AMERICAN CIVIL LIBERTIES UNION of NORTH CAROLINA FOUNDATION

P.O. Box 28004 • Raleigh, North Carolina 27611-8004
Phone (919) 834-3390 • Fax (866) 511-1344
www.acluofnc.org

April 1, 2014

VIA ELECTRONIC AND FIRST CLASS MAIL

Dear Sheriff XXX:

We are writing in regards to your response to our public records request dated January 16, 2014. Your response indicates you have made no efforts to come into compliance with the Prison Rape Elimination Act (PREA). It is deeply troubling that your facility is making no efforts to comply with PREA given that this law is intended to realize the laudable goal of preventing sexual assault in jails and make reporting of assault easier for detainees.

As you are likely aware, Congress acted in 2003 to address sexual assault in prisons and jails, which it described as having an "epidemic character" that the public and government was "largely unaware of," by adopting PREA. Through PREA, the National Prison Rape Elimination Commission was established to recommend "national standards for enhancing the detection, prevention, reduction and punishment of prison rape."[1] Final rules were adopted and signed by the Attorney General in May of 2012 and apply to "any confinement facility of a Federal, State, or local government," including "any local jail or police lockup."[2] The rules clearly outline the obligations of adult prisons and jails.[3] Given that the standards laid out in the PREA regulation are now the national standard, should an incident occur in a jail not in compliance, that facility is very likely to be found civilly liable and could face astronomical legal fees and civil settlements due to the decision not to comply.

In addition to being the national standard of care for prisoners, State and Federal facilities contracting with other entities, "including other government agencies, shall include in any new contract or *contract renewal* the entity's obligation to adopt and comply with the PREA standards."[4] Not only does your decision not to comply flaunt federal law, it also puts at risk any contracts you may wish to have or to renew with federal or state agencies to hold detainees. For example, if your facility holds misdemeanants for the State as part of the Statewide Misdemeanant Confinement Program, the State must require your compliance with PREA or risk falling out of compliance itself.[5] Additionally, any county that contracts with U.S. Immigration and Customs Enforcement (ICE) for the confinement of ICE detainees will be required to come into compliance by their contract with ICE or risk losing those contracts.

As you are no doubt aware, in North Carolina, special attention must be paid to how youthful offenders are housed in jails because 16 and 17 year olds are still treated as adults for purposes of charging and trying these offenders. This is especially true under the PREA regulations where a youthful offender is defined in PREA as any detainee under the age of 18. PREA requires at a minimum that policies addressing the holding of youthful offenders in

[1] 42 U.S.C. 15601(12), 15606 (d)(1).
[2] 42 U.S.C 15609(7).
[3] 28 C.F.R. 1 § 115.11-114.21.
[4] 28 C.F.R. 1§ 115.12 (2012).
[5] *See* Jamie Markham, *Does the Prison Rape Elimination Act Apply to Local Jails?,* UNC School of Government Blog, June 17, 2013, available at http://nccriminallaw.sog.unc.edu/?p=4314.

confinement facilities include:

1. A requirement that youthful inmates under the age of 18 be housed in units where no contact will occur with adult inmates in a "common space, shower area, or sleeping quarters."[6] Additionally, when youthful inmates are outside of the housing units, they must either be completely sight and sound separated from adult inmates at all times or there must be "direct staff supervision."[7]
2. Agencies such as jails are discouraged from using isolation to comply with this provision with PREA regulations directing agencies to "make their best efforts to avoid placing youthful inmates in isolation to comply."[8]
3. Strict regulation of the use of protective custody, directing that prisoners cannot be placed in 'involuntary segregated housing' unless:
   (a) an assessment of all available alternatives is made AND
   (b) a determination has been made that no available alternative means of separation is available (and this determination must be made within the first 24 hours of involuntary segregation).[9]
4. The agency has an affirmative obligation to ensure that prisoners in segregated protective units are still given access to "programs, privileges, education, and work opportunities to the extent possible."[10]
5. Absent exigent circumstances, facilities must offer youth the opportunity to participate in daily large-muscle exercise and any legally required special educations services.[11] The North Carolina Constitution is unique in its guaranteed "right to the privilege of education."[12] Young people, including youthful inmates, are therefore legally entitled to basic educational services even while incarcerated. Absent exigent circumstances, the facility is responsible for providing access to these services to the extent possible.

While we understand that you are in the best position to assess the resources and needs of your facility and how you may most easily come in to compliance with PREA, we wanted to stress again that PREA compliance is not optional and failure to implement the changes required by PREA puts your facility at risk. Should you need additional information about how your facility could come in to compliance, the PREA Resource Center, available online at www.prearesourcecenter.org, has a great deal of information and recommendations to help facilities to come in to compliance. Additionally, we would direct your attention to HB 725 Young Offenders Rehabilitation Act which is pending in the North Carolina General Assembly.[13] Should HB 725 be adopted, it would relieve much of the pressure put on jails to accommodate youthful offenders by PREA by removing the vast majority of these offenders to juvenile justice facilities.[14]

Please advise us on how you plan to come into compliance by April 30, 2014. We would be happy to continue this dialogue with you and to review any policies you are considering. Please do not hesitate to contact us if you have any further questions, or would like to discuss

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[6] 28 C.F.R. § 115.14(a).
[7] *Id* at § 115.14(b).
[8] *Id* at §115.14(c).
[9] *Id* at § 115.43 (a).
[10] *Id* at § 115.43 (b).
[11] *Id* at §115.14(c).
[12] N.C. CONST. art. I, § 15.
[13] http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=hb+725&submitButton=Go.
[14] The bill would remove most juveniles accused of misdemeanors from the adult system so that any period of detainment for these offenders would be handled by the Division of Juvenile Justice instead of adult facilities like jails. That would relieve Sheriffs of responsibility for most of these juvenile offenders according to statistics from the NC Sentencing and Policy Advisory Committee which found 79% of 16 and 17 year old convictions in fiscal year 2012-13 to be for misdemeanors.

possible policies or recommendations further.

Best regards,

Sarah Preston
Policy Director

Christopher Brook
Legal Director