


# Is It Enough?

## *The Implementation of PREA's Youthful Inmate Standard*



CAMPAIGN FOR

YOUTH  JUSTICE

BECAUSE THE CONSEQUENCES AREN'T MINOR





The Campaign for Youth Justice (CFYJ) is a national Initiative Focused on the removal of youth under 18 from the adult criminal Justice system. The Campaign works with youth, families, legislators And system stakeholders to create more developmentally appropriate Ways to hold youth accountable for their actions, while eliminating the Harms associated with exposure to adult courts, jails, and prisons.

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## Executive Summary

*“He [John Doe] still has flashbacks and nightmares—common symptoms of post-traumatic stress among rape victims, in prison or out—which are sometimes spurred by tiny details: the smell of saliva or shower mold, the feel of tiles like the ones his face was pressed into, a breeze that mimics the breath of an attacker on his neck. His shame can feel like a coating, ‘like I can’t wash it off, like people can look at me and tell.’”<sup>1</sup>*

In 2003, Congress passed and former President George W. Bush signed, the Prison Rape Elimination Act (PREA). PREA requires the Department of Justice to collect data and provide guidance and funding to federal, state, and local correctional facilities to end rape and sexual assault in lockups, jails, and prisons. Nearly a decade after the passage of PREA, the Department of Justice finalized its rule outlining specific standards for all jails, lockups, detention facilities, and prisons.<sup>2</sup> One of those standards was the Youthful Inmate Standard, which requires youth under 18 to be housed sight and sound separated from adults while held in adult jails and prisons.

In our 2015 report, *Zero Tolerance: How States Comply with PREA’s Youthful Inmate Standard*, we noted that PREA’s Youthful Inmate Standard is the emerging standard of care for housing youth in adult facilities.<sup>3</sup> Between 2014 and 2017, governors across the country have rapidly moved toward certifying their state’s compliance with PREA. In 2014, only two states (New Jersey and New Hampshire) certified compliance, 41 states and DC made assurances they were moving toward compliance, and 7 states were non-compliant.<sup>4</sup> By 2017, governors from 19 states certified compliance, 29 states and DC made assurances, and only two states (Utah and

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<sup>1</sup> See Maurice Chammah, *A Boy Among Men: What happens when you throw a teenager into an adult prison? Guess*, THE MARSHALL PROJECT (Feb. 25, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/25/A-boy-among-men> (John Doe is a 17 year old boy in Michigan who is currently part of a class-action lawsuit, *John Doe v. MDOC*, in which sexually assaulted youthful inmates are suing the Michigan Department of Corrections for their deliberate indifference towards upholding PREA standards).

<sup>2</sup> NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 215 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [hereinafter COMMISSION REPORT]; see also Press Release, Dept. of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), available at <https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape>.

<sup>3</sup> CARMEN E. DAUGHTERY, CAMPAIGN FOR YOUTH JUSTICE, ZERO TOLERANCE: HOW STATES COMPLY WITH PREA’S YOUTHFUL INMATE STANDARD (2015), available at [http://cfyj.org/images/pdf/Zero\\_Tolerance\\_Report.pdf](http://cfyj.org/images/pdf/Zero_Tolerance_Report.pdf).

<sup>4</sup> U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, STATES’ AND TERRITORIES’ RESPONSES TO THE MAY 15, 2014 PRISON RAPE ELIMINATION ACT DEADLINE (2014), available at <https://www.bja.gov/Programs/PREAcompliance.pdf>.

Arkansas) were non-compliant and elected to forgo federal funds rather than come into compliance with the PREA standards.<sup>5</sup>

September 4, 2018 marked the 15-year anniversary of the Prison Rape Elimination Act. This brief is a 50-state review of the implementation of PREA's Youthful Inmate Standard and its impact on youth held in adult facilities. The brief includes a review of 826 PREA audits of adult facilities conducted from 2014-2018. We focused primarily on the first complete cycle of PREA audits, which were conducted between August 2013 and August 2016. While a vast majority of adult facilities have never held youth, and therefore found the Youthful Inmate Standard to not apply to their facility, 73 facilities audited met the standard, 6 exceeded the standard (all prisons), and only 2 (both jails) did not meet the standard.

The defining question posed in this brief is: are youth under 18 safer in adult facilities now than they were before the passage of PREA and the implementation of the Youthful Inmate Standard? This question is difficult to answer since disaggregated data on sexual assaults in prison started as a result of the passage of PREA. However, we do have data that the overall number of sexual assault incidents reported by correctional administrators in adult facilities have tripled from 8,768 in 2011, before the PREA standards were finalized, to 24,661 in 2015.<sup>6</sup> Implementation of the PREA standards have succeeded in increased awareness and training on how to address sexual assault in state-run facilities, resulting in more reported incidents than before.

While the overall number of youth in adult jails and prisons on any given day has substantially decreased,<sup>7</sup> in part due to PREA's Youthful Inmate Standard; litigation, data, and numerous news stories suggest that youth who remain in these facilities are unfortunately still at risk. The Youthful Inmate Standard has encouraged adult facility administrators to hold youth in safer spaces, but implementation loopholes still leave some youth vulnerable. There is also growing recognition that safety should not only be defined as the absence of sexual assault, but also the absence of prolonged solitary confinement, having access to mental health treatment to address depression and self-harm, and being free from other traumatic institutional policies. As a result, we recommend that federal, state, and local elected officials consider the following actions to protect youth:

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<sup>5</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, FY 2017 LIST OF CERTIFICATION AND ASSURANCE SUBMISSIONS FOR AUDIT YEAR 3 OF CYCLE 1 (2017), available at <https://www.bja.gov/Programs/17PREA-AssurancesCertifications.pdf>.

<sup>6</sup> RAMONA R. RANTALA, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012-15 1 (2018), available at <https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>.

<sup>7</sup> JEREE THOMAS, CAMPAIGN FOR YOUTH JUSTICE, RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURTS (2015-2017) (2017), available at [http://cfyj.org/images/A-StateTrends\\_Report-Web.pdf](http://cfyj.org/images/A-StateTrends_Report-Web.pdf).

1. State legislators should pass bills to remove youth under 18 from adult facilities.
2. Congress should create a private right of action under PREA to incentivize the removal of youth out of adult facilities.
3. States should be held accountable for the PREA compliance of local facilities.
4. PREA Auditors should be able to visit a facility at any point during the relevant audit year to ensure a realistic representation of the conditions within the facilities.
5. The 180-day corrective action period should be shortened to ensure a swift response to safety threats.
6. States should restrict the use of solitary confinement of youth held in adult facilities, and if this is not feasible because of sight and sound challenges, youth should be immediately moved to juvenile placements.

While the Youthful Inmate Standard provided an important initial step toward protecting youth in adult facilities, it by itself, is not enough to ensure their safety.

## I. Introduction

In 2003, Congress passed the Prison Rape Elimination Act (PREA) to support the collection of data on prison rape in federal, state, and local correctional institutions and to provide funding and technical assistance to those institutions to address sexual assault.<sup>8</sup> Former Senators Edward Kennedy and Jeff Sessions co-sponsored and introduced PREA in the Senate on July 21, 2003.<sup>9</sup> Both houses of Congress passed the Act unanimously, and former President George W. Bush signed the bill on September 4, 2003.<sup>10</sup> The National Prison Rape Elimination Commission developed standards in 2009, and the Department of Justice adopted the standards as a final rule to prevent, detect, and respond to prison rape in 2012.<sup>11</sup>

In the twenty years preceding PREA's enactment, experts estimated that over one million incarcerated men and women were victims of sexual assault in correctional facilities.<sup>12</sup> Congress noted that certain populations within adult correctional facilities faced an increased risk of sexual assault, specifically youth and those with mental illnesses.<sup>13</sup> In particular, studies showed that youth housed in adult facilities were five times more likely to be sexually assaulted than youth housed in juvenile facilities.<sup>14</sup> One event that contributed to the passage of PREA was the publication of *No Escape: Male Rape in U.S. Prisons* in 2001 by Human Rights Watch. The report documented the experiences of over 200 incarcerated individuals who were raped in prison.<sup>15</sup> Likewise, there was widespread public support for reform that united many different religious and political organizations such as Prison Fellowship Ministries and Just Detention International.<sup>16</sup>

Legislators were also responding to the U.S. Supreme Court's decision in *Farmer v. Brennan*, where the Court held that deliberate indifference to a substantial risk of harm towards an inmate was cruel and unusual punishment that violated the Eighth Amendment.<sup>17</sup> Finally, in the

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<sup>8</sup> 34 U.S.C. § 30301.

<sup>9</sup> Elizabeth Eggert, *Violence and Silence: The Prison Rape Elimination Act and Beyond*, 7 TAPESTRIES: INTERWOVEN VOICES OF LOCAL AND GLOBAL IDENTITIES 6, 1 (2018), <http://digitalcommons.macalester.edu/tapestries/vol7/iss1/6/>.

<sup>10</sup> *Id.* at 1.

<sup>11</sup> Press Release, Dept. of Justice, *supra* note 3. See also COMMISSION REPORT, *supra* note 3.

<sup>12</sup> 34 U.S.C. § 30301(2) (2003).

<sup>13</sup> *Id.* § 30301(3)-(4).

<sup>14</sup> *Id.* § 30301(4).

<sup>15</sup> JOANNE MARINER, NO ESCAPE: MALE RAPE IN U.S. PRISONS, HUMAN RIGHTS WATCH (2001), available at <https://www.hrw.org/reports/2001/prison/report.html>.

<sup>16</sup> Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL'Y REV. 489, 501-02 (2011), available at [https://www-cdn.law.stanford.edu/wp-content/uploads/2018/03/jenness\\_smyth.pdf](https://www-cdn.law.stanford.edu/wp-content/uploads/2018/03/jenness_smyth.pdf).

<sup>17</sup> 34 U.S.C. § 30301(13).

interest of public health and interstate commerce, Congress believed PREA would effectively reduce recidivism, depression, post-traumatic stress disorder, suicide, and the spread of HIV and AIDS among correctional facility populations.<sup>18</sup>

One of the PREA standards adopted to protect one of the most vulnerable populations in an adult correctional setting was the Youthful Inmate Standard.

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### 115.14 Youthful Inmate Standard:

- a) A youthful inmate shall not be placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters.
  - b) In areas outside of housing units, agencies shall either:
    - i) maintain sight and sound separation between youthful inmates and adult inmates, or
    - ii) provide direct staff supervision when youthful inmates and adult inmates have sight, sound, or physical contact.
  - c) Agencies shall make best efforts to avoid placing youthful inmates in isolation to comply with this provision. Absent exigent circumstances, agencies shall not deny youthful inmates daily large-muscle exercise and any legally required special education services to comply with this provision. Youthful inmates shall also have access to other programs and work opportunities to the extent possible.
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Adult facilities that hold youth under 18 are audited on their compliance with the Youthful Inmate Standard. Executive-run state facilities are required to comply with the standard, or risk the state losing funding from the Department of Justice. In December 2016, Congress passed the *Justice for All Reauthorization Act*. This legislation strengthened PREA and required the U.S. Attorney General to create a website publishing all final PREA audits from states.<sup>19</sup> The audits

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<sup>18</sup> *Id.* § 30301(14)(a)-(f).

<sup>19</sup> Justice for All Reauthorization Act, Public L. No. 114-324. (2016) 130 Stat. 1948.



are now available through the Bureau of Justice Assistance website.<sup>20</sup> However, it is important to note that audits of locally-run facilities, specifically jails, are not all captured on this site, as they are not run by the state.

PREA requires that all facilities covered under the law are audited once within a three year cycle.<sup>21</sup> The process of each audit is conducted in five phases. During phase one, the auditor and facility administrators spend six to eight weeks preparing for the visit by planning, reviewing policies, and posting notices throughout the facility.<sup>22</sup> The next phase is the audit visit, where auditors spend a week touring the facility, interviewing incarcerated individuals, and reviewing the facility's records.<sup>23</sup> The third phase requires the auditor to review the evidence gathered and either issue a final or interim report depending on whether there are corrective actions that need to be implemented.<sup>24</sup> If the facility receives an interim report, the fourth phase gives facility administrators 180 days to bring the facility into compliance.<sup>25</sup> Finally, once the auditor issues a final report, the facility administrator has ninety days to file an appeal.<sup>26</sup>

In our 2015 report, *Zero Tolerance: How States Comply with PREA's Youthful Inmate Standard*, we noted that PREA's Youthful Inmate Standard was the emerging standard of care for housing youth in adult facilities.<sup>27</sup> Between 2014 and 2017, governors across the country have rapidly moved toward certifying their state's compliance with PREA. In 2014, only two states (New Jersey and New Hampshire) certified compliance, 41 states and the District of Columbia made assurances they were moving toward compliance, and 7 states were non-compliant.<sup>28</sup> By 2017, governors from 19 states certified compliance, 29 states and the District of Columbia made assurances, and only two states (Utah and Arkansas) were non-compliant and elected to forgo federal funds rather than come into compliance with the PREA standards.<sup>29</sup> When PREA passed

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<sup>20</sup> *State PREA submissions*, BUREAU OF JUSTICE ASSISTANCE, <https://www.bja.gov/state-PREA-submissions/> (last visited Aug. 16, 2018).

<sup>21</sup> PREA AUDITOR HANDBOOK, NAT'L PREA RESOURCE CENTER 2 (Aug. 2017), available at <https://www.prearesourcecenter.org/sites/default/files/library/PREAAuditorHandbook-V1.0%20August%202017.pdf>.

<sup>22</sup> *Id.* at 30.

<sup>23</sup> *Id.* at 39.

<sup>24</sup> *Id.* at 62.

<sup>25</sup> *Id.* at 66.

<sup>26</sup> *Id.* at 70.

<sup>27</sup> DAUGHERTY, *supra* note 4.

<sup>28</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, STATES' AND TERRITORIES' RESPONSES TO THE MAY 15, 2014 PRISON RAPE ELIMINATION ACT DEADLINE, (2014), available at <https://www.bja.gov/Programs/PREAcpliance.pdf>

<sup>29</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, FY 2017 LIST OF CERTIFICATION AND ASSURANCE SUBMISSIONS FOR AUDIT YEAR 3 OF CYCLE 1 (2017), available at <https://www.bja.gov/Programs/17PREA-AssurancesCertifications.pdf> [hereinafter FY 2017 LIST OF CERTIFICATION AND ASSURANCE SUBMISSIONS].



in 2003, the number of youth under 18 in adult prisons during a one day count was 2,800.<sup>30</sup> Thirteen years later, the number of youth in adult prisons on any given day is 956,<sup>31</sup> over a 65% decrease since PREA's passage.

Given this progress, this brief reviews recent audits of adult prisons, community confinement centers, lockups, and jails across the country to understand how adult facilities are complying with PREA's Youthful Inmate Standard, § 115.14, with a focus on audits conducted during the first audit cycle from August 2013 to August 2016.

## II. Audit Review Process

The Bureau of Justice Assistance (BJA) publishes State PREA Audit Submissions. We utilized BJA's website to find a majority of the audits for this review process. The website contains audits of facilities including jails, prisons, lockups, juvenile, and community confinement centers within the 48 states and the District of Columbia, organized alphabetically. However, we also searched for additional audits online and identified 42 additional facility audits, including a number of large local jails, which were not listed on BJA's website.

In addition to BJA's website and independent searches for large local jails, we cross referenced the audits we found with other available jail data resources. According to the Bureau of Justice Statistics Census of Jails data from 2013, almost 90 percent of youth housed in adult jails were held in just fifteen states: Alabama, Arizona, Florida, Georgia, Louisiana, Indiana, Maryland, Michigan, Missouri, New York, North Carolina, Pennsylvania, South Carolina, Texas, and Wisconsin.<sup>32</sup> Unfortunately, in these states there were very few PREA audits of jails available. We identified one jail audit available in Florida (Miami-Dade Corrections and Rehabilitation: meets standard, number of youthful inmates not disclosed),<sup>33</sup> Maryland (Chesapeake Detention Facility: not applicable, no youthful inmates),<sup>34</sup> North Carolina (Mecklenburg County Jail Central: meet standard, at least one youthful inmate),<sup>35</sup> and South Carolina (Sheriff Al Cannon

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<sup>30</sup> PAIGE HARRISON & ALLEN J. BECK, PHD, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003 8 (2004), *available at* <https://www.bjs.gov/content/pub/pdf/p03.pdf>

<sup>31</sup> E. ANN CARSON, PRISONERS IN 2016 16 (2018), *available at* <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

<sup>32</sup> TODD MINTON, BUREAU OF JUSTICE STATISTICS, CENSUS OF JAILS: POPULATION CHANGES, 1999-2013 12 (2015), *available at* <https://www.bjs.gov/content/pub/pdf/cjpc9913.pdf>.

<sup>33</sup> Renaldo Meyers, Miami-Dade Corrections and Rehabilitation Center PREA Audit (Fl. Dec. 30, 2014) <https://www.miamidade.gov/corrections/library/prison-rape-elimination-act-auditors-summary-report.pdf>.

<sup>34</sup> Kris Steece, Chesapeake Detention Center PREA Audit (Md. Oct. 24, 2017), *available at* [https://www.dpscs.state.md.us/prea/docs/Audit\\_Reports/CDF-Final-Report-2017.pdf](https://www.dpscs.state.md.us/prea/docs/Audit_Reports/CDF-Final-Report-2017.pdf).

<sup>35</sup> Timothy Fuss, Mecklenburg County Jail Central PREA Audit (N.C. Nov. 12, 2016), *available at* <http://www.mecksheriff.com/pdf/mcsosaudit16.pdf>.

Detention Center: meets standard, number of youthful inmates not disclosed),<sup>36</sup> and two in Texas (701 N. San Jacinto and 1200 Baker Street: both did not meet the standard, number of youthful inmates not disclosed).<sup>37</sup>

We sorted each state individually to locate prisons, jails, lockups, and community confinement centers that had audits available as of June 5, 2018. We reviewed audits for 639 prisons, 154 community confinement centers, 25 jails, 7 prisons and jails, and 1 lockup. Not all eligible facilities within the United States are included in this report because some of these facilities either had an audit that was “not available,” an audit that was linked to a broken online web link, or an audit that was linked incorrectly to a different facility that was not needed for this report. While we completed additional research outside of the BJA’s website to ensure at least one facility was covered in every state, due to the lack of information, a lot of facilities within the states were not covered as audits were unavailable. In addition, Utah and Arkansas were excluded from this report because, according to the Department of Justice’s Fiscal Year 2017 list of certifications and assurances submissions, they remain the only two states that have not adopted PREA.<sup>38</sup> In total, we reviewed a total of 826 PREA audits.

We reviewed audits for a few key pieces of information. First, we identified that the audit report was linked to the correct facility by identifying the name and location of the facility on the report. Second, we identified when the audit report was published, with the majority of reports submitted between August 2013 and August 2016 (during the first round of required audits). Third, to determine whether or not there were any youth held at the facility, we located the narrative description of facility characteristics, or general information on the ages of incarcerated individuals held in the facility in the beginning of the report. Many audit reports disclosed how many beds were available in a facility, or the total population of incarcerated individuals at the facilities, but did not specify how many of those were youth or adults. However, the majority of the facilities that either “met” or “exceeded” the Youthful Inmate Standard identified how many youth were in the facility at the time of the audit, with a range from 1 to 76 incarcerated youth.

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<sup>36</sup> Ronaldo D. Myers & Joli Rish Shumpert, Sheriff Al Cannon Detention Center PREA Audit (S.C. Oct 20, 2016) <https://sheriff.charlestoncounty.org/files/PREA-Certification.pdf?r=46>.

<sup>37</sup> Ian Rachal, Harris County Jail at 701 N. San Jacinto PREA Audit (Tex. May 30, 2016), *available at* [https://www.harriscountysos.org/documents/PREA/harris\\_county\\_final\\_report\\_701\\_n\\_san\\_jacinto.pdf](https://www.harriscountysos.org/documents/PREA/harris_county_final_report_701_n_san_jacinto.pdf) [hereinafter Rachal, 701 N. San Jacinto]; Ian Rachal, Harris County Jail at 1200 Baker Street Jail PREA Audit (Tex. Nov. 1, 2017), *available at* [https://www.harriscountysos.org/documents/PREA/harris\\_county\\_final\\_report\\_1200\\_Baker.pdf](https://www.harriscountysos.org/documents/PREA/harris_county_final_report_1200_Baker.pdf) [hereinafter Rachal, 1200 Baker St.].

<sup>38</sup> FY 2017 LIST OF CERTIFICATION AND ASSURANCE SUBMISSIONS, *supra* note 30.

In order to determine compliance with the Youthful Inmate Standard, we reviewed auditors' findings by locating Standard § 115.14 in the audits. Out of the 826 facilities reviewed, 745 facilities did not house youthful inmates at the time of the audit nor have they ever housed youthful inmates, and they did not indicate the potential of housing youthful inmates in the future. 73 facilities met the standard and 6 facilities exceeded the standard. Specifically, during the first complete PREA audit cycle, the Farmington Correctional Center (Missouri),<sup>39</sup> the Lovelock Correctional Center (Nevada),<sup>40</sup> the Garden State Youthful Correctional Facility (New Jersey),<sup>41</sup> the Foothills Correctional Institution (North Carolina),<sup>42</sup> the Sussex II State Prison (Virginia),<sup>43</sup> and the Wyoming Honor Conservation Camp & Wyoming Boot Camp (Wyoming)<sup>44</sup> exceeded the standard. These facilities are all prisons. Two facilities, the 701 N. San Jacinto Facility (Texas)<sup>45</sup> and the 1200 Baker Street Facility (Texas),<sup>46</sup> which are both jails, did not meet the standard, though the 1200 Baker Street Facility was not audited until 2017.

Of the 73 facilities that met the Youthful Inmate Standard, it is important to note that auditors in some facilities recognized that the facility met standards even though it did not house any youthful inmates at the time of the audit. There were two reasons for this: either the facility has housed youthful inmates in the past, or there is a possibility that the facility has the potential to house youthful inmates in the future, and under either condition the auditor found that the facility met standards. Within the 73 facilities that met standards, 50 housed youthful inmates at the time of audit; 5 housed youthful inmates in the past and can again in the future, but did not house youthful inmates during the time of audit; and 18 facilities did not house youthful inmates at the time of audit, but have the potential for housing youthful inmates in the future, and have made the proper accommodations to adhere to the Youthful Inmate Standard should it occur.

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<sup>39</sup> Shannon R. Butrum, Farmington Correctional Center PREA Audit (Mo. Feb. 16, 2015), *available at* <https://doc.mo.gov/sites/doc/files/PREA/farmington-correctional-audit-2015.pdf>.

<sup>40</sup> Shannon McReynolds, Lovelock Correctional Center PREA Audit (Nev. June 19-21, 2014), *available at* [http://doc.nv.gov/uploadedFiles/docnv.gov/content/About/NDOC\\_Office\\_of\\_the\\_Inspector\\_General/lcc\\_final\\_audit.pdf](http://doc.nv.gov/uploadedFiles/docnv.gov/content/About/NDOC_Office_of_the_Inspector_General/lcc_final_audit.pdf).

<sup>41</sup> Diane Lee, Garden State Youthful Correctional Facility PREA Audit (N.J. June 20, 2014), *available at* <https://www.state.nj.us/corrections/pdf/PREA/Reports/14%20Garden%20State%20PREA%20AUDIT%20FINAL.pdf>.

<sup>42</sup> Walter J. Krauss, Foothills Correctional Center PREA Audit (NC Apr. 26, 2016), *available at* <https://files.nc.gov/ncdps/documents/files/Foothills%20CI%20PREA%20Audit%20Report-Final.pdf>.

<sup>43</sup> Jeff G. Kovar, Sussex II State Prison PREA Audit (Va. Dec. 1, 2015), *available at* <https://vadoc.virginia.gov/about/facts/prea/prea-audit-report-sussex2.pdf>.

<sup>44</sup> Bobbi Pohlman-Rodgers, Wyoming Honor Conservation Camp; Wyoming Boot Camp PREA Audit (Wyo. Aug. 25, 2014), *available at* <https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d3lvLmdvdnxb2N8Z3g6NTVkYTUxZDIxN2ZiNTg2OQ>.

<sup>45</sup> Rachal, 701 N. San Jacinto, *supra* note 38.

<sup>46</sup> Rachal, 1200 Baker Street, *supra* note 38.

Of the 745 facilities that did not house youthful inmates, there were auditors that claimed the facilities met the standard on the audits, but if they had no potential for housing youthful inmates in the future and never housed them in the past, then we categorized them as “not applicable” rather than a facility that met the standard, unless the audit provided information that there was a possibility of housing them in the future and the facility would be prepared to be in compliance.

### **III. Facilities That “Exceed” The Standard**

Out of the 81 facilities that held youthful inmates, only 6 facilities, all prisons, exceeded the Youthful Inmate Standard. Among the 6 facilities, there were common operational practices noted by the auditors. Specifically, these facilities held youth in separate units or separate buildings from the adult population, youth had access to education, counseling programs, and recreational space, and there were proactive attempts to curb the use of solitary confinement. This section provides specific details of how these facilities exceeded the Youthful Inmate Standard.

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#### What Does It Take to “Exceed” the Youthful Inmate Standard?

Facilities that “exceeded” the youthful inmate standard all seemed to have the following in common:

- Separate units or separate buildings for youthful inmates;
  - Access to education programs;
  - Services like counseling programs;
  - Recreational space; and
  - Proactive policies to curb the use of solitary confinement.
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### *Separate Youthful Inmate Units*

In Farmington Correctional Center, a prison in Missouri, the Youthful Inmate Standard was one of two standards that the facility exceeded.<sup>47</sup> While not very detailed, the auditor found that Farmington was able to hold youthful inmates without the use of isolation, and that they were offered the same services as inmates held in the general population.<sup>48</sup> The auditor noted that the set up and services for youthful offenders was “impressive.”<sup>49</sup> Within the facility’s policy on offender housing assignments, there is a section that youthful offenders will only be housed with other youthful offenders. This policy is required under Missouri Law, Chapter 217, Department of Corrections, § 217.345.<sup>50</sup>

Similarly, in Lovelock Correctional Center (LCC), a prison in Nevada, there is a separate youthful offender unit.<sup>51</sup> Despite stating the facility exceeded the Youthful Inmate Standard, the auditor noted that the standard requires the facility to meet three elements in order for a finding of “meets standard.”<sup>52</sup> The auditor found that the facility met all three elements, but did not elaborate whether the facility went above and beyond a single element to warrant a finding of “exceeds standards.” In June 2018, the American Civil Liberties Union (ACLU) of Nevada released a report entitled *Youth Confinement in Nevada: Facility Assessment and Recommendations for Housing Youth Sentenced as Adults*. The report includes a review of conditions within the Lovelock Correctional Center. While LCC has a separate unit to keep youth separate from adults, the youthful inmates still have limited housing space. The boys held in the facility spend a majority of their time in the small, 20-bed unit, and since they have reached capacity, two of the youth were living in the infirmary at the time of the publication of the report.<sup>53</sup>

The Wyoming Honor Conservation Camp & Wyoming Boot Camp, a prison, was the only facility to have exceeded the Youthful Inmate Standard in the state.<sup>54</sup> The Youthful Inmate Standard

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<sup>47</sup> Butrum, *supra* note 40 at 4-5.

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.*

<sup>50</sup> Mo. Rev. Stat. § 217.345 (2013).

<sup>51</sup> McReynolds, *supra* note 41 at 2,7.

<sup>52</sup> *See id.* at 7 (listing those elements as follows: youthful inmates will not be placed in a housing unit where they have sight, sound, or physical contact with adult offenders; outside of the housing unit for youthful offenders must also be sight and sound separated from adult offenders, or youth must be directly supervised when they come in contact with adults; and, an agency must make best efforts to avoid placing youth in isolation to comply with the Youthful Inmate Standard).

<sup>53</sup> HOLLY WELBORN ET. AL, ACLU OF NEV., YOUTH CONFINEMENT IN NEVADA: FACILITY ASSESSMENT AND RECOMMENDATIONS FOR HOUSING YOUTH SENTENCED AS ADULTS 8 (2018), available at [https://www.aclunv.org/sites/default/files/wysiwyg/youth\\_confinement\\_in\\_nevada.pdf](https://www.aclunv.org/sites/default/files/wysiwyg/youth_confinement_in_nevada.pdf).

<sup>54</sup> Pohlman-Rodgers, *supra* note 45.

was one of five exceeded standards within the audit.<sup>55</sup> Prior to the audit, there were two youth under the age of 18 within the facility.<sup>56</sup> While the facility does not have a separate unit for youthful inmates, the two youth in the facility were kept in a separate sleep room, with a door alarm and a panic button.<sup>57</sup> Each evening at bedtime, the door alarm would be set in case anyone attempted to open the door.<sup>58</sup> The young men were provided a separate bathroom and shower from the rest of the population as well.<sup>59</sup>

Similar housing arrangements, specifically separate youthful inmate units, were in Garden State Correctional Center, a prison in New Jersey; Foothills Correctional Institution, a prison in North Carolina; and Sussex II State Prison in Virginia.<sup>60</sup>

### **Access to Programs**

Access to education, recreation, and counseling were also common themes in these facilities. However, this access to programming came with challenges for some of the facilities. For example, at Lovelock, when the youthful inmates want to engage in any programming outside of the unit, all 1,700 adult inmates have to be on lockdown, which not only affects the operations within the entire facility, but limits the youthful inmates' opportunity to engage in meaningful programming.<sup>61</sup> Aside from programming, youthful inmates receive two hours of in-person educational instruction every day through the Pershing County School District. Youth can take diploma or GED subject courses. In addition, youth receive pre-recorded videos on a tablet in their units to review lessons. While youth receive access to education, their adult counterparts receive comparably more educational time and access.<sup>62</sup> Similarly, youth in juvenile facilities also have more access to education.<sup>63</sup> While the audit mentions a recreational space provided for the youthful inmates, the ACLU reports that LCC has significant problems in providing the proper level and amount of exercise. The yard the youthful inmates have access to is small, enclosed by concrete walls and a chain-link fence ceiling, with a lack of sunlight.<sup>64</sup> This yard takes away the ability for youth to have outdoor recreation, which is noted as a

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<sup>55</sup> *Id.* at 3.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Id.* at 3-4.

<sup>58</sup> *Id.* at 3-4.

<sup>59</sup> *Id.* at 4.

<sup>60</sup> See Lee, *supra* note 42 at 6 (noting the facility had made significant updates to ensure compliance with the Youthful Inmate Standard, including creating a self-contained unit where the youth reside and conduct activities); Kraus, *supra* note 43 at 8 (explaining that the sight and sound separation modifications “are impressive” and “extraordinary.”); Kovar, *supra* note 44 at 9-10 (finding that youth are housed and participate in activities in an entirely separate unit from the adult population).

<sup>61</sup> Welborn, *supra* note 54 at 8.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

critical component for child development.<sup>65</sup> There is a gym that the youth have access to three times a week, and the yard is accessible only once a week for three hours.<sup>66</sup>

In the other facilities all of the educational programming happens inside of the unit. At Garden State Youthful Correctional Facility, a teacher is assigned to conduct classes in the unit five days a week and a full-time recreation teacher is also on the unit to conduct health classes. Youth also have access to drug and alcohol counseling.<sup>67</sup> At Sussex II State Prison in Virginia, there is a school division responsible for education programs for all incarcerated individuals and there is academic instruction provided for the youth.<sup>68</sup>

### ***Solitary Confinement***

Finally, some of the facilities that exceeded standard worked to limit solitary confinement or segregation by working on alternatives or requiring that programming continues while in segregation. At Farmington Correctional Center, the PREA auditor specifically highlighted that “FCC is able to house youthful offenders in compliance with the standard without the use of isolation while still providing the offenders with all services offered to offenders housed in general population.”<sup>69</sup> At the Foothills Correctional Center in North Carolina, there were 56 youthful inmates at the time of their audit in February 2016.<sup>70</sup> Of the three facilities in North Carolina that house youthful inmates, Foothills is the only institution that exceeds, rather than meets, the Youthful Inmate Standard.<sup>71</sup> The same year as the audit, W. David Guice, State Commissioner of Adult Corrections and Juvenile Justice, noted that the Youthful Offender Program, put in place on September 1, 2016, would focus on education, behavioral health, and treatment needs of youth held in the state prison system.<sup>72</sup> Further, after prison advocates and the ACLU asked the DOJ to investigate North Carolina’s use of solitary confinement in 2015, Department of Public Safety (DPS) officials announced an end to the use of solitary confinement.<sup>73</sup> At the time of the announcement, 70 youth were held in restrictive housing and confined to a cell 22-23 hours a day in Foothills.<sup>74</sup> Instead of solitary confinement, the new plan requires correctional officers to place inmates who display behavioral problems in modified

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Lee, *supra* note 42 at

<sup>68</sup> Kovar, *supra* note 44 at 9.

<sup>69</sup> Butrum, *supra* note 40 at 5.

<sup>70</sup> Krauss, *supra* note 43 at 8.

<sup>71</sup> *Id.* at 8.

<sup>72</sup> Rose Hoban, *Ending Solitary Confinement for Juveniles, Prison Commissioners Cites Use of Evidence Based Alternatives*, N.C. HEALTH NEWS (June 21, 2016), <https://www.northcarolinahealthnews.org/2016/06/21/ending-solitary-for-juveniles-prison-commissioner-cites-use-of-evidence-based-alternatives/>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*



housing with intensive supervision and limited privileges.<sup>75</sup> The rest of the youth will stay in new housing consisting of small units where inmates are given reinforcements to engage in positive behavior through an evidence-based approach.<sup>76</sup> Guice implemented this new policy as an alternative to solitary confinement after staff received training on the policy.<sup>77</sup>

### **Problems Persist**

While these facilities exceeded the Youthful Inmate Standard, it is important to note that they still struggle with sexual assault and physical assault. In July 2017, soon after Farmington's PREA audit, prosecutors charged a Farmington Correctional Center officer with a felony after she reportedly committed sexual misconduct with an inmate.<sup>78</sup> At Foothills Correctional Center, and in other facilities across North Carolina, there has been multiple physical assaults that suggest significant safety issues for youth and staff in the facility.<sup>79</sup> In Virginia, there has been a debate over whether the lack of trained staff to run state prisons has caused a safety crisis.<sup>80</sup> PREA audits represent a brief moment in the operations of these facilities, and while administrators may be able to comply with the Youthful Inmate Standard to protect youth from rape and sexual assault, there are broader safety issues. If these physical safety issues go unaddressed, youth in these facilities will remain in danger.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Renee Bronaugh, *Correctional Officer Charged*, DAILY JOURNAL ONLINE (July 1, 2017), [https://dailyjournalonline.com/news/local/correctional-officer-charged/article\\_15c26f45-29ed-5d5e-bb7c-aecd25f0f529.html](https://dailyjournalonline.com/news/local/correctional-officer-charged/article_15c26f45-29ed-5d5e-bb7c-aecd25f0f529.html).

<sup>79</sup> See Nick Ochsner, *Seven Correction Officers attacked in NC Prisons this week*, WBTV (Mar. 18, 2018), <http://www.wbtv.com/story/37509682/seven-correction-officers-attacked-in-nc-prisons-this-week> (noting, "North Carolina Representative Bob Steinburg (R-Chowan) has been pressing for more to be done to improve the safety of the state's prisons. He said he continues to be perplexed by the lack of action to improve the deadly and dangerous problems plaguing the state's problems on the part of both prison leadership and his fellow lawmakers.).

<sup>80</sup> See Laura Geller, *13News Now Investigates: Crisis in Corrections*, ABC 13 NEWS (Apr. 26, 2018), <https://www.13newsnow.com/article/news/local/13news-now-investigates-crisis-in-corrections/291-545647679> (explaining that there is a severe staffing shortage in Virginia prisons).

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## The PREA Auditor Handbook

In August 2017, the PREA Management Office, released the PREA Auditor Handbook that outlines the requirements of PREA auditor certification, establish standards of ethical auditor conduct, provide details on audit methodology, hold auditors accountable for audit quality, and provide transparency to the process.

Since the PREA Auditor Handbook was released, none of the six facilities in the first cycle found to “exceed” the Youthful Inmate Standard have been audited. However, 3 of the facilities were audited again shortly before the release of the handbook. In those second audits, the facilities were only found to “meet” the Youthful Inmate Standard, despite the fact that it does not seem like much has changed since the original audits.

While we cannot say for sure why these facilities were downgraded in their compliance with the Youthful Inmate Standard, it is possible that audits have become more thorough over time. With the addition of the PREA Auditor Handbook, it is our hope audits will be more consistent and thorough going forward.

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### IV. Facilities that Do Not Meet the Standard

During the first complete audit cycle, only one facility, the 701 N. San Jacinto jail facility in Harris County, Texas, did not meet the Youthful Inmate Standard.<sup>81</sup> According to the auditor’s report, the main concern was a complete lack of separate housing for youth due to overcrowding.<sup>82</sup> The auditor believed that the facility could eventually meet the standard; however, Texas law specifically allows 17-year-olds to be housed as adults because the state’s age of criminal responsibility is 17.<sup>83</sup> Therefore, during the audit, the youthful inmates were not held separate from the adult population. There was unsuccessful coordination on an appropriate corrective action plan to determine how youthful inmates can be housed separately.<sup>84</sup>

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<sup>81</sup> Rachal, 701 N. San Jacinto *supra* note 38 at 6.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> TEX. FAM. § 51.02(2)(A)

<sup>84</sup> Rachal, 701 N. San Jacinto, *supra* note 38 at 2.

During the corrective action period, all 17-year-old inmates were moved to the 1200 Baker St. jail facility, but the youth were still housed with adults, out of compliance with the Youthful Inmate Standard.<sup>85</sup> Further, in 2015, the Harris County Sheriff's Office reported 217 allegations of sexual abuse or harassment at the Baker facility.<sup>86</sup> Despite these reports, there was no agency-wide plan to address how youthful inmates were housed in adult facilities, even though they were working to house them with another agency through a contracted agreement.<sup>87</sup> The auditor recommended developing a plan where the youthful inmates would be reassigned to a specific area within the facility based on the current layout of the facility, but in order to create this necessary bed space, there would need to be a relocation of adult offenders and that would create temporary challenges.<sup>88</sup> Regardless, the auditor found that there was no justification for the 701 facility to not meet the Youthful Inmate Standard.<sup>89</sup>

In July 2016, the *Houston Chronicle* reported that 17-year-old youthful inmates had “virtually no place to go” while they are awaiting trial in adult court.<sup>90</sup> The facility was overcrowded and there was no dedicated space for youthful inmates.<sup>91</sup> Harris County Sheriff Ron Hickman acknowledged that while there were efforts to transfer the youthful inmates to other counties, those efforts failed because of space challenges.<sup>92</sup> While compliance for the Youthful Inmate Standard was not met, Harris County Sheriff's Captain, Ronny Taylor, stated that the department responded with measures to comply with PREA by hiring a PREA manager, establishing a 24-hour hotline to report sexual assault, investigating any threats, separating those who may appear vulnerable to abuse, and providing counseling to assault victims.<sup>93</sup>

In April 2017, during the second PREA auditing cycle, the Baker Street facility was audited by the same auditor who conducted the audit of the 701 facility.<sup>94</sup> The audit report was nearly identical to the 701 facility's report on compliance with the Youthful Inmate Standard. 17-year-old inmates were housed with adults, primarily due to housing space and classification issues.<sup>95</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> St. John Barned-Smith, *Stuck in Limbo: Feds Say Jails Need Separate Housing for Youngest Inmates*, THE HOUSTON CHRONICLE (July 1, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Stuck-in-limbo-Feds-say-jails-need-separate-8336756.php>.

<sup>87</sup> Rachal, 701 N. San Jacinto, *supra* note 38 at 2.

<sup>88</sup> *Id.* at 6.

<sup>89</sup> *Id.* at 6.

<sup>90</sup> Barned-Smith, *supra* note 89.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Rachal, 1200 Baker Street, *supra* note 38.

<sup>95</sup> *Id.* at 2.

Coordination on a corrective action plan was unsuccessful, and the facility was found not to meet the requirements of the Youthful Inmate Standard.<sup>96</sup>

These problems are not rare in Texas, once called the prison rape capital of the country.<sup>97</sup> A former Texas prison employee who oversaw a youthful offender program accused the state's Department of Criminal Justice of promoting a culture of cover up where incidents of abuse were ignored and reports of abuse were discouraged.<sup>98</sup> After the employee came forward, a state lawmaker requested an investigation into the Youthful Offender Program, and it was later announced the Youthful Offender Program for young men would relocate in order to ensure youth are sight and sound separated from the adult population.<sup>99</sup> Unfortunately, this change does not address the youth who are held in Texas jails.

## **V. Recommendations to Address PREA Issues & Limitations**

The passage of PREA and the development of the Youthful Inmate Standard was a step in the right direction. However, there are significant limitations in the law and abuses of implementation of the standard that harm the youth the law seeks to protect. The following section discusses six recommendations to address these issues and limitations in the current law.

### **Recommendation 1: Pass Legislation to Remove Youth Under 18 from Adult Facilities**

The most effective way for states to comply with the Youthful Inmate Standard is to pass legislation removing youth under 18 from adult jails and prisons. Over the past decade, a number of states have passed legislation creating a presumption that youth are held in juvenile placements or banning their placements in adult facilities.<sup>100</sup> These legislative changes have

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<sup>96</sup> *Id.* at 6.

<sup>97</sup> See Alysia Santo, *Texas: The Prison Rape Capital of the U.S.*, NEWSWEEK (June, 20, 2015, 2:48 PM), <https://www.newsweek.com/texas-prison-rape-capital-us-344729> (noting that, “[s]ince 200, the state prison system’s inspector general has referred nearly 400 cases of staff sex crimes against inmates to prosecutors).

<sup>98</sup> Jill Ament, *Former Texas Prison Employee Alleges A ‘Culture Of Cover-Up,’* TEXAS STANDARD (Mar. 8, 2018, 4:13 PM), <https://www.houstonpublicmedia.org/articles/news/2018/03/08/272327/former-texas-prison-employee-alleges-a-culture-of-cover-up/>.

<sup>99</sup> Lauren McGaughy, *Republican Lawmaker Wants State to Investigate Conditions for Texas Teens in Adult Prison*, DALLAS NEWS (Mar. 23, 2018), <https://www.dallasnews.com/news/crime/2018/03/22/republican-lawmaker-wants-state-investigate-conditions-texas-teens-adult-prison>; Lauren McGaughy, *After Sex Incident, Texas Will Soon Move Teen Prisoners to Former Death Row Wing*, DALLAS NEWS (June 1, 2018), <https://www.dallasnews.com/news/crime/2018/05/31/teens-behind-bars-tour-the-prison-texas-will-soon-move-young-felons>.

<sup>100</sup> NEELUM AYRA, UCLA SCHOOL OF LAW, GETTING TO ZERO: A 50-STATE STUDY OF STRATEGIES TO REMOVE YOUTH FROM ADULT JAILS 39-41 (2018), available at [https://drive.google.com/file/d/1LLSF8uBlrcqDaFW3ZKo\\_k3xpk\\_DTmItV/view](https://drive.google.com/file/d/1LLSF8uBlrcqDaFW3ZKo_k3xpk_DTmItV/view).

resulted in the number of youth held in jail on any given day declining by 51% since 2000<sup>101</sup> and the number of youth held in adult prisons on any given day declining by 58% since 2010.<sup>102</sup> These legislative efforts are supported by law enforcement. Both the National Sheriffs' Association and the Major Cities Chiefs' Association have released statements and resolutions in support of a presumption that youth should be served in juvenile placements instead of adult jails and prisons.<sup>103</sup> Support from law enforcement reflects a recognition that youth are different than adults and when they are placed in adult facilities they are more likely to experience abuse or commit suicide.<sup>104</sup> Congress should incentivize state legislators to remove youth from adult facilities by ensuring that state officials are accountable to both the youth they serve and to the U.S. Department of Justice.

### **Recommendation 2: Congress Should Strengthen the Incentive to Remove Youth from Adult Facilities to Comply with PREA by Creating a Private Right of Action**

The primary limitation of PREA is its lack of a private right of action for failure to comply with the law and standards. Under other federal laws that serve vulnerable populations, specifically the Individuals with Disabilities Education Act (IDEA),<sup>105</sup> the Americans with Disabilities Act,<sup>106</sup> Section 504 of the Rehabilitation Act,<sup>107</sup> and the Civil Rights Act of 1964,<sup>108</sup> there is a private right of action, which provides individuals with legal recourse when state actors violate the law.

An earlier iteration of PREA, called the Custodial Sexual Abuse Act of 1998, did provide a private right of action, but that provision was ultimately removed during negotiations for PREA to ensure its passage in 2003.<sup>109</sup> Courts have confirmed and reinforced that PREA does not create a private right of action.<sup>110</sup> Instead, those seeking to raise sexual assault claims must invoke the Eighth Amendment or 42 U.S.C. § 1983 claims. The standards for these claims are much higher, and in order for the plaintiff to succeed on a cruel and unusual punishment claim, the plaintiff

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<sup>101</sup> ZHEN ZHENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2016 9 (2018), *available at* <https://www.bjs.gov/content/pub/pdf/ji16.pdf>

<sup>102</sup> PAUL GUERINO, ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 35 (2011), *available at* <https://www.bjs.gov/content/pub/pdf/p10.pdf>. *See also* CARSON, *supra* note 32.

<sup>103</sup> MAJOR CITIES CHIEFS ASSOCIATION, POLICY STATEMENT ON YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM (2017), *available at* [https://www.majorcitieschiefs.com/pdf/news/policy\\_juvenile\\_age.pdf](https://www.majorcitieschiefs.com/pdf/news/policy_juvenile_age.pdf). *See also* NATIONAL SHERIFFS' ASS'N, RESOLUTION ON YOUTH TRIED AS ADULTS (2018), *available at* <https://www.sheriffs.org/sites/default/files/2018-02.pdf>

<sup>104</sup> ARYA, *supra* note 103.

<sup>105</sup> Individuals with Disabilities Education Act, 20 U.S.C. 33 § 1415 (2004).

<sup>106</sup> Americans with Disabilities Amendments Act of 2008, 42 U.S.C. §§ 12101 et. seq. (2008).

<sup>107</sup> Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 et. seq. (1973).

<sup>108</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000 et. seq. (1964).

<sup>109</sup> Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues Torture*, 3 CRIM. L. BRIEF 10, 11 (2008).

<sup>110</sup> *See Bell v. Cty. of Los Angeles*, No. CV 07-8187-GW(E), 2008 WL 4375768, at \*1 (D. CD. Cal. Aug. 25, 2008); *Pirtle v. Hickman*, No. CV05-146-S-MHW, 2005 WL 3359731, at \*1 (D. Idaho Dec. 9, 2005).

must prove that the defendant was “deliberately indifferent” to an objectively serious risk of harm.<sup>111</sup> In other words, the defendant must have actually known about the serious risk and chose not to do anything to mitigate or prevent it.<sup>112</sup> This high standard is particularly problematic for youth who are less likely to file complaints and generally lack to experience and sophistication to secure representation or navigate the legal process on their own.<sup>113</sup>

Without a private right of action, if a prison administrator and staff fail to comply with the PREA standards, the harshest consequence they face is the potential loss of federal funding, which, on average, constitutes just less than three percent of their state prisons’ budget.<sup>114</sup> For this reason, Utah and Arkansas have decided not to comply PREA.<sup>115</sup> In fact, Utah officials have stated that implementation of PREA would be too burdensome for the state.<sup>116</sup>

As a result, survivors of sexual assault in prison have to make difficult cruel and unusual punishment claims. For example, in *Bell v. Los Angeles County*, the plaintiff cited PREA standards in her suit against the county after she was sexually assaulted by an officer.<sup>117</sup> The court granted summary judgment to the defendant and reasoned that because there is no private right of action under PREA, the violation should have no effect on the court’s analysis of cruel and unusual punishment.<sup>118</sup> The jury ruled in favor of a youthful female victim in another case, *Poore v. Glanz*, only after the officers were found to be aware, but deliberately indifferent to the policies put in place to protect the youthful female inmates whom they knew were vulnerable.<sup>119</sup>

Courts are more receptive to PREA defenses by prison officials. In some cases, the court seems satisfied if the defendants prove they were complying with PREA standards. For example, when a woman reported being sexually assaulted by a corrections counselor, the defendants argued that there was no evidence proving the prison officials were deliberately indifferent to the risk

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<sup>111</sup> *Farmer v. Brennan*, 511 U.S. 825, 825-27 (1994).

<sup>112</sup> *Id.* at 826.

<sup>113</sup> JUST DETENTION INTERNATIONAL, THE PRISON LITIGATION REFORM ACT OBSTRUCTS JUSTICE FOR SURVIVORS OF SEXUAL ABUSE IN DETENTION 2 (2009), available at <https://www.prearesourcecenter.org/sites/default/files/library/28-jdifactsheetprisonlitigationreformact.pdf>.

<sup>114</sup> Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. OF LEGIS. & PUB. POL’Y 801, 806 (2015).

<sup>115</sup> Crime and Justice News, *UT, AR Still Refuses to Adopt Prison Rape Law*, THE CRIME REPORT, (May 14, 2017), <https://thecrimereport.org/2017/05/14/ut-ar-still-refuse-to-adopt-u-s-prison-rape-law/>.

<sup>116</sup> *Id.*

<sup>117</sup> No. CV 07-8187-GW(E), 2008 WL 4375768, at \*1 (C.D. Cal. Aug. 25, 2008).

<sup>118</sup> See *Id.* at \*6. See also *LeMasters v. Fabian*, No. 09-702 DSD/AJB, 2009 WL 1405176, at \*2 (D.Minn. May 18, 2009); *Rindahl v. Weber*, No. CIV. 08-4041-RHB, 2008 WL 5448232, at \*1 (D.S.D. Dec. 31, 2008); *Chinnici v. Edwards*, No. 1:07-cv-299, 2008 WL 3851294, at \*3 (D.Vt. Aug. 12, 2008).

<sup>119</sup> 724 F. App’x 635, 638 (10th Cir. 2018) (affirming that keeping female youthful inmates in a visually isolated and unmonitored section of the facility staffed by only one male staff violated their written policies that prohibited these practices).

of sexual assault, and therefore, this did not amount to cruel and unusual punishment.<sup>120</sup> Their argument was strengthened once the defense provided their prison audit showing the prison was in compliance with PREA's standards.<sup>121</sup>

Courts also enforce the restrictive Prison Litigation Reform Act (PLRA) exhaustion remedy provision, which courts often use as a reason to dismiss cases. The PLRA specifically requires that "no action can be brought with respect to prison conditions under 42 U.S.C.A. § 1983, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."<sup>122</sup> This requirement creates several problems, particularly for pro se litigants and youth who are often unaware that such a requirement exists, and even if they are aware, they may not know how to navigate all the administrative procedures they must exhaust before filing suit.

Courts regularly enforce the PLRA's exhaustion provision regardless of youth. In *Doe v. Michigan Department of Corrections*, the Court ruled against six out of seven "John Doe" plaintiffs for failing to exhaust all available administrative remedies.<sup>123</sup> The Court only ruled in favor of John Doe #3 because the grievance process was not available to him after a correctional officer ripped up his complaint in front of him.<sup>124</sup>

While the passage of PREA and its standards were a significant step toward transparency within prison systems, Congress should strengthen the incentive for state and local facilities to comply with PREA by creating a private right of action which would allow youth to hold facility administrators' accountable without burdensome exhaustion requirements. Creating this private right of action would also likely incentivize state legislators to consider removing youth under 18 out of adult jails and prisons to reduce the likelihood of litigation.

### **Recommendation 3: States Should Be Held Accountable for the PREA Compliance of Local Facilities.**

In our review of the PREA audits available on BJA's website, only 25 were county jails. Interestingly, the only two facilities we reviewed that failed to meet the Youthful Inmate Standard were both jails. While all types of facilities are audited, states only receive a deduction in federal funding for the non-compliance of executive-run state facilities. The main incentive

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<sup>120</sup> *Crane v. Allen*, No. 3:09-CV-1303-HZ, 2012 WL 602432, at \*1 (D. Oregon Feb. 22, 2012).

<sup>121</sup> *Id.* at 8 (holding that the audits showed that defendants' trainings, policies, and procedures complied with PREA standards).

<sup>122</sup> 42 U.S.C. 1997e(a) (2013).

<sup>123</sup> No. 13-14356, 2016 WL 465496, at \*1 (E.D. Mich. May 5, 2016).

<sup>124</sup> *Id.* at \*11.



for local jails to comply with PREA is to mitigate legal claims of deliberate indifference to conditions fostering sexual assault.<sup>125</sup> Beyond legal protection, local jails are generally not incentivized or required to publish their PREA audits.

Youth who are transferred to the adult system are almost four times more likely to be held in adult jails than in adult prisons.<sup>126</sup> Without the monetary incentive of compliance or the concern that a facility's PREA audit will be published online, there is a risk of significant transparency issues. To ensure PREA compliance with the Youthful Inmate Standard, states should be held accountable for all facilities covered by PREA within the state instead of only executive run facilities. This would ensure that the adult facilities that are more likely to house youth, specifically local jails, are required to be transparent and held accountable for their compliance with the standard. If states were held accountable for the treatment of youth in their local jails, state legislatures would also be incentivized to pass legislation requiring the placement of incarcerated youth in juvenile justice settings. Without this accountability, a majority of states have retained the ability for youth under 18 to be held in adult facilities.<sup>127</sup>

***Recommendation 4: PREA Auditors Should Be Able to Visit a Facility at Any Point During the Relevant Audit Year to Ensure a Realistic Representation of the Conditions within the Facilities.***

According to the PREA Auditor Handbook, published in August 2017, facility administrators are notified of the auditor's visit at least 6 to 8 weeks in advance, and the auditor verifies that a notice is placed in multiple locations throughout the facility where it is visible to all incarcerated individuals and staff.<sup>128</sup> In the time preceding the audit, the auditors are encouraged to constantly communicate with staff to ensure preparation for the visit.<sup>129</sup> For example, auditors work with staff to set expectations and timelines, discuss the process and logistics, and provide the facility with a Pre-Audit Questionnaire.<sup>130</sup> The ample amount of time between the notice and the visit allows the facility administration and staff to prepare and address issues in ways that do not necessarily reflect the normal operations of the facility. The lengthy audit notification process gives facilities the opportunity to temporarily address issues during the

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<sup>125</sup> See Maurice Chammah, *Where Rape Goes Unnoticed*, THE MARSHALL PROJECT (Apr. 3, 2015, 1:29 PM), <https://www.themarshallproject.org/2015/04/03/where-rape-goes-unnoticed> (stating that county jails may also comply in order to receive accreditation from the American Correctional Association and to obtain state and federal contracts to house individuals from other areas).

<sup>126</sup> See Wendy Sawyer, *Youth Confinement: The Whole Pie*, PRISON POLICY INITIATIVE (Feb. 27, 2018), <https://www.prisonpolicy.org/reports/youth2018.html> (comparing 3,700 youth held in jail to 956 youth held in prisons on any given day).

<sup>127</sup> MINTON, *supra* note 33 at 12.

<sup>128</sup> PREA AUDITOR HANDBOOK, *supra* note 22 at 30.

<sup>129</sup> *Id.* at 30.

<sup>130</sup> *Id.* at 30.

audit, but, it does not incentivize long-term compliance throughout the three-year audit cycle. Auditors or an independent government ombudsman should be allowed to visit and tour the facility at any point during the audit year without notice to ensure that facilities remain in compliance outside of the audit period.

***Recommendation 5: The 180-day Corrective Action Period Should Be Shortened to Ensure a Swift Response to Safety Threats.***

If an auditor identifies any areas of non-compliance during an initial visit, the facility administrator is given 180 days to implement any corrective actions before the auditor submits a final report.<sup>131</sup> Although facilities should have sufficient time to make any necessary changes to come into compliance with the PREA standards, this particular time frame leaves vulnerable individuals within the facility at risk for physical and sexual assault violations. In the interest of protecting incarcerated individuals and vulnerable populations, facilities should be required to address safety concerns within an abbreviated timeframe to avoid potential harm. There should be a stronger sense of urgency around addressing these issues. A shorter time frame to implement corrective actions will encourage facilities to be more proactive in mitigating these threats to security. The audit process in its entirety should be condensed to ensure that non-compliance is identified and addressed immediately.

***Recommendation 6: States Should Restrict the Use of Solitary Confinement of Youth Held in Adult Facilities and, If This Is Not Feasible Because of Sight and Sound Challenges, Youth Should Be Immediately Moved to a Juvenile Placement.***

The Youthful Inmate Standard states that, “agencies shall make best efforts to avoid placing youthful inmates in isolation to comply” with the sight and sound separation requirement.<sup>132</sup> The regulations expand on this standard and state that residents may only be isolated as a last resort when less restrictive means are inadequate.<sup>133</sup> They can only be isolated until alternative means are arranged, and they must still receive daily large-muscle exercise, educational programming, work opportunities, daily visits from clinicians, and periodic review determining whether isolation is still necessary.<sup>134</sup> This provision limits the officers’ power and encourages officers to actively pursue alternative methods to mitigate threats of violence against vulnerable populations.<sup>135</sup> However, the “last resort” standard is not an outright ban on solitary confinement, and it allows the facilities to have discretion in its implementation. Like sexual

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<sup>131</sup> *Id.* at 66.

<sup>132</sup> 28 C.F.R. § 115.14(c) (2012).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* § 115.342(b).

<sup>135</sup> *Id.* § 115.342(b).

assault, solitary confinement can have many negative physical and psychological effects on youth.

The sight and sound separation requirement is often a challenge for jail administrators if their facilities are overcrowded or they are housing very few youth. For example, the auditor for the Harris County Jail at 701 N. San Jacinto, was informed that the facility was so overcrowded that the jail did not have enough bed space to house youth separately from adults.<sup>136</sup> Similarly, Ronaldo Myers, a superintendent for Hampton Roads Regional Jail and a previously certified PREA Auditor, stated that he placed seven youth convicted as adults in solitary confinement for prolonged periods of time because separate housing would have required him to put 100 beds out of commission.<sup>137</sup> Due to the lack of space, the seven boys were only allowed out of their cells for one or two hours a day.<sup>138</sup> The use of solitary confinement to hold youth is also common in adult female institutions where the female youthful inmate population is generally low.<sup>139</sup> When facility space is limited, the “last resort” requirement should include the consideration of placement in a juvenile facility.

Solitary confinement has deleterious effects on adults. Research indicates that, incarcerated adults who have spent time in solitary have demonstrated suicidal thoughts, self-mutilation, and exacerbated mental illnesses.<sup>140</sup> Incarcerated individuals also experience anxiety, depression, anger, obsessive thoughts, and paranoia when isolated in their respective facilities.<sup>141</sup> The effect of solitary confinement is heightened for youth who are still mentally and psychologically developing.<sup>142</sup> Kalief Browder, a 16-year-old held for two years in solitary confinement at Rikers Island, NY while awaiting trial, suffered from many of the effects of solitary confinement such as restlessness and paranoia, and he even spent the years following

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<sup>136</sup> Rachal, 701 N. San Jacinto, *supra* note 38 at 6.

<sup>137</sup> Scott Daugherty, *Hampton Roads Regional Jail is Violating Federal Law by Holding Juveniles*, Superintendent Says, THE VIRGINIAN-PILOT (Dec. 18, 2017), [https://pilotonline.com/news/local/crime/article\\_68d0c6ef-73de-5a65-a74f-58147ccec8a9.html](https://pilotonline.com/news/local/crime/article_68d0c6ef-73de-5a65-a74f-58147ccec8a9.html).

<sup>138</sup> *Id.*

<sup>139</sup> Victoria Law, *Bill Challenging ‘Safekeeping’ of Tennessee Teens in Adult Prisons Could Soon Become Law*, THE APPEAL (May 18, 2018) <https://theappeal.org/bill-challenging-safekeeping-of-tennessee-teens-in-adult-prisons-could-soon-become-law-63fd5e0c3179/> (detailing two teenage girls’, Rosalyn Holmes and Teriyona Winton, experiences in solitary confinement in adult facilities because the population of youthful inmates were so low).

<sup>140</sup> Sandra Simkins, et al., *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J. OF L. & POL’Y 241, 254 (2012), available at [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1019&context=law\\_journal\\_law\\_policy](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1019&context=law_journal_law_policy).

<sup>141</sup> *Id.* at 254.

<sup>142</sup> Lisa Rapaport, *U.S. States Should Ban Solitary Confinement for Kids, Doctors Say*, REUTERS (Apr. 5, 2016), <https://www.reuters.com/article/us-health-youth-prisoners/u-s-states-should-ban-solitary-confinement-for-kids-doctors-say-idUSKCN0X22J4>.

his detention in and out of psychiatric wards.<sup>143</sup> He eventually committed suicide in 2015 after several prior attempts during his detention and post-release.<sup>144</sup>

International officials as well as elected officials in the United States have begun to address concerns around youth held in solitary confinement, particularly while they are in adult placements. The former Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, stated isolation could arise to cruel treatment and torture if it is used for prolonged periods of time on juveniles and called for its limited use and even abolition in some instances.<sup>145</sup> State legislators have also taken action to address these conditions.<sup>146</sup> In response to the seven youth held in solitary confinement at Hampton Roads Regional Jail, State Delegate Cliff Hayes Jr. and State Senator Lionell Spruill Sr. introduced legislation that would require the VA Board of Corrections to approve or certify adult facilities that hold youth.<sup>147</sup> Tennessee Governor Bill Haslam also signed a bill in May 2018 that amended the state's safekeeping law.<sup>148</sup> The law, which initially allowed youth to be held in a state prison pre-trial if the sheriff determined they could not hold the youth in a local jail, now prohibits sending juveniles to adult prisons for "safekeeping" because of the likelihood of being held in solitary confinement.<sup>149</sup>

The sight and sound separation requirement in the Youthful Inmate Standard protects youth from sexual assault, but puts them at risk of solitary confinement. States are beginning to restrict the use of solitary confinement or create the presumption that youth will be held in juvenile facilities instead of adult facilities. However, the most effective way to ensure that youth are not isolated because of the sight and sound separation requirement is to prohibit youth from ending up in adult facilities in the first place.

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<sup>143</sup> Jennifer Gonnerman, *Kalief Browder, 1993-2015*, THE NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

<sup>144</sup> *Id.*

<sup>145</sup> U.N. Secretary General, *Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, ¶ 77, U.N. Doc. A/66/268 (Aug. 5, 2011), available at <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

<sup>146</sup> *Lollis v. N.Y. Dep't of Soc. Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970) (holding that isolating a child in a room with only a mattress is inhumane treatment).

<sup>147</sup> Dave Boucher, *Gov. Bill Haslam Signs 'Safekeeping' bill, State Can No Longer House Teen Safekeepers in Adult Prisons*, TENNESSEAN (May 21, 2018, 6:04 PM), <https://www.tennessean.com/story/news/politics/2018/05/21/haslam-signs-safekeeping-bill-state-can-no-longer-house-teen-safekeepers-adult-prisons/566382002/>.

<sup>148</sup> *Id.* (referencing Tenn. Code Ann. § 41-4-121 (2018)).

<sup>149</sup> Dave Boucher, *Bond Posted for Memphis Teen who Spent Weeks in Adult Prison as 'Safekeeper'*, TENNESSEAN (May 18, 2018, 6:39 PM), <https://www.tennessean.com/story/news/crime/2018/05/16/memphis-teen-out-bond-after-weeks-safekeeper/614951002/>.

## **VI. Conclusion**

The passage of PREA was well-intended and a step toward the right direction in its goal of eliminating prison rape. However, as demonstrated in this brief, there are implementation concerns and the Youthful Inmate Standard is not enough to ensure that youth are protected. The most efficient and effective way to comply with the standard is to remove all youth under 18 from adult facilities. After 15-years, PREA has raised awareness and training around addressing sexual assault and rape. Unfortunately, until areas of the law and regulations are strengthened, the vulnerable populations the law seeks to protect, particularly youth, will continue to experience elevated risks of abuse.