

**Edward Byrne Memorial Justice Assistance Grant (JAG) Program
Frequently Asked Questions (FAQs)
Regarding the
Prison Rape Elimination Act (PREA) Certification Requirement and 5
percent Reduction**

Updated August 2018

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These FAQs are for reference only and to assist states. These FAQs do not supersede any guidance provided in the JAG PREA Reallocation Guidance, the National PREA standards, JFARA, or grant award documents.

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Edward Byrne Memorial Justice Assistance Grant (JAG) Program
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Regarding the
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5 Percent Reduction

Updated July 2018

JAG PREA Reallocation Overview:

Why is Department of Justice (DOJ) grant funding affected by state efforts to comply with the National Standards to Prevent, Detect, and Respond to Prison Rape?

The PREA statute provides that a state whose governor does not certify full compliance with DOJ's National Standards to Prevent, Detect, and Respond to Prison Rape (PREA Standards), 34 U.S.C. 30307(e), is subject to the loss of 5 percent of any DOJ grant funds that it would otherwise receive for prison purposes, unless the governor submits to the Attorney General an assurance that such 5 percent will be used by the state solely to adopt and achieve full compliance with the PREA Standards in future years.

In addition, the Justice for All Reauthorization Act (JFARA) of 2016, which was enacted on December 16, 2016, includes an amendment to the PREA statute. This change provides an option for governors who submitted an assurance to choose whether affected grant funds will be reallocated to the state to use for PREA compliance purposes or will be held in abeyance by DOJ's Office of Justice Programs pending future action by the state (See 34 U.S.C. §30307(e)). The abeyance option was available beginning in 2017 and provides opportunities for states to claim funds within three years following the enactment of JFARA. (For additional information regarding abeyance, please visit www.bja.gov/ProgramDetails.aspx?Program_ID=76.)

How does this PREA requirement apply to JAG funds?

Any DOJ grant funding that may be used by states for prison purposes is affected by the PREA statute. Because JAG funding can be used for a variety of prison purposes, a 5 percent reallocation for PREA compliance purposes or a 5 percent reduction to a state's JAG funding will be applied each year a governor does not certify full compliance with the PREA standards.

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Who is eligible to apply for PREA reallocation funds?

State Administering Agencies (SAAs) for states, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, and American Samoa that have submitted an assurance to DOJ that at least 5 percent of JAG funds will be used to achieve full compliance with the PREA Standards and did not request funds be held in abeyance per 34 U.S.C. §30307(e) are eligible to apply for PREA reallocation funds.

If the governor does not certify full compliance, how would the 5 percent reduction of a state's JAG funding be assessed?

States that do not have a certification of full compliance would have the 5 percent PREA reduction assessed against the state's 60 percent share of JAG funding plus the less-than-\$10,000 allocation, but it would exclude the mandatory variable pass-through (VPT) amount.

Below is an illustration of how the PREA reduction is assessed:

If state X is to receive an initial state allocation of \$3,000,000, the 5 percent PREA reduction would be calculated as follows:

The mandatory pass-through amount of \$1,200,000 (based on state X's mandatory 40 percent pass-through) is subtracted from the \$3,000,000, resulting in \$1,800,000, the state's 60 percent share of JAG funding.

The "less-than-\$10,000" allocation for state X, or \$250,000, is then added to the \$1,800,000, resulting in \$2,050,000.

The 5 percent PREA reduction is then assessed on the \$2,050,000 amount ($\$2,050,000 \times .05$), resulting in a \$102,500 reduction for state X.

For the District of Columbia and the territories, the reduction will be assessed on the full allocation because the entire allocation goes to the District and territorial governments.

If a state uses the 5 percent PREA reallocation, will that be included in the standard state JAG award?

The 5 percent PREA reallocation will not be included in the state JAG award, to facilitate separate tracking of PREA activities. For a state that submits an assurance that not less than 5 percent of its DOJ funding for prison purposes will be used solely to adopt and achieve full compliance with the PREA Standards and chooses to receive its funds in the form of a PREA reallocation award, the Bureau of Justice Assistance (BJA) will provide guidance and require a separate funding application be submitted that details the specific PREA-related activities to be carried out using these funds. BJA staff will work with states on this application, and awards will be made by September 30.

For states that choose the abeyance option, these funds will be held by DOJ's Office of Justice Programs until December 16, 2019, but they may be released earlier if the state's governor certifies full compliance with the PREA Standards prior to that date.

When does the PREA reduction take effect?

The first year of the 5 percent reduction was fiscal year 2014, which began on October 1, 2013 and ended on September 30, 2014. States have an ongoing obligation to work toward and achieve

compliance with the PREA Standards; therefore, the PREA reduction will be applied each year that the governor does not certify full compliance with the PREA Standards.

When is the governor's certification or assurance due to DOJ?

The deadline for submission of either a certification regarding adoption and full compliance with the PREA Standards or an assurance of intention to adopt and achieve full compliance with the PREA Standards is **October 15** each year.

What options does the governor have with regards to PREA compliance?

Pursuant to the PREA statute, the governor has the following options:

- (1) Submit a certification that all confinement facilities under his or her operational control are in full compliance with the PREA Standards.
- (2) Submit an assurance which gives the governor the option to:
 - a. Use not less than 5 percent of impacted DOJ funds to work toward and achieve full compliance with the PREA Standards in the future, resulting in a reallocation of impacted DOJ grant funds; or
 - b. Request that the Attorney General hold these grant funds in abeyance (**new option available in FY 2017 through FY 2019**).
- (3) Submit neither and accept a 5 percent reduction in such grants.

Pursuant to PREA Standard 115.501(a), governors shall make their certifications of compliance taking into consideration the results of the most recent PREA audit results. DOJ intends these audits to be a primary, but not the only, factor in determining compliance. For example, audit results for a particular period may show the selected one-third of audited facilities in compliance; however, the governor may have determined that other facilities under his or her control are, in fact, not in compliance with the standards.

Other than the standard described above requiring governors to “consider” the audit findings, neither the PREA statute nor the PREA Standards restrict the sources of information governors may use in deciding whether or how to certify compliance.

It is important to note that if a governor submits an assurance to DOJ that no less than 5 percent of the state's DOJ funding for prison purposes will be used to support implementation of the PREA Standards, the state will not lose the funds, but the funds will be reallocated to a PREA-specific award. States that elect to hold funds in abeyance will have opportunities to reclaim the balance of those funds within 3 years following the enactment of JFARA.

Governor's Certification:

To what facilities in the state does the governor's PREA certification apply?

PREA standards state, “The Governor's certification [of full compliance with the PREA Standards] shall apply to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch.” (28 C.F.R. § 115.501(b)) A “facility” is defined as “a place, institution, building (or part thereof), set of buildings, structure, or an area (whether or not enclosing a building or set of buildings) that is used

by an agency for the confinement of individuals.” Some standards apply specifically at the facility level, while others apply at the agency level.

This definition of facility includes local detention and correctional facilities as well as state correctional facilities; however, not all facilities within a state are subject to the governor’s certification. The governor’s certification does not encompass those facilities outside the operational control of the governor; namely, those facilities that are under the operational control of counties, cities, or other municipalities, or privately operated facilities not operated on behalf of the state’s executive branch.

The term “operational control” is not defined in the PREA Standards. The determination of whether a facility is under the operational control of the executive branch is left to a governor’s discretion, subject to the following guidance. Generally, there are several factors that may be taken into consideration in determining whether a facility is under the “operational control” of the executive branch:

- Does the executive branch have the ability to mandate PREA compliance without judicial intervention?
- Does the state have a unified correctional system?
- Does the state agency contract with a facility to confine inmates or residents on its behalf, other than inmates or residents being temporarily held for transfer to or release from a state facility?

The above list is not exhaustive, but it covers the majority of situations that governors may face in determining whether a facility or contractual arrangement is subject to the governor’s certification.

Please note that the PREA Standards require that any public agency that contracts for the confinement of its inmates with private agencies or other entities, including other government agencies, (1) include in any new contract or contract renewal the entity’s obligation to adopt and comply with the PREA Standards, and (2) provide for agency contract monitoring to ensure that the contractor is complying with the PREA Standards. (28 C.F.R. §§ 115.12, 115.112, 115.212, 115.312.) A state confinement agency that fails to comply with these requirements is, by the terms of the PREA Standards, not PREA compliant.

What compliance information must be submitted with the governor’s certification?

Under the PREA amendment in the Justice for All Reauthorization Act (JFARA),¹ the following documentation must be submitted with the governor’s certification:

- (1) A list of the prisons under the operational control of the executive branch of the state
- (2) A list of the prisons that were audited during the most recently concluded audit year
- (3) All final audit reports for prisons that were completed during the most recently concluded audit year
- (4) A proposed schedule to complete an audit of all the prisons during the following 3 audit years

Please note, the term “prisons” is utilized in JFARA and intended to include all facilities under operational control of the state’s the executive branch.

¹ For additional information about the Justice for All Reauthorization Act, please visit www.bja.gov/ProgramDetails.aspx?Program_ID=76.

What if a state is not fully compliant with the PREA Standards, but working toward full compliance?

Under 34 U.S.C. § 30307(e)(2), the State may provide an assurance that 5 percent of DOJ funds that can be used for prison purposes will be used to achieve full compliance with the PREA Standards, so that a certification of compliance may be submitted in future years, or request that the affected funds be held in abeyance by DOJ.

Assurance and Abeyance:

How can the governor choose to hold impacted DOJ grant funds in abeyance?

Each year, DOJ sends a letter to governors informing them of their options under the PREA statute. As attachments to that letter, DOJ includes two forms:

- (1) PREA Certification Form for Governors: to submit a certification of full compliance with the PREA Standards.
- (2) PREA Assurance Form for Governors: to submit an assurance to DOJ of their intention to adopt and achieve full compliance with the PREA Standards in future years. On this form, governors are given the option to reallocate 5 percent of impacted DOJ grant funds for PREA purposes or request to have those same funds held in abeyance by DOJ.

How can states claim funds held in abeyance?

Under the PREA amendment in the Justice for All Reauthorization Act (JFARA), signed into law on December 16, 2016 (Public Law 114-324), funds held in abeyance will be managed and distributed as follows (See 34 U.S.C. §30307(e)(2)(E)):

- States that select the abeyance option and are able to submit a certification within 3 years following enactment of JFARA will, upon submission of the certification, be able to claim the balance of funds held in abeyance to be used for the original purpose(s) of the impacted DOJ grant program(s). Funding will be distributed as part of, or as a supplement to, a grant made under the impacted DOJ grant program(s).
- States that select the abeyance option but are unable to submit a certification in the 3-year period following enactment of JFARA, although they have audited at least two-thirds of facilities under the operational control of the executive branch, will have the option to submit an assurance and receive the funds held in abeyance to be used solely for PREA compliance purposes.
- States that select the abeyance option and, within the 3-year period following enactment of JFARA, are unable to certify full compliance or provide an assurance that at least two-thirds of applicable facilities have been audited will relinquish the balance held in abeyance for redistribution to other states to be used for the original purpose(s) of the impacted DOJ grant program(s).

In which years will the abeyance option be available?

The abeyance option will sunset 3 years following the date of enactment of JFARA, on December 16, 2019. Therefore, governors who submit an assurance will have three opportunities to use the abeyance option: in fiscal years 2017, 2018, and 2019. A timeline of key dates is presented below.

Governors who submit an assurance will be asked to choose whether the DOJ grant funds will be reallocated to the state to use for PREA compliance purposes or held in abeyance as described above. The final disposition of funds held in abeyance will be determined based on a governor’s certification and assurance submission for Audit Year 3 of Cycle 2.

Fiscal Year	Audit Year	Audit Cycle	Certification Deadline
2017	3	1 (August 20, 2015 – August 19, 2016)	October 15, 2016
2018	1	2 (August 20, 2016 – August 19, 2017)	October 16, 2017
2019	2	2 (August 20, 2017 – August 19, 2018)	October 15, 2018
2020	3	2 (August 20, 2018 – August 19, 2019)	October 15, 2019

Information on submission requirements is provided annually to states in August.

What can a state do with its remaining JAG PREA reallocation funds if, after providing DOJ with an assurance, the state later comes into full compliance with the PREA Standards?

Per the PREA statute, any state that submits an assurance to the Office of Justice Programs (OJP) that it will reallocate 5 percent of certain formula grant funds (including JAG formula funds) to come into compliance with the PREA Standards will be allowed to retain those funds, which would otherwise have been forfeited as a penalty for PREA non-compliance. Once that state comes into full compliance with the PREA Standards, the governor should provide the PREA Management Office with that state’s certification of full compliance with PREA.

Upon receipt of that certification, OJP’s Bureau of Justice Assistance (BJA) will lift the PREA limitation on the JAG funds, and the state will be allowed to use any remaining JAG PREA reallocation funds for any of the lawful purposes under the JAG statute. Of course, a state could choose to continue to use its JAG PREA reallocation funds for the purpose of maintaining PREA compliance. For example, a state could continue to pay for ongoing PREA facility audit requirements, should it choose to do so.

As a process, after proof of certification, if a state chooses to use its remaining JAG PREA reallocation funds for general JAG purposes, it can submit a change of scope Grant Adjustment Notice (GAN) in the online Grants Management System (GMS). As part of the change of scope GAN, a copy of the governor’s certification should be provided. Once the change of scope GAN has been approved by BJA, the state can then submit a revised budget GAN in GMS to request to reallocate its funds to other approved JAG purpose activities consistent with the JAG statute.

Allowable Use of Funds:

Are the costs associated with preparing for and conducting PREA audits an allowable use of the 5 percent reallocation?

Yes. States may use the 5 percent reallocation on activities to help them achieve compliance with the National PREA Standards to Prevent, Detect, and Respond to Prison Rape (PREA Standards), including preparing for and conducting audits.

Allowable activities may also focus on addressing one or more of the major provisions of the PREA Standards, which include:

- General prevention planning
- Supervision and monitoring
- Staffing of juvenile facilities
- Juveniles in adult facilities
- Cross-gender searches and viewing
- Training and education
- Screening
- Reporting
- Responsive planning
- Investigations
- Discipline
- Medical and mental health care
- Grievances
- Lesbian, gay, bisexual, transgender, intersex (LGBTI), and gender nonconforming inmates
- Inmates with disabilities and limited English proficient (LEP) inmates.

If the governor submits an assurance, can the state use PREA reallocation funds for non-PREA JAG purpose areas?

No. If the governor submits an assurance that at least 5 percent of JAG funds will be used only for the purpose of enabling the state to adopt and achieve full compliance with the PREA Standards in future years, the entire 5 percent must be used for PREA purposes.

Can management & administration funds be deducted from the PREA reallocation funds?

PREA reallocation funds cannot be used for administrative costs, including indirect costs, which are administrative in nature.

Does my agency need to submit materials that we plan to publish, which are funded by PREA reallocation funds, to BJA for review?

Yes. You must submit to BJA for review and approval any curricula, training materials, proposed publications, reports, or any other written materials, including web-based materials and website content, which will be published using DOJ grant funds, at least 30 working days prior to the targeted dissemination date. Any written, visual, or audio publications, with the exception of press releases, whether published at the grantee's or government's expense, shall contain the following statement: "This project was supported by Grant No. <AWARD_NUMBER> awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute

of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice." The current edition of the DOJ Grants Financial Guide provides guidance on allowable printing and publication activities.

Resources:

Who can I contact for more information regarding PREA implementation?

For additional information concerning PREA, visit the National PREA Resource Center at www.prearesourcecenter.org and/or send inquiries to the PREA Management Office at PREACompliance@usdoj.gov.

Where can I find additional PREA Resources?

National PREA Standards to Prevent, Detect, and Respond to Prison Rape –

https://ojp.gov/programs/pdfs/prea_final_rule.pdf

PREA Standards in Focus – <https://www.prearesourcecenter.org/node/5261>

JFARA Fact Sheet – https://www.bja.gov/publications/JFARA-Fact-Sheet_Updated-2017.03.01.pdf