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

Re: Proposed PREA Standards Regarding PLRA Exhaustion

Dear Mr. Hinchman:

On behalf of the American Bar Association, I write to urge the Department of Justice to adopt the National Prison Rape Elimination Commission (NPREC) proposed standard RE-2, "Exhaustion of Administrative Remedies," which concerns exhaustion of administrative remedies in connection with claims of sexual abuse.¹ The ABA submitted

¹NPREC Proposed Standard RE-2: Exhaustion of administrative remedies. Under agency policy, a detainee 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 detainee, made by a third party, or forwarded from an outside official or office); or (2) when 90 days has 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. A detainee 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.

comments on the NPREC standards during the notice-and-comment period earlier this year. However, this particular issue regarding RE-2 was not a focus of the formal ABA comments (a copy of which is attached). In anticipation of the release of the proposed DOJ standards, we want to bring the ABA's position on RE-2 to your attention. While the NPREC proposed standard RE-2 is not fully consonant with relevant ABA policy, given the federal statutory framework within which the NPREC proposals are situated, the ABA commends it as an important step toward securing the rights of prisoners claiming sexual abuse.

The ABA has approved policy recommendations regarding access to the judicial process as Standard 23-9.2 of its *Criminal Justice Standards on the Treatment of Prisoners*, adopted by the ABA House of Delegates in February 2010. Subsection (d) of that Standard deals with exhaustion of administrative remedies, and provides:

A prisoner who files a lawsuit with respect to prison conditions but has not exhausted administrative remedies at the time the lawsuit is filed should be permitted to pursue the claim through the grievance process, with the lawsuit stayed for up to [90 days] pending the administrative processing of the claim, after which a prisoner who filed a grievance during the period of the stay should be allowed to proceed with the lawsuit without any procedural bar.

Standard 23-9.2(d), recognizing that many correctional grievance systems are difficult to navigate, seeks to secure a prisoner's access to the judicial process while also giving corrections officials an opportunity to respond to and perhaps resolve a prisoner's claims. Thus, it requires that lawsuits be stayed for several months if that time is needed for a complaint to be processed through a grievance system, and then be allowed to proceed in court. The ABA has also called for a legislative change, approving a resolution in February 2007 urging Congress to amend the PLRA to permit a prisoner who has not exhausted administrative remedies at the time a lawsuit is filed be permitted to pursue the claim administratively with the lawsuit stayed for up to 90 days

Like Standard 23-9.2(d), the proposed NPREC standard on exhaustion of administrative remedies seeks to ensure that prisoners' claims of custodial sexual abuse will not be rendered unreviewable by short prison grievance deadlines. As the NPREC report documents, shortcomings in prison grievance requirements frequently serve as a barrier to judicial review of allegations of serious sexual abuse of prisoners.² However, proposed NPREC Standard RE-2 must reconcile its laudable goal of ensuring appropriate redress of prisoner claims of sexual abuse with the requirement of the Prison Litigation Reform Act that prisoners exhaust administrative grievance systems or forfeit their right to bring a lawsuit. *See* 42 U.S.C. 1997e. It proposes to do this by specifying when a grievance procedure will be deemed exhausted, to make the procedure itself more

² The NPREC Report, like the Standards, recognizes that prisoner grievances may be frustrated by complex grievance procedures, in addition to short grievance deadlines. *See* Standard 23-9.1(e) and *National Prison Rape Elimination Commission Report* at 10, 92, 152 (2009).

responsive to claims of sexual abuse. For example, RE-2 provides that the administrative process will be deemed exhausted whenever a final decision on a report of sexual abuse is rendered, regardless of whether the complaint was “made by the detainee, made by a third party or forwarded from an outside official or office.” Alternatively, the prisoner’s administrative remedies will be deemed exhausted 90 days after the complaint is made, if this is shorter. The 90-day period begins to run when the abuse is reported, regardless of how much time has passed between the incident and the complaint. In addition, RE-2 provides for an emergency provision for prisoners seeking “immediate protection from imminent sexual abuse,” whereby a procedure is deemed exhausted 48 hours after the complaint it is made. In summary, RE-2 provides that administrative process will be deemed exhausted no longer than 90 days after a report of sexual abuse is filed, without regard to who files it, and in an emergency after 48 hours.

While the ABA would prefer that a prisoner claiming sexual abuse be allowed to file a lawsuit prior to exhausting the grievance process, with the lawsuit stayed for a period of time to permit the institution to deal with the complaint administratively, we recognize this would require Congress to amend the PLRA. Therefore, the ABA commends proposed NPREC standard RE-2 as an excellent intermediate step. Indeed, we believe it comes as close to compliance with ABA Standards as possible given the constraints on courts’ ability to address prisoner complaints imposed by the PLRA. We understand that some corrections officials have expressed concern that proposed NPREC standard RE-2 is inconsistent with the PLRA’s exhaustion requirement, in specifying when a procedure will be deemed exhausted. However, we believe the proposed standard does no more than require corrections agencies to adopt grievance policies that are more responsive to the particular challenges faced by victims of sexual abuse. This is appropriate given the sensitive and traumatic nature of sexual assault, which the NPREC report documents exhaustively.

We appreciate the attention that the Department of Justice has given to this important set of policy recommendations and understand the sensitivity of the issues involved. We believe that the NPREC recommendations as a whole and RE-2 in particular offers an important opportunity to address a pressing national problem. The ABA Criminal Justice Section has established committees to implement ABA policy relating both to PREA and the PLRA. The members of those committees, and the ABA as a whole, stand ready to provide whatever technical assistance you may find helpful on these issues.

Sincerely,



Thomas M. Susman