



Protections for Transgender Inmates Under PREA: a Comparison of State Correctional Policies in the United States

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Abstract

The Prison Rape Elimination Act (PREA) contains several protections for transgender inmates; specifically, that prison administration understands key definitions of “transgender,” that inmates are provided with the appropriate classification and housing, and they are kept safe from victimization by other inmates and staff. A total of ten states were found to be fully compliant by the Department of Justice deadline in 2015, but these policies are changing rapidly in the USA. This analysis aims to determine the status of each state’s protections using publicly available information about correctional policies. We find that approximately half of the states in the USA have published policies consistent with PREA, but several maintain policies regarding transgender inmates that are in direct conflict with federal law. Recommendations for compliance are provided.

Keywords Transgender inmates · PREA compliance

Introduction

In 2003, Congress enacted the Prison Rape Elimination Act (PREA). While intended to protect inmates from sexual harassment and attacks while incarcerated, the final regulations in 2012 also created the first federal protections for transgender inmates (Au, 2016; Bureau of Justice Assistance, 2017; Jenness & Fenstermaker, 2016; Prison Rape Elimination Act, 2003). These protections were included based on strong empirical evidence that transgender inmates are at higher risk of victimization by other inmates and staff while incarcerated (Au, 2016; Iyama, 2012)—for example, in one study, transgender inmates were 13 times more likely to report assault than those in a random sample of inmates (Jenness, Maxson, Matsuda, & Sumner, 2007). The mandate of PREA made it unlawful to ignore the special circumstances of imprisoning transgender individuals, and to protect them from violent assault. Before PREA, most prisons assigned housing based on biological sex, and transgender inmates were often segregated from the general population “for their protection”. While the pre-PREA practice of protection tended to punish transgender inmates by forcing housing based on birth assigned sex and

segregation from general population, PREA dictates a more holistic approach to protection of transgender inmates, which includes input from the inmates themselves (Au, 2016; Bureau of Justice Assistance, 2017; Prison Rape Elimination Act, 2003).

These mandatory provisions did not force states to immediately change their prison policies; however, states faced loss of federal funding for corrections if they did not fully enact PREA protections and annual reporting by 2015 (Routh et al., 2017; Shay, 2013). By June 2015, only ten states reported that they were in compliance with PREA: Arizona, Iowa, Maine, Mississippi, Missouri, New Hampshire, New Jersey, North Dakota, Oregon, Tennessee and Washington (United States Department of Justice, 2015), but these self-reports did not require states to prove that their policies contained all relevant provisions.

This article identifies state policies regarding transgender inmates that are PREA compliant, focusing on the 13 provisions pertaining specifically to transgender inmates.¹ Our analysis also considers whether each state has (1) any transgender specific prison policies, (2) transgender protection inclusiveness in an LGBT focused prison policy, (3) current policies that do not comply with PREA transgender protections, and/or (4) current policies offering greater protections than required by PREA for transgender inmates.

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¹ While several provisions of PREA also mention and/or include intersex inmates, for the purposes of this research, only transgender-specific protections are considered.

PREA Protections for Transgender Inmates

The Prison Rape Reform Act contains 13 relevant provisions that relate specifically to transgender inmates. They are focused on the general areas of (1) definitions, (2) housing and classification, (3) staff training, and (4) abuse prevention/response.

The following are summaries of the 13 provisions considered in this analysis (the exact language of PREA sections are contained in Appendix A):

- Definition of “gender nonconforming” (§115.5)
- Definition of “transgender” (§115.5)
- Protection of transgender individuals during physical examination (§115.15(e))
- Protection of transgender individuals during possible cross-gender searches (§115.15(f))
- Mandated staff training on LGBT issues and communication (§115.31(a)(9))
- Screening for risk based on LGBT status (§115.41(d)(7))
- Housing assignments made on case-by-case analysis (§115.42(c))
- Placement and programming assessed twice per year (§115.42(d))
- Transgender inmate’s own personal views should be considered for housing and programming decisions (§115.42(e))
- Ability for transgender inmates to shower separately (§115.42(f))
- No segregation of LGBT inmates into their own facilities (§115.42(g))
- No involuntary segregation (other than initial placement for up to 24 h) (§115.43(a))
- Consider whether motivation of an attack was due to LGBT status (§115.86(d)(2))

Defining Gender

Historically, gender has been viewed as a binary status equivalent to biological sex; however, the binary definition is insufficient when attempting to classify transgender inmates (Routh et al., 2017; Sumner & Jenness, 2014). Even early understanding of “transgender” individuals was defined along the traditional binary: transgender individuals were either boys who wanted to be girls, or girls who wanted to be boys (Shah, 2010). A more sophisticated understanding of gender relies on the notion of a gender continuum, which represents a wide range of gender identities that do not necessarily fall neatly into categories of “male/female” or “masculine/feminine.”

The shift in culture to an understanding of gender as a continuum has birthed new terminology to clarify our

understanding, including “gender fluid,” “bigender,” “intergender,” “androgynous,” “genderqueer,” and others. While these terms might appear to be interchangeable, there are nuanced differences that may not be readily obvious. In addition, as we continue to study and refine gender-based terminology, these terms may change meaning or some may fade away altogether.

These changing definitions can be extremely challenging for prison officials, as the entire prison system is based on a gender binary—there are prisons for men, and prisons for women (Sumner & Jenness, 2014; Sumner & Sexton, 2016). Thus, dealing with individuals who do not exist on the binary is problematic for correctional institutions (Jenness & Fenstermaker, 2014; Sumner & Jenness, 2014; Sumner & Sexton, 2016). In the words of Sumner and Sexton (2016):

The institution is faced with the choice between acknowledging difference in order to ensure the safety and security of a uniquely vulnerable population of prisoners—thereby conceding flaws in the sex-segregated premise of prison—and ignoring difference and subjugating the primary organizational goals of safety and security to illusory views of the prison as a single-gender institution. (p. 637).

Sumner and Jenness (2014) view this as a paradox, whereas sex segregation is a “defining characteristic of carceral environments,” while policies such as PREA, “reveal a plethora of organizational accommodations promised to transgender prisoners... who do not conform to a dichotomous gender system” (p. 253). Therefore, the legal implications surrounding the definitions of “transgender” have significant implications for classification and placement in prison (Routh et al., 2017).

Section 115.5 of PREA defines several terms related to transgender inmates, including *gender nonconforming* and *transgender*. *Gender nonconforming* is defined as “a person whose appearance or manner does not conform to traditional societal gender expectations; whereas, *transgender* is defined as “a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person’s assigned sex at birth.” Providing definitions of these terms is important, as correctional personnel are frequently unclear on these definitions, or conflate sexuality with gender (Jenness, 2010). Because our focus in this study is on transgender inmates, any provisions specific to lesbian, gay, bisexual, or intersex inmates without also being inclusive of transgender inmates will not be included.

Housing and Classification

Housing and classification issues are covered in sections 115.42(c), 115.42(d), 115.42(e), 115.42(f), 115.42(g), and 115.43(a) of PREA. Section 115.42 generally contains

instructions on screening information, including (c) whether to assign transgender/intersex inmates to a male or female facility (ensuring the inmates health and safety), (d) reviewing placements for intersex and transgender inmates at least twice per year to assess threats, (e) taking into account the transgender/intersex inmates views on their own safety, (f) the opportunity for transgender/intersex inmates to shower privately, and (g) disallowing the placement of any LGBTI inmate in a designated area based on solely their criteria as a member of the LGBTI community. Section 115.43(a) is found under “protective custody,” and specifies that inmates at high risk of sexual victimization shall not be placed in isolation, unless no other alternatives are available. In those cases, inmates are not to be placed in segregation for more than 24 h.

Historically, inmates have been classified into prisons based on their genitalia, regardless of gender (Faithful, 2009; Sumner & Jenness, 2014). The traditional classification process can also include a strip search, thereby “outing” an inmate’s transgender status to staff and other inmates, making them more vulnerable to victimization (Routh et al., 2017). Therefore, some have identified intake as the key moment in protecting transgender inmates from victimization in prison (Okamura, 2011).

Defining which inmates are transgender at intake can be a difficult process for prison administrators as well as researchers (Jenness, 2010). The term “transgender” can mean a variety of different things to different people, while the media and others tend to be overly focused on the issue of genitalia, being transgender is not sharply defined (Jones & Brookes, 2013; Shah, 2010; Sumner & Jenness, 2014; Sumner & Sexton, 2016). Administrators may conflate gender and sexuality, sometimes referring to transgender inmates as “gay men” (Jenness, 2010). This confusion can complicate the intake process, and result in transgender inmates being singled out for protective custody (Okamura, 2011; Sumner & Sexton, 2016).

Some states have clearly defined policies for gender classification at intake. For example, inmates in Arizona are asked about their sexual orientation and gender identity at intake, and their policies specifically dictates that “staff shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate’s genital status.” That information is considered private, and only be assessed by a qualified medical practitioner (Arizona Department of Corrections, 2015).

Staff Training

PREA requires that staff have appropriate training concerning transgender inmates in two separate sections. Under employee training, correctional staff must be trained on communication methods with LGBTI inmates (§115.31(a)(9)). Additionally, staff must be trained on conducting pat-downs and searches of

transgender inmates in a “professional and respectful manner, and in the least intrusive manner possible” (§115.15(f)).

Even prior to the passage of PREA, advocates touted the importance of staff training for transgender inmates, particularly with regard to HIV/AIDS education (Scott & Lines, 1999). Staff training can also reduce the risk of sexual violence (Reisner, Bailey, & Sevelius, 2014; Sisco & Becker, 2007), and has been called for by both inmates and correctional staff (Struckman-Johnson, Struckman-Johnson, Kruse, Gross, & Sumners, 2013). It is also important for staff to understand transgender lives and experiences, something inmates have deemed lacking (Jenness, Sumner, Sexton, & Alamillo-Luchese, 2014; Sexton, Jenness, & Sumner, 2010). Incorporating these aspects into training can help institutions meet PREA demands, by improving understanding and communication.

Training on pat-downs and searches is particularly important when dealing with transgender offenders, as these may be used as a pretext for victimization or harassment (Tarzwell, 2006). In addition, unnecessary strip searches of transgender inmates may be carried out by untrained staff to determine biological sex, when cis-gender inmates are not subjected to the same procedures (Scheel & Eustace, 2002).

Safety and Reducing Risk of Victimization

The final set of issues related to care of transgender inmates are focused on minimizing risk of abuse and sexual victimization. In this group, we examine whether states specifically include language that intake victimization assessment should include transgender status as a risk factor (§115.41(d)(7)) and if abuse occurs, the staff must determine whether the motive was related to the victim’s transgender status (§115.86(d)(2)). As discussed in the prior section, genital searches specifically done to determine biological sex are not allowed in order to avoid abuse (§115.15(e)).

Transgender inmates are at higher risk of victimization than others, by both staff and fellow inmates. While roughly 4% of adult inmates report being sexually assaulted while incarcerated, 35–40% of transgender inmates report the same (Beck, Berzofsky, Caspar, & Krebs, 2013; Beck, 2014). Prison administration may attempt to “protect” transgender inmates by placing them in administrative segregation, the isolative nature of which can cause devastating psychological harm (Okamura, 2011).

Some have argued that transgender inmates should be placed in women’s prisons (with the consent of the inmate), and this may serve to protect transgender inmates from sexual assault by other male inmates (Scott, 2012); however, there is little empirical evidence this is effective. In addition, inmates also need to be protected from assaults by staff (Mazza, 2012; Shah, 2010). The DOJ’s Review Panel on Prison Rape heard testimony from transgender individuals about their own

experience with rape and sexual assault while incarcerated, sometimes at the hands of officers (Mazza, 2012). Estimates from The National Inmate Survey indicate that transgender inmates are at similar risk to be assault by staff as by other inmates, particularly in local jails (Beck, 2014).

There are significant legal implications for prisons that do not adequately protect inmates from harm. The Eighth Amendment of the Constitution protects against “cruel and unusual punishment,” which can also take the form of “deliberate indifference” if the institution knowingly places inmates at higher risk of harm; unfortunately, the inmate must prove that prisons officials were aware of the risks, which can be difficult (Okamura, 2011). The Supreme Court has found that the “deliberate indifference” clause of the Eighth Amendment required “proof that (1) the prison official actually knew of impending harm that was easily preventable, and (2) the official exposed the plaintiff to the risk because of this knowledge, rather than in spite of it.” (Peek, 2003; p. 1233). Therefore, prison officials must be aware of the transgender inmate’s status as transgender, and take action that exposes the inmate to risk having that knowledge.

State Policies on Transgender Inmates

Several studies have analyzed state correctional policies affecting transgender inmates (Glezer, McNeil, & Binder, 2013; Routh et al., 2017; Tarzwell, 2006), most of which have focused on healthcare-related policies. Glezer et al. (2013) and Routh et al. (2017) investigated state statutes for evidence of access to healthcare with a specific focus on access to hormones, sex reassignment surgery, and counseling, but these analyses were completed prior to the mandatory date of PREA compliance and many states had not yet established their PREA policies. Tarzwell (2006) conducted an important early analysis of state transgender prison policies, well before the passage of PREA, but a good deal has changed regarding transgender inmates in the last decade.

This study will analyze all state correctional policies on the treatment of transgender inmates, focusing specifically on the aspects of PREA that relate to transgender inmates. While prior studies have done similar analysis, their focus has been on access to hormonal and other healthcare issues related to their gender identity, and/or completed prior to 2015 when the provisions became mandatory. This is the first comprehensive study to analyze all PREA protections for transgender inmates after the 2015 requirement date.

Methodology

The data for the current study were collected from online state-by-state searches conducted between October 2016 and February 2017. State policies were identified by initially

accessing each state’s Department of Corrections’ website, and following that, each state’s legislative codes and regulations were searched for relevant policies. Finally, Google searches were conducted using the following search terms:

1. [state] corrections PREA
2. [state] corrections policy transgender
3. [state] corrections “gender identity”
4. [state] corrections “gender dysphoria”

Any relevant results were recorded on a spreadsheet indicating date of most recent policy revision and relevant notes. A copy of each policy was downloaded, and a copy of its web address was recorded. In several cases, the authors contacted state offices by phone or email to obtain their policies utilizing the Freedom of Information Act (FOIA).

Our intent was to collect data on the 50 US states and the District of Columbia, for a final sample size of 51. We were unable to find any information about the state PREA policies for Illinois, Florida, Mississippi, and West Virginia. Although there is some evidence that all four states may be compliant in at least some of the PREA protections based on state assurances (U.S. Department of Justice, 2015), it is not known whether they are compliant with all of the 13 policies relevant to transgender inmates. Therefore, they are removed from analysis resulting in a sample of 47 cases (policies from 46 states plus the District of Columbia).

All policy searching was finalized in February 2017, and the corresponding policies were uploaded into Dedoose. Dedoose is a web-based qualitative research online application, which contains a variety of interactive data visualizations to assist with coding and theme development (Dedoose, 2017). A total of 90 relevant policies were identified, and all policies were categorized into one of 4 types: PREA policy, LGBT specific, transgender specific, and transgender inclusive. A PREA policy specifically references PREA or sexual assault prevention. An LGBT-specific policy was written to address issues regarding lesbian, gay, bisexual, and transgender inmates as a group. A transgender policy was specifically written to only address transgender and/or gender nonconforming inmates; often, these policies include the mental health diagnosis of gender dysphoria in their title or purpose. A transgender-inclusive policy was not written specifically about sexual assault, LGBT, or transgender inmates (such as a general housing classification policy) but contained one or more sections addressing transgender inmates. As shown in Table 1, the majority of the policies identified were state PREA policies, followed by transgender-specific policies. The fewest policies focused on LGBT inmates and transgender-inclusive policies.

The next step in our analysis was to assess each policy on whether it contained any of the 13 specific PREA provisions. Finally, we evaluated each state’s policies to determine

whether they provided extra protections for transgender inmates beyond mandated PREA requirements (overcompliance), and/or whether states had policies that conflicted with PREA guidelines.

Findings

The 13 Transgender PREA Protections

PREA contains 13 provisions that are relevant to transgender inmates. Only one state—Indiana—contained all 13 transgender relevant PREA provisions in their policy. The state corrections policies from Hawaii, Kentucky, North Dakota, Oklahoma, and Wisconsin each contained 12 of the 13 relevant provisions, whereas Idaho, Maine, Ohio, Pennsylvania, Texas, and Vermont state correctional policies contained 11 of the 13 provisions. Therefore, approximately 25% of state policies included a large majority of PREA transgender protections. Figure 1 provides a breakdown of the number of provisions included in each state's correctional policies.

As shown in Fig. 1, there were no regional patterns as to which state policies offered more transgender protections for inmates. While the Midwest and Northeast appeared to generally offer more prison protections for transgender individuals, Missouri, Michigan, Rhode Island, Maryland, and New Jersey were among the states that offered nearly no protections in their state corrections policies. Additionally, the general political leaning of a state did not appear to coincide with whether PREA transgender provisions were more or less likely to be included. For example, California, a more liberal leaning state, had only 7 of the 13 transgender provisions and Kentucky and Texas, conservative leaning states, had 12 and 11 (respectively) of the 13 transgender protections in their state correctional policies (see Pew Research Center, 2014)

Next, we examined each of the PREA provisions focused on definitions (Table 2), housing and classification (Table 3), and staff training and abuse prevention/response (Table 4). We begin by reviewing the states that provide clear definitions in their policies of “transgender” and “gender nonconforming,” that are consistent with those found in PREA. The results are contained in Table 2.

As seen in Table 2, states were much more likely to define *transgender* but not *gender nonconforming* in their correctional policies. While 64% of states defined transgender, only 19 (40%) of state policies contained definitions of both transgender and gender nonconforming. Seventeen states (36%) did not have either definition in their state correctional policies. The importance of these definitions cannot be overstated if corrections staff are expected to understand to which inmates these policies apply.

With regard to housing and classification (Table 3), only four states (Alabama, Idaho, Indiana, and Virginia)

Table 1 Types of state correctional policies based on prea/LGBT status ($N = 90$)

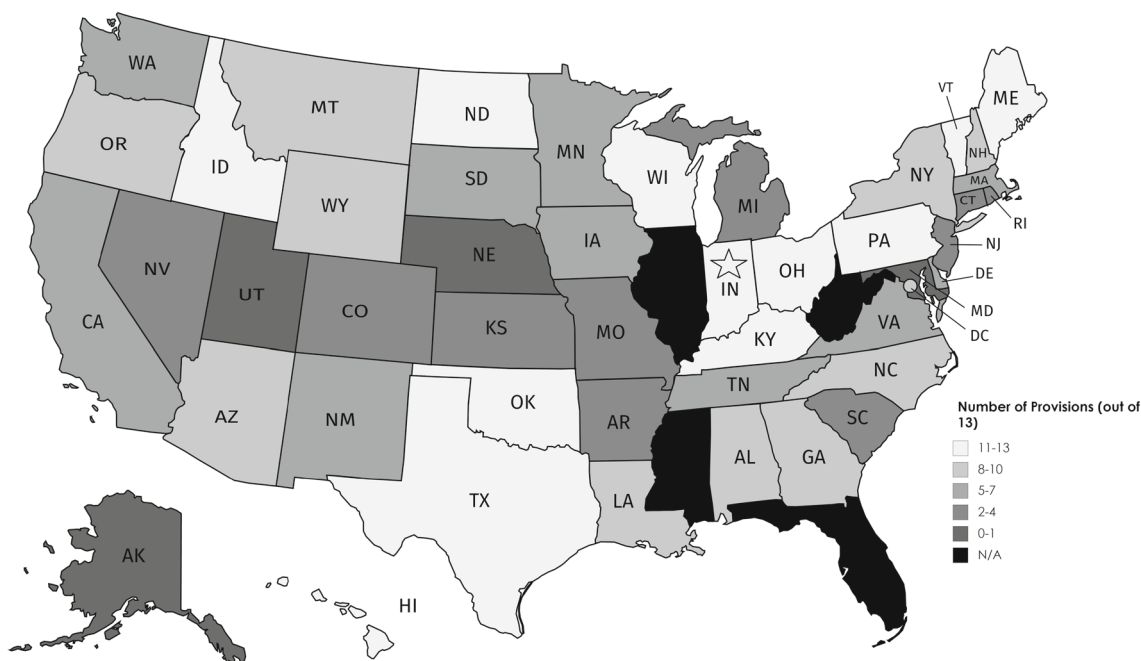
Type of policy	Number	Percent
Policy mentions PREA/Sexual Assault	55	61
Transgender policy (GID)	23	26
LGBT-specific policy	8	9
Transgender inclusive	4	4

and the District of Columbia provided all six housing/classification related protections. The transgender housing and classification corrections policy that was most often included in state policies is 115.42(c), which provides the protection that transgender inmates will not automatically be placed in housing based on their sex assigned to them at birth, but rather that housing classification will be determined on a case-by-case basis. Just over 75% (36) of states provided this protection in their policies, and 70% of states provided the protection that this determination is to be reviewed twice per year (115.42(d)). Over half (57%) of states included the provision that the inmate's personal views (116.52(e)) should be taken into account for placement, and half of the states protected against having LGBT-designated units or facilities (115.42(g)).

Sixty percent of states afforded the ability for transgender inmates to shower separately from other inmates (115.42(f)). Regardless of whether a transgender inmate is housed in a facility for men or facility for women, the need to be able to undress and shower in private may be one of the most important protections against harassment and assault afforded transgender individuals in prison. The least common protection toward transgender inmates contained in state policies is the protection against segregated housing (115.43(a)), as it was only present in ten (21%) of the states' correctional policies.

Because PREA was initially established to protect against potential sexual assault, it seems likely that most states would include protections to reduce victimization in their policies. In Table 4, we assess the degree to which prisons specifically include language protecting transgender-specific provisions about risk of sexual assault (§115.41(d)(7)), motivations behind such assaults (§115.86(d)(2)), and officer training. While 22 states (47%) declared that their risk assessment included LGBT status, 24 states (51%) had policies that required correctional facilities to consider whether an assault was motivated due to an inmate's perceived LGBT status. Only 16 states (34%) included both protections in their policies.

Two issues regarding staff training were assessed in Table 4—first, we evaluated staff training on how to adequately and appropriately communicate with transgender inmates. Second, we examined training staff on the proper way to conduct body pat-downs and searches of transgender inmates. As seen in Tables 4, 43% of state policies



☆ Indiana is the only state to contain all 13 provisions concerning transgender prisoners.

Fig. 1 Map of US States based on PREA transgender provision inclusion. Indiana is the only state to contain all 13 provisions concerning transgender prisoners

contained both segments of staff training. Four additional states included only the policy concerning staff training on communication, and 10% of states included only the policy concerning pat-downs and searches. Thirty-eight percent of states did not have either provision in their correctional policies. While these states may include such types of training, the fact that the language is left out of state policy in nearly half the states is troublesome. If language on training is not included, some facilities may not deem it necessary, and accountability becomes very difficult (if not impossible) if training is not state-mandated.

Another abuse prevention provision specifically assigned to staff is the prohibition against conducting a physical exam in order to determine genitalia for the purposes of housing classification. This protection was present in 55% of state policies. Interestingly, these states were not necessarily the same as those that guaranteed housing would not be determined solely on genitalia, as three states (Alaska, Minnesota, and Washington) that prohibited the physical exam did not contain the additional guarantee of housing decided on a case-by-case basis.

Given that many states are currently working to address issues related to transgender inmates, these policies are rapidly changing. Table 5 contains the dates of policy changes for each year. These policies are updated frequently, with 90% written or changed since 2014, and over 37% since the beginning of 2016 (through February 2017).

Additional Protections

Just over half of the states had one or more policy that contained some language designed to protect transgender protections beyond what is required by PREA. For example, several state policies required specialized committees delegated to ensure the protection of transgender inmates, and that PREA was followed. The District of Columbia had a transgender housing committee, which included at least one member of the transgender community who was deemed an “expert” in transgender issues (District of Columbia Department of Corrections, 2014). Similarly, Pennsylvania’s PREA policies included the forming of a Gender Review Committee (GRC), the purpose of which was “to make individualized determinations about transgender or intersex inmates’ housing and programming assignments to ensure their safety” (Commonwealth of Pennsylvania Department of Corrections, 2016).

Another type of additional protection for transgender inmates in corrections policies are anti-discrimination policies that specifically refer to sexual orientation and/or gender identity. For example, Vermont offered a general anti-discrimination statement that encompasses protections for transgender inmates,

It is the policy of the Vermont Department of Corrections (DOC) to treat all persons, whether or not in custody, in a respectful, courteous, and professional

Table 2 State policies that included the definitions of *transgender* and *gender nonconforming* of section 115.5 of PREA

State	Defines transgender	Defines gender nonconforming	State	Defines transgender	Defines gender nonconforming
AL	✓		MS ^a	–	–
AK	✓		MT	✓	
AZ	✓	✓	NE		
AR			NV		
CA	✓	✓	NH	✓	✓
CO	✓		NJ		
CT	✓		NM		
DE	✓	✓	NY	✓	
DC	✓		NC	✓	
FL ^a	–	–	ND	✓	✓
GA	✓	✓	OH	✓	✓
HI	✓	✓	OK	✓	✓
ID			OR	✓	✓
IL ^a	–	–	PA		
IN	✓	✓	RI	✓	✓
IA			SC		
KS	✓	✓	SD	✓	✓
KY	✓	✓	TN		
LA	✓	✓	TX	✓	✓
ME	✓		UT		
MD			VT		
MA			VA		
MI			WA		
MN	✓		WV ^a	–	–
MO	✓		WI	✓	✓
			WY	✓	✓

^a Missing: not able to locate policy

manner while maintaining safety and security. DOC is opposed to and prohibits without qualification the discrimination or harassment of any kind based on gender identity status and/or sexual orientation. DOC believes in the following principles as it relates to its policy towards all inmate (State of Vermont Department of Corrections, 2015).

In addition, The District of Columbia Department of Corrections included non-discrimination of transgender inmates as part of its citywide Human Rights Act (District of Columbia Department of Corrections, 2014).

Some state policies offered greater privacy to transgender inmates than currently required by PREA. For example, in addition to the ability to shower separately, State of Delaware Department of Correction (2016) afforded transgender inmates the ability to dress separately, and Michigan Department of Corrections (2015) provided access to private toilets. Additionally, State of Delaware Department of Correction (2016) required that when searches of transgender

inmates were necessary, they were to be searched in private. Knowledge of transgender status was also protected by some states. For example, Commonwealth of Pennsylvania Department of Corrections (2016) PREA policies stated, “all pertinent information regarding the transgender... individuals should be discussed on a need-to-know basis and shared only with the appropriate staff to provide necessary services.” Washington State had a similar confidentiality policy.

Proper language usage and treatment by correctional staff is another area of greater protections. State of Delaware Department of Correction (2016) policy on the treatment of transgender inmates included the statement that, “no DOC staff member will ridicule any offender, and will not attempt to change any offender’s understanding of their gender identity or sexual orientation.” States such as Delaware and Vermont also required correctional staff to use preferred pronouns when addressing inmates who are transgender. While not going as far as requiring proper pronouns, Idaho Department of Corrections (2011) required that no pronoun be used, and transgender inmates only be addressed by their

Table 3 State policies that included statements on transgender housing and classification

State	115.42(c) Housing case-by-case	115.42(d) 6 month review	115.42(e) Inmate input	115.42(f) Private showers	115.42(g) No specialized units	115.43(a) Isolation
Alabama	✓	✓	✓	✓	✓	✓
Alaska						
Arizona	✓	✓	✓	✓		
Arkansas						
California	✓					
Colorado	✓					
Connecticut	✓	✓	✓			
Delaware		✓	✓	✓		✓
District OF Columbia	✓	✓	✓	✓	✓	✓
Florida ^a	Missing					
Georgia	✓	✓				✓
Hawaii	✓	✓	✓	✓	✓	
Idaho	✓	✓	✓	✓	✓	✓
Illinois ^a	Missing					
Indiana	✓	✓	✓	✓	✓	✓
Iowa	✓	✓	✓	✓	✓	
Kansas						
Kentucky	✓	✓		✓	✓	✓
Louisiana	✓	✓		✓	✓	
Maine	✓	✓	✓	✓	✓	
Maryland						
Massachusetts	✓	✓	✓	✓		
Michigan	✓					
Minnesota	✓					
Missouri	✓					
Mississippi ^a	Missing					
Montana	✓	✓	✓	✓	✓	
Nebraska						
Nevada		✓				✓
New Hampshire	✓	✓	✓		✓	
New Jersey	✓		✓			
New Mexico	✓	✓	✓			
New York	✓	✓	✓	✓	✓	
North Carolina	✓	✓	✓	✓	✓	
North Dakota	✓	✓	✓	✓	✓	
Ohio	✓	✓	✓	✓	✓	
Oklahoma	✓	✓	✓	✓	✓	
Oregon	✓	✓	✓	✓	✓	
Pennsylvania	✓	✓	✓	✓	✓	
Rhode Island						
South Carolina	✓		✓	✓		
South Dakota		✓		✓	✓	
Tennessee	✓	✓				
Texas	✓	✓	✓	✓	✓	
Utah						
Vermont	✓	✓		✓	✓	✓
Virginia	✓	✓	✓	✓	✓	✓
Washington		✓		✓		
West Virginia ^a	Missing					
Wisconsin	✓	✓	✓	✓	✓	
Wyoming	✓	✓	✓	✓	✓	

^a Missing: not able to locate policy

last name. Idaho required staff to refrain from harassing inmates who were transgender.

Some state correctional policies included additional language in their definitions which assisted staff in better understanding transgender identity. For example, Kansas Department of Corrections (2016) PREA policy included the definitions of “transgender female” and “transgender

male.” Commonwealth of Pennsylvania Department of Corrections (2016) defined “transman” and “transwoman.” Kentucky Corrections (2017) policy on “Lesbian, Gay, Bisexual, Transgender, and Intersex Offenders (LGBTI)” provided examples in addition to their definition such as “a transgender woman (an individual who is anatomically male but self-identifies as female)

may have breasts or more feminine features due to hormone therapy or plastic surgery.”

In addition to the PREA requirement that staff obtain training on how to do a proper pat-down/search of an inmate who is transgender, Hawaii Department of Public Safety (2014) PREA policy dictated that the use of the back of a hand, instead of the front, constituted a “professional and respectful pat-down search of a transgender” inmate. Kentucky Corrections (2017) provided four options for searches of transgender inmates, which were (1) “searches conducted only by medical staff,” (2) “pat searches of adult inmates conducted by female staff only, especially given there is no prohibition on the pat searches female staff can perform,” (3) “asking inmates to identify the gender of staff with whom they would feel most comfortable conducting the search,” and (4) “searches conducted in accordance with the inmate’s gender identity” (p. 5).

While having PREA protections for transgender inmates is important, there is no PREA provision requiring states to inform transgender inmates about their rights. Some states, however, required this disclosure. For example, Delaware designed a handout for all transgender (and intersex) inmates, which lays out their rights (see Fig. 2). Idaho Department of Corrections (2011) Gender Identity Disorder healthcare policy similarly stated that transgender inmates would receive “information about all services available within the correctional system” (p. 4) in initial reception as well as anytime requested by the transgender inmate.

Many states (such as Georgia, Idaho, Maine, Minnesota, Texas, New York, New Hampshire, and Hawaii) also afforded some health and specialized mental healthcare to inmates who are transgender. For example, Hawaii Department of Public Safety (2015) cross-hormone therapy policy allowed correctional physicians to prescribe estrogen/testosterone when relevant, including continuing cross-hormone treatment that started while outside of custody. While some healthcare policies would only continue the treatment that an inmate was receiving prior to incarceration, some policies allowed for the start of treatment for transgender-related healthcare after custody begins. For example, New Hampshire Department of Corrections (2015) policy stated that “treatment options will not be precluded solely due to the level of medical services and treatments received, or lack of such services and treatments, prior to incarceration.”

A final theme of additional protections is the right to have gender appropriate clothing. Bras for Male-to-Female (MtF) transgender inmates appeared to be the garment most available in prisons. For example, New York State Department of Corrections (2013) afforded MtF inmates the right to obtain bras; however, no other clothing options were mentioned, including for Female-to-Male (FtM) inmates. In contrast, Oregon Department of Corrections (2017) policy allowed for the PREA Compliance Manager to make undergarments

available to both MtF and FtM inmates and allowed the transgender inmate to select the type of underwear, pajamas, and whether they would need bras.

Conflicting Policies

Finally, 40% of states continued to have at least one policy that conflicted directly with the transgender protections of PREA. Many of the conflicting policies continued to house transgender inmates solely based on their biological sex at birth. For example, Hawaii Department of Public Safety (2014) PREA policy specifically required that transgender inmates be housed based on their legal status as a male or female. Only rare exceptions made by health practitioners could alter that determination. Similarly, Idaho Department of Corrections (2011) policy for those with gender identity disorder stated that “facility placement will be based upon the offender’s primary physical sexual characteristics.”

Policies related to protective custody and segregated housing frequently conflict with PREA. For example, in the District of Columbia’s Gender Classification and Housing Policy (2014), an inmate who refuses a complete physical examination is placed in protective custody. While such protective custody was limited to 72 h under the policy, PREA requires that such protective custody can only occur for up to 24 h. Additionally, the policy allowed for continued protective custody if the Transgender Housing Committee felt it was in the inmate’s best interest for reasons of safety. In Virginia Department of Corrections (2017), state policies allowed segregation of transgender inmates for up to 30 days. According to Oregon Department of Corrections (2017) correctional policies, transgender inmates were initially housed outside of general population in a holding cell or the infirmary until the housing determination is made.

Some policies that *appear* to provide greater protections may actually be in conflict with PREA. For example, Maine Department of Corrections (2015) policy on the management of transgender inmates stated that housing should be done in accordance with gender reassignment. However, this negates the PREA provisions that require a case-by-case analysis, and the inmate’s personal views as to the best housing, taking into account the inmate’s safety concerns. Even Indiana, the only state to have policies that contain all 13 required provisions, also stated that involuntary restrictive housing may be used for up to 30 days, which is in direct conflict with PREA (State of Indiana Department of Corrections, 2014).

Many states that have PREA-required transgender protections may still have other policies that happen to conflict with the same protections. For example, Alabama Department of Corrections (2005) Gender Identity Disorder policy stated, “Inmates will be assigned to an ADOC Institution in accordance with their gender as determined by their external genitalia”; however, Alabama Department of Corrections (2016)

Table 4 State policies that included protections against inmate victimization and mandated training

State	115.15(e) No searches to determine sex	115.15(f) Training on cross-gender pat-downs	115.31(a)(9) Staff training on LBGTI inmates	115.41(d)(7) Include LGBT status in risk assessment	115.86(d)(2) Determine abuse motivation
Alabama	✓	✓			✓
Alaska					
Arizona	✓	✓	✓		✓
Arkansas	✓	✓	✓		✓
California	✓	✓	✓		✓
Colorado	✓				
Connecticut					
Delaware					
District of Columbia	✓	✓			
Florida ^a	Missing				
Georgia	✓	✓	✓	✓	✓
Hawaii	✓	✓	✓	✓	✓
Idaho	✓	✓	✓	✓	✓
Illinois ^a	Missing				
Indiana	✓	✓	✓	✓	✓
Iowa					
Kansas			✓		
Kentucky	✓	✓	✓	✓	✓
Louisiana	✓	✓	✓		
Maine	✓	✓	✓	✓	✓
Maryland					
Massachusetts				✓	✓
Michigan	✓				
Minnesota	✓			✓	✓
Missouri		✓			
Mississippi ^a	Missing				
Montana			✓	✓	✓
Nebraska					
Nevada				✓	✓
New Hampshire		✓		✓	
New Jersey					
New Mexico	✓	✓	✓		✓
New York	✓				✓
North Carolina			✓	✓	
North dakota	✓	✓	✓	✓	✓
Ohio	✓	✓	✓	✓	✓
Oklahoma	✓	✓	✓	✓	✓
Oregon		✓		✓	
Pennsylvania	✓	✓	✓	✓	✓
Rhode Island					✓
South Carolina					
South Dakota					✓
Tennessee	✓	✓	✓	✓	
Texas	✓	✓	✓	✓	
Utah					
Vermont	✓	✓	✓	✓	✓
Virginia					
Washington	✓	✓	✓		
West Virginia ^a	Missing				
Wisconsin	✓	✓	✓	✓	✓
Wyoming			✓	✓	✓

^a Missing: not able to locate policy

PREA policy contained all the required housing/classification provisions. This serious error in equating sex and gender implies that the provisions will likely not be followed in the spirit

of the law, and potentially places transgender prisoners at risk. While it appears that most states are moving toward PREA compliance in their transgender-related correctional policies,

Table 5 Year of relevant state policy

Year of policy	Number of policies
Unknown	3
2005	1
2006	0
2007	1
2008	0
2009	0
2010	0
2011	2
2012	0
2013	2
2014	19
2015	28
2016	24
2017	10

they must not only create new policies that are compliant but also ensure that old policies that are not compliant be revised or withdrawn.

It is important to note that while some states may appear to not include PREA transgender protections based on their state policies, there may be county and/or individual facility corrections policies that include these PREA standards within those states. For example, while Illinois did not provide any evidence online of their state policies concerning PREA, Cook County (which includes the City of Chicago and is one of the largest county jails in the USA averaging about 9000 detainees daily; Cook County Sheriff, 2017) provided transgender protections that not only met PREA standards, but are stronger in some regards (Hawkins, 2011).

Study Limitations

We analyzed only state policies, thereby omitting policies from local jails and federal prisons in this analysis. It is possible that reviewing policies from local jurisdictions would garner different results. Future studies may want to review local correctional policies.

Another limitation is that our study assessed the status of published policies available publicly—we are unaware of

PREA STANDARDS & INFORMATION RELATED TO TRANSGENDERED & INTERSEX INMATES

Information for Transgendered/Intersex Inmates

- During the intake process, you were asked questions concerning your sexual preference and gender status. The reason for the questions is to assist the Department in determining your risk of becoming a victim in a prison/jail/or community confinement setting.
- The Prison Rape Elimination Act of 2003 led to a Commission being formed to study ways to prevent sexual assault and abuse in incarcerated settings.
- The Commission identified various criteria which would make offenders more susceptible to becoming a victim. Identifying as transgender is one of those criteria which may make an individual more likely to suffer abuse.
- The PREA Commission published Standards to guide Departments of Correction the best ways to protect offenders from abuse
- The information which immediately follows comes from the Prison Rape Elimination Act Standards, Prisons and Jails, 28 C.F.R. Part 115.
- The agency trains staff in how to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex (LGBTI), or gender nonconforming inmates. Any concerns may be addressed to the PREA manager.

- 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.
- A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.
- Every six months, someone from the facility will meet with you to discuss any safety concerns, prior to the facility completing a transgender review of your case.
- Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates. An offender who identifies as transgender, and has received a transgender evaluation by medical/mental health, may request the ability to shower separately.
- The PREA manager at your facility will inform you on how this process will work for you.
- You may report sexual abuse or sexual harassment to any staff member you feel comfortable talking to. You may report verbally or in writing to any person working in the Department of Correction or anyone outside the facility you want to report for you.

Definitions:

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.

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.

- The agency trains 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. If you have concerns about pat searches, contact the PREA manager at your facility.

PREA coordinator: DOC employee responsible for the state-wide oversight of PREA standards, compliance with standards, training, data collection and inspection.

PREA manager: DOC employee designated at each DOC facility who is responsible to coordinate the facility's efforts to comply with DOC PREA policy and the federal PREA standards.

Address concerns to the facility PREA manager at your facility.

THE PREA MANAGER AT YOUR FACILITY IS:

(State of Delaware Department of Correction, 2016).

Fig. 2 Handout provided to transgender inmates in Delaware. (State of Delaware Department of Correction, 2016)

whether each state acts in accordance with its own published policies, or whether individual prison staff fail to act in accordance with PREA. Future studies may want to review state PREA annual reports and/or conduct a study of how states regulate compliance.

Finally, it is not known on whether following PREA actually reduces sexual assault or better protects transgender inmates. Since the passage of PREA, there have been reports of women's prisons being sued by female inmates for housing "men" in the prison (McGaughy, 2018). It appears transgender inmates may experience harassment and abuse at both men's and women's prisons. Most research on sexual assault and abuse of transgender inmates occurred prior to most PREA state provisions taking effect. Further research is needed to determine whether following PREA led to a reduction in assaults.

Conclusions

Protections for transgender inmates were detailed in the 2012 update to the Prison Rape Elimination Act. Unfortunately, by February 2017, many states still had not updated their published policies to reflect these changes. Given that transgender inmates are at higher risk of assault and may need special housing, clothing, and other requirements, states that have not updated their protections are relying on their staff to manage without direction from the state.

Most states in our analysis did not have correctional policies that included all 13 PREA provisions relating specifically to transgender inmates. Indiana was the only state that appeared to have policies that contained all the provisions; and about 25% of states have policies covering at least 11 provisions. There was no uniformity on which PREA provisions were included in state policies and which were missing. The least included housing provision concerned protecting transgender inmates from isolation (115.43(a)) by being automatically put into segregated housing. This is concerning as it is possible that many transgender inmates experience higher punishment through isolation just for the fact that they are not gender-conforming to the institution they are assigned. Another concern is that over a third of states lacked any definitions for correctional staff to understand what is meant by the terms "transgender" and/or "gender nonconforming." These provisions are especially needed so that staff know when these PREA provisions should be considered.

More effort is needed to ensure that all state policies conform with the requirements set forth in PREA. This is especially true for providing transgender inmates the safest and/or unnecessarily punitive housing options possible in a prison system defined by the gender binary. Additionally, training policies in many states still need to be updated to provide

correctional staff with the knowledge necessary to protect inmates of all gender identities.

At the same time, several states provided greater protections for transgender inmates than required by federal law. These include access to healthcare, gender-related clothing, and greater privacy protections. Additional information, such as non-discrimination statements, can also help to protect transgender inmates from potential abuse.

Unfortunately, some states continue to have policies that directly conflict with PREA, such as those that use genitalia to decide housing. It is important that state compliance with PREA not only be based on including the 13 protections but also that states retire any policies that conflict with them. Conflicting state policies may lead correctional staff to follow old rules and disregard PREA protections. Hopefully, this analysis can be helpful for states to oversee a process of dismantling old policies and rewriting policies that fail to comply with PREA.

Whether the changes to policies required by PREA actually leads to a reduction in harm to transgender inmates is relatively unknown. Further studies are needed to see whether those states that effectively follow PREA guidelines are reducing potential harm to transgender inmates and whether physical and sexual assaults decrease when state policies are compliant.

It is also important that state corrections policies be made available to the public. While PREA requires that annual assessments be available, it does not require states to publish their policies in the same manner. Publishing policies on treatment of LGBTI inmates can help educate the community, family members, and inmates about their rights under federal law.

A Final Note

In May 2018, President Donald Trump changed current federal guidelines with the publication of the "Transgender Offender Manual," which included housing placement of transgender prisoners (United States Department of Justice, 2018). These changes directly conflict with PREA, as they now require housing placement of federal prisoners to be based on "biological sex," and any other placement would only be in "rare cases." As of the time of this writing, it is unclear how these conflicting guidelines will alter the placement of transgender prisoners currently housed in state and federal prisons in the USA or whether these new guidelines will be brought to federal court to determine its lawfulness since it directly conflicts with federal PREA law.

Compliance with Ethical Standards

Conflict of Interest The authors declare that they have no conflict of interest.

Appendix 1

Language of 13 relevant transgender provisions in PREA:

§ 115.5 General definitions

Gender nonconforming means a person whose appearance or manner does not conform to traditional societal gender expectation.

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.

§ 115.15 Limits to cross-gender viewing and searches

(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.

§ 115.15 Limits to cross-gender viewing and searches

(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.

§ 115.31 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; and

§ 115.41 Screening for risk of victimization and abusiveness

(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;

§ 115.42 Use of screening information

(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.

§ 115.43 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 h while completing the assessment.

§ 115.86 Sexual abuse incident reviews

(d) The review team shall:

(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.

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