

QUESTIONS FROM THE COMMISSION OF THE  
"AT RISK: THE YOUTHFUL POPULATIONS" PANEL

CHAIRMAN WALTON: Mr. Marksamer, in reference to a gay offender, what is your recommendation as to what we should be recommending as far as a housing facility as to where such an inmate should be placed?

You don't want to place him in general population, obviously. That is -- I mean do you have any recommendations as to what we do, what we recommend, please?

MR. MARKSAMER: For gay youth in --

CHAIRMAN WALTON: Yes.

MR. MARKSAMER: -- the juvenile facilities; is that correct?

CHAIRMAN WALTON: Yes.

MR. MARKSAMER: Okay. What's very important in terms of addressing placement is that addressing -- keeping vulnerable youth from youth that are aggressive needs to occur in a youth sexual orientation, needs to be considered in that manner, and that's whether or not the youth identifies themselves as lesbian, gay, bisexual or transgender, but it's also whether or not other people perceive them and other inmates perceive them to be that way. And, therefore, there may be circumstances where it's appropriate to have units that are housing vulnerable youths that are less sophisticated criminally, youth with other concerns that make them more vulnerable.

But I think the real concern that needs to occur is regarding changing the culture of the institution, so that staff members and other wards are clear -- it's clear to them that homophobic comments and harassment and taunting is not okay, because that, I think, is the issue that really creates an atmosphere where sexual abuse is seen as an appropriate form of treatment towards gay youth.

COMMISSIONER KANEB: Just a point of information for me, Ms. LaBelle. Is Michigan an outlier in terms of incarceration of 14-year-olds in adult institutions?

MS. LABELLE: I think that there are states that prohibit the juveniles going into the facility until they're 18. There are states -- then there's a range.

I think Michigan is at the -- there may be one other state that allows it at 14, but there are only a couple at 14. Some have 16. Some have 18.

COMMISSIONER KANEB: You have represented a number of prisoners in litigation against, basically, the government, one way or another.

MS. LABELLE: Yes.

COMMISSIONER KANEB: One of the matters that we will be considering is the effect of the Prison Litigation Reform Act on the efficacy of the appeal process. We are not unaware of a lot of support, strong support, that exists for the maintenance of

that Act. But we are very much aware and becoming more and more educated about the need for making or reporting the appeal process a legitimate and effective mechanism.

Do you have any thoughts you'd like to convey to us about whether or not trying, if it looks to be at all feasible, to get a mitigation of the Prison Litigation Reform Act, at least as it applies to sexual abuse, or going some other route? People talk about independently appointed agency -- an agency that is not part of the prison administration system to review complaints that they would get from first. Do you have any thoughts about that?

MS. LABELLE: Yes. Thank you.

I mean I think that with regard to -- you're asking about the exhaustion of the grievance procedure that's required for the PLRA, I have almost no example of a juvenile who has been able to go through and exhaust that procedure. They simply are not -- in some states it's two, three days you're supposed to file after the assault. In Michigan there's still a requirement on the -- in the fliers and in the policy that you're supposed to talk to the officer who assaulted you prior to filing any grievances and it's rejected if you fail to try to mitigate it.

But the exposure -- it's -- these are not confidential in any sense of the word. And even all attempts to try to make them confidential, between

picking up the grievance and walking to the control center -- as most people know, prisons are a hotbed of gossip, and you know almost by the time they've turned the corner what the report was.

And whether that -- I mean whether that's a reality or that is a hardened perception, it really doesn't matter. The perception is that there's no confidentiality in reporting. And dislodging that perception, I think, would be extremely difficult in the short term.

Thinking that a child is going to report -- what many people tell me, you know, is almost in a shock condition, I mean boys who have been raped by some two or three people are not going to figure out --

COMMISSIONER KANEB: Excuse me.

Is it not virtually impossible to give somebody an appeal right, a clear shot, let's say even a review by an independent body, without the party against whom that person is complaining being informed?

MS. LABELLE: I think that's absolutely true.

What I'm saying is that they won't do it within the required time frames. And so it's very -- what -- when they do complain, it's rejected because it's untimely, and so there has to be some recognition of that.

COMMISSIONER KANEB: I don't mean to minimize it,

but that's a relatively simple matter. The window is too narrow.

I guess I will just finish by asking do you think that if there were to be established -- and I'm just sort of winging it here -- review bodies that were neither made up of prisoner advocates nor prison administrators entirely, if there were such bodies and the appeal window was not unreasonably narrow, do you think that could be a help in remedial action which could then in turn effect, presumably, the help and prevention?

MS. LABELLE: If you had a administrative mechanism that was perceived as fair and open-ended and had the capability of addressing issues of both discipline and treatment, I suppose, yes.

I've never seen one like that because remedial -- you know, you'd have to deal with -- when I'm talking in the context of juveniles, I'm having difficulty conceptualizing it because I think that even if you clear it up and get down to almost zero tolerance, the last victims standing are going to be the youth. And I have a really hard time seeing eradicating that with them in general population.

COMMISSIONER KANEB: Eradication is certainly our goal. But as the chairman observed at the beginning of this hearing, that is an ideal.

If we, you, people in prison administration whom we're going to have to depend upon and count on their goodwill, can be substantially effective, a lot

would have been accomplished.

MS. LABELLE: I agree.

I also think as you're looking at the PLRA you have to look at the fact that those that are forced to perform oral sex may not meet the standards for the PLRA's requirement of physical injury. And, in fact, some courts have certainly indicated that sexual activity without physical injury is not an actionable matter under the PLRA --

COMMISSIONER KANEB: Oh, yes, it is.

Nonconsensual sex of any sort is part of our mandate.

MS. LABELLE: Right.

I mean in terms of an actionable matter under the PLRA, which requires that -- if you're looking at litigation issues, not just for -- if you're looking at exhaustion, the other component is for a case to be actionable for damages, they must have physical injury. And some courts have declined to -- find that sexual activity without tearing or bodily physical injury does not meet the PLRA standard.

COMMISSIONER KANEB: For civil damage.

MS. LABELLE: For civil damages, correct.

And when you're looking at remedial issues, I do think it's important to look at, you know, the ability of people to get treatment. And unless there's going to be a mechanism provided through some voluntary remedial mechanism, the way people are able

to get treatment is through getting money damages to buy that treatment.

COMMISSIONER KANEB: Thank you.

CHAIRMAN WALTON: We're always chasing time, but Commissioner Aiken.

COMMISSIONER AIKEN: If I could defer to Professor.

COMMISSIONER SMITH: Actually, what I was going to do was make a suggestion that might help us with some time, which is to reserve the right to ask questions about the testimony of Ms. LaBelle and Ms. Owens in the second panel since they'll be testifying there.

CHAIRMAN WALTON: Okay.

COMMISSIONER SMITH: In the next panel.

CHAIRMAN WALTON: Okay. That's fine.

COMMISSIONER SMITH: And also for Mr. Marksamer.

CHAIRMAN WALTON: We're supposed to take a break between 2:30 and 2:45. We missed it, so if we could just take five minutes and come back and start with the next panel.

(Recess taken.)