring that budgetary circumstances (such as reduced State and local spending on prisons) do not compromise efforts to protect inmates (particularly from prison rape)." 42 U.S.C. 15605(a). Congress did not intend for the Department to impose unrealistic or unachievable standards but rather expected it to partner with those agencies in adopting and implementing policies that will yield successes at combating sexual abuse in confinement facilities, while enabling State and local correctional authorities to continue other correctional programs vital to protecting inmates, staff, and the community, and ensuring that inmates' eventual reintegration into the community is successful.

The statute does not mandate any specific approach in developing the standards, but instead relies upon the Attorney General to exercise his independent judgment. The Attorney General has concluded that the standards in the final rule define measures and programs that, when implemented, will prove effective in accomplishing the goals of the statute while also promoting voluntary compliance decisions by State and local agencies.

Executive Order 12988 - Civil Justice Reform

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

Unfunded Mandates Reform Act of 1995

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

The Department has assessed the probable impact of the final PREA standards and, as is more fully described in the RIA, believes that these standards, if fully adopted and implemented by all State, local, and private operators of confinement facilities, would theoretically result in an aggregate expenditure by such operators of approximately $467 million annually (*i.e.*, the total of $468.5 million annually set forth above, minus $1.75 million annually attributable to Department of Justice entities), when annualized over fifteen years at a 7 percent discount rate.

However, the Department concludes that the requirements of the UMRA do not apply to the PREA standards because UMRA excludes from its definition of "Federal intergovernmental

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

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

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

● A qualitative and quantitative assessment of the anticipated costs and benefits of these national standards appears above in the section on Executive Order 12866, as elaborated in the RIA;

● The Department does not believe that these national standards will have an effect on national productivity, economic growth, full employment, creation of productive jobs, or international competitiveness of United States goods and services, except to the extent described in the RIA, which postulates *inter alia* that some agencies may add staff in order to comply with some of the standards;

● Notwithstanding how limited the Department's obligations may be under the formal requirements of UMRA, the Department has engaged in a variety of contacts and consultations with State and local governments, including during the listening sessions the Working Group conducted in 2010. In addition, the Department solicited and received input from public entities in both its ANPRM and its NPRM. The Department received numerous comments on its NPRM from State and local entities, the vast majority of which addressed the potential costs associated with certain of the proposed standards. Standards of particular cost concern included the training standards, the auditing standard, and the standards regarding staff supervision and video monitoring. The Department has altered various standards in ways that it believes will appropriately mitigate the cost concerns identified in the comments. State and local entities also expressed concern that the standards were overly burdensome on small correctional systems and facilities, especially in rural areas. The Department's final standards include various revisions to the proposed rule to address this issue.

Small Business Regulatory Enforcement Fairness Act of 1996

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

Regulatory Flexibility Act

The Department of Justice drafted this final rule so as to minimize its impact on small entities, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601-612, while meeting PREA's intended objectives. The Department has conducted an extensive consideration of the impact of this rule on small governmental entities, and available alternatives, as elaborated in the RIA and in the above discussions of Federalism and UMRA.

The Department provided notice of the proposed standards to potentially affected small governments by publishing the ANPRM and NPRM, by conducting listening sessions, and by other activities; enabled officials of affected small governments to provide meaningful and timely input through the methods listed above; and worked (and will continue to work) to inform, educate, and advise small governments on compliance with the requirements.

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

Paperwork Reduction Act

This final rule contains a new "collection of information" covered by the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501-3521. Under the PRA, a covered agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number assigned by OMB. 44 U.S.C. 3507(a)(3), 3512.

The information collections in this final rule require covered facilities to retain certain specified information relating to sexual abuse prevention planning, responsive planning, education and training, and investigations, as well as to collect and retain certain specified information relating to allegations of sexual abuse within the facility.

At the time of the proposed rule, the Department submitted an information collection request to OMB for review and approval in accordance with the review procedures of the PRA.

As part of the comment process on the NPRM, the Department received a few comments pertaining to the PRA, mostly raising questions whether certain recordkeeping requirements of the PREA standards duplicated in part the recordkeeping requirements imposed by other Department regulations. These comments and the Department's responses thereto are discussed above in the SUPPLEMENTARY INFORMATION portion of this preamble and in the RIA.

Changes to the PREA standards made in response to comments on the NPRM and due to additional analysis resulted in the total PRA burden hours being greater than those estimated in the Department's initial information collection request. None of the comments received on the NPRM pertaining to the PRA aspects of the rule necessitated any changes in the PRA burden hours estimated by the Department. However, the Department has submitted to OMB a revised information collection request with the new burden estimates for review and approval.

List of Subjects in 28 CFR Part 115

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

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

Part 115—PRISON RAPE ELIMINATION ACT NATIONAL STANDARDS

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

Subpart A—Standards for Adult Prisons and Jails

Prevention Planning

115.11 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.
115.12 Contracting with other entities for the confinement of inmates.
115.13 Supervision and monitoring.
115.14 Youthful inmates.
115.15 Limits to cross-gender viewing and searches.
115.16 Inmates with disabilities and inmates who are limited English proficient.
115.17 Hiring and promotion decisions.
115.18 Upgrades to facilities and technologies.

Responsive Planning

115.21 Evidence protocol and forensic medical examinations.
115.22 Policies to ensure referrals of allegations for investigations.

Training and Education

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

Screening for Risk of Sexual Victimization and Abusiveness

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

Reporting

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

115.54 Third-party reporting.

Official Response Following an Inmate Report

115.61 Staff and agency reporting duties.
115.62 Agency protection duties.
115.63 Reporting to other confinement facilities.
115.64 Staff first responder duties.
115.65 Coordinated response.
115.66 Preservation of ability to protect inmates from contact with abusers.
115.67 Agency protection against retaliation.
115.68 Post-allegation protective custody.

Investigations

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

Discipline

115.76 Disciplinary sanctions for staff.
115.77 Corrective action for contractors and volunteers.
115.78 Disciplinary sanctions for inmates.

Medical and Mental Care

115.81 Medical and mental health screenings; history of sexual abuse.
115.82 Access to emergency medical and mental health services.
115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

Data Collection and Review

115.86 Sexual abuse incident reviews.
115.87 Data collection.
115.88 Data review for corrective action.
115.89 Data storage, publication, and destruction.

Audits

115.93 Audits of standards.

Subpart B—Standards for Lockups

Prevention Planning

115.111 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.
115.112 Contracting with other entities for the confinement of detainees.
115.113 Supervision and monitoring.
115.114 Juveniles and youthful detainees.
115.115 Limits to cross-gender viewing and searches.
115.116 Detainees with disabilities and detainees who are limited English proficient.
115.117 Hiring and promotion decisions.
115.118 Upgrades to facilities and technologies.

Responsive Planning

115.121 Evidence protocol and forensic medical examinations.
115.122 Policies to ensure referrals of allegations for investigations.

Training and Education

115.131 Employee and volunteer training.
115.132 Detainee, contractor, and inmate worker notification of the agency's zero-tolerance policy.
115.133 Reserved.
115.134 Specialized training: Investigations.
115.135 Reserved.

Screening for Risk of Sexual Victimization and Abusiveness

115.141 Screening for risk of victimization and abusiveness.
115.142 Reserved.
115.143 Reserved.

Reporting

115.151 Detainee reporting.
115.152 Reserved.
115.153 Reserved.
115.154 Third-party reporting.

Official Response Following a Detainee Report

115.161 Staff and agency reporting duties.
115.162 Agency protection duties.
115.163 Reporting to other confinement facilities.
115.164 Staff first responder duties.
115.165 Coordinated response.
115.166 Preservation of ability to protect detainees from contact with abusers.
115.167 Agency protection against retaliation.
115.168 Reserved.

Investigations

115.171 Criminal and administrative agency investigations.
115.172 Evidentiary standard for administrative investigations.
115.173 Reserved.

Discipline

115.176 Disciplinary sanctions for staff.
115.177 Corrective action for contractors and volunteers.
115.178 Referrals for prosecution for detainee-on-detainee sexual abuse.

Medical and Mental Care

115.181 Reserved.
115.182 Access to emergency medical services.
115.183 Reserved.

Data Collection and Review

115.186 Sexual abuse incident reviews.
115.187 Data collection.
115.188 Data review for corrective action.
115.189 Data storage, publication, and destruction.

Audits

115.193 Audits of standards.

Subpart C—Standards for Community Confinement Facilities

Prevention Planning

115.211 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.
115.212 Contracting with other entities for the confinement of residents.
115.213 Supervision and monitoring.
115.214 Reserved.
115.215 Limits to cross-gender viewing and searches.
115.216 Residents with disabilities and residents who are limited English proficient.
115.217 Hiring and promotion decisions.
115.218 Upgrades to facilities and technologies.

Responsive Planning

115.221 Evidence protocol and forensic medical examinations.

115.222 Policies to ensure referrals of allegations for investigations.

Training and Education

115.231 Employee training.
115.232 Volunteer and contractor training.
115.233 Resident education.
115.234 Specialized training: Investigations.
115.235 Specialized training: Medical and mental health care.

Screening for Risk of Sexual Victimization and Abusiveness

115.241 Screening for risk of victimization and abusiveness.
115.242 Use of screening information.
115.243 Reserved.
115.251 Resident reporting.
115.252 Exhaustion of administrative remedies.
115.253 Resident access to outside confidential support services.
115.254 Third-party reporting.

Official Response Following a Resident Report

115.261 Staff and agency reporting duties.
115.262 Agency protection duties.
115.263 Reporting to other confinement facilities.
115.264 Staff first responder duties.
115.265 Coordinated response.
115.266 Preservation of ability to protect residents from contact with abusers.
115.267 Agency protection against retaliation.
115.268 Reserved.

Investigations

115.271 Criminal and administrative agency investigations.
115.272 Evidentiary standard for administrative investigations.
115.273 Reporting to residents.

Discipline

115.276 Disciplinary sanctions for staff.
115.277 Corrective action for contractors and volunteers.
115.278 Disciplinary sanctions for residents.

Medical and Mental Care

115.281 Reserved.

115.282 Access to emergency medical and mental health services.
115.283 Ongoing medical and mental health care for sexual abuse victims and abusers.

Data Collection and Review

115.286 Sexual abuse incident reviews.
115.287 Data collection.
115.288 Data review for corrective action.
115.289 Data storage, publication, and destruction.

Audits

115.293 Audits of standards.

Subpart D—Standards for Juvenile Facilities

Prevention Planning

115.311 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.
115.312 Contracting with other entities for the confinement of residents.
115.313 Supervision and monitoring.
115.314 Reserved.
115.315 Limits to cross-gender viewing and searches.
115.316 Residents with disabilities and residents who are limited English proficient.
115.317 Hiring and promotion decisions.
115.318 Upgrades to facilities and technologies.

Responsive Planning

115.321 Evidence protocol and forensic medical examinations.
115.322 Policies to ensure referrals of allegations for investigations.

Training and Education

115.331 Employee training.
115.332 Volunteer and contractor training.
115.333 Resident education.
115.334 Specialized training: Investigations.
115.335 Specialized training: Medical and mental health care.

Screening for Risk of Sexual Victimization and Abusiveness

115.341 Obtaining information from residents.
115.342 Placement of residents in housing, bed, program, education, and work assignments.
115.343 Reserved.

Reporting

115.351 Resident reporting.
115.352 Exhaustion of administrative remedies.
115.353 Resident access to outside support services and legal representation.
115.354 Third-party reporting.

Official Response Following a Resident Report

115.361 Staff and agency reporting duties.
115.362 Agency protection duties.
115.363 Reporting to other confinement facilities.
115.364 Staff first responder duties.
115.365 Coordinated response.
115.366 Preservation of ability to protect residents from contact with abusers.
115.367 Agency protection against retaliation.
115.368 Post-allegation protective custody.

Investigations

115.371 Criminal and administrative agency investigations.
115.372 Evidentiary standard for administrative investigations.
115.373 Reporting to residents.

Discipline

115.376 Disciplinary sanctions for staff.
115.377 Corrective action for contractors and volunteers.
115.378 Interventions and disciplinary sanctions for residents.

Medical and Mental Care

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

Data Collection and Review

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

Audits

115.393 Audits of standards.

Subpart E—Auditing and Corrective Action

115.401 Frequency and scope of audits.
115.402 Auditor qualifications.
115.403 Audit contents and findings.
115.404 Audit corrective action plan.
115.405 Audit appeals.

Subpart F—State Compliance

115.501 State determination and certification of full compliance.

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

§ 115.5 General definitions.

For purposes of this part, the term—

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

Agency head means the principal official of an agency.

Community confinement facility means a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community correctional facility (including residential re-entry centers), other than a juvenile facility, in which individuals reside as part of a term of imprisonment or as a condition of pre-trial release or post-release supervision, while participating in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during nonresidential hours.

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

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

Direct staff supervision means that security staff are in the same room with, and within reasonable hearing distance of, the resident or inmate.

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

Exigent circumstances means any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility.

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

Facility head means the principal official of a facility.

Full compliance means compliance with all material requirements of each standard except for *de minimis* violations, or discrete and temporary violations during otherwise sustained periods of compliance.

Gender nonconforming means a person whose appearance or manner does not conform to traditional societal gender expectations.

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

Intersex means a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.

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

Juvenile means any person under the age of 18, unless under adult court supervision and confined or detained in a prison or jail.

Juvenile facility means a facility primarily used for the confinement of juveniles pursuant to the juvenile justice system or criminal justice system.

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

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

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

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

Medical practitioner means a health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or

her professional practice. A "qualified medical practitioner" refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

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

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

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

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

Secure juvenile facility means a juvenile facility in which the movements and activities of individual residents may be restricted or subject to control through the use of physical barriers or intensive staff supervision. A facility that allows residents access to the community to achieve treatment or correctional objectives, such as through educational or employment programs, typically will not be considered to be a secure juvenile facility.

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

Staff means employees.

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

Transgender means a person whose gender identity (*i.e.*, internal sense of feeling male or female) is different from the person's assigned sex at birth.

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

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

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

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

Youthful inmate means any person under the age of 18 who is under adult court supervision and incarcerated or detained in a prison or jail.

Youthful detainee means any person under the age of 18 who is under adult court supervision and detained in a lockup.

§ 115.6 Definitions related to sexual abuse.

For purposes of this part, the term—

Sexual abuse includes—

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

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

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

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

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

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

(4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation.

Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer includes any of the following acts, with or without consent of the inmate, detainee, or resident:

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

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

(3) Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or

where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(6) Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in paragraphs (1)-(5) of this section;

(7) Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, and

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

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

Sexual harassment includes—

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

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

Subpart A—Standards for Adult Prisons and Jails

Prevention Planning

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

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

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

(c) Where an agency operates more than one facility, each facility shall designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

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

(a) A public agency that contracts for the confinement of its inmates with private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards.

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

§ 115.13 Supervision and monitoring.

(a) The agency shall ensure that each facility it operates shall develop, document, and make its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities shall take into consideration:

(1) Generally accepted detention and correctional practices;

(2) Any judicial findings of inadequacy;

(3) Any findings of inadequacy from Federal investigative agencies;

(4) Any findings of inadequacy from internal or external oversight bodies;

(5) All components of the facility's physical plant (including "blind-spots" or areas where staff or inmates may be isolated);

(6) The composition of the inmate population;

(7) The number and placement of supervisory staff;

(8) Institution programs occurring on a particular shift;

(9) Any applicable State or local laws, regulations, or standards;

(10) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(11) Any other relevant factors.

(b) In circumstances where the staffing plan is not complied with, the facility shall document and justify all deviations from the plan.

(c) Whenever necessary, but no less frequently than once each year, for each facility the agency operates, in consultation with the PREA coordinator required by § 115.11, the agency shall assess, determine, and document whether adjustments are needed to:

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

(2) The facility's deployment of video monitoring systems and other monitoring technologies; and

(3) The resources the facility has available to commit to ensure adherence to the staffing plan.

(d) Each agency operating a facility shall implement a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such policy and practice shall be implemented for night shifts as well as day shifts. Each agency shall have a policy to prohibit staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

§ 115.14 Youthful inmates.

(a) A youthful inmate shall not be placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters.

(b) In areas outside of housing units, agencies shall either:

(1) maintain sight and sound separation between youthful inmates and adult inmates, or

(2) provide direct staff supervision when youthful inmates and adult inmates have sight, sound, or physical contact.

(c) Agencies shall make best efforts to avoid placing youthful inmates in isolation to comply with this provision. Absent exigent circumstances, agencies shall not deny youthful inmates daily large-muscle exercise and any legally required special education services to comply with this provision. Youthful inmates shall also have access to other programs and work opportunities to the extent possible.

§ 115.15 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) As of [**INSERT DATE 3 YEARS PLUS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, or [**INSERT DATE 5 YEARS PLUS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.

(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.

(d) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit.

(e) The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

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

§ 115.16 Inmates with disabilities and inmates who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that inmates with disabilities (including, for example, inmates who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with inmates who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective communication with inmates with disabilities, including inmates who have intellectual

disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans With Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to inmates who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The agency shall not rely on inmate interpreters, inmate readers, or other types of inmate assistants except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the inmate's safety, the performance of first-response duties under § 115.64, or the investigation of the inmate's allegations.

§ 115.17 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who may have contact with inmates, and shall not enlist the services of any contractor who may have contact with inmates, who—

(1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);

(2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or

(3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with inmates.

(c) Before hiring new employees who may have contact with inmates, the agency shall:

(1) Perform a criminal background records check; and

(2) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check before enlisting the services of any contractor who may have contact with inmates.

(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with inmates or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall ask all applicants and employees who may have contact with inmates directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

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

§ 115.18 Upgrades to facilities and technologies.

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

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

Responsive Planning

§ 115.21 Evidence protocol and forensic medical examinations.

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

(b) The protocol shall be developmentally appropriate for youth where applicable, and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," or similarly comprehensive and authoritative protocols developed after 2011.

(c) The agency shall offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization, or a qualified agency staff member. Agencies shall document efforts to secure services from rape crisis centers. For the purpose of this standard, a rape crisis center refers to an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages. The agency may utilize a rape crisis center that is part of a governmental unit as long as the center is not part of the criminal justice system (such as a law enforcement agency) and offers a comparable level of confidentiality as a nongovernmental entity that provides similar victim services.

(e) As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (e) of this section.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to:

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

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in prisons or jails.

(h) For the purposes of this section, a qualified agency staff member or a qualified community-based staff member shall be an individual who has been screened for appropriateness to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

§ 115.22 Policies to ensure referrals of allegations for investigations.

(a) The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are referred for investigation to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior. The agency shall publish such policy on its website or, if it does not have one, make the policy available through other means. The agency shall document all such referrals.

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

(d) Any State entity responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in prisons or jails shall have in place a policy governing the conduct of such investigations.

(e) Any Department of Justice component responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in prisons or jails shall have in place a policy governing the conduct of such investigations.

Training and Education

§ 115.31 Employee training.

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

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

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

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

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

(5) The dynamics of sexual abuse and sexual harassment in confinement;

(6) The common reactions of sexual abuse and sexual harassment victims;

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

(8) How to avoid inappropriate relationships with inmates;

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

(10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

(b) Such training shall be tailored to the gender of the inmates at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male inmates to a facility that houses only female inmates, or vice versa.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide each employee with refresher training every two years to ensure that all employees know the agency's current sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.

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

§ 115.32 Volunteer and contractor training.

(a) The agency shall ensure that all volunteers and contractors who have contact with inmates have been trained on their responsibilities under the agency's sexual abuse and sexual harassment prevention, detection, and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with inmates, but all volunteers and contractors who have contact with inmates shall be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report such incidents.

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

§ 115.33 Inmate education.

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

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

(c) Current inmates who have not received such education shall be educated within one year of the effective date of the PREA standards, and shall receive education upon transfer to a different facility to the extent that the policies and procedures of the inmate's new facility differ from those of the previous facility.

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

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

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

§ 115.34 Specialized training: Investigations.

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

(b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

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

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

§ 115.35 Specialized training: Medical and mental health care.

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

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

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

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

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

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

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

(d) Medical and mental health care practitioners shall also receive the training mandated for employees under § 115.31 or for contractors and volunteers under § 115.32, depending upon the practitioner's status at the agency.

Screening for Risk of Sexual Victimization and Abusiveness

§ 115.41 Screening for risk of victimization and abusiveness.

(a) All inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.

(b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

(c) Such assessments shall be conducted using an objective screening instrument.

(d) The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:

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

(2) The age of the inmate;

(3) The physical build of the inmate;

(4) Whether the inmate has previously been incarcerated;

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

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

(7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

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

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

(10) Whether the inmate is detained solely for civil immigration purposes.

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

(f) Within a set time period, not to exceed 30 days from the inmate's arrival at the facility, the facility will reassess the inmate's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening.

(g) An inmate's risk level shall be reassessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the inmate's risk of sexual victimization or abusiveness.

(h) Inmates may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(1), (d)(7), (d)(8), or (d)(9) of this section.

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

§ 115.42 Use of screening information.

(a) The agency shall use information from the risk screening required by § 115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

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

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

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

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

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.

§ 115.43 Protective custody.

(a) Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment.

(b) Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:

(1) The opportunities that have been limited;

(2) The duration of the limitation; and

(3) The reasons for such limitations.

(c) The facility shall assign such inmates to involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

(d) If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, the facility shall clearly document:

(1) The basis for the facility's concern for the inmate's safety; and

(2) The reason why no alternative means of separation can be arranged.

(e) Every 30 days, the facility shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

Reporting

§ 115.51 Inmate reporting.

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

(b) The agency shall also provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials, allowing the inmate to remain anonymous upon request. Inmates detained solely for civil immigration purposes shall be provided information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security.

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

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

§ 115.52 Exhaustion of administrative remedies.

(a) An agency shall be exempt from this standard if it does not have administrative procedures to address inmate grievances regarding sexual abuse.

(b)(1) The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.

(2) The agency may apply otherwise-applicable time limits to any portion of a grievance that does not allege an incident of sexual abuse.

(3) The agency shall not require an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.

(4) Nothing in this section shall restrict the agency's ability to defend against an inmate lawsuit on the ground that the applicable statute of limitations has expired.

(c) The agency shall ensure that—

(1) An inmate who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and

(2) Such grievance is not referred to a staff member who is the subject of the complaint.

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

(2) Computation of the 90-day time period shall not include time consumed by inmates in preparing any administrative appeal.

(3) The agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision. The agency shall notify the inmate in writing of any such extension and provide a date by which a decision will be made.

(4) At any level of the administrative process, including the final level, if the inmate does not receive a response within the time allotted for reply, including any properly noticed extension, the inmate may consider the absence of a response to be a denial at that level.

(e)(1) Third parties, including fellow inmates, staff members, family members, attorneys, and outside advocates, shall be permitted to assist inmates in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of inmates.

(2) If a third party files such a request on behalf of an inmate, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(3) If the inmate declines to have the request processed on his or her behalf, the agency shall document the inmate's decision.

(f)(1) The agency shall establish procedures for the filing of an emergency grievance alleging that an inmate is subject to a substantial risk of imminent sexual abuse.

(2) After receiving an emergency grievance alleging an inmate is subject to a substantial risk of imminent sexual abuse, the agency shall immediately forward the grievance (or any portion thereof that alleges the substantial risk of imminent sexual abuse) to a level of review at

which immediate corrective action may be taken, shall provide an initial response within 48 hours, and shall issue a final agency decision within 5 calendar days. The initial response and final agency decision shall document the agency's determination whether the inmate is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

(g) The agency may discipline an inmate for filing a grievance related to alleged sexual abuse only where the agency demonstrates that the inmate filed the grievance in bad faith.

§ 115.53 Inmate access to outside confidential support services.

(a) The facility shall provide inmates with access to outside victim advocates for emotional support services related to sexual abuse by giving inmates mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and, for persons detained solely for civil immigration purposes, immigrant services agencies. The facility shall enable reasonable communication between inmates and these organizations and agencies, in as confidential a manner as possible.

(b) The facility shall inform inmates, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

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

§ 115.54 Third-party reporting.

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

Official Response Following an Inmate Report

§ 115.61 Staff and agency reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against inmates or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

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

(c) Unless otherwise precluded by Federal, State, or local law, medical and mental health practitioners shall be required to report sexual abuse pursuant to paragraph (a) of this section and

to inform inmates of the practitioner's duty to report, and the limitations of confidentiality, at the initiation of services.

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

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

§ 115.62 Agency protection duties.

When an agency learns that an inmate is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the inmate.

§ 115.63 Reporting to other confinement facilities.

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

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

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

§ 115.64 Staff first responder duties.

(a) Upon learning of an allegation that an inmate was sexually abused, the first security staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

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

§ 115.65 Coordinated response.

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

§ 115.66 Preservation of ability to protect inmates from contact with abusers.

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with any inmates pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.72 and 115.76; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

§ 115.67 Agency protection against retaliation.

(a) The agency shall establish a policy to protect all inmates and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other inmates or staff, and shall designate which staff members or departments are charged with monitoring retaliation.

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

(c) For at least 90 days following a report of sexual abuse, the agency shall monitor the conduct and treatment of inmates or staff who reported the sexual abuse and of inmates who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by inmates or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any inmate disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) In the case of inmates, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(f) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

§ 115.68 Post-allegation protective custody.

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

Investigations

§ 115.71 Criminal and administrative agency investigations.

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to § 115.34.

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

(d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(e) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as inmate or staff. No agency shall require an inmate who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(f) Administrative investigations:

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

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

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

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

(i) The agency shall retain all written reports referenced in paragraphs (f) and (g) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

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

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

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

§ 115.72 Evidentiary standard for administrative investigations.

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

§ 115.73 Reporting to inmates.

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

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

(c) Following an inmate's allegation that a staff member has committed sexual abuse against the inmate, the agency shall subsequently inform the inmate (unless the agency has determined that the allegation is unfounded) whenever:

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

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

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

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

(d) Following an inmate's allegation that he or she has been sexually abused by another inmate, the agency shall subsequently inform the alleged victim whenever:

(1) The agency learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or

(2) The agency learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.

(e) All such notifications or attempted notifications shall be documented.

(f) An agency's obligation to report under this standard shall terminate if the inmate is released from the agency's custody.

Discipline

§ 115.76 Disciplinary sanctions for staff.

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

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

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

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

§ 115.77 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with inmates and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with inmates, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.

§ 115.78 Disciplinary sanctions for inmates.

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

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

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

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

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

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

(g) An agency may, in its discretion, prohibit all sexual activity between inmates and may discipline inmates for such activity. An agency may not, however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

Medical and Mental Care

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

(a) If the screening pursuant to § 115.41 indicates that a prison inmate has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.

(b) If the screening pursuant to § 115.41 indicates that a prison inmate has previously perpetrated sexual abuse, whether it occurred in an institutional setting or in the community, staff

shall ensure that the inmate is offered a follow-up meeting with a mental health practitioner within 14 days of the intake screening.

(c) If the screening pursuant to § 115.41 indicates that a jail inmate has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.

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

(e) Medical and mental health practitioners shall obtain informed consent from inmates before reporting information about prior sexual victimization that did not occur in an institutional setting, unless the inmate is under the age of 18.

§ 115.82 Access to emergency medical and mental health services.

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

(b) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders shall take preliminary steps to protect the victim pursuant to § 115.62 and shall immediately notify the appropriate medical and mental health practitioners.

(c) Inmate victims of sexual abuse while incarcerated shall be offered timely information about and timely access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where medically appropriate.

(d) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

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

(a) The facility shall offer medical and mental health evaluation and, as appropriate, treatment to all inmates who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.

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

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

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

(e) If pregnancy results from the conduct described in paragraph (d) of this section, such victims shall receive timely and comprehensive information about and timely access to all lawful pregnancy-related medical services.

(f) Inmate victims of sexual abuse while incarcerated shall be offered tests for sexually transmitted infections as medically appropriate.

(g) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

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

Data Collection and Review

§ 115.86 Sexual abuse incident reviews.

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

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

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

(d) The review team shall:

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

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;

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

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

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

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1)-(d)(5) of this section, and any recommendations for improvement and submit such report to the facility head and PREA compliance manager.

(e) The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

§ 115.87 Data collection.

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

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

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

(d) The agency shall maintain, review, and collect data as needed from all available incident-based documents, including reports, investigation files, and sexual abuse incident reviews.

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

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

§ 115.88 Data review for corrective action.

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

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in addressing sexual abuse.

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

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

§ 115.89 Data storage, publication, and destruction.

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

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

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

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.87 for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

Audits

§ 115.93 Audits of standards.

The agency shall conduct audits pursuant to §§ 115.401–.405.

Subpart B—Standards for Lockups

Prevention Planning

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

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

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

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

(a) A law enforcement agency that contracts for the confinement of its lockup detainees in lockups operated by private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards.

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

§ 115.113 Supervision and monitoring.

(a) For each lockup, the agency shall develop and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect detainees against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, agencies shall take into consideration;

(1) The physical layout of each lockup;

(2) The composition of the detainee population;

(3) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(4) Any other relevant factors.

(b) In circumstances where the staffing plan is not complied with, the lockup shall document and justify all deviations from the plan.

(c) Whenever necessary, but no less frequently than once each year, the lockup shall assess, determine, and document whether adjustments are needed to:

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

(2) Prevailing staffing patterns;

(3) The lockup's deployment of video monitoring systems and other monitoring technologies; and

(4) The resources the lockup has available to commit to ensure adequate staffing levels.

(d) If vulnerable detainees are identified pursuant to the screening required by § 115.141, security staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored

on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.

§ 115.114 Juveniles and youthful detainees.

Juveniles and youthful detainees shall be held separately from adult detainees.

§ 115.115 Limits to cross-gender viewing and searches.

(a) The lockup shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) The lockup shall document all cross-gender strip searches and cross-gender visual body cavity searches.

(c) The lockup shall implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(d) The lockup shall not search or physically examine a transgender or intersex detainee for the sole purpose of determining the detainee's genital status. If the detainee's genital status is unknown, it may be determined during conversations with the detainee, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

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

§ 115.116 Detainees with disabilities and detainees who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with detainees who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans With Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to detainees who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The agency shall not rely on detainee interpreters, detainee readers, or other types of detainee assistants except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the detainee's safety, the performance of first-response duties under § 115.164, or the investigation of the detainee's allegations.

§ 115.117 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who may have contact with detainees, and shall not enlist the services of any contractor who may have contact with detainees, who—

(1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);

(2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or

(3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with detainees.

(c) Before hiring new employees who may have contact with detainees, the agency shall:

(1) Perform a criminal background records check; and

(2) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check before enlisting the services of any contractor who may have contact with detainees.

(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with detainees or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall ask all applicants and employees who may have contact with detainees directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

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

§ 115.118 Upgrades to facilities and technologies.

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

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

Responsive Planning

§ 115.121 Evidence protocol and forensic medical examinations.

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

(b) The protocol shall be developmentally appropriate for youth where applicable, and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," or similarly comprehensive and authoritative protocols developed after 2011. As part of the training required in § 115.131, employees and volunteers who may have contact with lockup detainees shall receive basic training regarding how to detect and respond to victims of sexual abuse.

(c) The agency shall offer all victims of sexual abuse access to forensic medical examinations whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) If the detainee is transported for a forensic examination to an outside hospital that offers victim advocacy services, the detainee shall be permitted to use such services to the extent available, consistent with security needs.

(e) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (d) of this section.

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

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

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

§ 115.122 Policies to ensure referrals of allegations for investigations.

(a) The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) If another law enforcement agency is responsible for conducting investigations of allegations of sexual abuse or sexual harassment in its lockups, the agency shall have in place a policy to ensure that such allegations are referred for investigation to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior. The agency shall publish such policy, including a description of responsibilities of both the agency and the investigating entity, on its website, or, if it does not have one, make available the policy through other means. The agency shall document all such referrals.

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

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

Training and Education

§ 115.131 Employee and volunteer training.

(a) The agency shall train all employees and volunteers who may have contact with lockup detainees to be able to fulfill their responsibilities under agency sexual abuse prevention, detection, and response policies and procedures, including training on:

(1) The agency's zero-tolerance policy and detainees' right to be free from sexual abuse and sexual harassment;

(2) The dynamics of sexual abuse and harassment in confinement settings, including which detainees are most vulnerable in lockup settings;

(3) The right of detainees and employees to be free from retaliation for reporting sexual abuse or harassment;

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

(5) How to communicate effectively and professionally with all detainees; and

(6) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

(b) All current employees and volunteers who may have contact with lockup detainees shall be trained within one year of the effective date of the PREA standards, and the agency shall provide annual refresher information to all such employees and volunteers to ensure that they know the agency's current sexual abuse and sexual harassment policies and procedures.

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

§ 115.132 Detainee, contractor, and inmate worker notification of the agency's zero-tolerance policy.

(a) During the intake process, employees shall notify all detainees of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment.

(b) The agency shall ensure that, upon entering the lockup, contractors and any inmates who work in the lockup are informed of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment.

§ 115.133 Reserved.

§ 115.134 Specialized training: Investigations.

(a) In addition to the general training provided to all employees and volunteers pursuant to § 115.131, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

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

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

§ 115.135 Reserved.

Screening for Risk of Sexual Victimization and Abusiveness

§ 115.141 Screening for risk of victimization and abusiveness.

(a) In lockups that are not utilized to house detainees overnight, before placing any detainees together in a holding cell, staff shall consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused and, when appropriate, shall take necessary steps to mitigate any such danger to the detainee.

(b) In lockups that are utilized to house detainees overnight, all detainees shall be screened to assess their risk of being sexually abused by other detainees or sexually abusive toward other detainees.

(c) In lockups described in paragraph (b) of this section, staff shall ask the detainee about his or her own perception of vulnerability.

(d) The screening process in the lockups described in paragraph (b) of this section shall also consider, to the extent that the information is available, the following criteria to screen detainees for risk of sexual victimization:

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

(2) The age of the detainee;

(3) The physical build and appearance of the detainee;

(4) Whether the detainee has previously been incarcerated; and

(5) The nature of the detainee's alleged offense and criminal history.

§ 115.142 Reserved.

§ 115.143 Reserved.

Reporting

§ 115.151 Detainee reporting.

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

(b) The agency shall also inform detainees of at least one way to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse and sexual harassment to agency officials, allowing the detainee to remain anonymous upon request.

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

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

§ 115.152 Reserved.

§ 115.153 Reserved.

§ 115.154 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse and sexual harassment in its lockups and shall distribute publicly information on how to report sexual abuse and sexual harassment on behalf of a detainee.

Official Response Following a Detainee Report

§ 115.161 Staff and agency reporting duties.

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

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

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

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

§ 115.162 Agency protection duties.

When an agency learns that a detainee is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the detainee.

§ 115.163 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a detainee was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility or appropriate office of the agency where the alleged abuse occurred.

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

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

§ 115.164 Staff first responder duties.

(a) Upon learning of an allegation that a detainee was sexually abused, the first law enforcement staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

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

§ 115.165 Coordinated response.

(a) The agency shall develop a written institutional plan to coordinate actions taken in response to a lockup incident of sexual abuse, among staff first responders, medical and mental health practitioners, investigators, and agency leadership.

(b) If a victim is transferred from the lockup to a jail, prison, or medical facility, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

§ 115.166 Preservation of ability to protect detainees from contact with abusers

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with detainees pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.172 and 115.176; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

§ 115.167 Agency protection against retaliation.

(a) The agency shall establish a policy to protect all detainees and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other detainees or staff, and shall designate which staff members or departments are charged with monitoring retaliation.

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

(c) The agency shall monitor the conduct and treatment of detainees or staff who have reported sexual abuse and of detainees who were reported to have suffered sexual abuse, and shall act promptly to remedy any such retaliation.

(d) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(e) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

§ 115.168 Reserved.

Investigations

§ 115.171 Criminal and administrative agency investigations.

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to § 115.134.

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

(d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(e) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as detainee or staff. No agency shall require a detainee who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(f) Administrative investigations:

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

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

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

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

(i) The agency shall retain all written reports referenced in paragraphs (f) and (g) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

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

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

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

§ 115.172 Evidentiary standard for administrative investigations.

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

§ 115.173 Reserved.

Discipline

§ 115.176 Disciplinary sanctions for staff.

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

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

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

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

§ 115.177 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with detainees and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with detainees, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.

§ 115.178 Referrals for prosecution for detainee-on-detainee sexual abuse.

(a) When there is probable cause to believe that a detainee sexually abused another detainee in a lockup, the agency shall refer the matter to the appropriate prosecuting authority.

(b) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall inform the investigating entity of this policy.

(c) Any State entity or Department of Justice component that is responsible for investigating allegations of sexual abuse in lockups shall be subject to this requirement.

Medical and Mental Care

§ 115.181 Reserved.

§ 115.182 Access to emergency medical services.

(a) Detainee victims of sexual abuse in lockups shall receive timely, unimpeded access to emergency medical treatment.

(b) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

§ 115.183 Reserved.

Data Collection and Review

§ 115.186 Sexual abuse incident reviews.

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

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

(c) The review team shall include upper-level management officials, with input from line supervisors and investigators.

(d) The review team shall:

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

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the lockup;

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

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

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

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1)-(d)(5) of this section, and any recommendations for improvement and submit such report to the lockup head and agency PREA coordinator.

(e) The lockup shall implement the recommendations for improvement, or shall document its reasons for not doing so.

§ 115.187 Data collection.

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

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

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Local Jail Jurisdictions Survey of Sexual Violence conducted by the Department of Justice, or any subsequent form developed by the Department of Justice and designated for lockups.

(d) The agency shall maintain, review, and collect data as needed from all available incident-based documents, including reports, investigation files, and sexual abuse incident reviews.

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

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

§ 115.188 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.187 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each lockup, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in addressing sexual abuse.

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

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

§ 115.189 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.187 are securely retained.

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

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

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.187 for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

Audits

§ 115.193 Audits of standards.

The agency shall conduct audits pursuant to §§ 115.401-405. Audits need not be conducted of individual lockups that are not utilized to house detainees overnight.

Subpart C–Standards for Community Confinement Facilities

Prevention Planning

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

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

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

§ 115.212 Contracting with other entities for the confinement of residents.

(a) A public agency that contracts for the confinement of its residents with private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards.

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

(c) Only in emergency circumstances in which all reasonable attempts to find a private agency or other entity in compliance with the PREA standards have failed, may the agency enter into a contract with an entity that fails to comply with these standards. In such a case, the public agency shall document its unsuccessful attempts to find an entity in compliance with the standards.

§ 115.213 Supervision and monitoring.

(a) For each facility, the agency shall develop and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect residents against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, agencies shall take into consideration:

(1) The physical layout of each facility;

(2) The composition of the resident population;

(3) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(4) Any other relevant factors.

(b) In circumstances where the staffing plan is not complied with, the facility shall document and justify all deviations from the plan.

(c) Whenever necessary, but no less frequently than once each year, the facility shall assess, determine, and document whether adjustments are needed to:

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

(2) Prevailing staffing patterns;

(3) The facility's deployment of video monitoring systems and other monitoring technologies; and

(4) The resources the facility has available to commit to ensure adequate staffing levels.

§ 115.214 Reserved.

§ 115.215 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) As of [**INSERT DATE 3 YEARS PLUS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, or [**INSERT DATE 5 YEARS PLUS 60**

DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]for a facility whose rated capacity does not exceed 50 residents, the facility shall not permit cross-gender pat-down searches of female residents, absent exigent circumstances. Facilities shall not restrict female residents' access to regularly available programming or other outside opportunities in order to comply with this provision.

(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female residents.

(d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.

(e) The facility shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status. If the resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

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

§ 115.216 Residents with disabilities and residents who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that residents with disabilities (including, for example, residents who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with residents who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective communication with residents with disabilities, including residents who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans With Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to residents who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The agency shall not rely on resident interpreters, resident readers, or other types of resident assistants except in limited circumstances where an extended delay in obtaining an

effective interpreter could compromise the resident's safety, the performance of first-response duties under § 115.264, or the investigation of the resident's allegations.

§ 115.217 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who may have contact with residents, and shall not enlist the services of any contractor who may have contact with residents, who—

(1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. § 1997);

(2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or

(3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with residents.

(c) Before hiring new employees who may have contact with residents, the agency shall:

(1) Perform a criminal background records check; and

(2) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check before enlisting the services of any contractor who may have contact with residents.

(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with residents or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall also ask all applicants and employees who may have contact with residents directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

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

§ 115.218 Upgrades to facilities and technologies.

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

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

Responsive Planning

§ 115.221 Evidence protocol and forensic medical examinations.

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

(b) The protocol shall be developmentally appropriate for youth where applicable, and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," or similarly comprehensive and authoritative protocols developed after 2011.

(c) The agency shall offer all victims of sexual abuse access to forensic medical examinations whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization or a qualified agency staff member. Agencies shall document efforts to secure services from rape crisis centers. For the purpose of this standard, a rape crisis center refers to an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages. The agency may utilize a rape crisis center that is part of a governmental unit as long as the center is not part of the criminal justice system (such as a law enforcement agency) and offers a comparable level of confidentiality as a nongovernmental entity that provides similar victim services.

(e) As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (e) of this section.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to:

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

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in community confinement facilities.

(h) For the purposes of this standard, a qualified agency staff member or a qualified community-based staff member shall be an individual who has been screened for appropriateness

to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

§ 115.222 Policies to ensure referrals of allegations for investigations.

(a) The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are referred for investigation to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior. The agency shall publish such policy on its website or, if it does not have one, make the policy available through other means. The agency shall document all such referrals.

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

(d) Any State entity responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in community confinement facilities shall have in place a policy governing the conduct of such investigations.

(e) Any Department of Justice component responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in community confinement facilities shall have in place a policy governing the conduct of such investigations.

Training and Education

§ 115.231 Employee training.

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

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

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

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

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

(5) The dynamics of sexual abuse and sexual harassment in confinement;

(6) The common reactions of sexual abuse and sexual harassment victims;

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

(8) How to avoid inappropriate relationships with residents;

(9) How to communicate effectively and professionally with residents, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming residents; and

(10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

(b) Such training shall be tailored to the gender of the residents at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male residents to a facility that houses only female residents, or vice versa.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide each employee with refresher training every two years to ensure that all employees know the agency's current

sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.

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

§ 115.232 Volunteer and contractor training.

(a) The agency shall ensure that all volunteers and contractors who have contact with residents have been trained on their responsibilities under the agency's sexual abuse and sexual harassment prevention, detection, and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with residents, but all volunteers and contractors who have contact with residents shall be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report such incidents.

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

§ 115.233 Resident education.

(a) During the intake process, residents shall receive information explaining the agency's zero-tolerance policy regarding sexual abuse and sexual harassment, how to report incidents or suspicions of sexual abuse or sexual harassment, their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding agency policies and procedures for responding to such incidents.

(b) The agency shall provide refresher information whenever a resident is transferred to a different facility.

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

(d) The agency shall maintain documentation of resident participation in these education sessions.

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

§ 115.234 Specialized training: Investigations.

(a) In addition to the general training provided to all employees pursuant to § 115.231, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

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

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

§ 115.235 Specialized training: Medical and mental health care.

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

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

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

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

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

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

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

(d) Medical and mental health care practitioners shall also receive the training mandated for employees under § 115.231 or for contractors and volunteers under § 115.232, depending upon the practitioner's status at the agency.

Screening for Risk of Sexual Victimization and Abusiveness

§ 115.241 Screening for risk of victimization and abusiveness.

(a) All residents shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other residents or sexually abusive toward other residents.

(b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

(c) Such assessments shall be conducted using an objective screening instrument.

(d) The intake screening shall consider, at a minimum, the following criteria to assess residents for risk of sexual victimization:

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

(2) The age of the resident;

(3) The physical build of the resident;

(4) Whether the resident has previously been incarcerated;

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

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

(7) Whether the resident is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the resident has previously experienced sexual victimization; and

(9) The resident's own perception of vulnerability.

(e) The intake screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the agency, in assessing residents for risk of being sexually abusive.

(f) Within a set time period, not to exceed 30 days from the resident's arrival at the facility, the facility will reassess the resident's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening.

(g) A resident's risk level shall be reassessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the resident's risk of sexual victimization or abusiveness.

(h) Residents may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(1), (d)(7), (d)(8), or (d)(9) of this section.

(i) The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the resident's detriment by staff or other residents.

§ 115.242 Use of screening information.

(a) The agency shall use information from the risk screening required by § 115.241 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those residents at high risk of being sexually victimized from those at high risk of being sexually abusive.

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

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

(d) A transgender or intersex resident's own views with respect to his or her own safety shall be given serious consideration.

(e) Transgender and intersex residents shall be given the opportunity to shower separately from other residents.

(f) The agency shall not place lesbian, gay, bisexual, transgender, or intersex residents in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such residents.

§ 115.243 Reserved.

Reporting

§ 115.251 Resident reporting.

(a) The agency shall provide multiple internal ways for residents to privately report sexual abuse and sexual harassment, retaliation by other residents or staff for reporting sexual

abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.

(b) The agency shall also inform residents of at least one way to report abuse or harassment to a public or private entity or office that is not part of the agency and that is able to receive and immediately forward resident reports of sexual abuse and sexual harassment to agency officials, allowing the resident to remain anonymous upon request.

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

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

§ 115.252 Exhaustion of administrative remedies.

(a) An agency shall be exempt from this standard if it does not have administrative procedures to address resident grievances regarding sexual abuse.

(b)(1) The agency shall not impose a time limit on when a resident may submit a grievance regarding an allegation of sexual abuse.

(2) The agency may apply otherwise-applicable time limits on any portion of a grievance that does not allege an incident of sexual abuse.

(3) The agency shall not require a resident to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.

(4) Nothing in this section shall restrict the agency's ability to defend against a lawsuit filed by a resident on the ground that the applicable statute of limitations has expired.

(c) The agency shall ensure that—

(1) A resident who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and

(2) Such grievance is not referred to a staff member who is the subject of the complaint.

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

(2) Computation of the 90-day time period shall not include time consumed by residents in preparing any administrative appeal.

(3) The agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision. The agency shall notify the resident in writing of any such extension and provide a date by which a decision will be made.

(4) At any level of the administrative process, including the final level, if the resident does not receive a response within the time allotted for reply, including any properly noticed extension, the resident may consider the absence of a response to be a denial at that level.

(e)(1) Third parties, including fellow residents, staff members, family members, attorneys, and outside advocates, shall be permitted to assist residents in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of residents.

(2) If a third party files such a request on behalf of a resident, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(3) If the resident declines to have the request processed on his or her behalf, the agency shall document the resident's decision.

(f)(1) The agency shall establish procedures for the filing of an emergency grievance alleging that a resident is subject to a substantial risk of imminent sexual abuse.

(2) After receiving an emergency grievance alleging a resident is subject to a substantial risk of imminent sexual abuse, the agency shall immediately forward the grievance (or any portion thereof that alleges the substantial risk of imminent sexual abuse) to a level of review at which immediate corrective action may be taken, shall provide an initial response within 48 hours, and shall issue a final agency decision within 5 calendar days. The initial response and final agency decision shall document the agency's determination whether the resident is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

(g) The agency may discipline a resident for filing a grievance related to alleged sexual abuse only where the agency demonstrates that the resident filed the grievance in bad faith.

§ 115.253 Resident access to outside confidential support services.

(a) The facility shall provide residents with access to outside victim advocates for emotional support services related to sexual abuse by giving residents mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and by enabling reasonable communication between residents and these organizations, in as confidential a manner as possible.

(b) The facility shall inform residents, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

(c) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide residents with confidential emotional support services related to sexual abuse. The agency shall maintain copies of agreements or documentation showing attempts to enter into such agreements.

§ 115.254 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse and sexual harassment and shall distribute publicly information on how to report sexual abuse and sexual harassment on behalf of a resident.

Official Response Following a Resident Report

§ 115.261 Staff and agency reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against residents or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

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

(c) Unless otherwise precluded by Federal, State, or local law, medical and mental health practitioners shall be required to report sexual abuse pursuant to paragraph (a) of this section and to inform residents of the practitioner's duty to report, and the limitations of confidentiality, at the initiation of services.

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

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

§ 115.262 Agency protection duties.

When an agency learns that a resident is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the resident.

§ 115.263 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a resident was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility or appropriate office of the agency where the alleged abuse occurred.

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

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

§ 115.264 Staff first responder duties.

(a) Upon learning of an allegation that a resident was sexually abused, the first security staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

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

§ 115.265 Coordinated response.

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

§ 115.266 Preservation of ability to protect residents from contact with abusers

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with residents pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.272 and 115.276; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

§ 115.267 Agency protection against retaliation.

(a) The agency shall establish a policy to protect all residents and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other residents or staff and shall designate which staff members or departments are charged with monitoring retaliation.

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

(c) For at least 90 days following a report of sexual abuse, the agency shall monitor the conduct and treatment of residents or staff who reported the sexual abuse and of residents who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by residents or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any resident disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) In the case of residents, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(f) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

§ 115.268 Reserved.

Investigations

§ 115.271 Criminal and administrative agency investigations.

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to § 115.234.

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

(d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(e) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as resident or staff. No agency shall require a resident who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(f) Administrative investigations:

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

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

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

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

(i) The agency shall retain all written reports referenced in paragraphs (f) and (g) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

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

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

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

§ 115.272 Evidentiary standard for administrative investigations.

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

§ 115.273 Reporting to residents.

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

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

(c) Following a resident's allegation that a staff member has committed sexual abuse against the resident, the agency shall subsequently inform the resident (unless the agency has determined that the allegation is unfounded) whenever:

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

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

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

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

(d) Following a resident's allegation that he or she has been sexually abused by another resident, the agency shall subsequently inform the alleged victim whenever:

(1) The agency learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or

(2) The agency learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.

(e) All such notifications or attempted notifications shall be documented.

(f) An agency's obligation to report under this standard shall terminate if the resident is released from the agency's custody.

Discipline

§ 115.276 Disciplinary sanctions for staff.

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

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

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the

nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

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

§ 115.277 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with residents and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with residents, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.

§ 115.278 Disciplinary sanctions for residents.

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

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

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

(d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to require the offending resident to participate in such interventions as a condition of access to programming or other benefits.

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

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

(g) An agency may, in its discretion, prohibit all sexual activity between residents and may discipline residents for such activity. An agency may not, however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

Medical and Mental Care

§ 115.281 Reserved.

§ 115.282 Access to emergency medical and mental health services.

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

(b) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders shall take preliminary steps to protect the victim pursuant to § 115.262 and shall immediately notify the appropriate medical and mental health practitioners.

(c) Resident victims of sexual abuse while incarcerated shall be offered timely information about and timely access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where medically appropriate.

(d) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

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

(a) The facility shall offer medical and mental health evaluation and, as appropriate, treatment to all residents who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.

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

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

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

(e) If pregnancy results from conduct specified in paragraph (d) of this section, such victims shall receive timely and comprehensive information about and timely access to all lawful pregnancy-related medical services.

(f) Resident victims of sexual abuse while incarcerated shall be offered tests for sexually transmitted infections as medically appropriate.

(g) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

(h) The facility shall attempt to conduct a mental health evaluation of all known resident-on-resident abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

Data Collection and Review

§ 115.286 Sexual abuse incident reviews.

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

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

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

(d) The review team shall:

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

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;

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

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

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

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1)-(d)(5) of this section, and any recommendations for improvement, and submit such report to the facility head and PREA compliance manager.

(e) The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

§ 115.287 Data collection.

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

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

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

(d) The agency shall maintain, review, and collect data as needed from all available incident-based documents including reports, investigation files, and sexual abuse incident reviews.

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

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

§ 115.288 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.287 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in addressing sexual abuse.

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

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

§ 115.289 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.287 are securely retained.

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

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

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.287 for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

Audits

§ 115.293 Audits of standards.

The agency shall conduct audits pursuant to §§ 115.401-405.

Subpart D—Standards for Juvenile Facilities

Prevention Planning

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

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

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

(c) Where an agency operates more than one facility, each facility shall designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

§ 115.312 Contracting with other entities for the confinement of residents.

(a) A public agency that contracts for the confinement of its residents with private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards.

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

§ 115.313 Supervision and monitoring.

(a) The agency shall ensure that each facility it operates shall develop, implement, and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect residents against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities shall take into consideration:

(1) Generally accepted juvenile detention and correctional/secure residential practices;

(2) Any judicial findings of inadequacy;

(3) Any findings of inadequacy from Federal investigative agencies;

(4) Any findings of inadequacy from internal or external oversight bodies;

(5) All components of the facility's physical plant (including "blind spots" or areas where staff or residents may be isolated);

(6) The composition of the resident population;

(7) The number and placement of supervisory staff;

(8) Institution programs occurring on a particular shift;

(9) Any applicable State or local laws, regulations, or standards;

(10) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(11) Any other relevant factors.

(b) The agency shall comply with the staffing plan except during limited and discrete exigent circumstances, and shall fully document deviations from the plan during such circumstances.

(c) Each secure juvenile facility shall maintain staff ratios of a minimum of 1:8 during resident waking hours and 1:16 during resident sleeping hours, except during limited and discrete exigent circumstances, which shall be fully documented. Only security staff shall be included in these ratios. Any facility that, as of the date of publication of this final rule, is not already obligated by law, regulation, or judicial consent decree to maintain the staffing ratios set forth in this paragraph shall have until October 1, 2017, to achieve compliance.

(d) Whenever necessary, but no less frequently than once each year, for each facility the agency operates, in consultation with the PREA coordinator required by § 115.311, the agency shall assess, determine, and document whether adjustments are needed to:

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

(2) Prevailing staffing patterns;

(3) The facility's deployment of video monitoring systems and other monitoring technologies; and

(4) The resources the facility has available to commit to ensure adherence to the staffing plan.

(e) Each secure facility shall implement a policy and practice of having intermediate-level or higher level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such policy and practice shall be implemented for night shifts as well as day shifts. Each secure facility shall have a policy to prohibit staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

§ 115.314 Reserved.

§ 115.315 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) The agency shall not conduct cross-gender pat-down searches except in exigent circumstances.

(c) The facility shall document and justify all cross-gender strip searches, cross-gender visual body cavity searches, and cross-gender pat-down searches.

(d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering a resident housing unit. In facilities (such as group homes) that do not contain discrete housing units, staff of the opposite gender shall be required to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.

(e) The facility shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status. If the resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

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

§ 115.316 Residents with disabilities and residents who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that residents with disabilities (including, for example, residents who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with residents who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective

communication with residents with disabilities, including residents who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans With Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to residents who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The agency shall not rely on resident interpreters, resident readers, or other types of resident assistants except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the resident's safety, the performance of first-response duties under § 115.364, or the investigation of the resident's allegations.

§ 115.317 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who may have contact with residents, and shall not enlist the services of any contractor who may have contact with residents, who—

(1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);

(2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or

(3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with residents.

(c) Before hiring new employees who may have contact with residents, the agency shall:

(1) Perform a criminal background records check;

(2) Consult any child abuse registry maintained by the State or locality in which the employee would work; and

(3) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check, and consult applicable child abuse registries, before enlisting the services of any contractor who may have contact with residents.

(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with residents or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall also ask all applicants and employees who may have contact with residents directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-

evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

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

§ 115.318 Upgrades to facilities and technologies.

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

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

Responsive Planning

§ 115.321 Evidence protocol and forensic medical examinations.

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

(b) The protocol shall be developmentally appropriate for youth and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," or similarly comprehensive and authoritative protocols developed after 2011.

(c) The agency shall offer all residents who experience sexual abuse access to forensic medical examinations whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization or a qualified agency staff member. Agencies shall document efforts to secure services from rape crisis centers. For the purpose of this standard, a rape crisis center refers to an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages. The agency may utilize a rape crisis center that is part of a governmental unit as long as the center is not part of

the criminal justice system (such as a law enforcement agency) and offers a comparable level of confidentiality as a nongovernmental entity that provides similar victim services.

(e) As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (e) of this section.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to:

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

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

(h) For the purposes of this standard, a qualified agency staff member or a qualified community-based staff member shall be an individual who has been screened for appropriateness to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

§ 115.322 Policies to ensure referrals of allegations for investigations.

(a) The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are referred for investigation to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior. The agency shall publish such policy on its website or, if it does not have one, make the policy available through other means. The agency shall document all such referrals.

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

(d) Any State entity responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in juvenile facilities shall have in place a policy governing the conduct of such investigations.

(e) Any Department of Justice component responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in juvenile facilities shall have in place a policy governing the conduct of such investigations.

Training and Education

§ 115.331 Employee training.

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

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

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

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

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

(5) The dynamics of sexual abuse and sexual harassment in juvenile facilities;

(6) The common reactions of juvenile victims of sexual abuse and sexual harassment;

(7) How to detect and respond to signs of threatened and actual sexual abuse and how to distinguish between consensual sexual contact and sexual abuse between residents;

(8) How to avoid inappropriate relationships with residents;

(9) How to communicate effectively and professionally with residents, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming residents; and

(10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities;

(11) Relevant laws regarding the applicable age of consent.

(b) Such training shall be tailored to the unique needs and attributes of residents of juvenile facilities and to the gender of the residents at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male residents to a facility that houses only female residents, or vice versa.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide each employee with refresher training every two years to ensure that all employees know the agency's current sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.

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

§ 115.332 Volunteer and contractor training.

(a) The agency shall ensure that all volunteers and contractors who have contact with residents have been trained on their responsibilities under the agency's sexual abuse and sexual harassment prevention, detection, and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with residents, but all volunteers and contractors who have contact with residents shall be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report such incidents.

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

§ 115.333 Resident education.

(a) During the intake process, residents shall receive information explaining, in an age appropriate fashion, the agency's zero tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.

(b) Within 10 days of intake, the agency shall provide comprehensive age-appropriate education to residents either in person or through video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding agency policies and procedures for responding to such incidents.

(c) Current residents who have not received such education shall be educated within one year of the effective date of the PREA standards, and shall receive education upon transfer to a different facility to the extent that the policies and procedures of the resident's new facility differ from those of the previous facility.

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

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

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

§ 115.334 Specialized training: Investigations.

(a) In addition to the general training provided to all employees pursuant to § 115.331, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing juvenile sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

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

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

§ 115.335 Specialized training: Medical and mental health care.

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

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

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

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

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

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

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

(d) Medical and mental health care practitioners shall also receive the training mandated for employees under § 115.331 or for contractors and volunteers under § 115.332, depending upon the practitioner's status at the agency.

Screening for Risk of Sexual Victimization and Abusiveness

§ 115.341 Obtaining information from residents.

(a) Within 72 hours of the resident's arrival at the facility and periodically throughout a resident's confinement, the agency shall obtain and use information about each resident's personal history and behavior to reduce the risk of sexual abuse by or upon a resident.

(b) Such assessments shall be conducted using an objective screening instrument.

(c) At a minimum, the agency shall attempt to ascertain information about:

(1) Prior sexual victimization or abusiveness;

(2) Any gender nonconforming appearance or manner or identification as lesbian, gay, bisexual, transgender, or intersex, and whether the resident may therefore be vulnerable to sexual abuse;

(3) Current charges and offense history;

(4) Age;

(5) Level of emotional and cognitive development;

(6) Physical size and stature;

(7) Mental illness or mental disabilities;

(8) Intellectual or developmental disabilities;

(9) Physical disabilities;

(10) The resident's own perception of vulnerability; and

(11) Any other specific information about individual residents that may indicate heightened needs for supervision, additional safety precautions, or separation from certain other residents.

(d) This information shall be ascertained through conversations with the resident during the intake process and medical and mental health screenings; during classification assessments; and by reviewing court records, case files, facility behavioral records, and other relevant documentation from the resident's files.

(e) The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the resident's detriment by staff or other residents.

§ 115.342 Placement of residents in housing, bed, program, education, and work assignments.

(a) The agency shall use all information obtained pursuant to § 115.341 and subsequently to make housing, bed, program, education, and work assignments for residents with the goal of keeping all residents safe and free from sexual abuse.

(b) Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged. During any period of isolation, agencies shall not deny residents daily large-muscle exercise and any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible.

(c) Lesbian, gay, bisexual, transgender, or intersex residents shall not be placed in particular housing, bed, or other assignments solely on the basis of such identification or status, nor shall agencies consider lesbian, gay, bisexual, transgender, or intersex identification or status as an indicator of likelihood of being sexually abusive.

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

(e) Placement and programming assignments for each transgender or intersex resident shall be reassessed at least twice each year to review any threats to safety experienced by the resident.

(f) A transgender or intersex resident's own views with respect to his or her own safety shall be given serious consideration.

(g) Transgender and intersex residents shall be given the opportunity to shower separately from other residents.

(h) If a resident is isolated pursuant to paragraph (b) of this section, the facility shall clearly document:

(1) The basis for the facility's concern for the resident's safety; and

(2) The reason why no alternative means of separation can be arranged.

(i) Every 30 days, the facility shall afford each resident described in paragraph (h) of this section a review to determine whether there is a continuing need for separation from the general population.

§ 115.343 Reserved.

Reporting

§ 115.351 Resident reporting.

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

(b) The agency shall also provide at least one way for residents to report abuse or harassment to a public or private entity or office that is not part of the agency and that is able to receive and immediately forward resident reports of sexual abuse and sexual harassment to agency officials, allowing the resident to remain anonymous upon request. Residents detained solely for civil immigration purposes shall be provided information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security.

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

(d) The facility shall provide residents with access to tools necessary to make a written report.

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

§ 115.352 Exhaustion of administrative remedies.

(a) An agency shall be exempt from this standard if it does not have administrative procedures to address resident grievances regarding sexual abuse.

(b)(1) The agency shall not impose a time limit on when a resident may submit a grievance regarding an allegation of sexual abuse.

(2) The agency may apply otherwise-applicable time limits on any portion of a grievance that does not allege an incident of sexual abuse.

(3) The agency shall not require a resident to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.

(4) Nothing in this section shall restrict the agency's ability to defend against a lawsuit filed by a resident on the ground that the applicable statute of limitations has expired.

(c) The agency shall ensure that—

(1) A resident who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and

(2) Such grievance is not referred to a staff member who is the subject of the complaint.

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

(2) Computation of the 90-day time period shall not include time consumed by residents in preparing any administrative appeal.

(3) The agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision. The agency shall notify the resident in writing of any such extension and provide a date by which a decision will be made.

(4) At any level of the administrative process, including the final level, if the resident does not receive a response within the time allotted for reply, including any properly noticed extension, the resident may consider the absence of a response to be a denial at that level.

(e)(1) Third parties, including fellow residents, staff members, family members, attorneys, and outside advocates, shall be permitted to assist residents in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of residents.

(2) If a third party, other than a parent or legal guardian, files such a request on behalf of a resident, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(3) If the resident declines to have the request processed on his or her behalf, the agency shall document the resident's decision.

(4) A parent or legal guardian of a juvenile shall be allowed to file a grievance regarding allegations of sexual abuse, including appeals, on behalf of such juvenile. Such a grievance shall not be conditioned upon the juvenile agreeing to have the request filed on his or her behalf.

(f)(1) The agency shall establish procedures for the filing of an emergency grievance alleging that a resident is subject to a substantial risk of imminent sexual abuse.

(2) After receiving an emergency grievance alleging a resident is subject to a substantial risk of imminent sexual abuse, the agency shall immediately forward the grievance (or any portion thereof that alleges the substantial risk of imminent sexual abuse) to a level of review at which immediate corrective action may be taken, shall provide an initial response within 48

hours, and shall issue a final agency decision within 5 calendar days. The initial response and final agency decision shall document the agency's determination whether the resident is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

(g) The agency may discipline a resident for filing a grievance related to alleged sexual abuse only where the agency demonstrates that the resident filed the grievance in bad faith.

§ 115.353 Resident access to outside support services and legal representation.

(a) The facility shall provide residents with access to outside victim advocates for emotional support services related to sexual abuse, by providing, posting, or otherwise making accessible mailing addresses and telephone numbers, including toll free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and, for persons detained solely for civil immigration purposes, immigrant services agencies. The facility shall enable reasonable communication between residents and these organizations and agencies, in as confidential a manner as possible.

(b) The facility shall inform residents, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

(c) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide residents with confidential emotional support services related to sexual abuse. The agency shall maintain copies of agreements or documentation showing attempts to enter into such agreements.

(d) The facility shall also provide residents with reasonable and confidential access to their attorneys or other legal representation and reasonable access to parents or legal guardians.

§ 115.354 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse and sexual harassment and shall distribute publicly information on how to report sexual abuse and sexual harassment on behalf of a resident.

Official Response Following a Resident Report

§ 115.361 Staff and agency reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information they receive regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against residents or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

(b) The agency shall also require all staff to comply with any applicable mandatory child abuse reporting laws.

(c) Apart from reporting to designated supervisors or officials and designated State or local services agencies, staff shall be prohibited from revealing any information related to a

sexual abuse report to anyone other than to the extent necessary, as specified in agency policy, to make treatment, investigation, and other security and management decisions.

(d)(1) Medical and mental health practitioners shall be required to report sexual abuse to designated supervisors and officials pursuant to paragraph (a) of this section, as well as to the designated State or local services agency where required by mandatory reporting laws.

(2) Such practitioners shall be required to inform residents at the initiation of services of their duty to report and the limitations of confidentiality.

(e)(1) Upon receiving any allegation of sexual abuse, the facility head or his or her designee shall promptly report the allegation to the appropriate agency office and to the alleged victim's parents or legal guardians, unless the facility has official documentation showing the parents or legal guardians should not be notified.

(2) If the alleged victim is under the guardianship of the child welfare system, the report shall be made to the alleged victim's caseworker instead of the parents or legal guardians.

(3) If a juvenile court retains jurisdiction over the alleged victim, the facility head or designee shall also report the allegation to the juvenile's attorney or other legal representative of record within 14 days of receiving the allegation.

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

§ 115.362 Agency protection duties.

When an agency learns that a resident is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the resident.

§ 115.363 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a resident was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility or appropriate office of the agency where the alleged abuse occurred and shall also notify the appropriate investigative agency.

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

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

§ 115.364 Staff first responder duties.

(a) Upon learning of an allegation that a resident was sexually abused, the first staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical

evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

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

§ 115.365 Coordinated response.

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

§ 115.366 Preservation of ability to protect residents from contact with abusers.

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with residents pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.372 and 115.376; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

§ 115.367 Agency protection against retaliation.

(a) The agency shall establish a policy to protect all residents and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other residents or staff and shall designate which staff members or departments are charged with monitoring retaliation.

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

(c) For at least 90 days following a report of sexual abuse, the agency shall monitor the conduct or treatment of residents or staff who reported the sexual abuse and of residents who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by residents or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any resident disciplinary reports, housing, or program changes, or

negative performance reviews or reassignments of staff. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) In the case of residents, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(f) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

§ 115.368 Post-allegation protective custody.

Any use of segregated housing to protect a resident who is alleged to have suffered sexual abuse shall be subject to the requirements of § 115.342.

Investigations

§ 115.371 Criminal and administrative agency investigations.

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations involving juvenile victims pursuant to § 115.334.

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

(d) The agency shall not terminate an investigation solely because the source of the allegation recants the allegation.

(e) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(f) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as resident or staff. No agency shall require a resident who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(g) Administrative investigations:

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

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

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

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

(j) The agency shall retain all written reports referenced in paragraphs (g) and (h) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years, unless the abuse was committed by a juvenile resident and applicable law requires a shorter period of retention.

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

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

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

§ 115.372 Evidentiary standard for administrative investigations.

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

§ 115.373 Reporting to residents.

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

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

(c) Following a resident's allegation that a staff member has committed sexual abuse against the resident, the agency shall subsequently inform the resident (unless the agency has determined that the allegation is unfounded) whenever:

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

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

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

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

(d) Following a resident's allegation that he or she has been sexually abused by another resident, the agency shall subsequently inform the alleged victim whenever:

(1) The agency learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or

(2) The agency learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.

(e) All such notifications or attempted notifications shall be documented.

(f) An agency's obligation to report under this standard shall terminate if the resident is released from the agency's custody.

Discipline

§ 115.376 Disciplinary sanctions for staff.

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

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

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

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

§ 115.377 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with residents and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with residents, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.

§ 115.378 Interventions and disciplinary sanctions for residents.

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

(b) Any disciplinary sanctions shall be commensurate with the nature and circumstances of the abuse committed, the resident's disciplinary history, and the sanctions imposed for comparable offenses by other residents with similar histories. In the event a disciplinary sanction results in the isolation of a resident, agencies shall not deny the resident daily large-muscle exercise or access to any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible.

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

(d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to offer the offending resident participation in such interventions. The agency may require participation in such interventions as a condition of access to any rewards-based behavior

management system or other behavior-based incentives, but not as a condition to access to general programming or education.

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

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

(g) An agency may, in its discretion, prohibit all sexual activity between residents and may discipline residents for such activity. An agency may not, however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

Medical and Mental Care

§ 115.381 Medical and mental health screenings; history of sexual abuse.

(a) If the screening pursuant to § 115.341 indicates that a resident has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the resident is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.

(b) If the screening pursuant to § 115.341 indicates that a resident has previously perpetrated sexual abuse, whether it occurred in an institutional setting or in the community, staff shall ensure that the resident is offered a follow-up meeting with a mental health practitioner within 14 days of the intake screening.

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

(d) Medical and mental health practitioners shall obtain informed consent from residents before reporting information about prior sexual victimization that did not occur in an institutional setting, unless the resident is under the age of 18.

§ 115.382 Access to emergency medical and mental health services.

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

(b) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, staff first responders shall take preliminary steps to protect the victim pursuant to § 115.362 and shall immediately notify the appropriate medical and mental health practitioners.

(c) Resident victims of sexual abuse while incarcerated shall be offered timely information about and timely access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where medically appropriate.

(d) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

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

(a) The facility shall offer medical and mental health evaluation and, as appropriate, treatment to all residents who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.

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

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

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

(e) If pregnancy results from conduct specified in paragraph (d) of this section, such victims shall receive timely and comprehensive information about and timely access to all lawful pregnancy-related medical services.

(f) Resident victims of sexual abuse while incarcerated shall be offered tests for sexually transmitted infections as medically appropriate.

(g) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

(h) The facility shall attempt to conduct a mental health evaluation of all known resident-on-resident abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

Data Collection and Review

§ 115.386 Sexual abuse incident reviews.

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

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

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

(d) The review team shall:

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

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or, gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;

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

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

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

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1)-(d)(5) of this section, and any recommendations for improvement and submit such report to the facility head and PREA compliance manager.

(e) The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

§ 115.387 Data collection.

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

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

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

(d) The agency shall maintain, review, and collect data as needed from all available incident-based documents, including reports, investigation files, and sexual abuse incident reviews.

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

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

§ 115.388 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.387 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in addressing sexual abuse.

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

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

§ 115.389 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.387 are securely retained.

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

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

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.387 for at least 10 years after the date of its initial collection unless Federal, State, or local law requires otherwise.

Audits

§ 115.393 Audits of standards.

The agency shall conduct audits pursuant to §§ 115.401–405.

Subpart E—Auditing and Corrective Action

§ 115.401 Frequency and scope of audits.

(a) During the three-year period starting on **[INSERT DATE ONE YEAR PLUS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and during each three-year period thereafter, the agency shall ensure that each facility operated by the agency, or by a private organization on behalf of the agency, is audited at least once.

(b) During each one-year period starting on **[INSERT DATE ONE YEAR PLUS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the agency shall ensure that at least one-third of each facility type operated by the agency, or by a private organization on behalf of the agency, is audited.

(c) The Department of Justice may send a recommendation to an agency for an expedited audit if the Department has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with PREA-related issues.

(d) The Department of Justice shall develop and issue an audit instrument that will provide guidance on the conduct of and contents of the audit.

(e) The agency shall bear the burden of demonstrating compliance with the standards.

(f) The auditor shall review all relevant agency-wide policies, procedures, reports, internal and external audits, and accreditations for each facility type.

(g) The audits shall review, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period.

(h) The auditor shall have access to, and shall observe, all areas of the audited facilities.

(i) The auditor shall be permitted to request and receive copies of any relevant documents (including electronically stored information).

(j) The auditor shall retain and preserve all documentation (including, *e.g.*, video tapes and interview notes) relied upon in making audit determinations. Such documentation shall be provided to the Department of Justice upon request.

(k) The auditor shall interview a representative sample of inmates, residents, and detainees, and of staff, supervisors, and administrators.

(*l*) The auditor shall review a sampling of any available videotapes and other electronically available data (*e.g.*, Watchtour) that may be relevant to the provisions being audited.

(m) The auditor shall be permitted to conduct private interviews with inmates, residents, and detainees.

(n) Inmates, residents, and detainees shall be permitted to send confidential information or correspondence to the auditor in the same manner as if they were communicating with legal counsel.

(o) Auditors shall attempt to communicate with community-based or victim advocates who may have insight into relevant conditions in the facility.

§ 115.402 Auditor qualifications.

(a) An audit shall be conducted by:

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

(2) A member of an auditing entity such as an inspector general's or ombudsperson's office that is external to the agency; or

(3) Other outside individuals with relevant experience.

(b) All auditors shall be certified by the Department of Justice. The Department of Justice shall develop and issue procedures regarding the certification process, which shall include training requirements.

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

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

§ 115.403 Audit contents and findings.

(a) Each audit shall include a certification by the auditor that no conflict of interest exists with respect to his or her ability to conduct an audit of the agency under review.

(b) Audit reports shall state whether agency-wide policies and procedures comply with relevant PREA standards.

(c) For each PREA standard, the auditor shall determine whether the audited facility reaches one of the following findings: Exceeds Standard (substantially exceeds requirement of standard); Meets Standard (substantial compliance; complies in all material ways with the standard for the relevant review period); Does Not Meet Standard (requires corrective action). The audit summary shall indicate, among other things, the number of provisions the facility has achieved at each grade level.

(d) Audit reports shall describe the methodology, sampling sizes, and basis for the auditor's conclusions with regard to each standard provision for each audited facility, and shall include recommendations for any required corrective action.

(e) Auditors shall redact any personally identifiable inmate or staff information from their reports, but shall provide such information to the agency upon request, and may provide such information to the Department of Justice.

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

§ 115.404 Audit corrective action plan.

(a) A finding of "Does Not Meet Standard" with one or more standards shall trigger a 180-day corrective action period.

(b) The auditor and the agency shall jointly develop a corrective action plan to achieve compliance.

(c) The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility.

(d) After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action.

(e) If the agency does not achieve compliance with each standard, it may (at its discretion and cost) request a subsequent audit once it believes that is has achieved compliance.

§ 115.405 Audit appeals.

(a) An agency may lodge an appeal with the Department of Justice regarding any specific audit finding that it believes to be incorrect. Such appeal must be lodged within 90 days of the auditor's final determination.

(b) If the Department determines that the agency has stated good cause for a re-evaluation, the agency may commission a re-audit by an auditor mutually agreed upon by the Department and the agency. The agency shall bear the costs of this re-audit.

(c) The findings of the re-audit shall be considered final.

Subpart F—State Compliance

§ 115.501 State determination and certification of full compliance.

(a) In determining pursuant to 42 U.S.C. 15607(c)(2) whether the State is in full compliance with the PREA standards, the Governor shall consider the results of the most recent agency audits.

(b) The Governor's certification shall apply to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch.