

STANDING WITH LGBT PRISONERS:

An Advocate's Guide to Ending Abuse
and Combating Imprisonment

BY JODY MARKSAMER AND HARPER JEAN TOBIN



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CHAPTER 1:

WHY PRISONS ARE AN LGBT ISSUE



JAILS ARE TRAUMATIZING AND OFTEN DANGEROUS PLACES, ESPECIALLY FOR lesbian, gay, bisexual, and transgender people, and anyone who is gender nonconforming. In a country that incarcerates more of its people than any other in the world, LGBT people are more likely to end up behind bars, and more likely to face abuse behind bars. Being LGBT in a US jail or prison often means daily humiliation, physical and sexual abuse, and fearing it will get worse if you complain. Many LGBT people are placed in solitary confinement for months or years just because of who they are. Fortunately, advocates across the country are working to change this. Today, there are new national standards, legal developments, and other new tools—as well as many allies beyond the LGBT community who are combating mass incarceration and abuse behind bars—that make this a better time than ever to press for change.

LGBT PEOPLE ARE MORE LIKELY TO HAVE CONTACTS WITH THE CRIMINAL JUSTICE SYSTEM

While statistics about criminal justice and LGBT people in general are lacking, we know that some groups of LGBT people are disproportionately likely to come into contact with the criminal justice system, particularly LGBT youth and transgender people. A history of bias, abuse, and profiling toward LGBT people by law enforcement has contributed to disproportionate contacts with the justice system.¹ Moreover, while people may end up in jail or prison for many reasons, people who are poor are more likely to end up behind bars, and LGBT people are disproportionately poor.²

According to the National Transgender Discrimination Survey, 16% of transgender adults have been in a prison or jail for any reason. This compares with 2.7% of all adults who have ever been in prison,³ and 10.2% of all adults who have ever been under any kind of criminal justice supervision, including probation.⁴ Transgender people, especially poor people and people of color, report facing disrespect, harassment, discriminatory arrests, and physical and sexual assault by police at very high rates.⁵

While an estimated 4-8% of youth are LGBT, a major study of youth in juvenile detention found that as many as 13-15% are LGBT.⁶ Family rejection, homelessness, and hostility in the foster-care and other safety-net systems often serve to funnel LGBT youth into the juvenile justice system. Even though LGBT youth are often the targets of violence and abuse in schools, a 2010 study in the medical journal *Pediatrics* found that LGBT youth were up to three times more likely to experience harsh disciplinary actions in school than their non-LGBT counterparts.⁷

1 See Amnesty International, *Stonewalled: Police Abuse and Misconduct against LGBT People in the US* (2005). Available at: <http://amnesty.org/en/library/info/AMR51/122/2005>.

2 M.V. Lee, Badgett, Laura E. Durso, & Alyssa Schneebaum, *New Patterns of Poverty in the LGBT Community* (Williams Institute, 2013), available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>

3 NTDS.

4 Susan L. Brown & Wendy D. Manning, *Experiences with the Criminal Justice System in a Household Survey: Introducing the Survey of Criminal Justice Experience (SCJE)* (National Center for Family & Marriage Research, 2013), available at: <http://ncfmr.bgsu.edu/pdf/Measuring%20Incarceration%20HH%20Surveys/file135154.pdf>.

5 NTDS; Frank H. Galvan & Mohsen Bazargan, *Interactions of Latina Transgender Women with Law Enforcement* (2012). Available at: <http://williamsinstitute.law.ucla.edu/research/transgender-issues/interactions-of-transgender-latina-women-with-law-enforcement/>.

6 Angela Irvine, *We've Had Three of Them: Addressing the Invisibility of Lesbian, Gay, Bisexual, and Gender Nonconforming Youths in the Juvenile Justice System*, 9 *Colum. J. Gender & L.* 675 (2010).

7 Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, *Pediatrics* 127:1 49-57 (2011).

LGBT PEOPLE ARE ESPECIALLY VULNERABLE IN CUSTODIAL SETTINGS

The United States incarcerates people at the highest rate of any nation in the world, with prison and jail populations over the last thirty years growing at ten times the rate of the US population.⁸ Nearly 7 million adults are under correctional supervision in the US today, with more than 2.2 million of them in prisons and jails.⁹ In addition, hundreds of thousands are held in juvenile prisons and immigration detention each year. While conditions in jails and prisons vary, overcrowding, physical and sexual violence, and heavy reliance on solitary confinement are common. The Constitution guarantees that persons deprived of their liberty must be provided with adequate food, shelter, safety, and medical care, yet these standards are often not met.

In these settings, LGBT people are especially vulnerable to abuse and mistreatment, by both staff and other prisoners. More than 200,000 youth and adults are sexually abused in prisons, jails, and juvenile detention facilities each year according to federal estimates.¹⁰ In the same federal survey, prisoners who identified as “non-heterosexual” were 3 times as likely to report sexual abuse.¹¹ A study of California prisons found that transgender women in men’s prisons were 13 times as likely to be sexually abused as other prisoners.¹² Just as in any other setting, sexual abuse behind bars can lead to post-traumatic stress disorder, depression, substance abuse, HIV, and other infections that can take a heavy toll on survivors, their families and communities, and public budgets.

LGBT prisoners also face many other forms of mistreatment behind bars. Many face constant humiliation and degradation from staff and prisoners alike. Staff may blame them for their own victimization, believing they are “flaunting themselves,” and refusing to take grievances or reports of abuse seriously. If their vulnerability is recognized at all, it may be by placing them in indefinite solitary confinement, with little or no activity or human contact—conditions that can cause serious psychological harm, and which medical experts have found to amount to torture. In other cases, LGBT prisoners’ requests for temporary protective custody are ignored.

Transgender and gender nonconforming people can face additional forms of mistreatment. Though practices are changing, many facilities still house transgender people with men or women strictly according to their genital anatomy—often increasing their vulnerability to abuse. Facilities may deny them access to gender-appropriate clothing or grooming items, and punish them for attempting to express their gender identity. In addition, some facilities still place decisions about the medical needs of transgender people in the hands of administrators rather than health care providers, adopting blanket policies against providing hormone therapy or other transition-related care.

8 Roy Walmsley, *World Prison Population List* (ninth edition) (International Centre for Prison Studies, 2011), available at: http://www.prisonstudies.org/images/news_events/wppl9.pdf; James Austin et al., *Ending Mass Incarceration: Charting a New Justice Reinvention* (Sentencing Project, 2013), available at: http://www.sentencingproject.org/detail/publication.cfm?publication_id=497.

9 Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011* (Bureau of Justice Statistics, 2012), available at: <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

10 Allen J. Beck et al, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12* (Bureau of Justice Statistics, May 2013), available at www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

11 Beck et al., *Sexual Victimization in Prisons and Jails*.

12 Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Center for Evidence-Based Corrections, 2007), available at: <http://www.wcl.american.edu/endsilence/documents/ViolenceinCaliforniaCorrectionalFacilities.pdf>.

NOW IS A BETTER TIME THAN EVER TO DO THIS WORK

Right now, jails, prisons, and other custodial agencies around the country are looking at developing policies related to LGBT people, many for the first time. Perhaps the biggest reason is the federal Prison Rape Elimination Act (PREA). Passed by Congress in 2003, this law led to the publication in 2012 of the National Standards to Prevent, Detect, and Respond to Prison Rape, known as the PREA Standards. These comprehensive standards include several provisions that direct agencies to pay particular attention to protecting LGBT and gender nonconforming individuals, as well as those with intersex conditions. Jails and prisons are strongly incentivized, and in some cases required, to comply with these standards. Starting in 2014, some agencies could face financial penalties for non-compliance.

Agencies are also noticing that we are starting to win in court. There is now a growing body of court decisions saying that many ways LGBT people have been treated in jails in the past may violate the Constitution or other legal standards. For example, in recent years, there have been several cases in which courts have found the law was violated by denying transition-related health care for transgender prisoners. While the law in some of these areas is still developing, many agencies are taking notice.

Finally, because there is more of this advocacy work going on around the country, jails and prisons are more receptive to our message. LGBT advocates are increasingly taking this on as an important issue that affects particularly vulnerable members of our communities. Other advocates working on prison reform issues are increasingly recognizing LGBT folks as a key population in need of protection. At the same time, jails and prisons are starting to hear about other agencies adopting the policies in this toolkit, and these issues seem less foreign for them. Some agencies have started developing policies on their own initiative, even in areas where they aren't required to by the PREA Standards.

LGBT ADVOCATES CAN MAKE A DIFFERENCE

This is a resource to help introduce LGBT and allied activists to a range of issues that affect LGBT people behind bars, and prepare you to advocate for policies that will protect the safety, health, and rights of all LGBT people who may find themselves imprisoned. The bulk of this toolkit is focused on advocacy to improve conditions for LGBT people in jails, prisons and other confinement facilities. While taking immediate actions to protect LGBT people from some of the worst harms they face behind bars is critical, we believe reforming jails and prisons can never be a complete solution. As Attorney General Eric Holder has recently stated, we believe that too many people go to too many prisons for far too long in the US—at tremendous human, and fiscal, cost to all of us. Chapter 6 of this toolkit offers some suggestions for doing the important work of combating mass incarceration.

CHAPTER 2:

HOW TO USE THIS TOOLKIT



THIS TOOLKIT IS INTENDED FOR ADVOCATES WHO WOULD LIKE TO WORK, OR ARE working, with local or state corrections or detention agencies to develop and implement more just and humane policies toward LGBT people. This could include statewide LGBT equality groups, state or local transgender organizations, legal advocacy groups, or groups of grassroots activists, as well as organizations already working on prison reform or criminal justice issues that want to incorporate the concerns of LGBT people in their work.

We hope this toolkit will provide an introduction to the issues and policies that affect LGBT people in jails, prisons, and detention facilities, and provide practical suggestions for advocacy work with these agencies. The toolkit is intended for activists who are ready to put in some hard work to take advantage of the opportunities for reform that have been created by the PREA Standards, recent legal developments, and the increasing visibility of LGBT people in discussions about criminal justice.

NATIONAL INSTITUTE OF CORRECTIONS LGBTI POLICY GUIDE: A CRITICAL COMPANION

While this toolkit is aimed at LGBT advocates, the National Institute of Corrections has released an in-depth resource for custodial agencies on developing policies on LGBTI people. This resource, *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings*, covers much the same ground as this toolkit. We recommend that you consider providing this guide as a resource to the agency you are working with, and that you use it yourself as a companion to this toolkit and a reference for policy development. Be aware, however, that the NIC guide presents some issues in a slightly different way than we do in this toolkit. Find the NIC guide at: <http://nicic.gov/Library/027507>.

This toolkit is not comprehensive—it is only intended to get you started. This is among the most urgent, and most difficult, areas in LGBT advocacy today. Working with corrections or detention agencies can be very challenging and very different from working with legislators or other kinds of institutions. The right policy objectives and strategies will depend on the circumstances in your community or state. Ideally, your work will be informed by the experiences of LGBT people who've been incarcerated themselves as well as by allies working on criminal justice reform more broadly. Even once a new policy is adopted, continued work will be needed to monitor and press for meaningful implementation, and to provide support and advocacy for individual LGBT prisoners.

In addition, there are many issues beyond those addressed here that affect the lives of incarcerated LGBT people—including increasing oversight of jails and prison systems as a whole, working to reduce the number of people who are incarcerated in the first place, and supporting individuals in reintegrating into the community when they're released. There are many organizations around the nation and the world working hard on these issues, and some of these groups are mentioned throughout this toolkit.

CHAPTER 3:

UNDERSTANDING THE BASICS



THIS CHAPTER PROVIDES A BASIC OVERVIEW OF DIFFERENT TYPES OF confinement facilities and some critical legal and constitutional protections that apply to prisoners.

JAILS, PRISONS, AND OTHER CONFINEMENT FACILITIES

While this toolkit is primarily focused on advocacy with local jails, many of the same issues arise in a range of other types of confinement facilities. These include:

- **Jails:** Jails are typically run by cities and counties, and increasingly by private contractors. They hold both “pre-trial” detainees who have not been convicted of any crime and are awaiting criminal proceedings as well as inmates who are serving a sentence of one year or less. Local jails may be very small, holding just a few dozen individuals, or in urban areas may have a population of thousands. Jails hold more than 735,000 people in the US today.¹
- **Prisons:** Prisons are run by state departments of corrections as well as the Federal Bureau of Prisons, and increasingly by private contractors. They hold inmates serving sentences of one year or more. Prisons hold approximately 1.6 million people in the US today.²
- **Police lockups:** These are facilities operated by police departments to hold individuals who have just been arrested, usually for a few hours to a few days. Because of the short periods of time people are held, these facilities are often much smaller and more rudimentary. For example, they often do not have showers or medical staff on site.
- **Juvenile detention or correctional facilities:** These facilities (sometimes called juvenile halls, training schools, or other names) hold minors charged or convicted of crimes, and may be run by state or local agencies or private contractors. The juvenile justice system traditionally expresses a stronger commitment to treatment and rehabilitation. Some facilities are less harsh and restrictive than those for adults, although many are similar to adult jails. Juvenile facilities hold approximately 79,000 youth in the US today.³
- **Community confinement:** These are facilities where individuals are required to reside, instead of jail or prison, as a condition of pre-trial release or to complete a sentence. They may also be called halfway houses, restitution centers, or community treatment centers.
- **Immigration detention:** Immigration detainees are not being held because they've been charged with any crime, but because the government is determining whether or not to deport them. The main purpose of this form of civil detention is to ensure participation in court proceedings. Detainees are housed in a mix of federal facilities, for-profit detention centers, and local county jails. Detainees may be held for just a few days or for many months or years. Over 400,000 people are held in immigration detention each year, with an average of 34,000 held every day.⁴
- **Psychiatric and civil commitment facilities:** These are a range of types of facilities run by states, private contractors, or charities that hold people for involuntary mental health treatment or civil commitment. These facilities are not subject to the PREA Standards, but are subject to constitutional rights of freedom from abuse or other cruel treatment. Some may also be subject to nondiscrimination laws or hospital accreditation standards that prohibit anti-LGBT discrimination. This toolkit, together with resources on hospital LGBT policies (see the resources listed in Appendix D), may be useful in advocating with these types of facilities.

Facilities may vary widely in their size, restrictiveness, and other conditions. The procedures used to classify and house people, the jargon they use, and the legal standards that apply can also differ for one facility, or type of facility, to another. LGBT people are vulnerable to mistreatment in all types of confinement settings. LGBT advocates can, should, and do engage with all of them to develop more protective policies.

This toolkit is primarily focused on local jails, although much of the information and advice here is applicable to advocacy with any type of confinement facility. Advocates working with juvenile facilities, police lockups, or facilities that hold immigration detainees, should consult with allies and experts on how to tailor your advocacy and recommendations for these settings. For example, juvenile facilities are more treatment-oriented and may be more willing to adopt a presumption that transgender youth be housed according to their gender identity, unless youth or officials believe this will be unsafe in a particular case. In police lockups, screening processes and housing options may be very limited, and some of the best policies call for holding all transgender detainees in a single cell in the area where others of the same self-identified gender are held. Immigration detention facilities may be subject to different or additional PREA Standards adopted by the Department of Homeland Security (DHS).

WHAT IS INTERSEX?

Intersex refers to a range of developmental variations where individuals are born with a reproductive or sexual anatomy and/or chromosome pattern that doesn't seem to fit typical definitions of male or female. These variations are often grouped under the category of intersex, or differences of sex development (DSD). Until recently, it was routine in the US for parents of intersex children to be told their children needed to have immediate surgery to look more typically male or female, and they should keep their children's condition a secret. More recently, adults began stepping forward to say that this approach was unnecessary and harmful, and medical practices are slowly changing. Like transgender people, most but not all individuals with DSDs, identify as male or female, and some may transition from their birth-assigned gender to another gender.

Intersex variations are often not readily apparent to others. However, individuals can be vulnerable to abuse if their status becomes known, or if they are identified as gender nonconforming in some way. While intersex people may or may not identify with the LGBT community, the PREA Standards include intersex people in all the same protections set out for LGBT people, as well as those specific to transgender people, based on this shared potential for vulnerability.

UNDERSTANDING PREA AND CURRENT STATE OF THE LAW

LGBT people in jails, prisons, and juvenile facilities, like all other incarcerated people, have specific civil rights under the U. S. Constitution, state and federal statutes, and from the recently adopted PREA regulations. By understanding how these rights apply to LGBT people, you will be in a better position to advocate stronger policies and procedures concerning LGBT people that protect for their safety and their civil rights.

PREA Overview

The PREA Standards are a comprehensive set of federal rules that address all aspects of a facility's operations as they relate to preventing, detecting, and responding to abuse. The Prison Rape Elimination Act of 2003 required the US Department of Justice to develop these standards. The Department of Justice issued its PREA Standards in 2012, and President Obama has ordered the Department of Homeland Security, the Department of Defense, and other federal agencies that hold people in detention to adopt their own standards. Differing versions of the standards apply to different types of facilities, and some facilities that hold people involuntarily (such as psychiatric hospitals or civil commitment facilities) are not covered.

The PREA Standards are legally binding on federal prisons. State prison systems can face penalties on their federal funding if they are found not to be in compliance. Accrediting organizations (such as the American Corrections Association) are also required to adopt the standards in order to retain federal funding. PREA also applies to local facilities, such as jails and police departments, but those facilities don't face direct penalties for noncompliance. However, in some states, local agencies are also required by state law to comply. Local facilities could also lose needed accreditations or contracts to hold state or federal prisoners if they fail to comply with PREA standards.

The PREA Standards don't give prisoners a right to sue if agencies don't follow them; overall, civil rights litigation by prisoners remains very difficult. In the case of a lawsuit alleging abuse, however, a court could be influenced by the fact that an agency failed to take steps outlined by the Standards that might have prevented the abuse.

Because of all these incentives to follow PREA, agencies should be paying close attention to these regulations. The PREA regulations include several specific protections for LGBT individuals, such as consideration of LGBT status in determining risk for sexual victimization, limitations on cross-gender searches, and special considerations for transgender and intersex inmates. Knowing the PREA Standards yourself will allow you to help agencies create policies for LGBT inmates, which also help them to comply with PREA. Excerpts from key standards related to LGBT prisoners are provided in Chapter 5, and a summary of other key PREA provisions is included in Appendix C. The full PREA Standards can be found at PREAResourceCenter.org.

Overview of the LGBT Prisoners' Constitutional Rights

While the PREA Standards are not legally binding on all facilities and cannot be directly enforced in court—indeed it is often extremely difficult for prisoners to bring any kind of lawsuit to enforce their rights—prisoners do have rights under the U.S. Constitution and state constitutions. Referring to court rulings should not be the only, or first, tool for your advocacy, but it is helpful to know about areas in which there is support from the courts. There are a range of federal constitutional provisions that require facilities to ensure all individuals in their custody are physically safe, free from cruel and unusual punishment (or for juveniles and pre-trial detainees, free from unreasonable conditions of confinement), have equal access to programs and facilities, and have access to necessary medical care. In addition, the Constitution guarantees individuals the right to privacy and freedom of expression and religion. Although these constitutional rights are limited for those who are incarcerated, none are entirely extinguished, and many have important and particular relevance for LGBT people. This section provides a brief summary of key rights recognized by courts that are especially relevant to LGBT people in custody. Keep in mind that this area of the law is still developing. This summary is not exhaustive, and doesn't cite many cases (usually older ones) that have rejected claims by LGBT inmates.⁵

Right to Safety and Protection from Violence

Prisons and jails must protect prisoners from violence at the hands of other prisoners, as well as prison staff and correctional officers. If prison officials do not uphold this duty to protect, they have violated the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment. This principle was first established by the U.S. Supreme Court in the case of a transgender woman who was repeatedly sexually assaulted and beaten by other inmates. In that case, the Supreme Court stated that prison officials may be liable for such abuse when “the official knows of and disregards an excessive risk to inmate health or safety.”⁶ The Supreme Court also said, that an excessive risk of abuse can be established when a prisoner belongs to “an identifiable group of prisoners who are frequently singled out for violent attack by other inmates,” such as transgender people.⁷ When officials know that a person is LGBT and therefore vulnerable, failure to take adequate steps to protect them from abuse, can violate the Constitution.⁸

Medical Care

Prisons are required to provide inmates with adequate health care to meet their medical needs; failure to do so constitutes cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution.⁹ In order to be considered adequate, medical treatment in prisons must be based on medical considerations, rather than financial or political factors,¹⁰ and cannot be blatantly inappropriate.¹¹

Courts have consistently stated that gender dysphoria (GD)—formerly known as gender identity disorder (GID)¹²—is a serious medical condition that requires treatment under the Eighth Amendment,¹³ meaning that prisons must provide transgender people who are diagnosed with GD with adequate medical treatment, consistent with accepted medical standards.¹⁴

Transgender inmates have clearly established constitutional rights with regard to GD treatment. Inmates who wish to be evaluated for an initial GD diagnosis should be seen by a doctor or medical expert with some specialized expertise in treating transgender people.¹⁵ Treatment decisions regarding transgender inmates must be made based on individual medical needs. A facility cannot have a blanket policy that prohibits specific types of treatments, such as an absolute ban on hormone therapy or surgery.¹⁶ Additionally, prisoners who are already undergoing hormone therapy for GD cannot be abruptly taken off such treatment unless there is a clear medical reason to do so.¹⁷ In some cases, courts have also held that prisoners can establish a medical need to be treated in a gender-appropriate manner with respect to personal pronouns, or access to items such as bras or cosmetics, where that need is supported by a health care provider.¹⁸

Prison officials cannot deny certain GD treatments based solely on the argument that such treatments would increase the risk of violence towards the inmates receiving the treatments. Several courts have outright rejected these types of arguments,¹⁹ while other courts have stated that security concerns must be balanced against medical needs, and have a real basis.²⁰

Solitary Confinement and Other Isolating Conditions

Often, jail or prison officials will respond to the vulnerability of an LGBT inmate, by placing them in solitary “protective custody”—effectively punishing them for being a potential victim. Officials may segregate LGBT inmates as a temporary measure when specific circumstances demand, such as upon admission while determining an appropriate long-term placement, or immediately following an assault and during its investigation.²¹ Whether ongoing segregation of a vulnerable inmate is permissible depends on the purpose of segregation, the existence of feasible alternatives, the harshness or restrictiveness of conditions, its duration, and how frequently the continued appropriateness of segregation is reviewed.²² Institutions may not impose a blanket policy of automatically and indefinitely segregating all LGBT individuals without regard to reasonable alternatives or individual circumstances.²³ Some courts have ruled that the use of solitary confinement or other isolating practices with juveniles is unconstitutional.²⁴

Searches and Privacy

In general, jail and prison officials have wide latitude to conduct personal searches to identify weapons or contraband. However, searches must be conducted for a legitimate reason—not simply to harass an LGBT prisoner—and strip searches should be conducted out of view of other prisoners except in extremely urgent situations.²⁵ While some courts have held that strip searches must be conducted by officers of the same gender absent an emergency,²⁶ courts have not said how this rule applies to transgender people.

Certain highly personal information such as one's LGBT status or HIV status is protected by the Constitution, even in prison.²⁷ This means that unless a prisoner has disclosed this information themselves, staff may not disclose it to other prisoners without a legitimate reason.²⁸

Equal Treatment in Visitation and Other Opportunities

Courts have held that facilities may not exclude LGBT individuals from prison employment or programs simply because of their identity, absent some legitimate reason.²⁹ Some courts have also held that facilities may not ban visitation by same-sex partners,³⁰ completely prohibit same-sex hugging or kissing between inmates,³¹ or prohibit inmates from receiving LGBT publications.³² The Supreme Court has ruled that prisoners have the right to marry while behind bars,³³ and this holding should extend to same-sex couples, at least in those jurisdictions where they may otherwise marry.

A NOTE ON LANGUAGE IN THIS TOOLKIT

In this toolkit, we generally use the term “prisoner” in discussing people who are being held in a confinement facility. Be aware that facilities themselves use different terms: prisons and jails tend to refer to people as “inmates,” those being held in temporary police lock-ups or immigration detention are typically called “detainees,” and those in juvenile detention, halfway houses, or other community facilities may be called “residents.”

These different terms reflect the different laws, environments, and cultures in these facilities. Accordingly, the excerpts from PREA Standards and facilities policies in Chapter 5 use varying terms.

1 Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States*, 2011 (Bureau of Justice Statistics, 2012). Available at: <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>

2 Glaze & Parks, *Correctional Populations in the United States*.

3 Sarah Hockenberry, *Juveniles in Residential Placement*, 2010 (Office of Justice Programs, 2013). Available at: <http://www.ojjdp.gov/pubs/241060.pdf>.

4 Migration Policy Institute, *Immigration Enforcement in the United States* 126 (2013). Available at: <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

5 For more extensive summaries, see, e.g., National Institute of Corrections, *Policy Review and Development Guide: LGBTI Persons in Custodial Settings* (2013), available at: <http://nicic.gov/Library/027507>; Columbia Human Rights Law Review, *A Jailhouse Lawyer's Handbook*, Ninth Edition (2011), available at <http://www3.law.columbia.edu/hrlr/jlm/>.

6 *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

7 *Farmer v. Brennan*, 511 U.S. at 843.

8 See, e.g., *Green v. Bowles*, 361 F.3d 290, 294-95 (6th Cir. 2004); *Taylor v. Michigan Dep't of Corr.*, 69 F.3d 76, 87 (6th Cir. 1995); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004). See also *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004) (allegation that staff denied prisoner's request for increased protection due to his sexual orientation stated Equal Protection claim); *Schwenk v. Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000) (allegation that staff sexual assault was motivated in part by prisoner's transgender status stated claim under Gender Motivated Violence Act).

9 *Estelle v. Gamble*, 429 U.S. 97 (1976) (“[Eighth Amendment] principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration.”).

10 See, e.g., *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (holding that treatments cannot be denied merely because they are expensive); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (holding that treatment must be “based on medical considerations”); *Kosilek v. Maloney*, 221 F.Supp.2d 156, 192 (D. Mass. 2002) (holding that treatments cannot be denied merely because they are seen as “controversial” by the public).

11 See, e.g., *Edwards v. Snyder*, 478 F.3d 831 (7th Cir. 2007) (holding that treatment cannot be “blatantly inappropriate”); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) (holding that care cannot be such that “no minimally competent professional would have so responded under those circumstances”); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) (holding that medical care cannot be “so cursory as to amount to no treatment at all”).

12 GID is the formal diagnosis used by medical professionals to describe the distress experienced by an individual related to the sex he or she is assigned at birth.

13 See, e.g., *De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003); *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995); *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 799 (W.D. Mich. 1990); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987).

14 See *Castello v. Martin*, 197 Fed. Appx. 14, 16 (1st Cir. 2006) (holding that medical care in prisons must be “at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards”); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D. N.H. 2003) (“Adequate medical care” requires treatment by qualified medical personnel who provide services that are of a quality acceptable when measured by prudent professional standards in the community, tailored to an prisoner's particular medical needs, and that are based on medical considerations.”).

- 15 Cf., e.g., *Hayes v. Snyder*, 546 F.3d 516, 526 (7th Cir. 2008) (*Mata v. Saiz*, 427 F.3d 745, 756 (10th Cir. 2005) (holding nurse's failure to perform "gatekeeper" role by referring patient to a practitioner for symptoms of cardiac emergency could be deliberate indifference); *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (holding six weeks' delay in sending prisoner to a dentist, resulting in infection and loss of teeth, raised an Eighth Amendment claim); *LeMarge v. Wisneski*, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell the patient to seek one out was deliberate indifference); *Oxendine v. Kaplan*, 241 F.3d 1272, 1278-79 (10th Cir. 2001) (prison doctor who reattached accidentally severed finger, which became gangrenous, could be found deliberately indifferent for failing to refer prisoner for specialist care at any point; denial of access to "medical personnel capable of evaluating the need for treatment" and providing treatment one is not qualified for can be deliberate indifference).
- 16 *DeLonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (categorical refusal to even evaluate patient with persistent GD symptoms for surgical treatment stated plausible Eighth Amendment claim); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (holding that Wisconsin's blanket rule against state funds being used to treat prisoners diagnosed with GID constituted cruel and unusual punishment); *Allard v. Gomez*, 9 Fed. Appx. 793, 795 (9th Cir. 2001) (finding triable question of fact as to whether transgender prisoner was denied hormone therapy based on medical evaluation or as result of blanket rule); *Kosilek*, 221 F.Supp.2d 156 (holding that blanket policy that prohibits a prison's medical staff from making a medical determination of an individual prisoner's medical needs violates the Eighth Amendment). To date, exclusionary policies and the difficulty of litigating prison medical care issues have meant that no person in the United States has yet received transition-related surgical care while incarcerated. However, this may soon change due pending litigation. See *Kosilek v. Spencer*, 889 F.Supp.2d 190 (D. Mass. 2012), *aff'd*, --- F.3d ---, No. 12-2194 (1st Cir. Jan. 17, 2014) (ordering officials to provide surgery).
- 17 See *DeLonta*, 330 F.3d 630; *Wolfe*, 130 F. Supp. 2d 648; *Phillips*, 731 F.Supp. at 800.
- 18 See *Kosilek*, 221 F. Supp. 2d at 167; *Konitzer v. Frank*, 711 F.Supp.2d 874 (E.D. Wis. 2010); *Tates v. Blanas*, No. S-00-2539 OMP P, 2003 WL 23864868 (E.D. Cal. 2003).
- 19 See *Kosilek*, 221 F.Supp.2d at 162 (elements of social gender role transition may be denied only if facility "reasonably decides that there is truly no way that he can discharge both his duty to protect safety and his duty to provide [the prisoners] with adequate medical care"); *Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011) (rejecting contention that hormone therapy would increase risk of assaults, which defendants' own expert called "an incredible stretch"); *Tates v. Blanas*, No. S-00-2539, 2003 WL 23864868, *10 (E.D. Cal. 2003) (officials could not deny transgender woman a bra where they failed to balance security risks against medical needs, and where other women were issued bras).
- 20 See *Battista v. Clarke*, 645 F.3d 449 (1st Cir. May 20, 2011).
- 21 See, e.g., *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 (6th Cir. 1997) (table of unreported decisions).
- 22 *Estate of DiMarco v. Wyoming Dept. of Corr.*, 473 F.3d 1334 (10th Cir. 2007) (segregation of intersex prisoner); *Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir. 1987) (segregation of transgender prisoner). See also *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978). Historically, some systems also segregated individuals based on HIV status, however this practice has been abandoned by every state prison system. See *Henderson v. Thomas*, 913 F.Supp.2d 1267 (M.D. Ala. 2012) (holding HIV segregation policy unconstitutional).
- 23 See, e.g., *Tates v. Blanas*, No. S-00-2539, 2003 WL 23864868, *10 (E.D. Cal. Mar. 11, 2003) (automatic segregation of all transgender prisoners); *Medina-Tejada v. Sacramento County*, No. Civ.S-04-138FDC/DAD, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006) (same).
- 24 See, e.g., *D.B. v. Tewksbury*, 545 F.Supp. 896, 905 (D.Or. 1982); *Inmates of Boys' Training School v. Affleck*, 346 F.Supp. 1354 (D.R.I. 1972); *Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F.Supp. 473, 480-82 (S.D.N.Y. 1970). Although few courts have considered the issue recently, one court did, find that where youth are held in juvenile detention, the use of "protective" isolation is presumptively treated as cruel, harmful, and unconstitutional. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155-56 (D. Haw. 2006) (Concluding that, "The expert evidence before the court uniformly indicates that long-term segregation or isolation of youth is inherently punitive and is well outside the range of accepted professional practices... Defendants' practices are, at best, an excessive, and therefore unconstitutional, response to legitimate safety needs of the institution."). Courts have not yet addressed the use of solitary confinement and isolation on minors held in adult facilities. See, e.g., *Hughes v. Judd*, 8:12-cv-568-T-23MAP, 2013 WL 1821077 (M.D.Fl. 2013) (certifying class of juveniles challenging placement in adult jail).
- 25 See, e.g., *Farmer v. Perrill*, 288 F.3d 1254 (10th Cir. 2002) (holding that a trans prisoner had a clearly established right "not to be subjected to a humiliating strip search in full view of several (or perhaps many) others unless the procedure is reasonably related to a legitimate penological interest"); see also *Elliott v. Lynn*, 38 F.3d 188 (5th Cir. 1994); *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992); *Mays v. Springborn*, 575 F.3d 643 (7th Cir. 2009); *Franklin v. Lockhart*, 883 F.2d 654 (8th Cir. 1989); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988); *Hayes v. Marriott*, 70 F.3d 1144 (10th Cir. 1995).
- 26 See, e.g., *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 113 (9th Cir. 2011) ("Courts throughout the country have universally frowned upon cross-gender strip searches in the absence of an emergency or exigent circumstances").
- 27 See, e.g., *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (sexual orientation); *Powell v. Shriver*, 175 F.3d 107, (2d Cir. 1999) (transsexualism). See also *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001) (HIV status); *Moore v. Prevo*, 379 F. App'x. 425, 428 (6th Cir. 2010) (same); *Thomas v. District of Columbia*, 887 F. Supp. 1, 4 (D.D.C. 1995) (sexual orientation); but see *Franklin v. McCaughtry*, 110 F. App'x 715, 719 (7th Cir. 2004) (suggesting that any such right is limited to "the purposeful dissemination of intensely private medical information" such as HIV or transsexualism).
- 28 See also *Thomas v. District of Columbia*, 887 F. Supp. 1, 4 (D.D.C. 1995) (pattern of sexual harassment including spreading rumors concerning prisoner's sexual orientation that resulted in emotional distress and fear for safety could establish Eighth Amendment claim).
- 29 See, e.g., *Phelps v. Dunn*, 965 F.2d 93, 100 (6th Cir. 1992) (religious services); *Johnson v. Knable*, 862 F.2d 314 (4th Cir. 1988) (table) (prison employment); *Kelley v. Vaughn*, 760 F. Supp. 161 (W.D. Mo. 1991) (same). While courts are usually deferential to prison officials' justifications, some courts have held in other contexts that discrimination based on sexual orientation and gender identity are subject to heightened scrutiny. E.g., *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012) (sexual orientation), *aff'd*, 133 S.Ct. 2675 (2013); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (gender identity).
- 30 *Doe v. Sparks*, 733 F. Supp. 227 (W.D. Pa. 1990).
- 31 *Whitmire v. State of Arizona*, 298 F.3d 1134 (9th Cir. 2002).
- 32 *Espinoza v. Wilson*, 814 F.2d 1093 (6th Cir. 1987); but see *Wilson v. Buss*, 370 F.Supp.2d 782 (N.D. Ind. 2005) (upholding ban on "blatantly homosexual" publications in prison on the basis that they would make a prisoner a target for abuse).
- 33 *Turner v. Safley*, 482 U.S. 78 (1987).

CHAPTER 4:

WORKING WITH JAILS (AND OTHER FACILITIES) ON LGBT POLICIES



WHILE THERE IS NO ONE WAY TO ADVOCATE FOR POLICY CHANGES IN JAILS OR other confinement facilities, there are some basics that are worth considering in any local effort. This chapter outlines key information you may need, approaches to developing relationships and writing policies, and suggestions for overcoming obstacles.

GETTING STARTED

Before jumping right into an LGBT policy campaign with a prison or jail, it is important that you have a solid understanding of an agency or facility's current practices and culture concerning LGBT issues. There are three general areas of understanding that will be very helpful for you in determining the content of the policy and in figuring out how you will work with the facility or agency to develop and implement the policy.

First, you will want to get a sense of the experiences, needs, and risks of LGBT prisoners detained in the facility. Second, you should also assess staff and administration attitudes and knowledge about sexual orientation and gender identity and expression and their openness to policy development. Finally, you should determine the current practices and policy at the facility in key areas such as screening and classification, how they are applied to LGBT people, and what, if any, training staff receive in this area. Once you have a clearer picture of the needs, problems, and practices within the agency or facility, you will be in a good position to start developing a solid plan for your new campaign.

Advice from an advocate: If you have not been through the system you do not know what it is like. Work with folks who have interacted with the system as well as those who work within it. Be a pen pal or go visit folks who are currently incarcerated or who have recently been incarcerated there. Hear what they are experiencing in jail. Be conscious that their concerns and wishes about prison conditions may not be what you think.

UNDERSTANDING PROBLEMS CURRENTLY FACED BY LGBT PRISONERS

While you may already be aware of common problems and risks that LGBT prisoners face generally, it will be advantageous for you to have a good understanding of the experiences, risks, and needs of LGBT people in the facility where you want to develop policy. This will allow you to focus your policy development on the specific problem areas that LGBT prisoners face in this facility. This is where talking to current and former LGBT prisoners key. If you are not already in contact with current or former prisoners, now is the time for you to outreach to these populations. Some ideas on how to do this include:

- reaching out to local LGBT service providers,
- reaching out to service providers who work with currently and formerly incarcerated people, such as prisoner watchdog groups, prisoner advocates, public defenders, community re-entry programs, and harm reduction programs
- participating in a community visitation program
- requesting to be a pen pal with a current LGBT prisoner, and
- asking community members you already know if they know anyone for you to talk to.

While gathering information from currently or formerly incarcerated individuals is a good place to start, it is also important to fully engage current and former prisoners to the greatest extent possible in every step of your campaign and in your campaign's leadership.

INVOLVING INDIVIDUALS WHO ARE CURRENTLY OR WERE PREVIOUSLY INCARCERATED IN THIS FACILITY OR OTHERS IN YOUR CAMPAIGN

Include formerly incarcerated individuals in your working group. If no one in the initial group of advocates planning the work has ever been incarcerated, consider inviting individuals who have been incarcerated to take an active role in your advocacy work—planning your strategy, meeting with officials, and developing policy proposals. If individuals lack the interest or ability to commit to being part of your core group, they may be able to take another role, such as sharing their story in a meeting with officials or in an officer training, or providing feedback on policy proposals. Whatever their degree of involvement, it is important that formerly incarcerated individuals not be tokenized or expected to represent the experiences of all currently or formerly incarcerated LGBT people.

Conduct a needs assessment survey. In many local communities, advocates have conducted needs assessment surveys to determine the key challenges affecting trans people and the things they think are most important to change. Sometimes these assessments focus on specific issues or segments of the trans community, such as folks who have had involvement in underground or street economies. Needs assessments can include paper and online surveys, community meetings, focus groups, or one-on-one interviews.

Create an advisory group. For example, the Sylvia Rivera Law Project (SRLP) has a Prisoner Advisory Committee that provides regular input on the problems and concerns facing incarcerated trans, intersex and gender nonconforming people in New York correctional facilities, as well as on the strategies and objectives that SRLP uses. The advisory group currently includes around 70 currently incarcerated individuals who regularly advise on and participate in SRLP's advocacy work. The group also shares stories and artistic works through an annual newsletter called *In Solidarity* and through a blog on SRLP's website.

UNDERSTANDING FACILITY STAFF AND ADMINISTRATION ATTITUDES ABOUT SEXUAL ORIENTATION AND GENDER IDENTITY AND EXPRESSION

In order to be able to get a facility to adopt and implement a policy you will first need to have a good sense of its staff and administrators' knowledge and attitudes about sexual orientation, gender identity, and gender expression, as well as their openness to creating policy in this area. You can get some of this information from current and former prisoners, but you will get a clearer picture of where things are if you are able to have honest conversations with the individuals who work in the facility or oversee it. Is there a friendly staff member who you already know or to whom you can arrange an introduction? If so, he or she should be able to help you gain an understanding of the general level of skills, knowledge, and comfort of agency staff and administration in this area. If you are already on good working terms with facility administration, you may want to consider asking them to pull together an informal focus group or have their staff complete a short, anonymous online survey that would assess knowledge and attitudes related to LGBT prisoners. Is the facility administration ready to improve practices related to LGBT prisoners but meeting reluctance from staff members? Knowing this type of information will help you better plan for policy development as well as staff training prior to implementing any new policies.

UNDERSTANDING CURRENT PRACTICE AND POLICY AT THE FACILITY FOR LGBT PRISONERS

It is important for you to be aware of any written or unwritten policies the facility follows that affect LGBT prisoners. You can start looking for these policies or procedure manuals online, as some agencies post some written policies on their websites. You can also make a written request to the agency asking for access to all or specific pieces of their written policies under your state's freedom of information law.¹ You will need to research how to do this in your jurisdiction. If you already have a good relationship with a staff member or administrator you can ask them for copies of relevant policies and manuals as well as any informal policies that they may be aware of. Be aware that if you request all written policies it may be a significant volume of information and the cost of filing a formal request for documents could be significant. In some jurisdictions, prisoner advocacy groups will already have copies of written policies; this may be a good place to start looking for information that is not available online. Below are some examples of the types of policies and the areas of practice to inquire into:

- Nondiscrimination and anti-harassment policy
- Personal rights of prisoners (e.g., privacy)
- Intake and risk assessment
- Classification
- Housing policies
- Medical care and medication screening and delivery
- Any policies specific to transgender prisoners
- Clothing, grooming, and hygiene
- Searches
- PREA policies
- Other policies regarding physical and sexual abuse prevention

With this information, you'll be ready to determine how you are going to engage the agency or facility you are looking to create policy for, what your advocacy campaign's goals are, and who you want to reach out to so you can create a broader coalition.

¹ For information on using freedom of information laws, see Columbia Human Rights Law Review, A Jailhouse Lawyer's Manual, Ninth Edition (2011), available at: <http://www3.law.columbia.edu/hrlr/jlm/chapter-7.pdf>.

BUILDING A RELATIONSHIP WITH FACILITY STAFF AND ADMINISTRATION AND HOW TO WORK WITH THE FACILITY

Identifying and Engaging with the Right System Officials

In order to make sure that any policy that is developed is specifically tailored to the facilities' practices and systems you will want to have line staff, security staff, and others who interact with prisoners on a daily basis involved in developing the policy. In addition, in order to make sure that any policy that is developed will actually get adopted and implemented, you will want to have department leadership and other administration actively involved in the process. You will need their buy-in. You may also want to consider engaging representatives from other areas in the agency, including medical, mental health, and programming/treatment staff. In some cases the provision of medical and mental health care will be done by a different agency and you may need to engage with representatives from that agency, such as the Department of Health, to ensure that medical care policies also implement LGBT-specific provisions.

It can be incredibly useful to build individual relationships with key officials and/or staff who share a personal commitment to the issues you're working on. These may be agency leaders, mid-level administrators, or front-line staff who are personally invested in ensuring the best possible outcomes and are willing to have candid conversations and help strategize about addressing the concerns of others in the agency, developing trust, and overcoming roadblocks. These folks may reach out to you or you may identify them in larger meetings. Depending on the size of the agency, there may be an employee resource group for LGBT employees that you can reach out to. Keep in mind that these folks work for the agency and may have limitations on their ability to meet or share information with you, but they can still help a lot. You will often need to take the time to build these relationships and do behind the scenes work before you can even start discussing what a policy could look like.

Gaining Buy-in

To be successful in influencing agency policy, you will likely need to develop relationships with key leadership and staff and persuade them that you can help them with their mission and goals. Although some agencies will start from a place of real ignorance about LGBT people, most agency leaders and staff want to ensure they are following the law, protecting themselves from lawsuits, minimizing conflicts with prisoners that could pose dangers to their staff, and providing a basic level of decency and safety.

You can use many tools to do some initial education with agency officials and gain buy-in for policy changes. Some helpful tools include personal stories from LGBT community members, data and findings from studies and official reports, examples of successful policies from other agencies, specific provisions of the PREA standards, and relevant court decisions. Being familiar with the PREA standards and their provisions relating to LGBT people will be very helpful here, because complying with PREA is very important to facilities. But in addition to talking about PREA, giving officials the opportunity to get to know LGBT individuals and understand who we are is invaluable. Offering to provide cultural competence training for their staff can also be a very helpful initial step.

Understand that leaders and staff may have a lot of questions and will look to you for answers. Sometimes their questions will be very basic and others may surprise you. Try to meet them where they are and answer their questions as best you can. If you don't know how to answer a question, tell them you'll get back to them and reach out for help from an expert.

TIP:

"Personal stories can really help officials to listen and can bring to life the issues faced by transgender prisoners."

— Flor Bermudez, former Youth in Out-of-Home Care Attorney, Lambda Legal

LESSONS LEARNED:

Developing policy for a jail or prison could take a very long time.

Doing this work requires perseverance and patience. Courtney Gray, Transgender Program Director at the GLBT Center of Colorado, explains that a willingness to work tirelessly is crucial. It is important to keep in mind that there is a common goal between jail staff and advocates when things get tough.

Coalition Building—You Shouldn't Go at this Alone

While you don't need a large, well-funded organization to do this work, you will be most effective if you engage the help of allies and experts beyond your core group of LGBT advocates. Ideally, other advocates in your community or elsewhere can provide you with knowledge of your local agency or facility, legal or policy expertise or research, added credibility, and a broader perspective. Remember that this is a particularly complex and challenging area for advocates—you shouldn't go it alone.

Consider reaching out to other organizations in your local community or state that may have experience working with this agency, even if not on LGBT issues. They may be willing to give you advice, key background information, or even join your campaign. Potential allies include:

- Legal services organizations that represent prisoners
- Public defenders and other attorneys who handle criminal matters
- Non-legal organizations that provide services to prisoners or monitor their treatment
- Organizations that serve formerly incarcerated individuals, such as community re-entry programs and harm reduction programs
- Racial justice organizations
- Legal or policy organizations focused on criminal justice reform
- State ACLU chapters
- LGBT or transgender organizations in a neighboring community or state that have worked with jails or prisons before
- Local policy focused organizations as well as LGBT and prisoner rights lawyers.

Many advocates have found it very helpful to bring attorneys in on the policy development and have had them do trainings for the advocates on the law and other policies. You can also reach out to national LGBT organizations such as NCTE for advice and assistance, such as providing copies of recent policies from other jurisdictions and providing feedback on policy proposals.

QUESTION: Should We Set Up a Committee or a Task Force? What Could that Look Like?

In order to more fully engage stakeholders, other advocates, and agency staff in your advocacy group's efforts at developing an LGBT policy, you may want to consider pulling together a task force, committee, or named coalition that will solely focus on improving conditions in the prison or jail for LGBT folks who are incarcerated.

What are the benefits of doing this? To start with, by setting up something new and separate from the organization you are working with, you can more easily spread the word around and get folks excited for a first meeting. You can also send out organization- or individual-specific invitations to those you believe will be important players in this effort. In addition, folks who may otherwise be unsure about attending a meeting that is led by one particular organization may be interested and excited to participate in a group where the leadership is coming from multiple perspectives.

Below are three common forms that a stand-alone task force, committee, or coalition could take. There are advantages and disadvantages for each of the forms but depending on your community and how interest in policy reform first developed, you may find that it is clear which type best suits you.

1. Advocate-led committees or task forces with involvement of agency officials

This is a very common format for LGBT policy development. Advocates from different organizations come together and invite other individuals as well as agency staff and administration to join the new committee or task force. Advocates host the meeting at a location that is comfortable for them and are generally the ones who drive the group forward. In order to truly involve system staff and administration, advocates should think about how to set up meetings at times that would also work for these individuals as well as ways to help them get involved and feel some ownership.

2. Advocate committees or coalitions that work on their own and then present policy to agency officials

If you have found it too difficult or even impossible to get agency staff or administration to sit at the table with you, you may have no other option than to develop policy recommendations for them on your own. One goal of this type of committee will need to be to figure out how to get your work in front of the agency for discussion. After presenting policy recommendations to them, the agency may become interested in working with you to refine the policy.

3. System-led committees or task forces where advocates are invited to participate at varying levels

Occasionally an agency will organize its own committee or task force and will invite you or other advocates to participate in policy development. They may ask you to serve as full members of the group or as occasional advisors. When agencies do this, it usually means that high-level administrators are supportive of improving policy. What may prove difficult is that the agency's ideas for what policy looks like may be very different from the advocates. If the agency is calling the shots, hosting meetings of the group, and deciding who can and cannot participate, you can help steer the policy in the right direction by helping the agency see that they need the input and involvement of community advocates in order to craft a policy that is workable for all stakeholders. This can be done by offering trainings for the group and sharing personal stories among other things.

HOW POLICY DISCUSSIONS GET STARTED

Advocates Initiate Policy Discussions

If you are coming at this completely from the outside, you will need to figure out who to initiate talks with from the facility and how to start the conversation. Before you do so, however, you should reach out to others who have worked on jail and prison policies or conditions in your area.

After completing your initial research and consulting, there are many ways to make contact. If you already have a good relationship with a local or state legislator or another government agency, or if your local government or mayor's office has an LGBT-affairs liaison, you could ask them for advice or an introduction. Other local or state advocates, whether LGBT groups or other progressive or criminal justice reform groups, may be willing to approach the agency with you or make an introduction on your behalf. If you have no other options, it is okay to make a cold call to the agency and request a meeting. If there have been any recent stories in the media or cases in the courts in your state relating to LGBT prisoners, this issue may already be on the minds of officials. Depending on the facts and outcomes of those situations, this may provide either a helpful opening or a sticking point you will need to get past.

Sometimes an agency will initially be hesitant to engage with community advocates or talk about LGBT issues. If they are very resistant, public pressure through the media, protests, and pressure from a broader coalition of community groups (beyond the LGBT community) may be useful—but keep in mind that ultimately you will need to develop a working relationship with the agency.

Correction Officials Initiate Policy Discussions

If your organization has been approached by a local jail or department of corrections because they have identified that they need to improve practices with LGBT prisoners, you will need to figure out how open they are to working with advocates and figure out a way to get them to include you in the development of policy. You may also need to shift the focus to issues that you have identified as most important. It may be helpful to reach out to local attorneys who do LGBT work or prisoner rights or general civil rights organizations civil rights in order to bring more advocates to the table. When agencies initiate policy development they may have a very clear picture of what the policy will say regarding transgender prisoners and housing or medical access. Offering to provide trainings that help staff and administration to better understand these issues may make a big difference in getting the facility to be more open about what the policy ultimately says.

In some cases, corrections officials are approaching advocates because they have been compelled to create a policy in response to a lawsuit or government report. If you find yourself in this situation, it may be difficult to get the facility to address any issues outside those that it sees itself as being required to address. You should, however, still try pressing for a broader approach to policy development.

Department Has Created a New Policy with No Advocate Involvement

If you recently found out that the local jail or prison has created a new policy related to LGBT prisoners and the policy is either not being implemented or needs to be improved upon or expanded in order to respond to the needs of LGBT prisoners, you may find it difficult to make inroads with the agency. This is where coalition building will be key. In such a situation elected officials may prove useful allies. You also must determine how to make the administration aware and care that the policy is not being implemented or is inadequate as is.

QUESTION: Should we try to develop one policy that is specific to the range of needs of LGBT prisoners or would it be better to embed provisions that address LGBT issues into the already existing policies of the facility?

As with many other things addressed in this guide, there is no universal right answer here. You should raise this question with the facility, advocates who have worked with the facility before, and corrections experts you trust to see what they think makes most sense for how their policies work. You should also engage individuals presently and formerly incarcerated in the particular facility who may have a sense of which directives and policies are most important. Some important questions include: What will be most operationally effective for the facility in order to implement change? What would be the best way to make sure that staff and prisoners are aware of these policy protections? What is the easiest way for the facility's administration to adopt the new policies?

STRATEGY AND APPROACH

SPOTLIGHT:

The DC Trans Coalition (DCTC) used protests to call attention to the need for a comprehensive policy for the DC Department of Corrections. DCTC had first attempted to work with the agency on policy creation but were mostly ignored so they moved to public protests. "Protests help you get in the door," Jeff Light from DCTC stated. "When you are a group... that represents a small voting block you've got to make a little bit of noise to get a seat at the table." Once at the table, DCTC brought in legal and policy experts as well as affected community members to press for the best policy they could get.

Handling Conflict Between Policy Advocates and the Facility

It's important to remember that when it comes to writing or revising its own policies, the agency is in control of the process. They will be the ones who ultimately decide what gets into the policy and what doesn't, what level of involvement the advocates will have in the final drafting of the policy, and whether they are actually going to adopt anything that gets developed out of the work of your campaign. Therefore, keeping a good relationship with the agency staff will be an important part of the overall work of your campaign.

But it won't always be easy to do this. There will some folks who mean well but don't know what to do, and others who are always focused on the negative. Some of the individuals you are working with may even make homophobic and transphobic remarks. Not all advocates will be able to sit in meetings with facility staff who repeatedly use wrong pronouns or who say things that are hurtful without intending to. Unless the facility is being legally required to develop new policies (say, because of a lawsuit), the officials you are sitting down with generally want to make things better for LGBT prisoners but may not do a good job at showing it. In addition, what they think is better may not be the same as what you think is better. In order to keep things moving forward, you may sometimes have to give facility staff the benefit of the doubt that they want to learn and help. This can be hard to do, especially for people who have personally been harmed by the policies and practices in place in the facility. You must strike a delicate balance when working with facility officials—if they feel advocates are attacking them when they see themselves as trying hard, they may stop working with you completely. While this does not mean you should ignore inappropriate comments from facility staff, it may mean that rather than calling the administrator out in front of the group, one or two campaign members should speak with that person privately about what was said and why it was problematic.

These types of tensions are one reason it is very valuable for advocates to meet separately from facility staff to discuss how the process is going and plan next steps. Advocates can then speak freely about any anger or distrust that they may feel without jeopardizing the relationship with agency officials. It can also help for a campaign member or ally who understands both the facility's perspective and the advocates' perspective to meet with your team to help foster a better sense of how to discuss desired policy changes in a way that everyone can understand and value.

LESSONS LEARNED:

You may be met with ignorance and possibly even hostility from officials.

To help mitigate this, you should focus on assisting agency staff to become culturally competent around trans identities and issues. You may need to do a lot of education, including explaining the basics of gender identity and how (and why) to respect transgender people. Even as you do these things you will need to have a thick skin and give people the benefit of the doubt, especially at the beginning of the process.

ANTICIPATING AND RESPONDING TO FACILITY ADMINISTRATION AND STAFF CONCERNS

How to Respond to Officials' Concerns or Objections

Determine what legitimate concerns exist and figure out how to address them in policies or otherwise. Identify what fears exist that could be overcome through educating staff. You will need well-supported arguments, data, tools, and other evidence in order to help put facility concerns at ease. Examples of common concerns and responses are provided in chapter [5.5]

Some departments may want to be assured that they are not going out on a limb with untested policies. You can give encouragement by sharing policies from other jurisdictions and explaining how this new policy is simply a part of complying with the law. On the other hand, there are some departments who see themselves as cutting-edge. If that is your situation, you get them excited about leading the way by pointing to policies from other jurisdictions and showing them how they can do better, or by letting them know that they are going to be the first to develop a policy that addresses a particularly important issue.

Sometimes the objections you hear from the facility are based not on a discomfort with LGBT policy but on bureaucratic roadblocks that the facility has not shared with you. It is important to understand what is behind any objections that are being raised so that you can address them appropriately. The facility may need to handle these issues before it is able to move forward with policy development. There is also the possibility that you may need to find a way to get around these roadblocks without waiting on the facility to resolve its internal issues.

TIP:

Include in the policy a process to increase transparency with implementation, such as a ninety-day review process to be sure the policy is being implemented the way that it is written.

Policy Adoption and Implementation

Once the agency has started writing a policy it is important to stay engaged as much as possible. The details of these policies can be critical. Ask if you can provide feedback on drafts of the policy before it is finalized or if you can participate in the actual drafting process. Allied groups in your community and national groups like NCTE can help you review drafts and provide focused feedback.

At some point, it may become clear that there are some issues the agency is not currently prepared to address or is not willing to address in the way you recommend. The agency is ultimately in charge of deciding its own policies but you may have to decide if the changes they are ready to make are enough of a step forward to warrant supporting their adoption.

Either before, during, or after the process of actual drafting, you may want to ask the official or officials with whom you have the best relationships whether (and how) you can help get internal buy-in to adopt the policy, or help with implementation. Help getting buy-in may mean meeting with higher officials in the agency, gathering support from other community groups, leveraging relationships with elected officials, providing additional information, research, or even putting them in contact with officials at other agencies that have adopted similar policies. If you do reach out to individuals at other agencies, you will want to engage the person(s) you're putting them in touch with and have a good idea of what they are going to say. Some may be more helpful, or more willing to help, than others.

Helping with implementation may mean providing or participating in staff training, educating the media and LGBT community members, and finding ways to monitor how the policy is working. One option is to propose an ongoing committee or task force of agency officials and community members that would continue to meet periodically to oversee implementation of the policy and identify and resolve any problems that may arise. With or without a formal monitoring process, the best way to know what is really going on and what still needs to be done is to support and work with currently and formerly incarcerated LGBT individuals and local organizations that serve them. Additional strategies to address implementation issues might include filing freedom-of-information requests, reporting violations of PREA standards to the agency's designated PREA auditor, and working with legal organizations.

FROM THE FIELD:

Colorado advocate Courtney Gray, a trans woman, along with a trans-masculine colleague went through the prisoner intake process at the Denver Sheriff Department after their transgender prisoner policy was adopted, being processed as they were newly arrived prisoners. While the administration knew that this was a test, the staff conducting the intake did not. It helped to give them an accurate look at how staff would actually treat transgender people under the new policy.

TRAINING

In order to implement a policy, training staff and administration about the policy is key. Ideally this would happen before the policy is implemented or shortly thereafter. Some questions that will come up include: Who will develop the training module and who will deliver it? Is this a department-led training or can advocates come in with their own materials? Would the facility consider conducting a training jointly with advocates? How long should the training be? Who will be required to take it? Will it be a one-time training or will it happen periodically?

MEDIA AND MESSAGING

Throughout this process, you may want to use media to build support or pressure for your work. In some cases, the agency you're working with will want to publicize its work with you and take credit for doing something positive. Publicizing and praising the progress you've made can be valuable for educating community members about their rights, sustaining relationships with the agency as you work on implementation, and laying the groundwork for advocacy with other agencies or lawmakers. Think hard about what your message should be, as well as whether it should depend on your audience or what point you're at in your advocacy.

Always keep in mind that the policies you're advocating for are not a cure-all. They will not end violence behind bars, or address many of the other harms caused by mass imprisonment. Changing how people are treated inside facilities can make a huge difference in their lives—but it is no substitute for changes in laws and in our communities that would keep LGBT people out of jail or prison in the first place. Also, keep in mind that the agency you're working with could have a very problematic history and reputation with some communities, and while the staff you're working with may genuinely want to do good, the agency may also want to improve its image.

You may want to consider carefully the tone and extent of your praise for specific policy changes or other steps being taken, as well as any praise of the agency itself. Also consider whether there are other changes, with this agency or with other local or state agencies or laws, which you may want to identify as also needing to be changed going forward. For example, if there is a separate campaign underway to combat racial profiling or reform drug laws or criminal sentencing in your city or state, you may want to identify this as a logical next step. While it can be powerful for several groups to make a joint statement, in some situations it may be useful for different organizations or individuals to use somewhat different messages. Regardless, these are things you'll want to consider before the agency puts out a press release or a reporter calls you for a statement.

SUPPORT INDIVIDUAL LGBT PRISONERS

Even with stronger policies on paper, LGBT prisoners often need individual support and advocacy. LGBT prisoners often lack the support of family or friends outside, and may face additional obstacles to accessing the limited organizational supports available to prisoners generally. Supportive connections outside prison walls can be invaluable in surviving the trauma and isolation of imprisonment, even if it comes only in the form of letters. When prisoners' rights aren't being respected—whether under an LGBT policy or any other law or policy—it can be virtually impossible to resolve alone from behind bars. Targeted individual advocacy by those outside can be incredibly effective, and is sometimes the only way any policies regarding prisoners' rights get enforced.

You don't need to be a lawyer, social worker, or expert to support and advocate for individual prisoners. This can involve corresponding by mail, visiting in person, helping track down information or obtain needed personal items, writing letters or making calls to prison officials to address grievances, contacting supportive organizations to provide legal assistance or make arrangements for needs following release, or using a petition or local media to draw attention to an urgent problem (e.g., being denied medical care or kept in solitary confinement). You'll need to be familiar with facility policies on letters and visits. Much of this work is being done by small groups of individuals or small organizations like Black and Pink and the Transgender & Intersex Justice Project. Make a commitment to stay engaged and support LGBT prisoners.

CHAPTER 5:

KEY TOPICS AND CONSIDERATIONS FOR LGBT JAIL POLICIES



THIS CHAPTER IDENTIFIES KEY ISSUES THAT ADVOCATES SHOULD FOCUS ON IN developing policies toward LGBT people, and provides recommendations, advocacy considerations, relevant PREA provisions (where they exist), and examples of existing policy language for each topic. Applicable provisions from the PREA standards are important to understand as they will typically help frame the conversation, together with relevant research, court rulings, and individual stories. (Note that the PREA language provided comes from the standards for adult jails and prisons. Separate PREA Standards apply to police lockups, juvenile facilities, and community facilities, which are often similar but have some important differences.)

TIP:

Don't go into this conservatively or defensively. Press for the strongest possible policy and see what you can get.

Examples of language from existing policies are provided as illustrations. These examples may need to be adapted to the agency you're working with, and in many cases can be improved upon. We do not recommend copying language word-for-word from these examples, nor do we necessarily support all other provisions of the agency policies excerpted here. These examples can give you an idea of what you may want your policy to look like, and their adoption by other agencies can provide support for your advocacy. Most of the policy elements discussed here have already been adopted by a number of corrections, juvenile detention, and/or law enforcement agencies, and full copies of many of these policies can be found online or obtained from national organizations such as NCTE.

Questions to be thinking about when working on content development within each of these key areas:

- What procedures would be most effective at protecting the physical safety and the physical and mental health of LGBT prisoners?
- What procedures would provide the most respect to LGBT prisoners?
- What is the agency required to do by the law—be it PREA, the Constitution, or specific state laws? Do these procedures meet or exceed the agency's legal obligations?

1. NON –DISCRIMINATION STATEMENTS

The cornerstone for any written policy that addresses the conditions of confinement for LGBT people is a clear non-discrimination statement. Such a statement should specifically prohibit discrimination as well as verbal, physical, and sexual harassment of prisoners on the basis of actual or perceived sexual orientation and gender identity by any staff member—including correctional officers, volunteers, and contractors—as well as by other prisoners.

Non-Discrimination Statement Policy Excerpts

Cumberland County, Maine Sheriff's Office—Policy D-243A Transgender Inmates—12/2009

5. While housed at the Cumberland County Jail transgender, intersex and transsexual inmates shall not be discriminated against and shall not be subject to verbal or physical harassment or a hostile environment.

Denver Sheriff Department, Department Order 4005.1, June 6, 2012

G. 5. While in the custody of or while housed at any division of the Denver Sheriff Department, DSD staff:

- a. Shall not discriminate against transgender/gender-variant inmates. <ACA 4ADLF 6A 02; 6B02>
- b. Shall not subject transgender/gender-variant inmates to verbal or physical harassment or create a hostile environment. <ACA 4ADLF 6A 02>

2. INTAKE AND IDENTIFICATION PROCEDURES AND RISK ASSESSMENTS

Intake is most often the first time facility staff will come into contact with new prisoners and will be able to identify those with specific vulnerabilities. Identifying LGBT prisoners and others who are vulnerable is the first step in decreasing safety risks and addressing concerns of these prisoners. If LGBT prisoners are not identified, the facility will have a harder time addressing specific safety concerns when making classification and housing decisions for LGBT prisoners and meeting the specific privacy and health care needs of transgender prisoners. Therefore, policies should include intake and identification procedures to identify LGBT prisoners and those who are perceived to be LGBT in order to provide for their safety and to meet their specific needs.

Identifying LGBT and other potentially vulnerable persons is part of an overall process of risk assessment. The assessment-screening instrument should use objective factors that are less likely to penalize LGBT people on the basis of bias or misunderstanding. The facility will most likely already have some policy and/or procedures in place related to risk assessments, in light of the requirements of the PREA Standards and court decisions.

You should review any current risk assessment related policy or procedures that the facility uses and see if there is any reference currently to LGBT people, sexual orientation, or gender identity. You've want to make sure to identify any negative language, for example, anything that may result in LGBT prisoners being seen as prone to abusive behavior based on their identity. Most likely, the facility's procedures in this area will not include any language that is specific to LGBT prisoners and will need to be updated to incorporate the PREA requirements, including assessing actual or perceived LGBT status as a risk factor for victimization. While some facilities develop separate policies focusing specifically on LGBT or trans prisoners, it may be easier for staff to learn and follow provisions that are incorporated into the existing, general assessment policies. Any policy changes in this area should indicate that prisoners' identification as LGBT, or the perception that they are LGBT, fall under the list of criteria used to assess prisoners' risk of victimization and should not be used as an indicator of potential abusiveness.

The goal with this type of policy is not to force or require prisoners to come out and identify themselves, but rather to ensure that those prisoners who are concerned about their vulnerability based on their identity, or those who need access to medical care or facility accommodations that respect their gender identity, have a clear opportunity during the intake process to inform facility staff of these concerns and needs. It is important to remember that many LGBT prisoners will not feel comfortable disclosing their identity to prison or jail officials and also that there are prisoners who may be facing similar vulnerabilities as LGBT prisoners but do not self-identify as LGBT. Because prisoners who are uncomfortable disclosing their identities and prisoners who do not identify as LGBT may still be vulnerable to abuse because of their appearance, mannerisms, or other characteristics, any policy in this area should also provide guidance to intake staff on how to identify prisoners who may be perceived as LGBT but who do not otherwise indicate that they are LGBT.

What intake and identification procedures look like is very facility-specific, but any policy you develop in this area should include direction related to the following:

Intake Screening: To Ask or Not to Ask

You will need to make a decision as to what should happen during intake that will help to identify LGBT prisoners without singling them out or creating a situation where the identification process is itself harassing. The overarching question to answer in this area is whether or not you want intake procedure to include asking all prisoners about their sexual orientation and gender identity. While the PREA Standards require an agency to attempt to collect information on the sexual orientation and gender identity of prisoners in order to decrease risk of sexual abuse, specific steps explaining how facilities should go about doing this are not included in the standards. The PREA Standards do require that facilities ask questions related to prisoners feelings of vulnerability and this line of questioning may help to open up conversation related to a prisoner's LGBT identity.

If you determine that you want the facility to ask all prisoners about their sexual orientation and gender identity at intake, below are a handful of additional issues that you should address in the policy. Simply stating that intake staff need to ask about sexual orientation and transgender status does not provide any guidance on how to do this in a respectful manner that provides for the safety of those who are LGBT.

- Who will ask these questions?
- At what point in the intake process will the question(s) be asked?
- Will the intake screening take place in a private setting or near staff and other prisoners?
- How should the questions be asked?
- What should the facility do to encourage prisoners to feel comfortable disclosing?
- Where and how should information related to a prisoner's LGBT identity be recorded? Who has access to this information and when?
- What training will intake screeners receive on how to inquire about LGBT status?

If you are considering recommending that intake ask everyone about their sexual orientation and gender identity, it would be helpful to the facility if you developed the language and framing of the question. You can then suggest including this language in the policy, post orders for specific officer positions conducting intake screening (these are similar to a detailed job description in many correctional systems), or training materials. Here are some additional ideas to consider:

- Prior to asking about identity, it would be helpful if intake staff explained why they are asking about these things and to say that they ask all prisoners this question during intake.
- It may also be helpful to phrase the question in a way that does not demand a yes or no answer to "Are you LGBT?" Instead, after asking about other vulnerability factors, they could ask, "Are there any other factors that may make you vulnerable or require special consideration, such as being gay, lesbian, bisexual, or transgender?"

If you determine that you do not want the facility to ask all prisoners about their sexual orientation and gender identity at intake, your policy should instead provide guidance to staff on how to identify, either at intake or at a later time, who is (or may be perceived as) LGBT. One possibility here is for the facility to have a general vulnerability question that intake staff asks everyone that provides prisoners with an opportunity to express vulnerability concerns related to LGBT identity. When a staff member believes someone could be LGBT, staff members would then directly ask and explain that they are asking in order to identify prisoners who are at risk of abuse.

If you are hesitant about having intake staff handle sensitive questions related to sexual orientation or gender identity, you may want to consider developing a policy where information about sexual orientation or gender identity is ascertained through multiple channels in addition to intake, such as through conversations during medical and mental health screenings or by reviewing relevant arrest records or records from prior incarcerations.

Regardless of the approach taken or the timing of the inquiry, any policy in this area should include a statement that prisoners will not be disciplined for any refusal or nondisclosure of their LGBT identity.

QUESTION: Should intake officials be attempting to identify folks who are LGBT or gender nonconforming based on appearance, behavior, or mannerisms, or is relying on these kinds of judgments alone a form of inappropriate stereotyping?

Prison and jail officials have expressed a real need for guidance in this area. While gender nonconforming appearance, behaviors, or mannerisms should not be the sole basis for labeling someone as LGBT, staff should be looking at these factors during intake to help identify prisoners who are potentially at risk. When intake staff thinks a prisoner may be vulnerable based on the prisoner's gender nonconformity, they should be required to ask the prisoner whether he or she feels vulnerable to abuse because they are LGBT or because others may perceive the prisoner to be LGBT. This inquiry should be made in a respectful manner and in a private location.

Ultimately a facility can determine someone is vulnerable to abuse because of gender nonconformity regardless of how the prisoner identifies or responds to a question about his or her sense of vulnerability. However, the facility should not label a prisoner as LGBT who has not self-identified as such.

Specific Guidance for Identifying Transgender Prisoners

Intake staff may need specific guidance to help them to identify prisoners who may be transgender in the ordinary course of intake assessments. Guidelines for staff might address some of the following points:

- A prisoner's gender identity and transgender status may be determined by: self-identification by the prisoner; statements regarding a prisoner's preferred name or pronouns; a prisoner's appearance; court, medical, identification, or other records or documentation; or other factors that may come to light during standard intake procedures.
- It is important to understand that while some prisoners may self-identify during intake questioning, prisoners may use a variety of terminology to describe their identity depending on their cultural background and age, e.g., a prisoner may self-identify as transgender, transsexual, gender nonconforming, or any one of many terms that have similar meanings in a prisoner's primary language if other than English. Some transgender prisoners may describe themselves simply as gay, regardless of their actual sexual orientation. Some prisoners may not use identity terms at all but instead will make statements along the lines of, "I am trapped in the wrong body," or "I am really a woman."
- When reviewing a prisoner's identification documents, court, or medical records, or other documentation, staff should determine whether these documents identify a prisoner as transgender or if they use a gender marker that is different from the gender the individual is living and outwardly presenting as. For transgender prisoners who have been transferred from a local jail, their transgender status is often noted in any accompanying paperwork, reports, or files. For transgender prisoners who were recently arrested, it is not uncommon for their arrest reports to note that they were dressed in women's clothing at the time of arrest.
- In other cases, an individual's appearance (e.g., clothing, wig, hair and grooming, makeup, breasts, etc.) or preferred name or AKA may indicate to staff that a prisoner may be transgender.

Immediate Decisions to be Made After Identifying a Transgender Prisoner

Once a facility identifies that a prisoner is transgender, there are some actions that must be taken in order to better protect the transgender prisoner's safety, dignity, and privacy before final decisions are made regarding classification, housing, and medical care. You may want to consider including in your policy some guidance for intake staff on how to make these immediate decisions related to temporary housing and assessment, referrals to specific committees to make longer term decisions, and using a screening form to help identify the transgender prisoner's preferences related to their specific privacy and safety needs. Numerous jurisdictions are now employing some version of a screening form for transgender prisoners that allows them to state their preferences related to some or all of the following: gender of individual who will search them in the event a search is necessary, pronoun, housing, and medical needs. For examples of such forms, see Appendix B.

Relevant PREA Standards and Guidance

PREA Standards—DOJ PREA Standards § 115.41

- (d) The intake screening shall consider, at a minimum... to assess inmates for risk of sexual victimization:
 - (1) Whether the inmate has a mental, physical, or developmental disability;
 - (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.
- (h) 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.

Screening for Risk of Sexual Victimization and for Abusiveness: Guidelines for Administering Screening Instruments and Using the Information to Inform Housing Decisions, National PREA Resource Center, May 2013¹

It is best to ask directly about sexual orientation and gender identity rather than to guess or try to interpret based on visible traits. Although staff's observations may inform their first impressions about people they are screening, it is important that information provided through the screening interview be given more weight. Some staff have found they are more successful when they introduce questions about sexual orientation and gender identity by saying, "I ask you because there is no way to tell the answers from the outside" or "I'm going to ask you some questions that I ask everyone I see" or some similar phrase to indicate you are not targeting that individual.

¹ Available at: <http://www.prearesourcecenter.org/sites/default/files/library/preascreeningguidelinesvera.pdf>.

Policy Excerpts Regarding Identifying Transgender Prisoners

Denver Sheriff Department, Department Order 4005.1, June 6, 2012

5.A.1. When determining whether prisoners are transgender/gender-variant, the following should be taken into consideration:

- a) Prisoner's appearance or behavior does not match the gender marker on the prisoners arresting/transportation paperwork or identification.
- b) Prisoner self-reports. If there is doubt or a question concerning the validity of the self-report the DSD officer shall consult a supervisor and if necessary, medical staff.
- c) Arresting/transporting agency has alerted the DSD staff to the prisoner's transgender/gender-variant status.
- d) Prisoner's past history, if known.
- e) DSD officer discretion.

D. Medical Staff Notification

- 1. The intake search officer will be responsible for notifying the medical staff that a transgender/gender variant inmate has been identified.

E. Temporary Housing

- 1. The transgender/gender-variant inmate shall be temporarily housed in Administrative Segregation. This temporary housing shall be for no more than 72 hours, excluding weekends and holidays.

Cumberland County, Maine Sheriff's Office—Policy D-243A Transgender Inmates—12/2009

A.1. When an individual indicates they are transgendered or intersex at any time while in custody, or an inmate's gender identity, appearance, overt expression or behavior differs from their birth sex or genitalia, jail staff shall question the individual regarding sexual identity, gender identity or gender expression.

- 5. Upon intake, when an inmate's gender-related expression, identity, appearance or behavior differs from their sex, staff shall place those inmates in one of the side cells in the intake area during intake, their status will be protective custody. If the inmate has been housed previously at this facility, prior housing assignment will be considered.

B.1. After the completion of intake and the inmate has been identified as transgender or intersex, they shall be housed in one of the intake side cells on protective custody status consistent with the inmate's gender declaration for no more than 72 hours, excluding weekends and holidays until the Transgender Review Committee can arrange for their housing needs.

Santa Clara Probation Department, Juvenile Hall Transgender Procedure Guidelines, 2012

A. Transgender youth may be identified during admissions based on:

- 1. A youth's statements that he or she is transgender, is "trapped in the wrong body," or is really a different sex than his or her birth sex;
- 2. A minor's request to be called by a name that is not traditionally associated with his or her birth sex;
- 3. Any statements in arrest reports indicating the youth is transgender or that the police were unsure of the minor's sex.

B. Upon admission, a minor who, may fall under the definition of transgender as noted above, but who has not previously filled out a Transgender Preference Form, will be admitted and processed in the following manner:

1. During the regular admit process the Admit Counselor will ask:
 - a. Do you go by another name other than the one listed here on the JCR [juvenile court record]?
 - b. Do you dress as a boy or girl in the community?
 - c. Do you see yourself as a boy or a girl?
2. The Admit Counselor will ask minor's preferred name and pronoun and note this on the unit assignment sheet and the rolodex card.
5. In order to ensure their privacy and safety, the transgender minor will be temporarily classified as an NR (no roommate) / O (Other) risk and shall be provided a single room pending further review by the Unit Supervisor and/or housing decisions based on the MDT [multi-disciplinary team].

3. CLASSIFICATION AND PLACEMENT ASSESSMENTS

The facility is likely to already have a policy in place that lays out general classification and placement procedures. You should review this policy in order to determine if there is anything specific to LGBT prisoners that may need to be changed. Some things to look for include:

- Blanket policies regarding the housing of LGBT prisoners, such as requiring LGBT prisoners be placed in segregation or in a special unit.
- Statements calling for the classification of LGBT prisoners as sexual offenders or other similar language
- Statements requiring housing of transgender prisoners based on genitalia or birth sex

If the current classification procedures include any of the above items you will likely need to work on having these statements amended or removed from the policy in addition to adding provisions that address some or all of the issue areas discussed below, either in the current policy or in a stand-alone LGBT policy.

Limiting the Use of Segregation

The use of solitary confinement and other forms of isolation is not unique to LGBT prisoners but that affects LGBT people in a very disproportionate way. Although LGBT people may be vulnerable to abuse at the hands of other prisoners, segregation and isolation is not the appropriate way to address this vulnerability. In most facilities “segregation” is used as punishment for rule violations or to keep violent or aggressive prisoners separated from those who are more vulnerable. It is difficult or impossible for prisoners who are isolated or placed in protective custody to access education, training, recreation, employment, and other support services that are available to those in general population. For many, being placed in segregation or protective custody also means being locked down for 22-24 hours a day in a small cell with very little human interaction or activity of any kind. Such conditions are psychologically difficult for all human beings to handle and can be especially damaging for youth and those with pre-existing mental illness or mental disabilities. As a result, segregation units typically have the highest rates of self-harm and suicide in correctional systems. Unfortunately, it has been common to automatically place individuals in segregation due to their LGBT status. Protective custody should only be used as a last resort or when addressing a specific imminent threat and then only for the shortest period necessary.

The best policies create strict, short timelines for reviewing the use of segregation, require documentation as to the reasons for the placement, and identify examples of alternatives that must be considered before individuals can be placed in segregation for protective purposes. Alternatives to segregation might include increased supervision or escorts for the vulnerable person, single-cell placement or placement with a similarly vulnerable cellmate within the general population, transfer to a different facility (including, for a transgender person, from a male to a female facility or vice versa), or, when possible, consideration for parole or another form of release. For as long as an individual remains in segregation, they should have equal access to programs, privileges, visitation, counsel, and recreation available to other prisoners. You may also want to consider including a statement in the policy that prisoners can opt in to protective custody if they are fearful for their own safety.

Relevant PREA Standard

PREA—DOJ PREA Standards § 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. ...
- (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.

Limitations on Use of Segregation Policy Excerpt

Cook County, IL Department of Corrections, Interagency Directive No. 64.5.42.0, March 7, 2011

D.7. An inmate with Gender identity disorder shall be housed in Protective Custody or Administrative Segregation only when there is reason to believe the inmate presents a heightened risk to self or others, or if there is an immediate risk of harm to the inmate by other inmates. This placement shall be for such limited periods of time during which the heightened security risk exists.

D.8. While in Protective Custody or Administrative Segregation, an inmate with gender identity disorder shall not be deprived of access to educational, vocational, or other program services available to other inmates in special housing.

U.S. Immigration and Customs Enforcement, Directive No. 11065.1, September 4, 2013

- 1) A detainee's age, physical disability, sexual orientation, gender identity, race, or religion may not provide the sole basis for a decision to place the detainee in involuntary segregation. An individualized assessment must be made in each case.

Not Classifying LGBT People as Sex Offenders

Facilities should not label or treat LGBT prisoners as sex offenders or house them with sex offenders simply because of their LGBT status. Classification or placement as a sex offender should not occur without adequate due process protections, such as a hearing, an evaluation by a qualified mental health professional, and an opportunity to appeal. If you are aware that this has been a problem in the facility you are developing policy for, you should include a statement in the policy that LGBT prisoners should not be treated as sex offenders.

Gender Specific Housing Determinations for Transgender Prisoners

Individualized Assessments

When facilities don't have clear policies in place, transgender prisoners usually end up being placed by default in a men's or women's facility or unit based on their genitalia. With this understanding in mind, many state and local correctional and law enforcement agencies have adopted clear written policies concerning housing placements for transgender prisoners. The PREA Standards require facilities to make case-by-case decisions that prioritize a transgender prisoner's own views with respect to his or her own safety.²

This is likely to be the most difficult area for you to develop policy. For a discussion on how to respond to common objections from facility officials regarding housing transgender people consistent with their identity, see chapter 6. This may be an area to consider reaching out to regional or national groups such as NCTE or others mentioned in this resource.

Because a policy of individualized decisions leaves the agency a great deal of discretion, it will be especially important to monitor implementation of new policies to ensure that the facility does not continue to enforce rigid rules regarding anatomy or other personal characteristics. You will want to try to find out as much as possible about how many transgender individuals have been housed consistent with their gender identity, how many have not, and the reasons documented for not doing so. This is a key reason to press for involving community stakeholders in ongoing implementation or consultation (see below) once the policy is implemented.

HOUSING AND GENDER: WHY A CASE-BY-CASE APPROACH?

In almost every other context—workplaces, schools, hospitals, shelters, etc.—we advocate unequivocally that all people have full and equal access according to their gender identity. Indeed, we maintain that this is the only approach that is truly non-discriminatory. So why not advocate for this same approach in jails and prisons? We believe advocating for a case-by-case approach is more responsive to the unique challenges and circumstances of the correctional facilities and is supported by existing laws in most jurisdictions.

We believe all trans people should have the right to be treated according to their self-identified gender for all purposes, in all settings. This is exactly what many trans people would wish for themselves in a custodial setting, and what would be safest for them. However, in talking to transgender people who have been incarcerated and organizations that work directly with incarcerated people, we have learned that some trans people still feel safer being housed in a facility for their birth-assigned sex. This may be because (for example) a transgender man feels that in his case he would be identified easily as a target for abuse in a men's and would be safer in a women's prison, or (for example) a transgender woman has been housed in a men's jail before and is uncertain how she would be treated in the women's jail.

Given these realities, and the difficulties of changing mindsets of traditionally rigid correctional institutions, we believe advocating for a case-by-case approach is what makes sense at present. The national PREA Standards require agencies to take a case-by-case approach, and this approach has already been implemented by many agencies. Our suggestions aimed at making sure that the most weight is given to prisoners' own views of where they should be housed, and that any presumption is in favor of housing based on identity, not anatomy. The other policy features we suggest are aimed at ensuring that individuals' safety and dignity are protected to the greatest extent possible no matter where they are housed.

² While some facilities allow transgender individuals to waive the individualized process and be housed according to their genitalia, this can result in undue pressure on prisoners to waive their rights, and it is not clear how this is consistent with the PREA Standard.

Prioritize Safety of Transgender Prisoners

Because facilities have a legal responsibility to not be indifferent to risks of harm for all prisoners, a good policy will explicitly highlight safety for the transgender prisoner as a priority. A good classification policy will also seriously consider a transgender prisoner's sense of where he or she would be safest amongst the factors used to determine which gendered placement is most appropriate for that prisoner. In fact, the PREA Standards require this, because individuals often can provide essential perspective concerning how they may be perceived and where they are most at risk. The prisoner's sense of where he or she will be safest should be prioritized over other factors.

Range of Housing Options

When developing policy related to classification, it is important that you have an understanding of the layout of the facilities your policy will apply to. Some questions to consider include:

1. Are there separate facilities in different locations for men and women?
2. Are prisoners housed in single cells generally, with one or more roommates, or in bunk or dorm rooms with many others?
3. Are there units that are specific to vulnerable prisoners? What conditions/restrictions do prisoners in such units face?
4. Are housing decisions made at one location like a reception center and then prisoners are sent to a range of different types of facilities?

If the agency you are working with has a range of options, you should include language in the policy that requires the facility to consider such options when making a placement determination for a transgender prisoner. Bunk rooms and other group housing settings are typically very unsafe for transgender prisoners. If the facility you are developing policy for either exclusively uses bunk rooms or occasionally does, you should try to talk with transgender people who have been housed in these group settings about their experiences. Although in many cases you may want your policy to include language that either discourages or even prohibits placing transgender prisoners in bunk rooms, you may hear from former prisoners that there are social or other benefits to being housed in a bunk room that they do not want to lose. If that is the case, you should include language in your policy that calls for additional safeguards that will increase safety for transgender prisoners in these group settings.

Documentation of Classification Decision Reasons and Reassessments

A good classification policy requires that facility staff document the reasons that a specific classification decision was made. This type of documentation is very helpful for transgender prisoners, particularly if they are housed in gendered units that they did not want to be housed in. Without documentation, getting a classification decision reviewed or reassessed at a later date is more difficult and unlikely to yield a different result. The PREA Standards require that placements for transgender prisoners must be reassessed at least twice each year in order to review threats to safety experienced by the prisoner. This is a floor for the agency and not a ceiling. Therefore, you may want to consider expanding what the facility will be reviewing during the reassessment to go beyond just threat to safety and include things such as emotional well-being of the individual, new transition or medical developments, and respect for the prisoner's gender identity.

Different Approaches for Temporary Police Lock-Ups

Temporary police lock-ups, and other facilities where individuals are only held for a number of hours or 2-3 days differ in important ways from those that hold individuals for weeks, months, or years. In this kind of very short-term facility, housing options may be very limited, and making individualized housing decisions may be impossible. In this type of setting, it may make sense to advocate for a different approach, such as housing trans people in single cells or in the same cell. If the facility is divided by gender, you could consider advocating that trans people always be housed alongside the gender with which they identify, but physically separated from others.

Relevant PREA Standard

PREA DOJ PREA Standards § 115.42—Use of screening information.

(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.

Transgender Housing Policy Excerpts

Denver Sheriff Department, Department Order 4005.1, June 6, 2012

G. 2. Classification and placement of transgender/gender-variant inmates should not be determined solely based on the inmates' birth sex, identity documents, or physical anatomy. Classification and placement of transgender/gender-variant inmates should be made to maximize the health and safety of the individual.

3. Transgender/gender-variant inmates must be housed safely and in the least restrictive setting possible.
 - a. Additional safety precautions may include (but are not limited to) access to private showers, single cells, etc., and will be offered if and when available.
 - b. Requests from a transgender/gender-variant inmate to be placed in the same cell with another transgender/gender-variant inmate should be honored when possible.
4. Classification staff shall document in the Jail Management System (JMS) the choices and reasons regarding housing and additional safety precautions for all transgender/gender-variant inmates.

Cumberland County, Maine Sheriff's Office—Policy D-243A Transgender Inmates—12/2009

2. All transgender and intersex inmates shall be classified based on security and safety needs, housing availability and gender identity.

Miami-Dade Corrections and Rehabilitation—DSOP No. 18-017 12/28/2009

- I. ... Staff shall ensure that a transgender inmate classification and housing assignment provides a safe, humane and secure environment, free from the threat of sexual assault/battery and staff sexual misconduct/harassment.

District of Columbia Department of Corrections—Program Statement No. 4020.3—
2/20/2009

In accordance with [the Department's general policy on inmate classification], all transgender and intersex inmates will be classified and assigned housing based on their safety/security needs, housing availability, gender identity and genitalia. ... The [Transgender] Committee shall ask the inmate his or her own opinion of his or her vulnerability in the general jail population of the male or female units. This information shall be taken into consideration in determining the proper housing assignment ... A written decision by the Transgender Committee shall be maintained in the inmate's medical record.

Factors for Making Housing Decisions for Transgender Prisoners

While having a policy statement that explicitly states that decisions should not be based solely on birth sex or genitalia is a good start, providing guidance on what factors should be considered when making these decisions will likely result in better placement outcomes for transgender prisoners. You may want to consider recommending a presumption of housing based on gender identity. Even when policies call for a case-by-case decision, staff members will often act under the assumption that housing based on genital anatomy is more appropriate. While all decisions should be individualized, beginning from a state presumption of housing based on gender identity may help to correct this traditional bias.

Factors listed in some existing policies include:

- Prisoner's views regarding safe placement
- Gender identity
- Charges
- Length of stay
- Institutional history (e.g. discipline, history of victimization or abusiveness)
- Input from medical/mental health staff (on impact on medical/mental health)
- Other safety and security needs

Some additional factors you may want to consider are the gender listed on an individual's identification, any medical steps taken as a part of gender transition, and the individual's social gender role in the community. Including gender on identification as a factor may make more sense if your state makes it possible for most people who have transitioned to update their identification.

Who is Responsible for Making Decisions Regarding Classification and Housing?

After discussing what goes into the decision making process for housing placements for transgender prisoners, a policy should also clearly state who will be making this decision, when the decision is made, and how. Many agencies have given this responsibility to what are commonly called “transgender committees” (TC). The membership of these TC’s varies, but typically includes administrators, classification staff, medical staff, mental health staff, a PREA coordinator, and sometimes a community member. If you decide to use this approach, the following questions will help you to address the important details related to having such a committee:

- Who is on the Committee?
- Who from the committee meets with the prisoner prior to the committee meeting and what information should they illicit? Is there a form for the prisoner to complete that allows the prisoner to express his or her concerns and desires related to housing? (Example: the Denver Sheriff Department uses a form with standard questions regarding housing and search preferences, medication and other needs (such as bras), and a general question about the individual’s social transition and medical treatment.)
- What type of information does the committee consider when determining placement? What concerns, if any, are prioritized (e.g., medical or mental health opinion, prisoner’s safety)?
- How long is the waiting period between a referral to the committee and a final decision?
- Will the committee reach decisions based on consensus, majority vote, or some other process?
- What is the appeals process if the prisoner feels the housing decision was inappropriate? What is the process for having the placement decision reassessed at least twice a year as required by PREA?
- Is the decision of the committee final or does someone in the agency have veto power? What reasons could form the basis of such a veto?
- Are there other things that the committee is responsible for providing input on, such as clothing, grooming, health care, programming access?

Not all facility policies call for a transgender committee to make housing determinations for transgender prisoners, although this appears to be the most common approach in policies that have been adopted within the last few years. If a committee does not seem like the right option for the facility you are working with, you should consider identifying who will be making housing determinations. If no one is responsible, then housing determinations for transgender prisoners will likely be made by the general intake and classification officers. We have found that transgender prisoners fare better if medical or mental health staff, or both, are involved in housing decisions rather than only facility administrators or other staff who are likely to be less familiar with what it means for someone to be transgender.

Transgender Committee Policy Excerpts

Miami-Dade Corrections and Rehabilitation—DSOP No. 18-017 12/28/2009

III. The Transgender Committee (TC) is responsible for determining a permanent housing assignment for each transgender inmate through a review of the respective classification, medical and mental health records. In addition, prior to permanent housing, the TC shall meet with each inmate to determine his/her vulnerability within the general jail population and length of time living within a community as the acquired gender.

District of Columbia Department of Corrections—Program Statement No. 4020.3—
2/20/2009

- b. As part of the housing assessment for vulnerability, the Transgender Committee shall determine the transgender inmate's housing assignment after review of all of the inmate's records and assessments and an interview with the inmate. The Committee shall ask the inmate his or her own opinion of his or her vulnerability in the general jail population of the male or female units. This information shall be taken into consideration in determining the proper housing assignment. The Committee will attempt to reach consensus, ultimately relying on majority vote when needed.

Blanket Housing Policies and Special Units

Classification and housing determinations should always be made on an individualized basis. It may be necessary to include language in the policy that specifically prohibits the facility from automatically placing LGBT prisoners in segregation or in specific facilities, units, or cells based solely on LGBT status or identity, including in special housing units for vulnerable populations generally or explicitly for LGBT individuals. The PREA Standards prohibit this kind of automatic segregation. Facilities will sometimes push for creating “gay” or “transgender” units as an alternative to the policies recommended by advocates. While classification systems are designed to place people who are considered vulnerable or low-risk together, singling out LGBT people for a special unit can result in isolation, deprivation of privileges, and greater stigmatization, thereby making individuals even more of a target. The PREA Standards allow automatically placing LGBT prisoners in special housing units only in the very rare case where advocates have pressed to create such a unit to resolve a prisoner abuse lawsuit.

In some communities, advocates have pressed for a housing unit for LGBT prisoners that is voluntary rather than automatic, has fully equal privileges, and exists alongside policies and procedures for housing LGBT people in general population and in facilities consistent with their gender identity. This approach could provide more options for safely housing LGBT prisoners, but it also has risks, such as that the facility could focus on an LGBT unit as an alternative rather than a companion to other reforms, that conditions in the housing unit could be restricted in the future, or that placement will not truly be voluntary if prisoners are given the alternative of solitary or of a general population where little is being done to protect them. Advocates may wish to pursue this approach, in combination with the other approaches outlined in this section, when they have sought community input and determined this is the most effective way to increase safety and decrease isolation for vulnerable individuals.

Relevant PREA Standard

PREA - DOJ PREA Standards § 115.42

- (g) The agency may 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.

No Blanket Housing Policy Excerpt

Cumberland County, Maine Sheriff's Office—Policy D-243A Transgender Inmates—12/2009

- 4. The Transgender Review Committee shall avoid blanket housing policies, such as automatically putting all transgender inmates in segregation...

4. PROCEDURES FOR MEETING ADDITIONAL SAFETY AND PRIVACY NEEDS OF TRANSGENDER INDIVIDUALS

Regardless of whether a transgender person is housed in a male or female facility, he or she is likely to face specific privacy and safety concerns when showering, using a multi-user bathroom, changing clothing, or being searched or tested for drug use. When a facility does not have a specific policy that explains how to avoid subjecting transgender prisoners to unnecessary risk of physical and emotional harm during these activities, the privacy and safety needs of transgender prisoners are most often ignored. Unless there is policy that states otherwise, rules limiting cross-gender pat and strip searches and supervision will be applied based on the prisoner's housing assignment or anatomy. The key to developing sound policy in these areas is to focus on ways the facility can protect the privacy, dignity, and safety of transgender prisoners during all facility procedures while not singling them out or preventing them from being able to participate in the facilities' daily programming.

Showering and Bathroom Practices

Decisions regarding the use of showers and bathrooms should be individualized with the goal of protecting the privacy, dignity, and safety of transgender prisoners within the context of a confinement setting. Different facilities have different ways of handling showers for prisoners as well as different layouts. While in most facilities each cell will have a toilet, in many juvenile facilities and some smaller jails, or in any jail that houses prisoners in a dorm-like setting, prisoners may need to use multi-user bathrooms. If possible, you should arrange to have a tour of the facility or facilities that you are working on policy for so you can see the range of physical lay-outs related to showers and multi-user bathrooms and the amount of privacy that is afforded to prisoners while showering or using the toilet. If there are separated stalls with privacy shields this may provide sufficient privacy and safety for transgender prisoners. If there is one large room with showerheads along the walls, then your policy will need to address how to ensure safety and privacy for transgender prisoners. The same would be true if multi-user bathrooms have several toilets next to each other with no stall walls or doors. One option is for transgender prisoners to have the option of showering or using the bathroom at a different time than the rest of the prisoners. However, this option may make it easier for the staff member to harass or assault the transgender prisoner. It may be possible in this case to request the use of a shower or toilet in the medical unit or somewhere else that can provide some level of privacy. This may require creativity and a willingness of the facility to accommodate these requests.

TIP:

It is critical to get a tour of the facility so you can see what type of privacy is available and observe how they handle security first hand.

Relevant PREA Standard

PREA DOJ PREA Standards § 115.42—Use of screening information.

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

Shower and Bathroom Policy Excerpt

Denver Sheriff Department, Department Order 4005.1, June 6, 2012

G 3. a. Additional safety precautions [for transgender/gender-variant inmates] may include (but are not limited to) access to private showers, single cells, etc., and will be offered if and when available.

Searches

Your policy should provide guidance to facility staff on how to handle pat downs and strip searches of transgender identified prisoners as well as prisoners who are gender nonconforming. Searches, especially strip searches, even when conducted in a professional manner, are extremely unpleasant and often humiliating experiences for any prisoner. Therefore, you should determine what policies the facility you are working with already has in place that limit the times when prisoners are strip searched and that require searches to be conducted respectfully and in a professional manner. These policies should meet the requirements laid out in the PREA Standards regarding searches, including PREA's limitations on cross-gender searches). If these policies are weak or non-existent, you should consider developing a search policy that applies to the general population in addition to transgender prisoners.

There are a few transgender-specific provisions related to searches that you should include. First, strip searches of transgender prisoners should be prohibited for the purpose of determining genital status or for other non-legitimate purposes such as to punish or humiliate the transgender prisoner or to amuse staff members. You may also want to include language that provides increased privacy for transgender prisoners during strip searches as these types of searches are often done in group settings. For example, your policy could include a provision requiring that strip searches of transgender prisoners must be conducted out of sight of other prisoners and staff members who are not necessary for the search.

In addition, your policy should include directions on determining the sex of the staff member who will conduct strip searches of a transgender prisoner. While PREA is clear that male staff shall not strip search female prisoners, the standards do not provide guidance to facilities on how the prohibition of cross-gender searches applies to transgender prisoners. Facilities have adopted a couple of different approaches to determining who will conduct a strip search in these cases. The best practice is to allow a transgender prisoner to state his or her preference for the gender of the staff to conduct any searches shortly after intake. This usually happens when the newly admitted prisoner completes a form that allows him or her to state preferences related to searches, name, and pronoun, and classification, etc. Some examples of these forms are included in Appendix C. Unless there are exigent circumstances, facilities with policies like this usually require that the prisoner is searched by a staff member of the gender indicated on the form. If you follow this route, your policy should also address who should conduct searches in cases where a transgender prisoner states no preference or before the prisoner has the opportunity to complete the form. Some facilities have tasked the decision as to who will conduct the search to the transgender committee, which takes the prisoner's preference into consideration. In addition to being used by many jails and detention facilities, this approach is used by major police departments, including those in Boston, Los Angeles, New York, New Orleans, and the District of Columbia.

Another possible option is to have all transgender prisoners searched by female staff members. Although this is not the ideal situation because it does not take into account an individual's own views about who should search them, it would likely result in less abuse of transgender prisoners than a status quo policy of having prisoners searched by staff members who have the same genitalia as the prisoner. This is not because female staff members are necessarily less likely to commit abuse, but because transgender prisoners in general, regardless of their gender identity, are more likely to be perceived as feminine and/or female by staff.

Finally, in order to help staff members conduct searches of transgender and gender nonconforming prisoners in the most respectful and professional manner possible, training on appropriate methods for conducting searches of this population should be provided to all of those who may be conducting both pat searches and strip searches.

Relevant PREA Standards

PREA DOJ PREA Standards § 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. (f) The agency shall train security staff in how to conduct cross-gender pat-down searches and searches of transgender and intersex individuals in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

PREA Frequently Asked Questions, PREA Resource Center³

Operationally, three options are in current practice for searches of transgender or intersex inmates/residents: 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.

Searches of Transgender Arrestees and Prisoners Policy Excerpts

District of Columbia Metropolitan Police Department—General Order PCA 501-02—October 16, 2007

- a. When an arresting officer has reason to believe that the arrestee is a transgender individual, before searching that individual prior to transport to the station, the officer shall:
 - (1) Specifically inform the arrestee that he/she must, and will be, searched before being placed in a transport vehicle;
 - (2) Ask the arrestee if he/she has any objections to being searched by a male or female officer; and
 - (3) If the prisoner does object, inquire as to the nature of the objection.
- b. If the arrestee states an objection to either the male or female gender, then, absent exigent circumstances, the arresting officer shall:
 - (1) Ask an officer who is of the gender requested by the arrestee to conduct the search; and
 - (2) Document the arrestee's objection (either by writing it in his or her notebook or by advising the dispatcher over the radio), indicating that he/she requested to be searched by a male/female officer (specifically indicating the stated preference).

Cumberland County, Maine Sherriff's Office—Policy D-243A Transgender Inmates—December 2009

1. Prior to searching a transgender inmate, when possible complete the Statement of Preference form C-120C to determine the sex of the staff member who will be conducting the search. All searches of the transgender inmate's person will be done by an officer of the gender requested by the transgender inmate. If the inmate does not specify a preference, then the search will be done by an officer of the same gender as the transgender inmate's gender presentation (e.g. a female-to-male inmate expressing no preference should be searched by a male officer).

³ Available at: <http://www.prearesourcecenter.org/faq>.

Cook County, IL Department of Corrections, Interagency Directive No. 64.5.42.0 March 7, 2011

D.6. To the extent that strip and pat-down searches are permitted for security purposes, said searches of an inmate with gender identity disorder shall only be made by correctional officers of the gender recommended by the Gender Identity Committee.

Miami-Dade Corrections and Rehabilitation—DSOP No. 18-017 12/28/2009

VI- A transgender inmate shall not be strip searched randomly or as a form of harassment. All frisk and strip searches shall be conducted in accordance with DSOP 11-022 "Frisk and Strip Search Procedures." At no time will a sworn officer frisk or strip search an inmate to determine the inmate's sex.

Denver Sheriff Department, Department Order 4005.1, June 6, 2012

B. 1. Pat Searches

- a. If there is prior knowledge that an inmate is transgender/gender-variant, and a pat search as defined in Department Order 4040 is required, the officer performing the search should be of the same sex as identified by the inmate's transgender/gender-variant search preference.
- b. The prisoner shall sign the Statement of Preference Form, indicating initial preference, preferred name, and preferred pronoun.

2. Strip Searches

- a. When a strip search is required for a transgender/gender-variant prisoner, the search will be conducted by an officer and overseen by a supervisor and will only be performed as part of the book in process in accordance with Department Order 4040.
- b. The officer and the supervisor will be of the same sex that is listed on the inmate's Statement of Preference Form unless otherwise directed by the supervisor. Refer to Department Order 4040, "Inmate and Facility Searches".
- c. Strip searches shall not be performed as a punitive measure.
- d. Strip searches will not be done for the sole purpose of observing the prisoner's genitalia or determining gender.

Cross-gender Supervision

In situations where nudity is unavoidable, such as when a staff member or probation officer is required to watch someone submit a urine sample for a drug test, you should include direction in your policy for determining the gender of the staff member who can observe drug tests and other similar situations. The options for determining the gender of the staff member to do this are similar to those that are discussed in the section on searches above.

You should be aware that there are many other situations in prison where it is unavoidable that prisoners are unclothed in front of other prisoners or staff members. Limiting cross-gender supervision will make it less likely that staff members of a different sex than the prisoners in the unit will have the opportunity to view these prisoners unclothed. Similar to the limitations on cross-gender searches, the PREA Standards don't specifically say how rules on cross-gender supervision apply to transgender people. And because many transgender prisoners are housed in units with people who have a different gender identity than they do, it is more likely that they will be viewed unclothed by staff member of a different gender in the absence of a clear policy. Your policy should address how to increase privacy for transgender prisoners when undressing. With some direction, it is possible to put some language into a policy that would decrease viewing by different gendered staff for transgender prisoners, such as permitting a transgender prisoner to undress behind a privacy barrier. Because of the requirements of PREA, and the lack of direction on how limitations for cross-gender viewing apply to transgender prisoners, including provisions in your policy that speak directly to this issue will be necessary if you want staff members to treat transgender prisoners consistent with the gender the prisoner identifies as.

Relevant PREA Standards

PREA DOJ PREA Standards § 115.15—Limits to cross-gender viewing and searches.

(d) The facility shall implement policies and procedures that enable prisoners to shower, perform bodily functions, and change clothing without non-medical 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 a prisoner housing unit.

5. OTHER PRISONER MANAGEMENT PROCEDURES

A prisoner's LGBT status may also be relevant in a range of other areas that often fall under the broader heading of prisoner management. This includes clothing and presentation and visitation rules.

Clothing, Hairstyle, and Grooming

Access to gender-appropriate clothing and personal items, and the ability to groom oneself in a manner consistent with one's gender identity, can be essential for all transgender and gender nonconforming prisoners, especially those who are housed based on their birth-assigned sex. Although clothing issued by facilities are often unisex in nature, you should determine what types of clothing the facility issues to female prisoners versus male prisoners and whether there are restrictions on the types of clothing prisoners can buy and possess. Some questions to think about include:

- Are there different types of undergarments issued to males and females? How is it determined who gets what? Are there any written or commonly practiced exceptions?
- Is clothing in facilities for males issued in different colors than clothing issued in facilities for females (e.g. males get grey pants while females get mauve pants)?
- Are there catalogs of clothing and grooming items prisoners can purchase and possess, and if so, who can access which catalog?
- Are there any restrictions on the types of clothing items prisoners can possess and receive through the mail?

Access to undergarments in particular is most often determined based on whether the facility is designated for females or for males. Therefore, most policies in this area provide for exceptions for prisoners who are transgender, but are housed in a facility consistent with their birth sex, to access and possess undergarments that are provided to prisoners in the facility consistent with their gender identity. Generally, existing policies sharply limit the ability of prisoners to express themselves through their clothing, although there is no reason why you should not try to pursue a policy that increases this freedom. As a baseline, your policy should allow transgender prisoners to receive, purchase, and possess clothing items (not just undergarments) that prisoners with the same gender identity are permitted to receive, purchase, and possess regardless of which facility the prisoner is housed in. While some facilities make access to these items dependent on a medical diagnosis or approval by medical staff, a simpler and better approach is to make them equally available either to all prisoners identified as transgender, or to any prisoner who requests them.

In addition, a good policy in this area should also permit transgender prisoners to possess hygiene and other personal items appropriate for them and to groom themselves in a manner consistent with their gender identities.

Clothing, Undergarments, and Personal Items Policy Excerpts

Cumberland County, Maine (Policy D-243A Transgender Inmates):

A.4. A transgender inmate with a female gender identity, for example, should be issued and permitted to receive and possess the same undergarments issued to other female inmates.

Massachusetts Department of Correction, Policy No. 103 DOC 652, 09/09/2012

Commensurate with the security level of the housing placement, GID inmates housed in a male institution (male to female, or MTF) shall be permitted to purchase and retain clothing items and articles authorized for other male inmates housed in that institution, as well as those items authorized for females commensurate with their particular security level at the female institution. Similarly, GID inmates housed in a female institution (female to male, or FTM) shall be permitted to purchase and retain clothing items and articles authorized for other female inmates housed in that institution, as well as those items authorized for males commensurate with their particular security level at the male institutions.

Cook County, IL Department of Corrections, Interagency Directive No. 64.5.42.0 March 7, 2011

D.5. An inmate with gender identity disorder shall be allowed to possess those hygiene and personal items that may be purchased through commissary that are consistent with the recommendations of the Gender Identity Committee.

Cumberland County, Maine (Policy D-243A Transgender Inmates):

C.7.—Transgender inmates should be permitted to dress, groom, and use names and pronouns that are consistent with their gender identity.

Visitation Rules

Facilities should not prohibit visits by same-sex partners of prisoners or include restrictions on showing affection between prisoners and their same-sex partners during visits if these same restrictions do not apply to heterosexual couples. As noted in chapter 3, courts have ordered prisons to stop enforcing these types of policies. You should review the policies and practices of the facility to make sure they do not include any discriminatory language. If there is discriminatory language, you should attempt to change these policies. If you encounter resistance in this or other areas in changing existing discriminatory policies, you should contact one of the LGBT legal organizations in the resource section of this guide for additional support.

6. COMMUNICATION AND INFORMATION MANAGEMENT PROCEDURES

Staff and volunteers should always use respectful language and terminology when talking to or about prisoners and should not use language in the workplace that is demeaning or conveys bias or hatred towards LGBT people. In addition, a good policy provides facility staff direction on what name and pronoun to use when referring to transgender prisoners, as well what name to include in facility records. Finally, information about a prisoner's sexual orientation and gender identity is considered private information and sharing this information broadly could create unnecessary risks to an LGBT prisoner's physical safety and emotional wellbeing. Facility policies should provide staff with guidance on how to protect the confidentiality and privacy of LGBT prisoners.

Demeaning Language

Your policy recommendation should include a provision that directs facility staff not to use demeaning or derogatory language with LGBT prisoners including not referring to transgender prisoners as "he-she" or "it."

Demeaning Language Policy Excerpts

Miami-Dade Corrections and Rehabilitation—DSOP No. 18-017 12/28/2009

V.A.2 Avoid using language that a reasonable person would consider demeaning, specifically, language aimed at a person's actual or perceived gender identity expression and/or sexual orientation.

Davidson County Sheriff's Office, SOP No. 2-11.107 7/1/2009

Language: DCSO employees will not use derogatory terms (i.e. faggot, he/she) when addressing or referring to transgender or intersex inmates.

Name and Pronoun Use

Facility staff should call transgender prisoners by the name and pronoun they prefer, even if this name differs from their legal name. Some facilities have chosen to have transgender prisoners complete a preference form where the prisoner writes down their preferred name and pronoun, amongst other things. This approach can be helpful to make sure all staff who have access to a prisoner's file will be informed of his or her preferred name and pronoun before the staff member uses the wrong name and pronoun without realizing it. The policy should also indicate that the use of a prisoner's preferred name and pronoun does not require that the prisoner have completed a legal name change or have changed his or her gender marker on any identification documents.

Name and Pronoun Use Policy Excerpts

Davidson County Sheriff's Office, SOP No. 2-11.107 7/1/2009

Language: All DCSO employees will address transgender and intersex inmates using the chosen name of the inmate and pronouns consistent with the inmate's gender identity.

Miami-Dade Corrections and Rehabilitation—DSOP No. 18-017 12/28/2009

V.A.1 - Address the transgender inmate by last name or use the gender specific identifier appropriate to the inmate's gender identity expression such as Mr., Mrs., Miss, Ma'am, Sir, he, she, etc.

Cumberland County, Maine Sheriff's Office—Policy D-243A Transgender Inmates—12/2009

2. Booking Name: When booking a transgender arrestee, the Cumberland County Jail will use the arrestee's adopted name (i.e., non-birth name that the inmate uses in self reference) in the booking, either as the primary name or as the "also known as" ("a.k.a.").

7. Transgender inmates should be permitted to ... use names and pronouns that are consistent with their gender identity.

Denver Sheriff Department, Department Order 4005.1, June 6, 2012

G. 5. While in the custody of or while housed at any division of the Denver Sheriff Department, DSD staff:

c. Should address transgender/gender-variant inmates using preferred names and pronouns as indicated on the Statement of Preference Form. Preferred names and pronouns should be used regardless of whether or not the inmate has completed a legal name change, and regardless of whether the gender marker listed on the inmate's identity documents has changed.

Information Management and Confidentiality

Information concerning a prisoner's transgender status or sexual orientation is protected by the constitutional right to privacy and may not be arbitrarily disclosed. As discussed in chapter 3, individuals have a constitutional privacy interest in certain highly personal information even when incarcerated, and that that category includes one's transgender status, as well as one's sexual orientation.

Accordingly, the decision to reveal information about a prisoner's sexual orientation and gender identity generally belongs to the prisoner alone. While some prisoners are out to everyone, others are not. Facility staff should respect each prisoner's privacy and never disclose a prisoner's sexual orientation or gender identity to other prisoners or to outside individuals or agencies unless the prisoner has given express permission to the staff member to do so. While it may be necessary to share this information with other staff members in the facility for the benefit of the prisoner, any such disclosure should include only the information necessary to achieve this benefit and should only be disclosed to the staff members who need to be informed. Including information about privacy in the facility's policy is recommended, especially in cases where a facility has had a history of disclosing this information in a way that violated prisoners' rights. For transgender prisoners in particular, their housing placement may effectively out them (i.e., if they are a woman in a men's facility), however the facility must still protect the individual's privacy to the extent possible, e.g., with regard to specifics of a prisoner's medical history. For additional information and support about the law in this area, contact one of the LGBT legal organizations listed in the resource section.

7. MEDICAL AND MENTAL HEALTH CARE

Equal Access to Care and Some Key Issues

For the most part, LGBT individuals have the same medical and mental health needs as others in a facility and should receive the same treatment. Some key issues, such as HIV care, treatment for anxiety and post-traumatic stress, treatment following allegations of abuse, and patient confidentiality are particularly important issues for LGBT people. For example, LGBT individuals may experience anxiety, depression, or post-traumatic stress as a result of harassment or abuse, and their requests to be evaluated by a mental health provider may not be taken seriously. Or, a patient's HIV status may be discussed casually in front of others, or medication may be delivered in a careless way that could disclose their status. These are typically issues of compliance with existing policies.⁴

Transgender and intersex people may have additional needs with regard to primary care, including routine preventive screenings, which may not be typical for people of the gender with which they are housed. Facilities must provide adequate care for all serious medical needs, and all parts of the body, without regard to a person's birth-assigned or self-identified gender. For example, a transgender woman over fifty may need both breast and prostate care.

Transition-related Health Care for Transgender People

One area where many facilities still have inadequate policies is in evaluating and treating gender dysphoria. Gender dysphoria is a serious medical condition for which treatment is both medically necessary and effective. Treatment for gender dysphoria can involve counseling, social gender role transition (sometimes called a "real life experience"), hormone therapy, and any of a variety of possible surgical treatments. The World Professional Association for Transgender Health (WPATH)'s Standards of Care are fully applicable to the treatment of transgender people in confinement facilities. Failure to provide treatment for gender dysphoria can lead to serious physical and mental health consequences.

An adequate health care policy for transgender prisoners should incorporate each of the following key principles:

- Treatment decisions are made by health care providers, not administrators. As discussed in Chapter 3, a facility may not adopt a blanket rule that it will not treat gender dysphoria or will not provide specific treatments regardless of medical need.
- Treatment decisions should not be based on the level of care received prior to arrival. Such "freeze-frame" policies have been held unconstitutional. Individuals who have never received any treatment or a specific treatment, or have taken medications without a prescription, should be evaluated and treated based on medical need.
- Medications should not be interrupted absent a medical decision. Cutting off any regular medication can have harmful consequences. Prisoners taking hormone medications, should be maintained on such medications pending a medical evaluation, regardless of whether they were prescribed by a licensed health provider,
- Evaluations and treatment provisions should be conducted by, or in consultation with, a competent provider. While monitoring hormone therapy is not medically complex, inexperienced providers may not understand when it is needed. Facilities should contract or consult with a knowledgeable provider and/or arrange for one to train their own staff.

⁴ On HIV/AIDS care in custodial settings, see Gay Men's Health Crisis, Fenced In: HIV/AIDS in the Criminal Justice System (2012), available at: http://www.gmhc.org/files/editor/file/a_pa_2012_prison.pdf.

- No treatment, including surgical treatments, should be off the table. Surgical treatments have never been provided to incarcerated transgender people in the United States, but this is likely to change in the near future in light of the developing case law (see Chapter 3). While facilities are unlikely to agree to include specific policy language providing for the possibility of surgery, for prisons we recommend ensuring that the policy provides for all medically necessary treatments and does not exclude any specific treatment, or provide for only a limited list of treatments.
- Prisoners should be permitted to express and be treated according to their gender identity. As noted in Chapter 3, issues like access to gender-appropriate undergarments and grooming items and the use of appropriate pronouns can be a medical issue. Ideally, policy provisions on these issues would be separate from medical policies and not restricted to those with a gender dysphoria diagnosis. However, framing this as a medical issue can be very persuasive.

Access to Health Care for Transgender Prisons Policy Excerpts

California Correctional Health Care Services and CDCR, Policy 4.26.1– 12/12⁵

California Correctional Health Care Services (CCHCS) and the California Department of Corrections and Rehabilitation (CDCR) shall provide medically necessary treatment that meets Constitutional requirements for incarcerated individuals who are diagnosed with Gender Identity Disorders (GID)...

A. Required Mental Health Evaluation

There shall be a mental health evaluation assessing the diagnostic status of all patient-inmates identifying as GID [sic] to consider which, if any, transgender therapies may be needed.

The mental health evaluation shall also determine capability for informed consent and identify any barriers or mental health contraindications to transgender therapies under consideration...

B. Required Medical History and Physical/Specialty Consult

A patient-inmate receiving a diagnosis of GID shall, in addition to a mental health evaluation, receive a general history and physical evaluation by a medical practitioner. This evaluation shall specifically identify any evaluations or assessments for GID symptoms performed by a health care professional prior to incarceration, any contraindications or comorbidities which might preclude hormone therapy or other transgender therapies as treatment options, and consider other treatment options as appropriate. Upon completion of the required medical evaluation a Request for Services (RFS) for a clinical review by a medical transgender specialist shall be initiated. This RFS shall include the results of both the mental health and medical evaluations.

C. Creation and Implementation of a Treatment Plan

Upon completion of the specialist review and recommendations, the patient-inmate's PCP shall implement the recommendations of the specialist in regard to hormone therapy if informed consent has been obtained. ...

D. Informed Consent Required Prior to Treatment

In all cases, there shall be a discussion with the patient-inmate regarding the risks associated with hormone therapy. When such therapy is to be commenced or continued, written informed consent shall be obtained. ...

⁵ Full policy can be found at <http://www.cphcs.ca.gov/docs/imspp/IMSPP-v04-ch26.1.pdf>. Note that the policy is supplemented by a more detailed Care Guide for clinical staff.

E. Patient-Inmates Entering or In CDCR on Hormone Therapy

If a patient-inmate is receiving hormone therapy at the time of entering into CDCR custody or during his or her incarceration, unless the continuation of such therapy poses an undue risk or harm such that continuing the therapy would be a breach of the standard of medical care, the therapy shall be maintained until a mental health evaluation, a medical history and physical exam, and transgender specialist consult has occurred. A continuation of that therapy shall be subject to a determination by the PCP, in consultation with the transgender specialist, and consistent with approved Care Guide: Gender Identity Disorder (GID). A treatment plan for such patient-inmates shall be created as set forth above. The PCP shall document any decision to discontinue hormone therapy, including the clinical factors that place the patient-inmate at an unreasonable level of risk, in the UHR.

F. Patient-Inmates Not on Hormone Therapy upon Entry into CDCR but Self Identify As Gender Identity Disorder [sic]

There shall be a required mental health evaluation, medical history and physical evaluation and transgender specialist consultation, consistent with approved Care Guide: Gender Identity Disorder (GID) for patient-inmates seeking to initiate hormone therapy. In cases where deemed appropriate, a treatment plan shall be created consistent with this policy and guidelines.

Idaho Department of Corrections, Control Number 401.105.03.501—6/25/2009

10. Hormone Replacement Treatment and Cross-Sex Hormonal Therapy shall be provided as needed but only when medically indicated and consistent with the offender's treatment plan. An offender who is receiving hormonal medications related to Cross-Sex Hormonal Therapy at the time of incarceration will be continued on such hormonal medications unless current medical providers determine there is a medically compelling reason to discontinue treatment. An offender who is initially diagnosed with GID while incarcerated at IDOC will be eligible to receive hormonal medications as provided herein.

Federal Bureau of Prisons—P6031.03, 08/23/12⁶

The treatment plan [for inmates with GID] may include elements or services that were, or were not, provided prior to incarceration, including, but not limited to: those elements of the real life experience consistent with the prison environment, hormone therapy, and counseling. Treatment plans will be reviewed regularly and updated as necessary. Current, accepted standards of care will be used as a reference for developing the treatment plan. All appropriate treatment options prescribed for inmates with GID in currently accepted standards of care will be taken into consideration during evaluation by the appropriate medical and mental health care staff. Each treatment plan or denial of treatment must be reviewed by the Medical Director or BOP Chief Psychiatrist... In summary, inmates in the custody of the Bureau with a possible diagnosis of GID will receive a current individualized assessment and evaluation. Treatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration.

⁶ Full policy can be found at http://www.bop.gov/policy/progstat/6031_003.pdf

POLICY STATEMENTS FROM MEDICAL ORGANIZATIONS ON TREATMENT FOR INCARCERATED TRANSGENDER PEOPLE

Medical experts agree that transition-related treatments for transgender people are safe, effective, and for many, medically necessary.⁷ For example, both the American Medical Association (“AMA”) and the American Psychological Association (“APA”) have adopted public statements that reject the misconception that transition-related medical care is “cosmetic” or “experimental,” and recognize such care as effective, therapeutic, and a “medical necessity [...] for appropriately evaluated individuals.”⁸

Medical organizations have also adopted public statements that recognize and support the need for transgender-specific care in institutional settings, such as jails, prisons, and detention facilities. For example, an APA public statement recognizes the necessity of providing transition-related care for transgender people in institutional settings and calls on institutions to provide such care.⁹ Similarly, the National Commission on Correctional Health Care (NCCHC) has adopted a position statement that provides guidance to health professionals working in correctional settings about their responsibility to ensure the physical and mental health of transgender people in their custody.¹⁰ According to NCCHC, the proper approach to transgender medical care is to follow the WPATH Standards of Care. The WPATH Standards of Care state that transgender people living in institutional settings should have access to the same medical treatments as would be available to them in the community; and that no treatment should be refused because an individual is behind bars or did not receive that treatment previously.¹¹

7 See generally World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed. 2011); Bockting & Coleman, *add cite*; Wylie C. Hembree et. al, *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 (9) *Journal of Clinical Endocrinology & Metabolism* 3132, 3154 (2009); APA Transgender Policy Statement, *add cite*, at 3; AMA Resolution 122, *add cite*, at 2, n. 7.

8 AMA Resolution 122; APA Transgender Policy Statement.

9 *Id.*

10 See National Commission on Correctional Health Care, “Position Statement on Transgender Health Care in Correctional Settings,” (adopted by NCCHC Board of Directors Oct. 18, 2009), available at <http://www.ncchc.org/resources/statements/transgender.html>.

11 See WPATH Standards of Care, at 67-68.

8. PRISONER EDUCATION AND POLICY DISSEMINATION

In order for a policy to be effective, prisoners and staff need to know about it, understand it, and be able to reference it if need be. You will need to determine how and when prisoners are told about the policy and other ways the policy is disseminated.

Informing Prisoners About the Policy

The PREA Standards require that all prisoners receive both basic information during intake about reporting abuse, as well as comprehensive education about agency policies and procedures regarding sexual abuse prevention and response. While PREA does not specifically require that this education cover policies toward LGBT prisoners, you should press to ensure that it does. The timing and procedure for informing prisoners about LGBT-related policies will be facility-specific. One thing you will need to know when drafting this section is how the facility currently handles informing prisoners of existing policies. The facility is likely to have an orientation handbook that is given to all prisoners at intake and/or some type of orientation session or video. If the facility includes other policies in the handbook you should include language in the policy that requires the new LGBT policy to be added to the orientation handbook. If the handbook only references facility policies and rules and does not include copies of policies, the new LGBT policy should also be referenced and copies of it should be made available to prisoners during the intake process. If there are orientation sessions or videos that all prisoners watch during or shortly after intake, the new policy should be discussed in the session or video and copies should be available during the session or video. If the facility does not follow PREA's prisoner education requirements for existing policies, you should press them to do so, and to include the new policy. It is important that the new policy specifically states how prisoners will be informed about it so there is a clear procedure that all staff can follow. In addition, prisoners should be given a copy of this policy if they ask for one at any time during their incarceration.

Posting the Policy

The facility is likely to have a designated area where important policies are posted in order to ensure that prisoners and staff are aware of them. One of these places may be where intake and assessment occur and another may be in common areas of each unit or common areas that prisoners from different units have access to, such as libraries, cafeterias or gyms. You should find out where the facility you are working with currently posts policies and include in the LGBT policy that this new policy should be posted in those same locations. If the facility does not already post policies or notices to prisoners, you should talk with the facility about where they think would provide the most exposure for posting it and what would work for them.

Relevant PREA Standards

PREA DOJ PREA Standards § 115.33 Inmate education.

- (a) During the intake process, inmates shall receive information explaining the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.
- (b) Within 30 days of intake, the agency shall provide comprehensive education to inmates either in person or through video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding agency policies and procedures for responding to such incidents.
- ...
- (f) In addition to providing such education, the agency shall ensure that key information is continuously and readily available or visible to inmates through posters, inmate handbooks, or other written formats.

9. STAFF AND VOLUNTEER TRAINING REQUIREMENTS

Disseminating the Policy to Employees, Contractors, and Volunteers and Oversight of Implementation

In order to make sure that staff members at the facility are aware of this new policy, all new staff members and volunteers should receive copies of the policy during their orientation and current staff and volunteers should receive a copy shortly after its adoption. In addition, a copy should be placed in any electronic folders or binders that contain other important policies so staff members can refer to it when needed. Contractors should also be informed about the nondiscrimination and non-harassment aspects of the policy and be required to abide by them when they sign contracts to work with the facility.

In addition, management and supervisors need to monitor compliance to ensure staff members are following and implementing the provisions properly. The policy should include guidance on how administrators and supervisors can measure staff compliance in evaluation procedures and when making determinations related to promotion, discipline, and termination. Staff members who are not abiding by the policy should receive additional training, targeted supervision, and other support to ensure future policy compliance. If appropriate, staff should be subject to disciplinary measures for non-compliance with policy.

Finally, the policy should include regularly scheduled reviews of the policy to ensure compliance with other laws as well as to provide opportunity for improvement.

Policy Dissemination and Oversight Excerpt

Denver Sheriff Department, Department Order 4005.1, June 6, 2012

7. B. Management: The Division Chief/Unit Commander or Unit Manager of any division or unit affected by this policy will:

1. Ensure that existing procedures and all newly developed orders are in compliance with this order.
2. Ensure that all affected personnel are made aware of this policy.
3. Ensure this policy is reviewed annually for compliance with all federal, state and local laws and standards.

C. Supervisors: All supervisors will ensure that the provisions of this policy are being followed.

Training Staff and Volunteers

Training is an essential step to ensure that staff members understand the requirements of the new policy and have the tools and skills to put the policy into everyday practice. All facility staff and administrators should receive training about the policy and LGBT people during orientation and as part of continuing education or training requirements.

A training curriculum should include at a minimum, the following topics:

1. The goals and requirements of the facility's LGBT policy;
2. How to manage LGBT prisoners in a respectful, fair, and non-discriminatory manner; and
3. How to prevent and respond to harassment and abuse against LGBT prisoners.

These trainings should be taught by professional trainers with experience training on this topic.

Relevant PREA Regulations

PREA DOJ PREA Standards § 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 individuals in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

PREA DOJ PREA Standards § 115.31—Employee training.

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.

Training Policy Excerpts

Cook County, IL Department of Corrections, Interagency Directive No. 64.5.42.0, March 7, 2011

E. Gender Identity Disorder Training—The CCSO Training Institute staff shall provide training to officers and supervisory staff in gender identity disorder sensitivity and the role of the Gender Identity Committee in formulating Accommodation Plans. All officers must successfully complete and be certified in the prescribed course administered by the CCSO Training Institute.

Miami-Dade Corrections and Rehabilitation—DSOP No. 18-017 12/28/2009

IV. MDCR staff shall be provided information on transgender awareness through classroom training or an educational workbook. Training shall also be provided to volunteer and contractual staff through an educational workbook. ... In addition, MDCR sworn personnel shall complete transgender awareness refresher training every 4 years as a requirement for Mandatory In-Service Training (MIST). The training shall include but is not limited to the following: Cultural awareness; Employee ethics; Prison Rape Elimination Act (PREA); Procedures for reporting inmates identified as transgender; Signs and symptoms of gender identity disorder.

10. SEXUAL ABUSE INCIDENT REVIEWS

PREA requires facilities to conduct a thorough incident review at the end of every investigation of alleged sexual abuse. The review should be aimed at identifying how an incident could have been prevented and whether the facility's policies or procedures need further improvements. Critically, the PREA Standards require that this review of every incident include specific consideration of whether the victim was targeted because they were LGBT. This is important both because it can help to identify patterns of abuse targeting LGBT people, prompt the agency to consider steps it needs to take in the future, and also create a record that can be used to press for those future changes. Information about incident reviews (with personal identifying information removed) can potentially be obtained through state freedom of information laws.

Relevant PREA Regulations

PREA DOJ PREA Standards § 115.15—Limits to cross-gender viewing and searches.

- (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 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;
- ...
- (6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1)-(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.

11. OTHER PROVISIONS RELATED TO SEXUAL ABUSE PREVENTION, DETECTION, AND RESPONSE

Full implementation of all aspects of the PREA Standards is critical for preventing, detecting, and responding to abuse. We encourage advocates to compare the facility's existing policies to the full PREA Standards in areas such as hiring, training, supervision and monitoring, reporting, investigations, health care and other support for those who report abuse, and data collection. Even if you do not know much about these topics, simply pointing to areas where the facility has not yet incorporated a related PREA provision can sometimes be enough to effect a change. Collaborating with local or regional groups dedicated to combating sexual violence may be useful for advocates who want to focus more on these issues.

CHAPTER 6:

ADDRESSING COMMON CONCERNS, FEARS, AND OBJECTIONS



AGENCY LEADERSHIP OR STAFF MAY HAVE A VARIETY OF CONCERNS, QUESTIONS, fears, or objections to your proposals. They may be concerned that the changes you want to make would cost a lot of money, compromise the safety of their officers, open them up to lawsuits, or generate public controversy. Some of the strongest concerns or objections you may hear will likely be about recommendations specific to transgender people, especially regarding housing. Taking these concerns seriously and addressing them can be essential to having your ideas accepted. Below are some short answers to common questions and concerns we've heard. These examples are by no means exhaustive, and fully addressing the agency's concerns may require additional research or consultation. Advocates are encouraged to reach out to NCTE or other groups who have done this work before.

In some cases, it can be very helpful to identify experts who might be respected and trusted by the agency to respond to these concerns. Examples of experts might include medical or mental health providers with expertise in working with transgender people, or supportive officials at other agencies who are willing to talk to the agency you're working with and address their concerns. You'll want to talk with these experts first and have an idea of what they're going to say.

We treat every prisoner the same. Why should some get special treatment?

It's important to keep in mind that agency staff have to work with, and are obligated to protect, all the people in their custody, most of whom are not LGBT. At the same time, corrections officials understand that all inmates are not the same and that, in fact, some populations are more vulnerable than others. You can help officials understand that, like some other populations, LGBT people have the same rights but also some unique vulnerabilities that need to be addressed. Research findings, court rulings, and the PREA Standards support this approach.

This is a correctional facility. We don't treat people based on their personal preferences. Why should it be different for LGBT people?

We understand that ensuring the safety of both officers and prisoners is the highest priority of the institution. Our recommendations are aimed at ensuring safety in light of the unique vulnerabilities of LGBT people and their understanding of the risks facing them. The PREA Standards recognize that in many cases, prisoners may have critical knowledge regarding their own vulnerability and what situations might expose them to greater risk of abuse. Prisoners' views regarding their own vulnerability are important because, even for members of the same group, that vulnerability will play out differently in specific situations based on individual factors such as appearance, demeanor, stature, prior victimization, and past institutional history. Asking transgender prisoners to specify whether they would feel safer if housed with or searched by men or women serves to minimize their risk of assault and harassment and reduce the likelihood that the facility or individual officers will be held liable for harm experienced by the prisoner. Prisoners wouldn't be asked to give their personal preferences, but to give their view of what would be safest for them. These policies have been embraced by many major police departments, sheriff's departments, and juvenile facilities.

Housing transgender women with women is not possible. Has any other agency even tried to do this?

Case-by-case housing placements for transgender people, including housing transgender women in women's housing in appropriate cases, has been the policy of several local and state custodial agencies for a number of years. For example, the District of Columbia Department of Corrections and the Cumberland County, ME Sheriff's Department have both had such a policy since 2009, the Cook County, IL Sheriff's Department adopted a similar policy in 2011, the Denver, CO Sheriff Department did so in 2012, and the Harris County, TX Sheriff's Department adopted a similar policy in 2013. This has also been the practice or policy of the juvenile corrections systems in Hawaii and New York State since the late 1990's and 2008 respectively. Santa Clara County, CA and New Orleans, LA adopted similar policies for their juvenile facilities in 2012 and 2011, respectively. Because it is required by the DOJ PREA regulations, many more agencies will be adopting this approach in the next few years.

This practice is also becoming more common outside the United States, with many corrections agencies in Europe and Australia housing transgender women in women's facilities on a case-by-case basis. In 2011, the UK Ministry of Justice issued national guidelines on this issue that call for case-by-case placements.

Does a woman with "male" genitalia pose a safety risk in a women's facility?

No. While a transgender woman might have genitalia that appear similar to a (non-transgender) man's, this does not mean she presents the same risks that a non-transgender male prisoner might. There are many reasons for this difference. What is most important to understand is that a transgender woman's core psychological identity is as a woman. Typically transgender women are uncomfortable with the genitalia they were born with, and are not interested in talking about or having their bodies viewed by others.¹ She may have a strong desire and a medical need for reconstructive surgery, but has been unable to obtain it. In many cases, hormone therapy eliminates both erectile function and fertility. Additionally, while the overwhelming majority of men are sexually attracted to women, the overwhelming majority of detained transgender women report being sexually attracted to men.² While any prisoner is capable of engaging in abusive conduct, there is no reason to believe that transgender women present any more risk to their fellow women prisoners than other women.

In practice, a growing number of corrections facilities for youth and adults have successfully housed transgender women with their natal genitalia alongside other women, without experiencing any incidents of abuse by trans women or other prisoners. By contrast, sexual abuse of transgender women in men's facilities is a common occurrence. A statewide study in California found that when transgender women are housed with men, they are 13 times more likely to be sexually assaulted than male prisoners in the same facilities.³

Does placement of a transgender woman in a women's setting violate the privacy of other women?

The mere presence of a transgender woman does not infringe upon the privacy of other female prisoners. Again, it is important to remember that regardless of their anatomy or the gender they were assigned at birth, transgender women have a core psychological identity as women. Of course, some prisoners may feel uncomfortable or object to sharing a cell or pod with a transgender woman—just as some prisoners may feel uncomfortable being housed with a lesbian or a woman with a visible disability. If prisoners have questions about a transgender prisoner's placement, staff can explain that the placement was made according to official policy, based on all the circumstances, and in the interest of safety and security. Staff can also make clear that the transgender female prisoner is a transgender female and not a man. Finally, staff should always make clear that any harassment or other misconduct by any prisoner or staff member should be reported and will be taken seriously.

Facilities are encouraged to provide as much privacy as possible for all prisoners to change clothes, shower, and attend to bodily functions, consistent with security needs. Notably, the DOJ PREA rules require that transgender prisoners (regardless of where they are housed) be provided the opportunity to shower separately from other prisoners, and most transgender prisoners will choose to do so out of concern for their own privacy and the risk of harassment or abuse.

Would these policies violate state laws or expose the facility to legal liability?

LGBT-protective policies would decrease a facility's legal risks, not increase them. The risk of liability from failing to adequately protect vulnerable LGBT prisoners is substantial, while the scenarios facilities may be worried about are either highly unlikely, legally baseless, or both.

A facility would not be liable simply because a non-transgender female objects to being housed with a transgender female. Courts have rejected such claims, stating that a person does not have a right to be free from a presence of another person who shares the same gender identity within a prison or other sex-segregated facility simply because the other person is transgender or has different external genitalia. Rather, when an institution has made a considered decision as to which facility is most appropriate for a transgender person, courts have deferred to that decision.⁴

Obviously, every facility is responsible for preventing any kind of abuse, regardless of who it is committed by or against. This is the purpose of a classification system. The risk that a transgender woman could be abused in a men's facility may be very great, while in general transgender women present no more risk to others than other women. An individual's criminal, institutional, and other history must be considered as part of the classification, however, and any prior history of sexual violence should be considered as a risk factor for any placements.

In general, state laws do not restrict agencies from housing individuals consistent with their gender identity rather than their birth sex. At most, state statutes usually require that "sex" be considered along with a number of other factors in classifying prisoners. (If this concern is raised, you may need to do some legal research, or find a partner who can do this. Keep in mind that legal objections sometimes stand in for other concerns that need to be addressed.)

Does this approach create the risk that a non-transgender prisoner may attempt to "game the system" in order to be housed with women?

While it is theoretically possible that a male prisoner might state that he is transgender in an attempt to obtain a housing placement with women, this is highly unlikely. Transgender women are a highly stigmatized population, and one well known to be vulnerable to abuse in custody. Involving a trained medical or mental health care provider in the assessment process, and asking a standard set of questions, will ensure any such rare cases would be easily identified.

1 See, e.g., George R. Brown (2010): Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder, *International Journal of Transgenderism*, 12:1, 32 ("Persons with GID often describe being repulsed by the presence of their genitalia and wish to have them removed as part of their overall transition from male to female").

2 L. Sexton, V. Jenness & J.M. Sumner, *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, *JUSTICE QUARTERLY*, 27:6 (2010).

3 V. Jenness, C. L. Maxson, K. N. Matsuda & J. M. Sumner, *Violence in California correctional facilities: An empirical examination of sexual assault*, at 3. Irvine, CA: Center for Evidence-Based Corrections (2009).

4 See *Crosby v. Reynolds*, 763 F.Supp. 666 (D. Maine 1991) (rejecting claim by non-transgender female prisoner who objected to housing with transgender female prisoner); *Cruzan v. Special School District No. 1*, 294 F.3d 981 (8th Cir. 2002) (rejecting claims by non-transgender female employee who objected to using restroom with transgender female employee).

CHAPTER 7:

DON'T STOP AT THE JAILHOUSE DOOR: Combating Incarceration of LGBT People



THIS GUIDE HAS FOCUSED PRIMARILY ON REFORMING JAIL POLICIES TO IMPROVE the conditions of confinement for LGBT people. These reforms can improve the health and well-being of incarcerated LGBT people, prevent trauma and abuse, give individuals a better chance once they're released, and even save lives. But reforming jail conditions is not enough. Incarceration is inherently traumatic, dehumanizing, and harmful. It imposes tremendous costs on individuals, their loved ones, and our communities, not to mention wasting billions of dollars that could be better spent. And the United States incarcerates people at a higher rate than any other nation in the world.

Fortunately, there is much that LGBT advocates can do to combat the crisis of mass incarceration that disproportionately affects poor LGBT people and LGBT people of color. While all work to combat discrimination and violence and increase opportunities for LGBT people ultimately plays a role in preventing incarceration, it is important to also address the driving factors within the criminal justice system itself. This is a great time to be working on these issues, as there is growing concern across the political spectrum that, in the words of Attorney General Eric Holder, "Too many Americans go to too many prisons for far too long and for no truly good law enforcement reason." Political figures from President Obama to former House Speaker Newt Gingrich have recently called for making changes in local, state, and federal laws, as well as for implementing court programs and prosecution policies that support diversion and rehabilitation instead of incarceration. Thanks to these changes, prison populations around the country have recently begun to decline for the first time in decades.

There may already be efforts underway in your state or city to combat mass incarceration, and adding LGBT advocates to the mix can help win additional visibility and political support. These issues belong on the agendas of statewide LGBT organizations and local community groups alike. As with reforming jail conditions, the list of potential allies for combating incarceration is long and includes racial justice groups, ACLU chapters and other civil rights organizations, public defenders and legal service groups, disability advocates, social service providers, churches and other faith groups, anti-violence groups, and even groups focused on balancing state budgets.

The following, in no particular order, are just some of the ways advocates can work to keep LGBT people out of jails and prisons.

Press police departments to stop profiling and discriminatory policing and adopt policies ensuring the safety of LGBT people. Ignorance, bias, and profiling by law enforcement are among major factors in bringing LGBT people into contact with the justice system. In addition to working on policies and practices for those who are already in custody, advocates can work with police departments to enact effective and enforceable bans on profiling and discriminatory policing practices based on sexual orientation and gender identity, and to adopt policies and practices that prohibit harassment by police and ensure safety of LGBT people while in police custody, including respecting individuals' gender identities on the street and in police custody.

Combat the school-to-prison pipeline for LGBT youth. Like other minority groups, LGBT students often face disproportionate discipline in school, and can end up forced out of school and into the juvenile justice system. LGBT advocates are increasingly speaking up against the expanded use of police in schools and the use of expulsion and criminal charges and other zero-tolerance disciplinary policies that can disproportionately harm LGBT youth. With even the U.S. Department of Education speaking up against the criminalization of students, many state and local lawmakers and school districts are seeking to replace zero-tolerance with more humane and sensible approaches. LGBT advocates should be at the table to ensure the stories and concerns of LGBT youth are heard.

Support probation and parole for LGBT people. Probation is a period of court-ordered supervision given instead of incarceration or for a period of time post-incarceration. Parole is a conditional early release from prison, allowing someone to finish their sentence under conditions similar to probation. Many states have focused on expanding the use of probation and parole to reduce incarceration and decrease time behind bars (and save money). Supporting these efforts in your state is critical. Because people on probation or parole must check in with officers and obey other conditions set by a court, however LGBT people can run into hostility and bias in many forms (including discriminatory conditions) that increase their risk of being re-incarcerated. Therefore, LGBT advocates can help by working with probation and parole departments and courts to help increase their understanding of and ability to support LGBT people, pressing for limits on officer discretion, advocating against fees imposed on probationers and parolees, and working to increase access to advocacy and legal help in these processes.

Examine diversion programs and specialty courts. Diversion programs involve the prosecutors dropping or not filing criminal charges against someone in exchange for an agreement that the person will participate in a treatment program or other support services. Specialty courts are focused on a specific population, such as those charged with low-level drug, DUI, or prostitution offenses, persons with mental illnesses or disabilities, who are homeless or veterans, and emphasize treatment and services through ongoing court supervision instead of incarceration. Thousands of these programs exist throughout the country, and there are important differences between programs. These programs have the potential to reduce imprisonment, but also have been subject to various criticisms, including that many programs rely on mandated services that don't meet individuals' real needs; lead to more arrests and even incentivize service providers to assist in increasing arrests; employ sanctions for noncooperation that can be even harsher than traditional sentences; and are an inadequate substitute for changing criminal laws themselves. LGBT advocates should examine any existing programs in the community, consult affected community members and allied organizations, and determine whether to support changes in existing programs, advocate for new programs, or work with implementing agencies to better equip them to work with LGBT people (including adopting trans-inclusive policies for gender-specific programs).

Combat prison expansion and the privatization of prisons. Combating the building or expansion of jails and prisons is another way to fight mass incarceration—prison beds that are built tend to get and stay filled. LGBT advocates should oppose new or expanded facilities not because they should be built somewhere else, but because they are unnecessary, wasteful, and harmful to all communities. In the 1990s many states and localities built significantly more juvenile facilities than were needed then or now. LGBT advocates should work with juvenile justice groups who are actively trying to shut down these unnecessary, run down, or very large juvenile facilities in their localities. Activists are also fighting against awarding contracts for private, for-profit prisons and jails, which have track records of abuse and inhumane conditions, and are more difficult to monitor effectively and hold accountable for rights violations. Some states, such as Illinois and New York, ban the use of for-profit prisons, and similar proposals have been introduced in several other states. Even without an explicit ban, some states like New Hampshire have rejected all proposals for private prison contracts.

Oppose “anti-prostitution zones” and other law enforcement-based approaches to prostitution. Some cities have proposed laws to expand the grounds for arresting people suspected of prostitution in certain areas, or to make it a crime to even set foot in whole neighborhoods if you have a past conviction for prostitution. Community activists have fought to stop passage or limit implementation of these policies in several cities, as well as to prohibit police confiscation of condoms and introduction of condoms as evidence of prostitution. Similarly, some cities are working on ways to offer support to minors who engage in prostitution outside of the juvenile justice system. Given the significant numbers of LGBT people who are profiled or subjected to heightened and discriminatory enforcement of prostitution-related offenses, LGBT advocates might consider supporting efforts in some cities to narrow or eliminate local criminal laws on prostitution, or to limit the enforcement of those laws.

Challenge local laws that criminalize poverty. As a population that faces disproportionate poverty and homelessness, LGBT people are harmed by ordinances that criminalize sitting, eating, storing personal belongings, or begging in public places, as well as selective enforcement of loitering and other general laws against homeless persons. Poor communities are also threatened by “gang injunction” laws that give authorities wide discretion to criminalize ordinary day to day activities (such as walking down the street or riding in a car) based on one’s association with alleged gang members. LGBT advocates can work with other local groups to oppose these and other measures that effectively criminalize poverty.

Lobby your state representatives for criminal justice reforms. Many states, from Texas to New York, are moving to reform their criminal justice systems. These efforts cross partisan lines, and LGBT advocates can be key coalition partners. Perhaps the most critical changes are reforms to sentencing laws, which would eliminate or reduce mandatory minimum sentences and give more discretion to judges to use diversion, probation, or shorter prison sentences. Other changes to consider supporting in your state might include proposals to:

- Repeal laws that criminalize conduct based on HIV status
- Keep minors out of adult jails and prisons
- Allow intermediate sanctions for parole violations instead of sending people back to prison
- Restore or expand “good time” credits that can shorten sentences
- Require reasonable telephone rates for prisoners to stay connected to loved ones
- Restore voting rights to formerly incarcerated people
- Decriminalize marijuana possession, as was recently done in Colorado and Washington State

Support community re-entry programs. Re-entry programs help individuals being released from incarceration reintegrate by connecting them with housing, training, support services, and employment. These programs need more funding to better serve more people by giving them the tools to avoid being re-incarcerated. LGBT advocates can also work with these programs to become more equipped to serve LGBT people (including adopting trans-inclusive policies for gender-specific programs). Groups that provide legal services for the LGBT community can also consider adding services such as helping people expunge or seal their criminal record.

PRESIDENT OBAMA ON MASS INCARCERATION

"[T]here's a big chunk of [today's] prison population that is involved in nonviolent crimes. And it is having a disabling effect on communities. You have entire populations that are rendered incapable of getting a legitimate job because of a prison record. And it gobbles up a huge amount of resources. If you look at state budgets, part of the reason that tuition has been rising in public universities across the country is because more and more resources were going into paying for prisons, and that left less money to provide to colleges and universities. I think we have to figure out what are we doing right to make sure that that downward trend in violence continues, but also are there millions of lives out there that are being destroyed or distorted because we haven't fully thought through our process." —TIME, Dec. 19, 2012

Lobby your state and local representatives to ban discrimination based on past convictions. When employers, housing providers, and other entities automatically turn away those with past convictions, they make successful reentry impossible and guarantee that more people will be re-incarcerated. Several states and over 50 cities and counties have passed laws governing public and/or private employment that guarantee workers who were previously incarcerated the chance to have their qualifications considered and to explain their convictions. Some employers are voluntarily pledging to "Ban the Box," (referring to the box on job applications that asks about arrests or convictions) and some communities have extended "Ban the Box" protections to housing. LGBT organizations should also make a commitment to ensure equal opportunity for applicants with criminal records in their own hiring. Find more information about the "Ban the Box" campaign at NELP.org and <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/ban-the-box-campaign>.

Lobby Congress for federal sentencing reform. Today there is remarkable bipartisan support in Congress for federal sentencing reform. Two bills you should press your elected officials to support are 1) the Smarter Sentencing Act, which would reform mandatory minimum sentences for drug offenses (introduced in the 113th Congress by Senators Richard Durbin (D-IL) and Mike Lee (R-UT) and Reps. Raul Labrador (D-ID) and Bobby Scott (D-VA)); and 2) the Justice Safety Valve Act, which would give federal judges more discretion to set lower sentences when appropriate (introduced in the 113th Congress by Senators Patrick Leahy (D-VT) and Rand Paul (R-KY) and Reps. Scott and Thomas Massie (R-KY)). Bring a group of constituents to visit their members of Congress' local office and ask for their support.

RESOURCES

In addition to the publications and organizations listed in Appendix D, the following resources may be useful starting places for LGBT advocates who are looking to get involved in some of the types of efforts described above.

- The ACLU Criminal Law Reform Project provides reports, social media tools, and other resources on a wide variety of related topics. Your state ACLU chapter may have state specific resources. Visit aclu.org.
- The Advancement Project provides resources for activists on voting rights restoration and ending the school-to-prison pipeline. AdvancementProject.org Families Against Mandatory Minimums has smart, accessible resources on sentencing reform, available at FAMM.org.
- BreakOUT! works to end the criminalization of LGBTQ youth in New Orleans through organizing, leadership development, healing justice, and policy advocacy. YouthBreakOut.org.
- Californians for Safety and Justice is an example of a state-based campaign to replace prisons with common sense solutions. SafeandJust.org

- CURB (Californians United for a Responsible Budget) provides resources on opposing jail expansion. CurbPrisonSpending.org
- Citizens United for Police Reform (CPR) is a campaign (prominently including LGBTQ advocates) to end discriminatory policing in New York City through policy advocacy, litigation, education, and community mobilization. ChangetheNYPD.org.
- Critical Resistance is a national organization aimed at ending the prison industrial complex. It currently has chapters in Los Angeles, New Orleans, and Oakland. CriticalResistance.org
- The Drug Policy Alliance is the nation's leading organization promoting drug policies grounded in science, compassion, health, and human rights. DrugPolicy.org.
- Families Against Mandatory Minimums has smart, accessible resources on sentencing reform, available at FAMM.org. The Advancement Project provides resources for activists on voting rights restoration and ending the school-to-prison pipeline. AdvancementProject.org
- Streetwise and Safe works to build and share leadership, knowledge, skills, and community among queer and trans youth of color affected by criminalization and actual or perceived involvement in street economies. StreetwiseandSafe.org
- FIERCE is a membership-based organization building the leadership and power of LGBTQ youth of color in New York City. FIERCE's campaigns include combating police abuse and the criminalization of LGBTQ youth of color and homeless youth.
- Native Youth Sexual Health Network (NYSHN) is an organization by and for Indigenous youth whose advocacy and organizing work includes tackling issues of police misconduct, incarceration, school push-out, and sex work and sex trade as they affect youth and adults, including Two-Spirit and LGBTQ people. NativeYouthSexualHealth.com.
- Critical Resistance is a national organization aimed at ending the prison industrial complex. It currently has chapters in Los Angeles, New Orleans, and Oakland. CriticalResistance.org
- Streetwise and Safe works to build and share leadership, knowledge, skills, and community among queer and trans youth of color affected by criminalization and actual or perceived involvement in street economies. StreetwiseandSafe.org
- The Justice Policy Institute (JusticePolicy.org), the Sentencing Project (SentencingProject.org), and the Vera Institute Center on Sentencing and Corrections (Vera.org) provide extensive in depth research and analysis on criminal justice reform issues.
- Right on Crime provides resources that, while they may not always align with LGBT and progressive advocate perspectives, can help persuade conservative lawmakers to back reforms. RightonCrime.com

APPENDICES



APPENDIX A: LEAVE BEHIND MATERIALS FOR INITIAL MEETINGS WITH JAIL AND PRISON OFFICIALS

Lesbian, Gay, Bisexual, and Transgender People: Key Facts for Custodial Agencies

LGBT individuals are part of your population. Lesbian, gay, and bisexual men and women are at least 3.5% of the US population. Transgender women (who transition from male to female) and transgender men (who transition from female to male) are at least 0.3-0.5% of the US population. LGBT people are of every age, race, ethnicity, socioeconomic class, religion and profession (including law enforcement and corrections). Every custodial agency has LGBT people in its population, whether they initially identify themselves or not.

Transgender women and men have a core psychological identity that differs from the sex they were born. Transgender people live as the women and men they experience themselves to be, even if their identification or anatomy does not appear to match.

LGBT individuals experience “the highest rates of sexual victimization” in custody, according to the Department of Justice. LGBT inmates experience sexual abuse by staff at twice the rate of other inmates, and sexual abuse by another inmate at 2.5 times to 10 times the rate of other groups. Transgender women housed in men’s prisons are most at risk, reporting sexual assault at 13 times the rate of male inmates.

PREA Standards require protection and individualized placement for LGBT individuals. National PREA Standards from the U.S. Justice Department require agencies to do the following:

- Identify vulnerable individuals, including LGBT people, at intake
- Not place LGBT people in segregation or specific units solely because of their status
- Place transgender people in female or male housing on a case-by-case basis that considers their psychological identity and safety, not on the basis of their anatomy
- Ensure transgender people can shower separately from others
- Search transgender individuals in a respectful manner, and never solely to determine anatomy
- Train staff on communicating with LGBT individuals
- Assess whether victims were targeted for being LGBT

Courts have said agencies have a legal responsibility to provide protection and care for LGBT inmates. Courts across the country have said that agencies have a responsibility to recognize the vulnerability of LGBT inmates and protect them from abuse; treat sexual orientation or transgender status as confidential information; and provide transgender-related medical care.

Jurisdictions across the country are adopting policies to protect LGBT inmates. Agencies that have adopted these policies include:

- Harris County (Houston), Texas
- City and County of Denver, Colorado
- Cook County (Chicago), Illinois
- Cumberland County (Portland), Maine
- the District of Columbia
- L.A., N.Y., and Boston Police

APPENDIX B: EXAMPLES OF TRANSGENDER PRISONER PREFERENCE FORMS

The following are examples of forms currently in use by adult and youth correctional and law enforcement agencies. Some of these forms deal only with searches, while others also record an individual's gender identity, preferred name, appropriate pronoun, and/or the individual's view of where they would be most safely housed. These are only examples; we recommend tailoring your recommendations to the circumstances and level of receptivity of the facility you are working with.

Denver Sheriff Department (Colorado)

APPENDIX A—DEPARTMENT ORDER 4005

Denver Sheriff Department

STATEMENT OF SEARCH PREFERENCE FORM

Inmate Name: _____
(please print)

Booking #: _____

Preferred Pronoun (i.e., he/she): _____

Preferred Name: _____
(please print)

While in custody of the Denver Sheriff's Department, I would prefer to be searched by an officer of the below indicated sex whenever possible. I understand that this preference will be respected unless the situation is an emergency, there is no one of that sex available, or the failure to conduct a search will jeopardize the safety of the staff or inmates.

Female ____ Male ____ Both ____

Inmate Signature: _____ Date: _____

Witnessing Officer(s) Signature and Serial Number:

Officer 1: _____ Serial #: _____

Date Signed: ____/____/____

Officer 2: _____ Serial #: _____

Date Signed: ____/____/____

Cumberland County Sheriff's Office (Maine)

EFFECTIVE 12/09

C-120C

STATEMENT OF PREFERENCE

I, _____, acknowledge that I am in the course of a biological/physiological sex change procedure. I have been advised that I am under arrest and that I will be detained at the Cumberland County Jail. I have also been advised that for security reasons, a (strip) search must be conducted of my person by corrections officer(s). I prefer that this search be conducted by corrections officer(s) of the _____ sex. I hereby state that any humiliation or embarrassment inherent in such a search will be lessened by having that search conducted by corrections officer(s) of the _____ sex. I hereby acknowledge that by offering me the opportunity to express my preference, the Cumberland County Jail has minimized the invasion of my privacy inherent in a (strip) search and that the Cumberland County Jail is not liable for any invasion of my privacy caused by the sex of the particular officer(s) performing this search.

After being fully advised, the inmate has verbally expressed preference that the search be conducted by officer(s) of the _____ sex.

Inmate's signature

Date

Witness

Date

Witness

Date

Boston Police Department (Massachusetts)

Boston Police Department

STATEMENT OF SEARCH PREFERENCE FORM

(This form is to be used when booking transgender individuals)

TO BE COMPLETED BY THE BOOKING OFFICER

Master Booking Name: _____

Legal Name: _____

C.R. Number: _____

Preferred Name (if different from master/legal name): _____

Preferred Pronoun (i.e. he/she): _____

TO BE COMPLETED BY PRISONER

For the purpose of searches conducted while in the custody of the Boston Police Department, I prefer to be searched by an officer of the gender indicated below. I understand that my preference will be respected unless there is no appropriate individual available and failure to conduct a search would jeopardize the safety of other prisoners or officers.

Female _____ Male _____

Prisoner Signature: _____ Date: _____

Witnessing Officer(s) Signature(s) -- TO BE COMPLETED BY BOOKING OFFICER

1. Name: _____ ID#: _____

Signature: _____ Date: _____

2. Name: _____ ID#: _____

Signature: _____ Date: _____

0076-BFS-0413

Santa Clara Probation Department, Juvenile Hall (California)

TRANSGENDER PREFERENCE FORM

To be filled out either by a staff member with input from the youth or the youth.

Name: _____ DOB: _____

File #: _____ Birth Sex: _____

Gender Identification: Male ____ Female ____

Transgender: MTF ____ FTM ____

Name Preference: _____

Pronoun Preference: He ____ She ____

Housing Preference: Male Unit ____ Female Unit ____ No Preference ____

Search Preference:

Transgender youth may request that a male or female staff member conduct (pat and strip) searches as necessary.

I prefer to be searched by a staff member that is : Male ____ Female ____

Urine Testing:

Minor will be tested by same sex as selected for searches.

APPENDIX C: SUMMARIES OF (NON-LGBT-SPECIFIC) PREA STANDARDS

These summaries are intended solely to help identify possible gaps in the policies of the facility you are advocating with. The full PREA standards can be found at <http://www.prearesourcecenter.org/>.

PREA Coordinator

All agencies that run a confinement facility must have a written policy that mandates zero tolerance toward all forms of sexual abuse and sexual harassment and that outlines the agency's approach to preventing, detecting, and responding to such conduct. These agencies must designate an agency-wide PREA coordinator who will develop, implement, and oversee the agency's efforts to comply with the PREA standards. In addition, any agency that operates more than one facility must have a PREA compliance manager for each facility who will coordinate the individual facility's PREA compliance efforts.

Supervision and Monitoring

An agency must ensure that each facility it operates develops, documents, and makes its best efforts to comply with a staffing plan. This staffing plan should provide for adequate levels of staffing, and, where applicable, video monitoring, to protect prisoners against sexual abuse. At least once a year, the agency, in consultation with the PREA coordinator, must determine whether adjustments are needed to the staffing plan.

Each agency operating a confinement facility must implement a policy and practice of having supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment for both day and night shifts.

Hiring and Promotion Decisions

An agency must not hire or promote anyone who may have contact with prisoners if that person has attempted, engaged in, or been convicted of sexual abuse in a confinement facility. Agencies must ask all applicants and employees directly about previous sexual abuse or harassment.

An agency must conduct a criminal background records check before hiring an employee who may have contact with prisoners. After hiring an employee, the agency must conduct a background check at least every five years unless there is a system in place for otherwise gathering such information for current employees.

If an agency is asked to provide an employment reference for a former employee, it must provide information on substantiated allegations of sexual abuse or sexual harassment involving that former employee.

Training and Education

All facilities must train staff on a variety of issues related to sexual abuse prevention and reporting, including interacting professionally with LGBT and gender nonconforming people and those with intersex conditions. This requirement also applies to volunteers, contractors, investigators, and medical and mental health care practitioners.

During and after the intake process, prisoners must receive information explaining the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment. This information must be continuously and readily available or visible to prisoners through posters, prisoner handbooks, or other written formats.

Minors in Adult Facilities

Many correctional experts recommend that minors should never be housed in adult prisons. The Standards do not completely prohibit this practice, but they require separation of youthful prisoners from adult prisoners both inside and outside of housing units, unless there is direct staff supervision.

Reporting Abuse

The Standards stipulate that individuals must have multiple ways to internally make private reports of sexual abuse and harassment, retaliation (by staff or other prisoners), and any staff negligence that may have contributed to abusive incidents.

Individuals will also have at least one way to report abuse or harassment outside of the correctional department/agency and may choose to do so anonymously. No discipline may be taken against a prisoner for filing a grievance unless the agency can demonstrate that it was filed in bad faith.

Support for Survivors of Abuse

When a person has experienced sexual abuse, the Standards require facilities to ensure that the individual is separated from alleged abusers and protected from retaliation. Facilities must provide immediate and ongoing medical and mental health care as needed; gather and preserve evidence and conduct an investigation; report the allegations to appropriate law enforcement authorities; report the results of investigations to abuse survivors; and take appropriate corrective action. Facilities must also permit individuals to access support from outside organizations in as confidential a manner as possible.

Official Response Following a Prisoner Report

All staff are required to immediately report to designated officials any knowledge, suspicion, or information regarding sexual abuse or sexual harassment that occurred in any facility. The first staff member to respond to an allegation of sexual abuse must separate the alleged victim and abuser, preserve and protect the crime scene for collection of evidence, and ensure that the alleged victim and abuser not take any actions that could destroy physical evidence on their persons.

An agency must establish a policy to protect all prisoners and staff from retaliation for reporting sexual abuse or harassment or cooperating with investigations of such abuse or harassment. The agency must also designate which staff members or departments are responsible for monitoring signs of retaliation.

If a facility responds to allegations of abuse by placing the victim in protective custody, the facility must ensure that all available alternatives have been assessed and that there is no alternative means of separation from alleged abusers. Alternatives might include relocating a perpetrator of abuse, providing heightened supervision, changing housing placement or cellmates, placement in a single occupancy cell within the general population, or transfer from a men's to a women's facility or vice versa.

In cases where prisoners must be placed in segregation or isolation, access to programs, education, and other opportunities must continue to the greatest extent possible. Moreover, segregation—when it must be used—cannot last for longer than 30 days. Agencies must document and review the reasons for any restrictions on programs or other opportunities and any use of segregation beyond 30 days.

Investigations

Agency investigations into allegations of sexual abuse and sexual harassment must be promptly, thoroughly, and objectively completed by investigators who have received special training in sexual abuse investigations. Administrative investigations must include an effort to determine whether staff actions, or failures to act, contributed to the abuse. The investigation must be documented in written reports that include a description of the physical and testimonial evidence (including DNA evidence and witness interviews), the reasoning behind credibility assessments, and investigative facts and findings.

Where appropriate, an agency must offer all victims of sexual abuse access to forensic medical examinations and must attempt to provide a victim advocate from a rape crisis center. The advocate will accompany and support the victim throughout the forensic medical examination process, which must be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible.

After an investigation, the agency must inform the prisoner as to whether the allegation was determined to be substantiated, unsubstantiated, or unfounded. Substantiated allegations of conduct that appears to be criminal must be referred for prosecution, and the agency must inform the prisoner as to the perpetrator's punishment. In addition, the agency must retain all written investigative reports for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

Consensual Sex vs. Sexual Abuse

The Standards define sexual abuse between prisoners as sexual contact made without consent, through threat or coercion, or when a person is unable to consent. The Standards permit facilities to prohibit sex of any kind between prisoners. However, facilities may not treat consensual sex as equivalent to sexual abuse.

The Standards define any sexual contact with prisoners by a staff member as sexual abuse. Prisoners cannot be disciplined for sexual contact with staff unless the agency finds after investigation that the staff member did not consent.

Staff must be trained on distinguishing between consensual sexual activity and abuse, and in juvenile facilities must also be trained on applicable age of consent laws.

Grievances and Access to Courts

Federal law limits prisoners' access to the courts by first requiring that they go through (exhaust) all steps of an institution's internal grievance system. In an effort to relieve some of the unfair effects of this law on survivors of sexual abuse, the Standards require agencies to adjust their procedure to deem grievances related to sexual abuse "exhausted" in certain circumstances. The Standards prohibit imposing a time limit on when a prisoner may submit a grievance regarding sexual abuse. An agency must deem a grievance regarding sexual abuse to be exhausted if it is denied at any stage of appeal, or is not responded to by a set deadline.

The Standards also require agencies to provide a way for prisoners to submit grievances without being required to address the issue directly with facility staff, and to permit prisoners to get assistance with their grievances from third parties.

If agencies fully implement the Standards, these requirements would make it easier for abuse survivors to ultimately bring their claims to court. However, individuals should be aware that their grievance will be subject to the procedures an agency has in place at the time of the grievance, whether or not they comply with the PREA Standards.

Discipline

If a staff member violates an agency's policies by engaging in sexual abuse, the presumptive disciplinary sanction is termination. Disciplinary sanctions for any other violation relating to sexual abuse or harassment must be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories. Unless the activity was clearly not criminal, all terminations or resignations related to an agency's sexual abuse and harassment policy must be reported to law enforcement agencies and relevant licensing bodies.

If a prisoner is found to have engaged in prisoner-on-prisoner sexual abuse, they will be subject to disciplinary sanctions commensurate with the nature and circumstances of the abuse committed, the prisoner's disciplinary history, and the sanctions imposed for comparable offenses by other prisoners with similar histories.

Prisoners may not be disciplined for any refusal or nondisclosure during screening regarding gender identity, sexual orientation, intersex condition, disability status, or prior sexual victimization.

Data Collection and Review

After every substantiated or unsubstantiated sexual abuse investigation, a facility review team must submit a report describing whether the agency needs to change its policies or practices to better prevent, detect, or respond to abuse. The facility must implement the review team's recommendations or improvement or must document its reasons for not doing so.

An agency must collect, review, report, and publish all aggregated sexual abuse data from facilities under its direct control and private facilities with which it contracts. Before this information is made public on the agency's website or through other means, all personal identifiers should be removed.

Audits

All facilities must have an independent audit of PREA compliance at least once every three years. Auditors must have the opportunity to interview prisoners and receive confidential correspondence from prisoners.

While PREA does not explicitly require that facilities post information identifying auditors and their contact information, advocates should press for this information to be included inmate education and handbooks.

PREA Standards apply to:

- State and federal prisons
- City and county jails
- Short-term police lock-ups (such as police stations);
- Juvenile detention centers; and
- Community confinement facilities (including halfway houses, rehabilitation centers and other community residential facilities for those completing a criminal sentence, fulfilling a condition of pre-trial release, or post-release supervision).

Specific requirements differ for each type of facility. All agencies must ensure that their contractors are in compliance with applicable Standards. Separate PREA Standards issued by the Department of Homeland Security (DHS) apply to immigration detention facilities. Other types of detention facilities may be covered by forthcoming federal standards.

APPENDIX D: ADDITIONAL READING AND RESOURCES

Top Resources

National Institute of Corrections, Policy Review and Development Guide: LGBTI Persons in Custodial Settings (2013). Available at: <http://nicic.gov/Library/027507>.

National Institute of Corrections, Online Resources on LGBTI Offenders, <http://nicic.gov/LGBTI>.

PREA Resource Center: <http://www.prearesourcecenter.org/>.

Research, Personal Narratives, and Background Reading

Center for Evidence-Based Corrections, Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault (2007). Available at: http://ucicorrections.seweb.uci.edu/files/2013/06/Jenness-et-al._PREA-Report.pdf.

Lori Sexton, Valerie Jenness & Jennifer Macy Sumner, "Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons," *Justice Quarterly*, 27(6):835-866 (2010).

Allen J. Beck et al, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12 (Bureau of Justice Statistics, May 2013). Available at www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (2011).

Eric Stanley & Nat Smith (eds.), *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (2011).

Frank H. Galvan & Mohsen Bazargan, *Interactions of Latina Transgender Women with Law Enforcement* (2013). Available at: <http://williamsinstitute.law.ucla.edu/research/transgender-issues/interactions-of-transgender-latina-women-with-law-enforcement/>.

Amnesty International USA, *Stonewalled: Police Abuse and Misconduct Against LGBT People in the US* (2005). Available at: <http://amnesty.org/en/library/info/AMR51/122/2005>.

Sylvia Rivera Law Project, "It's War in Here": A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons (2007). Available at: <http://srp.org/files/warinhere.pdf>.

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

Medical Care

World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed. 2011).

UCSF Center of Excellence for Transgender Health, *Primary Care Protocol for Transgender Patient Care* (2011).

National Comm'n on Correctional Health Care, *Position Statement: Transgender Health Care in Correctional Settings* (2009). Available at: <http://www.ncchc.org/transgender-health-care-in-correctional-settings>.

Gay Men's Health Crisis, *Fenced In: HIV/AIDS in the Criminal Justice System* (2012). Available at: http://www.gmhc.org/files/editor/file/a_pa_2012_prison.pdf

Youth

Child Welfare League of America, Recommended Practices to Promote the Safety and Well-Being of LGBTQ Youth and Youth at Risk of or Living with HIV in Child Welfare Settings (2012). Available at: <http://www.lambdalegal.org/sites/default/files/publications/downloads/recommended-practices-youth.pdf>.

National Center for Lesbian Rights & Sylvia Rivera Law Project, A Place of Respect: A Guide for Group Care Facilities Serving Transgender and Gender Non-Conforming Youth (2011). Available at: <http://www.nclrights.org/legal-help-resources/resource/a-place-of-respect-a-guide-for-group-care-facilities-serving-transgender-and-gender-non-conforming-youth>.

The Equity Project—<http://www.equityproject.org>. The Equity Project seeks to educate and train juvenile justice professionals, providing the resources and information necessary to ensure safety and fairness for LGBT youth in the juvenile justice system.

Support for Incarcerated/Detained Individuals

Just Detention International—<http://www.justdetention.org>. JDI is a health and human rights organization that advocates for the safety of inmates around the world, seeking to end sexual abuse in all forms of detention.

TGI Justice Project—<http://www.tgjip.org>. TGIJP is a support and survival organization for low income transgender women of color and their families, who are in prison, formerly incarcerated, or targeted by the police.

Black and Pink—<http://www.blackandpink.org>. Black and Pink is a family of currently and formerly incarcerated LGBTQ people, working to abolish the prison industrial complex through advocacy, education, direct action, and organization.

Justice Now—<http://www.jnow.org>. Justice Now fights to end the practices of policing and imprisoning, with a specific concern for violence against women in those contexts.

The Prisoner Correspondence Project—<http://www.prisoner Correspondence Project.com>. The Project is a Montreal-based direct-correspondence program for GLBTQI, gender-variant, and Two-Spirit prisoners in Canada and the United States.

Hearts on a Wire Collective—<https://www.facebook.com/HeartsOnAWire>. Pennsylvania-based Hearts on a Wire produces a newsletter by and for trans and gender-variant prisoners and provides outside support and advocacy.

Bent Bars Project—<http://www.bentbarsproject.org>. Bent Bars is a letter-writing project for lesbian, gay, bisexual, transgender, gender-variant, intersex, and queer prisoners in the United Kingdom.

Legal Assistance for Incarcerated/Detained Individuals

Legal service organizations—<http://www.lsc.gov/find-legal-aid>. A list of affordable legal services and their contact information by Legal Services Corporation, organized by state (Page available in Spanish)

Immigration legal service providers—<http://www.justice.gov/eoir/probono/states.htm>. A comprehensive list of free legal service providers, organized by state, and compiled by the United States Department of Justice

ACLU—<https://www.aclu.org>.

Lambda Legal—<http://www.lambdalegal.org>.

National Center for Lesbian Rights—<http://www.nclrights.org>.

Gay & Lesbian Advocates & Defenders of New England—<http://www.glad.org>.

Sylvia Rivera Law Project (New York)—<http://srlp.org>.

Transgender Law Center—<http://transgenderlawcenter.org>.

Transgender Legal Defense and Education Fund—<http://www.transgenderlegal.org>.

Immigration Equality—<http://immigrationequality.org>.

National Immigrant Justice Center—<http://www.immigrantjustice.org>.

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