

LGBTI+ Considerations for Jail Operations

Lt. Tracy Wade
Clay County Sheriff's Office

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California Transgender Woman Beaten in Men's Jail Wins Settlement



Lawsuit: Trans woman sexually abused, harassed in men's jail

By USA TODAY April 10, 2023



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A transgender beauty influencer was put in a men's jail after her arrest in Miami

November 10, 2022 - 5:01 AM ET

By Jaclyn Diaz



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Trans Inmates Transferred to Prisons in Alignment With Gender Under New California Law

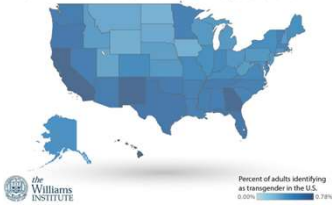
Over 200 transfers have been requested, but just 21 have been approved thus far.



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Statistics

1.4 million Adults in the U.S.
Identify as **Transgender**,
0.6% of the Adult Population



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[Click here for a video](#)

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Disclaimer

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Course Objectives

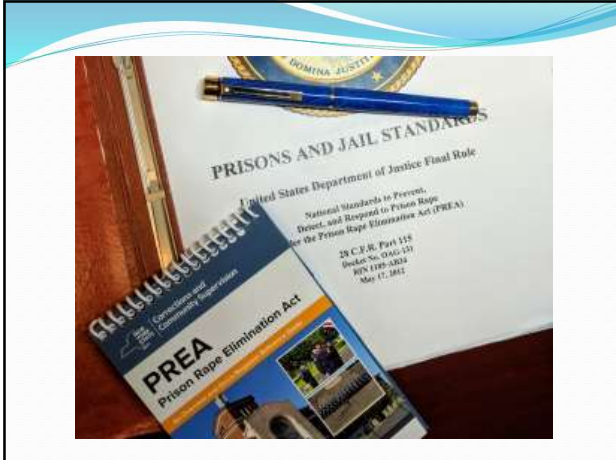
- List three liability principles agencies can practice proactively to be defensible against transgender inmate lawsuits.
- Describe the difference between the PREA Act and the PREA Standards.

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Course Objectives

- Describe 3 actions agencies can take to protect themselves and the incarcerated member of the LGBTI+ community.
- Describe 3 considerations when creating or reviewing a policy on transgender inmates that will be defensible in court.

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True or false:

The PREA ACT is a federal law
and it's requirements are
binding on county jails.

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The PREA Standards are
binding on county jails.

True or false?

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What is PREA?

- PREA (Prison Rape Elimination Act)
- 2003
- It is a federal law
- Compliance is required for all agencies



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Key Provisions of the PREA Act

- 1) Established a zero-tolerance for sexual misconduct, sexual abuse and sexual assault.
- 2) Collect available data and information on incidents in order to improve management and administration
- 3) To create national reporting and prevention standards regarding prisoner sexual assault.

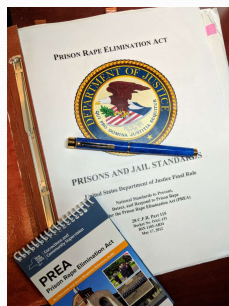
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PREA Standards

Prison and Jail Standards

Additional tools and resources to combat rape and sexual assault in your facilities and may be useful in the absence of other federal rulings.

State Law, not PREA Standards govern county jails



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PREA Standards, by itself, is:

- NOT binding on states
- NOT binding on Sheriffs
- NOT binding on county jails

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221.020, RSMo.

- *"Except as otherwise provided in this section and sections 221.400 to 221.420, the sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible.*

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There is no Missouri statutes that claim to wholly adopt or incorporate all the PREA Standards into Missouri law

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Exception.....

- There is only one Missouri statute that even mentions PREA and it is in SB 53 and SB 60 and was signed by the Governor on 07/14/21: regarding juveniles certified as adults and what the procedure is for taking care of them.
- **211.072.6, RSMo.** All pre-trial certified juveniles under eighteen years of age who are held in adult jails pursuant to the best interest of justice exception shall continue to be subject to the protections of the Prison Rape Elimination Act (PREA) and shall be physically separated from adult inmates.

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221.050, RSMo.

Separation of Prisoners

- Persons confined in jails shall be separated and confined according to sex.

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Conclusion....

- As applied to Missouri Sheriffs, the PREA Standards are just a resource for drafting policies.
- BUT policies that consider PREA guidelines demonstrate your Sheriff's Office is not deliberately indifferent to sexual assault regarding inmates.

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Taking a Proactive Approach to the PREA Standards

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3 Key Points of PREA

- Zero Tolerance
- Right to Report
- Free medical and mental health care

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ZERO TOLERANCE

- Carries the most liability, because it is embedded in what the law requires
- Zero-tolerance language in written policy

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Right to Report

- Multiple internal and external ways to report
- Staff may report privately
- Third parties may report
- Inmates may report verbally, in writing and/or anonymously
- No time limit

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Free Medical and Mental Health Services

- Access to free emergency medical treatment and crisis intervention services
- SAFE and SANE Examinations provided free of charge
- Victim advocate from a rape crisis center

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Free Medical and Mental Health Services

- Provide access to resources for confidential emotional support services
- Ongoing medical and mental health care for sexual abuse victims and abusers.

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Additional PREA Standards

- PREA Coordinator/PREA Compliance Managers
- Housing out inmates? Those agencies must be PREA compliant.
- Adequate staffing
- Video monitoring (where applicable)
- Unannounced checks by supervisors to identify and deter staff-to-inmate abuse
- Juvenile standards

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Additional PREA Standards

- No cross-gender strip searches or cross-gender visual body cavity searches (exigent circumstances)
- Male staff not to search female inmates, ABSENT EXIGENT CIRCUMSTANCES. DOCUMENT
- Policy/Procedures for privacy when inmates shower, change clothing, and bodily functions

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Special Considerations for LGBTI+

Gender Determination

- No search or physical examination of a transgender or intersex inmate for the SOLE purpose of determining the inmate's genital status

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Special Considerations for LGBTI+

Gender Determination

- If an inmates 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

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Special Considerations for LGBTI+

Gender Determination

- Staff will act in a professional and respectful manner when asking inmate
- Pat-down search preference form

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Hiring and Promotions

- No hiring or promoting of anyone who has engaged in, been convicted or been disciplined for sexual activity for an inmate
- Criminal histories/backgrounds on all persons working in a jail

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Training/Education for Staff and Volunteers

- Zero-tolerance
- How to prevent, detect and report sexual abuse
- Retaliation
- Dynamics of sexual abuse and sexual harassment in confinement
- Common reactions of victims
- Avoiding improper relationships with inmates
- Mandatory reporting
- How to communicate effectively and professionally with inmates from the LGBTI+ community

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Specialized Training

- For investigators
- Medical and Mental Health staff
- Volunteer staff
- Contractors and Vendors

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Training for Inmates

- During intake: ZERO TOLERANCE and how to REPORT
- Within 30 days, a comprehensive education
- Key information is continuously available

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Intake Screening

Screening shall consider the following:

- Inmate has physical, mental or developmental disability
- Inmate's age
- Physical build of inmate
- Inmates previous incarcerations
- Is criminal history on inmate non-violent?

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Intake Screening

- Prior convictions for sex offenses
- Whether inmate is or perceived to be from the LGBTI+ community
- History of sexual victimization
- Inmates own perception of vulnerability
- Is inmate detained for immigration purposes alone?

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Intake Screening

If intake screening indicates prior sexual victimization or an inmate has perpetrated sexual victimization, regardless of where it occurred, staff ensure inmate is offered follow up with medical or mental health within 14 days

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Follow Up Screening

Within 30 days, rescreen inmate to reassess the inmate's risk of violence (can reassess anytime)

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Classification

- Use the information from the screening to determine housing and cell assignment.
- The goal is to separate those inmates at a high risk of being sexually victimized from those classified as being at a high risk of being sexually abusive.
- Each inmate should be treated as an individual. No "freeze frame" standards

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Placement of Transgender Inmates

Needs to meet two standards:

1. Placement would ensure the inmate's health and safety
2. Placement would present management or security problems.

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Placement of Transgender Inmates

- Review placement at least twice a year
- The transgender inmate's own views with respect to his or her safety shall be given serious consideration
- Agency shall not place the LGBTI+ inmates in dedicated units solely on the basis of such identification or status

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Placement of Transgender Inmates

Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates

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Protective Custody and Transgender Inmates

If an inmate is at high risk for sexual victimization, they shall not be placed in INVOLUNTARY segregation unless an assessment of all ***available alternatives*** have been made, and a determination has been made that there is no available alternative means of separation from likely abusers.

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Protective Custody and Transgender Inmates

- Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education and work opportunities to the extent possible.
- If restrictions occur, document why.

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Protective Custody and Transgender Inmates

If needed, a facility can assign inmates to involuntary segregated housing only until an alternative means of separation from likely abuse can be arranged, within 30 days.

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Protective Custody and Transgender Inmates

DOCUMENT EVERYTHING!

- Why the agency is concerned for the inmates safety
- Why there is no alternate means of separation at your facility
- Upon a review every 30 days (including the inmate's input), why the segregation is continuing

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Additional Components of PREA

- How to investigate allegations of abuse
- How to collect and review data to make recommendations for changes to a facility to prevent future occurrences of sexual assault
- Reporting
- Audits every three years

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Goals:

- Ensure the custody, care and control of transgender inmates
- Respond to LGBTI+ inmates in a way that will be legally defensible
- Response does not affect the safety and security of the facility

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Liability Principles

- Duty to Protect
- Deliberate Indifference
- Medical Diagnosis and Care

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8th Amendment

Prohibits cruel and unusual punishment

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Estelle v. Gamble (429 U.S. 97)

- Court held that a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs
- An official is liable only "if he knows that the inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

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Estelle v. Gamble (429 U.S. 97)

- Denying or delaying medical treatment for serious medical need
- To prevail, the plaintiff must prove:
 - Medical needs were serious
 - Jail officials/medical staff had actual knowledge
 - Jail officials/medical staff deliberately failed to take reasonable action to resolve the medical need

Reasonable does not need to be IDEAL or even EFFECTIVE

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Courts and Gender Identity Dysphoria

- Courts have viewed GID as a serious medical condition when:
 - The medical need in question is “important and worthy of comment or treatment.”
 - Does the medical condition significantly affect daily activities?
 - Does chronic and substantial pain exist?

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Hudson v. Palmer (468 U.S. 517)

Court held that prison inmates have no privacy rights in their cells protected by the Fourth Amendment to the United States Constitution

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Farmer v. Brennan (511 U.S. 825)

- One of the first cases regarding a transgender person
- One of the first cases the Supreme Court addressed sexual assault in prison

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Farmer v. Brennan (511 U.S. 825)

The Supreme Court defines a “transsexual” as one who has a rare psychiatric disorder in which the person feels persistently uncomfortable about his or her anatomical sex and who typically seeks medical treatment, including hormone therapy and surgery, to bring about a permanent sex change.

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Farmer v. Brennan (511 U.S. 825)

- Factors:
 - Officials will not be free to ignore obvious signs of danger
 - Official knew of a substantial risk from the very fact that it was obvious
 - An official can't escape liability by showing that he knew of the risk but did not think that the complainant was especially likely to be assaulted by the prisoner who committed that act

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Farmer v. Brennan (511 U.S. 825)

Officials can't be held liable if they prove that they were unaware of even an obvious risk or if they responded reasonably to a known risk, even if the harm ultimately was not averted.

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Standard:

A corrections official “would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.”

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Farmer v. Brennan (511 U.S. 825)

Ignore something
intentionally=
DELIBERATE INDIFFERENCE

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Transgender inmate settles Oregon lawsuit over medical care

Oct. 24, 2017 | Updated Tue., Oct. 24, 2017 at 1:36 p.m.



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California Is First to Pay for Prisoner's Sex-Reassignment Surgery

By The Associated Press



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Judge: Missouri prisons must OK hormone therapy for inmate



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What Resources Exist?

- Policies
- Procedures
- Operational Practices

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Policy Development

- Administrators may base their policies on “best practices” and not legal-based principles
- They don’t meet the constitutional minima
- Example



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Policy Development

- Is your written policies and procedures outline the definition, diagnosis, and treatment of inmates claiming to have gender identity dysphoria?
- Does your policy state medical treatment decisions should be individualized or does it contain “freeze frame” language?
- Zero tolerance

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Staff Training

- Professionalism
- Zero tolerance
- Identification of transgender inmates
- Pat-searches, strip searches and body cavity searches
- Communication skills including not mis-gendering an inmate
- Staff are not to diagnose medical or psychiatric problems
- Has your medical providers sat down with your administration to discuss treatment options?

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Inmate Training

- Zero tolerance
- Right to Report and how to report acts of sexual violence

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What Can We Learn From Each Other?

- What does your intake screening look like?
- Do transgender inmates have access to all services?
- Do transgender inmates have access to all enrichment activities?
- Are housing assignments being made on a case-by-case basis?

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Questions to Consider

- What is your policy on placing transgender inmates in protective custody involuntarily?
- What does your staff base their decision on regarding placement of the inmate?
- Have procedures been prearranged with the medical and mental health staff regarding transgender inmates?
- Are there limitations on gender-specific purchases off commissary?

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Bureau of Prisons:

1. Use biological sex to make the initial determination for housing
2. Consider the health and safety of the transgender inmate
3. Consider behavioral history, overall demeanor, program participation, and interactions with other inmates
4. Consider whether the placement will threaten the management and security of the facility or pose a risk to other inmates

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- At the end of the day, this is about DUTY TO PROTECT and DELIBERATE INDIFFERENCE.
- That should be the primary focus of all decisions made regarding transgender inmates.

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Conclusion

- Strong legal-based policy and constitutional jail
- Implement PREA Standards within the facility
- Classification system
- Training
- Avoid “deliberate indifference”

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