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Does a policy that houses transgender or intersex inmates based exclusively on external genital anatomy violate Standard 115.42(c) & (e)?

Yes. Standard 115.42(c) states:

In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

In addition, Standard 115.42(e) states:

A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.

Being transgender is a known risk factor for being sexually victimized in confinement settings. The standard, therefore, requires that facility, housing, and programming assignments be made "on a case-by-case basis." Any written policy or actual practice that assigns transgender or intersex inmates to gender-specific facilities, housing units, or programs based solely on their external genital anatomy violates the standard.

A PREA-compliant policy must require an individualized assessment. A policy must give "serious consideration" to transgender or intersex inmates' own views with respect to safety. The assessment, therefore, must consider the transgender or intersex inmate's gender identity – that is, if the inmate self-identifies as either male or female. A policy 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. A PREA auditor must examine a facility or agency's actual practices in addition to reviewing official policy. A PREA audit that reveals that all transgender or intersex inmates in a facility are, in practice, housed according to their external genital status raises the possibility of non-compliance.

The auditor should then closely examine the facility's actual assessments to determine whether the facility is conducting truly individualized, case-by-case assessments for each transgender or intersex inmate. The auditor will likely need to conduct a comprehensive review of the facility's risk screening and classification processes, specific inmate records, and documentation regarding placement decisions.

The Department recognizes that the decision as to the most appropriate housing determination for a transgender or intersex inmate is complicated. Facilities may consider several methods to make these assessments. Best practices include informing decisions on appropriate housing through consultation by facility administration, classification and security staff, and medical and mental health professionals. However, a facility should not make a determination about housing for a transgender or intersex inmate based primarily on the complaints of other inmates or staff when those complaints are based on gender identity.

Importantly, the facility shall not place transgender inmates in involuntary segregated housing without adhering to the safeguards in Standard 115.43.

Compliance
LGBTI Inmates/Residents/Detainees/Staff
Screening
115.42
115.43



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Justice Department Defends Rights of Transgender Inmates in Court Filing

by MEDARDO PEREZ

The Department of Justice (DOJ) filed a brief Saturday defending current federal policies that allow transgender inmates to be housed in facilities that correspond with their gender identity.

In a filing to the U.S. District Court for the Northern District of Texas, lawyers for the DOJ defended the federal government against four plaintiffs currently serving time in Texas correctional facilities. The four women are seeking a preliminary injunction that would have them transferred out of their current facilities to others that do not currently house transgender women, as well as prevent the Bureau of Prisons (BOP) from enforcing its trans-affirming policies nationwide.

The plaintiffs allege the placement of transgender inmates in women's facilities violates the rights of non-transgender women under the U.S. Constitution and the Religious Freedom Restoration Act (RFRA).

Within their brief, DOJ lawyers argue that the plaintiffs "have not met their heavy burden of showing the extraordinary relief of a preliminary injunction is appropriate" — failing to establish that they face "imminent harm" under current policies and not exhausting "administrative remedies."

"The transgender inmates ... are not even in the same housing unit as Plaintiffs. The record and BOP's investigation also belies Plaintiffs' claims ... that the named transgender inmates exposed themselves to Plaintiffs or threatened them with physical assault," the DOJ brief states. "Plaintiffs' unsubstantiated allegations fail to establish that they would suffer a real, substantial, and immediate harm in the absence of a preliminary injunction."

The women seek to stymie the Prison Rape Elimination Act Regulations established in 2012 by the DOJ, which require the BOP to consider transgender or intersex inmates' health and safety in housing assignments.

"Transgender individuals are particularly vulnerable to abuse when they enter federal and state prisons," said Robin Maril, associate legal director for the Human Rights Campaign. "It is essential that these inmates are placed in housing based on their gender identity if that is where [prison officials] thinks they are safest and receive medically necessary health care."



Two transgender prisoners are allowed exercise time separated from the main prisoner population. Corbis via Getty Images

In their complaint, which was filed in May, lawyers for the plaintiffs contend transgender inmates are being housed "as a method of affirming their misperceived sex."

"Blending of the sexes in the confined and restricted conditions attendant to prisons violates the privacy of female inmates and causes numerous dangers and threats to the physical and mental health and safety of our female Plaintiffs," the complaint states. "The basis for the recent changes to rules and regulations is a politically-driven agenda to affirm that gender identity theory, rather than biological sex, is the normative basis to determine whether an inmate is male or female."

The plaintiffs are being represented by lawyers at Alliance Defending Freedom (ADF), a conservative Christian law firm that was labeled a "hate group" by the Southern Poverty Law Center in 2016.

ADF did not respond to NBC News' request for comment.

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Further in the court filing, the DOJ argues that even if the court grants the women a preliminary injunction that would prevent the placement of transgender inmates in the plaintiffs' Texas facilities, the request for a nationwide injunction should be denied, as the alleged injuries "cannot serve as a basis for invalidating BOP's policies and procedures governing the placement of all transgender inmates throughout the United States."

The case is before Judge Reed O'Connor, who, in 2016, blocked the Obama administration's directive that forced public schools to allow students access to bathrooms consistent with their gender identity. That same year, O'Connor ordered another injunction to prevent federal health

officials from enforcing policies intended to ban doctors and hospitals from discriminating against transgender individuals.

LGBTQ advocates remain watchful of the DOJ's motion to protect the rights of transgender inmates.

“The Attorney General has asserted a commitment to combating violence against transgender people, which should include the extreme risk of violence transgender people face in prisons,” said Harper Jean Tobin, director of policy at the National Center for Transgender Equality, in an email to NBC News. “Advocates for ending sexual abuse in prison will closely watch to see whether the Justice Department's response to this litigation reflects that commitment.”

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