

The dismal state of transgender incarceration policies

We evaluated the current transgender and gender non-conforming policies of 21 states in terms of PREA standards, World Professional Association for Transgender Health (WPATH) Standards of Care, and correctional staff training and treatment of transgender individuals. All but one come up short.

by Elliot Oberholtzer, November 8, 2017

In the summer of 2013, Chelsea Manning's high-profile incarceration and subsequent pardon brought the existence of trans women in prison into the mainstream discourse. Activists like Janet Mock and CeCe McDonald have courageously spoken out about their experiences while incarcerated. But while their high-profile cases have resulted in greater awareness about the criminalization of trans people — particularly trans women of color — and the abuses the mass incarceration system heaps upon them, there is very little discussion of actual policies. Advocacy groups and departments of corrections alike are operating with almost no information in this area, leaving incarcerated trans people without resources and at the mercy of widespread ignorance.

To begin to bridge this research gap, the Prison Policy Initiative has conducted a review of the current transgender/gender non-conforming policies ① of 21 states. ②

Most states' policies are sparse, and convey a clear discomfort with and ignorance about the trans community. We have, however, identified one state's policy as representing current best practices in the field: the

Delaware currently has the best policy for the treatment of transgender people in prison.

Delaware Department of Corrections policy. This two-part policy, revised in 2016 in response to an ACLU lawsuit, sets an informed and comprehensive standard.

In this post we review the scope of the gaps and inadequacies in states' transgender incarceration policies, hold up suggestions from Delaware and other leaders in the field as partial solutions, and make recommendations for further research that is desperately needed in this area.

PREA Requirements

The starting point for most state policies on trans care and rights is the Prison Rape Elimination Act. Passed in 2003, the Prison Rape Elimination Act (PREA) was a sweeping reform designed to acknowledge and address the widespread sexual abuse happening in prisons and jails nationwide. In 2009, the National Prison Rape Elimination Commission identified transgender people as a population at high risk of experiencing assault and violence while incarcerated. In 2012, the commission finalized national standards for the

prevention of sexual assault in prison, including several guidelines addressing transgender issues (see sidebar).

PREA Guidelines

The PREA guidelines for transgender care are narrow and focused on protecting trans people from physical abuse by fellow incarcerated people and by correctional staff. The PREA standards establish that:

- Individuals must be screened upon intake for risk factors for experiencing abuse, including whether they identify as trans.
- When an individual identifies as trans, the facility must assess them on a case-by-case basis to decide housing (i.e. whether they belong in a men's or women's facility), and an individual's views regarding their own safety must be seriously considered in housing decisions.
- Trans people cannot be placed in segregated housing or solitary confinement for their own protection without their consent, or unless it is the only available option.
- Trans people must be given the opportunity to shower separately.
- Correctional staff may not physically search trans people to determine their genital status; all examinations must be conducted by a medical professional as part of a broader medical exam.
- Facilities must train correctional staff in how to search and communicate with trans people respectfully.
- When reviewing an incident of rape or sexual assault, staff must review whether the incident was motivated by various factors including gender identity and/or transgender status.

Though the PREA standards do not address many of the issues most salient to trans incarcerated people, such as access to medical care, they do provide a minimum baseline for protection and respect. However, many state policies fall short of even this bare minimum. In the table below, we have summarized 21 states' policies' level of compliance with the PREA standards regarding transgender individuals.

PREA Compliance by State

| | Intake screening has procedures for people to identify as trans | Trans housing decisions must be case-by-case | Must seriously consider trans people's views in housing decisions | No segregated housing/ isolation without consent | Separate showers | No searches to establish genital status |
|---------------|---|--|---|--|------------------|---|
| Ala. | Y | N | Y | Y | Y | Y |
| Alaska | N | N | N | N | N | N |
| Ariz. | Y | N | Y | N | Y | Y |
| Calif. | N | N | N | N | N | N |
| Del. | Y | Y | Y | Y | Y | Y |
| | | | | | | <div> <div></div> <div>Show all states</div> <div></div> </div> |
| Wash. | Y | N | N | N | Y | Y |

Almost no states' policies fully comply with PREA standards. Data compiled by the Prison Policy Initiative from a review of a most recent available PREA audit report for each facility; for most, reports were available for 2016-2017.

Only one state's policies — Pennsylvania's — fully match the PREA standards in all particulars, and no particular standard is universally present. This means that while a trans person incarcerated in Delaware should be able to access basic rights like protection from baseless invasive physical searches and some say in their housing safety, someone incarcerated in Oklahoma or Tennessee cannot. Even in supposed progressive bastions such as California and Vermont, a trans person is not assured of the full range of basic rights that the federal commission deemed necessary for their safety while incarcerated.

In addition to our state policy research, we also reviewed over 500 PREA audit results, and found that in the last 5 years, only 3 facilities in these 21 states have failed their PREA audit. What does it mean that so many states are returning perfect PREA audit scores when their

policies are not compliant with the PREA standards? Either individual facilities are all meeting the standards for transgender individuals without state-level guidance, or PREA auditors are letting trans people slip through the cracks.

Further complicating matters is the reality that the vast majority of states are in the position of certifying that they are “working towards” PREA compliance, but are not there yet.

Experts in the field have noted that the penalties for noncompliance are weak, and

states can avoid penalties altogether by providing “assurances” that they are working towards compliance, even if those assurances come with no concrete evidence or timeline. Five states chose in 2014 to “opt out” of their PREA requirements altogether: the governors of Idaho, Texas, Indiana, Utah and Arizona chose to take the modest financial penalty for noncompliance upfront. While some states like Texas have since rescinded that hard-line stance, it still leaves them in an uncertain middle ground: are they working towards compliance or not?

If PREA is not being enforced, trans people are being deprived of even the most basic rights and protections behind bars.

If PREA is not being enforced, and states’ compliance with the PREA standards is so uneven, then trans people across the nation are being deprived of even the most basic rights and protections behind bars.

Health Care

Health care standards for transgender individuals have come a long way in recent years. While ignorance in the medical profession and the general public still abounds (24% of trans people report having to teach their medical provider about appropriate care, according to the nationally-representative 2015 U.S. Transgender Survey), more and more medical practitioners are moving towards models of care that recognize gender diversity as an identity, not a pathology, and that respect trans people’s agency and expertise. The World Professional Association for Transgender Health (WPATH) Standards of Care are widely recognized as best practices in the field (see sidebar).

The WPATH Standards of Care

The WPATH Standards of Care do not mandate any particular “transition” process, order, or script. Instead, they outline therapeutic approaches and treatments that have been shown to alleviate gender dysphoria and to improve quality of life for trans people, with the overall guidance that the number and combination of these approaches will be unique to each individual. “Treatment options include the following:

- Changes in gender expression and role (which may involve living part time or full time in another gender role, consistent with one’s gender identity);
- Hormone therapy to feminize or masculinize the body;
- Surgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring);
- Psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; or promoting resilience;
- Offline and online peer support resources, groups, or community organizations that provide avenues for social support and advocacy;
- Offline and online support resources for families and friends;
- Voice and communication therapy to help individuals develop verbal and non-verbal communication skills that facilitate comfort with their gender identity;
- Hair removal through electrolysis, laser treatment, or waxing;
- Breast binding or padding, genital tucking or penile prostheses, padding of hips or buttocks;
- Changes in name and gender marker on identity documents.”

Prison medical care is, however, lagging far behind these international standards. In our policy review, we found that:

- 17 out of 21 states did not even provide for access to psychotherapy, much less any of the social, pharmaceutical or surgical therapies WPATH recommends. This is extremely worrying given that trans people experience psychological distress at nearly eight times the rate of the general population, often due to discrimination and “minority stress”.
- 13 out of 21 states did not provide access to hormone treatments, and a further 4 states only provided hormones if an individual had been prescribed them prior to being incarcerated. 37% of trans people who were receiving hormone therapy before being incarcerated report being denied their hormones once inside, even though suddenly stopping hormone treatment can have serious medical consequences.
- Only one state, Delaware, explicitly outlined care such as surgery, electrolysis, and gynecological exams for trans people in their policy.
- Delaware was also the only state to name the WPATH standards explicitly, and to instruct medical professionals to use them as guidance.

- Even Delaware's otherwise excellent policy did not address mastectomies (also called "top surgery"). This omission highlights an additional barrier to care for trans men: the faulty assumption, almost universal in these policies, that the only transgender individuals who end up incarcerated are trans women.

Health Care Access by State

| | Policy provides access to psychotherapy | Policy provides access to hormones | Policy provides access to bottom surgery (Often uses term "Sex reassignment surgery"/"SRS" or just "surgery") | Policy provides access to electrolysis | Policy provides access to top surgery (breast implants, mastectomy) |
|---------------|---|---|---|--|---|
| Ala. | N | Only if prescribed prior to incarceration | N | N | N |
| Alaska | N | N | N | N | N |
| Ariz. | Y | N | N | N | N |
| Calif. | N | N | N | N | N |
| Del. | Y | Y | Y | Y | N |
| | | | | | <div> <div></div> <div>Show all states</div> <div></div> </div> |
| Wash. | N | N | N | N | N |

Most state correctional agencies don't address health care in their policies regarding transgender individuals. Data compiled corrections policies.

Denying necessary medical care to incarcerated people violates the Eighth Amendment of the Constitution's protection against cruel and unusual punishment. The US Seventh Circuit Court of Appeals established clearly in the Fields v. Smith 2011 case that hormone treatment

and surgical treatment are medically necessary care, suggesting that almost all of the states we reviewed are directly violating the Constitution in their policies. Lawsuits will continue to be brought against departments of corrections until states update their policies to provide basic medical care for transgender individuals.

Staff Training and Respect

A common theme in the narratives of trans people who have been incarcerated is that correctional staff, medical personnel, and other service providers create an environment of harassment and disrespect towards them.

In a 2009 survey of incarcerated trans and gender-variant people in Pennsylvania, conducted by the Hearts on a Wire Collective, respondents outlined the ignorance and abuse they faced:

- 64% of respondents reported that medical staff did not know how to handle their health needs as trans/gender variant people.
- 80% of respondents had been verbally harassed by staff; 30% had been physically or sexually assaulted by staff.
- 30% of respondents reported that staff had encouraged or permitted cisgender incarcerated people to harass or assault them.
- 50% of respondents who had filed a grievance report due to harassment said that nothing was done to address it; furthermore, 60% of those who had filed a grievance reported retaliation for doing so.
- 17% of respondents had been prevented from practicing their religion based on their gender or perceived gender.

The Pennsylvania study is not unique. The 2015 U.S. Transgender Survey, the first nationally representative survey of transgender individuals, echoed its findings, reporting that 20% of respondents who had been incarcerated in the last year had experienced physical or sexual assault from correctional staff.

The issue of staff mistreatment of transgender individuals is multifaceted, and the policy level is only one of the places where it must be addressed. However, most states are not even addressing it on the policy level at all:

Staff Policies by State

| | Staff must use preferred pronouns | Staff must use preferred name | Staff must respect trans people | Trans competency is part of staff training | Policies |
|---|--|--|---|--|--|
| Ala. | N | N | N | N | Admin Regulation 637, Admin Regulation 454 |
| Alaska | N | N | N | N | Institutions Policy 808 |
| Ariz. | N | N | N | Y | Inmate Management Department Order 810 |
| Calif. | N | N | N | Y | Operations Manual Article 44 |
| Del. | Y | N | Y | Y | Administration Policy 8.60A, Bureau of Correctional Healthcare Services Policy 11-E-14 |
| <div> <div>↑</div> <div>Show all states</div> <div>↓</div> </div> | | | | | |
| Wash. | N | N | N | N | Policy DOC 490.820 |

Almost no states' policies address staff conduct in interactions with transgender individuals. Data compiled by the Prison Policy Initiative from a review of department of corrections policies.

Again the standout in the field, Delaware's policy makes important strides by including communications guidance such as "transgender individuals shall be addressed with their preferred pronouns," and "No DOC member will ridicule any offender, and will not attempt to change any offender's understanding of their gender identity or sexual orientation." It is also the only policy that ensures that transgender people are provided with written information about their rights while incarcerated in Delaware, an important acknowledgement of trans people's right to agency regarding their own treatment.

But even Delaware's policy falls short in several key aspects:

- Along with instructing staff to respect individuals' pronouns, the policy should also instruct staff to respect their preferred/chosen names.
- The policy should, like the Vermont Department of Corrections policy, specify that "LGBTQI status will not impact a determination on whether or not an inmate may undergo programming. LGBTQI inmates will be given the same treatment in

determining access to programming and services as other inmates within the correctional facility.”

- The policy should specify that an individual’s status as transgender is confidential information, and lay out guidelines for the protection of their privacy.
- The policy does not clearly outline the consequences for correctional staff who do not adhere to the guidelines; without clear disciplinary measures in place, there is the real possibility that this policy will not be enforced.

Aside from Delaware and Vermont, most states’ policies do not even acknowledge the vital role that staff play in determining a facility’s attitude towards transgender individuals. Given the widespread silence of states’ policies on the subject, it is not surprising that large numbers of trans people who have been incarcerated report abuse and mistreatment at the hands of correctional staff.

Further Research

The state of transgender incarceration policies is one of ignorance, inadequacy, and absence. Research and policy groups concerned with transgender rights should focus seriously on transgender incarceration policies at both the state and local level.

Research questions that will help fill in the gaps include:

- How can advocacy groups encourage other states to put into practice comprehensive policies like Delaware’s? Can the model of a high-profile court case leading to policy reform be replicated?
- From the policy level to the practice level, how are states’ policies being implemented and how are facilities being held accountable to them?
- What is the relationship between PREA audit compliance, policy, and actual practice?
- What training are corrections medical staff receiving on transgender health, and does it adhere to the WPATH standards?
- What training and disciplinary procedures can be implemented to improve correctional staff’s conduct towards transgender individuals?

As the case in Delaware shows, legal advocacy is an important piece of this struggle. More organizations should follow the examples of the ACLU and Lambda Legal, and make transgender incarcerated individuals a priority in their work. And for those efforts to succeed, we need to fill in the research gaps.

1. This article uses the umbrella term “transgender” (and the abbreviation thereof, “trans”) to cover anyone who identifies differently than the gender they were assigned at birth. Terminology varies state-by-state, with state policies often using wildly out-of-date language (see [Nevada DOC’s use of “transgender treatment”](#) and “gender identity disorder”) or parroting current best-practices definitions without true understanding of their meaning and ramifications (such as [Missouri DOC’s policy](#), which uses a current, correct definition of “transgender” in its definitions section and then later

employs the phrase “amount of time living as a transgender”, indicating that their understanding of their own definitions is sorely lacking).

Though “transgender” is one of the most widespread umbrella terms within the community, it should be acknowledged that there are people whom it does not adequately cover; for example, many Native people who identify as Two-Spirit note that their gender is culturally-specific, and predates the colonial violence of the binary assignment process. ↩

2. The 21 states represented here are those that are available online and without a FOIA request; further

research should include a review of all 50 states' policies. ↩

2 responses:



1. *Nell Gaither* says:

November 9, 2017 at 4:33 pm

Thank you for bringing attention to some of the issues faced by incarcerated trans persons.

We do a lot of work with incarcerated trans persons in Texas, and I should point out that although the Safe Prisons/PREA Plan doesn't include access to hormones for trans persons, that is included in healthcare policy CMHC Policy G-51.11 (https://www.tdcj.state.tx.us/divisions/cmhc/docs/cmhc_policy_manual/G-51.11.pdf).

I'm sure the authors and others are aware also that policy and audits do not always reflect reality. Although Texas received some high marks here, the actual experience of incarcerated trans persons in dealing with sexual abuse and sexual harassment, as well as other forms of violence, is pretty dismal. We are increasingly seeing persons who report sexual abuse and other violence retaliated against, with having their allegations be found unsubstantiated, then when they continue to state they were subjected to violence, they are hit with a disciplinary case for lying during an investigation.

Additionally, there is serious discrimination against trans persons among PREA auditors. We will probably file a complaint against one auditor in particular who for unknown reasons has told one trans person in Texas that she was requested by the FBI to investigate trans discrimination. This same auditor told another incarcerated trans woman that she should be able to insist on wearing nail polish (colored floor wax for her nails) because that was protected under PREA. Of course, when she tried to do that she received a disciplinary case. This is a PREA auditor engaging in harassment of trans persons.

Policy is only a small first step. Accountability has a long ways to go in Texas.

Thank you again for this post!

Nell Gaither, President
Trans Pride Initiative



1. *Elliot Oberholtzer* says:

November 17, 2017 at 1:08 pm

Hi Nell,

Thanks so much for your comment, and for the important work your organization does. We've updated the table to include the information from the health care policy you linked.

We agree that the gap between policy and actual treatment of incarcerated trans people is wide; this is one of the areas that desperately needs further research, particularly because it is so material to people's lives and safety.