PREA SIGN-ON LETTER TO REMOVE YOUTH FROM ADULT JAILS AND PRISONS

This letter has the final substantive recommendations we are asking people to sign onto.
The footnotes and minor grammar edits are still in process.

To sign-onto this letter, please send an email to jjcampaign@cfyj.org.

Organizations: please send the name of your organization and city/state.

Individuals: please send your full name, any relevant descriptors (e.g., family member, professor at university, PTA president), and city/state

April 4, 2011

Attorney General Eric Holder, Jr.

U.S. Department of Justice

950 Pennsylvania Avenue NW

Washington, DC 20530-0001

RE: Docket No. OAG-131; AG Order No. 3244 - 2011

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

 **Questions 36 and 37**

Dear Attorney General Holder,

The signatories to this letter thank you for considering the comments submitted in response to the Advanced Notice of Proposed Rulemaking regarding the Prison Rape Elimination Act (PREA) last May. We appreciate the Department’s continued exploration of the best ways to protect incarcerated youth[[1]](#footnote-1) from the horrors of sexual victimization in custody and are pleased that you have posed questions to the field about how the Department’s draft regulations could be strengthened to address the particular dangers for youth housed in adult jails and prisons.

In this letter we reaffirm our request that the Department use these regulations to ban placing youth in adult jails and prisons. Adult facilities housing children and youth face a dangerous dilemma, forced to choose between housing youth in the general adult population, where they are at substantial risk of both physical and sexual abuse, and housing youth in segregated settings which cause or exacerbate mental health problems. Neither option is safe nor appropriate for children, nor a good practice for corrections agencies ill-equipped to address the unique needs of youth. We believe that anything less than a complete ban would ignore all of the available research and evidence, expert opinion from correctional experts, and current policies in federal and international law, and would fail to meet the goals established by Congress when passing PREA.

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

Yes. According to the Bureau of Justice Statistics (BJS), 10,000 children are held in adult jails and prisons daily, [[2]](#footnote-2) and the annual number of youth exposed to the dangers of sexual assault in adult facilities is significantly higher because of the “flow” of youth entering and exiting facilities. The Department should protect these youth by requiring the removal of all youth under 18 from adult facilities.

It is not uncommon for a young person to have contact with the justice system once or twice, never to return. But if a young person is sexually abused while in custody, he or she will suffer lifelong trauma from that abuse, which often results in mental illness, substance abuse, and a higher likelihood of continued involvement in the criminal justice system.[[3]](#footnote-3)

**Youth in adult facilities are at great risk of prison rape.** Studies from across the nation confirm that youth tried as adults fit the risk profile of those persons at the highest risk of sexual assault. According to the prison rape literature, the persons with the highest likelihood of being sexually assaulted are:

1. Inmates who are young, inexperienced in prison culture, and easily intimated;
2. Those who are physically small or weak;
3. Inmates suffering from mental illness and/or developmental disabilities;
4. Inmates who are middle-class/not streetwise;
5. Offenders who are not gang affiliated;
6. Those who are known to be homosexual;
7. Those who have been previously sexually assaulted;
8. Inmates who are disliked by staff or other inmates;
9. Those who “snitch,” that is, report prohibited behavior;
10. First-time, non-violent offenders.[[4]](#footnote-4)

National Prison Rape Elimination Act Commissioner Brenda Smith testified before Congress that most of the youth held in adult facilities have “no prior exposure to the adult correctional environment [which] makes adult prisons very difficult for youth to navigate and puts them at an increased risk for sexual abuse.”[[5]](#footnote-5) We know that the overwhelming majority of youth tried as adults are nonviolent offenders, and a considerable proportion are first-time offenders. [[6]](#footnote-6) In more than half of the states, there is no lower age limit on who can be prosecuted as an adult, so even young children can be prosecuted as adults and sent to adult jails and prisons. [[7]](#footnote-7) For example, only six states have age restrictions on the pre-trial detention of youth in jails.[[8]](#footnote-8) In addition to age and offense, we know that other characteristics of youth further raise their risk levels. Youth in adult facilities have even more significant mental health needs than youth held in juvenile facilities.[[9]](#footnote-9) Youth are also likely to have had significant histories of prior sexual assault, particularly the girls.[[10]](#footnote-10) Many lesbian, gay, and bisexual youth are held in adult facilities as well.[[11]](#footnote-11) All of these factors make youth more likely to be victimized.

PREA-funded studies confirm the high rates of sexual violence against youth in adult facilities. BJS studies conducted in 2005 and 2006 found that 21% and 13% respectively, of the victims of substantiated inmate-on-inmate sexual violence in jails were youth under the age of 18[[12]](#footnote-12) – a surprisingly high percentage of victims considering that only 1% of all jail inmates are youth under 18.[[13]](#footnote-13) Unfortunately, BJS studies conducted since that time have not disaggregated youth victimization in adult facilities but have grouped all persons under the age of 25 together.[[14]](#footnote-14) This is a critical gap in our understanding of the risks to youth that the Department should rectify immediately.

In light of this evidence, the National Prison Rape Elimination Act Commission concluded that “more than any other group of incarcerated persons, youth incar­cerated with adults are probably at the highest risk for sexual abuse” and recommended that “individuals under the age of 18 be held separately from the general population.”[[15]](#footnote-15) Although the Commission was right to recommend keeping youth separate from other adult inmates, the Commission overlooked the danger caused when youth are held in isolation conditions, a common side-effect of efforts to keep youth safe from sexual assault.

**Isolation has devastating consequences for youth.** Isolation conditions can cause anxiety, paranoia, and exacerbate existing mental disorders and put youth at risk of suicide. [[16]](#footnote-16) In fact, youth are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.[[17]](#footnote-17) According to University of California–Santa Cruz psychology professor Craig Haney, the effects of isolation are profound and disabling for youth:

The political stereotype is that a fourteen- or sixteen-year-old who commits an adult crime must be as sophisticated as an adult when paradoxically these kids are most often younger than their age emotionally. Regardless of what they have done, they are in an uncertain, unformed state of social identity. These are kids who are the least appropriate to place in solitary confinement. Not only are you putting them in a situation where they have nothing to rely on but their own, underdeveloped internal mechanisms, but you are making it impossible for them to develop a healthy functioning adult social identity. You're basically taking someone who’s in the process of finding out who they are and twisting their psyche in a way that will make it very, very difficult for them to ever recover.[[18]](#footnote-18)

Correctional staff understand this dilemma. Sherriff Gabriel Morgan, of Newport News, VA, testified before Congress that:

[O]ur ability to effectively manage the juvenile safety is tenuous at best. Most of the time, we are forced to put them in protective custody or some sort of administrative segregation for their own protection. This amounts to additional punishment inasmuch as juveniles are in isolation cells for the majority of the day. These findings and many cited in my written submission begs the question, is this a violation of the Eighth Amendment of our Constitution? Further, as a civilized body, are we guaranteeing the provisions of the 14th Amendment due process and equal protection clause?

**The draft regulations are inadequate to protect youth.** Under the Departments proposed adult standards an adult facility will identify youth as vulnerable and make an individualized determination of how to ensure their safety (§115.41). In many facilities, youth will be placed in protective custody to keep them safe. Although the draft adult regulations recognize that protective custody is a punitive condition that is both unfair and harmful to vulnerable inmates (§115.43), from a practical standpoint adult facilities will have no alternatives but to keep youth in isolation indefinitely. A similar problem occurs if one applies the current juvenile standards to youth held in adult facilities. The Department should not permit jurisdictions to house youth in protective custody to protect youth from sexual abuse, thus relying on one dangerous practice in an attempt to eliminate another.

Adult facilities are simply not equipped to meet the needs of youth. All leading professional associations in the field, including the American Bar Association, the American Correctional Association, the National Commission on Correctional Health Care, and National Juvenile Detention Association have recognized that juveniles have distinct physical, emotional, social, and safety needs that are different than those of adults and have adopted policy statements and guidelines calling for youth to be housed in different settings than adult prisoners.

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

The Department should explicitly recognize that all youth have a heightened vulnerability for sexual abuse in adult correctional settings and include a standard requiring the removal of youth under 18 from adult facilities.

**§ 115.44 Prohibition on housing juveniles in adult facilities**

**(a) No person under the age of 18 may be housed in a jail or prison.**

**(b) The agency operating the adult facilit(ies) shall enter into memoranda of understanding or other agreements with juvenile justice agenc(ies) to receive and immediately house all persons under the age of 18 who are currently, or in the future, assigned to its care.**

Our proposed rule would go beyond the current requirements established by the Juvenile Justice and Delinquency Prevention Act (JJDPA)[[19]](#footnote-19) in order to protect all youth from the very real risk of sexual abuse in adult facilities.

The JJDPA was enacted over three decades ago to keep youth out of adult facilities and requires states to ensure that no juvenile be “detained or confined in any institution in which they have contact with adult inmates.”[[20]](#footnote-20) Although this language suggests that Congress intended to prevent youth from being housed in adult facilities altogether, the JJDPA does not protect all youth. There are four categories of youth that may potentially be placed in an adult jail or prison:

1. Youth who have not committed any crime (nonoffenders);
2. Youth who have committed an offense that is not a criminal offense for adults (status offenders);
3. Youth who have committed a crime and are adjudicated in the juvenile justice system; and
4. Youth who have committed a crime and are prosecuted in the adult criminal justice system.

The JJDPA only protects youth in the first three categories, and allows youth in the third category to be held in rural jails in certain instances. The JJDPA does not currently protect youth prosecuted in the adult criminal system. At the time the JJDPA was passed, many fewer youth were prosecuted as adults. State legislative changes during the 1980s and 1990s made it easier for youth to be prosecuted in adult criminal courts, and now recent estimates are that 250,000 children are prosecuted as adults each year in the United States.[[21]](#footnote-21)

Our recommended standard would remove all youth under the age of 18 from adult facilities, and therefore goes beyond the statutory requirements of the existing JJDPA. The penalties imposed on a facility or agency for failure to remove youth from adult facilities should be imposed as appropriate to the type of violation. To the extent that facilities are currently housing youth in adult facilities in violation of the current JJDPA (i.e., the first three categories of youth), these facilities should be found out of compliance with both the JJDPA and PREA. Facilities housing youth in adult facilities in violation of our recommended approach, but that are not in violation of the JJDPA (i.e., youth in the fourth category), should be found out of compliance with PREA alone. The statutorily prescribed financial penalities should be assessed. We urge the Department to set aside any funds that are withheld from jurisdictions that fail to comply with our proposed rule to help facilities come into compliance.

Although state juvenile justice systems differ in many ways, the majority of states (37) have set their maximum age of juvenile jurisdiction at age 18, and we believe the Department should similarly establish a clear line that adulthood begins at age 18. The American Bar Association, in its Juvenile Justice Standards Relating to Transfer Between Courts, recommends 18 as the age of juvenile jurisdiction. The United States Supreme Court has also established age 18 as the age relevant to judge criminal penalties imposed on youth. In the 2005 decision of *Roper v. Simmons,* the Supreme Court affirmed the Missouri State Supreme Court’s decision to prohibit the death penalty for juvenile offenders, defined as persons under the age of 18, even though Missouri’s juvenile justice system ends at age 17.[[22]](#footnote-22) Last year, the Court maintained this defining line in *Graham v. Florida,* when the Court held that persons cannot be given a life sentence without the possibility of parole for a non-homicide crime committed before the age of 18. Finally, international treaties endorse age 18 as the proper age to delineate between juvenile and adult court treatment.

The Department would also be justified in making such a rule on the basis of congressional intent. Congress passed PREA in response to its findings that “young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities – often within the first 48 hours of incarceration.”[[23]](#footnote-23) As Chairman John Conyers noted in the most recent legislative hearing on the sexual abuse of incarcerated children, “I would like to discuss what I believe is a very simple solution: we should stop sending children to adult jails and prisons. It absolutely makes no sense to incarcerate children in dangerous adult jails.”

**The costs of removing youth from adult facilities are justified by the benefits.** We acknowledge that the costs may be significant in some jurisdictions, particularly for states that have set their age of juvenile court jurisdiction below the age of 18. Nonetheless, the important inquiry for the Department is whether the costs outweigh the benefits. In addition to the moral benefit of removing youth from adult facilities, we believe that the Department will similarly find that from a cost-benefit standpoint, our recommendations are justified.

The Department’s Initial Regulatory Impact Analysis did not consider the abuse of youth in adult facilities in the baseline calculations of the prevalence of prison rape and sexual abuse in adult jails and prisons. When the Department revisits the cost-benefit issue, the Department should account for the increased risks that youth face when housed in adult jails and prisons (e.g., the higher suicide rates) and the increased costs associated with increased recidivism of youth prosecuted as adults. According to both the U.S. Centers for Disease Control and Prevention and the Department’s own Office of Juvenile Justice and Delinquency Prevention, youth who are transferred from the juvenile court system to the adult criminal system are approximately 34% more likely than youth retained in the juvenile court system to be re-arrested for violent or other crime. [[24]](#footnote-24)

We also ask the Department not to make any blanket assumptions about the cost impact on state and local jurisdictions. While the average costs of housing youth in juvenile facilities are higher than the average costs of housing youth in adult facilities, adult facilities that keep youth safe from abuse often house youth in specialized units (e.g., mental health unit) that may be comparable to housing youth in juvenile facilities. For example, in 2007, the Rhode Island legislature dropped the age of juvenile court jurisdiction from 18 to 17 in an effort to save money. Yet the costs to keep youth safe in the adult facility skyrocketed and the legislature immediately reversed the change.

In conclusion, we urge the Department to swiftly promulgate a final rule with our recommendations to ensure that all youth are protected from sexual abuse as was intended by Congress when it passed PREA. Every day that youth remain in adult jails and prisons they are at great risk.

For your convenience, we have included several attachments we hope will prove helpful as the Department considers our recommendations. Attachment A provides a list of laws and policies that support our position. Attachment B provides copies of relevant testimony before Congress and the National Prison Rape Elimination Commission regarding the dangers posed by incarcerating youth in adult facilities. Attachment C is a copy of a recent report by the Campaign for Youth Justice illustrating recent state trends removing youth from adult facilities. Finally, in anticipation of concerns from juvenile correctional institutions that there may be a rare youth whose conduct in a juvenile facility is so extreme as to render a youth unmanageable in a juvenile justice environment, we have drafted language to accommodate those concerns in Attachment D.

Thank you for your consideration. Should you have any additional questions, please feel free to contact Neelum Arya at the Campaign for Youth Justice, (202) 558-3580 or narya@cfyj.org, or Dana Shoenberg at the Center for Children’s Law and Policy, 202-637-0377, x107 or dshoenberg@cclp.org.

 Sincerely,

[Complete List of Organizations – National, State]

Campaign for Youth Justice

Center for Children’s Law and Policy

Just Detention International

Loyola Law School Center for Juvenile Law and Policy

National Crittenton Foundation

National Juvenile Defender Center

Rebecca Project for Human Rights

Southern Poverty Law Center (SPLC)

[Complete List of Individuals]

Jeffrey A. Butts, Ph.D.

Todd R. Clear, Ph.D., Dean, Rutgers University

The Honorable H. Ted Rubin (retired), Denver Juvenile Court

Jennifer Woolard, Ph.D., Associate Professor of Psychology, Georgetown University

Maureen Pacheco, J.D., Clinical Professor, Loyola Law School

**Attachment A**

**List of Supporting Laws, Standards, and Policies**

**Federal Law and Policies**

* 18 U.S.C. § 5039 (prohibiting placement of youth in federal custody in adult facilities)
* 42 U.S.C. § 5633 (a)(prohibiting the placement of youth in state and local custody in adult facilities in certain circumstances)
* USDOJ, Federal Bureau of Prisons, Policy 5216.05 (prohibiting placement of youth in adult facilities)
* USDOJ, Federal Standards for Prisons and Jails (1980)
* USDOJ, Office of Juvenile Justice and Delinquency Prevention, Guidance Manual for Monitoring Facilities Under the Juvenile Justice and Delinquency Prevention Act of 1974, as amended (recommending that juveniles tried as adults be sight and sound separated from adult inmates)

**State Law and Policies**

* California Welfare and Institutions Code §§207.1, 207.6
* California Code of Regulations Title 15 §§ 1100 – 1163
* California Memoranda of Understanding between California Department of Corrections and California Youth Authority (2004, 2001)
* Georgia Board of Corrections Rule 125-4-8-.01
* Hawaii Revised Statutes 352-28
* Hawaii Department of Public Safety Policy No. Cor. 14.07
* Kentucky Revised Statutes 640.070
* Kentucky Department of Juvenile Justice Policy and Procedures Policy Number DJJ 352
* Maine Department of Corrections Title 15 §3202-A (7)
* New Jersey Statutes §§ 10A:31-28.1, 2A: 4A - 36

**Professional Standards**

* ABA Standards for Criminal Justice: Treatment of Prisoners (3rd edition)(2010) Standard 23-3.2 (b)
* ACA Adult Correctional Institutions (4th edition, 2003), 4-4306
* ACA Adult Correctional Institutions (4th edition, 2003), 4-4307
* ACA Adult Correctional Institutions (4th edition, 2003), 4-4308
* ACA Adult Correctional Institutions (4th edition, 2003), 4-4309
* ACA Adult Correctional Institutions (4th edition, 2003), 4-4310
* ACA Adult Correctional Institutions (4th edition, 2003), 4-4311
* ACA Adult Correctional Institutions (4th edition, 2003), 4-4312
* ACA Core Jail Standards (1st edition, 2010), l-CORE-2A-19
* ACA Core Jail Standards (1st edition, 2010), l-CORE-2A-20
* ACA Juvenile Detention Standards (3rd edition, 1991), 3-JDF-3E-04

**Policy Statements**

* American Academy of Child and Adolescent Psychiatry, Recommendations for Juvenile Justice Reform, Second Edition (2005)
* American Academy of Pediatrics, Health Care for Children and Adolescents in the Juvenile Correctional Care System (2001)
* American Bar Association, Resolution on Youth in the Criminal Justice System (101D) (2002)
* American Correctional Association, Public Correctional Policy on Juvenile Justice (2007)
* American Correctional Association, Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction (2009)
* American Jail Association, Juveniles in Jails (1993)
* American Medical Association, Health Status of Detained and Incarcerated Youth (1990)
* American Public Health Association, Encourage Healthy Behavior by Adolescents (2000)
* American Psychiatric Association, Adjudication of Youths as Adults in the Criminal Justice System (2006)
* Association of State Correctional Administrators, Resolution #2 – Evaluating the Effects of Incarceration in Adult Facilities on Youth Offenders (2006)
* Coalition for Juvenile Justice, Children Detained in Adult Jails (n/d)
* Council of Juvenile Correctional Administrators, Waiver and Transfer of Youths to Adult Systems (2009)
* International Community Corrections Association, Public Policy on Juvenile Justice (2006)
* National Association for the Advancement of Colored People, Opposition to Transfer of Youth to the Adult Criminal Justice System (2008)
* National Association of Counties, American County Platform & Resolutions (2009)
* National Association of Social Workers, Juvenile Justice and Delinquency Prevention (2005)
* National Commission on Correctional Healthcare, Health Services to Adolescents in Adult Correctional Facilities (1998)
* National Commission on Correctional Healthcare, Prevention of Juvenile Suicide in Correctional Settings (2007)
* National Juvenile Detention Association, Opposing the Use of Adult Jails for the Detention of Juveniles (1981)
* National Juvenile Detention Association, Holding Juveniles Under Criminal Court Jurisdiction in Juvenile Detention (1997)
* The Parent-Teacher Association, Child Safety and Protection (n/d)
* United States Conference of Catholic Bishops, Responsibility, Rehabilitation, and Restoration: A Catholic Perspective and Criminal Justice (2000)
* U.S. Conference of Mayors, Calling for Reauthorization of the Juvenile Justice and Delinquency Prevention Act (2008)

**International Law**

* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” Article 16
* American Convention on Human Rights, Article 19
* American Convention on Human Rights, Article 5
* American Convention on Human Rights, Article 6
* American Declaration of the Rights and Duties of Man, Article XI
* Convention on the Rights of the Child, Article 1
* Convention on the Rights of the Child, Article 19
* Convention on the Rights of the Child, Article 27
* Convention on the Rights of the Child, Article 3
* Convention on the Rights of the Child, Article 34
* Convention on the Rights of the Child, Article 37
* Convention on the Rights of the Child, Article 40
* Declaration of the Rights of the Child, Principle 2
* Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem Do Para,” Article 7
* Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem Do Para,” Article 8
* Inter-American Convention to Prevent and Punish Torture, Article 7
* International Covenant on Civil and Political Rights, Article 10
* International Covenant on Civil and Political Rights, Article 24
* United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), Rule 52
* United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), Rule 54
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 11
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 12
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 13
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 14
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 15
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 20
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 27
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 28
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 29
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 31
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 37
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 38
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 47
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 49
* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 85
* United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), Rule 13.4
* United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), Rule 13.5
* United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), Rule 26.2
* United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), Rule 26.3
* United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 8

**Attachment B**

**Testimony on Dangers of Youth in Adult Facilities**

* Linda Bruntmyer, Hearing before the Senate Committee on the Judiciary, “Prison Rape Reduction Act of 2002,” July 31, 2002
* Deborah LaBelle, Esq., Hearing before the National Prison Rape Elimination Commission, “At Risk: Sexual Abuse and Vulnerable Groups Behind Bars,” August 15, 2005
* Gabriel A. Morgan, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, “Keeping Youth Safe While in Custody: Sexual Assault in Adult and Juvenile Facilities,” February 23, 2010
* T.J. Parsell, Hearing before the National Prison Rape Elimination Commission, “At Risk: Sexual Abuse and Vulnerable Groups Behind Bars,” August 15, 2005

**Attachment C**

**Campaign for Youth Justice report, *State Trends:***

***Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System***

**Attachment D**

**Alternate Regulatory Proposal**

Although we believe that no youth should ever be housed in an adult facility, we have provided some additional language for the Department to consider. It is with great reluctance that we offer an alternative. As noted in the Departments Federal Standards for Prisons and Jails issued in 1980:

It is the position of the Department of Justice that juveniles, especially non-criminal juveniles, do not belong in adult prisons or jails of any sort. These standards do not treat in any detail the handling of juveniles in adult facilities, in keeping with our view that to recommend the development of special programs, policies and procedures to accommodate juveniles might encourage the placement of juveniles in adult facilities rather than their removal.

We have crafted our alternative proposal to address the potential concerns of some correctional agencies who may point to the very rare and isolated cases of youth who have caused serious injury to others in a juvenile facility and are beyond the facility’s control. The proposed standard has three components. First, the regulations should require that adult agencies enter into agreements with juvenile agencies for the initial reception of youth who may otherwise enter their custody. Congress specifically found that youth are at risk within the first 48 hours. We believe that requiring adult agencies to make arrangements with juvenile justice agencies (see the memoranda from California provided in this attachment) will help ensure that youth are not exposed to adult facilities for any length of time without concrete evidence that a youth is disruptive to the juvenile facility.

Second, youth should never be housed in an adult facility without a court making a full investigation into the circumstances why the youth has been unsuccessful in the juvenile facility. We know that victims of sexual assault may engage in destructive behavior to escape from sexual assaults. This behavior can also include assaults on staff. Dr. Barry Krisberg, former president of the National Council on Crime and Delinquency and current Distinguished Senior Fellow and Lecturer in Residence at the Berkeley Center for Criminal Justice, testified before the National Prison Rape Elimination Commission that many youth become disciplinary problems as a self-protective mechanism:

What youth tended to do to protect themselves, particularly when the lights were out in the dormitory, was often to assault staff to get locked up, and they didn't mind being locked up 23 hours a day if that meant, as they would often say, not having to watch your back. So, you'd see staff, and, in fact, correctional officers and superintendents would routinely tell me that the lockup units were populated with essentially what they called protective custody cases. These were not gang-bangers, these were not violent youths, these were youth trying to escape the victimization that was going on in the dormitories. Another way out was to engage in abnormal behavior, like suicidal gestures, smearing feces on yourself or your bed, claiming that you were hearing voices, so that the psychologist and psychiatrist would, again, get you out of these terrible dormitories and into some single room where you'd feel some modicum of safety.[[25]](#footnote-25)

Our proposal would require that before a youth could be transferred to an adult facility, a court must conduct a hearing, with the youth represented by counsel and physically present, so the judge can have a complete understanding of the issues. Given their previous histories of trauma and victimization, we know that some youth will pose behavioral challenges and may appear guarded, oppositional, angry, defensive, or manipulative.[[26]](#footnote-26) Stress from a traumatic event may interfere with a child’s capacity to listen or reason, and punitive interventions typically exacerbate behaviors of concern.[[27]](#footnote-27) Our revisions require the Court to consider a youth’s prior victimization and to consult with medical and mental health practitioners when determining an appropriate intervention or sanction. The court is prohibited from transferring a youth to an adult facility as part of a sanction for conduct in the juvenile facility.

Finally, for the few youth who may enter adult facilities, the regulations should contain additional protections including making sure that youth are separated from the adult population, youth are provided with programs and services to meet their developmental needs and opportunities for social interaction, and staff working with youth have the necessary training. Every 10 days, the court must review the decision to house a youth in the adult facility to determine if the youth should return to the juvenile facility.

The Department should consider the following language for a standard to :

**Alternate § 115.44 Prohibition on housing juveniles in adult facilities**

(a) No person under the age of 18 may be housed in a jail or prison, except under the special circumstances and after specific procedures detailed in paragraphs (b) and (e) of this section have been undertaken

(b) The adult agency shall enter into memoranda of understanding or other agreements with juvenile justice agencies to receive and immediately house all persons under the age of 18 who are currently, or in the future, assigned to its care.

(c) No person under the age of 18 may be transferred to a jail or prison without a written court order after notice and evidentiary hearing, with the youth and his/her counsel present and able to participate, with findings that the youth has:

(1) Seriously injured or endangered the life or health of another youth resident or staff member in the juvenile facility or program; or escaped from the juvenile facility or program; or established a pattern of disruptive behavior not conducive to the established policies and procedures of the juvenile program; and

(2) The youth’s behavior cannot be safely managed by disciplinary procedures in the juvenile facility. The court shall consult with medical and mental health practitioners to determine whether a youth’s mental disabilities, mental illness, or previous history of victimization contributed to his or her behavior when determining an appropriate course of action. While the disciplinary history of the youth may impact the recommendation to transfer the youth to the adult facility, the transfer to an adult facility may not be used as a disciplinary sanction or activity.

(d) If persons under the age of 18 are transferred to the facility pursuant to the court order, the facility shall:

(1) Ensure youth do not have sight or sound contact with inmates over the age of 18;

(2) Assess and provide programs and services to meet the special needs of youth including education comparable to that provided in the community, special diets to meet their nutritional needs, developmentally appropriate health and mental health care, daily opportunities for recreation and exercise, and contact visits with family members;

(3) House youth in living conditions with adequate program space to meet the physical, social, and emotional needs of youth. Facilities must allow for social contact with peers and may not isolate juveniles from other juveniles, unless the juvenile presents an immediate health and/or safety risk to other inmates or staff;

(4) Ensure youth are visually checked by staff at least every 15 minutes; receive daily visits from mental health or health care providers; and have opportunities for social interaction including daily visits by personnel from administrative, clinical, social work, or religious units; and

(5) Ensure that employees working with persons under the age of 18 are trained in the developmental, safety, and other specific needs of youth including:

(i) Adolescent development for girls and boys, including what is normative sexual behavior for adolescents, what is acceptable behavior of adolescents, how to distinguish between normative adolescent behavior and sexually aggressive and dangerous behaviors, the factors that make youth vulnerable to sexual abuse, how to handle disclosures of victimization by youth in a sensitive manner, and the ways in which sexual victimization can affect healthy development;

(ii) The developmental and programming needs of youth;

(iii) The prevalence of trauma and abuse histories of youth, possible behaviors of youth with trauma and abuse histories, and appropriate gender specific ways of responding to those behaviors;

(iv) How to communicate effectively and professionally with specific populations of youth (e.g., gender, race, ethnicity, sexual orientation, gender identity, disability, or youth with limited English proficiency);

(v) The mental health needs of youth including crisis prevention and intervention, suicide prevention, cognitive-behavioral interventions, and substance use and abuse.

(e) The facility shall provide written progress reports on the behavior and welfare of the youth to the court at an evidentiary hearing, after notice, with the youth and counsel present, every 10 days to determine whether the youth should be returned to a juvenile facility with the court providing written findings and placement determination.

1. As discussed in greater detail below, the Department’s current definition of “juvenile” in § 115.5 currently does not include all youth. For the purposes of this letter, we use the terms “children” and “youth” interchangeably to refer to all persons under the age of 18. We have answered these questions assuming the Department intended to solicit comments about how the proposed PREA standards for adult facilities should be modified to address the needs of the entire youth population. [↑](#footnote-ref-1)
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3. See also Ching-Tung Wang & John Holton, *Total Estimated Cost of Child Abuse and Neglect in the United States*,Prevent Child Abuse America Economic Impact Study (2007), *available at* <http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf> (documenting the adverse impact on children who have been sexually abused). [↑](#footnote-ref-3)
4. Add prison rape reviews [↑](#footnote-ref-4)
5. Committee on the Judiciary, Feb. 23 [↑](#footnote-ref-5)
6. *The Consequences Aren’t Minor: the Impact of Trying Youth as Adults and Strategies for Reform* (2007, March). Washington, DC: Campaign for Youth Justice. [↑](#footnote-ref-6)
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