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Dear Deputy Cole, AAG Columbus, and AAG Perez:

On April 13 of this year, the Committee on Corrections of the New York City Bar Association (Committee) submitted comments to the Department of Justice concerning proposed National Standards to Prevent, Detect and Respond to Prison Rape, 28 C.F.R. Part 115 (PREA Standards).[1] We now write to update these comments in light of the recent decision by the Second Circuit Court of Appeals in the matter *Amador et al. v. Andrews et al*.[2], a putative class action brought by women inmates of New York State correctional facilities who alleged that they had been sexually abused by corrections staff. While the Court did determine that certain of the plaintiffs' claims were actionable, it denied other plaintiffs' claims on the basis that they had failed to exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA). The Committee believes that this decision highlights problematic uncertainty about just what a prisoner

[1] Copy attached for your reference.
[2] *Amador et al. v. Andrews et al*., No. 08-2079-pr (2d Cir. Aug. 19, 2011).

must do to exhaust administrative remedies when reporting sexual assault by a prison officer, and what kind of notice prisoners receive about how to exhaust administrative remedies. We therefore ask that the Department consider the following comments – together with our April 13, 2011 comments – as it makes final decisions on PREA Standards.

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, 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 focuses on a wide range of post-conviction issues, including administrative procedures provided in correctional systems. In 2008, the Committee submitted an *amicus curiae* brief in the *Amador* matter supporting plaintiffs' petition for permission to appeal the District Court's decision concerning mootness and exhaustion of administrative remedies.

In its decision, the Second Circuit dismissed claims of those plaintiffs whose complaints of sexual abuse the Court found wanting under PLRA standards. The Court determined that the PLRA requires complaints be lodged as grievances with the highest level of the grievance system, dismissing the claims of prisoners who did exactly as they were told at orientation and afterward and confided in staff from the Inspector General's Office. All of the plaintiffs had been told that they should confide in whatever prison personnel they felt most comfortable speaking with, and that their complaint would be investigated by the Inspector General's office. But because none of the plaintiffs were informed that only if they followed formal grievance procedures would their complaints be actionable in federal court, those who did not complete the grievance procedures saw their claims dismissed by the Second Circuit.

This ruling highlights a problem with the proposed PREA Standards. While they permit prisoners to complain about sexual abuse through multiple reporting channels, there is no commensurate requirement that prisoners be told that they must file a grievance and appeal it to the highest level in order to preserve their right to file a court case. *See* Overview of PREA Standards, 76 Fed. Register Number 23 at 6260. As stated in our April 13 comments, the Committee believes that prisoners who suffer sexual abuse by correctional staff should be permitted to complain to any correctional personnel they feel comfortable with – i.e. that multiple channels for reporting should indeed be permitted – and that ***all*** reporting options be treated as grievances. This is consistent not only with the orientation materials we understand were furnished to women prisoners in New York State facilities and with current DOCCS policy, *see* DOCCS Directive 4028A at § V.B, http://www.docs.state.ny.us/Directives/4028A.pdf, but also with standards of common decency and safety.

In addition, because the Second Circuit decision appears to require that a prisoner complaining of sexual abuse articulate that correctional officials "failed to protect her from harm," the Committee suggests that the Department make it clear that such unrealistic formalities are not required predicates for presenting claims for injunctive relief. The Committee further suggests that – based on realities of the prison system and on concepts of basic fairness and decency – any complaint of sexual abuse should be

considered sufficient, no matter the form of words chosen. To do otherwise unfairly denies access to the courts to people who are not informed of or not able to recite a set, meaningless phrase.

Finally, the Committee continues to believe that the proposed 20-day deadline for filing sexual abuse complaints, with 90-day extension upon proof of trauma, is unacceptab**ly** restrictive. Twenty days is far too short a deadline, and the 90-day extension is itself problematic and unlikely to be of help. A victimized prisoner who is afraid of retaliation is not in a position to adequately document trauma. In addition, many prisoners have serious mental health issues, often left untreated. It is unfair and unworkable to put the burden of documentation on the prisoner, thereby creating 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.

Conclusion

The Committee recognizes that the comment period regarding proposed PREA regulations has closed, but requests that, in light of the very recent, very relevant *Amador* decision, the Department consider the comments we submit today, together with those we submitted on April 13.

Respectfully,

Sara Manaugh
Chair, Corrections Committee