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Re: Comments on National Standards to Prevent, Detect, and Respond to Prison Rape, submitted pursuant to Notice of Proposed Rulemaking, January 24, 2011

March 30, 2010

Dear Attorney General Holder:

I write to comment on the proposed National Standards to Prevent, Detect, and Respond to Prison Rape. I am a professor of law at UCLA, and have spent the past decade studying the law and policy of incarceration in the United States. Recently, I conducted an empirical study of a program in the L.A. County Jail designed to protect the most vulnerable prisoners from sexual victimization.[1] In the course of this research, I have closely examined the problem of prison rape, its causes, and the means of its prevention.

I strongly commend DOJ for its care in formulating its proposed standards, and for taking seriously the issues raised during the 2010 notice and comment period. I am confident that, once adopted, these new national standards will do much to further PREA's aims of preventing, detecting and appropriately responding to the commission of prison rape.

Yet still more must be done if these important aims are to be achieved. Unfortunately, the proposed standards contain a number of provisions that undermine PREA's goals, unnecessarily leaving innumerable men and women vulnerable to serious sexual violence. I write to highlight several provisions that urgently need revising, and to urge DOJ to make these revisions before finalizing the standards.

A number of serious concerns raised by the current standards may be succinctly stated:

- **The final standards should forbid agencies from placing juveniles in adult facilities**. Juveniles in adult prisons are known to face a very high risk of sexual assault, and the alternative to placing them in general population—protective

[1] UCLA IRB #G07-01-106-04.

custody—is inappropriate for juveniles, depriving them of both community and necessary programming and causing or exacerbating mental health issues.

- **The final standards should prohibit non-emergency cross-gender pat searches and non-emergency cross-gender viewing of inmates.** These practices are forbidden in most western countries, with good reason: they contribute to a sexualized institutional atmosphere and encourage and facilitate sexual abuse. The exception for cross-gender pat searches created by § 115.14(e) (exempting from such treatment "those inmates who have suffered documented prior cross-gender sexual abuse while incarcerated") is insufficient. Anyone with a history of prior sexual abuse, whether in prison or not, is liable to be traumatized by cross-gender pat searches, and even those who have experienced such abuse while in detention may have been too afraid to report it. This policy will thus in practice ensure that prior victims of sexual abuse will be subject to this potentially traumatic treatment. Furthermore, the exception for cross-gender viewing created by § 115.14(c) (for "viewing . . . incidental to routine cell checks") is so broad as to swallow the rule, leaving inmates vulnerable to such viewing at any time despite the presence of easy alternatives (eg/ requiring opposite gender officers to announce their arrival in cellblocks).

- **The final standards should be extended to cover immigration detention facilities.** PREA was intended to apply to *all* people in detention, and when PREA was first drafted, DHS did not exist and the INS—then part of DOJ—administered immigration detention. Today, ICE's own standards address sexual assault, but though they are commendable, they are not enforceable. They also leave many crucial issues unaddressed and lack the force of law. If DOJ does not have the authority to promulgate rules to cover DHS, DOJ officials should strongly recommend that Congress legislatively require this coverage.

Other serious concerns raised by the proposed final standards require somewhat longer elaboration. In what follows, I highlight three issues as to which DOJ's current stance calls out for reconsideration. These issues concern:

(1) **the use of protective custody** (i.e., solitary confinement) to protect inmates at risk of sexual victimization (§ 115.43 & §115.66);

(2) **the use of segregated housing to protect lesbian, gay, bisexual, transgender, and other intersex (LGBT) inmates** from sexual victimization (§ 115.42); and

(3) **the filing of grievances** by victims of prison rape (§ 115.52/252/352).

I especially draw your attention to my comments on the second issue (at Part 2 below), relating to restrictions on the use of segregated housing to protect LGBT inmates. The Notice of Proposed Rulemaking (NPR) issued by DOJ on January 24, 2011 explicitly references my previous comments on this issue,[2] and I believe the revisions DOJ made in response to those comments went too far, thereby creating an unnecessary and substantial risk of serious harm. I strongly commend DOJ for taking steps to ensure the survival of the important LA County Jail program that I described in my previous comments. Unfortunately, the fix opted for seems to have thrown out the baby with the bathwater. Specifically, despite the real possibility that segregating LGBT inmates on the basis of sexual orientation and gender identity can in some cases *increase* the victimization and abuse of LGBT inmates, the standards have now entirely eliminated any and all restrictions on housing LGBT inmates in segregated units. Yet, as I describe below, a much more modest change would have protected facilities like the LA County Jail (which has successfully deployed a segregationist strategy to protect gay and transgender inmates from sexual victimization), while continuing to protect LGBT inmates in the way the Commission originally sought to do.

I. **The Final Standards Should Tighten Restrictions on the Involuntary Placement in Protective Custody (ie Solitary Confinement) of Inmates at High Risk of Sexual Assault or Who Have Been Sexually Victimized**

The Commission's recommended standard SC-2 stipulated that inmates at high risk of sexual assault may be placed in involuntary protective custody or other forms of isolation or solitary confinement "only as a last resort and then only until an alternative means of separation from likely abusers can be arranged."[3] This recommendation was wise. In practice, "protective custody" amounts to extended isolation. People in protective custody are typically locked in small cells for 23 or more hours a day with little or no human contact. The conditions of confinement are virtually identical to those in which prisoners are placed as punishment for disciplinary infractions. The Commission's recommended standard recognized that people who are at high risk of sexual victimization have done nothing wrong, and that protective custody should not be used except under extraordinary circumstances and then for as short a time as possible.

[2] U.S. DEPARTMENT OF JUSTICE, PREA NOTICE OF PROPOSED RULEMAKING 37 (January 24, 2011) (hereinafter DOJ PREA NPR).

[3] See NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 217 (June 2009) (hereinafter NPREC REPORT) (SC-2); see also id. at 8 (expressing concern with the possibility that correctional facilities may excessively rely on "protective custody and other forms of segregation (isolation or solitary confinement) as a default form of protection").

Unfortunately, the proposed standards effectively reinstate involuntary protective custody as an available housing placement for at-risk individuals. True, as written, § 115.43 (a) appears to disfavor this strategy.[4] However, two problematic features of § 115.43 mean that in practice, there will be minimal limits on the use of protective custody as housing for vulnerable inmates. First, § 115.43 (a) places no substantive restrictions on an agency's use of protective custody. Whereas the Commission stipulated that protective custody may be used "only as a last resort," the proposed standard simply requires that an agency make "an assessment of all available alternatives." This exclusively procedural requirement opens the way as a practical matter for a placement in protective custody even where alternatives could be made available.

True, § 115.43 (a) does say that available alternatives may be used "only until an alternative means of separation from likely abusers can be arranged." But any bite this limitation may have is wholly undercut by the second problematic feature of § 115.43: § 115.43 (c), which allows agencies to house someone in protective custody involuntarily *for up to 90 days*. Intentionally or not, § 115.43 (c) establishes a 90-day norm for the use of involuntary solitary confinement in the PREA context, thereby strongly signaling that placing inmates at high risk of sexual victimization in protective custody for 3 months at a time raises no PREA issues. Even worse, § 115.43 does not even set 90 days as the absolute outer limit, but instead allows for 90-day extensions whenever agency officials find there to be "a continuing need for separation from the general population."[5]

It is important to be clear about the implications of this proposed standard. It allows agency officials to take the most vulnerable individuals in custody, and instead of creating safe spaces where they can live free from the threat of sexual assault, to keep them locked up alone in tiny cells for 23 hours a day for months at a time. If this is not punishing people for being victims, it is hard to see what would be. Imagine you yourself being locked up alone for three entire months in an extremely confined space. The experience would be—and is—be extremely traumatic, not to mention psychologically disturbing even for people without a previous history of mental illness.

This trauma may be alleviated to some extent by affording the people in solitary confinement access to human interaction and stimulation, and § 115.43 (b) does require that inmates in protective custody "have access to programs, education, and work opportunities to the extent possible." But as those familiar with prisons well know, it can be extremely resource-intensive to make programming available to people in solitary confinement. This is especially likely to be the case with respect to vulnerable inmates, who are only in solitary because the prison has not

[4] See DOJ PREA NPR (stipulating at § 115.43 (a) that "[i]nmates at high risk for sexual victimization may be placed in involuntary segregated housing only after an assessment of all available alternatives has been made, and then only until an alternative means of separation from likely abusers can be arranged").
[5] Id. (§ 115.43 (e)).

created safe spaces for them in the general population. As a consequence, in many if not most cases, individuals in protective custody under § 115.43 are unlikely as a practical matter to have access to programming or other educational or work opportunities, thereby only increasing the harmful psychological and emotional effects of a 3-month stay in isolation.

For these reasons, I strongly urge you to rethink § 115.43, and to model the final standard after the Commission's proposed SC-2, on which protective custody would be available only as a last resort and only until an alternative means of separation from likely abusers can be arranged. Otherwise, the final standards will only legitimate a practice that inflicts severe pain and suffering on people just because they are vulnerable to victimization.

At the very least, the length of time for which agencies may place at-risk inmates in protective custody should be considerably reduced. Although agencies may sometimes require a period of time to identify alternative housing for vulnerable inmates, a three-month renewable window effectively relieves the pressure on agencies to create alternative housing arrangements while placing severe burdens on people who have done nothing wrong. As an alternative, a non-renewable 21-day window, although still extremely burdensome for prisoners, would give agency officials three weeks to make alternative arrangements. Furthermore, a three-week window without the possibility of renewal would create appropriate incentives for agencies to establish permanent alternative housing for vulnerable inmates in a way consistent with the aims of PREA.

II. The Proposed Standards Go Too Far in Eliminating All Restrictions on Segregated Housing Based on Sexual Orientation and Gender Identity. The Final Standards Should Contain a Qualified Prohibition on Such Housing.

The Commission's recommended standard SC-2 contained the following language:

> *"Lesbian, gay, bisexual, transgender, or other gender-nonconforming inmates are not placed in particular facilities, units, or wings solely on the basis of their sexual orientation, genital status, or gender identity."*

This sweeping language appears to have been motivated at least in part by the Commission's desire to arrest the practice, followed in many correctional facilities, of automatically segregating gay, bisexual and other gender nonconforming prisoners in long-term protective custody as a way to keep them safe. Such conditions, even if increasing a person's protection from sexual assault, force vulnerable prisoners into an impossible choice between personal safety and the satisfaction of other basic and urgent human needs, above all, those of community and fellow human contact. As noted above, opposition to that practice is wholly appropriate. With the above-quoted

language, the Commission may have sought to ensure alternative mechanisms for protecting members of these particularly vulnerable groups.

In my May 2010 comments, I expressed concern with the wholesale nature of SC-2's prohibition. As I explained, SC-2 as written went beyond prohibiting the use of protective custody as a long-term strategy for protecting LGBT prisoners. It also foreclosed the practice of separately housing sexual minorities in dormitories, wings or units set aside for their exclusive use. This latter approach is entirely distinct from protective custody. Rather than housing gay, transgender or intersex prisoners in isolated single cells, segregated housing in a dorm setting or a designated cell block could keep members of these groups relatively safe from sexual victimization—PREA's key goal—while still allowing residents access to programming and the opportunity for interpersonal interaction, that prisoners in protective custody are routinely denied.

My primary concern with SC-2's sweeping nature was that it would have endangered an important program currently in place in the LA County Jail. For the past 25 years, LA County has been housing gay male and transgender prisoners separately from the Jail's general population in a unit known as "K6G". Over the past few years, I have spent considerable time studying this unit, and my research convincingly shows that with K6G, the L.A. County Sheriff's Department[6] has successfully managed to house its gay and transgender prisoners in relative freedom from sexual abuse. Indeed, with its total segregation from the general population, K6G has arguably become the safest place in the Jail—no small thing when one considers the daily harassment and abuse that gay and transgender inmates often endure in a prison's general population.

As written, SC-2 could have spelled the end of this successful program, as well as foreclosed other jurisdictions from adopting the K6G model even in cases where all parties agree that this approach is the most appropriate option under the circumstances. At the same time, as I explained in my comments, the concerns motivating SC-2—most notably, that under some circumstances, segregation on the basis of sexual orientation or gender identity could *increase* the vulnerability of target populations—told in favor of qualifying rather than wholly deleting SC-2's prohibition.

In crafting its proposed standards, DOJ clearly took the fate of K6G seriously. Indeed, the success of K6G was the sole reason offered in the NPR to explain why the proposed standards did "not include the Commission's recommended ban on assigning inmates to particular units solely on the basis of sexual orientation or gender identity."[7] In this way, DOJ has assured the

[6] The L.A. County Sheriff's Department administers the L.A. County Jail under the current leadership of Sheriff Leroy Baca.

[7] See DOJ PREA NPR, at 37 (explaining that "the proposed standard does not include the Commission's recommended ban on assigning inmates to particular units solely on the basis of sexual orientation or gender

ongoing protection of vulnerable prisoners in LA County, and the LA County Jail may now continue to operate this successful program without fear of being out of compliance with PREA standards. This is a welcome result for which DOJ deserves commendation.

Unfortunately, in its response to the K6G concern, DOJ appears to have thrown out the baby with the bathwater. Rather than modifying SC-2 to qualify the conditions under which an agency may segregate prisoners on the basis of sexual orientation or gender identity, it instead eliminated the prohibition entirely. As a result, there are no longer any restrictions at all on "assigning inmates to particular units solely on the basis of sexual orientation or gender identity."[8]

From the perspective of PREA, this is a dangerous situation. Although LA County's K6G program has been very successful, in other places, segregating prisoners on the basis of sexual orientation or gender identity has actually *facilitated* the abuse of segregated inmates. For example, at Fluvanna Correctional Institution in Virginia, women who identified as or were perceived to be lesbian or otherwise gender non-conforming were removed from the general population and placed in what became known as the "butch ward," where they were subject to ongoing harassment and other punitive conditions.[9] In that case, rather than being protected by segregation (as occurs in K6G), targeted women were placed at risk of abuse because of it.

As the Fluvanna case indicates, segregation in the LGBT context can be a risky strategy, since it gathers sexual minorities in one place and publicly proclaims their status as such. This can be thought of as the "sitting duck" concern: that concentrating all sexual minorities in one unit will draw attention to people who are already vulnerable to victimization, making them sitting ducks for any predators—whether inmates or officers—bent on assault.

This concern is especially salient in women's prisons, where it is custodial officers and other staff who pose the greatest threat. For this reason, in my May 2010 comments, I urged a revision of SC-2 to prohibit the segregation of lesbian, bisexual or other gender non-conforming inmates in women's prisons. Absent this prohibition, corrections officials in women's prisons may pursue a segregationist strategy thinking they are thereby furthering the goals of PREA, when in fact they are actually nourishing the conditions under which sexual victimization thrives. **This concern alone should be sufficient to justify reinstating SC-2 in a qualified form.**

But there is a further reason to reinstate a qualified version of SC-2, one that I have become convinced of in the past year. Since submitting my comments, I have consulted extensively with LGBT advocates, exchanging perspectives on the issue of segregating LGBT prisoners. In these

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identity" and noting that "[o]ne commenter discussed the success of the Los Angeles County Jail in housing gay male and transgender prisoners in a separate housing unit").

[8] Id.

[9] See *VA women's prison segregated lesbians, others*, ASSOCIATED PRESS, June 11, 2009.

exchanges, I explained my concern that a wholesale prohibition would threaten the ongoing existence of K6G, thereby exposing gay male and transgender prisoners in the LA County Jail to possible victimization in the Jail's general population. Moreover, I argued that the segregation option should remain open for other jurisdictions where—as in LA County—prison officials and LGBT advocates agree that this would be the best way to keep these vulnerable populations safe. In turn, the advocates with whom I spoke helped me to see that, although the LA County program has been successful, there are reasons to think that in other jurisdictions, such a program could actually lead to *increased* victimization of gay, transgender and other non-conforming inmates; in other words, that depending on the circumstances, the sitting duck concern may be equally salient in men's prisons.

It is relevant here that K6G's success is a function of several factors, many of which, although not unique, will not be present everywhere. These factors include the considerable size of the gay and transgender population in Los Angeles County; the ongoing involvement of the Los Angeles LGBT community in K6G's design and the support this community has provided for both the Jail and K6G's inmates; and the respectful, open-minded, and sympathetic attitude toward K6G and its inmates taken by the officers who run the program. In other jurisdictions, by contrast, there may be many fewer GBT inmates, few if any community advocates with the resources or interest in supporting such a program, and—unfortunately but realistically—a dearth of sympathetic correctional officers willing to commit themselves to maintaining such a program. And where this is the case, an official decision to segregate gay and transgender inmates, even as a protective measure, may only increase the vulnerability of these inmates, officially announcing their GBT status and thereby exposing them as available victims to would-be predators (thus making them sitting ducks).

In short, in the course of my conversations with LGBT advocates, I became even more convinced that, in light of PREA's goals, it would be a grave mistake to entirely abandon the commitments of SC-2. Instead, what is needed is a way to ensure the ongoing survival of K6G while foreclosing the option of segregating on the basis of sexual orientation or gender identity in places where doing so would be dangerous to LGBT inmates.

I believe there is an easy way to achieve these dual aims. K6G grew out of a lawsuit brought against the Jail on behalf of all gay inmates after several gay inmates were raped. This case was resolved via a consent decree establishing the K6G unit. This legal posture made clear that advocacy groups supported a segregationist strategy in this context—support that would likely not have been forthcoming absent the belief that this approach was in the best interests of gay inmates. It also made sure that outsiders concerned with the interests of K6G's target populations would be watching to confirm that segregation did not lead to victimization. Over time, outside advocates have become partners with Jail officials in ensuring the success of the unit.

The K6G experience teaches that, when segregation arises from a legal settlement with buy-in from all sides, success is much more likely. Conversely, where a segregationist strategy is pursued unilaterally by prison officials, the lack of community involvement and oversight can greatly increase the vulnerability of segregated inmates and thus the likelihood that they will be victimized. Moreover, when segregation is adopted unilaterally by prison officials, it becomes more likely that a general ignorance of and discomfort with gay, transgender or other gender non-conforming people may have motivated the decision and/or may drive the official treatment of inmates in the segregated unit. And unfortunately, where this is so, harassment and abuse of segregated inmates is more likely to follow (as appears to have happened in Fluvanna).

For these reasons, I strongly urge DOJ to adopt the following provision as part of § 115.42 (Use of Screening Information):

> *(f) The agency shall not place lesbian, gay, bisexual, transgender, or other intersex inmates in particular facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement or legal judgment for the purpose of protecting such inmates.*

This language was crafted conjointly with Harper Jean Tobin of the National Center for Transgender Equality and Jody Marksamer of the National Center for Lesbian Rights. We all agree that this is the best possible way to ensure both the survival of K6G and the ongoing protection of prisoners vulnerable to sexual abuse on account of their sexual orientation or gender identity. Protecting vulnerable prisoners is PREA's central aim, and I strongly urge DOJ to adopt the proposed provision as part of its final PREA standards.

III. The Proposed Exhaustion Procedure Excessively Limits Access to the Courts for Prisoners with Meritorious Claims of Sexual Abuse. The Reasons Offered For the Shift from RE-2 Do Not Hold Up to Scrutiny. DOJ Should Therefore Revert to the Exhaustion Procedure Originally Proposed by the Commission in RE-2

Since the passage of the Prison Litigation Reform Act of 1995 (PLRA), prisoners wishing to get a hearing in federal court must first exhaust all administrative remedies. This exhaustion requirement applies even when prisoners have experienced the worst forms of sexual abuse. Unfortunately, too often it is extremely difficult for prisoners to satisfy this exhaustion requirement. In many institutions, grievance procedures are opaque and filing deadlines are extremely short. Prisoners who have been traumatized by sexual abuse may be unable to act quickly enough to figure out filing requirements or meet deadlines. These difficulties are compounded by the fact that many prisoners are illiterate, learning disabled or seriously mentally

impaired. Furthermore, many prisoners who have filed official grievances report being retaliated against by fellow inmates and even correctional officers. As a consequence, even prisoners who have experienced severe sexual abuse may be too afraid to file grievances through official channels and are thus locked out of federal court altogether. This result is doubly concerning from the perspective of PREA, since not only do victims thereby lose any possible remedy for their violation, but the fact of the abuse winds up buried, leaving officials potentially unaware of the victimization taking place in their facilities.

The Commission's proposed standard RE-2 directly addressed these problems in the context of sexual abuse. First, it ensured that prisoners who because of the sexual abuse or its after-effects were unable to make a timely official report will not be precluded from pursuing administrative or judicial remedies. Second, by allowing a claim to have been deemed exhausted after 90 days from the point of filing, it provided ample opportunity for prison officials to respond to the allegations internally while not penalizing victims for official failures to timely respond to their reports of victimization. Third and finally, it protected prisoners from the threat of retaliation by allowing them to choose whether to report sexual abuse to prison officials personally or to report the abuse to a third party or an outside office or officer, who would then pass the information on to prison administrators.

RE-2 successfully balanced two crucial interests implicated by the PLRA's exhaustion requirement. On the one hand, it provided adequate opportunity for prison administrators to respond to allegations of sexual abuse. Certainly, prisons are complex institutions and prison administrators routinely face many competing pressures on their time and attention. But given the imperative to protect prisoners from sexual abuse, it is reasonable to ask administrators to respond to allegations of such abuse within a three-month period of being put on notice. On the other hand, it imposed realistic reporting obligations on victims of sexual abuse, and ensured that their claims would be heard and addressed.

Unfortunately, proposed standard § 115.52[10] departs significantly from RE-2 in ways that run directly counter to PREA's goals. Whereas RE-2 stipulated that administrative remedies would be deemed exhausted 90 days from the filing of a complaint, thereby providing agencies three full months to respond to allegations of sexual abuse, § 115.52 (a)(1) imposes a 20-day deadline for filing a grievance, to run from the moment of the assault. Under § 115.52, victims of sexual abuse who were unable to file within the 20-day window will find the courthouse doors closed to their claims.

Although § 115.52 (a)(2) does provide for a 90-day extension, those wishing to qualify for this extension would be required to provide documentation of their inability to file within the 20

[10] See also § 115.252 & § 115.352.

day period. This provision suggests an utter failure to understand the experience of the people who face sexual victimization behind bars. Even in the free world, people who have been raped are frequently traumatized by the experience. It can take weeks and even months before they are able to process what happened to them. They may find themselves paralyzed with confusion and fear. This incapacity is only compounded in the case of prison rape, where victims are often isolated, without support, and in fear of repeated assaults. And as noted, prisoners tend to be disproportionately illiterate, learning disabled or seriously mentally impaired. Under these circumstances, it is entirely unreasonable to expect the victims of sexual abuse behind bars to be able either to comply with a 20-day filing deadline or to muster the requisite documentation to earn a 90-day extension.

For these reasons, DOJ's final standards should include the exhaustion procedure originally adopted by the Commission as RE-2. There is some suggestion in the NPR that RE-2 somehow ran afoul of the PLRA. This is false and a red herring. The PLRA requires only that prisoners bringing claims in federal court must first have exhausted their administrative remedies. RE-2 simply created a standard for establishing when prisoners bringing claims of sexual victimization may be deemed to have satisfied this requirement.

RE-2 thus furthered the aims of PREA while posing no PLRA problem. By contrast, § 115.52 (a)—the proposed alternative to RE-2—arguably runs afoul of PREA, by increasing the restrictions on prisoners' access to federal courts in cases of sexual abuse. By stipulating a 20-day clock, § 115.52 (a) effectively sets a national 20-day default rule, incentivizing agencies with longer filing deadlines to cut those deadlines to 20 days. In this way, § 115.52 would *worsen* the situation for victims of prison rape, in direct and inexplicable opposition to the clear goals of PREA.

The NPR's discussion of the shift from RE-2 to § 115.52's 20-day filing deadline is framed to suggest that several valid agency concerns motivated the change.[11] But a careful parsing of the five reasons actually given in the NPR reveals an absence of any compelling justifications either for replacing the 90-day period with a 20-day window or for shifting the presumption from exhaustion to default.

1. As noted, the notion that a presumption of exhaustion would be inconsistent with the PLRA is a red herring.

2. The worry that an exhaustion presumption would "encourage the filing of frivolous claims" is something the Commission considered and rightly rejected. For one thing, the PLRA's three-strikes provision already contains a strong deterrent against frivolous

[11] See DOJ PREA NPR, at 42-44.

suits.[12] Moreover, as § 115.52 (d)(5) makes clear, agencies have other tools for disincentivizing bad faith filings. And given the many reasons to think that meritorious claims may be routinely foreclosed by the constraints recreated by § 115.52, the worry about frivolous claims is simply insufficient to justify § 115.52 draconian restrictions.

3. Concerns regarding agencies' need for "sufficient time for investigation" relate to the Commission's establishment in RE-2 of a 48-hour window for exhaustion of administrative remedies in cases of "an inmate seeking immediate protection from imminent sexual abuse,"[13] and does not bear on the shift in presumption from exhaustion to default or to the 20-day filing deadline.

4. The concern with "gamesmanship" on the part of prisoners also arose in the context of the imminence requirement created by RE-2. And even taken more broadly, this concern would be insufficient to justify the shift in presumption from exhaustion to default. For one thing, even were some prisoners to file grievances to try to get "changes to housing or facility assignments for reasons unrelated to sexual abuse" as suggested in the NPR,[14] such efforts could be readily thwarted by officials. And were such prisoners to elevate these efforts to the federal courts, their claims would be quickly exposed as frivolous and penalized by the PLRA's three-strikes rule. Again, agencies have mechanisms for penalizing the filing of bad faith grievance requirements, and the worry about procedural abuses should not be used to justify closing the courthouse doors on prisoners with meritorious claims.

5. Finally, as the NPR indicates, the concern about stale claims relates to the absence of a limitation period and thus bears on neither the shift in presumption from exhaustion to default or the 20-day filing deadline.[15]

In short, if strong arguments exist for the retreat from RE-2 to § 115.52, they have yet to be brought forward, whereas extremely strong arguments exist for retaining the original Commission formulation. I therefore strongly encourage DOJ to adopt the exhaustion procedure originally proposed by the Commission in RE-2. As it is now, § 115.52 would not only directly compromise the goals of PREA, but would actually make it even more difficult in some

[12] See 28 U.S.C. § 1915(g) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.").

[13] NPREC REPORT at 217 (RE-2).

[14] DOJ PREA NPR at 43.

[15] More generally, a concern with stale claims may be valid and may tell in favor of some statute of limitations on claims, but any such limit would need to reflect the seriousness of allegations of rape, which 20 days does not do.

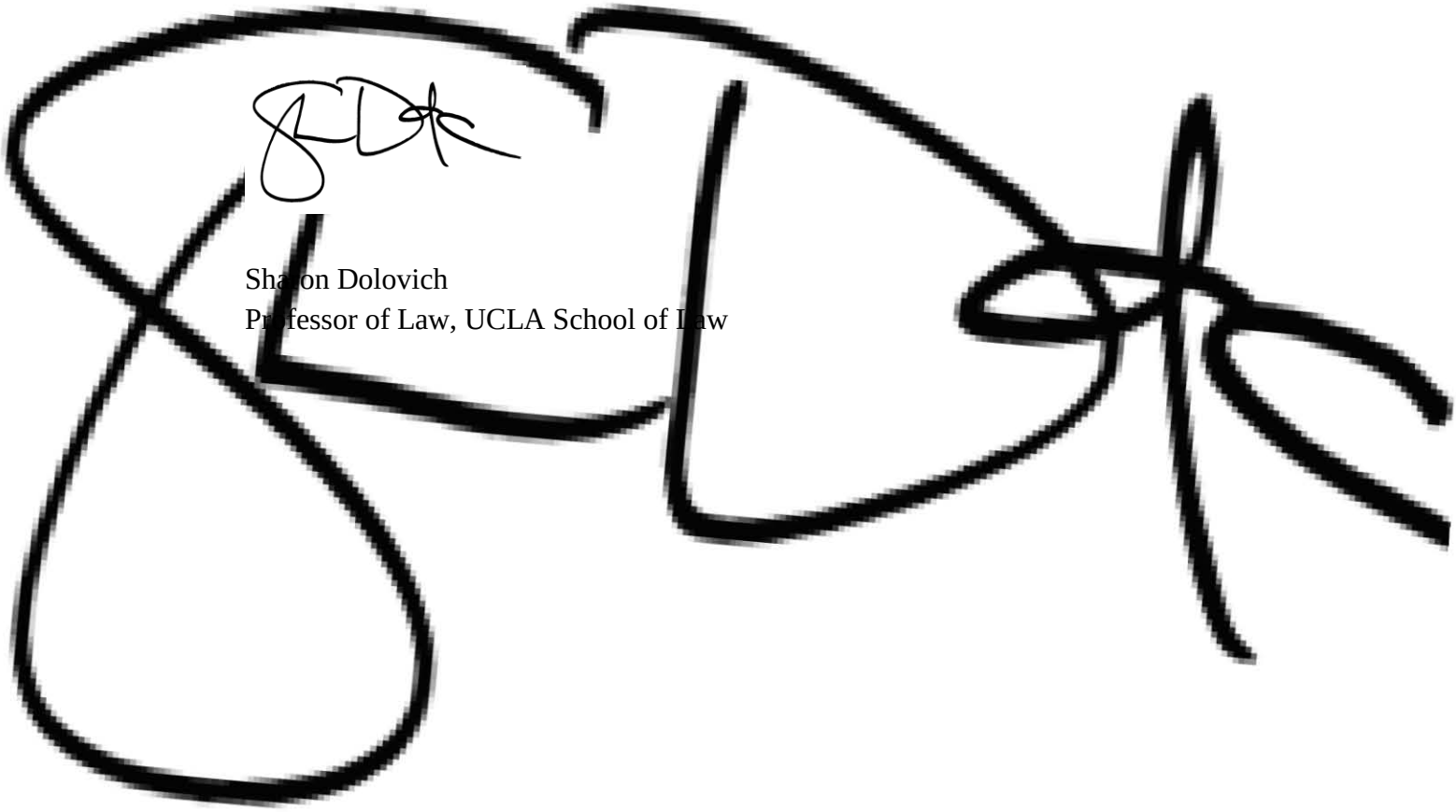
jurisdictions for prisoners with meritorious claims of sexual abuse to get into federal court. This cannot be the aim of the Attorney General and is certainly not consistent with PREA.

One final concern regarding § 115.52 bears noting: § 115.52 (d)(5) provides that "[a]n agency may discipline an inmate for intentionally filing an emergency grievance where no emergency exists." As written, this provision contains no qualification restricting discipline o cases of grievances filed in bad faith. As a result, adoption of § 115.52 (d)(5) would enable agencies to punish any inmate who filed an emergency grievance where the agency subsequently determined that no emergency exists, *even if the inmate sincerely and in good faith believed themselves to face imminent assault*. As written, all § 115.52 (d)(5) requires is that the grievance was intentionally filed and no emergency found to exist.

Given this troubling possibility, one can only conclude that the current construction of § 115.52 (d)(5) reflects an inadvertent drafting error. At the very least, therefore, § 115.52 (d)(5) should be amended to read:

> *(d)(5) An agency may discipline an inmate for filing an emergency grievance in bad faith knowing that no emergency exists.*

Thank you for your consideration of this submission.



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