



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Florida

April 12, 2024

Re: Improving the Safety of Transgender Individuals in Florida Jails

Dear Sheriff,

We write to express our concerns regarding your facility’s policies and procedures for transgender individuals in custody. The Eighth Amendment to the U.S. Constitution requires jails and prisons to “provide humane conditions of confinement[,]” to “ensure that inmates receive adequate food, clothing, shelter, and medical care,” and to protect detainees from “violence at the hands of other prisoners”—including transgender individuals in custody.¹ The federal Prison Rape Elimination Act (“PREA”) also compels certain protections against sexual abuse and harassment.² Despite these requirements, not all facilities are in compliance. We hope this letter will assist you in aligning your policies with legal requirements.

Incarcerated transgender persons are often subject to hostility, violence, sexual assault, and inadequate healthcare. Transgender individuals in custody should be treated with respect and dignity, including having access to healthcare services such as gender-affirming care. To better ensure the safety of transgender individuals in your facility and your institution’s compliance with federal law, below are some recommendations for supporting transgender, gender nonconforming, and intersex individuals in custody. We urge you to incorporate these changes into your policies and procedures.

Accurate and Respectful Definitions

To develop inclusive guidelines and to improve the safety of incarcerated transgender, gender nonconforming, and intersex individuals, it is vital that facility staff are provided with accurate definitions. We recommend that you update your policies to include appropriate definitions for the following terms:

Transgender: a person whose gender identity (i.e., internal sense of self) is different from the person’s assigned sex at birth as male or female.

¹ *Farmer v. Brennan*, 511 U.S. 825, 825 (1994) (holding that prison officials who deliberately ignored the sexual assault and violence against a transgender woman in prison could be held liable for violating the Eighth Amendment).

² See *About: Prison Rape Elimination Act*, NAT’L PREA RES. CTR. (2024), <https://www.prearesourcecenter.org/about/prison-rape-elimination-act>; see also *Prison Rape Elimination Act*, 28 C.F.R. Part 115 (2023); *Prison Rape Elimination Act (PREA)*, FLA. DEP’T OF CORR., <https://fdc.myflorida.com/prea/index.html#:~:text=It%20was%20created%20to%20eliminate,and%20respond%20to%20sexual%20abuse.>

Gender identity: a person’s internal, deeply felt sense of self as male, female, a blend of both, or other gender(s), regardless of the person’s sex assigned at birth. An individual’s gender identity can be the same or different from their sex assigned at birth.

Gender expression: the way a person displays their gender identity to others.

Gender nonconforming: a person whose appearance or manner does not conform to traditional societal gender expectations. Gender nonconforming also includes nonbinary, referring to an individual’s gender identity that is outside of the male and female binary system, like intersex.

Intersex: a person who has one or more of a range of variations in sex characteristics or reproductive anatomy.³

A transgender, gender nonconforming, or intersex person should be addressed according to their gender identity, preferred name, and pronouns, not their sex assigned at birth.⁴ An individual’s self-identification is sufficient to confirm their gender identity, absent specific evidence that they have falsely asserted a gender identity.⁵

Not only is it important to properly identify transgender, gender nonconforming, and intersex individuals in custody for their safety, but it is also essential that your staff do so without misgendering⁶ and deadnaming.⁷ While misgendering and misnaming in any form are harmful,⁸ intentional misgendering and deadnaming are often indicators of abuse that can lead to serious negative health outcomes.⁹

³ See, e.g., ACLU, PRISON RAPE ELIMINATION ACT (PREA) TOOLKIT, END THE ABUSE: PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT 3 (2014); *Transgender and Non-Binary People FAQ*, HRC, <https://www.hrc.org/resources/transgender-and-non-binary-faq>; *GLOSSARY: Gender Identity*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/resources?s=Gender+Identity>; *GLOSSARY: Nonbinary*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/resources?s=Gender+Identity>; *Intersex 101: Everything you need to know!*, INTERACT, <https://interactadvocates.org/wp-content/uploads/2024/02/Intersex-101-Handout-Double-Sided-Posters-2.pdf>.

⁴ *Understanding Transgender People: The Basics*, NCTE (Jan. 27, 2023),

<https://transequality.org/issues/resources/understanding-transgender-people-the-basics>.

⁵ Letter from NYCLU & TLDEF, to Sheriffs in New York State Regarding the Treatment of Transgender People in Custody, Exhibit A (Oct. 23, 2023) (“The fact that a person has not obtained a legal name change or has not obtained government-issued identification that reflects their affirmed sex and gender identity does not constitute such specific evidence.”), <https://www.nyclu.org/en/publications/letter-sheriffs-new-york-state-regarding-treatment-transgender-people-custody>.

⁶ Misgendering is the act of using the incorrect gender when referring to an individual, either intentionally or unintentionally. See Zawn Villines, *Misgendering: Why it matters, and why it is harmful*, MEDICALNEWSTODAY (July 7, 2023), <https://www.medicalnewstoday.com/articles/misgendering>.

⁷ Deadnaming means referencing someone by a name they no longer use, such as a transgender person’s birth or legal name—if they have chosen a different name that aligns with their gender identity or expression. See *Why Deadnaming is Harmful*, CLEV. CLINIC (Nov. 17, 2021), <https://health.clevelandclinic.org/deadnaming>.

⁸ A 2018 study found that the frequency of misgendering of transgender individuals correlates to more stigmatization and negative mental health effects. See *id.*

⁹ See Villines, *supra* note 6.

Policies and Procedures to Provide Gender-Affirming Care¹⁰

As emphasized by the nation’s leading health organizations, gender-affirming care is life-saving healthcare.¹¹ Gender-affirming care is evidence-based, medically necessary treatment for gender dysphoria, defined as clinically significant discomfort or distress “related to incongruence between a person’s gender identity, sex assigned at birth . . . and/or primary and secondary sex characteristics.”¹² In a recent lawsuit we brought concerning an incarcerated transgender person’s access to gender-affirming care, the U.S. Court of Appeals for the Eleventh Circuit—whose jurisdiction includes Florida—determined that “responding to an inmate’s acknowledged medical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate is the very definition of ‘deliberate indifference’—anti-medicine, if you will.”¹³ Among the risks resulting from a lack of adequate healthcare include severe emotional distress, anxiety, depression, life-threatening attempts at self-treatment, and suicide.¹⁴ Like treatment for other health conditions, treatment for gender dysphoria should be individualized and determined by healthcare professionals capable of evaluating the patient’s particularized medical needs.¹⁵

We urge you to create a policy codifying the availability of gender-affirming care for individuals in your custody as well as outlining the appropriate procedures to provide such healthcare. Example policies can be found through the National Center for Lesbian Rights, the Center for Children’s Law and Policy, and the National PREA Resource Center.¹⁶ Also, while the Florida Department of Corrections (“FDOC”) Procedure 403.012¹⁷ is not perfect, this procedure illustrates how gender-affirming care can be provided in custodial settings in Florida.

PREA Standards Addressing Sexual Abuse and Harassment

In a 2022 study examining the experiences of LGBTQ+ individuals detained in U.S. prisons and jails, abuse was found as “the norm, not the exception”: 94.3% of participants reported incidents of abuse, including

¹⁰ Gender-affirming care consists of an array of services including “medical, surgical, mental health, and non-medical services for transgender and nonbinary individuals.” *See Trans Health Care in Florida: What You Need to Know*, ACLU (Aug. 11, 2022), <https://www.aclu.org/news/lgbtq-rights/trans-health-care-in-florida-what-you-need-to-know>.

¹¹ *See Medical Association Statements in Support of Health Care for Transgender People and Youth*, GLAAD (June 21, 2023), <https://glaad.org/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory/>.

¹² *Gender dysphoria*, APA (Nov. 15, 2023), <https://dictionary.apa.org/gender-dysphoria>.

¹³ *Keohane v. Fla. Dep’t of Corrs. Sec’y*, 952 F.3d 1257, 1266-67 (11th Cir. 2020).

¹⁴ *See Richard Saenz, A Crisis Behind Bars: Legal Issues Impacting Transgender People in Prisons*, ABA (Jan. 22, 2024), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/crisis-behind-bars-legal-issues-impacting-transgender-people-prisons/; *see also See Trans People in Florida Prisons Say Gender-Affirming Care Ban Upended Their Health Care*, THE MARSHALL PROJECT (Jan. 25, 2024, 6:00 AM), <https://www.themarshallproject.org/2024/01/25/transgender-health-care-prisons-florida>.

¹⁵ *See Saenz, supra* note 14.

¹⁶ *See SHANNAN WILBER & JASON SZANYI, MODEL POLICY: TRANSGENDER, GENDER NONCONFORMING, AND INTERSEX YOUTH IN CONFINEMENT FACILITIES*, NAT’L CTR. FOR LESBIAN RTS., CTR. FOR CHILDREN’S L. & POL’Y & NAT’L PREA RES. CTR. (2019).

¹⁷ *See FDOC, Procedure 403.012* (Nov. 13, 2019), <https://fdc.myflorida.com/health/403.012.pdf>.

“verbal assault, physical assault, sexual harassment” as well as “other sexual contact.”¹⁸ The PREA standards include federal regulations that mandate protections for individuals in custody¹⁹ and provide for an extensive auditing process of each facility.²⁰ Failure to comply with PREA can result in loss of federal funding and may be used in litigation to bolster assertions of deliberate indifference in the context of alleged Eighth Amendment violations.²¹ Mirroring PREA, the FDOC established a “zero-tolerance” policy “for all forms of sexual abuse, sexual battery and sexual harassment,” between individuals in custody, staff members, contractors, and volunteers.²² While PREA outlines dozens of standards for jails and prisons, we highlight two areas that, based on our research, consistently need improvement across Florida jails: strip searches and housing assignments.

(1) Strip Searches

The PREA standards prohibit a search or physical examination of a transgender or intersex individual conducted “for the sole purpose of determining the [individual’s] genital status.”²³ Instead, an individual’s “genital status” may be self-identified, confirmed via medical records, or “if necessary, by . . . a broader medical examination conducted in private by a medical practitioner.”²⁴ Facility staff must be trained on how to professionally and respectfully conduct “cross-gender” pat-down, strip, and cavity searches of transgender and intersex individuals “in the least intrusive manner possible,”²⁵ and each institution must document all searches.²⁶ Agencies or facilities that perform searches “based solely on the gender designation of the facility without considering other factors such as the gender identity or expression of the individual inmate or the inmate’s preference regarding the gender of the person conducting the search, would not be compliant with [PREA].”²⁷ As a result, some Florida jails appropriately permit transgender and intersex individuals in custody to identify the preferred gender of staff to search them.

A resourceful way to gather an individual’s search preferences is to provide them with a preference form during your intake process that indicates the gender of staff members who they would feel most comfortable examining them. This form should be provided to all transgender, gender nonconforming, and intersex

¹⁸ See SOMJEN FRAZER ET AL., PROTECTED & SERVED: 2022 COMMUNITY SURVEY OF LGBTQ+ PEOPLE AND PEOPLE LIVING WITH HIV’S EXPERIENCES WITH THE CRIMINAL LEGAL SYSTEM (2022).

¹⁹ ACLU, END THE ABUSE: PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT 1 (2014).

²⁰ See 28 C.F.R § 115.401.

²¹ ACLU, *supra* note 19, at 2.

²² FLA. DEP’T OF CORR., *supra* note 2.

²³ 28 C.F.R § 115.15 (e).

²⁴ *Id.*

²⁵ 28 C.F.R § 115.15(f).

²⁶ 28 C.F.R § 115.15(c) (“The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates”).

²⁷ Under PREA, such agencies or facilities would not be compliant with standards 115.15, 115.115, 115.215, and 115.315. *Frequently asked questions*, NAT’L PREA RES. CTR. (Oct. 24, 2023), <https://www.prearesourcecenter.org/frequently-asked-questions/can-you-please-clarify-parameters-conducting-search-transgender-or>.

individuals, not only those diagnosed with gender dysphoria.²⁸ One example is the Florida Department of Juvenile Justice’s Statement of Preference Form provided to incarcerated youth.²⁹ The form states, in part:

I would prefer to be searched by a staff person of the below indicated gender whenever possible. I understand that this preference will be respected unless the situation is an emergency, there is no one of that gender available, or the failure to conduct a search will jeopardize the safety of the staff or other juveniles.

In addition to providing a preference form, searches must be performed privately and with discretion. Searches, particularly strip searches, are usually unpleasant, uncomfortable, humiliating, and often traumatic—especially for transgender, gender nonconforming, and intersex individuals—regardless of who is performing the search.³⁰ Therefore, a private strip search should be conducted out of sight of any other individual in custody and include only necessary personnel.³¹

(2) Housing Placement

Transgender, gender nonconforming, and intersex people in jails experience increased levels of assault if they are housed in facilities based on their sex assigned at birth, not their gender identity.³² As a result, housing placement decisions should not be decided based on fixed perceptions about transgender, gender nonconforming, or intersex people or an individual’s external genital anatomy, but rather a “case-by-case basis whether a placement would ensure the inmate’s health and safety,” where a “transgender or intersex inmate’s own views with respect to [their] own safety shall be given serious consideration.”³³

Although numerous jails in Florida contain policies that include consideration of an individual’s gender identity for housing placement purposes, as outlined by PREA,³⁴ in practice, transgender, gender nonconforming, and intersex individuals in Florida jails are universally placed in housing consistent with their sex assigned at birth.³⁵ For institutions with formal housing policies concerning transgender individuals, we urge you to consider the serious harm that may befall the transgender, gender nonconforming, and intersex individuals in your custody who are placed according to their sex assigned at

²⁸ NCTE, POLICIES TO INCREASE SAFETY AND RESPECT FOR TRANSGENDER PRISONERS: A GUIDE FOR AGENCIES AND ADVOCATES 32 (2018), <https://transequality.org/sites/default/files/docs/resources/PoliciestoIncreaseSafetyandRespectforTransgenderPrisoners.pdf>.

²⁹ Fla. Dep’t of Juv. Just., Statement of Preference Form, <https://www.djj.state.fl.us/content/download/23204/file/prea-statement-of-search-preference-form.docx>.

³⁰ NCTE, *supra* note 28.

³¹ *Id.*; *see also* VERA INST. OF JUST., ADVANCING TRANSGENDER JUSTICE: ILLUMINATING LIVES BEHIND AND BEYOND BARS 62 (Feb. 2024).

³² *See* Caroline Medina et al., *Protecting and Advancing Health Care for Transgender Adult Communities*, CTR. FOR AM. PROGRESS 1, 15 (highlighting that incarcerated transgender people placed in housing based on their sex assigned at birth are “nearly 10 times as likely to be assaulted than the general prison population”).

³³ *See* 28 C.F.R § 115.42(c)-(e); *see also* VERA INST. OF JUST., *supra* note 31, at 8.

³⁴ *See* 28 C.F.R § 115.42(c)-(e).

³⁵ “Contrary to PREA and its implementing regulations, prisons and jails almost always house transgender women based on their anatomy, not their gender identity.” Saenz, *supra* note 14.

birth without taking the their individual needs into account.³⁶ If your facility does not yet have such a policy, we urge you to create one by referring to the PREA standards.³⁷

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Transgender individuals, particularly transgender people of color, are significantly overrepresented in prisons and jails, yet their unique needs frequently remain unaddressed.³⁸ To improve the safety of transgender, gender nonconforming, and intersex individuals in your custody, we urge you to adopt formal policies and procedures in accordance with federal law and the principles outlined above.

Thank you for your attention to this matter. We would be happy to discuss your facility's policies and procedures further. Please do not hesitate to contact us with any questions or concerns.

Sincerely,



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³⁶ *Frequently asked questions*, NAT'L PREA RES. CTR. (Mar. 24, 2016), <https://www.prearesourcecenter.org/frequently-asked-questions/does-policy-houses-transgender-or-intersex-inmates-based-exclusively> (noting a policy that houses transgender or intersex inmates based exclusively on external genital anatomy as a violation of PREA).

³⁷ See 28 C.F.R § 115.42(c)-(e).

³⁸ See Saenz, *supra* note 14; see also ANDREW R. FLORES ET AL., WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016).