KNOW YOUR RIGHTS

Laws, Court Decisions, and Advocacy Tips to Protect Transgender Prisoners



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INTRODUCTION

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> "It was challenging being in a men's prison because I faced a different level of discrimination being a trans woman, having this body, and being around all these men. The staff hyper-sexualized me and used my body to create policies only for me: 'Oh, they can do that, but you can't.' … Prisons aren't safe for anybody. Prisons were created to oppress and hold down and deteriorate you."
>
> —CeCe McDonald, transgender woman and activist, on her incarceration in a men's prison in Minnesota

This guide identifies laws, court decisions, advocacy tips, and other resources that may be helpful for adult transgender prisoners.[1] Each transgender person's experience in prison and jail is different, in part because the conditions vary a great deal from one prison to another and change over time. However, the safety and health of every transgender prisoner in the United States is guaranteed by the U.S. Constitution no matter where the prisoner is held. And the recently-released Prison Rape Elimination Act ("PREA") standards provide additional support for the protection of transgender prisoners. Both PREA and the Constitution protect prisoners even if they are kept in a privately run facility and even if the medical or correctional staff are not government employees.[2]

This guide is divided into the following sections: **The Prison Rape Elimination Act**, **Safety and Protection from Violence**, **Medical Care**, **Housing and Administrative Segregation**, **Searches and Privacy**, **Safely Preserving/ Enforcing Your Rights**, and **Resources**, which includes lists of organizations and helpful documents. It focuses primarily on the standards imposed by PREA and the protections offered by the Eighth and Fourth Amendments to the United States Constitution. However, prisons and jails may also violate your rights under the Constitution's Equal Protection Clause if they deny you the services or benefits they provide to other prisoners because you are transgender.[3] In addition, there may be additional federal and state laws, or agency policies, that could help you but are not addressed in this guide.

1 Although this guide may be helpful for youth, the focus is on adults. Separate statutory and constitutional standards may apply to youth in both adult and juvenile facilities. Additionally, the guide focuses on criminal confinement facilities rather than civil detention. Though it may be helpful for civil Immigration & Customs Enforcement (ICE) detainees, the rights of an ICE detainee differ in certain ways from those of a criminal prisoner.

2 *See* 42 U.S.C. 15609(7) (defining "prison" for purposes of PREA to include "any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government"); 28 C.F.R. § 115.501(b) ("The Governor's certification shall apply to all facilities in the State under the operational control of the State's executive branch, including facilities operated by *private entities* on behalf of the State's executive branch." (emphasis added)); *West v. Adkins*, 487 U.S. 42, 56-57 (1988) (private doctor who contracts with state to provide medical care may be sued for violating the Constitution); *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (private prison management company and its employees may be sued for violating the Constitution); *Conner v. Donnelly*, 42 F.3d 220 (4th Cir. 1994) (private doctor who sees prisoners by referral from prison may be sued for violating Constitution even if doctor is not under contract with the state); *but see Minneci v. Pollard*, 132 S. Ct. 617 (2012) (where a federal prisoner has an adequate state tort damage remedy, the prisoner may not sue the employees of a privately-operated prison for damages for violating the Eighth Amendment).

3 *See Fields v. Smith*, 712 F. Supp. 2d 830, 867-69 (E.D. Wis. 2010) (facility violated Equal Protection Clause where it denied hormone therapy to prisoners with gender dysphoria while providing such treatment for other medical conditions); *see also Johnson v. Knable*, 862 F.2d 314, at *1 (4th Cir. 1988) (reversing summary judgment on gay prisoner's claim that he was denied prison work based on his sexual orientation); *Kelley v. Vaughn*, 760 F. Supp. 161, 163-64 (W.D. Mo. 1991) (denying motion to dismiss prisoner's complaint alleging removal from job because he was gay).

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THE PRISON RAPE ELIMINATION ACT (PREA)

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Congress passed the Prison Rape Elimination Act (PREA) in 2003 to address the widespread problem of sexual assault and harassment in prisons, jails, police lock-ups, community corrections and immigration detention.[4] In May 2012, after nearly a decade of study, the U.S. Department of Justice issued final regulations to implement PREA. These regulations are known as the PREA Standards.[5]

The PREA Standards apply to prisons, jails, lock-ups and community corrections facilities at the federal, state, and local levels and include specific protections for transgender prisoners, which are discussed below. Some states have opted out of PREA, which means corrections agencies in these states do not plan to comply with the PREA Standards. However, the Standards may still be helpful in those states for prisoner lawsuits and in advocating for better conditions because they establish benchmarks for treating prisoners humanely.[6] Unfortunately, prisoners cannot sue prisons or prison officials for violating the PREA Standards.[7] But there are important ways to hold agencies and officials accountable for violating PREA's mandates.

REPORT VIOLATIONS

- Compliance with the Standards is determined through audits—or reviews—that take place annually and are conducted by outside agencies.[8] Each year, one third of an agency's facilities must be audited. Facilities that fail to comply with the PREA Standards risk losing required accreditations and/or a portion of their federal funding.[9]
    - Check for information about upcoming audits in your facility. There should be contact information listed for the auditors and you can report violations directly to them.
    - Whenever you write to the Inspector General or file a grievance, send a copy of that grievance to the PREA Coordinator for the agency that has custody over you. Even if you do not know the person's name, you can send to "PREA Coordinator."
- Incorporate Violations Into Grievances & Litigation. Even though there is no private right to sue under PREA, a violation of the PREA Standards could help to show that a prisoner's constitutional rights have been violated.

4 *See* 42 U.S.C. § 15601 *et seq.*

5 These Standards did not include immigration detention facilities but the Department of Homeland Security (DHS) separately promulgated regulations that apply to DHS facilities in March of 2014. *See* 6 C.F.R. Part 115, available at http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf.

6 *See, e.g., Lopez v. LeMaster*, 172 F.3d 756, 761 (10th Cir. 1999) ("While these [state health department jail] standards do not establish constitutional parameters for the reasonable measures necessary to ensure inmate safety, they do provide persuasive authority concerning

7 *See De'lonta v. Clarke*, 7:11-CV-00483, 2013 WL 209489, at *3 (W.D. Va. Jan. 14, 2013) (collecting cases stating that PREA does not "create a private right of action for inmates to sue prison officials for noncompliance with [PREA]").

8 28 C.F.R. § 115.401.

9 42 U.S.C. § 15607(e)(2).

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SAFETY & PROTECTION FROM VIOLENCE

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> "I would like for my legacy to be that I changed injustices for a multitude of people who were or would have suffered unjustly..."[10]
>
> —Dee Farmer, transgender woman and plaintiff in *Farmer v. Brennan*

The violence and discrimination that many transgender people experience in the free world may actually worsen for a transgender person who is incarcerated. However, a number of transgender individuals have fought successfully for better conditions, and circumstances in a few jails and prisons have improved as a result. These prisoners' examples of resilience and survival inspire others, in prison and out, to continue the fight for the safety from violence each person deserves.

The Constitution requires that prisons and jails protect prisoners from violence by other prisoners and staff. If prison officials do not uphold this duty to protect, they violate the Eighth Amendment of the U.S. Constitution's prohibition on cruel and unusual punishment. For example, in a case involving the repeated rape and beating of a transgender prisoner by other prisoners, the U.S. Supreme Court held that prison officials cannot be deliberately indifferent to the sexual abuse of a transgender prisoner.[11] A prison official shows "deliberate indifference" if he or she recklessly disregards a substantial risk of harm to a prisoner.[12] Deliberate indifference requires the official to *know of* and *disregard* an excessive risk of harm by failing to take reasonable steps to reduce the risk.[13] For that reason, prisoners should tell prison staff in writing about any risks or concerns they have that could lead to violence or harm.

Transgender prisoners are frequently singled out for violence. In one study of transgender women housed in California men's prisons, 59% reported being sexually assaulted.[14] Courts have stated that prison officials should be aware of this heightened risk and protect transgender prisoners.[15] In practice, this means that if a transgender prisoner notifies prison officials either that she is transgender *and/or* has been threatened by staff or other prisoners, the officials should take steps to protect that prisoner.[16]

The PREA Standards require that prisons and jails screen prisoners within 72 hours of intake to assess their risk for sexual victimization or abuse.[17] Such screening must take into account whether the prisoner is (or is perceived to be) lesbian, gay, bisexual, transgender (LGBT) or gender nonconforming, and facilities must consider this screening information in making housing and program assignments, with the goal of protecting vulnerable prisoners.[18]

Some steps you can consider taking to protect yourself, if you feel comfortable doing so, are:

• INFORM PRISON STAFF YOU ARE AT RISK

Tell prison staff that you are transgender, have been victimized in the past, or believe you will be at risk. Do this both verbally and in writing, if you can.

• REPORT THREATS

Advise staff in writing of any threats to your safety, even if they are not directed at you personally. When alerting staff to these threats, send a copy to the inspector general, the PREA coordinator and someone on the outside who you trust.

• FILE A GRIEVANCE

If you have suffered a sexual assault, you do not have to file a grievance within the normal time limits of the appeal system.[19] However, because other legal time limits may apply, and in order to best protect yourself, it is best to file an appeal as soon as possible. You should also be sure to appeal through every level of review in order to protect your ability to bring a lawsuit about your assault.

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10 Alison Flowers, "Dee Farmer Won a Landmark Supreme Court Case on Inmate Rights. But that's Not the Half of It." The Village Voice, Jan. 29, 2014, available at http://www.villagevoice.com/2014-01-29/news/dee-farmer-v-brennan-prison-rape-elimination-act-transgender-lgbt-inmate-rights/full/.

11 *See Farmer v. Brennan*, 511 U.S. 825 (1994) (prison officials' deliberate indifference to the beating or rape of a transgender prisoner violates Eighth Amendment's prohibition against cruel and unusual punishment).

12 *Id.* at 836.

13 *Id.* at 837, 847.

14 Valerie Jenness et al., Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault (Irvine: Center for Evidence-Based Corrections, University of California, 2007), 3.

15 *See Lojan v. Crumbsie*, 12 CV. 0320 LAP, 2013 WL 411356, at *4 (S.D.N.Y. Feb. 1, 2013) (mere knowledge that plaintiff was transgender was sufficient to put prison officials on notice that she was susceptible to physical attack).

16 *See Green v. Brown*, 361 F.3d 290, 293-95 (6th Cir. 2004) (defendant's knowledge of transgender prisoners' vulnerability raised issue of fact as to deliberate indifference in failing to take protective measures); *Green v. Hooks*, 6:13-cv-17, 2013 WL 4647493, at *3 (S.D. Ga. Aug 29, 2013) (allegations that defendants were aware that transgender plaintiff feared for her life and that "prison is dangerous for transgender inmates" stated plausible case of deliberate indifference).

17 28 C.F.R. § 115.41(b); 28 C.F.R. § 115.241(b); 28 C.F.R. § 115.341(a).

18 28 C.F.R. § 115.41(c)(7).

19 28 C.F.R. § 115.52(b).

MEDICAL CARE

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> We … all, whether we've been charged with a crime or not, whether we are popular or unpopular, whether we are loved or unloved, whether we are understood or stigmatized, deserve safe, quality, knowledgeable healthcare."[20]
>
> —Janet Mock, transgender woman and writer, on medical care for transgender people

CONSTITUTIONAL REQUIREMENTS FOR MEDICAL TREATMENT

The Eighth Amendment requires that prisons provide adequate health care for prisoners' serious medical needs.[21] A staff member of the prison or outside contractor violates the Constitution by causing a prisoner "significant injury or unnecessary and wanton infliction of pain"[22] or by exposing a prisoner to a substantial risk of future harm[23] when the official denies the prisoner medical treatment or offers care that is so incompetent that it amounts to no care at all.[24]

In recent years, courts have consistently found that gender dysphoria (GD)—previously referred to as gender identity disorder (GID)—presents a serious medical need that may require treatment to comply with the Eighth Amendment.[25] However, many transgender prisoners struggle to get prison medical staff to diagnosis them with gender dysphoria. In addition, the Constitution does not grant a prisoner his or her choice of treatment for GD, and more often than not, a court will defer to the medical judgment of prison health care providers.[26]

Still, the Constitution offers some protections regarding the quality of care. **First,** decisions about treatment must be based on *medical considerations*, rather than financial, political, or other factors.[27] Therefore, you cannot be denied treatment based on generalized and unproven claims that such treatment might make you a target of harassment or violence. Some courts have outright rejected these arguments,[28] while other courts have stated that the balancing of security concerns does not necessarily mean that particular treatments should be denied altogether.[29]

Second, medical treatment for prisoners diagnosed with GD should be *consistent with accepted medical standards* regarding the treatment of GD in general.[30] Numerous courts have recognized the World Professional Association of Transgender Health (WPATH) Standards of Care as the prevailing standard for treatment of GD.[31] And staff cannot ignore these standards because a person with GD is in prison.[32] Under these standards, you should be evaluated by a person with experience treating GD and then provided with care that is appropriate for you, which may include counseling, access to commissary items appropriate for your gender identity, hormone therapy, and possibly surgery.[33] However, as of the date of this document, no final court decision has held that a prison or jail system must provide gender confirmation surgery (sometimes called "sex reassignment surgery") to a transgender prisoner. Still, where hormone therapy or surgery is deemed medically necessary, officials may not simply treat the prisoner with antidepressants and/or therapy.[34] And 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.[35]

Third, blanket bans on specific types of treatments, such as a ban on hormone therapy or gender confirmation surgery, are unconstitutional.[36] Many prisons and jails across the country still have *freeze frame policies* that only allow hormone therapy for prisoners who were receiving such therapy before incarceration. These policies are probably unconstitutional because they prevent individualized medical decisions.[37] The Federal Bureau of Prisons (BOP) has therefore ended its old freeze frame policy and provides hormones to prisoners even if they have not taken them before.[38]

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Fourth, prison and jail staff may violate the Constitution if they refuse to evaluate a prisoner for GD or if they take too long to do so. Prison officials often put off or outright deny transgender prisoners access to health care for GD, even though courts have repeatedly found that such delays or denials of assessment or treatment violate the Constitution.[39] Even delays in starting treatment because a prisoner will be released soon may violate the Eighth Amendment.[40] One common reason prisoners with GD are denied adequate treatment is that very few prisons have health care staff with expertise or training to treat GD. However, denying prisoners' access to a health care provider with the necessary expertise may violate the Constitution, as many courts have concluded.[41]

Because the Eighth Amendment requires that prison officials actually be aware of serious medical needs, you should be sure to file appeals whenever staff refuse to evaluate you for GD or fail to provide you with care. You should also describe the symptoms you are experiencing without that care.

NECESSARY MEDICAL CARE FOR MANY TRANSGENDER INDIVIDUALS INCLUDES ACCESS TO CLOTHING AND GROOMING STANDARDS CONSISTENT WITH GENDER IDENTITY

Most prisons and jails have very strict policies about clothing and grooming. For example, prisons generally only allow prisoners to wear prison or jail issued clothing items and may force prisoners to keep their hair a certain length.

When such restrictions are applied to transgender people, they can make their GD much worse. Many transgender prisoners are not given clothing appropriate for their gender identity—often, transgender women in male facilities are denied access to bras and other undergarments. Similarly, transgender men are sometimes required to keep their face clean-shaven, and transgender women are sometimes not allowed to grow their hair past a certain length (or are forced to have their heads shaved during the intake process).

Such experiences can be psychologically harmful for transgender prisoners. As a result, staff might violate the Eighth Amendment if they do not allow you to have gender-appropriate clothing and grooming supplies, such as makeup and hair removal tools, or deny your request to present consistently with your gender identity.[42]

Because of this, several county jails have good policies regarding clothing and grooming. For example, King County, Washington allows transgender women to order from the commissary and wear the same items, such as bras, as other females at the facility.[43] Similarly, Cumberland County, Maine allows transgender men and women to dress, groom, and use names and pronouns that are consistent with their gender identity.[44]

While it might be very hard for you to get the medical care you need, here are a few things you can do:

- Look for policies about transgender prisoners, including policies about medical care. They may be in the prison law library. If not, you can ask staff for copies or send a public records request for all policies about transgender prisoners.
- If you were receiving hormones from a doctor prior to incarceration, have your medical records sent to the medical or health director at your facility.
- Get a copy of the WPATH *Standards of Care* to show the prison medical staff, or tell them where to find them (http://www.wpath.org/). Be sure to ask for care in writing, and send a copy to the health director of your prison or jail.
- Even if you are told that denials of medical and mental health care cannot be appealed, file appeals anyway. Try to get a medical staff member to respond to your appeals about care instead of correctional staff. If correctional staff answer your grievance, request at the next level that medical staff respond to your appeal since it involves medical issues.

20 Janet Mock, "Chelsea Manning & the Battle for Trans Inclusive Health Care Without Bias" (August 22, 2013), available at http://janetmock.com/2013/08/22/chelsea-manning-transgender-healthcare/.

21 *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("[Eighth Amendment] principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration.").

22 *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010). *See also Fennell v. Quintela*, 393 F. App'x 150, 157 (5th Cir. 2010); *Atkinson v. Taylor*, 316 F.3d 257, 266 (3d Cir. 2003); *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (internal quotation marks omitted); *Harrison v. Barkley*, 219 F.3d 132, 136 (2d Cir. 2000) (internal quotation marks omitted).

23 *See Helling v. McKinney*, 509 U.S. 25, 33 (1993). *See also Soneeya v. Spencer*, 851 F. Supp. 2d 228, 248 (D. Mass. 2012) (prison officials deliberately indifferent where they failed to "remove[ ] the risk of serious future harm" stemming from GID); *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) ("[Plaintiff']s need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent.").

24 *See, e.g., Edwards v. Snyder*, 478 F.3d 831, 832 (7th Cir. 2007) (treatment cannot be "blatantly inappropriate");

Collignon v. Milwaukee Cnty., 163 F.3d 982, 989 (7th Cir. 1998) (medical treatment in prison 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) (medical care in prison cannot be "so cursory as to amount to no treatment at all").

25 *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) ("We assume for purposes of this appeal that transsexualism constitutes a serious medical need."); *Brown v. Zavaras,* 63 F.3d 967, 970 (10th Cir. 1995) (prison officials must provide treatment to address the medical needs of transsexual prisoner); *Meriwether v. Faulkner,* 821 F.2d 408 (7th Cir. 1987) (recognizing transsexualism as a serious medical need that should not be treated differently than any other psychiatric disorder); *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 799 (W.D. Mich. 1990) (complete refusal by prison officials to provide a person with GID with any treatment at all would state an Eighth Amendment claim). Note also that various physical manifestations of GID, such as genital mutilation, are also considered serious medical needs within the meaning of the Eighth Amendment. *See, e.g., De'Lonta*, 330 F.3d at 634 ("[N]eed for protection against continued self-mutilation [because of GID condition] constitutes a serious medical need.").

26 *See, e.g., Meriwether*, 821 F.2d at 413 (transgender prisoner has right to some form of treatment, but not to her choice of a "particular type of treatment, such as estrogen therapy"); *Briones v. Grannis*, CV 09-08074-VAP(VBK), 2010 WL 3636139, at *6 (C.D. Cal. Sept. 14, 2010) (failure to provide transgender prisoner with the specific type of hormone treatments she requested did not constitute an Eighth Amendment violation).

27 *See, e.g., Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (treatments cannot be denied merely because they are expensive); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) (treatment must be "based on medical considerations"); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 182 (D. Mass. 2002) (treatments cannot be denied merely because they are controversial).

28 *See Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011) (rejecting prison security argument because "transgender inmates may be targets for violence even without hormones" and defendants' expert "testified that it would be 'an incredible stretch' to conclude that banning the use of hormones could prevent sexual assaults"); *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 240-41 (D. Mass. 2012).

29 *See Battista v. Clarke*, 645 F.3d 449, 454-55 (1st Cir. 2011); *Tates v. Blanas*, No. S-00-2539, 2003 WL 23864868, *10 (E.D. Cal. 2003) (officials must balance security risks of providing transgender prisoner with bra against her medical needs); *Kosilek*, 221 F. Supp. 2d at 191 ("It has been, and remains, permissible for [prison officials] to consider the security implications of the medical care prescribed for [transgender prisoners]").

30 *See Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) ("[M]edical treatment may so deviate from the applicable standard of care as to evidence a physician's deliberate indifference."); *Estate of Cole v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996) (Eighth Amendment violation where treatment represents "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment"); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (Eighth Amendment guarantees medical care "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards"); *Barrett*, 292 F. Supp. 2d at 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 inmate's particular medical needs, and that are based on medical considerations."). *See also* above, n.23.

31 *De'Lonta*, 708 F.3d at 522-23 (WPATH standards "are the generally accepted protocols for the treatment of GID"); *Fields*, 653 F.3d at 553-54 (characterizing the WPATH standards as the "accepted standards of care"); *Kosilek*, 221 F. Supp. 2d at 166 (same).

32 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, Version 7 ("Standards of Care"), at 67 ("Access to these medically necessary treatments should not be denied on the basis of institutionalization or housing arrangements.").

33 Standards of Care, at 22-23 (recommended minimum credentials for mental health professionals who work with adults presenting with gender dysphoria); at 8-10 (treatment is individualized to include one or more of psychotherapy, change of gender expression or role, hormone therapy, and surgery, since individual's treatment needs vary).

34 *See, e.g., Fields*, 653 F.3d at 555 ("Although DOC can provide psychotherapy as well as antipsychotics and antidepressants, defendants failed to present evidence rebutting the testimony that these treatments do nothing to treat the underlying disorder."); *cf. Edwards*, 478 F.3d at 831 (a prisoner's "receipt of *some* medical care does not automatically defeat a claim of deliberate indifference if a fact finder could infer the treatment was so 'blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate' a medical condition."); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) (prisons cannot simply choose an "easier course of [medical] treatment that they know is ineffective").

35 *See De'Lonta*, 330 F.3d at 634-35; *Wolfe v. Horn,* 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001); *Phillips*, 731 F. Supp. at 800 ("Taking measures which actually reverse the effects of years of healing medical treatment . . . is measurably worse [than failing to provide such treatment in the first place].").

36 *See Fields*, 653 F.3d at 557-58 (Wisconsin's blanket ban on hormone therapy and sex reassignment surgery constituted facial violation of Eighth Amendment); *De'Lonta,* 330 F.3d at 635 (allegations of denial of treatment based on blanket policy rather than medical judgment sufficient to support claim for deliberate indifference); *Allard v. Gomez*, 9 F. App'x. 793, 795 (9th Cir. 2001) (deliberate indifference if transgender prisoner was denied hormone therapy as result of blanket rule); *Soneeya*,

851 F. Supp. 2d at 250 (blanket prohibition on female canteen items and clothing violates Eighth Amendment); *Houston v. Trella*, No. 04-CV-1393, 2006 WL 2772748, at *8 (D. N.J. Sept. 25, 2006) (policy of withholding hormone treatment violates Eighth Amendment); *Barrett*, 292 F. Supp. 2d at 286 ("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs and prescribing and providing adequate care to treat those needs violates the Eighth Amendment"); *Kosilek*, 221 F. Supp. 2d at 176 (blanket policy that prohibits prison's medical staff from making medical determination of an individual prisoner's medical needs violates Eighth Amendment). *See also Colwell v. Bannister*, 763 F.3d 1060, 1068-70 (9th Cir. 2014) (blanket policy of denying cataract surgery where prisoners had at least one "good eye" violated Eighth Amendment); *Brock v. Wright*, 315 F.3d 158, 166-67 (2d Cir. 2003) (policy forbidding treatment of keloid scars for purposes of alleviating moderate chronic pain could support deliberate indifference finding); *Batterson v. Bannister*, No. 3:07-CV-142-BES-VPC, 2008 WL 3871710, at *8 (D. Nev. Aug. 19, 2008) (blanket policy prohibiting treatment for chronic pain without individualized assessment of prisoners' medical needs states Eighth Amendment claim).

37 *See Brooks v. Berg*, 270 F. Supp. 2d 302, 313 (N.D.N.Y. 2003), *vacated in part on other grounds*, 289 F. Supp. 2d 286 (N.D.N.Y 2003) ("[T]here is no exception to [the Eighth Amendment] for serious medical needs that are first diagnosed in prison."); *Kosilek*, 221 F. Supp. 2d at 193 (while presumptive freeze frame policy is permissible, ultimate decisions must be made an individualized basis rather than blanket rule); *see also Lynch v. Lewis*, No. 7:14-CV-24 HL, 2014 WL 1813725, at *2-*3 (M.D. Ga. May 7, 2014) (denial of hormones pursuant to freeze frame policy may violate the Eighth Amendment).

38 Federal Bureau of Prison Program Statement 6031.04 ("Patient Care"), dated June 3, 2014, at 42 (providing that "inmates in the custody of the Bureau with a possible diagnosis of GID will receive a current individualized assessment and evaluation" and that "[t]reatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration.").

39 *See, e.g., Estelle*, 429 U.S. at 104-05 (prison officials may manifest deliberate indifference by "intentionally denying or delaying access to medical care"); *Kothmann v. Rosario*, 558 F. App'x 907, 911 (11th Cir. 2014) (possible Eighth Amendment violation where transgender prisoner alleged that prison health official knew hormone therapy was medically necessary but nonetheless refused to provide it); *De'lonta,* 708 F.3d 520, 525 (4th Cir. 2013) (failure to evaluate transgender prisoner for surgery could constitute deliberate indifference); *Fields*, 653 F.3d at 558-59 (statute that prevented medical personnel from evaluating prisoners with GID for hormone therapy or surgery violated Eighth Amendment); *Battista*, 645 F.3d at 455 (extreme "composite of delays, poor explanations, missteps, changes in position and rigidities" regarding prisoner's request for hormone therapy showed deliberate indifference); *Jett v. Penner*, 439 F.3d 1091, 1097-98 (9th Cir. 2006) (delay of over a year before seeing a hand specialist constituted deliberate indifference); *Wallin v. Norman*, 317 F.3d 558. 562 (6th Cir. 2003) (delay of one week in treating urinary tract infection and delay of one day in treating serious leg injury could constitute deliberate indifference).

40 *See McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (extended delay in starting Hepatitis C treatment because prisoner might be released within twelve months stated claim under Eighth Amendment).

41 *See De'lonta*, 708 F.3d at 526 n. 4 (allegation that prisoner had not been evaluated by a GID specialist for surgery stated claim of deliberate indifference); *Kosilek*, 221 F. Supp. 2d at 161, 189 (prisoner who was only seen by social worker and psychiatrist who did not have experience diagnosing GID had never received an individualized medical evaluation, since she had not been evaluated by qualified medical staff); *see also, e.g., Hayes v. Snyder*, 546 F.3d 516, 526 (7th Cir. 2008) (refusal to refer to a specialist where doctor did not know cause of reported extreme pain could support deliberate indifference finding); *LeMarbe v. Wisneski*, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell 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 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 performing surgery one is not qualified for can be deliberate indifference); *Hathaway v. Coughlin*, 37 F.3d 63, 68-69 (2d Cir. 1994) (jury could conclude that prison doctor was deliberately indifferent when he failed to refer prisoner for re-evaluation for surgery to a specialist despite requests for further treatment from the prisoner); *Ancata v. Prison Health Servs., Inc*., 769 F.2d 700, 704 (11th Cir. 1985) (prison's refusal to provide specialty consultations from an orthopedic specialist or a psychiatrist without a court order was deliberate indifference).

42 *See Konitzer v. Frank*, 711 F. Supp. 2d 874, 908-11 (E.D. Wis. 2010) (prison officials' denial of plaintiff's requests for makeup, women's undergarments, and facial hair remover might give rise to an Eighth Amendment violation); *Soneeya*, 851 F. Supp. 2d at 246 (prison officials' delay in providing female canteen items and clothing necessary for plaintiff's GID treatment constituted deliberate indifference). Other legal arguments for right to gender expression in prisons have not been successful. *See, e.g., Lopez v. City of New York*, No. 05 Civ. 10321, 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009) (prison officials' refusal to allow plaintiff to wear women's clothing did not violate the equal protection clause of the 14th Amendment); *Nelson v. Anderson*, No. 7:07cv00149, 2007 WL 989980, at *2 (W.D. Va. March 30, 2007) (rejecting plaintiff's claim that prison officials violated his generalized due process rights by forbidding him from drawing his eyebrows in); *Powell v. Cusimano*, 326 F. Supp. 2d 322, 343 (D. Conn. 2004) (rejecting plaintiff's equal protection claims regarding prison's prohibition against hair extensions and contact lenses); *Star v. Gramley*, 815 F. Supp. 276, 278 (C.D. Ill. 1993) (rejecting plaintiff's equal protection and free speech/expression claims regarding right to wear makeup and women's clothing in prison).

43 King County, Department of Adult and Juvenile Detention, Adult Divisions, General Policy Manual, 6.03.007 (April 2, 2014).

44 Cumberland County Sheriff's Office, Policy and Procedure, Transgender Inmates, No. D-243A (Dec. 2009).

HOUSING & ADMINISTRATIVE SEGREGATION

Know Your Rights: Laws, Court Decisions, and Advocacy Tips to Protect Transgender Prisoners

> "Soltary confinement is...cruel and unusual punishment that benefits no one, and nothing about it rehabilitates anyone."[45]
>
> —Dee Dee Webber, transgender woman in NY men's prison on her four years in solitary confinement

Prisons and jails generally separate prisoners by sex, which they decide based on a prisoner's external genital characteristics or assigned sex at birth, regardless of their gender identity or presentation. However, the PREA Standards require prisons and jails to make individualized housing and program placements for all transgender and intersex prisoners, including when assigning them to male or female facilities.[46] Staff also have to consider housing and program assignments at least twice a year to review any threats to safety experienced by the prisoner and must take into account a prisoner's own view of his/her safety.[47] The PREA Standards also make clear that staff cannot make housing or program placements based solely on a prisoner's LGBT status.[48]

Many correctional facilities house transgender prisoners in long-term segregation, claiming they are doing so to protect the prisoners from violence. Prisoners who are placed in administrative segregation are often kept in their cells for nearly 24 hours a day and cannot participate in education, jobs, and other programming. Although staff have a lot of power over the decision to put prisoners in administrative segregation, there are some protections for prisoners. The PREA Standards do not allow staff to place you in administrative segregation against your will unless they have found—within the first 24 hours of involuntary segregation—that there is no other way to keep you safe.[49] The PREA Standards also state that you cannot be segregated against your will for more than 30 days, and that prisoners placed in protective custody must be given access to programs, privileges, education, and work opportunities to the extent possible.[50]

Whether you can be segregated for safety concerns depends on the exact purpose of segregation, the existence of alternatives, the harshness of the conditions, the duration of segregation, and whether the placement in segregation is regularly reviewed.[51] Prisons are not supposed to put LGBT prisoners in segregation for long periods of time without regularly and meaningfully considering other, less restrictive places where they can be housed.[52]

Here are a few things you can do if you do not feel safe in your housing situation:

- If you are placed in segregation and do not want to be there, file an appeal about your placement. You should also appeal anything that seems unfair about your placement, such as not being able to participate in a hearing, not being told why you were moved to segregation, not being able to participate in programming, or not being told when you can get out.
- If your placement is based on so-called safety concerns and you would feel safer in a women's facility (as a transgender woman), request such a transfer and file appeals if you do not get one.
- As always, appeal all denials as soon as you can and within the time frames required by the grievance process.

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45 "Voices from Solitary: Cruel and Unusual Punishment for Transgender Women," available at http://solitarywatch.com/2014/08/07/voices-from-solitary-cruel-and-unusual-punishment-for-transgender-women/

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

47 28 C.F.R. § 115.42(d), (e).

48 28 C.F.R. § 115.42(g).

49 28 C.F.R. § 115.43(a).

50 28 C.F.R. § 115.43(c), (b).

51 *See Estate of DiMarco v. Wyoming Dept. of Corrections*, 473 F.3d 1334, 1342 (10th Cir. 2007); *Meriwether*, 821 F.2d at 416; *see also Hutto v. Finney*, 437 U.S. 678, 686-87 (1978).

52 *See Medina-Tejada v. Sacramento County*, No. Civ.S-04-138FDC/DAD, 2006 WL 463158, at *8 (E.D. Cal. Feb. 27, 2006) (transgender prisoners should not be subject to automatic segregation); *Tates*, 2003 WL 23864868, at *9-10 (same).

SEARCHES & PRIVACY

Know Your Rights: Laws, Court Decisions, and Advocacy Tips to Protect Transgender Prisoners

Transgender prisoners are frequently targeted for excessive, harassing, or public strip searches. Courts have recognized, however, that prisoners have a right to privacy during full body searches.[53] Therefore, staff must have a good reason to do strip searches and cannot use them to harass or intimidate prisoners.[54]

Courts have also held that staff must do strip searches professionally and respectfully even when those searches are legally justified. For example, a strip search conducted in full view of other prisoners and prison staff may violate a prisoner's privacy rights.[55] If there is no emergency, courts have also held that male staff should not strip-search women (including transgender women) and that female staff should not strip-search men.[56] Additionally, some jails have -policies stating that transgender prisoners are allowed to choose the gender of the staff who will search them.[57]

The PREA Standards also state that cross-gender strip and pat-down searches should not happen unless there is an emergency (or when performed by a medical practitioner)[58] and that staff cannot search or physically examine transgender prisoners solely to determine their genital status.[59] Prisons and jails must train staff to perform respectful searches of transgender prisoners.[60] Finally, the PREA Standards require that transgender prisoners be given access to private showers if requested.[61]

Transgender prisoners have a right to privacy and confidentiality regarding their transgender status or sexual orientation. Therefore, prison staff are not generally allowed to publicize or disclose the fact that a prisoner is transgender or gay.[62]

Here are some general tips regarding searches and privacy:

- If you are asked to strip down in front of other prisoners, politely ask to be moved to a separate area.
- If you cannot use a private shower, ask to be able to shower at a different time than other prisoners or in a private area (as the PREA Standards require).[63]
- If you do not want to be searched by a staff member of a particular sex, politely ask for a different staff member to search you. You should inform staff that you do not feel safe being searched by staff members of that sex. In some prisons or jails, you may also be able to get a general order or piece of paper (sometimes called a "chrono") that says you should only be searched by women (if you are a transgender woman).
- Ask for your facility's official policy regarding searches. If not provided, it may be available in the law library or can be requested through a public records request.

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53 *See Lee v. Downs,* 641 F.2d 1117, 1119-20 (4th Cir. 1981) (noting that involuntary exposure of one's genitals may be "especially demeaning and humiliating" and holding that prisoners should not be forced to expose themselves unless "reasonably necessary" to do so).

54 *See Bell v. Wolfish*, 441 U.S. 520, 560 (1979) (prison strip searches can only be conducted where "significant and legitimate security interests" outweigh "the privacy interests of the inmates"); *Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009) (strip searches cannot be conducted "in a harassing manner intended to humiliate and cause psychological pain").

55 *See Farmer v. Perrill*, 288 F.3d 1254, 1260 (10th Cir. 2002) (transgender prisoners have "the 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*") (emphasis in original); *Meriwether*, 821 F.2d at 418 (forcing transgender prisoner to regularly "strip before guards and other inmates" may violate the Eighth Amendment where "maliciously motivated, unrelated to institutional security, and hence 'totally without penological justification.'") (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)).

56 *See Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) (prisoner had valid Fourth Amendment privacy claim where he was strip-searched in front of female prison staff); *Shaw v. District of Columbia*, 944 F. Supp. 2d 43, 55-57 (D.D.C. 2013) (transgender woman in prison had constitutional right not to be strip-searched by male prison staff).

57 Cumberland County Maine, D-243A, Denver Sheriff Department, Department Order 4005.1, Transgender and Gender-Variant Inmates (June 6, 2012),

58 28 C.F.R. § 115.15(a).

59 28 C.F.R. § 115.15(a), (e).

60 28 C.F.R. § 115.15(f).

61 28 C.F.R. § 115.42(f).

62 *See Powell v Shriver*, 175 F.3d 107, 113-14 (2d Cir. 1999) (disclosure of fact that prisoner was transgender violated her constitutional right to privacy); *see also Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (threats to disclose arrestee's sexual orientation violated his constitutional right to privacy).

63 28 C.F.R. § 115.42(f)

Unfortunately, even though there are certain ways that staff should treat or protect you, it is not always easy to get the medical care or treatment that you deserve.

One big problem is the Prison Litigation Reform Act (PLRA), a federal law that was enacted in 1996 to decrease the number of lawsuits brought by prisoners.

- Under the PLRA, prisoners who want to file a federal lawsuit about something that happens to them in jail or prison must first complete the internal appeals process. This means that you need to know the rules of any appeals process (sometimes called a "grievance process") in your prison or jail, including how quickly you have to file an appeal after something happens to you. In most prisons or jails, for instance, you will have to file a written complaint on a form that is provided. You have to explain what happened to you and also name any staff members who were involved. You will also have to explain how you want the prison or jail to fix what happened to you.

- If you do not file an appeal, it is very likely that you will not be able to bring a lawsuit about what happened to you. There are a few examples of courts holding that prisoners did not have to file appeals in emergency circumstances,[64] where the prisoner could not get a copy of the grievance forms,[65] or where the prison or jail just ignored the appeal.[66] These cases are rare, though, so you should always file an appeal and be sure to keep appealing it through every level.

- The PLRA also requires prisoners to pay the full filing fee in all cases. If you do not have the money up front, you can pay in monthly installments from your prisoner account. Not having money should not prevent you from filing, but how much and how quickly you end up having to pay may have to be worked out with the court.

- The PLRA also prevents many otherwise justified lawsuits from moving forward because it says that in general, prisoners cannot get money damages unless they have suffered a "physical injury or the commission of a sexual act."[67] Because of this, many courts have ruled that prisoners with psychological or emotional injuries cannot get money damages. The PLRA defines "sexual act" narrowly, requiring victims of sexual assault who are 16 or over to prove penetration or oral contact with a penis, vulva, or anus.[68]

Here are a few tips for protecting your legal rights:

- Get a copy of your prison's or jail's appeal policy. Always follow the policy exactly.

- Remember that the PLRA only applies to cases that are brought by a prisoner. This means that if you are about to be released, your case will not be controlled by most of the PLRA provisions if you file it after your release. Because other legal deadlines may apply, though, you should always try to get legal advice before you make any decisions about when or how to file a lawsuit about something that happened to you in prison or jail.

- Keep track of everything that happened to you—the names of officers, other prisoners, where things happened, when things happened, what policies are available, which are not available, etc. Even if you never bring a case in court, having details about what happened can be very important if you reach out to other people for help. If you are afraid that staff might take your paperwork, send copies to people you trust on the outside. Be aware, though, that if you are not sending information by legal mail to an attorney or legal organization, staff will likely read everything you put in letters or envelopes.

- Connect with organizations that work with transgender prisoners, including the ones listed below. You may also be able to connect with a pen pal on the outside if you feel that you need additional help or support.

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64 *See Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001).

65 *See Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001).

66 *See Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (when prison officials do not respond to a prisoner's initial grievance, administrative remedies are exhausted); *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (same).

67 42 U.S.C. § 1997e(e); *see also Zehner v. Trigg* 133 F.3d 459, 461-62 (7th Cir. 1997).

68 *See* 18 U.S.C. § 2246(2).

RESOURCES

Know Your Rights: Laws, Court Decisions, and Advocacy Tips to Protect Transgender Prisoners

If you need more information about these issues, or if you are thinking about filing a lawsuit about something that happened to you, the organizations and resources listed below might help.

LEGAL AND ADVOCACY ORGANIZATIONS

American Civil Liberties Union LGBT & HIV Project 125 Broad St., 18th Fl. New York, NY 10004 www.aclu.org	**ACLU National Prison Project** 915 15th St., NW, 7th Floor Washington, DC 20005 (212) 549-2500 www.aclu.org
Black and Pink 614 Columbia Rd. Dorchester, MA 02125 (617) 519-4387 www.blackandpink.org	**Just Detention International** 3325 Wilshire Blvd., Suite 340 Los Angeles, CA 90010 (213) 384-1400 1900 L St. NW, Suite 601 Washington, DC 20036 (202) 506-3333 www.justdetention.org
Lambda Legal National Headquarters 129 Wall Street New York, NY 10005 (212) 809-8585 www.lambdalegal.org/nhq	**National Center for Lesbian Rights** 870 Market St., Suite 370 San Francisco, CA 94102 1-800-528-6257 www.nclrights.org
National Center for Transgender Equality 1325 Massachusetts Ave. NW, Suite 700 Washington, DC 20005 (202) 903-0112 www.transequality.org	**Gay & Lesbian Advocates & Defenders** 30 Winter St., Suite 800 Boston, MA 02108 (617) 426-1350 www.glad.org
Prison Legal News P.O. Box 1151 Lake Worth, FL 33460 (561) 360-2523 www.prisonlegalnews.org	**Sylvia Rivera Law Project** 147 W. 24th St., 5th Floor New York, NY 10001 (212) 337-8550 www.srlp.org

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TJI Justice Project 1230 Market St. PMB 705 San Francisco, CA 94102 www.tgijp.org	**Transgender Law Center** 1629 Telegraph Ave., Suite 400 Oakland, CA 94612 (415) 865-0176 www.transgenderlawcenter.org
Transgender Legal Defense & Education Fund 20 West 20th St., Suite 705 New York, NY 10011 (646) 862-9396 www.tldef.org	**Transformative Justice Law Project** 4707 N. Broadway, Suite 307 Chicago, IL 60640 (773) 272-1822 www.tjlp.org
Center for Constitutional Rights 666 Broadway, 7th Floor New York, NY 10012 (212) 614-6499 www.ccrjustice.org	**Southern Poverty Law Center** 400 Washington Ave. Montgomery, AL 36104 (888) 414-7752 www.splcenter.org

USEFUL DOCUMENTS

A Jailhouse Lawyers' Manual http://www3.law.columbia.edu/hrlr/jlm	**Jailhouse Lawyer's Handbook** http://jailhouselaw.org
National PREA Resource Center http://www.prearesourcecenter.org	**PREA Standards** http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf
Jody Marksamer and Harper Jean Tobin, *Standing with LGBT Prisoners: An Advocate's Guide to Ending Abuse and Combating Imprisonment*, National Center for Transgender Equality http://transequality.org/PDFs/JailPrisons_Resource_FINAL.pdf	**Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates, *Transgender Prisoners in Crisis*, Lambda Legal** http://www.lambdalegal.org/sites/default/files/publications/downloads/transgender_prisoners_in_crisis.pdf

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