

PRISON RAPE ELIMINATION ACT (PREA) TOOLKIT

# END THE ABUSE

Protecting LGBTI Prisoners from Sexual Assault



**ACLU**

AMERICAN CIVIL LIBERTIES UNION



# END THE ABUSE

## Protecting LGBTI Prisoners from Sexual Assault Introduction

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**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 leveraged to protect LGBTI individuals from sexual assault. This four-part toolkit is designed for advocates both in and outside of correctional settings to use PREA’s requirements to end the abuse of LGBTI individuals. As federal, state and local agencies reassess their policies and practices to come into compliance with PREA, there will be key opportunities to make important policy changes that will impact all individuals in confinement settings. The time to act is now.

# END THE ABUSE

## Protecting LGBTI Prisoners from Sexual Assault Advocacy Guide

The Prison Rape Elimination Act (PREA) was signed into law in 2003.<sup>1</sup> The Act charged the Department of Justice (DOJ) with gathering data on the incidence of prison rape,<sup>2</sup> and created the National Prison Rape Elimination Commission (NPREC) to study the problem and recommend national standards to DOJ.<sup>3</sup> After nine years of study and commentary by experts, the DOJ promulgated a comprehensive set of regulations implementing the Act in May 2012.<sup>4</sup> 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.<sup>5</sup>

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,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> Over the course of three years beginning August 20, 2013, state and local agencies must audit every facility operated by the agency.<sup>9</sup> 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.<sup>10</sup>

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.”<sup>11</sup>

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.<sup>12</sup> However, states can avoid that penalty if they promise to use their federal funding to conform to PREA standards in the future,<sup>13</sup> and PREA provides no penalties for local agencies that fail to meet its standards.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> Just over two weeks later, Texas passed a piece of legislation that mandates PREA training for correctional officers who work in juvenile facilities.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> New York,<sup>21</sup> North Carolina,<sup>22</sup> and Texas<sup>23</sup> each had PREA laws pending in committee prior to the close of this legislative session. Several other states, such as Nevada,<sup>24</sup> New Mexico,<sup>25</sup> and West Virginia,<sup>26</sup> 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,<sup>27</sup> 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.<sup>29</sup> This screening "shall consider,

at a minimum...whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex or gender nonconforming."<sup>30</sup> 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."<sup>31</sup> Safety determinations must be made on an individualized basis.<sup>32</sup>

**The regulations also require agencies to make individualized housing and program placements for all transgender and intersex individuals.<sup>33</sup> This includes assignment of transgender and intersex individuals to male or female facilities.<sup>34</sup> All such program and housing assignments must "be reassessed at least twice each year to review any threats to safety experienced by the inmate"<sup>35</sup> and an individual's "own views with respect to his or her own safety shall be given serious consideration" in these assessments.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup> Agencies are also required to effectively train staff to conduct professional and respectful searches of transgender and intersex persons.<sup>40</sup>

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.<sup>41</sup> Agencies are required to provide transgender and intersex individuals with access to private showers in all circumstances.<sup>42</sup>

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."<sup>43</sup>

### *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).<sup>44</sup> Under the PREA regulations, involuntary segregated housing should generally not exceed 30 days.<sup>45</sup> When prisoners are placed in protective custody, they must be given access to “programs, privileges, education, and work opportunities to the extent possible.”<sup>46</sup> 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.<sup>47</sup>

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.”<sup>48</sup> 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](mailto:cstrangio@aclu.org), or the National Prison Project, [afettig@aclu.org](mailto: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

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

<sup>2</sup> 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).

<sup>3</sup> 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>.

<sup>4</sup> 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).

<sup>5</sup> 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](http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf).

<sup>6</sup> 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>.

<sup>7</sup> 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](http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf).

<sup>8</sup> 28 C.F.R. §§ 115.401(b).

<sup>9</sup> 28 C.F.R. §§ 115.401(a).

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

<sup>11</sup> 28 C.F.R. §§ 115.11, 115.111, 115.211, 115.311.

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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

<sup>16</sup> 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).

<sup>17</sup> 2013 Colo. Legis. Serv. Ch. 171 § 17-1-115.7 (West).

<sup>18</sup> S.B. 653, 82d Leg., Reg. Sess. (Tex. 2011).

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

<sup>20</sup> S.B. 716, 2013-2014 Leg., Reg. Sess. (Cal. 2013).

<sup>21</sup> S.B. 1394, 2013 Leg., 236th Sess. (N.Y. 2013).

<sup>22</sup> H.B. 585, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

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

<sup>24</sup> S.B. 33, 77th Leg., Reg. Sess. (Nev. 2013).

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

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

<sup>27</sup> 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).

<sup>28</sup> 28 C.F.R. § 115.5

<sup>29</sup> 28 C.F.R. § 115.41(b); 28 C.F.R. § 115.241 (b); 28 C.F.R. § 115.341(a).

<sup>30</sup> 28 C.F.R. § 115.41(d)(7).

<sup>31</sup> 28 C.F.R. § 115.42 (a)

<sup>32</sup> 28 C.F.R. § 115.42 (b)

<sup>33</sup> 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.").

<sup>34</sup> *Id.*

<sup>35</sup> 28 C.F.R. § 115.42 (d).

<sup>36</sup> 28 C.F.R. § 115.42 (e).

<sup>37</sup> 28 C.F.R. § 115.15 (e)

<sup>38</sup> 28 C.F.R. § 115.15 (b) and 28 C.F.R. §115.215(b)

<sup>39</sup> 28 C.F.R. § 115.15 (a)

<sup>40</sup> 28 C.F.R. § 115.15 (f)

<sup>41</sup> 28 C.F.R. § 115.15 (d).

<sup>42</sup> 28 C.F.R. § 115.42 (f).

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

<sup>44</sup> 28 C.F.R. § 115.43 (a).

<sup>45</sup> 28 C.F.R. § 115.43 (c).

<sup>46</sup> 28 C.F.R. § 115.43 (b).

<sup>47</sup> 28 C.F.R. § 115.43 (b).

<sup>48</sup> 28 C.F.R. § 115.42 (g).

### 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,<sup>1</sup> and created the National Prison Rape Elimination Commission (NPREC) to study the problem and recommend national standards to DOJ.<sup>2</sup> After nine years of study and commentary by experts, the DOJ promulgated a comprehensive set of regulations implementing the Act in May 2012.<sup>3</sup>

### 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.<sup>4</sup> 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.<sup>5</sup>

### 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.**

Under the PREA regulations, facilities cannot “search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate’s genital status.”<sup>6</sup> Any policy or practice that permits this type of search must be changed. If the genital status of a person is unknown and that information is relevant, it can be obtained by speaking with the individual, examining medical records or as part of a routine medical exam that all individuals undergo as part of intake.<sup>7</sup>

#### **Institute Individualizing Housing, Program and Work Assignments for Transgender & Intersex Individuals**

The PREA regulations require agencies to make individualized housing and program placements for all transgender and intersex individuals. This includes assignment of transgender and intersex individuals to male or female facilities. All such program and housing assignments must “be reassessed at least twice each year to review any threats to safety experienced by the inmate”<sup>8</sup> and an individual’s “own views with respect to his or her own safety shall be given serious consideration”<sup>9</sup> in these assessments. Any policy or practice that houses individuals based solely on their genital status must be changed.

To ensure a meaningful assessment of the housing and program needs of transgender and intersex individuals, upon intake, all transgender or intersex individuals should

As the nation’s largest public interest law organization, with affiliate offices in every state and a legislative office in Washington D.C., the ACLU works daily in courts, legislatures, and communities to promote more effective criminal justice policies.

1 To learn more visit [www.aclu.org/preatoolkit](http://www.aclu.org/preatoolkit)

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. Those preferences should be honored.

### **Institute procedures governing the searches of transgender and intersex individuals**

The PREA regulations require agencies to effectively train staff to conduct professional and respectful searches of transgender and intersex persons.<sup>10</sup>

The PREA Resource Center identifies three options for conducting searches of transgender and intersex individuals that would comply with PREA: “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.”<sup>11</sup>

The PREA regulations also require that transgender and intersex individuals be permitted to shower privately.<sup>12</sup>

### **Limit 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) because such housing often amounts to isolation or solitary confinement and therefore creates hardship for the vulnerable individual. 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).<sup>13</sup> Under the PREA regulations, involuntary segregated housing should generally not exceed 30 days.<sup>14</sup> When prisoners are placed in protective custody, they must be given access to “programs, privileges, education, and work opportunities to the extent possible.”<sup>15</sup> 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.<sup>16</sup>

## **ENDNOTES**

<sup>1</sup> 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).

<sup>2</sup> 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>.

<sup>3</sup> 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).

<sup>4</sup> National Prison Rape Elimination Commission, Report 73 (June 2009); 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 166-68 (National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), available at [http://endtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf).

<sup>5</sup> 77 FR 37105 (June 20, 2012).

<sup>6</sup> 28 C.F.R. § 115.15 (e).

<sup>7</sup> Id.

<sup>8</sup> 28 C.F.R. § 115.42 (d).

<sup>9</sup> 28 C.F.R. § 115.42 (e).

<sup>10</sup> 28 C.F.R. § 115.15 (f).

<sup>11</sup> PREA Resource Center, “Frequently Asked Questions,” <http://www.prearesourcecenter.org/faq#n1069> (last visited November 18, 2013).

<sup>12</sup> 28 C.F.R. § 115.42 (f).

<sup>13</sup> 28 C.F.R. § 115.43 (a).

<sup>14</sup> 28 C.F.R. § 115.43 (c).

<sup>15</sup> 28 C.F.R. § 115.43 (b).

<sup>16</sup> Id.

### 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.<sup>1</sup> This screening “shall consider, at a minimum...whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex or gender nonconforming.”<sup>2</sup>

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

#### Searches

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

## Protective Custody

- Under the PREA regulations, you cannot be placed in involuntary segregated housing unless (1) an assessment of all available alternatives is made AND (2) a determination is made that no alternative means of separation is available (and this determination must be made within the first 24 hours of involuntary segregation).<sup>14</sup>
- Under the PREA standards, involuntary segregated housing should generally not exceed 30 days.<sup>15</sup>
- If you are placed in restrictive housing for your own protection, you must be given access to “programs, privileges, education, and work opportunities to the extent possible.”<sup>16</sup> Unfortunately, agencies are given significant latitude with restrictions because of the “to the extent possible” qualification, but the nature of, reason for and duration of any restrictions to program, privilege, education and work opportunities must be documented.<sup>17</sup>

## WHAT CAN I DO IF THE FACILITY WHERE I AM HOUSED IS NOT FOLLOWING PREA?

- Report the violation to an outside auditor.
  - The PREA regulations require agencies to conduct one audit (or review) 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.<sup>18</sup>
  - Over the course of three years beginning August 20, 2013, state and local agencies must audit every facility operated by the agency.<sup>19</sup>
  - Six weeks prior to any audit of your facility, notice of the audit and contact information for the auditors must be prominently displayed.<sup>20</sup>
- Contact the PREA coordinator.
  - All agencies subject to PREA must identify a PREA coordinator to monitor and implement compliant policies.<sup>21</sup>
- File a grievance.
  - If you have been sexually assaulted, placed involuntarily in protective custody, searched or housed solely based on your genital characteristics 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.<sup>22</sup>
- 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 setting, this may be evidence that the facility was deliberately indifferent and failed to protect you from a serious risk of harm – a violation of your rights under the Eighth Amendment.
- Contact outside service providers
  - PREA mandates that correctional facilities provide prisoners with access to outside victim advocates for emotional support services related to sexual abuse by giving mailing addresses and telephone numbers, including toll-free hotline numbers where available.<sup>23</sup>

## ENDNOTES

<sup>1</sup> 28 C.F.R. § 115.41 (b); 28 C.F.R. § 115.241 (b).

<sup>2</sup> 28 C.F.R. § 115.41 (d)(7).

<sup>3</sup> 28 C.F.R. § 115.42 (a).

<sup>4</sup> 28 C.F.R. § 115.42 (b).

<sup>5</sup> 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.”).

<sup>6</sup> *Id.*

<sup>7</sup> 28 C.F.R. § 115.42 (d).

<sup>8</sup> 28 C.F.R. § 115.42 (e).

<sup>9</sup> 28 C.F.R. § 115.15 (e).

<sup>10</sup> 28 C.F.R. § 115.15 (a).

<sup>11</sup> 28 C.F.R. § 115.15 (f).

<sup>12</sup> 28 C.F.R. § 115.15 (d).

<sup>13</sup> 28 C.F.R. § 115.42 (f).

<sup>14</sup> 28 C.F.R. § 115.43 (a).

<sup>15</sup> 28 C.F.R. § 115.43 (c).

<sup>16</sup> 28 C.F.R. § 115.43 (b).

<sup>17</sup> *Id.*

<sup>18</sup> 28 C.F.R. § 115.401 (b).

<sup>19</sup> 28 C.F.R. § 115.401 (a).

<sup>20</sup> PREA Resource Center, “Audit Process”  
<http://www.prearesourcecenter.org/audit/audit-process>.

<sup>21</sup> 28 C.F.R. §§ 115.11 (c), 115.111(b), 115.211(b), 115.311(c).

<sup>22</sup> 28 C.F.R. §§ 115.52 (b)(1).

<sup>23</sup> 28 C.F.R. §§ 115.53(a).

# END THE ABUSE

## Protecting LGBTI Prisoners from Sexual Assault Regulations

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

#### §§ 115.15, 115.115, 115.215, 115.315 Limits to cross-gender viewing and searches.

- a. The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.
- b. As of August 20, 2015, or August 21, 2017 for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.
- c. The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.
- d. The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts,

buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit.

- e. The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.
- f. The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

### TRAINING

#### §§ 115.31, 115.231, 115.331 Employee training

- a. The agency shall train all employees who may have contact with inmates on:  
...
  9. How to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming inmates;

### SCREENING

#### §§ 115.41, 115.241 Screening for risk of victimization and abusiveness.

- a. All inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.
- b. Intake screening shall ordinarily take place within 72

hours of arrival at the facility.

- c. Such assessments shall be conducted using an objective screening instrument.
- d. The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:

...

- 7. Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
- 8. Whether the inmate has previously experienced sexual victimization;
- 9. The inmate's own perception of vulnerability; and

...

Inmates may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(1), (d)(7), (d)(8), or (d)(9) of this section.

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 inmate's detriment by staff or other inmates.

#### § 115.341 Obtaining information from residents.

Within 72 hours of the resident's arrival at the facility and periodically throughout a resident's confinement, the agency shall obtain and use information about each resident's personal history and behavior to reduce the risk of sexual abuse by or upon a resident.

Such assessments shall be conducted using an objective screening instrument.

At a minimum, the agency shall attempt to ascertain information about:

...

- 2. Any gender nonconforming appearance or manner or identification as lesbian, gay, bisexual, transgender, or intersex, and whether the resident may therefore be vulnerable to sexual abuse;

...

- 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 agency shall use information from the risk screening required by § 115.41 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.
- b. The agency shall make individualized determinations about how to ensure the safety of each inmate.
- 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.
- d. Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.
- e. A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.
- f. Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.
- g. The agency shall not place 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.

**§ 115.242 Use of screening information (content is the same as 115.42 but does not have (d))**

**§ 115.342 Placement of residents in housing, bed, program, education, and work assignments.**

- a. The agency shall use all information obtained pursuant to § 115.341 and subsequently to make housing, bed, program, education, and work assignments for residents with the goal of keeping all residents safe and free from sexual abuse.
- b. Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged. During any period of isolation, agencies shall not deny residents daily large-muscle exercise and any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible.
- c. Lesbian, gay, bisexual, transgender, or intersex residents shall not be placed in particular housing, bed, or other assignments solely on the basis of such identification or status, nor shall agencies consider lesbian, gay, bisexual, transgender, or intersex identification or status as an indicator of likelihood of being sexually abusive.
- d. In deciding whether to assign a transgender or intersex resident to a facility for male or female residents, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the resident's health and safety, and whether the placement would present management or security problems.
- e. Placement and programming assignments for each transgender or intersex resident shall be reassessed

at least twice each year to review any threats to safety experienced by the resident.

- f. A transgender or intersex resident's own views with respect to his or her own safety shall be given serious consideration.
- g. Transgender and intersex residents shall be given the opportunity to shower separately from other residents.
- h. If a resident is isolated pursuant to paragraph (b) of this section, the facility shall clearly document:
  1. The basis for the facility's concern for the resident's safety; and
  2. The reason why no alternative means of separation can be arranged.
- i. Every 30 days, the facility shall afford each resident described in paragraph of this section a review to determine whether there is a continuing need for separation from the general population.

**PROTECTIVE CUSTODY**

**§ 115.43 Protective custody.**

- a. Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment.
- b. Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:
  1. The opportunities that have been limited;
  2. The duration of the limitation; and
  3. The reasons for such limitations.
- c. The facility shall assign such inmates to involuntary segregated housing only until an alternative means

of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

- d. If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, the facility shall clearly document:
  - 1. The basis for the facility's concern for the inmate's safety; and
  - 2. The reason why no alternative means of separation can be arranged.
- e. Every 30 days, the facility shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

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 facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;
  - 4. Assess the adequacy of staffing levels in that area during different shifts;
  - 5. Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and
  - 6. Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1) through (d)(5) of this section, and any recommendations for improvement and submit such report to the facility head and PREA compliance manager.
- e. The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

## AUDITS & OVERSIGHT

### §§ 115.11, 115.111, 115.211, 115.311 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.

- a. An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.
- b. An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.
- c. Where an agency operates more than one facility, each facility shall designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

### §§ 115.86, 115.186, 115.286, 115.386 Sexual abuse incident reviews.

- a. The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.
- b. Such review shall ordinarily occur within 30 days of the conclusion of the investigation.
- c. The review team shall include upper-level management officials, with input from line

### § 115.401 Frequency and scope of audits.

- a. During the three-year period starting on August 20, 2013, and during each three-year period thereafter, the agency shall ensure that each facility operated by the agency, or by a private organization on behalf of the agency, is audited at least once.
- b. During each one-year period starting on August 20, 2013, the agency shall ensure that at least one-third of each facility type operated by the agency, or by a private organization on behalf of the agency, is audited.
- c. The Department of Justice may send a recommendation to an agency for an expedited audit if the Department has reason to believe that a particular

facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with PREA-related issues.

- d. The Department of Justice shall develop and issue an audit instrument that will provide guidance on the conduct of and contents of the audit.
- e. The agency shall bear the burden of demonstrating compliance with the standards.
- f. The auditor shall review all relevant agency-wide policies, procedures, reports, internal and external audits, and accreditations for each facility type.
- g. The audits shall review, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period.
- h. The auditor shall have access to, and shall observe, all areas of the audited facilities.
- i. The auditor shall be permitted to request and receive copies of any relevant documents (including electronically stored information).
- j. The auditor shall retain and preserve all documentation (including, e.g., video tapes and interview notes) relied upon in making audit determinations. Such documentation shall be provided to the Department of Justice upon request.
- k. The auditor shall interview a representative sample of inmates, residents, and detainees, and of staff, supervisors, and administrators.
- l. The auditor shall review a sampling of any available videotapes and other electronically available data (e.g., Watchtour) that may be relevant to the provisions being audited.
- m. The auditor shall be permitted to conduct private interviews with inmates, residents, and detainees.
- n. Inmates, residents, and detainees shall be permitted to send confidential information or correspondence to the auditor in the same manner as if they were communicating with legal counsel.
- o. Auditors shall attempt to communicate with community-based or victim advocates who may have insight into relevant conditions in the facility.

**§ 115.501 State determination and certification of full compliance.**

- a. In determining pursuant to 42 U.S.C. 15607(c)(2) whether the State is in full compliance with the PREA standards, the Governor shall consider the results of the most recent agency audits.
- b. The Governor's certification 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.