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Brenda V. Smith

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Protecting Juveniles in Adult Facilities from Sexual Abuse: Best Practices for Implementing the Youthful Inmate Standard

Introduction

Housing youth who are prosecuted and convicted as adults in adult facilities is challenging and creates significant dilemmas for correctional agencies.¹ In particular, should such “youthful inmates” be treated as part of the regular adult population or should these youth be housed in facilities still under the purview of the adult corrections agency but in facilities designated for youth?² More narrowly, should youthful inmates who remain in an adult facility be held in separate housing blocks? Or, should youthful inmates in adult correctional facilities be housed in protective custody or solitary confinement for their protection?³ How should agencies provide required services for

¹ “Youth” for the purposes of this publication is defined as individuals under the age of 18.

² See CAMPAIGN FOR YOUTH JUSTICE, *Key Facts: Children in Adult Jails & Prisons* <http://www.campaignforyouthjustice.org/documents/KeyFactsonYouthinAdultJailsandPrisons.pdf>.

³ See Barack Obama, *Barack Obama: Why We Must Rethink Solitary Confinement*, THE WASHINGTON POST (January 25, 2016).



youthful inmates—education, recreation, program access, visitation, and medical treatment?⁴ What must agencies share publicly and privately if youth are harmed in custody—is a mandatory report required?⁵ In order to obtain medical treatment, participate in interviews—is parental consent required,⁶ or does conviction in adult criminal court and imprisonment in an adult facility automatically emancipate youth?⁷ Or would youthful inmates be best served in juvenile-only facilities until they reach age 21, or even until the age of 25, as is policy in a number of states?⁸

Agencies and facilities have grappled with these issues for decades and have come to different conclusions and solutions. These solutions and conclusions have often been the result of advocacy or litigation on behalf of vulnerable youth in adult prisons and jails. During hearings on the sexual assault of individuals in custody, in the resulting

https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl.

⁴ Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, PRINCETON, THE FUTURE OF CHILDREN, https://www.princeton.edu/futureofchildren/publications/docs/18_02_09.pdf.

⁵ See, e.g., WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES, MANDATORY REPORTERS <http://www.dcf.wisconsin.gov/children/CPS/progserv/manrpts.HTM>.

⁶ See generally, Lourdes M. Rosando, *Consent to Treatment and Confidentiality Provisions Affecting Minors in Pennsylvania*, (January 2006). http://www.jlc.org/sites/default/files/publication_pdfs/consent2ndedition.pdf.

⁷ Cornell University Law School, Legal Information Institute, *Emancipation of Minors*, https://www.law.cornell.edu/wex/emancipation_of_minors.

⁸ California, Oregon and Wisconsin are three examples of States with laws that allow youth to remain in juvenile correctional facilities until age 25. See also THE DEPARTMENT OF HEALTH, HEALTH INSURANCE COVERAGE FOR FAMILIES, <https://www.healthcare.gov/young-adults/children-under-26/> (detailing that individuals under 26 are still treated as children for the purposes of health coverage in family insurance plan).



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legislation, the Prison Rape Elimination Act (PREA), and in the report of the National Prison Rape Elimination Commission (NPREC), correctional officials, advocates and the formerly incarcerated consistently identified youth housed in adult facilities as vulnerable to physical and sexual abuse.⁹ As a result, the final rules promulgated by the U.S. Department of Justice (DOJ) and applicable to all facilities in the United States significantly restricts and discourages housing anyone under the age of eighteen with those over the eighteen. These restrictions are applicable even when State law explicitly requires the automatic prosecution in adult court of individuals at age 16 and 17, resulting in a presumption of detention in an adult facility at arrest and beyond.¹⁰ Additionally, the PREA standards provide strong evidence for the elimination of housing individuals under the age of 18 from those 18 and above.¹¹ In situations, where agencies can demonstrate that they cannot avoid housing youth under 18 with those 18 and above, the PREA rules require that they document and report these incidents.¹²

⁹ NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 19 (2009) [hereinafter NPREC REPORT].

¹⁰ The DOJ promulgated the PREA regulations with full knowledge and awareness of differences in jurisdictions, which allow for the detention of youth under 18 in adult facilities as a matter of state law. The final PREA rules nevertheless require states to do “sight and sound separation of youth in custody who are under 18 from individuals over 18 in order to be deemed compliant with the PREA. *See id.*

¹¹ *Id.*

¹² *Id.* at 221.



This guidance addresses key issues that agencies have faced in their efforts to comply with the Youthful Inmate Standard.¹³ Section I provides background regarding the current system of laws regarding the incarceration of youthful inmates in adult facilities.¹⁴ Many states have engaged in legal reform in order to comply with the Youthful Inmate Standard. Section II describes the vulnerabilities that exist within the current system. Several states have attempted to address those vulnerabilities by changing the way in which they house youth. Section III identifies core features necessary for protecting youth in adult settings. Finally, Section IV details specific promising practices that states have used to protect youth in adult custodial settings and comply with the letter and spirit of PREA.

I. Background

Youth enter the adult criminal justice system because of the porosity between the juvenile system and the adult systems. This porosity occurs in several ways. The first is transfer. Transfer occurs when youth who would normally be held accountable in the juvenile court system are turned over to the adult system for adjudication.¹⁵ In these

¹³ *Id.* at 219. Note that separate guidance on complying with the “youthful detainee” standard is necessary as the issues differ. *See* C.F.R. § 115.5 (2011) (“Youthful detainee means any person under the age of 18 who is under adult court supervision and detained in a lockup.”).

¹⁴ *See* NPREC REPORT, *supra* note 9, at 19; *see also* C.F.R. § 115.5 (2011).

¹⁵ *See, e.g.*, 33 V.S.A. § 5281 et. seq. (Vermont has a youthful offender provision in which the youth pleads to the offense (or a lesser offense if the prosecutor agrees), and then the case is sent to juvenile court for disposition. If the youth successfully completes juvenile probation, the conviction is expunged.). *See also* Md. Crim. Pro. Art. § 4-202.2 (Maryland has a similar provision called “second chance transfer,” which occurs under



situations, the state charges the juvenile as an adult and punishes the juvenile as an adult.¹⁶ Detailed below are brief descriptions of each of these transfer practices.

A. The Mechanisms of Juvenile Transfer to Adult Jurisdiction

There are several routes that youth take that bring them into the juvenile system including: (1) statutory waiver; (2) judicial waiver; (3) mandatory waiver; (4) presumptive waiver; and (5) direct file.¹⁷ In order to implement the Youthful Inmate Standard, jurisdictions have to contend with these laws. Detailed below are brief descriptions of each of these practices.

1. Statutory Waiver

Statutory exclusion or “waiver” refers to a statutory scheme where certain crimes are excluded from the jurisdiction of the juvenile courts. This means that when a juvenile is accused of committing one of those enumerated crimes, he or she is charged as an adult simply because of the nature of the crime he or she is accused of committing. For example in Connecticut, murder is excluded from juvenile court jurisdiction.

conditions mentioned above assuming that the youth pleads to an offense that would not have resulted in adult jurisdiction), but still leaves the transfer of the child up to the judge's discretion.); Ohio Rev. Code § 2152.121 (2012) [parenthetical needed here]; WASH. REV. CODE § 13.40.030(1)(v)(ii) [parenthetical needed here]; NEB. REV. STAT. § 29-2204(5) (2015) (stating that even if the youth remains in adult court, the sentencing judge has the discretion to not impose the penalty provided for the crime, but instead make any disposition as would be available under the juvenile code).

¹⁶ See CAMPAIGN FOR YOUTH JUSTICE, FACT SHEET: TRYING YOUTH AS ADULTS, <http://www.campaignforyouthjustice.org/Downloads/KeyResearch/FactSheetTryingYouthAsAdults.doc>.

¹⁷ See *id.*; PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS, AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2 (2011), <http://www.ojjdp.gov/pubs/tryingjuvasadult/appendix.html>.



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2. Judicial Waiver

Judicial waiver occurs when a juvenile court judge uses her discretion to transfer a juvenile case to adult criminal court jurisdiction. Judicial waiver can be mandatory or presumptive. So, while the case can be prosecuted in juvenile or adult court, the judge can decide where the youth will be prosecuted.

3. Mandatory Judicial Waiver

Mandatory waiver refers to statutes that require transfer to adult criminal court jurisdiction due to the alleged crime and/or age or prior record of the juvenile.

Mandatory waiver differs from statutory exclusion because it requires that a juvenile court judge make an initial determination before transferring the juvenile to adult court.

4. Presumptive Waiver

Presumptive waiver occurs when there is a statute mandating that a juvenile be tried as an adult due to her crime, age or prior juvenile record. Statutes that include this presumption may also include a provision allowing the juvenile to rebut this presumption by arguing that she would be better served by remaining within the juvenile court's jurisdiction.

5. Direct File

Finally, a juvenile can also be tried as an adult at the discretion of the prosecutor. This can happen when a statute provides for "direct file" which means that the statute gives prosecutors the discretion to charge juveniles as adults. Additionally, a prosecutor may have the discretion, depending on the circumstances, to charge the juvenile with an



offense that is statutorily excluded from juvenile court jurisdiction or is subject to a mandatory waiver statute.

In addition to the complexity of these differing state laws that govern transfer processes, each state determines the age for juvenile court jurisdiction. These laws provide another entry point for youth into adult prisons and jails.

B. State Differences in the Age of Juvenile Court Jurisdiction

Many states automatically prosecute 16 and 17 year olds as adults.¹⁸ Yet, the age of majority e.g.—the age to drink, vote, sign contracts, marry, and enter the military, can be considerably older than the age when juvenile court jurisdiction ends.¹⁹ As such, the incongruent result that a youth is in adult custody, but needs parental permission for medical care or to sign releases or other legal documents.²⁰

Creating another level of complexity is the fact that each state has mandatory reporting statutes that require certain public officials—teachers, correctional authorities,

¹⁸ See N.C. GEN. STAT. § 7B-1604 (2012); N.Y. CRIM. PROCEDURE LAW § 1.20 (Consol. 2013); GRIFFIN, *supra* note 25 at 2; THE PROJECT ON ADDRESSING PRISON RAPE, JUVENILES IN ADULT FACILITIES FIFTY STATE SURVEY (forthcoming).

¹⁹ See U.S. CONST. AMEND. XXVI (Setting the U.S. Drinking age at 18); Ala. Code § 16-64-1 (2015) (setting the age of contracting in Alabama at 19); Mo. Ann. Stat. § 451.090 (2011) (setting the age to marry without parental consent in Missouri at 18);

CENTERS FOR DISEASE CONTROL AND PREVENTION, *Fact Sheets Age 21 Minimum Legal Drinking Age* <http://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm>; ARMY ENTRANCE REQUIREMENTS <http://www.goarmy.com/jag/about/requirements.html> (setting the age of eligibility for entrance into the U.S. Army at 18).

²⁰ See BUREAU OF JUSTICE STATISTICS, *National Survey of Youth in Custody* (2012) <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=321#Methodology> (reference the difficulty BJS had getting reliable statistics on victimization of youth in adult settings because of the need to get parental approval in some states for youth to participate).



nurses, and doctors—to report physical and sexual abuse of youth.²¹ These statutes often require mandatory reports until age 21;²² again several years older than the age that youth can be placed in adult prisons. For example, Wisconsin’s mandatory reporting statute requires reporting of abuse even when a youth is in adult custodial settings.²³ There is a penalty when enumerated mandatory reporters fail to make the relevant ordered report.²⁴

Finally, is the issue of housing youth who are charged or prosecuted as adults. Usually, housing is a separate matter from charging and conviction. Often, juveniles charged and convicted as adults will be held pre-trial and post-conviction in adult facilities. Some states, however, have enacted laws that allow youth to remain in juvenile facilities pre-trial.²⁵ Still others permit youth to remain in juvenile facilities post-

²¹ See, e.g., WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES *supra* note 7.

²² *Id.*

²³ MANDATORY REPORTING WIS. STAT. § 48.981 (2014) (“Community placement means . . . any other placement of an adult or juvenile offender in the community under the custody or supervision of the department of corrections, the department of health services, a county department under or any other person under contract with the department of corrections, the department of health services or a county department under to exercise custody or supervision over the offender.”).

²⁴ See ALA. CODE § 38-9-2 (2011).

²⁵ See THE PREA RESOURCE CENTER, FREQUENTLY ASKED QUESTIONS, *Juveniles in a Juvenile Setting Under PREA Standards 115.14*,

<http://www.prearesourcecenter.org/frequently-asked-questions> (“Individuals confined in juvenile facilities are defined as “residents” and may reside in juvenile facilities until the age allowable by state law, which in most states is 21, and in some as high as 25. The PREA standards do not provide for any sight and sound separation of residents in juvenile facilities either because of age or court of conviction. Neither the standard on youthful inmates (115.14) nor the standard for youthful detainees (115.114) is applicable in juvenile facilities. The Youthful Inmate standard requiring separation of those under age 18 from those over 18 is “setting specific,” applicable only in prisons, jails, and lockups. Even where state law provides for automatic prosecution in adult court of



conviction until the age of 21 and sometimes until 25.²⁶ Still others have facilities specifically for youthful offenders,²⁷ and may even allow youth to have reduced sentences even though they were convicted as adults.²⁸

II. Applicable Standards for Housing Youth

While this guidance is focused on the PREA Youthful Inmate Standard, there are other frameworks and standards that may affect how facilities house youth. This chart identifies standards—including the Youthful Inmate standard—that apply to youth who are in custodial settings. There are several applicable standards, both under the PREA and the Juvenile Justice Delinquency and Prevention Act (JJDP), that may apply to youth in custody, depending on where the youth is housed. The PREA standards define a youthful inmate as any person under the age of 18 who is under adult court supervision and incarcerated or detained in a prison or jail.²⁹ A youthful detainee is defined as any person under the age of 18 who is under adult court supervision and detained in lockup.³⁰ A juvenile under the JJDP is a person under the laws of the state in which she is

individuals at age 16 (e.g., NC, NY) and age 17 (e.g., GA, NH, IL, LA, MD, MA, MI, SC, TX, WI) when those persons are detained or confined in an adult prison, jail, or lockup, such individuals must be sight and sound separated from those over the age of 18.”).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See, e.g.,* Youth Rehabilitation Act, 28 C.F.R. § 2.106 (2000).

²⁹ 28 C.F.R. § 115.5.

³⁰ *Id.*



arrested who is to be prosecuted as a delinquent, rather than as an adult.³¹ The JJDPA standards apply to all facilities, juvenile and adult. For example, the law specifically defines “Jail or Lockup for adults” as a temporary locked facility that detains individuals pre and post arrest. Importantly, the JJDPA requires participating states to monitor adult facilities to ensure juveniles are appropriated removed and sight and sound separated when detention does result.

The PREA Youthful Inmate Standards, in essence, extends the JJDPA Jail Removal requirement to include an age standard. Thus, while the JJDPA protects youth charged in juvenile court, the PREA adds additional protections to youth under eighteen who may as a matter of state law be automatically charged, detained and subsequently prosecuted in the adult criminal justice system.

Both the JJDPA and PREA condition receipt of DOJ funds on compliance with the respective standards.³² This chart categorizes the different standards based on who they apply to—juveniles under the JJDPA, youthful inmates or youthful detainees under PREA.

³¹ See The Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601 *et. seq.* (2012).

³² See *id.*; The Prison Rape Elimination Act, 42 U.S.C. § 15607 (2012).



Standard	JJDPA	Youthful Inmate	Youthful Detainee
Sight and Sound Separation ³³	×	×	×
Deinstitutionalization of Status Offenders ³⁴	×		
Disproportionate Minority Contact ³⁵	×		
Jail Removal ³⁶	×		
Access to Programs and Work Opportunities, Exercise, and Special Education Services ³⁷		×	×
Avoid Placing Youth in Isolation ³⁸		×	×
Direct Supervision When Youthful Inmates and Adult		×	×

³³ The “Sight and Sound Separation” standards of the JJDPs requires that any juvenile or youthful inmate who is housed in the same facility as an adult must be separated from adult inmates by “sight and sound” in housing units. This standard is included in both the JJDPa and the PREA standards covering youthful inmates and detainees. See The Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601 *et. seq.* (2012); National Standards to Prevent, Detect, and Respond to Prison Rape, 28 C.F.R. § 115.14(a) (2012).

³⁴ This standard is found in the JJDPa and is widely enacted in state codes; it requires that juveniles who are status and/or non-offenders not be detained or confined in any detention and/or correctional facility. 42 U.S.C. § 5601 *et. seq.*

³⁵ The JJDPa also requires states to address the issue of the overrepresentation of youth of color in the justice system. *Id.*

³⁶ The “Jail Removal” requirement of the JJDPa requires that juveniles not be placed in adult jails or lockups. Minimal exceptions generally allow for alleged delinquents—never alleged or adjudicated status/non-offenders—to be held in adult facilities for very short periods of time (i.e. 6 hours) while awaiting processing, transfer to juvenile facility, or waiting to make a court appearance. *Id.*

³⁷ The PREA standards require that facilities comply with the standards in a way that still provides youthful inmates with access to programs, work opportunities and education services. 28 C.F.R. § 115.14(c).

³⁸ Facilities should not resort to isolating youth in order to comply with the sight and sound separation standards of PREA. *Id.*



Standard	JJDPA	Youthful Inmate	Youthful Detainee
Inmates Have Contact ³⁹			

III. Problems with the Current System

There is a long history of vulnerability of youth housed with adults.⁴⁰ Those risks are well documented and include the potential of physical and sexual abuse and exploitation by older inmates and staff.⁴¹ PREA made specific findings about the vulnerability of youth when housed with adults.⁴² Congress found that “[j]uveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.” And NPREC stated in its final report that “[m]ore than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse.”⁴³

A. The Risk of Sexual Abuse

Youth are particularly vulnerable to abuse in all custodial settings—both juvenile and adult.⁴⁴ One of the key features of PREA was its requirement that the Bureau of

³⁹ When youthful inmates do have sight, sound, or physical contact with adult inmates outside of the housing units, the facility should provide direct staff supervision. 28 C.F.R. § 115.14(b)(2).

⁴⁰ See, e.g., Maurice Chamamah, *A Boy Among Men*, THE MARSHALL PROJECT (Feb., 25, 2015) <https://www.themarshallproject.org/2015/02/25/a-boy-among-men#.l2onV4f2z>.

⁴¹ *Id.*

⁴² The Prison Rape Elimination Act, 42 U.S.C. § 15607 (2012).

⁴³ NPREC REPORT, *supra* note 9.

⁴⁴ Allen Beck, BUREAU OF JUSTICE STATISTICS, *Sexual Victimization Reported by Juvenile Correctional Authorities, 2007–2012* (Jan. 2016); Allen Beck, BUREAU OF



Justice Statistics (BJS) collect data on the prevalence of prison rape.⁴⁵ In 2005, BJS found that 21% percent of all substantiated allegations of inmate-on-inmate sexual violence occurred in jails.⁴⁶ Given the above-noted inclusion of sixteen and seventeen year olds for prosecution and subsequent detention in adult jails, we know that of those victimized two-thirds (65.5%) were re-victimized.⁴⁷ Of youth victimized by other inmates 78.6% reported experiencing physical force or threat of force, while the perpetrator otherwise pressured 39.8%.⁴⁸ These youthful victims reported these assaults less than 1 in 6 times (15.4%).⁴⁹

BJS also found that male youthful inmates reported higher rates of staff sexual misconduct (3.3%) than female juveniles (0.9%) while youthful inmates held for violent sex offenses reported higher rates of staff sexual misconduct (12.0%) than those held for property offenses (1.5%).⁵⁰ Additionally, three-quarters (75.8%) of those youthful

JUSTICE STATISTICS, *Sexual Victimization Reported by Adult Correctional Authorities, 2009–2011* (Jan. 2014).

⁴⁵ The Prison Rape Elimination Act, 42 U.S.C. § 15607 (2012).

§ 115.14(a) (2012). This standard is found only in the JJDPa and requires that juveniles who are status offenders are not detained in any correctional facility. 42 U.S.C. § 5601 *et. seq.*

⁴⁶ Paige Harrison & Allen Beck, THE BUREAU OF JUSTICE STATISTICS, *Prisoners in 2005*, <http://www.bjs.gov/content/pub/pdf/p05.pdf> (2006).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Allen Beck, BUREAU OF JUSTICE STATISTICS, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (2011–12).



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inmates assaulted were victimized more than once by staff, while fewer than 1 in 10 reported the staff sexual misconduct.⁵¹

Finally, “[y]outh who identified their sexual orientation as gay, lesbian, bisexual, or other reported a substantially higher rate of youth-on-youth victimization (10.3%) than heterosexual youth (1.5%).”⁵² Ultimately, these statistics illustrate a trend across facilities indicative of increased vulnerability for youth to experience sexual violence in custody.

B. Agencies Have Faced Scrutiny and Liability for Sexual Abuse of Youth in Adult Settings

The press, local and federal legislators, and domestic and international human rights organizations have scrutinized the physical and sexual abuse of youth in adult facilities.⁵³ Agencies have also faced federal and state litigation regarding the abuse of youth in adult facilities. Detailed below are representative cases.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Statement of Interest, *N.P. v. Georgia*, No. 2014-CV- 241025 (G.A. Sup. Ct. Mar. 13, 2015), http://www.justice.gov/sites/default/files/crt/legacy/2015/03/13/np_soi_3-13-15.pdf; CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: UPDATES FROM THE 2013-2014 LEGISLATIVE SESSION (2014), <http://www.campaignforyouthjustice.com/research/cfyj-reports> (analyzing various legislative attempts to remove children from the adult criminal justice system); *More Harm Than Good: How Children Are Unjustly Tried As Adults In New Orleans*, SOUTHERN POVERTY LAW CENTER (Feb. 17, 2016), <https://www.splcenter.org/20160217/more-harm-good-how-children-are-unjustly-tried-adults-new-orleans> (discussing arrest, charging and prosecution policies in New Orleans and their impact on youth’s entry into the adult criminal justice system); Juliet Eilperin, *Obama Bans Solitary Confinement of Juveniles in Federal Prisons*, WASHINGTON POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html; Joel Rose, *Culture of Violence Pervades Rikers’ Juvenile*

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a. *Poore v. Glanz*, No. 11-CV-797-JED-TLW, 2014 U.S. Dist. LEXIS 120818, at *1 (N.D. Okla. Aug. 29, 2014).

In this case a seventeen-year-old female held at the Tulsa County Jail alleged 10 instances in which a male detention officer sexually assaulted her.⁵⁴ Juvenile female inmates at Tulsa County Jail, which houses adult inmates as well, are held in individual cells in the medical unit of the jail. The Court discussed, at length, the facility's Youthful Offender Policy, which required: two officers—one of the same sex as the youthful inmate—be present when entering a juvenile's cell. The court found that detention officers working in the juvenile unit of the Tulsa Jail had only one year of experience in the Tulsa Jail, and that the medical unit was frequently single-staffed.

b. *Doe v. Michigan*, No. 2:13-cv-14356-RHC-RSW (2014).

In this case a class of seven individual inmates who were under 18 at the time of their incarceration allege that they were sexually assaulted and harassed by adult prisoners as well as prison guards while in custody with the Michigan Department of Corrections (MDOC). MDOC responded stating that PREA does not apply to state facilities and that they were otherwise not liable due to correcting the conditions alleged to cause harm to youth in custody. The DOJ Special Litigation Unit responded by publishing a Statement of Interest on behalf of the DOJ stating that PREA does in fact

Facilities, NPR (Oct. 15, 2014), <http://www.npr.org/2014/10/15/356165968/culture-of-violence-pervades-rikers-juvenile-facilities>.

⁵⁴ Ziva Branstetter, *Glanz: Policies to Protect Juveniles Weren't Followed for Girls*, READ FRONTIER (Feb. 25, 2016) <https://www.readfrontier.com/investigation/glanz-policies-protect-juveniles-weren-followed-girls/>.



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apply to all state-run facilities. The Statement does not comment as to the veracity of MDOC's claim of rectifying conditions of confinement, but states that even if conditions are corrected the correction does not necessarily render claims of harm made before the changes moot.

IV. Best Practices and Promising Practices for Youthful Inmates in Adult Facilities

PREA has generated opportunities and incentives for jurisdictions to innovate and change the ways they provide housing for youthful inmates. These changes have the potential to have a significant impact on youth safety, in particularly safety from physical and sexual abuse my adult inmates. They also have the potential to change the conditions of confinement overall for these youthful inmates who often experience isolation and lack of access to age appropriate programs and opportunities in adult facilities.⁵⁵ Agencies have implemented the Youthful Inmate Standard in a variety of ways, often using multiple strategies. These strategies include: (1) law and policy reform; (2) enforcing

⁵⁵ See e.g. Erin Cox, *State Approves \$30 million Youth Jail*, BALTIMORE SUN (May 13, 2015), <http://www.baltimoresun.com/news/maryland/bs-md-youth-jail-20150513-story.html> (detailing plans to have separate youth facility for teenagers charged as adults to address years of concern about the practice of housing young city defendants alongside adults); Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, THE ATLANTIC (Jan. 8, 2016), <http://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/> (discussing the lack of vocational opportunities for youth in adult prisons and jails); MARTIN FORST ET. AL, *Youth In Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 *Juvenile & Family Court Journal* 1-14 (1989), <http://onlinelibrary.wiley.com/doi/10.1111/j.1755-6988.1989.tb00634.x/abstract> (discussing differences in treatment and opportunities for youth in training schools as opposed to adult prisons and jails).



sight and sound separation as required by the youthful inmate standard; (3) using a direct supervision model; (4) having separate sleeping areas for youth; and (5) using alternative forms of supervision.

A. Law and Policy Reform

Eleven states—Colorado, Idaho, Indiana, Maine, Nevada, Hawaii, Virginia, Pennsylvania, Texas, Oregon and Ohio—have passed laws limiting states’ authority to house youthful inmates post-conviction in adult jails and prisons.⁵⁶ Five states have expanded their juvenile court jurisdiction so that older youth who previously would be automatically tried as adults no longer go straight into the adult criminal justice system—Connecticut, Illinois, Mississippi, Massachusetts, and New Hampshire.⁵⁷ Fifteen states have engaged in transfer reform making it more likely that youth will stay in the juvenile justice system—Arizona, Colorado, Connecticut, Delaware, Illinois, Nevada, Indiana, Utah, Virginia, Washington, Ohio, Maryland, Nebraska, Washington, D.C. and New York.⁵⁸ Twelve states—California, Colorado, Georgia, Indiana, Texas, Missouri, Ohio, Washington, Florida, Hawaii, West Virginia, and Iowa—have changed their mandatory

⁵⁶ See generally THE CAMPAIGN FOR YOUTH JUSTICE, ZERO TOLERANCE: HOW STATES COMPLY WITH PREA’S YOUTHFUL INMATE STANDARD (2015), http://www.campaignforyouthjustice.com/images/pdf/Zero_Tolerance_Executive_Summary.pdf; see also THE PROJECT ON ADDRESSING PRISON RAPE, MEETING THE YOUTHFUL INMATE STANDARD: IMPLICATIONS FOR OPERATIONS, PROMISING PRACTICES, AND THE LAW [hereinafter “Youthful Inmate Standard Webinar”] (Dec. 16, 2014), <https://www.wcl.american.edu/endsilence/documents/WEBINARYIfinal12-15-14.pdf>.

⁵⁷ See generally THE CAMPAIGN FOR YOUTH JUSTICE, *supra* note 60; see also YOUTHFUL INMATE WEBINAR, *supra* note 60.

⁵⁸ See generally THE CAMPAIGN FOR YOUTH JUSTICE, *supra* note 60; see also YOUTHFUL INMATE WEBINAR, *supra* note 60.



minimum sentencing laws to take into account the developmental differences between youth and adults, allow for post-sentence review for youth facing juvenile life without parole or made other changes to how youth are sentenced in the adult system.⁵⁹

The federal government and some states choose to house youthful inmates in juvenile facilities until they are at least 18 and then transfer them to adult housing.⁶⁰ For example, in Maine “[a] youth who has been convicted and sentenced to a sentence alternative involving imprisonment and who has not attained 18 years of age at the time of sentence imposition must be committed to a Department of Corrections juvenile correctional facility for an indeterminate period not to extend beyond the youth's 18th birthday.”⁶¹

B. Sight and Sound Separation

In practice some state prison systems have effectuated sight and sound separation of adult and juvenile inmates in a variety of ways. South Carolina’s has designated a wing in one of its adult housing units for use of youthful male inmates only. Missouri has installed a 12-foot privacy fence around the housing unit designated for male youthful inmates.⁶² The male unit provides programming areas as well as outdoor large

⁵⁹ See YOUTHFUL INMATE WEBINAR, *supra* note 60.

⁶⁰ This has long been the policy and practice of the Federal Bureau of Prisons (BOP), which has a relatively small number of youth under eighteen who are subject to the federal Juvenile Justice Act and youth charged in adult court in the District of Columbia. *See id.*

⁶¹ ME. REV. STAT. tit. 15, § 3205 (2014).

⁶² See YOUTHFUL INMATE WEBINAR, *supra* note 60.



muscle exercise areas, which includes a basketball court.⁶³ When female youthful inmates are incarcerated in Missouri they are housed in a trailer on the grounds of the Missouri prison for women.⁶⁴ The female trailer allows for sight and sound separation, programming, and large muscle exercise.⁶⁵

While these physical modifications increase the likelihood of sight and sound separation, they can still limit the access of youthful inmates to the full area of a facility. Youth often have very limited access and freedom of movement, which is important developmentally.⁶⁶ Housing options for female youthful inmates can be even restricted. Because, there are fewer female youthful inmates, they may be the only female youthful inmate in a system.⁶⁷ As a result of the sight and sound restriction, their only contact may be with correctional staff. In these instances where there are small numbers of youthful inmates, states have considered moving youth to other states with larger groups of youthful inmates. While addressing the issues of critical mass, transferring youth to other states limits youth's access to family, legal counsel and other important contacts and supports in their own state.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See generally THE WORLD HEALTH ORGANIZATION, *Adolescent Development* http://www.who.int/maternal_child_adolescent/topics/adolescence/dev/en/.

⁶⁷ Presentation by Regina Gilmore, District of Columbia, Department of Corrections Women's Program Manager and Reentry Coordinator, Tour and Meeting on Issues Related to Women in Custody, October 22, 2015. See also Ziva *supra* note 54.



B. The Direct Supervision Model

Under the direct supervision model, staff directly supervises youth when they are in the presence of adult inmates. For example, in Illinois prisons male inmates who are 17 years old are housed separately from adult inmates and under direct supervision when outside of their housing unit.⁶⁸ While providing direct supervision addresses the issue of limiting youthful inmates' physical contact with adult inmates, it does not address the issue of sight and sound. If adult inmates can see or hear youthful inmates, then they have the opportunity to threaten or intimidate them. In Pennsylvania, the Pennsylvania Department of Corrections is in the process of making policy changes to ensure that all residents the agency meets the sight and sound criteria for youthful inmates under the age of eighteen. This policy would govern Pennsylvania's facility, SCI Pine Grove and provides for changes in the sight and sound procedure.⁶⁹

C. Providing Specialized Programming Units and Separate Sleeping Units for Youthful Inmates

In order to meet the Youthful Inmate Standard, agencies have created specialized programming units and separate sleeping units for youthful inmates. Under this model youth sleep in segregation cells at night but attend programs together in specialized units. While addressing the issues of sight and sound separation broadly, such practices still limit the space youth can use in facilities. Additionally, often the separate sleeping arrangements are in disciplinary segregation units where youth may have separate

⁶⁸ See YOUTHFUL INMATE WEBINAR, *supra* note 60.

⁶⁹ *Id.*



sleeping rooms but where they can hear and be exposed to inmates who are either mentally ill and/or in segregation for serious institutional infractions. There are also, legitimate concerns that such measures could lead to extended isolation for youth, such as that which occurred at Baltimore City Detention Center.⁷⁰

D. Utilizing Alternate Forms of Supervision

One promising model is to place youth who are convicted on non-violent offenses as adults on community supervision, electronic monitoring, or in treatment rather than in adult facilities.⁷¹ States that use this model have the authority to do so because they have engaged in legal reform, which provides the flexibility to use these alternative forms of supervision.⁷²

III. Recommendations

The vulnerability of youthful inmates housed with adults is an issue of deep concern to many organizations and agencies. These organizations—including the DOJ—have proposed a number of recommendations that are remarkably consistent. These recommendations deserve consideration and attention from states and agencies that house youthful inmates.

⁷⁰ Juliet Linderman, *Feds: Baltimore Jail Illegally Keeping Juveniles in Solitary*, THE BALTIMORE SUN <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-teens-in-solitary-20150327-story.html>.

⁷¹ *See, e.g.*, PROBATION DEPARTMENT OF THE COUNTY OF SAN DIEGO, *Adult Community Supervision* http://www.sandiegocounty.gov/probation/adult_information_community_supervision.html.

⁷² *See supra* pp. 14-16.



A. The Department of Justice

Individual components of the DOJ have provided substantial funding to implement PREA and continue to make recommendations—in real time—for jurisdictions regarding the implementation of the Youthful Inmate Standard. The Bureau of Justice Assistance (BJA), for example, created a PREA Resource Center (PRC), which dedicates resources to implementation of all PREA standards including the Youthful Inmate Standard.⁷³ BJA has long supported enhanced staff training to effectively work with youth in custody, given youth are known to have vulnerabilities beyond those experienced by the adult population.⁷⁴ The Office of Juvenile Justice and Delinquency Prevention encourages particularized educational responses to the developmental needs of young people in the juvenile and adult justice system and has recommended “modify[ing] the current definition of “adult inmate” to give states the flexibility to allow juveniles under adult criminal court jurisdiction to be placed – and remain – in juvenile facilities until they reach the state’s age of extended juvenile court jurisdiction”.⁷⁵

⁷³ See The National PREA Resource Center, <http://www.prearesourcecenter.org/>.

⁷⁴ See generally The Bureau of Justice Statistics, Funding, <http://www.bjs.gov/index.cfm?ty=fun#assist>.

⁷⁵ STATEMENT OF ROBERT L. LISTENBEE, ADMINISTRATOR, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, AT A FIELD HEARING ENTITLED, “The Juvenile Justice and Delinquency Prevention Act: Preserving Potential, Protecting Communities,” (June 9, 2014), <http://www.judiciary.senate.gov/imo/media/doc/06-09-14ListenbeeTestimony.pdf>.



B. The Federal Bureau of Prisons, and the National Institute of Corrections

The Federal Bureau of Prisons (BOP) has long implemented policy and practice consistent with the Youthful Inmate Standard. Specifically, any youth in federal custody held under the federal Juvenile Justice and Delinquency Prevention Act—which is different than the JJDPA—are held under contract in local juvenile detention centers.⁷⁶

D. Bureau of Justice Assistance

The BJA has recommended that agencies provide better staff training to handle youth populations, in particular “more energetic, and more impulsive” youths.⁷⁷ BJA recommends specialized education to respond to the developmental needs of younger offenders.⁷⁸ Finally, BJA recommends further research and assessment on the experience with housing youthful inmates.⁷⁹ BJA also encourages particularized educational responses to the developmental needs of young people in the juvenile and adult justice system and plans to further develop policy in this area as States continue to receive BJA funds conditioned on the assurance of compliance with all of the PREA standards.⁸⁰

⁷⁶ See JOHN SCALIA, THE BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 3 (1997), <http://www.bjs.gov/content/pub/pdf/Jdfcjs.pdf>.

⁷⁷ See THE BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT (2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See, e.g., Office of Juvenile Justice and Delinquency Prevention, Prison Rape Elimination Act (PREA) and Title II Formula Grant Funds, <http://www.ojjdp.gov/programs/GrantDistributions.html> (“[s]tates that submitted certifications will receive a “bonus” to their Title II Formula Grant award, while states



E. Campaign for Youth Justice

The Campaign for Youth Justice (CFYJ) has long recommended that states amend laws that permit youth to be prosecuted or imprisoned as adults.⁸¹ CFYJ also recommends that policymakers solicit stories from youth and their families about youth experiences being housed in adult facilities, in order to better understand those experiences, to learn from them and ultimately craft better policies, practices and laws.⁸² Additionally, CFYJ recommends the creation of an interstate memorandum on the treatment of youth in adult facilities to help clarify policy goals for this practice.⁸³

F. National Institute of Corrections:

The National Institute of Corrections (NIC) recommends better data collection in order to eliminate “data gaps” in understanding the experience of youth in adult settings.⁸⁴ NIC also recommends that states youth not be housed in adult facilities while

that submitted assurances will be issued a separate PREA Reallocation grant, to be used solely for the purpose of enabling the state or territory to achieve full compliance with the PREA standards in future years.”); BUREAU OF JUSTICE ASSISTANCE, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM, FREQUENTLY ASKED QUESTIONS REGARDING THE PRISON RAPE ELIMINATION ACT CERTIFICATION REQUIREMENT, <https://www.bja.gov/Programs/JAG-PREA-FAQ.pdf> (describing the impact on non-compliance with PREA standards and the impact of grants under Edward Byrne Memorial Justice Assistance Grant (JAG) Program).

⁸¹ See CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005–2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 44 (2011), <http://www.campaignforyouthjustice.org/images/nationalreports/statetrendslegislativevictories.pdf>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ THE NATIONAL INSTITUTE OF CORRECTIONS, YOU’RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 29 (2011), <http://static.nicic.gov/Library/025555.pdf>.



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they are still pretrial detainees.⁸⁵ Finally, NIC recommends the development of practices and strategies to better serve youth who were sentenced as adults and are have been released on to parole.⁸⁶

IV. Conclusion

Law, policy and strategies to address the treatment of youth in adult prisons and jails is developing rapidly.⁸⁷ These changes are being driven by the growing concerns by the public and policymakers about problems of policing⁸⁸ and the pipeline for youth into the juvenile and adult criminal justice system.⁸⁹ These concerns have been deepened as the public and policymakers have acknowledged the vulnerability of youth in adult settings.⁹⁰ The enactment of PREA and the development and implementation of the

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See generally CAMPAIGN FOR YOUTH JUSTICE, *supra* note 60; see also, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 132 S.Ct. 2455 (U.S. 2012) (recognizing that the age of youth should be a factor in decisions about criminal culpability).

⁸⁸ See generally THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM (May 2014), http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf; Liz Ryan, *Reducing Racial and Ethnic Disparities in the Juvenile Justice System: Federal Support Still Needed*, THE CAMPAIGN FOR YOUTH JUSTICE (Oct. 16, 2013), <http://campaignforyouthjustice.org/news/blog/tag/Disproportionate%20Minority%20Confinement>.

⁸⁹ See generally THE HUMAN RIGHTS PROJECT FOR GIRLS, THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY (2015), http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf; *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/racial-justice/race-and-inequality-education/school-prison-pipeline>.

⁹⁰ See *supra* note 53 and accompanying text.



standards, in particular the youthful inmate standard, have the potential to improve the conditions for youth in the criminal justice system and to increase their safety.



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