

September 7, 2011

James Cole, Deputy Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue NW, Room 4111  
Washington DC 20530

Dear Mr. Cole:

We write to express our urgent concerns about a conflict between the Department of Justice's draft National Standards To Prevent, Detect, and Respond to Prison Rape ("National Standards") and judicial interpretations of the Prison Litigation Reform Act ("PLRA"). As the recent Second Circuit decision in *Amador v. Andrews*, No. 08-2079-pr (2d Cir. Aug. 19, 2011), (decision attached) demonstrates, inmates' utilization of the range of reporting methods specified in the draft standards (at §§ 115.51, 115.52, 115.151, 115.251, 115.252, 115.351, 115.352 ) may risk being found by courts as insufficient to satisfy the administrative exhaustion requirement of the PLRA.

While this issue was addressed in many of the submissions made during the recent public comment period, the Court's decision in *Amador* compels us to raise the issue again. The Department should take simple steps to harmonize the National Standards with the exhaustion requirements of the PLRA. Failure to do so will create even more confusion as courts continue to interpret the already complex PLRA. The National Standards are a major tool for carrying out the Congressional intent of the Prison Rape Elimination Act (PREA) – to end sexual abuse in all confinement facilities in the United States. As currently drafted, the National Standards run the risk of significantly limiting inmates' ability to pursue constitutional claims seeking redress and remedy for sexual abuse.

In *Amador*, the Court concluded that an inmate who utilizes reporting mechanisms outside of a facility's written grievance process, even when encouraged to do so by prison officials, significantly risks forfeiture of any future civil claim. In order to eliminate this risk, or at least significantly minimize it, the Department should simply replace the draft Reporting and Exhaustion standards with the proposed National Prison Rape Elimination Commission standards on this issue (RE 1-2).<sup>1</sup>

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<sup>1</sup> RE-1 Inmate reporting -The facility provides multiple internal ways for inmates to report easily, privately, and securely sexual abuse, retaliation by other inmates or staff for reporting sexual abuse, and staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse. The facility also provides at least one way for inmates to report the abuse to an outside public entity or office not affiliated with the agency that has agreed to receive reports and forward them to the facility head (RP-2), except when an inmate requests confidentiality. Staff accepts reports made verbally, in writing, anonymously, and from third parties and immediately puts into writing any verbal reports.

RE-2 Exhaustion of administrative remedies-Under agency policy, an inmate has exhausted his or her administrative remedies with regard to a claim of sexual abuse either (1) when the agency makes a final decision on the merits of the report of abuse (regardless of whether the report was made by the inmate, made by a third party, or forwarded from an outside official or office) or (2) when 90 days have passed since the report was made, whichever occurs sooner. A report of sexual abuse triggers the 90-day exhaustion period regardless of the length of time that has passed between the abuse and the report. An inmate seeking immediate protection from imminent sexual abuse will be deemed to have exhausted his or her administrative remedies 48 hours after notifying any agency staff member of his or her need for protection.

To the extent that the Department is unable to carry out this recommendation, the Department should, at a minimum, adopt National Standards that clearly indicate the following:

1. In order to be in compliance with the National Standards, an agency should update its written grievance procedures so that receipt of a report that an inmate has been sexually abused or sexually harassed made through any route specified in draft standards 115.51(a-c), 115.151(a-c), 115.251(a-c), and 115.351(a-c) will be deemed a grievance in compliance with the agency's grievance process. A report will only be classified as a "request for informal resolution" as currently described in draft standards 115.52(c)(1-2), 115.252(c)(1-2), and 115.352(c)(1-2) if informal resolution is the first required step in the agency's written grievance procedures. Without this clarification, bad actors within an agency could classify a report as a "request for informal resolution" simply to circumvent the grievance process.
2. Further, the provisions on the appeals process in draft standards 115.52(c)(4), 115.252(c)(4), and 115.352(c)(4) should be changed so that an agency will be required to automatically process an appeal at every stage of an administrative review on behalf of an inmate for any grievance regarding sexual abuse or sexual harassment, including grievances originally submitted through a route specified in the standards.
3. Because all reports of sexual abuse or sexual harassment, including those against facility staff, will be processed through the grievance procedure, additional measures should be taken to protect the person making the report from retaliation and to prevent interested parties within the facility from tampering with evidence. Therefore, all reports or grievances regarding sexual abuse or sexual harassment, whether filed within or outside of the agency's normal grievance procedures, should be kept confidential during the course of the investigation in order to protect the safety of the inmate and the integrity of any future criminal investigation and prosecution.

*Amador* is a disappointing decision for a number of reasons but it also provides an opportunity to address inconsistencies between the draft National Standards and the PLRA's exhaustion requirement. Failing to deal with these contradictions will result in regulations that run counter to the Congressional intent of PREA. More importantly, it will leave survivors of sexual abuse in detention without a means to enforce their constitutional rights.

Thank you in advance for your attention to this important issue.

Sincerely,

AIDS Foundation of Chicago  
American Civil Liberties Union  
HIV Prevention Justice Alliance  
Human Rights Watch  
Just Detention International  
National Gay and Lesbian Task Force  
Texas Civil Rights Project