

As most of you know, the Adam Walsh Act created a new "sexually dangerous person" civil commitment statute, codified at 18 U.S.C. § 4248. The BOP has already begun certifying inmates as "sexually dangerous" under that statute. Certification immediately stays release pending a hearing on the merits and may result in lifetime civil commitment. For these certifications, the BOP has been relying, at least in part, on statements made by the defendants during BOP treatment programs, particularly the Sex Offender Treatment Program at Butner, NC, and the Sex Offender Management Program at Devens, MA. There is now great risk for any client to participate in such programs, or any others in which they are required or encouraged to provide information about past sexual misconduct or sexual proclivities of any sort.

Unlike the Treatment Program, which is voluntary, inmates are placed involuntarily into the Sex Offender Management Program at Devens. The Program handbook, which sets forth the rights of inmates in the program and is given to them upon entry, is not available on the BOP's website; however, we have recently obtained a copy of it from Dr. Renaud, the Sex Offender Management Program Coordinator at Devens. Some of the most important points of the program are listed below, and the Handbook is attached to this email for your files.

1. The program is based on the philosophy that criminal sexual behavior can be managed through "intensive supervision and competent treatment." Thus, even though this is not a "treatment program," psychological evaluations and treatment do in fact play a pretty significant role in the program, and appear to be de facto mandatory conditions for "successful" participation.
2. A psychosexual evaluation and risk assessment is completed for all inmates during the course of the program. The assessment component "may" consist of a series of interviews, questionnaires, psychological tests, and physiological assessments. Participants are measured in 3 areas: intelligence & cognitive functioning; personality & psychopathology; and psychosexual functioning. Penile plethysmographs and polygraphs may also be recommended. The evaluation results are used to develop the Correctional Management Plan for each inmate AND "to make appropriate recommendations for institutional and community supervision and treatment." We can safely assume that those recommendations will be harsh for any inmate who refuses to participate in the evaluation process (see point 5 below). The resulting CMP may contain recommendations for treatment. Inmates are informed that adherence to the CMP will be "closely monitored" and that they will be held accountable for failing to adhering to its contents (again, see point 5)
3. Treatment Aspects: There are 3 types of "treatment" provided at Devens that may be recommended in the CMP: (1) Sex Offender Education Program, which is designed to "promote acceptance of responsibility, awareness of the harm of sexual victimization and victim impact, and education about relapse prevention concepts"; (2) Non-residential Sex Offender Treatment, which is a "significantly less intrusive" version of the Butner program that may consist of group and/or individual therapy; and (3) Psychiatric Treatment, with the potential for medication.
4. Post-release: Program staff makes recommendations for appropriate post-release housing and/or community center placements, suitable employment, community-based treatment, and community supervision. They do this through a comprehensive discharge packet which is sent to the USPO approximately 90 days prior to release and contains detailed risk assessment information addressing such areas as polygraph testing, treatment recommendations, employment and Internet restrictions, contact with minors, etc. It also includes predictions of risk-assessment based on "observation, interview, file review and clinical judgment." All program participants are referred to sex-offender treatment programs upon release and are subject to the BOP's sex offender jurisdiction notification rules.
5. Penalties for refusing to participate: Completing psychological tests, participating in psycho-education classes and non-residential therapy, and other similar components of the program are voluntary. HOWEVER, failure to participate "may" (read: will) prohibit community center placement, and "may" (read: will) be viewed as indicating an increased risk of re-offense and will therefore impact the risk assessment that is sent to Probation (and likely the SDP certification decision as well). Other institutional sticks for refusing to participate include keeping inmate pay at the Maintenance pay level and assigning the inmate to the "least preferred housing available."

6. Potential for Discipline: Specific violations of program requirements are subject to the Inmate Disciplinary Process. I believe this is referring, in part, to the sweeping restrictions on "inappropriate materials," which include among other things pornographic or sexually explicit materials, nude or partially nude depictions of adults or children, publications depicting physical abuse or sexual violence, "any material that depicts, describes or encourages activities which may lead to violence, sexual crimes, or exploitation," and "any other material that, in the clinical opinion of SOMP staff, is considered to have the potential to contribute to future sexual offending behavior." NOTE that not all of these materials are otherwise restricted in the general BOP population AND that program staff "may provide therapeutic guidance on the risks of using such materials," which presumably opens up another opportunity to probe for statements that may be harmful in the future.

7. Confidentiality: According to the handbook, inmates are told that "their confidentiality is protected at all times, except in cases where there is potential harm to self or others, when the security of the correctional institution is threatened, or when there is suspected child abuse." Obviously, the BOP will argue that they are entitled to breach confidentiality for purposes of the SDP evaluation because "there is potential harm to others." We should consider arguing that confidentiality can't be breached until AFTER there has been a determination that this person should be certified as "sexually dangerous," which itself means that there is a potential harm to others if the person is released. Wondering whether the person is potentially dangerous cannot be enough to breach confidentiality -- otherwise, the policy is a tautology that renders the promise of confidentiality meaningless for all program participants (and probably all inmates designated as sex offenders). The biggest downside to this argument is . . . what does it get us? More certifications? Or could we use the deficient notice to argue for exclusion of the statements? Along this line, according to the handbook, there is a BOP policy that obligates the BOP to protect inmate confidentiality. Does anyone have it? If not, we should get it.

8. Length of program: From entry until release from prison.

9. When inmates are being evaluated for release purposes (and, I'm sure, for SDP purposes as well), they are asked to sign an informed consent form. Dr. Renaud is not willing to provide us with a copy of that form -- which probably indicates that it will be helpful to defendants, perhaps in challenging the notice they are given about how their statements will be used. She says we need a FOIA request for that one, but it might be easier just to get it (and all prior versions of it) through discovery.