

**Prison Rape Review Panel
January 8, 2014**

**Submitted Testimony of Joshua C. Delaney
U.S. Department of Justice**

Introduction

Thank you for the opportunity to testify before you today. My name is Joshua C. Delaney. I am a Senior Trial Attorney with the Department of Justice's Civil Rights Division. I was a Vice Chair of the Attorney General's PREA Working Group – the DOJ entity under the leadership of the Office of the Deputy Attorney General that drafted recommendations to the Attorney General regarding the final PREA Standards. As part of my role in the Group, I was a primary drafter of, among other things, the final PREA auditing standards and proposed internal auditing process guidance.

I would like to provide a bit of additional context on my other DOJ activities relevant to PREA and development of the auditing Standards and process. Prior to my involvement in developing the Final PREA Standards, I worked exclusively on ensuring lawful conditions of confinement in adult and juvenile facilities, and initiated a number of investigations involving allegations of a pattern or practice of custodial sexual misconduct under the Civil Rights of Institutionalized Persons Act (also known as CRIPA) and the Violent Crime Control and Law Enforcement Act of 1994. In just two investigations we initiated, 16 staff had been charged with crimes relating to the sexual abuse of confined girls, aged 13-16. Of the 16 indicted staff, three were supervisors, including: one facility superintendent, one lieutenant, and one sergeant. The combined 73 criminal counts involved charges of molestation, indecent behavior, unlawful lewd behavior, criminal malfeasance, and obstruction of justice. If the PREA Standards had been

finalized and in place at these facilities, I am highly confident that all or most of this horrendous sexual abuse would not have occurred.

Since the Standards were initially published on May 17, 2012, I have been deeply involved in the implementation of the Final Standards. My duties have included, among other things, developing interpretive guidance clarifying various aspects of the Standards, and applying the Standards to a variety of fact-specific real-life scenarios. In addition, I have been intimately involved in outreach, training, and presenting to, dozens of national and regional stakeholders at conferences and in webinars. Finally, I have been deeply involved in the development of the PREA auditing process, including the auditor certification process.

In the latter role, I have participated in development of the audit methodology, the audit instrument, and the DOJ auditor certification process. I have participated in a number of PREA auditing beta tests in various jurisdictions, have observed a number of actual PREA audits, and have participated, as a lead faculty, in every PREA auditor training class.

Overview of Testimony

I have been asked to testify before you today regarding the development and implementation of the PREA auditing Standards, current activities of the PREA Working Group, and the DOJ's ongoing role in enforcing compliance with the Final Standards.

Development and Implementation of PREA Auditing Standards

In developing and implementing the PREA auditing Standards, we incorporated a number of driving principles into both the final auditing Standards, as well as the current and evolving

audit methodology and architecture. I will discuss these principles in both contexts, and then provide a brief overview of the mechanics of the actual audit process.

Overview of Driving Auditing Standards Principles

Driving principles incorporated into the final auditing Standards include “substantive incorporation,” auditor independence, thoroughness, strong DOJ oversight, “compliance as a goal,” and transparency.

First, the auditing Standards are considered substantive Standards. Hence, an agency or confinement facility may not be considered fully compliant with the PREA Standards, unless it also complies with, and is subjected to, the auditing requirements.¹ Because auditing is fully incorporated into the Standards, a facility may not accurately proclaim that it is “PREA compliant” but that it just chose not to be subject to external PREA audits.

Second, the auditing Standards require independence. That is, auditors must be external to the confinement agency being audited. In addition, auditors must not have received compensation from the agency being audited for the three-year period before or after the audit, except for compensation received for conducting other PREA audits.

Third, auditors must be permitted unfettered access to agency and facility personnel; documents; electronic media; inmates, detainees, and residents; and facility grounds. Auditors are entitled to conduct private interviews with inmates, and also to receive confidential correspondence with any inmates. Auditors are also encouraged to communicate with any community-based or victim advocates who may have insight into relevant conditions in the

¹ See 28 C.F.R. §§ 115.93, 115.193, 115.293, and 115.393. The only exception to the auditing requirement is for lockups that are not utilized to house detainees overnight. See 28 C.F.R. §§ 115.193.

facility. In addition, auditors shall rely on, among other things, auditor-selected (rather than agency self-selected) samplings of documents, personnel, and inmates. Also, significantly, the agency being audited bears the burden of affirmatively demonstrating compliance with the Standards. This affirmative burden ensures that the agency does not put the auditor in the impossible position of having to prove noncompliance in the face of a complete absence of supporting evidence. This level of auditor access and methodology ensures a fair, thorough, and comprehensive review of facility compliance.

Fourth, auditors are required to obtain and maintain certification by the DOJ. In furtherance of maintaining this certification, auditors are entitled to obtain copies of any relevant documents, and auditors must retain and preserve any documentation and information the auditor relies upon in making compliance determinations.² The preserved information must be made available to the DOJ upon request. These provisions require auditors be accountable to the DOJ, and permits the DOJ to maintain strong oversight of the conduct of audits. In essence, the DOJ has incorporated the ability to “audit the audit.” To be clear, the DOJ holds the auditor’s license, and the auditor is ultimately accountable to the DOJ for ensuring the quality of the audit, performing the audit in a fair and ethical manner, and for following the proscribed audit methodology. The DOJ may conduct a peer review of any completed audit, and auditors may be decertified for cause.

Fifth, and perhaps most importantly, the Standards encourage agencies and facilities to ultimately achieve full compliance with the Standards. Rather than the audits being a mere mechanism to shame facilities that are not fully compliant, the Standards provide for an

² Auditors and agencies are encouraged to transmit and retain documents electronically, and the Department and PREA Resource Center are developing an electronic document repository to facilitate these requirements.

automatic 180-day corrective action period for any provisions which the auditor concludes are out of compliance. The auditor and agency are jointly required to develop a detailed corrective action plan, and the auditor has up to 180 days to verify that the corrective action measures have been fully and successfully implemented. Only then do the audit determinations become final and required to be made publicly available.

Finally, audit results must be transparent. The Standards require agencies to publish final audit reports publicly – on the agency’s website or otherwise.

Overview of Driving Auditing Methodology Principles

A number of driving principles were incorporated into the subsequently-developed audit process, auditing instrument, auditor certification process, and DOJ-developed interpretive guidance. The principles include consistency among auditors, consistency in the conduct of audits, and auditor ethics.

We have developed processes and methodology to ensure consistency, to the greatest extent possible, among auditors. For example, minimum qualifications for potential auditors have been finalized. Auditor candidates are required to have minimum relevant career-related experience and education, to undergo a criminal records background check, and to participate in 40 hours of standardized training conducted by the DOJ and the PREA Resource Center, including successful completion of a written examination at the conclusion of the training. Such training includes, among other things, interpretation of the Standards, and the auditing instrument and methodology.

In addition, we have developed processes to ensure consistency of audit methodology between and among facility audits. For example, the PREA Resource Center, its partners, and

the Department of Justice have developed extensive and comprehensive auditing instruments. There is one auditing instrument for each of the four sets of Standards. Each instrument is comprised of 12 documents which include auditor instructions, model interview questions, a pre-audit agency questionnaire, the audit tool, lists of documents to review, and a template for the auditing report.

Finally, the DOJ has issued interpretive auditing guidance that minimizes the potential for auditor conflicts of interest. For example, certified auditors from one confinement agency may not perform reciprocal auditing of another confinement agency, unless separated in time by at least one year. Further, a certified auditor from one confinement agency may not conduct a PREA audit of a contract facility, if the contract facility holds inmates of the auditor's agency.

Audit Mechanics Overview

By way of reference, I will provide a quick overview of the practical mechanics of the actual audit process. The PREA Resource Center maintains a list of all currently-certified PREA auditors on its website, including their certification types and locations. First, agencies requiring an audit contact one or more of the listed auditors. After contacting, interviewing, and negotiating the terms of the auditing contract, an agency engages the auditor for one or more facility audits. A timeline is developed for each audit benchmark, including the onsite portion of the audit. Second, the agency posts a notification of the upcoming audit as well as auditor contact information in housing units and other areas of the facility so inmates may engage in confidential advance communication with the auditor. Third, the auditor sends the agency the pre-audit questionnaire and advance document requests as needed.

Fourth, the auditor spends a number of days at the facility touring the inmate or resident areas, interviewing staff and inmates, requesting and reviewing additional documentation and information, and providing a preliminary exit overview at the onsite conclusion. Fifth, the auditor follows up with the agency to obtain any additional documents, conducts any additional required interviews (via teleconference), makes initial audit determinations, and submits an audit report to the agency (generally within 30 days of the onsite audit). If the agency meets or exceeds all PREA Standards, this report is final and is published by the agency. If the report indicates deficiencies, then the auditor and agency promptly and jointly develop a detailed corrective action plan to address each deficiency including timelines and deliverables. The auditor must attempt to verify successful completion of the corrective action measures within 180 days of the initial report. In any event, the auditor updates his or her findings with any additional areas of compliance, and issues the final audit report. Agencies are then required to publish this final audit report.

Current PREA Working Group Status and Activities

I will now provide a brief overview of the current PREA Working Group status and activities. On August 27, 2013, the DOJ established a new PREA Management Office within the Office of Justice Programs and, specifically, within the Bureau of Justice Assistance. The Office is managed by Interim PREA Manager Thurston Bryant and Ruby Qazilbash. Both Mr. Bryant and Ms. Qazilbash have been very diligent and talented in assuming these new duties. The Office is overseen by BJA Director Denise O'Donnell, OJP Principle DAAG Mary Lou Leary, and OJP AAG Karol Mason. All five individuals have demonstrated thoughtfulness and a deep

commitment in ensuring the successful implementation of all aspects of PREA. The PREA Management Office is now responsible for, among other things, implementing the auditor certification process; convening a PREA Working Group for issues of interpretive guidance that require deliberation;³ and, of course, managing the state compliance certification process, the potential state grant reduction process, and the PREA Resource Center grants and sub-grants. As with the prior iteration, the current PREA Working Group is comprised of representatives of various stakeholder components within the DOJ.⁴ I am the primary representative of the Civil Rights Division within the Working Group.

Since the new structure went into effect, the Office has convened two Working Group meetings, consulted with the Civil Rights Division and other stakeholder components on several occasions, and has resolved an additional five interpretive issues expanding the knowledge base maintained on the PREA Resource Center's FAQ website. These items include resolving issues regarding the Governors' certifications, and the conduct of audits. In the aggregate, the DOJ has issued 41 official statements of interpretive guidance since the Standards were published, as well as hundreds of fact-specific informal interpretive inquiries. Additional FAQ items are pending and expected to be finalized in the near term. However, much work needs to be done to address additional pressing issues of interpretive guidance. Future Working Group meetings are expected to occur on a monthly basis going forward.

³ Prior to the creation of the new Office, the Office of the Deputy Attorney General convened the PREA Working Group on several occasions to deliberate on issues of interpretive guidance.

⁴ Besides the Office of Justice Programs, the Bureau of Justice Assistance, and the Civil Rights Division, other key stakeholder components include the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, Access to Justice, the Bureau of Prisons, the National Institute of Corrections, the Office of Violence Against Women, and the U.S. Marshal's Service.

DOJ's Role in Enforcing Compliance with the Standards

Finally, I will discuss DOJ's role in enforcing compliance with the PREA Standards.

While the PREA Standards are applicable to facilities operated by, or on behalf of, the Department of Justice, and state and local governments, the DOJ has varying roles in ensuring compliance with respect to each level of government.

The Standards were immediately binding on the Federal Bureau of Prisons. As a component of the Department of Justice, the Attorney General has inherent authority to ensure compliance within the Bureau. The BOP has been proactive in implementing the PREA Standards, and was the first agency to contract for, and be subject to, facility audits. To date, 12 Bureau facilities (including two complexes with multiple facilities) have completed the onsite portion of audits; all by external DOJ-certified auditors as required by the Standards.

With respect to state-operated facilities or private facilities operated on behalf of a state, the DOJ has a number of obligations set forth in the PREA statute. First, the DOJ is responsible for administering a potential five-percent annual reduction in any DOJ grant funds that may be used for prison purposes within a state. The DOJ is required to impose the reduction if a Governor fails to submit either a certification that state agencies are in full compliance with the Standards, or an assurance that the potential funding reduction will be used to achieve full compliance in future years. Second, the DOJ is required to publish an annual report listing each state that is not in compliance with the Standards.

With respect to facilities operated by, or on behalf of, local governments, the DOJ provides resources to all agencies, including local agencies, that are attempting to comply with the Standards. For example, the DOJ-funded PREA Resource Center provides free technical

assistance to agencies for PREA implementation purposes. In addition, the DOJ has provided limited grant funding for local agencies attempting to become PREA compliant.

While the DOJ has no direct authority to enforce compliance with the Standard at the local level, the Standards themselves incorporate many of these facilities pursuant to the contracting Standard. Specifically, the Standards require that any public agency (DOJ, state, and local) that contracts with other public or private agencies for the confinement of its inmates, detainees, or residents, must include in any new contract or contract renewal: (1) a requirement that the contracted agency comply with the PREA Standards, and (2) a requirement that the contracting agency be permitted to conduct contract monitoring to ensure compliance with the Standards.

Because many DOJ and state agencies contract with local and private agencies for bed space, these local and private facilities must ultimately be PREA compliant or risk losing its contracts. Conversely, DOJ and state agencies that fail to implement these contractual requirements on local and private facilities will themselves be considered out of compliance with the Standards.

Finally, the DOJ has a variety of other obligations that may play a role in ensuring compliance with the Standards with respect to confinement agencies at all levels pursuant to the Final Standards and other authority. For example the DOJ is responsible for managing the PREA Resource Center, which has been instrumental in developing the auditing process and the provision of technical assistance. In addition, the DOJ is responsible for considering audit appeals petitioned by confinement agencies. The Standards also permit the DOJ to send a recommendation to an agency for an expedited audit if the DOJ has reason to believe that a

particular facility may be experiencing problems relating to sexual abuse. While the recommendations for an expedited audit are not enforceable by the DOJ, such a recommendation will, at a minimum, alert the confinement agency and, perhaps other key stakeholders, that a facility may be experiencing severe problems relating to sexual abuse.

I would note also, that various DOJ divisions, offices, and components enforce laws that protect the federal rights of inmates, residents, and detainees in confinement. Within the Civil Rights Division alone, the Special Litigation Section, the Criminal Section, the Disability Rights Section, and the Federal Coordination and Compliance Section all enforce statutes that substantively overlap with one or more aspects of the Final PREA Standards. In addition, the Special Litigation Section has incorporated substantive provisions of the Standards into “minimum remedial measures” provisions in investigative findings letters, and in remedial consent decrees and settlement agreements where agencies have been found to have engaged in unlawful conditions of confinement involving a pattern or practice of sexual abuse.

In conclusion, I would like to put our collective efforts in combating prison rape into some context. It will take a number of years to adequately gauge the effectiveness of the Final Standards in reducing sexual abuse. However, according to the recently released Bureau of Justice Statistics reports, if we can reduce sexual abuse in prisons and jails, by even 10%:

6890 fewer state and federal prison inmates will be sexually abused during the next 12 months; 2750 fewer jail inmates will be sexually abused during that year; and 6725 fewer children will be sexually abused in juvenile justice facilities during that timeframe. And these numbers do not include the potential reductions in sexual abuse among detainees in lockups, and

residents in community confinement facilities. If such reductions were maintained for a number of years, then necessarily there will be hundreds of thousands of fewer incidents of sexual abuse. However, I am increasingly optimistic that we can, collectively over time, reduce sexual abuse in confinement by 20, 30, or even 50% per year.

I would like to thank this distinguished panel for your interest in these critical topics, and I look forward to addressing any questions you may have.