



A prison or jail sentence should never include sexual assault. On May 17, 2012, the Department of Justice released the final federal regulations implementing the Prison Rape Elimination Act (PREA). These regulations apply to federal, state and local correctional facilities and lock-ups and include key protections for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) individuals. Despite—or likely because of—the decade-long process leading up to the passage of the final regulations, much confusion remains about how PREA's protections can be

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

The coordinator must have “sufficient time and authority to

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 implement (in a 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.

be made to protect against future abuse.¹⁶ Ensuring that these reviews are mandated by actual policy and that they

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 seg

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 included a list of prohibited actions, the regulations do not explicitly prohibit

- 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)

WHAT IS PREA?

The Prison Rape Elimination Act (PREA) was passed by Congress and signed into law in 2003. The Act charged the Department of Justice (DOJ) with gathering data on the incidence of prison rape,¹ and created the National Prison Rape Elimination Commission (NPREC) to study the problem and recommend national standards to DOJ.² After nine years of study and commentary by experts, the DOJ promulgated a comprehensive set of regulations implementing the Act in May 2012.³

ARE LGBTI INDIVIDUALS PARTICULARLY VULNERABLE IN PRISON, JAIL AND JUVENILE DETENTION?

Yes. Reports of harassment and sexual abuse of LGBTI individuals in custody are staggering.⁴ Transgender and intersex individuals are at especially high risk because they 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 also rarely any guidance offered to staff on how and when searches of transgender and intersex individuals should be done, which leave them particularly susceptible to abusive searches.

In addition, 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.

DO THE PREA REGULATIONS INCLUDE PROTECTIONS FOR LGBTI INDIVIDUALS?

Yes. 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

HOW SHOULD FACILITIES PROTECT LGBTI INDIVIDUALS FROM ABUSE?

The final PREA regulations impose affirmative obligations on agencies to reduce the risk of sexual abuse of LGBTI individuals.

Agencies can take the following steps to follow PREA’s mandates and reduce the violence experienced by LGBTI individuals in custody.

Eliminate searches for the sole purpose of determining genital characteristics.

ENDNOTES

¹ 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).

² Nat'l Prison Rape Elimination Comm'n., Nat'l Prison Rape Elimination Comm'n. Rep. 1 (June 07, 2012), available at <http://www>

END THE ABUSE

Protecting LGBTI Prisoners from Sexual Assault Know Your Rights

WHAT IS PREA?

The Prison Rape Elimination Act (PREA) is a federal law passed by Congress in 2003. In May of 2012, after nine years of study and commentary by experts and stakeholders, many of whom are currently or were formerly incarcerated, the Department of Justice (DOJ) published a comprehensive set of regulations implementing the Act. These regulations are currently in effect.

DO THE PREA REGULATIONS APPLY TO ALL PRISONS & JAILS?

The PREA regulations apply to prisons, jails, police lock-ups, juvenile detention centers and community confinement facilities. The regulations apply to the federal government, states, and local governments like cities and counties and to private prisons contracted with government agencies. The DOJ PREA regulations do not apply to federal immigration detention facilities or federal Health & Human Services (HHS) facilities. These agencies were directed by the President to promulgate their own PREA regulations.

HOW DOES PREA PROTECT LGBTI INDIVIDUALS?

The DOJ 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 specific protections against the types of assault, harassment, and prolonged isolation that are commonly reported by LGBTI individuals in custody.

Three key areas of protection included in the final standards relate to the housing of LGBTI individuals, searches of transgender and intersex individuals, and use of protective custody placements.

Housing & Placement

- The final PREA standards require adult prisons and jails to screen individuals within 72 hours of intake to assess

the individual’s risk for sexual victimization or abuse.¹ This screening “shall consider, at a minimum...whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex or gender nonconforming.”²

- 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.”³ Safety determinations must be made on an individualized basis.⁴
- The regulations require agencies to make individualized housing and program placements for all transgender and intersex individuals.⁵ This includes assignment of transgender and intersex individuals to male or female facilities.⁶ All such program and housing assignments must “be reassessed at least twice each year to review any threats to safety experienced by the inmate”⁷ and an individual’s “own views with respect to his or her own safety shall be given serious consideration” in these assessments.⁸

Searches

- The PREA regulations prohibit any search that is conducted for the sole purpose of determining an individual’s genital status.⁹
- Agencies are prohibited from conducting cross-gender strip and cavity searches except in exigent circumstances or when performed by a medical practitioner.¹⁰
- Agencies must train staff to conduct professional and respectful searches of transgender and intersex individuals.¹¹
- 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.¹² Agencies are required to provide transgender and intersex individuals with access to private showers in all circumstances.¹³

or been subject to any other abusive practice, and you believe it is safe to do so, file a grievance through the proper channels at your facility.

- To preserve your right to file a lawsuit, you generally must exhaust your administrative remedies. This means you must file grievances and appeal each decision to the highest decision maker within the timeframes given. Under the PREA regulations, you are not required to file grievances related to sexual assault within any specific timeframe.²²
- File a lawsuit.
 - A violation of the PREA regulations by the facility may not be itself legally sufficient for a lawsuit in federal court but it can be evidence that the facility did not otherwise meet its obligations under the Constitution.
 - For example, if you are transgender and are sexually assaulted in a group shower, you may be able to file a lawsuit.

ENDNOTES

¹ 28 C.F.R. § 115.41 (b); 28 C.F.R. § 115.241 (b).

² 28 C.F.R. § 115.41 (d)(7).

³ 28 C.F.R. § 115.42 (a).

⁴ 28 C.F.R. § 115.42 (b).

⁵ 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.”).

⁶ *Id.*

⁷ 28 C.F.R. § 115.42 (d).

⁸ 28 C.F.R. § 115.42 (e).

⁹ 28 C.F.R. § 115.15 (e).

¹⁰ 28 C.F.R. § 115.15 (a).

¹¹ 28 C.F.R. § 115.15 (f).

¹² 28 C.F.R. § 115.432 (n)

¹³ 28 C.F.R. § 115.42 (f).

¹⁴ 28 C.F.R. § 115.43 (a).

¹⁵ 28 C.F.R. § 115.43 (c).

¹⁶ 28 C.F.R. § 115.43 (b).

¹⁷ *Id.*

¹⁸ 28 C.F.R. § 115.401 (b).

¹⁹ 28 C.F.R. § 115.401 (a).

²⁰ PREA Resource Center, “Audit Process”
<http://www.prearesource.com/> (<http://www.pryburh.com/> § 115.42ah § 10c)

The final PREA regulations are codified at 28 C.F.R. 115. The full text and summary of changes was published in the Federal Register at 77 FR 37105. This is also available online here: <https://www.federalregister.gov/articles/2012/06/20/2012-12427/national-standards-to-prevent-detect-and-respond-to-prison-rape>.

The regulations are organized with definitions at the beginning, 28 C.F.R. 115.5, 28 C.F.R. 115.6, and then separated by the standards for different types of facilities, prisons (28 C.F.R. 115.11 et seq.), lockups (28 C.F.R. 115.111 et seq.), community confinement facilities (28 C.F.R. 115.211 et seq.), and juvenile detention facilities (28 C.F.R. 115.311 et seq.).

The full text of key LGBTI provisions is below.

CROSS-GENDER SEARCHES

10. The resident's own perception of vulnerability;

This information shall be ascertained through conversations with the resident during the intake process and medical and mental health screenings; during classification assessments; and by reviewing court records, case files, facility behavioral records, and other relevant documentation from the resident's files.

The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the resident's detriment by staff or other residents.

HOUSING & ASSIGNMENTS BASED ON VULNERABILITY

§ 115.42 Use of screening information.

- a. The s files.

supervisors, investigators, and medical or mental health practitioners.

- d. The review team shall:
 1. Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;
 2. Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;
 3. Examine the area in the I~~Q~~

§ 115.501 State determination and certification of full compliance.

a.