TEXAS CRIMINAL JUSTICE COALITION

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INTERIM TESTIMONY 2014

House Committee on County Affairs

Charge 2: Continue oversight of the Texas Commission on Jail Standards and issues jails currently face, including the mental health of those in jail, and make recommendations for refinement or improvement of processes and programs.

Dear Members of the Committee,

My name is Elizabeth A. Henneke. I am a Policy Attorney for Texas Criminal Justice Coalition (TCJC). Thank you for allowing me this opportunity to present testimony on the Prison Rape Elimination Act and provide recommendations on the effective implementation of the national standards.

PRISON RAPE ELIMINATION ACT

In September 2003, the United States Congress unanimously passed the Prison Rape Elimination Act (PREA).[1] PREA is a federal statute aimed at preventing sexual assault and victimization in juvenile facilities, adult prisons, jails, lockups, and other detention facilities. PREA standards are mandatory for federal facilities. State and local facilities that do comply with federal standards stand to lose 5% of particular federal funds. Additionally, states and localities that are not in compliance with the standards may be vulnerable to litigation. Private civil litigants might assert noncompliance with PREA standards as evidence that facilities are not meeting their constitutional obligations.

TCJC urges this Committee to support Texas counties' efforts to comply with their PREA obligations, as well as to provide additional assistance for these counties to bring physical facilities into compliance and to facilitate training and technical assistance on PREA's requirements. Finally, TCJC recommends expanding the jurisdiction of the Texas Commission on Jail Standards and the Ombudsman for the Texas Juvenile Justice Department so that they may provide PREA audits at no cost to counties.

KEY FINDINGS

- **Texas reports almost four times the number of sexual assault incidents as other states**. "Texas has the highest reported number of alleged incidents at 550 for a rate per 1,000 prisoner population of 3.95, almost four times the national average for the states of 1.05. It also has one of the lowest substantiation rates (less than three percent)."[2]

- **Locally operated facilities are 3 times more likely to have staff sexual misconduct as state facilities**. Nationally, "[l]ocal and privately operated juvenile facilities reported 3.22 allegations of staff sexual misconduct per 1,000 youth, nearly 3 times the rate in State prison systems (1.12 per 1,000 inmates) and Federal prisons (1.33)."[3]

KEY FINDINGS (CONTINUED)

- **Texas facilities have high reported incidents of sexual assaults**. During its initial investigation into allegations of prison rape, the Bureau of Justice Statistics found that five Texas prison facilities were among those nationally with the highest prevalence of sexual assault.[4] An astounding 15.7% of inmates surveyed indicated that they were sexually assaulted by another inmate or staff.

Table 4. Prison facilities with the highest prevalence of sexual assault, by another inmate or staff and by level of force and injury, National Inmate Survey, 2007

		Inmate-on-inmate sexual assault			Staff-on-inmate sexual assault			
Facility name	Total prevalence[a]	Physically forced	Pressured	Injured[b]	Physically forced	Pressured	Reported as willing	Injured[b]
U.S. total	4.5%	1.3%	1.7%	0.5%	0.9%	1.5%	1.7%	0.3%
Estelle Unit, TX	15.7	5.1	7.9	2.0	0.9	4.4	5.2	0.4
Clements Unit, TX	13.9	1.7	3.3	1.0	4.1	6.8	5.6	3.1
Tecumseh State Corr. Inst., NE	13.4	0.0	1.2	0.0	7.5	11.8	5.9	3.9
Charlotte Corr. Inst., FL	12.1	0.6	1.1	0.0	2.6	6.1	5.7	0.0
Great Meadow Corr. Fac., NY	11.3	1.0	2.8	0.0	6.0	6.3	2.8	2.0
Rockville Corr. Fac., IN[c]	10.8	6.5	7.5	3.7	0.5	1.1	0.9	0.6
Valley State Prison for Women, CA[c]	10.3	4.7	5.9	1.5	1.5	3.3	3.3	0.9
Allred Unit, TX	9.9	3.6	3.2	3.3	2.8	3.2	2.3	0.9
Mountain View Unit, TX[c]	9.5	7.5	6.8	2.7	0.7	3.0	1.4	2.1
Coffield Unit, TX	9.3	2.1	3.9	0.0	0.4	1.4	4.3	0.0

Note: Detail may add to more than totals because victims may report more than one type of victimization, injury, and type of force.

[a]Percent of inmates reporting one or more incidents of sexual victimization involving another inmate or facility staff in the past 12 months or since admission to the facility, if shorter. (See *Methodology* for definitions.) Weights were applied so that inmates who responded accurately reflected the entire population of each facility on selected characteristics, including age, gender, race, time served, and sentence length. (See *Methodology* for nonresponse and post-stratification weighting procedures.)

[b]Injuries included knife or stab wounds, broken bones, anal or rectal tearing, teeth chipped or knocked out, internal injuries, knocked unconscious, bruises, black eyes, sprains, cuts, scratches, swelling, or welts.

[c]Female facility.

WHAT IS PREA?

In passing PREA, Congress "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.'"[5] "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."[6] PREA has four primary goals:

- Data Collection: Section four of PREA requires the Bureau of Justice Statistics to collect statistics on the incidence of prison sexual violence in state, local, and federal custodial facilities.

- Training and Technical Assistance: Under Section five of PREA, the National Institute of Corrections received funding to administer a national clearinghouse on sexual violence in custody and to provide training and technical assistance to the field.[7]

- Grants to the States: PREA authorizes a grant program to help states meet the PREA requirements.[8] To date the total federal amount given in grants to states and local departments of corrections from 2004-2013 is $54,376,459.[9] **The most heavily funded state from these grants was Texas, which has received $3,576,598.**[10]

- Development of National Standards: On June 20, 2012, the Department of Justice adopted a series of national standards aimed to prevent, detect, and respond to prison rape. "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."[11] "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."[12] There is no

penalty to the state for facilities outside the state's operational control; however, as discussed more fully below, counties may still be vulnerable to private litigation for noncompliance.

WHAT DOES PREA REQUIRE?

The PREA "standards are generally not outcome-based, but rather focus on policies and procedures."[13] Many of these procedures are straightforward and non-controversial. Two of the standards that might be the most challenging for Texas are discussed below.

Cross-Gender Viewing Standard (§115.15) prohibits:

- Cross-gender strip or visual body cavity searches except in exigent circumstances or when performed by medical practitioners.
- Cross-gender pat-down searches of female inmates, absent exigent circumstances. *(Effective 8/20/15 for facilities over 50 inmates, 8/20/17 for facilities under 50 inmates)*
- Facilities from restricting female inmates' access to regularly available programming or other out-of-cell opportunities.

Furthermore, facilities must implement policies and procedures enabling inmates to do the following without non-medical staff of the opposite gender viewing their breasts, buttocks, or genitalia:

- shower,
- perform bodily functions, and
- change clothing
- EXCEPT
  - in exigent circumstances
  - when such viewing is incidental to routine cell checks

Youthful Inmates Standard (§115.14) requires that:

- No youth under 18 years of age can be placed in a housing unit where contact will occur with adult inmates in a common space, shower area, or sleeping quarters.
- 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.
- Agencies must avoid placing youth in isolation 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.

POTENTIAL LIABILITY FOR FAILING TO COMPLY WITH PREA

"PREA does not require State and local facilities to comply with the Department [of Justice]'s standards, nor does it enact a mechanism for the Department to enforce such compliance; instead the statute provides certain incentives for such confinement facilities to implement the standards."[14] These incentives include grants to help local facilities come into compliance. **Several Texas counties have already received PREA-related grants: Dallas County Juvenile Department ($88,942), Travis County Juvenile Probation Department ($100,000), Atascosa County Juvenile Probation Department ($300,000), Harris County, Texas ($237,693), and Webb County, Texas ($250,000).**[15]

While the Department of Justice maintains that "[t]he standards are not intended to define the contours of constitutionally required conditions of confinement,"[16] **it is highly likely that the PREA standards will inform future civil litigation surrounding prison conditions.** In *Farmer v. Brennan*, the United State Supreme Court set forth the standard for determining if prison conditions violated the 8th Amendment.[17] The two-part test

adopted by the Supreme Court required the plaintiff to prove (1) that the conditions were cruel and (2) that the government was deliberately indifferent to the conditions facing the inmate. Prior to PREA, this second prong—deliberate indifference—narrowed the class of claims that litigants were able to bring, because it is extremely difficult for them to prove that a government entity was deliberately indifferent to the conditions facing inmates. **PREA has the potential, however, to change the way this litigation proceeds in the future by providing national standards—supported by extensive evidence-based research, correctional administrator input, public commentary, and other documentation—that suggest what governments must do to provide safe environments for inmates.** Thus, failure to follow these PREA standards could be seen as prima facie evidence of deliberate indifference and may result in plaintiffs succeeding past the initial stages of litigation, substantially increasing litigation costs to facilities that fail to comply with PREA.

Although there is no reliable data available specifically setting forth the costs of litigating these cases in Texas, the National Center for State Courts (NCSC) has developed a model to estimate the costs of civil litigation that resolve at different stages of litigation.[18]

COSTS ESTIMATES PER SIDE OF LITIGATION FOR TYPICAL AUTOMOBILE TORT CASE

Litigation Stage	Amount expended on attorney's fees alone for lowest 25%	Amount expended on attorney's fees alone for highest 75%
Case Initiation	$1000	$7,350
Between Discovery through Formal Negotiations or ADR	$5,000	$36,000
Trial	$18,000	$109,000

This cost model suggests that litigation costs alone may substantially increase for facilities that fail to comply with PREA. It is too early to predict what the costs might be if a plaintiff is successful. One ex-inmate of Travis County has sued alleging that county and sheriff's officials displayed deliberate indifference to his safety by failing to comply with PREA; he is seeking $2 million in damages as compensation for the rape he sustained while in the Travis County jail.[19]

PREA AUDITS

To be considered compliant with the PREA standards, all confinement facilities must be audited at least every three years, with one-third of each facility type operated by an agency, or private organization on behalf of an agency, audited each year.[20] These include adult prisons and jails, juvenile facilities, lockups (housing detainees overnight), and community confinement facilities, whether operated by the Department of Justice or a unit of a state, local, corporate, or nonprofit authority.

Audits are conducted using an instrument developed by the PREA Resource Center in conjunction with the Department of Justice. Each agency seeking PREA compliance is responsible for contracting with or otherwise securing the services of one or more DOJ-Certified Auditors to schedule audits for each of its facilities during the three-year audit cycle. **PREA experts anticipate that these audits will cost approximately $3,000-$10,000 per facility.**[21]

COST-SAVING AND PUBLIC SAFETY-DRIVEN SOLUTIONS

- **Fully implement the National Standards to Prevent, Detect, and Respond to Prison Rape.** Violence and victimization have no place in our society, including in our prisons, and we have an obligation to ensure that any facility under state or local operation is safe. The punishment of incarceration does not, and cannot, include a sentence of rape. These National Standards are the result of years of study, professional and public comment, and research into methods for preventing prison rape.

- **Raise the age of maximum juvenile jurisdiction from 17 to 18 to lower the financial burden on counties.** The Youthful Inmates Standards have greatly impacted adult county jails, forcing them to expend extra costs to comply, and leaving many counties simply unable to comply due to architectural constraints. For example, Dallas County spends approximately $79,850 per week to separate 17-year-olds from adults. Harris County has had to evacuate entire floors simply to move one or two 17-year-olds to the shower. Smaller counties are simply unable to provide sight and sound separation and/or avoid placing youth in insolation without retrofitting facilities at tremendous expense.[22] Raising the age of jurisdiction would move these 17-year-olds into juvenile facilities that are more easily able to comply with PREA standards and would obviate the costs of doing sight and sound separation.

- **Provide assistance to counties to bring physical facilities into PREA compliance, and provide training and technical assistance to staff of county facilities.** The success of the PREA standards will depend on successful implementation in county facilities that fosters a change in culture by institutionalizing policies and practices that bring these concerns to the fore.

- **Expand the jurisdiction of the Texas Commission on Jail Standards so that it may have its staff certified as DOJ-Certified Auditors and provide PREA audits at no cost to adult county facilities.** With a staff of just 16 people and an annual budget of less than $1 million,[23] the Texas Commission on Jail Standards ("the Commission") tries to prevent and mitigate the harm to inmates and damages to Texas counties from damaging lawsuits, specifically by setting constitutional jail standards for counties to follow, conducting facility inspections, and enforcing compliance with rules and procedures. Should the Commission be expanded to provide the additional service of auditing county facilities for PREA compliance, the Commission must be assured a level of funding adequate to provide such valuable assistance to Texas counties.

- **Expand the jurisdiction of the Independent Ombudsman for the Texas Juvenile Justice Department so that it may have its staff certified as DOJ-Certified Auditors and provide PREA audits at no cost to juvenile county facilities.** The Texas Legislature created the Office of the Independent Ombudsman (OIO) for the juvenile justice system in 2007, and tasked it with protecting the safety and rights of incarcerated youth at state secure juvenile facilities. TCJC supports legislation that would allow OIO staff to visit with youth in county juvenile facilities. The OIO has been critically important in protecting youth in state juvenile facilities, and with expanded resources would be able to provide the additional service of auditing county facilities for PREA compliance.

Citations

[1] Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601-15609 (2003).
[2] James Austin, Tony Fabelo, Angela Gunter, & Ken McGinnis, *Sexual Violence in the Texas Prison System*, Sept. 2006, http://www.prearesourcecenter.org/sites/default/files/library/jfainstitute-texasresearch.pdf.
[3] Allen J. Beck & Timothy Hughes, *Sexual Violence Reported by Correctional Authorities, 2004*, Bureau of Justice Statistics, July 2005, http://www.bjs.gov/content/pub/pdf/svrca04.pdf.
[4] Allen J. Beck and Paige M. Harrison, *Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007*, Bureau of Justice Statistics, Dec. 2007, http://www.bjs.gov/content/pub/pdf/svsfpri07.pdf.
[5] U.S. Department of Justice, National Standards to Prevent, Detect and Respond to Prison Rape, Executive Summary, p. 1 (citing 42 U.S.C. 15606(d)(1), (e)(1)).
[6] Ibid. (citing 42 U.S.C. 15609(7) & (9)).
[7] PREA § 15604(a).
[8] See PREA § 15605(a) (stating that the purpose of the grants is to ensure that "budgetary circumstances. . . do not compromise efforts to protect inmates" and "to provide funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape").
[9] OJP Grant Awards, http://grants.ojp.usdoj.gov:85/selector/main.
[10] Ibid.
[11] U.S. Department of Justice, National Standards to Prevent, Detect and Respond to Prison Rape, Executive Summary, p. 2 (citing 42 U.S.C. 15607(c)).
[12] Ibid.
[13] Ibid. at 2.
[14] U.S. Department of Justice, National Standards to Prevent, Detect and Respond to Prison Rape, Executive Summary, p. 10 (emphasis added); *see also* Webinar: PREA Readiness – Arlington County Detention Facility, @ 56:00, http://www.prearesourcecenter.org/training-and-technical-assistance/webinars/827/webinar-prea-readiness-arlington-county-detention-fac.
[15] OJP Grant Awards, http://grants.ojp.usdoj.gov:85/selector/main.
[16] Ibid. at 2.
[17] 511 U.S. 825 (1994).
[18] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Jan. 2013, 5 http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx.
[19] "Ex-inmate sues over Travis County jail rape claim" Austin American-Statesman, Mar. 14, 2014.
[20] Audit, National PREA Resource Center, http://www.prearesourcecenter.org/audit.
[21] Presentation by Lisa Capers to the Texas Juvenile Justice Department Advisory Council Meeting, Apr. 26, 2014.
[22] Michele Deitch, Anna Lipton Galbraith, & Jordon Pollock, *Conditions for Certified Juveniles in Texas County Jails*, May 2012, p. 25.
[23] Commission on Jail Standards, Summary of Budget Expenditures for the Fiscal Year 2014, as of March 31, 2014.