NEW YORK CITY BAR

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April 13, 2011

Robert Hinchman
Senior Counsel, Office of Legal Policy
Department of Justice
950 Pennsylvania Avenue, NW., Room 4252
Washington, DC 20530

Dear Mr. Hinchman:

The Committee on Corrections of the New York City Bar Association submits the following comments on the proposed National Standards to Prevent, Detect and Respond to Prison Rape, 28 C.F.R. Part 115.[1] While we offer comments on select areas only, we are disturbed that the Department of Justice forewent this historic opportunity overall to adopt and even to strengthen the National Prison Rape Elimination Commission's (NPREC) recommended standards. We are also disturbed that the proposed National Standards apply only to jails and prisons, and not to persons in immigration detention. As set forth more fully below, we see no reason for this exclusion, which will permit continued abuse of some of the most vulnerable among us. Finally, we are disturbed that the Department's proposed National Standards include no requirement for affirmative investigations of sexual abuse, relying instead on prisoner complaints. This belies any serious interest in ending custodial sexual abuse.

Founded in 1870, the New York City Bar Association now comprises more than 23,000 lawyers and law students. Association members are active in more than 150 committees,

[1] While these comments post-date the April 4, 2011 deadline for the submission of comments to the NPRM, we nonetheless appreciate the opportunity to be heard on the National Standards.

drafting reports, amicus briefs, testimony, statements and letters, convening fora on issues of concern to the bar, and commenting on public policy and legislation. The Association's Corrections Committee – devoted to ameliorating conditions of confinement and eradicating roadblocks to prisoner reentry – is concerned with the issue of sexual violence in state and federal correctional institutions. In 2008, the Committee submitted an *amicus curiae* brief in the matter *Amador v. Andrews*, 03 Civ. 0650 (KJD)(GWG), now pending before the United States Court of Appeals for the Second Circuit, which concerns charges of prison guards' rape and sexual assault of women inmates in New York State custody.

**Comments:**

- **The proposed filing deadline will most likely result in less access to the courts than currently exists. (**Standards § 115.52/252/352, Paragraph (a))

The proposed 20-day deadline for filing sexual abuse complaints, with 90-day extension upon proof of trauma, is unacceptably restrictive, particularly in light of the NPREC's recommendation that the correctional facility accept any sexual abuse grievance regardless of the length of time that had passed between abuse and report. *See* Overview of PREA Standards, 76 Fed. Register Number 23 at 6258. As the Department recognized by creating a 90-day extension, 20 days is far too short a deadline, period. The 90-day extension is itself problematic, and unlikely to be of help. A victimized incarcerated person who is afraid of retaliation is not in a position to adequately document trauma, and it is questionable just what evidence an institution or agency would find acceptable, which may lead to administrative process that would be unnecessary were complaints instead to be accepted whenever filed. This requirement also ignores incarcerated population demographics. People in jail or prison may be illiterate, or have learning disabilities. Many have serious mental health issues, often left untreated. It is unfair and unworkable to put the burden of documentation on the incarcerated individual, which creates an insurmountable obstacle to vindication of meritorious claims of sexual violence and abuse in court.

A more appropriate standard would require that complaints be accepted if they are made within any time period that permits correctional facilities to meaningfully investigate them and take action, with the burden on agencies denying complaints as stale to demonstrate why this is so. At the very least, the Department should impose a more realistic filing deadline, one that is be commensurate with the facility's state statute of limitations for filing such a suit. Extensions of any such deadline should be permitted where mitigating circumstances exist, particularly where government officials cannot demonstrate prejudice from the delay in filing.

- **The proposed standard allows confusing multiple reporting options, with no accompanying warning about exhaustion of administrative remedies. (**Standards § 115.52/252/352, Paragraph (c))

While the proposed National Standards permit prisoners to complain about sexual abuse through multiple reporting channels, there is no commensurate requirement that they be told that they must file a grievance and appeal it to the highest level before they can file a

court case. *See* Overview of PREA Standards, 76 Fed. Register Number 23 at 6260. This problem was highlighted in the *Amador* litigation, where women prisoners in the New York State system were told at orientation and afterward that they should confide in whatever prison personnel they felt most comfortable speaking with, but not informed that only if they followed formal grievance procedures would their complaints be adjudicated. We believe that multiple channels for reporting should indeed be permitted, but that the National Standards must include a requirement that prisoners should explicitly be told that utilizing them is not sufficient to preserve their right to sue about the misconduct. Better, the National Standards could require that ***all*** reporting options be treated as grievances.

- **Sexual abuse complaints should be forwarded to the top, not bottom, level of the grievance system. (**Standards § 115.52/252/352, Paragraph (c))

The proposed National Standards should be revised to provide that when a facility receives a sexual abuse complaint, the complaint should be forwarded to the top level of the grievance system, not to the first level of the grievance system. Complaints of abuse should be immediately reviewed by higher level administrators who have the authority to act upon them. Forwarding complaints to facility level grievance personnel is not only inefficient, but places the complainant at additional risk of retaliation. It further chills reporting of sexual violence and abuse, and serious treatment of complaints.

- **The proposed National Standards must apply to persons in immigration detention.**

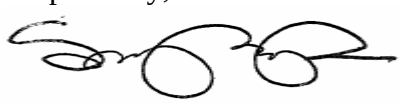
The Corrections Committee has grave concerns about the Department's exclusion of immigration detention facilities from its proposed National Standards. PREA was intended to protect individuals in both criminal and civil detention from sexual abuse, irrespective of the type of facility in which they are housed. In 2009, over 383,000 immigrants were detained in local and state facilities nationwide. In New York State alone there are almost 1,000 immigrant detainees in jails and detention centers. Under the proposed National Standards an immigration detainee temporarily housed in one of New York's local jails would be protected from sexual abuse under PREA but would lose that protection if transferred to a detention facility. Such a result cannot possibly be what Congress intended in passing PREA.

Additionally, as the NPREC found, immigration detainees are especially vulnerable to sexual abuse, making the Department's exclusion of detention facilities from the protections of PREA even more egregious. Immigration detainees are not entitled to counsel and therefore are less likely than other detainees to be aware of their right to be protected from sexual abuse and, without an advocate, they are unable to safely report such abuses if they do occur. Immigrant detainees are also vulnerable due to their social, cultural and language isolation and the traumatic experiences they may have endured in their country of origin. While efforts by ICE to address abuse by imposing its own abuse-prevention standards in immigration detention facilities are laudable, those internal regulations do not compare to the protections afforded by PREA in either scope or enforceability. Immigrant detainees deserve the protections afforded by PREA and immigrant detention centers should be included in the Department's standards.

**Conclusion**

The New Your City Bar Association's Corrections Committee urges the Department to reconsider its proposed standards governing administrative remedies. As written, they fall well short of the recommendations made by NPREC and fail to provide real protection to victims of custodial sexual violence and abuse, and threaten to set a new, unacceptable floor for processing and treatment of abuse complaints.

Respectfully,



Sara Manaugh
Chair, Corrections Committee