
Justice Department Tells Prisons to Take Gender Identity Seriously

Prison and jail policies "must allow for housing by gender identity when appropriate" say new federal guidelines.

[Elizabeth Nolan Brown](#) | Mar. 25, 2016 12:40 pm

The Department of Justice (DOJ) has [ordered U.S. prisons and jails to stop ignoring gender identity](#) when assigning inmates to male or female units. Although federal regulations already require this, many places still have blanket policies of housing transgender inmates based solely on their genitalia, [according to The Guardian](#).

Since 2003, when George W. Bush signed into the law the Prison Rape Elimination Act (PREA), jails and prisons have been required to make decisions about housing transgender and intersex inmates on "a case-by-case basis"—although implementation of the regulations didn't happen until 2012. The regulations stipulate that decisions must be made based on "whether a placement would ensure the inmate's health and safety," "whether the placement would present management or security problems," and "a transgender or intersex inmate's own views with respect to his or her own safety."

Asked recently whether "a policy that houses transgender or intersex inmates based exclusively on external genital anatomy" violates the law, the feds [said yes](#). "A PREA-compliant policy must require an individualized assessment," and this assessment "must consider the transgender or intersex inmate's gender identity—that is, if the inmate self-identifies as either male or female."

This needn't be the sole determinant, however. Recognizing that the decision is "complicated," the DOJ guidance says that policies "may also consider an inmate's security threat level, criminal and disciplinary history, current gender expression, medical and mental health information, vulnerability to sexual victimization, and likelihood of perpetrating abuse. The policy will likely consider facility-specific factors as well, including inmate populations, staffing patterns, and physical layouts. The policy must allow for housing by gender identity when appropriate."

Adam Frankel, coordinator of Human Rights Watch's lesbian, gay, bisexual, and transgender rights program, [told The Guardian](#) this isn't enough. Federal guidelines should "prohibit these kinds of dangerous placements, which ... create an extraordinarily high risk for transgender people in prison and blatantly disrespect their gender identity," he said.

According to Bureau of Justice Statistics data, trans inmates are sexually assaulted while imprisoned at much higher rates than others. The 2014 National Inmate Survey showed that around four percent of state and federal prisoners and 3.2 percent of those in jail were sexually assaulted between 2011 and 2012. But for trans inmates, these numbers jump to 34.6 and 34 percent.

Other rights groups applauded the DOJ move. A joint [statement from the National Center for Transgender Equality](#) (NCTE) and Just Detention International said the new guidance "sends the clearest message yet that current housing practices in prisons and jails are in violation of PREA" and "makes clear that housing transgender people based solely on sexual anatomy is not 'case-by-case.'"

"This guidance states what should be obvious, except almost all our state and local governments are getting it wrong," said NCTE Executive Director Mara Keisling.

"Housing transgender people based on body parts rather than who they are is dangerous and at odds with PREA. That means housing someone as the gender they live as has got to be on the table every time, and it should be the rule rather than the exception."

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