

END THE ABUSE

Protecting LGBTI Prisoners from Sexual Assault Advocacy Guide

The Prison Rape Elimination Act (PREA) was signed into law in 2003.¹ The Act charged the Department of Justice (DOJ) with gathering data on the incidence of prison rape,² and created the National Prison Rape Elimination Commission (NPREC) to study the problem and recommend national standards to DOJ.³ After nine years of study and commentary by experts, the DOJ promulgated a comprehensive set of regulations implementing the Act in May 2012.⁴ The Department of Justice in its summary of the final PREA regulations recognized “the particular vulnerabilities of inmates who are [Lesbian, Gay, Bisexual, Transgender and Intersex] LGBTI or whose appearance or manner does not conform to traditional gender expectations” and included landmark protections against the types of assault, harassment, and prolonged isolation that are commonly experienced by LGBTI individuals in custody.⁵

While the Federal government was immediately bound to implement the PREA regulations in federal prisons and with respect to individuals in the custody of the United States Marshal Service,⁶ states had until August 2013 to certify compliance with the regulations or potentially lose five percent of any DOJ grant funds directed towards prison funding.⁷ The Department of Homeland Security (DHS) and the Department of Health and Human Services (DHHS) were charged by Executive Order with promulgating PREA-compliant regulations within 180 days of the final DOJ regulations. Those regulations are still under review.

The PREA regulations primarily rely on an audit system and PREA coordinators to monitor and track compliance. The regulations require agencies to conduct one audit per year of at least one third of each facility type (prison, jail, juvenile facility, overnight lockup, and community confinement facility) operated by the agency.⁸ Over the course of three years beginning August 20, 2013, state and local agencies must audit every facility operated by the agency.⁹ Under PREA, governors are responsible for certifying the state’s compliance with the standards imposed by the regulations and must consider the results of the most recent audits in determining the state’s compliance status.¹⁰

All agencies subject to PREA must identify a PREA coordinator to monitor and implement compliant policies.

The coordinator must have “sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.”¹¹

The PREA regulations set forth new national standards that apply to federal, state and local agencies. State agencies face the loss of five percent of their federal funding if they fail to comply with PREA.¹² However, states can avoid that penalty if they promise to use their federal funding to conform to PREA standards in the future,¹³ and PREA provides no penalties for local agencies that fail to meet its standards.¹⁴ Due to the lack of a penalty mechanism at the local level, some local agencies may try to ignore PREA or be slow to comply with the regulations. This is another reason why advocacy and outside pressure is especially important for the success of PREA, and can make an enormous difference for the safety and security of all prisoners.

The PREA Regulations Offer Key Opportunities for Reducing Violence against LGBTI individuals.

Reports of harassment, assault and prolonged isolation of LGBTI individuals in custody are staggering. LGBTI individuals are often placed against their will in highly isolating and restrictive settings that not only fail to keep them safe, particularly from staff-perpetrated sexual abuse, but that also damage their health and reduce their chances of early release because of significant limitations imposed on educational, program and work opportunities in these settings. Transgender and intersex individuals are often assigned to placements based solely on an examination of their genital characteristics without accounting for the particular safety needs of each individual. There is rarely any guidance on how and when searches of transgender individuals should be done. The final PREA regulations include key protections against the common and abusive practices that individuals experience in different custodial settings and can be used to create meaningful changes for LGBTI prisoners who are particularly vulnerable.

DOCUMENTING VIOLATIONS

Ask your state or local corrections agency for the schedule

of PREA audits and contact information for the auditors. Once you have this information, you can report violations to the auditors. Facilities are also required to post notice of upcoming audits and contact information for auditors six weeks prior to the audit.¹⁵ People in custody should be advised to look out for audit notices and contact the auditors with any information about PREA violations.

If there are any facilities that are particularly non-compliant, that information can also be reported to the Special Litigation Division of the Office of Civil Rights at the DOJ. The Special Litigation Division has the power to monitor conditions of confinement in state and local facilities under the Civil Rights of Institutionalized Persons Act (CRIPA). Where systemic violations are occurring, the Special Litigation Division may take action. Reports should be made directly to the Special Litigation Section here:

U.S. Department of Justice
Civil Rights Division—Special Litigation Section
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-6255 or (877) 218-5228

POLICY & LEGISLATIVE CHANGE

The final PREA regulations can be leveraged to reduce the violence and other common problems that LGBTI individuals experience while incarcerated. State and local agencies must now be in compliance with PREA but some facilities or systems may not have updated their policies yet. If you discover from a prisoner or through a public records request that an agency or facility has maintained PREA non-compliant policies, you should alert them to the violation and remind them of their obligation to be in compliance with the PREA regulations. Another strategy would be to write your state Department of Corrections or local jail or juvenile detention center to ask about changes in policy and practice that have been made to comply with their obligations under PREA. Such an inquiry may start a dialogue and put corrections leaders on notice that the advocacy community in their jurisdiction is prepared to hold them accountable to PREA's mandates.

The PREA regulations also require that at the conclusion of any investigation of sexual abuse, regardless of whether the allegation was substantiated, that the facility conduct an incident review that includes upper-level management and assesses whether the alleged incident was motivated by race, ethnicity, actual or perceived LGBTI status or gender identity and whether any policy changes need to

be made to protect against future abuse.¹⁶ Ensuring that these reviews are mandated by actual policy and that they are conducted thoroughly and seriously should be part of your advocacy strategy.

In addition to agency advocacy, some states are moving to pass state legislation that would clarify state and local agency obligations to eliminate sexual violence. Several states have passed their own PREA laws. In May 2013, Colorado's Governor signed into law a bill that makes PREA regulations binding for prisoners under age 18 who are being held in any of the state's correctional facilities.¹⁷ Just over two weeks later, Texas passed a piece of legislation that mandates PREA training for correctional officers who work in juvenile facilities.¹⁸ Connecticut has passed an even broader law: in 2011, that state adopted the full PREA regulations in all facilities that hold adult prisoners and detainees, including local jails.¹⁹

As of June 2013, a number of states have active PREA-related legislation in their legislatures. The California State Senate approved a comprehensive PREA bill on May 29, 2013, which is now pending in the Assembly.²⁰ New York,²¹ North Carolina,²² and Texas²³ each had PREA laws pending in committee prior to the close of this legislative session. Several other states, such as Nevada,²⁴ New Mexico,²⁵ and West Virginia,²⁶ introduced PREA laws in the last year and a half.

Passing state legislation to guarantee PREA compliance, monitoring and enforcement is the best way to ensure that all facilities and agencies in the state implement and rigorously follow the PREA regulations and require independent, outside audits.

LITIGATION

Though PREA does not create a private right of action to sue for violations of the Act or regulations,²⁷ there may be room for litigants to argue that noncompliance with the PREA standards presents evidence that facilities are not meeting their constitutional obligations. If a state, agency or facility has maintained PREA non-compliant policies or practices, this may be evidence that officials have been deliberately indifferent to an objectively serious risk of harm. The data that was collected by Congress, the NPREC and the DOJ during the passage of PREA and the implementing regulations effectively put agencies and officials on notice of the particular vulnerability of LGBTI prisoners.

KEY LGBTI ISSUES TO MONITOR IN CUSTODIAL SETTINGS

Definitions

What To Look For

Many state and local corrections agencies will develop PREA directives. The directives may include definitions related to sexual abuse and reporting mechanisms but may leave out definitions related to LGBTI individuals.

What You Can Do

Advocate with these agencies for the inclusion of clear definitions related to LGBTI individuals in custody.

- **Gender nonconforming** means a person whose appearance or manner does not conform to traditional societal gender expectations.
- **Intersex** means a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.
- **Transgender** means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person's assigned sex at birth.
- **Gender Expression** means the manner in which a person expresses his or her gender identity to others.
- **Gender Identity** means a person's internal, deeply felt sense of being male or female, or in between, regardless of the person's sex at birth.
- **Questioning** means a person, often a younger person, who is exploring or unsure about their sexual orientation, gender identity and/or gender expression.
- **Sexual orientation** means the internal experience that determines one's physical, emotional or other attraction to men, women, both or neither (asexual). Everyone has a sexual orientation.

Individualized assessments for placement of LGBTI individuals.

The final PREA regulations require adult prisons and jails and juvenile detention facilities to screen individuals within 72 hours of intake to assess the individual's risk for sexual victimization or abuse.²⁹ This screening "shall consider,

at a minimum...whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex or gender nonconforming."³⁰ Agencies are then charged with using this screening information to "inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive."³¹ Safety determinations must be made on an individualized basis.³²

The regulations also require agencies to make individualized housing and program placements for all transgender and intersex individuals.³³ This includes assignment of transgender and intersex individuals to male or female facilities.³⁴ All such program and housing assignments must "be reassessed at least twice each year to review any threats to safety experienced by the inmate"³⁵ and an individual's "own views with respect to his or her own safety shall be given serious consideration" in these assessments.³⁶ Given that corrections agencies in the United States almost universally assign people to male or female facilities based solely on genital characteristics or birth assigned sex, this standard marks an important and significant departure from current practice and will require oversight and pressure from advocates to ensure that it is effectively implemented.

What To Look For

- Any policy that mandates placement of transgender and intersex individuals based solely on a person's genital characteristics or gender designation on state issued identification presents a clear PREA violation.
- Any policy or practice that determines facility, housing, work or bed assignments solely on the basis of an individual's actual or perceived LGBTI status violates PREA.

What You Can Do

- Work with the agency to implement policies that identify transgender and intersex individuals through respectful and affirming intake procedures.

- *Sample language: "Transgender individuals may be identified during admission/intake based on:*

A statement that he or she is transgender, is 'trapped in the wrong body,' or is really a different sex than his or her birth sex;

A request to be called by a name that is not traditionally associated with his or her birth sex;

Any statements in arrest reports/jail or court records indicating the person is transgender or that the police were unsure of the person's sex."

- No one should inquire about an individual's medical transition, genital characteristics or surgical status unless necessary for a medical evaluation.
- Advocate for policies that trigger regular and individualized assessments for the placement and program assignments of transgender and intersex individuals. This means that transgender women must be considered for placement in women's facilities and transgender men for placement in men's facilities.
 - Individual assessments should also include an individual's sense of his or her own safety in different placement options (i.e., male vs. female facilities, general population, protective custody).
 - *Sample Language: "A transgender or intersex individual shall be provided with a form or screening questionnaire to be conducted or filled out in private that will allow the person to select the following:*
 - A preferred name,*
 - A preferred pronoun,*
 - Where the person would feel safest being housed;*
 - The sex of staff that the person would feel safest performing searches and/or urine testing."*
- Monitor individual placements that are based solely on an individual's genital characteristics and report such placements and the underlying policies and practices to auditors.

Searches and supervision of transgender individuals.

The PREA regulations prohibit any search that is conducted for the sole purpose of determining an individual's genital status.³⁷

All cross-gender pat, strip and cavity searches are subject to strict guidelines under PREA but restrictions on cross-gender pat searches of female individuals do not go into effect until August 2015.³⁸ Even though agencies are not required to be in compliance with all search provisions, all agencies should be taking steps to implement policies consistent with the cross-gender pat and strip search prohibitions prior to the 2015 effective date. Under the regular effective dates for PREA compliance, agencies are prohibited from conducting cross-gender strip and

cavity searches **except in exigent circumstances** or when performed by a medical practitioner.³⁹ Agencies are also required to effectively train staff to conduct professional and respectful searches of transgender and intersex persons.⁴⁰

PREA further mandates that facilities implement policies to ensure that individuals are able to shower and undress without being viewed by staff of the opposite gender and that staff of the opposite gender announce themselves prior to entering any housing area.⁴¹ Agencies are required to provide transgender and intersex individuals with access to private showers in all circumstances.⁴²

The PREA regulations do not offer clear guidance on what constitutes a cross-gender search or cross-gender viewing for transgender and intersex individuals. The PREA Resource Center identifies three policy options for conducting searches of transgender and intersex individuals: "1) searches conducted only by medical staff; 2) searches conducted by female staff only, especially given there is no prohibition on the pat-searches female staff can perform (except in juvenile facilities); and 3) asking inmates/residents to identify the gender of staff with whom they would feel most comfortable conducting the search."⁴³

What To Look For

- Policies requiring genital searches by staff solely to determine the genital characteristics of a transgender or intersex person are prohibited by PREA.
- Regardless of where transgender and intersex individuals are housed, any policy or practice that forces transgender or intersex individuals to shower in group shower settings violates PREA.
- Policies or practices that treat transgender and intersex individuals as the sex of their housing assignment for purposes of triggering cross-gender search protections.
- Policies and practices that do not provide for an individualized determination of cross-gender search protections for transgender and intersex individuals.

What You Can Do

- Advocate for clear guidelines on searches of transgender individuals including prohibitions on any searches for the sole purpose of examining or determining a transgender or intersex person's genital characteristics.

- Sample language: *“Under no circumstances shall any search be conducted solely for the purpose of determining a prisoner or detainee’s genital characteristics.”*
- Advocate for policies that allow transgender and intersex individuals to identify upon intake the gender of the officer that they would feel safest searching them.
 - Sample language: *“If a prisoner has been identified as transgender or intersex, he or she shall be asked at intake to indicate his or her preference as to the gender of the officer that will perform searches in the event searches are required, and that preference will be honored absent exigent circumstances.”*
- Advocate for the agency to remove any policies that require transgender individuals to automatically be treated as the gender of their housing assignment for the purposes of triggering cross-gender search protections.
- Advocate for policies that permit all transgender and intersex individuals to access private showers.

Strict limits on the use of protective custody

The PREA regulations strictly regulate the use of protective custody (separation from others to address a current need for protection). This regulation arises from the serious concern that protective custody in jails, prisons and juvenile detention centers is often synonymous with isolation or solitary confinement so that individuals subject to it are frequently harmed or “punished” as a result of their vulnerable status. Under PREA prisoners cannot be placed in “involuntary segregated housing” unless (1) an assessment of all available alternatives is made AND (2) a determination has been made that no alternative means of separation is available (and this determination must be made within the first 24 hours of involuntary segregation).⁴⁴ Under the PREA regulations, involuntary segregated housing should generally not exceed 30 days.⁴⁵ When prisoners are placed in protective custody, they must be given access to “programs, privileges, education, and work opportunities to the extent possible.”⁴⁶ Though agencies are given significant latitude with restrictions because of the “to the extent possible” qualification, the nature of, reason for and duration of any restrictions to program, privilege, education and

work opportunities must be documented.⁴⁷

The regulations also prohibit agencies from “plac[ing] lesbian, gay, bisexual, transgender, or intersex inmates in dedicated 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.”⁴⁸ In juvenile facilities, no such placement based solely on LGBTI status may be made regardless of prior legal settlements or judgments. This includes placements in particular units or wings, including placement in protective custody or other isolated setting. Where such placement is made voluntarily it should be considered permissible under this standard.

What To Look For

- Any protective custody policy that does not have clear time limits and procedures for documenting the use of protective custody for vulnerable prisoners violates PREA’s mandate.
- Any protective custody policy that limits or otherwise restricts access to programs, work assignments, educational opportunities and/or other privileges should be reviewed for PREA compliance.
- Any involuntary placement in protective custody or administrative segregation solely on the basis of one’s actual or perceived LGBTI status or gender expression is inconsistent with the final PREA standards.

What You Can Do

- Advocate for policies that eliminate the use of prolonged involuntary protective custody.
- Advocate for clear policies on the availability of programming and services to all individuals housed in restrictive settings including voluntary protective custody and involuntary protective custody.
- Monitor reports by transgender prisoners that they are being placed involuntarily in protective custody or other restrictive housing setting based solely on their gender identity or expression.

Mis-Use of PREA That Harms LGBTI Individuals

Though the PREA regulations include vitally important protections for LGBTI individuals in custodial settings, some agencies have adopted policies that harm LGBTI and

other individuals as part of the larger effort to end prison sexual abuse.

What To Look For

- Policies or practices that limit “cross-gender” expression because such expression “invites” sexual assault.
- Policies or practices that treat consensual contact between prisoners as sexual abuse.
- Policies or practices that prohibit the possession of condoms, lubricant or other safer sex items.

What You Can Do

- Advocate for policies that permit transgender, gender non-conforming and intersex individuals to access grooming items and accessories consistent with their gender identity regardless of where they are housed (i.e., transwomen in men’s facilities should have access to mailroom, property, clothing, commissary and other items available to women in women’s facilities).
- Advocate for the removal of policies treating consensual contact between individuals in custody as sexual abuse. Under PREA consensual contact between two individuals in custody is not considered sexual abuse.
- Advocate for policies that make condoms, lubricant and other safer sex items available to individuals in custody and forbid officers from using condoms as evidence of sexual abusiveness or victimization.

CONTACTS

The ACLU is collecting information about individual PREA violations, non-compliant policies and other systemic violations of the rights of LGBTI persons in prison, jail, juvenile detention and community corrections.

Please contact the LGBT & AIDS Project, cstrangio@aclu.org, or the National Prison Project, afettig@aclu.org, with any questions about monitoring PREA compliance in your city, county or state or to identify violations in a specific facility or jurisdiction.

ENDNOTES

¹ Prison Rape Elimination Act of 2003 (PL 108-79), codified at 42 U.S.C. §§ 15601 *et. seq.*

² For data collected, see Prison Rape Elimination Act (Sexual Violence in Correctional Facilities), Bureau of Justice Statistics (last visited November 18, 2013), available at <http://www.bjs.gov/index.cfm?ty=tp&tid=20> (listing Bureau of Justice Statistics data gathered since the act's passage).

³ Nat'l Prison Rape Elimination Comm'n., Nat'l Prison Rape Elimination Comm'n Rep. 1 (June 2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

⁴ See Press Release, Department of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html> (summary of regulations).

⁵ National Prison Rape Elimination Commission, Report 73 (June 2009) (hereinafter Commission Report); A. Beck et al., Sexual Victimization in Jails and Prisons Reported by Inmates, 2008-09 14-15 (Bureau of Justice Statistics, Aug. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>; V. Jenness et al., Violence in California correctional facilities: An empirical examination of sexual assault (Center for Evidence-Based Corrections 2009); 167-68; J.M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 167-68 (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), available at http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf.

⁶ 42 U.S.C. 15607 (b) [2003]. See also Memorandum from the President of the United States Implementing the Prison Rape Elimination Act (May 17, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act>.

⁷ 42 U.S.C. 15607 (e)(2) [2003]. States must also audit state facilities every three years. See 28 C.F.R. §§ 115.93, 115.193, 115.293, 115.393, 115.401, 115.402, 115.403, 115.404, 115.405, 115.501 [2012], available at http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

⁸ 28 C.F.R. §§ 115.401(b).

⁹ 28 C.F.R. §§ 115.401(a).

¹⁰ 42 U.S.C. 15607(c)(2); 28 C.F.R. §§ 115.501(a).

¹¹ 28 C.F.R. §§ 115.11, 115.111, 115.211, 115.311.

¹² See PREA Standards, *supra* note 4, at §115(A).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ PREA Resource Center, "Audit Process" <http://www.prearesourcecenter.org/audit/audit-process> (last visited November 18, 2013).

¹⁶ 28 C.F.R. § 115.86(2), 28 C.F.R. § 115.186(2), 28 C.F.R. § 115.286(2), 28 C.F.R. § 115.386(2).

¹⁷ 2013 Colo. Legis. Serv. Ch. 171 § 17-1-115.7 (West).

¹⁸ S.B. 653, 82d Leg., Reg. Sess. (Tex. 2011).

¹⁹ CONN. GEN. STAT. § 18-81cc (Conn. 2012). Bill text available at <http://www.cga.ct.gov/2012/sup/chap325.htm#Sec18-81cc.htm>.

²⁰ S.B. 716, 2013-2014 Leg., Reg. Sess. (Cal. 2013).

²¹ S.B. 1394, 2013 Leg., 236th Sess. (N.Y. 2013).

²² H.B. 585, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

²³ H.B. 990, 83d Leg., Reg. Sess. (Tex. 2013); see also H.B. 3634, 83d Leg., Reg. Sess. (Tex. 2013).

²⁴ S.B. 33, 77th Leg., Reg. Sess. (Nev. 2013).

²⁵ S.B. 526, 51st Leg. Sess., 1st Sess. (N.M. 2013).

²⁶ S.B. 427, 80th Leg., Reg. Sess. (W. Va. 2012).

²⁷ See *Alexander v. Sandoval*, 532 U.S. 275, 291 (2003) (holding that, in the absence of explicit authorization by Congress, no private right of action is created simply by statute). 42 U.S.C. § 15602(3)(7) (2003).

²⁸ 28 C.F.R. § 115.5

²⁹ 28 C.F.R. § 115.41(b); 28 C.F.R. § 115.241 (b); 28 C.F.R. § 115.341(a).

³⁰ 28 C.F.R. § 115.41(d)(7).

³¹ 28 C.F.R. § 115.42 (a)

³² 28 C.F.R. § 115.42 (b)

³³ 28 C.F.R. § 115.42 (c) ("In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.").

³⁴ *Id.*

³⁵ 28 C.F.R. § 115.42 (d).

³⁶ 28 C.F.R. § 115.42 (e).

³⁷ 28 C.F.R. § 115.15 (e)

³⁸ 28 C.F.R. § 115.15 (b) and 28 C.F.R. §115.215(b)

³⁹ 28 C.F.R. § 115.15 (a)

⁴⁰ 28 C.F.R. § 115.15 (f)

⁴¹ 28 C.F.R. § 115.15 (d).

⁴² 28 C.F.R. § 115.42 (f).

⁴³ PREA Resource Center, "Frequently Asked Questions," <http://www.prearesourcecenter.org/faq#n1069> (last visited November 18, 2013).

⁴⁴ 28 C.F.R. § 115.43 (a).

⁴⁵ 28 C.F.R. § 115.43 (c).

⁴⁶ 28 C.F.R. § 115.43 (b).

⁴⁷ 28 C.F.R. § 115.43 (b).

⁴⁸ 28 C.F.R. § 115.42 (g).