Board Agenda Item L
Attachment L-2

Public Comment Letter
American Civil Liberties Union

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August 29, 2016

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Dear Ms. Wolfe,

The ACLU of California submits the following comments on the proposed amendments to the Minimum Standards for Local Detention Facilities, Title 15, Division 1, Chapter 1, Subchapter 4, California Code of Regulations. Our comments address two issues: (1) compliance with the federal Prison Rape Elimination Act; and (2) treatment of pregnant inmates.

I. Compliance with the Federal Prison Rape Elimination Act

The proposed amendments fail to comply with the minimum standards required of local detention facilities under the federal Prison Rape Elimination Act of 2003 (PREA). Specifically, the proposed regulations fail to include mandatory duties imposed on local facilities by PREA. By failing to include these federally mandated duties, the regulations fall below the minimum standards required by federal law. The proposed regulations thus are in conflict with federal law and their adoption would violate the Administrative Procedures Act. Failure to comply with PREA also subjects state and county facilities that detain adults to serious risks of legal liability and litigation costs. We therefore urge the BSCC to adopt changes to these proposed amendments to comply with PREA, as specified below.

A. The Requirement to Comply with PREA

The Prison Rape Elimination Act of 2003 (PREA), Pub. L. No. 108-79, 117 Stat. 972 (2003) (codified at 42 U.S.C. §§ 15601-15609), was passed by Congress and signed by President George W. Bush in 2003. The purpose of PREA is to end the unacceptable sexual assaults that occur in custodial facilities and to ensure the basic dignity and human rights of all detained people. Federal regulations on PREA implementation have now been adopted and are binding on every detention facility in the United States. (28 CFR Part 115, et seq.)[1] Under California's

[1] PREA directed the attorney general to promulgate standards for all confinement facilities including, but not limited to, local jails, police lockups, and juvenile facilities. See 42 U.S.C. § 15609(7). DOJ has promulgated regulations

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Administrative Procedures Act, any proposed regulations must be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Gov. Code §11349, subd. (d).) PREA has established minimum jail standards for every detention facility in the United States. California regulations may not contain lesser standards.

Additionally, PREA requires 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 during any period in which such organization fails to . . . adopt accreditation standards consistent with the national standards adopted pursuant to [PREA]". (42 U.S.C. §15608.) The BSCC is the regulatory agency in California with jurisdiction over county jails. BSCC both establishes and enforces jail standards on the counties. As such, BSCC is the "organization responsible for the accreditation" of county jails in California, within the meaning of PREA, and is therefore required to adopt standards consistent with PREA. Failure to do so would render BSCC ineligible for any new federal grants.

Furthermore, while PREA does not create a private right of action to sue for violations of the Act or regulations, litigants can argue that a facility's noncompliance with the PREA standards presents evidence that facilities are not meeting their constitutional obligations to protect inmates and keep them safe.[2] If a state, agency or facility has maintained policies or practices that do not comply with PREA, this may be evidence that officials have been deliberately indifferent to an objectively serious risk of harm. This is particularly true where lesbian, gay, bisexual, transgender, and intersex (LGBTI) inmates are sexually harassed, abused, or assaulted. The findings of the National Prison Rape Elimination Commission (NREC) and the DOJ during the passage of PREA and the regulations to implement PREA all effectively put agencies and officials on notice of the particular vulnerability of LGBTI prisoners and of the specifics steps needed to minimize the risk of harm.

In sum, state regulations must be consistent with and cannot fall below the minimum standards established by PREA. Moreover, incorporating PREA requirements into state regulations will significantly increase the likelihood that prisons and jails will quickly adopt PREA-compliant policies and practices. This will not only create safer criminal justice facilities but also result in fiscal benefits for the state and local facilities at risk of substantial loss or diversion of federal funds or litigation costs.

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establishing standards for prisons and jails (28 C.F.R. §§115.11 – 115.93), lockups (28 C.F.R. §§115.111 – 115.193), residential community confinement facilities (28 C.F.R. §§115.211 – 115.293), and juvenile facilities (28 C.F.R. §§115.311 – 115.393).

[2] *See, e.g. Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (holding, in the context of a case concerning failure to protect a transgender woman from harm in a male facility, that prisons and jails "have a duty to protect prisoners from violence at the hands of other prisoners.").

B. "Nonduplication" Standards Within the APA

At its June 9, 2016 meeting, some BSCC staff and board members raised the issue of whether adopting PREA requirements in Title 15 would conflict with California's Administrative Procedures Act (APA) standards regarding "nonduplication." It would not. First, adopting standards established under federal law does not require duplication of federal law or regulations verbatim. Rather, it requires that the standards set forth as California's minimum jail standards not fall below the federal standards. Second, the APA provides that its "nonduplication" standard is met where duplication of a federal or state law or regulation is necessary for purposes of clarity. (1 CCR §12(b)(1).) Here, adding language to Title 15 that informs counties of PREA requirements certainly clarifies what minimum standards they are legally required to meet. Lastly, the APA specifically provides for California regulations to "incorporate by reference" another document, such as federal statutes and regulations, where it is either cumbersome or impractical to publish the document in the California Code of Regulations or where "other applicable law specifically requires the adoption or enforcement of the incorporated material by the rulemaking agency." (1 CCR §20.) Thus, the APA's "nonduplication" requirements do not prevent California from adopting state regulations that are consistent with the federal PREA standards –in fact, the state is required to do so—and do not prevent the state from explicitly incorporating part or all of the federal regulations in Title 15 in order to provide clarity to local facilities.

C. Specific Recommendations

PREA requires adult institutions to prevent sexual assault from occurring in the first place.[3] Among other things, jails and prisons must adopt new screening, classification, and housing procedures that screen people's risk level for sexual assault, and make efforts to place people in the facility in the manner that makes them safe while also reducing unnecessary prolonged isolation and segregation.[4] Housing classification determinations must be made on a case-by-case basis, taking into account a person's own views about safety.[5] Local agencies responsible for operating adult institutions also have to minimize opportunities for sexual assault by having sufficient staffing, rounds, and video monitoring, and by getting rid of physical spaces that might invite attacks.[6] Adult institutions must also stop cross-gender viewing and monitoring in spaces where inmates are naked, as well as cross-gender invasive searching.[7] Jails and prisons are never allowed to conduct searches for the purpose of determining a person's genital status.[8] Transgender inmates must be permitted to shower privately.[9]

[3] 28 C.F.R. § 115.61.
[4] 28 C.F.R. §§ 115.41-43.
[5] 28 C.F.R. § 115.41-42.
[6] 28 C.F.R. §§ 115.13.
[7] 28 C.F.R. § 115.15.
[8] *Id.*
[9] 28 C.F.R. § 115.42.

None of these requirements are currently addressed in the proposed regulations about classification or safety. Further, the regulations fail to provide sufficient clarity to institutions regarding important areas of law. We explain in detail below.

1. Definitions Should be Added to the Regulations

PREA requires consideration of various forms of vulnerability to assess housing classification, including whether someone is transgender, gender nonconforming, or intersex. The proposed regulations are currently silent on this requirement, failing to give local institutions the necessary guidance to comply with this mandate of federal law. The proposed regulations should be amended to clearly state this and to define these terms in the classification regulation.

We propose the following definitions: 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."[10] Gender nonconforming means "a person whose appearance or manner does not conform to traditional societal gender expectations."[11] Intersex means "a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female."[12] Gender expression and gender identity should also be defined for the benefit of classification officers. Gender expression means "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[13] Gender expression is an entirely different thing than a person's gender identity. A person's gender identity is an individual's internal, personal sense of their own gender (e.g. male, female, both or neither), which may or may not be associated with a person's assigned sex at birth.

2. The Regulations Should be Amended to be Consistent with PREA's Requirements Regarding Staffing Levels, Video Monitoring and Safety Plans

The proposed amendments to 15 CCR §§1027 and 1027.5 change the state regulations concerning staffing levels and security checks, but do not reflect PREA's staffing, video monitoring, and safety plan requirements. Indeed, the Administrative Working Group (AWG) considered but rejected a recommendation to include language informing counties of their obligation to provide a sufficient number of personnel required to ensure compliance with PREA. (AWG Draft at 34.) The proposed regulations should be amended to ensure local agencies responsible for operating adult institutions comply with staffing, video monitoring and safety plan requirements in PREA. The California regulations should specifically state that each institution is required to develop a plan that establishes sufficient staffing, rounds, and video monitoring and that takes into consideration the eleven criteria specified in the federal regulations.[14] California's regulations should also require documenting and justifying any

[10] 28 C.F.R. § 115.5.
[11] *Id.*
[12] *Id.*
[13] Cal. Penal Code § 422.56(c).
[14] 28 C.F.R. 115.13

deviations from the plan, and getting rid of physical spaces that might invite attacks. Further, California's regulations should state that these plans must be reassessed by the local agency, in consultation with the PREA coordinator for the institution, on at least an annual basis, as required under federal law. Finally, California's regulations should state that each local agency must also have a policy of unannounced visits to each institution by supervisory staff, during both the day and night shifts, to deter sexual abuse and misconduct, again as required by federal law.[15]

3. The Regulations Should be Amended to Prohibit Cross-Gender Viewing and Searching, as Required by PREA

The proposed revisions fail to address PREA requirements to protect transgender people, and others, from risk of abuse by limiting cross-gender viewing and invasive searching.[16] This is an area in which local facilities would benefit from greater clarity and guidance in the state regulations. We receive frequent questions from county jails and other law enforcement agencies about how to apply the federal rules on cross-gender viewing/searching to transgender inmates.

Title 15 should be amended to state that: (1) transgender inmates will be asked to indicate their preference with respect to the gender of the officer searching them; (2) the person conducting the search and the transgender inmate will both be of the same gender identity unless the transgender inmate has indicated a different preference; (3) searches will not be done for the purpose of observing the person's genitalia.

Note that under California law, sex and gender mean the same thing and both are defined to include a person's gender identity. (Cal. Penal Code §422.56: "'Gender' means sex, and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."; see also Cal. Penal Code §422.57 (applying the definition of "sex" from Section 422.56 to the entire Penal Code)). Thus, when assessing compliance with cross-gender search rules, it is a person's gender identity and not anatomy that governs.

4. Transgender Shower Requirements

The proposed revisions fail to address PREA requirements that transgender people must be permitted to shower separately.[17] Title 15 should be amended to specifically include this requirement.

[15] 28 C.F.R. § 115.13.
[16] 28 C.F.R. § 115.15.
[17] 28 C.F.R. § 115.15.

5. Regulations Should be Amended to Incorporate PREA's Restrictions on Prolonged or Unsubstantiated Isolation and Programming Deprivations

PREA provides that prisoners cannot be placed in segregated housing against their will unless there has been an individualized assessment of all available alternatives and there are no available alternatives.[18] No one should be involuntarily placed in segregated housing solely on the basis of their gender identity.[19] If an involuntary segregated housing assignment is made, the reason must be clearly documented and it must be regularly reviewed.[20] When people are placed in segregated protective units, jails have to ensure they are given access to programs, privileges, education, and work opportunities to the greatest extent possible.[21]

The Classification Work Group has proposed amending 15 CCR §1053, concerning administrative segregation and programming access for those who jeopardize the safety and security of the facility or other inmates. (CWG at 10.) But the Classification Work Group has not addressed PREA's rules about segregation and the limits on segregation for people placed there for their own protection. The failure of the proposed regulations to address this distinct population may lead local facilities to conclude that no additional protections or measures are needed. This is inconsistent with the requirements of federal law.

Similarly, the Programs and Services Work Group, proposes amending 15 CCR §1061, concerning facility's inmate education plans. (PSWG at 5.) Unfortunately, these proposed amendments fail to address and incorporate PREA's requirements concerning the efforts jails and prisons must make to ensure those held in segregated custody for their own protection are not deprived of programming and work opportunities or other privileges, as required by 28 CFR § 115.43. The regulations should be amended to include these legal requirements.

6. The Regulations Should be Amended to Incorporate PREA's Discipline and Accountability Requirements

Under PREA, adult institutions must have a zero tolerance policy toward sexual abuse, harassment and assault.[22] PREA requires a real investigation, accountability, and reporting of sexual assault incidents. There must be clear mechanisms to report sexual assault and those who report must be protected from retaliation.[23] Real investigations must happen, with uniform

[18] 28 C.F.R. § 115.43.
[19] 28 C.F.R. § 115.42.
[20] *Id.*
[21] 28 C.F.R. § 115.43.
[22] 28 C.F.R. § 115.11.6
[23] 28 C.F.R. §§ 115.51, 115.67, 115.78, 115.82(d); see also Cal. Penal Code § 2637(a).

protocols, and evidence preserved.[24] Inmates who engage in inmate-on-inmate sexual abuse must face serious consequences.[25] The same is true of staff, contractors, and volunteers.[26]

None of these requirements are addressed in the proposed revisions to Title 15. The regulations should be amended to include these legal requirements.

7. The Regulations Should be Amended to Incorporate PREA's Medical and Mental Health Requirements

PREA requires that, when sexual assaults do occur, jails and prisons must provide people with appropriate medical and mental health services, confidentially, and at no cost, in a manner consistent with the level of care in the community.[27] This means people must get urgent trauma care, which includes treatment of injuries, STI testing, post-exposure prophylaxis, and, for those who need it, emergency contraception and pregnancy testing.[28] Prompt forensic exams must also be provided to incarcerated people who want them, in order to preserve evidence for a possible prosecution.[29] Adult institutions have to provide people with access to outside victim advocates and rape crisis organizations and, upon release, must connect them to relevant mental health and social services.[30] Jails and prisons must also have screening in place to identify people who have experienced sexual victimization, whether in the institutional setting or in the community, in order to ensure they receive follow-up screenings and care they need.[31]

The proposed revisions have not incorporated these legal requirements. For example, §1206, concerning the Health Care Procedures Manual, and §1208, concerning Access to Treatment, should be amended to require policies and procedures that implement PREA's medical, mental health and forensic exam requirements; §1206.5, concerning Management of Communicable Diseases in Custody Settings, should be amended to require plans for ensuring victims of sexual assault receive post-exposure prophylaxis; §1207, concerning Medical Receiving Screening, should be amended to reference PREA's requirements that inmates be screed for prior sexual victimization to ensure those victimized are offered follow-up meeting and care; and §1209 should be amended to reference policies and procedures needed to ensure access to outside advocates and rape crisis centers.

[24] 28 C.F.R. § 115.21(c), 22.
[25] 28 C.F.R. § 115.78.
[26] 28 C.F.R. § 115.76.
[27] 28 C.F.R 115.82(a)-(b), (d); 28 C.F.R 115.83(a)-(c).
[28] 28 C.F.R. § 115.82(c); 28 C.F.R. § 115.83(d)-(f).
[29] 28 C.F.R. § 115.21.
[30] *Id.*
[31] 28 C.F.R. §§ 115.81, 83.

8. The Regulations Should be Amended to Incorporate PREA's Inmate Education Requirements

PREA requires that inmates at intake 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. [32] Within 30 days of intake, jails and prisons must provide inmates with comprehensive education about their right 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.[33] Facilities must also make key information continuously and readily available or visible.

None of these requirements are reflected in the proposed draft amendments.[34] At a minimum, §1069, the Inmate Orientation regulation, should be amended to require discussion of inmate's rights under PREA and how to make PREA complaints.

II. Treatment of Pregnant Inmates

In 2005, Section 6030 of the Penal Code was amended to require the BSCC to adopt standards for local correctional facilities including the requirement that inmates who are pregnant be provided prenatal and postpartum information and health care. (AB 478 – Chap. 608, Stats. of 2005.) Eleven years later, there are still no such regulations in Title 15 that establish specific standards pertaining to women in county jails. Title 15 § 1206(f) merely states that local jails must set forth policies and procedures regarding care for pregnant and lactating women "in conformance with applicable state and federal law." The state regulatory code, however, does contains a number of such provisions regarding women in state prisons (located in Cal. Code Regs., Title 15 § 3355.2). We strongly recommend that the BSCC make the provisions "Treatment of Pregnant Inmates," found in Cal. Code Regs., Title 15 § 3355.2(a)-(l), applicable to women incarcerated in county facilities.

Section 3355.2 includes specific provisions for pregnancy care, including timing, frequency, and required components of prenatal care, and various accommodations necessitated by pregnancy. We have heard from many women incarcerated in county jails throughout the state that their prenatal and/ or postpartum health care is not provided 1) in a timely manner, 2) with enough frequency, and 3) in a comprehensive manner. We have also heard from women in county facilities that pregnancy accommodations (such as lower bunks and lower tier housing assignments) are often delayed or not provided at all. And finally, we have heard from women in county facilities that they would benefit greatly from being allowed a support person during labor and delivery (§ 3355.2(k)).

[32] 28 C.F.R. § 115.33.
[33] *Id.*
[34] *Id.*

Thus, applying the protective provisions of § 3355.2(a)-(l) to women in county facilities is common sense. Because the affected populations share many of the same demographics and medical needs, both county jails and state prisons should afford pregnant and postpartum the same care and protections.

Finally, we also recommend that the BSCC include a requirement that postpartum women be given lactation accommodation (specifically - being provided a breastpump and instructions, and the ability to store milk for pick-up and delivery to the child). One of the major issues we have seen in county facilities is the lack of awareness that postpartum women need to express breastmilk. We have seen family crises affecting both incarcerated mother and her baby when facilities do not provide lactation accommodation, and therefore strongly suggest clearer guidance on this point.

Conclusion

We urge that these proposed revisions to Title 15 be amended to make the regulations fully consistent with the minimum requirements of PREA, and to include regulations requiring women in county jails to receive the same prenatal and postpartum care as women in state prison.

Respectfully,

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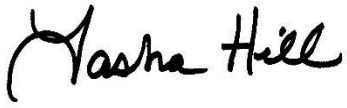

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Public Comment Letter
Legal Services for Prisoners With Children

September 12, 2016

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RE: Sections to 1058.5 & 1122.5 of Title 15 "Minimum Standards for Local Detention Facilities" Lacks the Clarity Necessary to Protect Pregnant Women

Dear Ms. Wolfe:

Legal Services for Prisoners with Children (LSPC) writes to request greater clarity on sections 1058.5 and 1122.5 of the Minimum Standards for County Jails. These sections concern the shackling of pregnant, incarcerated women (adults as well as minors).

Founded in 1978, LSPC has a long history of advocating for the civil and human rights of people in prison, their loved ones, and the broader community. LSPC has years of experience working with families separated by incarceration, and with individuals who have suffered the injustices and indignities of the criminal legal system in California. LSPC has been advocating for the removal of shackles from pregnant, incarcerated women since 2005.

When California Penal Code §3407 (§3407) was adopted in 2013 a victory was won in the fight for the safety, rights, and dignity of incarcerated women. In order to ensure that this policy was being translated into practice, LSPC conducted research and released a report entitled, "No More Shackles." This report found that 34 of California's 58 counties were not in compliance with the statute prohibiting the use of waist, wrist, and leg shackles on pregnant women within correctional facilities. Dr. Gail Newel, MD, MPH, co-chair of the American Congress of Obstetricians and Gynecologists in District 9, stated that, "[t]his report shows progress towards implementation but clearly more needs to be done, and should be done now, to prevent often irreversible harm." The B.S.C.C.'s movement and leadership in promulgating these regulations is important; equally important is that the regulations provide enough clarity that county sheriffs will follow the law and the best practices as described in "No More Shackles."

Merely repeating the exact text of §3407 is duplicative and will not adequately protect pregnant women.

The language used in §3407, which was copied exactly to create §1058.5 and §1122.5 of Title 15, fails to clarify the implementation of the law as it is merely a repetition of the same exact language. If creating law that said exactly what §3407 already says

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were enough, then all 58 California Counties would have been in compliance, and this regulation would not be necessary. However, we know that a regulation clarifying §3407 is necessary because so many sheriffs were in violation of it. Instead of repeating the language of §3407, the BSCC should write a real regulation which clarifies the legal requirements of county sheriffs. The following paragraphs provide some examples of ways that the regulation can be enhanced to clarify each County's duties under §3407.

1. **Protect women who are known to be pregnant or have given notice of pregnancy.**

Under the changes to the minimum standards, the women must be "known" to be pregnant to qualify for this treatment. In this context, "known" is vague and will not adequately protect women. In order to fully protect the health and safety of both the woman and the fetus, it is imperative that jail staff extend this treatment to all women who are known to be pregnant, who reasonably appear to be pregnant, and who inform staff that they are pregnant. This simple change will cover more women who are, in fact, pregnant.

2. **Clarify that notice should ideally be provided in writing and verbally.**

For the protection of pregnant women, and to shield sheriffs from liability for failing to implement this policy, notice should generally be given in writing, and should be permanently posted in areas that pregnant women are likely to see it (e.g., in visiting areas, in medical facilities, and by phones). Written notices should be published in English, Spanish and any other languages commonly spoken and read in the facility. Notice should also be given verbally to all women who are incarcerated at the facility. This will allow pregnant women to see and reread the information, share it with their health providers, and allow women who may not be able to read to have notice of the law.This will better implement the law as the Legislature intended. Additionally, it will protect the county from liability by creating a paper trail that can be used to prove that notice was given. Of course, if there is a reason why written notice cannot be given, verbal communication of the woman's rights is still available.

3. **Clarify that the safety and security exceptions are only to be used in exceptional circumstances.**

A blanket statement about a safety and security exception could swallow the rule against shackling of pregnant women unless more clarity is provided. These regulations should clarify that there must be an additional and individual determination that there is a safety and security necessity requiring shackling rather than the general rule. The underlying incarcerating conviction cannot be enough to justify requiring shackles, or the entire law would be rendered toothless. Under the regulations as proposed, the jail may use shackles on a pregnant woman if it is deemed necessary for the "safety and security of the mother, the staff, or the public. The terms "safety and security" are overly broad terms that can be easily manipulated to justify the use of shackles on pregnant women at nearly any time under nearly any circumstance, including while in labor. Moreover, we recommend that the terms "safety and security" be replaced an "extremely abnormal situation that resulted in the need for additional restraint."

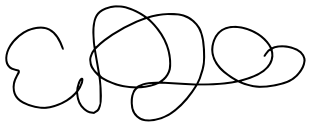
4. **Shackles should be removed as soon as possible, and at the latest, when medically obliged.**

These proposed regulations include removal in case of a medical emergency, which should be unnecessary in the vast majority of situations because pregnant, incarcerated women should generally not be shackled. The removal regulations should specify that shackles should be removed as soon as they are not necessary

for the exceptional risk to safety and security of the mother, staff of public, regardless of a medical emergency.

Additionally, the terms “medical emergency” and “medically necessary” are vague terms that seem to limit a woman’s release from the use of restraints to dire situations. Child birth is a traumatic experience for a significant percentage of women. Jail staff, with the exception of medical personnel, does not have the skill or training to determine when an incarcerated person is in a medical emergency. The goal of the legislation is to protect the health and safety of incarcerated, pregnant women and their fetuses, therefore the regulations should reflect the intent to error on the side of health and safety for the woman and fetus.

Sincerely,



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Attachment L-2

Public Comment Letter
Prison Law Office

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September 12, 2016

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Dear Ms. Wolfe,

The Prison Law Office submits the following comments on the proposed amendments to the Minimum Standards for the Local Detention Facilities, Title 15, Division 1, Chapter 1, Subchapter 4, California Code of Regulations. Our comments address compliance with the federal Prison Rape Elimination Act of 2003 (PREA)[1].

Adopting the proposed regulations would be a violation of the Administrative Procedures Act.
All local correctional facilities are required to comply with PREA. The DOJ promulgated regulations that are binding on every detention facility in the country, including local jails and juvenile facilities.[2] The proposed amendments to the minimum standards in Title 15 fail to incorporate the duties federally mandated by PREA. The California Administrative Procedures Act requires proposed regulations to be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."[3] Adopting regulations that fall below the minimum standards established by PREA would, thus, violate the California Administrative Procedures Act.

Role of BSCC and Loss of Federal Funding
The BSCC "promulgates regulations for adult and juvenile detention facilities, conducts regular inspections of those facilities … and administers significant public safety-related grant funding."[4] The BSCC is "the administering agency for a host of federal and state public safety grants".[5]

As the state regulatory agency that establishes the minimum standards for local facilities, including county jails, and inspects those facilities for compliance, the BSCC, for purposes of PREA is the "organization responsible for the accreditation" of jails in California. Failure to adopt standards that meet or exceed those set in PREA will make the BSCC ineligible for any new Federal grants until those standards are adopted.[6]

[1] 42 U.S.C. §§ 15601-15609.
[2] 42 U.S.C. § 15609(7), 28 C.F.R. §§ 115.11-115.93, 115.311-115.393.
[3] Gov. Code § 11349(d).
[4] http://bscc.ca.gov/m_bsccboard.php
[5] http://bscc.ca.gov/m_bsccboard.php
[6] 42 U.S.C. § 15608.

Role of BSCC and Liability
One of the central roles of the BSCC is that it "provides leadership to the adult and juvenile criminal justice systems".[7] Sheriff's Departments and Probation Departments across the state are left without guidance from the BSCC about what their obligations are and how to comply with PREA. We have heard from local partners that they have been told by BSCC staff that BSCC is not providing guidance or monitoring PREA compliance in any way. This means counties are left on their own to figure out how to become compliant and schedule PREA audits, ignored by the state agency responsible for establishing and enforcing minimum standards.

By failing to incorporate PREA into the minimum standards in Title 15 and conducting biennial inspections of local facilities for compliance with standards that fall below the PREA requirements, the BSCC is failing its local partners and leaving them susceptible to litigation. A facility's policies or practices that fall below the standards set forth in PREA are evidence of "deliberate indifference". Since PREA was signed into law in 2003 and the DOJ has promulgated regulations, all county correctional agencies and staff have been on notice of the particular vulnerability of LGBTI people in their facilities and the minimum standards that need to be adopted to minimize harm to this vulnerable population of incarcerated people.

Failure to adopt policies that are PREA compliant is also evidence that a facility's policies and procedures constitute a substantial departure from the accepted standards of conditions of confinement. The PREA standards were developed by a broad coalition of supporters from across the political spectrum, passed with bipartisan support, and signed into law by a Republican president. These standards are the minimum and to the extent that the minimum standards set forth in Title 15 fall below the PREA standards, they represent a departure from the accepted standards of conditions of confinement.

Conclusion
We urge the BSCC to establish minimum standards that rise to the level set by PREA. Adopting standards below this threshold will violate the Administrative Procedures Act and leave counties susceptible to a loss in federal funding and liability.

Please do not hesitate to contact us if you have any questions. Thank you.

Sincerely,

p.p. Don Specter
Director

Lynn Wu
Staff Attorney, Juvenile Justice Policy and Projects Manager

cc: Kathleen Howard, Executive Director, BSCC
BSCC Board Members
Aaron Maguire, General Counsel, BSCC

[7] http://bscc.ca.gov/m_bsccboard.php

Board Agenda Item L
Attachment L-2

Public Hearing Minutes
Thursday, September 15, 2016

BOARD OF STATE AND COMMUNITY CORRECTIONS
TITLE 15 DIVISION 1, CHAPTER 1, SUBCHAPTER 4
MINIMUM STANDARDS FOR LOCAL DETENTION FACILITIES

PUBLIC HEARING MINUTES

Thursday, September 15, 2016
Meeting held at: BSCC Training Room
2590 Venture Oaks Way, Room 103, Sacramento, CA 95833

I. CALL TO ORDER:

The meeting commenced at 10:03 a.m.

Deputy Director Allison Ganter welcomed the public to the Public Hearing on the proposed rulemaking action for Title 15, Division 1, Chapter 1, Subchapter 4, Minimum Standards for Local Detention Facilities, on September 15, 2016 at the Board of State and Community Corrections (BSCC) offices, 2590 Venture Oaks Way, Room 103, Sacramento, CA 95833.

II. PUBLIC COMMENTS:

1. Lynn Wu, Staff Attorney, Juvenile Justice Policy and Projects Manager

As we have previously discussed, I have submitted extensive written comments so I will keep this short. Our main concern from the Prison Law Office's perspective is that adopting these regulations without consideration of the Prison Rape Elimination Act (PREA) would violate Administrative Procedures Act (APA) and also subjects the counties, for which BSCC is to provide guidance, to potential liability around not complying with PREA. PREA was passed in 2003 and the regulations have been out. There are counties that are on their own trying to comply with PREA and we have heard from counties that we work with that they really look to the BSCC, and to the state, for guidance and that they are not receiving that. And they in some cases have expressly been told that BSCC is not going to monitor or provide guidance for that. I think that is contradictory to the role and the mission of BSCC, as stated on your own website. Not only is it a violation of the APA but also that counties are really looking to the BSCC for guidance and that this is an opportunity to make sure that the state agency is really supporting the counties in achieving compliance with this law to avoid loss of federal funding. I know these regulations are for the adult facilities but the juvenile facilities obviously get a lot of federal funding and I think that could be extremely detrimental if they're facing that loss of federal funding.

2. Steven Meinrath, Advocate, American Civil Liberties Union of California

We have submitted lengthy written comments and at the risk of sounding repetitive of the prison law office we are making essentially the same points that the federal law establishes minimum standards for county jails. Specifically under the PREA of 2003, minimum standards were set for every detention facility in the county. Under the APA, proposed regulations must be in harmony with federal law, so where the federal law has set a floor of minimum standards, California is not free to go below those standards. We believe that the proposed amendments to Tile 15 do not adhere to the federal minimum requirements, and therefore we believe they are in violation of the APA as well as in violation of federal law. We have given several specific examples of where we believe the regulations can be changed. We have made specific recommendations for amendments. We raised this issue at the Board meeting, the last BSCC Board meeting, and the issue came up of the non-duplication standard of the APA. We believe that this is not a reason why federal law should not be complied with. We believe that non-duplication as an APA standard was intended to address perhaps a lazy administrator who is cutting and pasting the language of a state statute into regulation and its unnecessary and duplicative, and pads the code with excess verbiage. This is not at all the situation that we have here, in fact we believe that the APA requires that California regulations comport with federal law, so we believe that it is actually required that our regulations in some way, shape, or form meet the federal standards. We have made several specific recommendations on how that can be done. I won't read the entire letter because you already have it, but we do appreciate this chance to come in and underscore the point and we thank you for your consideration.

May I add one more comment that I neglected to mention, this addresses the issue of the treatment of pregnant inmates, in 2005, Penal Code Section 6030 was amended to specifically require BSCC to adopt standards for local correctional facilities including the requirement that inmates who are pregnant be provided with prenatal and postpartum information and healthcare, and that hasn't been done. The extent to which that has been complied with is simply that BSCC has adopted a regulation that says that local jails must set forth policies and procedures regarding healthcare, but it doesn't say what these policies and procedures are. We think there is an excellent model which is CDCR's regulations which is also part of title 15. Section 3355.2 specifies very specific procedures and provisions for pregnancy care including timing frequency in required components of prenatal care and various accommodations necessitated by pregnancy. We think it's obviously very doable because CDCR is already doing it and we think this is long overdue to apply these to the local level also as required by the penal code. That's the end of my comments.

VI. CLOSED SESSION

Seeing that there were no further persons who wished to comment the public hearing was closed at 10:18.

ROSTER OF PERSONS IN ATTENDANCE

Public Members

Ms. Lynn Wu, Staff Attorney, Juvenile Justice Policy and Projects Manager
Mr. Steven Meinrath, Advocate, American Civil Liberties Union of California

BSCC Staff

Allison Ganter, Deputy Director, Facilities Standards and Operations (FSO)
Ginger Wolfe, Associate Governmental Program Analyst, Facilities Standards and Operations (FSO)