

Letter to BOP re Changes to Transgender Offender Manual

Hugh J. Hurwitz
Acting Director
Federal Bureau of Prisons
320 First St., NW
Washington, DC 20534

Dear Acting Director Hurwitz:

As representatives of civil and human rights organizations, mental health and religious organizations, we write to request that you affirm your commitment to the Prison Rape Elimination Act (PREA) and reverse the recent policy changes to the Bureau of Prisons' Transgender Offender Manual. The new policy all but mandates housing transgender prisoners based on genital characteristics or sex assigned at birth. The policy changes and resulting practices throughout the Bureau of Prisons ("BOP") clearly contravene the plain language of the PREA regulations and the intent of PREA. Worse, the policy exposes transgender prisoners in your custody to the well-documented, unacceptable and extremely heightened risk of sexual abuse by both staff and other prisoners, which not only violates PREA – it also violates the Constitution.

The BOP Policy Creates a Substantial Risk of Serious Harm and Disregards the Known Vulnerabilities of Transgender Prisoners

The BOP policy openly disregards transgender prisoners' widely known, well-documented heightened vulnerability to custodial sexual abuse. As early as 1994, the Supreme Court recognized this vulnerability – and the adverse effect that improper housing considerations and decisions have on transgender prisoners – in *Farmer v. Brennan*. (511 U.S. 825 (1994)). Dee Farmer had always identified as female, and first started hormone therapy in her teens. By the time she was sentenced to federal prison, she had been living consistently with her gender identity for years. She presented as a woman, had medical treatment to support her gender transition, and wore makeup. And yet she was housed in several BOP facilities for men during her incarceration. When she was transferred to a maximum security men's prison and placed in general population, it should have surprised no one that she had been raped within two weeks. In fact, the BOP had transferred her despite knowing that placing Ms. Farmer, a transgender woman, in that environment would pose a significant threat to her safety. The Supreme Court therefore held that disregarding the known risk of harm to Ms. Farmer because she was a transgender woman would constitute deliberate indifference in violation of the Constitution.

The Supreme Court correctly recognized that transgender prisoners are particularly vulnerable to sexual abuse and sexual harassment, a fact that had been known to corrections professionals for decades. Since the *Farmer v. Brennan* decision, studies and data have further quantified the unacceptable danger that transgender prisoners face in all custodial settings. Official data collected by the Bureau of Justice Statistics confirm that, nationwide, transgender prisoners experience exceptionally high rates of sexual victimization: in a 2011-2012 survey, almost 40 percent of transgender prisoners reported experiencing sexual victimization while incarcerated, compared to four percent of all prisoners. (Allen J. Beck, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12, Supplemental Tables: Prevalence of Sexual*

Victimizations Among Transgender Adult Inmates (Dec. 2014)). In California, a study of the state's prisons for men found that the rate of sexual assault for transgender women in those prisons was 13 times higher than for men in the same prisons (58.5 percent as compared to 4.4 percent). (Valerie Jenness, et al., Center for Evidence-Based Corrections, University of California, Irvine, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007)). These staggering rates of abuse still likely represent significant underreporting.

The Prison Rape Elimination Act Requires Prisons to Protect Transgender Prisoners

Rape and sexual abuse should never be part of any prisoner's sentence. Recognizing this, Congress passed the Prison Rape Elimination Act ("PREA") in 2003 to expose and combat the "epidemic character of prison rape and the day-to-day horror experienced by victimized inmates." (34 U.S.C. § 30301(12)). PREA was co-sponsored by then-Senator Jeff Sessions and the late Senator Edward M. Kennedy, and was passed with unanimous support from both parties in Congress. Pursuant to PREA, and after extensive public comment periods and subsequent revisions, the U.S. Department of Justice published the final National Standards to Prevent, Detect, and Respond to Prison Rape under the Prison Rape Elimination Act in the Federal Register on June 20, 2012. The PREA Standards were immediately binding on the BOP. (34 U.S.C. § 30307(b)).

The PREA Standards focus on the various systems necessary to achieve the goal of preventing, detecting, and responding to sexual abuse in confinement settings. A crucial factor in preventing sexual violence is safeguarding vulnerable prisoners from sexual abuse and sexual harassment. The PREA Standards recognize transgender prisoners' "particular vulnerabilities" to sexual abuse (77 C.F.R. 37109), and are designed to protect transgender prisoners from their heightened risk of sexual abuse in several ways. When it comes to placement decisions, the PREA Standards are clear: in determining whether to assign a transgender prisoner to a facility that houses male or female prisoners, "an agency may not simply assign the inmate to a facility based on genital status." (77 C.F.R. 37110). PREA mandates this requirement because a person's genital characteristics alone do not offer an accurate proxy for their lived experience, treatment needs, or relative safety in correctional institutions. Rather than presumptive rules that transgender people be housed based on their genital characteristics or assigned sex at birth, PREA mandates that agencies make decisions on a case by case basis and in deciding whether to house a transgender prisoner in a male or female facility, give "serious consideration to the inmate's own views regarding his or her own safety." (77 C.F.R. 37110; see also Standards 115.41 and 115.42).

PREA clearly requires case-by-case placement decisions, and contemplates placement in facilities that conform to a transgender prisoner's gender identity. This intent is clear in other areas of the PREA Standards as well. For example, in the preamble to PREA, the Department of Justice explained that concerns about cross-gender pat searches of transgender prisoners "can be addressed by properly assigning (or re-assigning) transgender and intersex inmates to facilities or housing units that correspond to their gender identity, and not making housing determinations based solely on genital status." (77 C.F.R. 37135).

The BOP's Transgender Offender Manual Violates PREA's Protections

The new BOP policy exceeds the agency's authority by violating PREA. It does so by, at worst, prohibiting housing prisoners according to gender identity, and at best making such placements extremely unlikely. This is because the new policy in effect requires BOP to house transgender prisoners according to "genital status" or "biological sex". Although the policy claims to require facility assignments to be made

on a “case-by-case basis” in an apparent nod to PREA, the attendant restrictions on facility housing reveal that it will be almost impossible for a transgender prisoner to be housed in a facility based on anything other than genital status. Reverse-engineering the outcome of any purported “case-by-case” analysis and proclaiming that any placement consistent with gender identity be made “only in rare cases” flouts the requirements of PREA.

Indeed, the policy mandates all initial facility designations to be made based on “biological sex” – a term undefined in the policy that presumably refers to a prisoner’s assigned sex at birth. However, the term “biological sex” has no fixed binary definition in either law or medicine and until recently it appeared nowhere in federal or state law. In practice this undefined term allows “biological sex” to be a moving target; one that opens the door to discrimination and animus as its meaning is allowed to shape-shift to keep transgender prisoners from ever being housed in accordance with their gender identity.

Once the initial facility designation has been mandated, the policy requires the BOP to evaluate the same factors it uses for essentially every other prisoner’s facility classification, such as security risks, programming needs, and facility mission. The policy then specifically states that housing based on a prisoner’s gender identity “would be appropriate only in rare cases” and “where there has been significant progress towards transition as demonstrated by medical and mental health history.” (Transgender Offender Manual at p.6 (May 11, 2018)). The new BOP policy properly requires that a transgender prisoner’s views with respect to their safety be taken into consideration for “housing unit and programming assignments,” which occur after a facility designation has been made. Noticeably absent is a similar requirement regarding the initial facility placement, as required by the PREA Standards. (Standard 115.42). The plain terms of the policy – and the terms that are omitted – make clear that it is a reversion to potentially unlawful pre-PREA practices.

One glaring omission in the revised policy broadcasts the BOP’s intent to completely prohibit housing based on gender identity, disregarding both transgender prisoners’ own perceptions of safety and the studies that confirm the overwhelming risk to transgender prisoners housed based on genital characteristics. The revised section on initial housing designations for transgender prisoners adds 17 lines of text, yet deletes just one sentence: “The [Transgender Executive Council] will recommend housing by gender identity when appropriate.” (Transgender Offender Manual at p.6).

The reality of the revised Transgender Offender Manual is that transgender prisoners will almost universally be assigned to male or female facilities according to their sex assigned at birth or genital characteristics, in direct contravention of the PREA Standards, and with blatant disregard to the documented dangers this presents to transgender prisoners in the BOP.

Conclusion

Transgender prisoners will unquestionably suffer serious harm if this policy is implemented as written. We ask that you reaffirm the BOP’s commitment to the safety of all of the people in its custody. We ask that you reaffirm the BOP’s congressionally-mandated obligation to adhere to each of the final National Standards to Prevent, Detect, and Respond to Prison Rape under the Prison Rape Elimination Act. We ask that you follow the requirements of PREA and the U.S. Constitution, not to mention basic human decency, and house transgender prisoners safely, based on their individual needs.

Sincerely,

[List organizations]

cc: Jeff Sessions, Attorney General of the United States