



POLICY REVIEW AND DEVELOPMENT GUIDE

*Lesbian, Gay, Bisexual, Transgender,
and Intersex Persons in Custodial Settings*

2nd Edition

Home

Core Principles for Understanding LGBTI Individuals in Custody

This policy guide was prepared under cooperative agreement 10PEI36GKE7 and revised under cooperative agreement 13CS17GKN9 from the National Institute of Corrections, U.S. Department of Justice, and Smith Consulting. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official opinion or policies of the U.S. Department of Justice.

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About

Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings, 2nd Edition

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Foreword

The Project on Addressing Prison Rape ^[1] (the Project) at American University's Washington College of Law ^[2] (WCL) has had a cooperative agreement with the National Institute of Corrections ^[3] (NIC) to provide training and technical assistance to high-level correctional decisionmakers on key issues in preventing and addressing staff sexual misconduct since 1999. In 2003, with the enactment of the Prison Rape Elimination Act (PREA), the Project's focus shifted to addressing prison rape—both staff sexual misconduct and inmate-on-inmate sexual abuse. Beginning in 2006, Smith Consulting began a collaborative effort with the Project and NIC to focus efforts on providing technical assistance to the field of corrections on a variety of issues.

Since the passage of PREA in 2003, increased national and international attention has been paid to the issue of sexual abuse of individuals in custody. As identified by the National Prison Rape Elimination Commission ^[4] (NPREC) during its fact-finding process, lesbian, gay, bisexual, transgendered, and intersex (LGBTI) individuals—both adults and youth—under custodial supervision are one of the groups most at risk for abuse. In June 2009, NPREC proposed comprehensive standards for eliminating sexual abuse of LGBTI individuals in custodial settings. The final standards promulgated by the U.S. Department of Justice ^[5] (DOJ) in May 2012 recognized the unique vulnerabilities of LGBTI populations kept intact most of NPREC's findings and recommendations and in several instances, strengthened the protections for LGBTI populations. DOJ is

continuing to issue guidance on gender non-conforming individuals as it relates to the standards specifically through the FAQ section on the [National PREA Resource Center's](#) [6] website.

However, this fundamental question remains unanswered: Have the conditions changed that allow the abuse of LGBTI individuals in custodial settings to occur? Although several state and local systems have made strides in addressing sexual abuse of LGBTI individuals in their care, much work remains. With the final standards as benchmarks, along with stronger laws protecting LGBTI individuals from abuse, progress can be swift and abuse of LGBTI individuals in custody can be significantly reduced.

In the first edition of this guide, we aimed to reach out to correctional agencies in order to help them identify, address, and respond to abuse of LGBTI individuals through agency policies and procedures. We hoped to deepen the dialogue between staff and administrators as well as community leaders and criminal justice advocates about strategies to eliminate abuse of LGBTI individuals in custody. The second edition of this guide provides updated key information to correctional agencies about PREA's impact on agency practice as it relates to LGBTI individuals in custody.

Acknowledgments

Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings Second Edition is the work product of many organizations and individuals concerned about preventing and addressing the abuse of LGBTI adults and youth in custody. It addresses rapidly developing areas of practice and law in the United States. The information in this publication is current as of August 30, 2014. Both law and best practices in this area are continuing to evolve; we will remain abreast of those changes and we encourage you to contact us with new information as it becomes available.

We would like to thank the many contributors who have given us insightful and honest commentary about the situations that LGBTI individuals face in custodial settings, which provided insight into promising ways correctional officials can address with respect and dignity the needs of LGBTI individuals in custodial settings. We would also like to thank the Project's research staff and deans fellows who collected and analyzed new information for this edition: Caleb Bess, Melissa Loomis, Rebecca Heinsen, Deanna Glickman, and Emma Burgess Roy.

Additionally, we thank the following individuals from the National Institute of Corrections for supporting this important work: Mr. Jim Cosby, Director; Mr. Robert Brown, Deputy Director; and Ms. Lorie Brisbin, Correctional Program Specialist, Community Services Division.

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Chapter 1. Introduction and Overview

Introduction

Meeting the needs and protecting the rights of LGBTI people in various custodial settings presents both challenges and opportunities for society's institutions, including law enforcement and corrections.

Purpose and Intent of this Guide

This policy guide will assist correctional administrators, medical and mental health staff, training coordinators, line staff, and policymakers as they craft policies to address the treatment of LGBTI individuals in custodial settings. It may also help agencies that are paying greater attention to the needs of LGBTI individuals as they work to implement the PREA Standards, which require correctional agencies to safely screen, classify, and house LGBTI inmates as well as those who have intersex conditions. By integrating information about LGBTI individuals into policies, practices, and organizational culture, agencies will be better able to meet the needs of these inmates and increase the skill level of staff who work with this population on a daily basis.

This guide includes information that will help adult correctional facilities and juvenile justice agencies to assess, develop, or improve policies and practices regarding LGBTI individuals in their custody. The guide is not meant to be a quick reference for writing policies appropriate for all agencies and facilities. It is intentionally vague on “how-to” advice and “plug-and-play” policy guidance. Guides for writing policies exist in many forms.^[1] Rather, the purpose of this guide is to (1) define agencies' obligations to LGBTI populations, both legally and in accordance with PREA Standards; (2) begin a dialogue within agencies regarding the safety and treatment needs of LGBTI populations; and (3) guide agencies in asking good questions about practices and implementation strategies for meeting the needs of LGBTI populations.

Part of the mission for all correctional agencies is to provide safe and secure environments for all individuals in their care and custody. State and federal law imposes legal obligations on correctional and juvenile agencies for the treatment of all persons in custody, with specific provisions for LGBTI populations. Agencies need policies to define and clarify the appropriate treatment of LGBTI individuals in their custody and meet all constitutional and other obligations to provide humane treatment to those in their custody. Additionally, strong policies can help mitigate the risk of liability to the agency and its staff in the event of an incident or litigation.

Chapter 1 of this policy guide discusses general terminology and the reasons that agencies need policies. It discusses the terminology necessary to understand issues of sexual orientation. Having a basic understanding of these terms helps us understand the issues and concerns of LGBTI individuals and the challenges they face in custodial settings. Understanding and proper use of terminology are at the core of developing policy and practice as they relate to LGBTI inmates and youth. In addition to this general discussion of terminology, there is a full glossary of terms in Appendix A. It is important to remember that these terms are evolving and can vary depending on who is using them. However, the glossary is consistent with the PREA Standards, and this set of definitions is used in this publication. Chapter 2 addresses the needs of juvenile justice agencies in creating policies for LGBTQI youth in custody. Chapter 3 discusses the needs of adult correctional settings (prisons, jails, and community corrections facilities) in developing LGBTI policies for inmates or residents. The appendices include a glossary; a case law digest; resources that address LGBTI issues along with resources for LGBTQI youth and adults; sample policies for prisons, jails, community corrections, and juvenile agencies; and training matrices.

Issues in Providing Care and Safety for LGBTI Individuals in Custody

During the past three decades, an increasing number of individuals have openly identified as lesbian, gay, bisexual, or transgender, and many young people are actively questioning their sexual orientation and gender identity. In addition, society has developed an increased awareness of people living with intersex conditions. Today, individuals who are—or are perceived to be—LGBTI are a part of nearly all segments of society, including those who are inmates *and* staff in correctional settings. Given the

unique circumstance of LGBTI people under the jurisdiction of both adult and juvenile criminal justice systems, as well as those who are housed in immigration detention, correctional authorities must be able to ensure the safety of LGBTI people in their custody.

In 2011, there was considerable change in legislative and policy decisions concerning LGBTI issues. Anti-bullying initiatives, such as the *It Gets Better* campaign, have raised public awareness about the struggles of LGBTQI youth.[2] School administrators responded in turn, displaying a heightened sensitivity toward LGBTQI youth.[3] Schools enacted zero-tolerance policies and other anti-bullying measures aimed at eradicating violence and aggression toward LGBTQI or other gender-nonconforming students.[4] Same-sex marriage advocates cheered the Obama administration's decision to no longer defend Defense of Marriage Act (DOMA) cases.[5] During the 2012 election season, voters were challenged to expand LGBTI rights, and they rose to the task; Maine, Maryland, and Washington joined Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia in approving same-sex marriages.[6] Furthermore, Minnesota residents rejected a ballot measure to amend the state constitution to define marriage as a union between a man and a woman.[7] Lastly, Wisconsin voters elected Tammy Baldwin as the first openly gay U.S. senator.[8]

Unfortunately, a lack of knowledge about LGBTI people, coupled with little guidance for correctional institutions on how to maintain safety and how to respectfully communicate with this population, has resulted in significant challenges for LGBTI people in custody. The nature and severity of these problems were at the forefront of PREA's enactment, the proposed Standards developed by the NPREC, and the final Standards issued by the DOJ.

In April, 2007, the Center for Innovative Public Policies, Inc., through an initiative with the NIC, collaborated with The Project on Addressing Prison Rape to sponsor the meeting "Working with Lesbian, Gay, Bisexual, Transgender, and Intersex Populations in Corrections Systems: Identification of Issues and Resources, Development of Recommendations." [9] The meeting brought together a diverse group of stakeholders, subject-matter experts, and corrections officials to identify challenges, propose solutions, develop recommendations, and identify resources for agencies with LGBTI populations.

During the meeting, the group identified approximately 30 separate challenges; the resulting unpublished report also made a number of important recommendations for improving the treatment of LGBTI adults and youth in custody.

A primary recommendation was to develop a policy guide for correctional agencies on the issue. The concept of this policy guide was born from that recommendation; the guide seeks to address the needs identified during the 2007 meeting by providing policy and practice recommendations that will help correctional staff who work with LGBTI adults and youth in custody.

The final standard makes the following applicable to prisons, jails, and community confinement facilities: (1) transgender and intersex inmates must be given the opportunity to use the toilet and shower separately from other inmates; and (2) it is prohibited to place LGBTI inmates in a dedicated unit or facility solely on the basis of LGBTI identification, unless such placement is pursuant to a legal requirement for the purpose of protecting such inmates.[10]

Evolving Terminology and Definitions

To address the needs of LGBTI individuals in custodial settings, it is necessary to have a full understanding of the basic and appropriate terms that individuals use to present themselves. The most basic concepts are "gender identity" and "sexual orientation."

Gender Identity

Gender identity is a person's internal, deeply felt sense of being male or female, distinct from his or her sexual orientation. Everyone has a gender identity and, for many, their gender identity is consistent with their assigned sex at birth and their physical anatomy.

A **transgender** person has a gender identity that is different from his or her assigned sex at birth. A transgender woman is a person whose birth sex is male but who understands herself to be female and desires to live her life as a female; a transgender man is a person whose birth sex is female but who understands himself to be male and desires to live life as a male. A transgender person may publicly express his or her gender identity while very young, middle aged, or even elderly. **Transition** is the term that is often used to describe the time period when transgender people start publicly living their lives in accordance with their gender identity. Transition often includes a change in dress, hairstyle, and physical appearance; the use of a new name; and a change in pronoun (from "he" to "she," or vice versa). During transition, many transgender people will also begin to undergo medical treatments (such as hormone therapy or surgery) to change their physical bodies to better match their gender identity; however, not all transgender people undergo medical treatments.

Some people's gender-related appearance, characteristics, and behaviors—**gender expression**—cross genders or include

aspects of both masculinity and femininity. The term **gender nonconforming** can be used to describe people whose gender expression is outside of societal assumptions for how men and women are expected to behave or appear.

Many transgender people experience high levels of distress that result in depression, anxiety, low self-esteem, and even suicide ideation.[11] For some, the high level of distress develops into a condition known as either **gender identity disorder (GID)** or **gender dysphoria**. [12] In 2012, the American Psychological Association (APA) announced its intention to remove the term “GID” from the forthcoming *Diagnostic and Statistical Manual, fifth edition*, and replace it with gender dysphoria.[13] The term “gender dysphoria” is used in this guide, except in circumstances where specific court holdings have turned on a GID diagnosis.

Heterosexual people who are gender nonconforming, or do not conform to gender stereotypes, are often perceived by others to be LGBTI and face many of the same risks of maltreatment in custodial settings as LGBTI people do.

Sexual Orientation

Sexual orientation refers to a person’s romantic and physical attraction to members of the same sex or a different sex. There is a continuum of sexual orientation, from exclusively heterosexual or “straight” (attraction to members of a different sex) to exclusively homosexual or “gay” or “lesbian” (attraction to members of the same sex), along with degrees of bisexuality (attraction to same-sex and different-sex people). People who are not sexually attracted to anyone are **asexual**. An asexual individual can still experience relationships but may not have feelings of sexual attraction or the desire to act on these feelings if they do occur.

Intersex

People who are **intersex** or have intersex conditions[14] are born with external genitalia, internal reproductive organs, chromosome patterns, or endocrine systems that do not fit typical definitions of male or female. The medical conditions causing these variations are sometimes grouped under the terms “intersex” or disorders of sex development (DSD).[15] It is estimated that 1 in 2,000 babies is born with an intersex condition.[16] Although most people with intersex conditions do not identify as transgender, due to their unique bodies or their gender expressions, many experience abuse and harassment in correctional settings similar to the type of abuse transgender people experience.

Use of Terminology and Acronyms

Often, acronyms are used to refer to individuals who are “sexual minorities.” The most common acronym is **LGBT**—lesbian, gay, bisexual, and transgender—and is often used to identify the full community of individuals who do not consider themselves heterosexual or who are transgender.

Some people also use “**Q**” to include individuals who self-identify as “queer” or “questioning” or both. The term **questioning** refers to the active process in which young people explore their sexual orientation or gender identity or both and question the societal assumption that they are heterosexual or gender conforming. Many LGBT people go through this process of questioning before “coming out” (or telling other people that they identify as LGBT). It is important to note that not all people who are questioning, especially young people, will later identify as LGBT.

The PREA Standards do not use an acronym, but instead use the terms gay, lesbian, bisexual, transgender, and intersex.[17] The PREA Standards also use the term “gender nonconforming” to encompass “any person whose appearance or manner does not conform to traditional societal gender expectations.”[18]

In this guide, the acronym **LGBTI** is used to refer to the whole community of people who are sexual and gender minorities—lesbian, gay, bisexual, transgender, and intersex individuals. Additionally, the acronym **LGBTQI** (lesbian, gay, bisexual, transgender, questioning, and intersex) is used in this guide to reflect the process of questioning that often occurs in adolescence.

The American Counseling Association “opposes the promotion of ‘reparative’ therapy as a cure for individuals who are homosexual.” The American Psychoanalytic Association believes that “[p]sychoanalytic technique does not encompass purposeful efforts to ‘convert’ or ‘repair’ an individual’s sexual orientation.”[19]

Core Principles for Understanding LGBTI Individuals in Custody

Just as corrections officials must develop an understanding of core terms used by LGBTI people, there are also core principles that can help officials better understand sexual orientation and gender identity. These core principles are based on well-developed research and principles developed by medical and mental health professionals.

Awareness and Self-Identification

Research in the area of adolescent development demonstrates that both sexual orientation and gender identity are established at a very early age.[20] The latest research shows that children are disclosing their sexual orientation to others at younger ages than in previous generations.[21] Not all youth who have same-sex attractions, experiences, or relationships self-identify as lesbian, gay, or bisexual.[22] For some, it can take many years to understand and become comfortable with their identities, and some people do not come out until much later in their lives.[23]

Substantial research indicates that gender identity is “hard-wired”. Do not assume the child or youth is confused about their gender identity. They most likely are not. This is not about current or future sexual orientation. Sexual Orientation is unrelated to Gender Identity.[24]

Do No Harm: The Necessity of Medical and Mental Health Care

Health professionals agree that a person’s gender identity is an ingrained and inherent part of his or her overall identity, and attempts to change it will be ineffective and could potentially cause significant harm.[25] Even though some people may choose not to act on their feelings or do not self-identify as lesbian, gay, or bisexual, individuals with same-sex attractions cannot change their sexual orientation.[26]

Objective scientific research demonstrates that lesbian, gay, and bisexual identities fall within the range of normal sexual development and are not associated with mental disorders or emotional or social problems,[27] and they are not the result of prior sexual abuse or any other trauma.[28] In addition, numerous studies over the past 20 years have found that transgender individuals do not have serious underlying psychopathologies that cause or influence their transgender identities and that the number of transgender people with reported psychiatric problems mirrors that in the general population.[29]

The World Professional Association for Transgender Health (WPATH)[30] has issued internationally accepted protocols for the treatment of youth and adults with gender dysphoria.[31] Treatment focuses on supporting a person’s understanding of his or her gender and is highly personalized, based on individual needs.[32] Treatment can include a combination of counseling, hormone therapy, or surgeries as well as encouraging gender expression and gender identification.[33] Disrespecting, punishing, or prohibiting transgender people from expressing their gender identity can lead to depression, suicide attempts, and problems with relationships, school, and work.[34]

Medical experts do not view transitional treatments for transgender people as dangerous or experimental.[35] Both the American Medical Association (AMA) and the American Psychological Association (APA) agree that these transition-related treatments are effective and medically necessary for individuals who have been appropriately evaluated.[36] Medical organizations further recognize and support the need for transgender-specific care in custodial settings.[37]

The National Commission on Correctional Health Care (NCCHC) adopted a position statement that provides guidance to health professionals who work in correctional settings about their responsibility to ensure the physical and mental health of transgender people in custody. According to NCCHC, the proper approach to transgender medical care is to follow the World Professional Association for Transgender Health Standards of Care, ensuring that transgender people who live in institutional settings have access to the same medical treatments that would be available to them in the community. NCCHC also discourages a “freeze” or halting of treatment regimes for transgender people when they come into custody, and instead recommends that treatments remain dynamic depending on current medical recommendations.[38]

Emerging Data on LGBTI Individuals in Custodial Settings and the Challenges They Face

Individuals who are (or who are perceived to be) LGBTI are a presence in jails, prisons, juvenile facilities, community corrections facilities, and immigration detention facilities. A 2008 study conducted by the Bureau of Justice Statistics (BJS) found that 8 percent of the prison inmates surveyed identified a sexual orientation other than heterosexual (114,300 out of 1,430,300 surveyed inmates of federal and state prisons).[39] Recently, a BJS survey of juvenile facilities found that more than 12 percent of youth self-identified as nonheterosexual.[40]

LGBTI Individuals in Custodial Settings

LGBTI individuals are at significant risk for contact with the justice or correctional system. Although the social climate for LGBTI people has improved significantly over the past few decades, LGBTQI youth and adults continue to face hostility and discrimination in their homes, schools, workplaces, communities, and social service settings. As a result, LGBTI people may not have access to support networks to help prevent them becoming involved in the criminal justice system.

Studies of LGBTIQ youth in school settings reveal that they experience a higher frequency of verbal harassment and physical assault than their heterosexual counterparts.[41] Reports of physical violence include individuals' clothes being forcibly removed, gang rape,[42] and even death.[43] LGBTIQ youth often face these challenges not only at school but also in their homes and communities.[44] Family rejection and school failure can lead to other problems, including homelessness,[45] involvement in the sex industry,[46] psychological problems,[47] and self-medication with alcohol and drugs.[48] Consequently, LGBTIQ people may have disproportionate contact with the criminal justice system that may begin, for some, in adolescence and continue into adulthood.[49]

Furthermore, LGBTIQ identity can sometimes overwhelm companion issues of poverty and race. A study conducted by the National Gay and Lesbian Task Force and the National Center for Transgender Equality found that transgender individuals were 4 times more likely to live in extreme poverty.[50] Individuals living in poverty have a substantially higher rate of involvement with the juvenile and criminal justice systems. These issues are exacerbated for LGBTIQ people of color, who are already disproportionately poor and may be detained by law enforcement because of their race.[51]

What the Data Illustrate

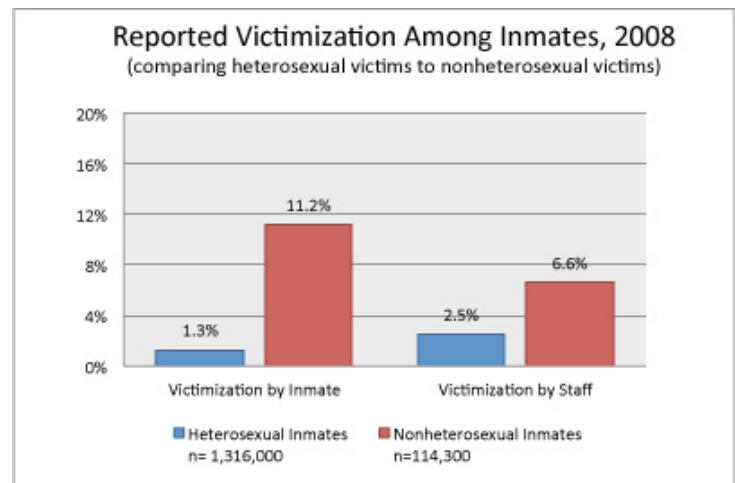
LGBTIQ individuals who have contact with the juvenile or adult justice system often experience a number of serious challenges that begin at arrest and continue through release. These issues include abusive and demeaning contact with criminal justice officials; being inappropriately classified and housed; lack of access to resources, including medical and mental health care; and abusive treatment (verbal, emotional, physical, and sexual) from other inmates and staff.

Recent research efforts have focused on the incidence of sexual violence against LGBTIQ individuals in custody. Research and testimony about the vulnerability of those who are, or are perceived to be, LGBTIQ animated the passage of PREA in 2003. Even prior to PREA's passage, research on sexual abuse in correctional facilities consistently documented that men and women with nonheterosexual orientations, transgender individuals, and people with intersex conditions were highly vulnerable to sexual abuse.[52]

The NPREC proposed Standards to address prison rape on June 23, 2009;[53] compliance indicators were included to address the specific vulnerability of LGBTIQ populations based on the finding that "certain individuals are more at risk of sexual abuse than others." [54] In particular, the NPREC found that "corrections administrators need to do more to identify those who are vulnerable and protect them in ways that do not leave them isolated and without access to rehabilitative programming." [55]

Research conducted by BJS pursuant to its mandate under PREA supports the NPREC's findings and earlier research on the prevalence of sexual abuse in custodial settings.[56] The BJS survey of youth in juvenile facilities found that more than 1 in 5 nonheterosexual youth reported sexual victimization involving another youth or a facility staff member, whereas slightly more than 1 in 10 heterosexual youth reported sexual victimization.[57] The same study found that nonheterosexual youth were almost 10 times more likely than heterosexual youth to report they had been sexually abused by other youth while in custody (12.5 percent and 1.3 percent, respectively).

A 2008 BJS study of federal and state prisoners found that among 1,316,000 heterosexual inmates, only 1.3 percent reported sexual victimization at the hands of another inmate and 2.5 percent reported victimization by a staff member.[58] Among 114,300 inmates with a non-heterosexual orientation, 11.2 percent reported sexual victimization perpetrated by another inmate and 6.6 percent reported sexual victimization by a staff member.[59]



Other data illustrate that transgender women and girls are highly vulnerable to sexual abuse, especially when housed in facilities for men or boys.[60] The University of California's Center for Evidence-Based Corrections found that "[s]exual assault is 13 times more prevalent among transgender inmates, with 59 percent reporting being sexually assaulted." [61] In this study, transgender victims were also far more likely than other victims to have been sexually assaulted on multiple occasions.[62] Such findings make clear that "[e]ven when compared to other relatively vulnerable populations, transgender people are perilously situated." [63] Because of this concern, the APA and the NCCHC have both issued statements recognizing that transgender inmates are at especially high risk of abuse and calling for their protection.[64]

"In matters of housing, recreation, and work assignments, custody staff should be aware that transgender people are common targets for violence. Accordingly, appropriate safety measures should be taken regardless of whether the

person is placed in male or female housing areas.”[65]

A number of successful lawsuits have been filed by transgender inmates against the Federal Bureau of Prisons, state departments of corrections, and local jails across the country. In recent years, federal courts have issued decisions in every circuit as well as the U.S. Supreme Court. These cases involve allegations of inadequate health care, deliberate indifference to abuse, and other forms of mistreatment. For example, in 2003 the Fourth Circuit found that the Virginia Department of Corrections (VADOC) was required to continue to provide hormone therapy to Ophelia De’Lonta, a transgender inmate in their custody. De’Lonta was engaged in litigation with the VADOC, seeking a state-funded sex reassignment surgery, when the State of Virginia granted her parole. As a result of Ms. De’Lonta’s release, the court did not decide whether sex reassignment surgery was medically necessary and thus required by the Constitution.[66]

Risk, Housing, and Classification

Because there are no specific policies to provide guidance for correctional staff on exercising appropriate judgment for risk assessment and placement of LGBTI inmates, these inmates are most often placed or housed according to their genitalia or sex assigned at birth. If an independent medical analysis and a risk assessment are not conducted, inmates’ safety, security, or programming needs may be at risk; this also could risk the safety and security of other inmates and staff.[67] This is an issue in both adult and juvenile settings, where LGBTQI youth can face denial of access to health care, inappropriate housing, and punishment for expressing their gender.[68]

Placement based on biology particularly impacts transgender women placed in men’s facilities. The NPREC found that transgender women housed with men are “at extremely high risk for abuse.”[69] These women report verbal harassment, abusive strip searches, sexual assault, long-term administrative detention, and denials of program participation.[70] The NPREC found that “research on sexual abuse in correctional facilities consistently documents the vulnerability of ... transgender individuals.”[71] LGBTI inmates also report that agency staff single out transgender people for abuse and have ignored or encouraged abuse by other inmates.[72] Although little research exists on inmates with intersex conditions, NPREC findings show that this group is vulnerable to sexual abuse.[73] PREA Standards incorporate special measures to protect both transgender and intersex inmates.[74] When individuals enter custody, authorities must make important decisions about risk, housing, and classification; such decisions are often made on the basis of gender. Because LGBTI inmates are gender nonconforming, this presents challenges at the outset.

Corrections officials are aware of the particular vulnerabilities LGBTI individuals face; many facilities house LGBTI populations in administrative segregation or special population units.[75] These options, although often based on a desire to protect vulnerable inmates from sexual harassment or assault, are effective for brief periods of time but have proven unworkable for a myriad of reasons. The PREA Standards provide that “[i]nmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers.”[76]

If an independent medical analysis and a risk assessment are not conducted, inmates’ safety, security, or programming needs may be at risk; this also could risk the safety and security of other inmates and staff.

Administrative segregation, and the ensuing isolation from the general population for purposes of “safety,” often exacerbates mental health conditions such as depression or gender dysphoria. In addition, isolation from the general population often means limited or no access to programming, regular visitation, or health care, all of which are necessary for LGBTI populations. Likewise, data suggest that special population units (such as those on Rikers Island and the San Francisco County Jail) have not kept inmates who identify as LGBTI any safer.[77]

LGBTQI youth have experiences that are similar to their adult counterparts. A study by the Equity Project documented the experiences of LGBTQI youth, finding that these youth in juvenile justice facilities were often labeled sexual predators, isolated from other youth, singled out, or even sent to sex offender programs. Youth were also denied access to education or group activities because staff lacked the capacity and skills to protect them from serious acts of physical, sexual, or verbal abuse.[78] LGBTQI youth were often placed in protective custody or administrative segregation, where they were confined to their cells for up to 23 hours a day.[79] These experiences and conditions put LGBTQI youth at risk for other mental health issues such as depression, low self-esteem, substance abuse, and suicide.[80]

Based on their actual or perceived sexual orientation and gender identity, LGBTQI youth may be subjected to physical, sexual, and emotional abuse at the hands of other youth as well as facility staff members.

Staff may treat LGBTQI youth disrespectfully and unfairly, or they may punish and ridicule youth because of their actual or perceived sexual orientation or gender identity.

LGBTQI youth may also be segregated as a means of protecting them from abuse or based on an unfounded fear that

they will prey on others in a sexual manner.^[81]

Endnotes

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- [2] “It Gets Better,” itgetsbetter.org (“In September 2010, syndicated columnist and author Dan Savage created a YouTube video with his partner Terry Miller to inspire hope for young people facing harassment. In response to a number of students taking their own lives after being bullied in school, they wanted to create a personal way for supporters everywhere to tell LGBT youth that, yes, it does indeed get better.”).
- [3] Advancement Project, et al., *Two Wrongs Don’t Make a Right, Why Zero Tolerance is Not the Solution to Bullying* (2012), http://b3cdn.net/advancement/73b640051a1066d43d_yzm6rkffb.pdf ^[1].
- [4] Advancement Project, *Two Wrongs*.
- [5] Department of Justice, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, (February 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> ^[2].
- [6] “Election 2012 Shows A Social Sea Change On Gay Marriage,” *Huffington Post*, November 8, 2012, http://www.huffingtonpost.com/2012/11/08/election-2012-gay-marriage-sea-change_n_2090106.html ^[3].
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- [9] See generally, National Institute of Corrections and the Center for Innovative Public Policies, Inc., *Working with Lesbian, Gay, Bisexual, Transgender, and Intersex Populations in Corrections Systems: Identification of Issues and Resources, Development of Recommendations* (2007) (unpublished document on file with the author).
- [10] National Standards to Prevent, Detect, and Respond to Prison Rape 28 CFR 115.
- [11] Israel and Tarver, *Transgender Care*, 134–135.; American Medical Association, *Resolution 122: Removing Financial Barriers to Care for Transgender Patients*, (2008). http://www.tgender.net/taw/ama_resolutions.pdf ^[6] [hereinafter *AMA Resolution 122*].
- [12] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (APA, 2000), 576, 581 (diagnostic criteria for GID include a persistent discomfort with one’s assigned sex and with one’s primary and secondary sex characteristics, which causes intense emotional pain and suffering).
- [13] Dani Heffernan, “The APA Removes “Gender Identity Disorder” From Updated Mental Health Guide,” GLADD (blog), December 3, 2012, <http://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide> ^[7] .
- [14] Often intersex conditions are called “disorders.” There is a robust discussion in both the medical and advocacy communities about the use of the term. See, Elizabeth Reis, “Divergence or Disorder: The Politics of Naming Intersex,” *Perspectives in Biology and Medicine* 50 (2007): 535.
- [15] See, “Advocates for Informed Choice: FAQ,” <http://aiclegal.org/faq/> ^[8]. For more information about intersex conditions, visit Accord Alliance, <http://www.accordalliance.org> ^[9].
- [16] See, Intersex Society of North America, <http://www.isna.org/faq/frequency> ^[10].
- [17] See, 28 C.F.R. § 115.41 (2012).
- [18] 28 C.F.R. § 115.5 (2012).
- [19] Joy S. Whitman, Harriet L. Glossoff, Michael M. Kocet, and Vilia Tarvydas, “Exploring Ethical Issues Related to Conversion or Reparative Therapy,” *Counseling Today*, May 14, 2006, <http://ct.counseling.org/2006/05/exploring-ethical-issues->

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[23] Ryan, "LGBTI Youth."

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[26] See, APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation, *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, (Washington, DC: American Psychological Association, 2009), 35–41, <http://www.apa.org/pi/lgbc/publications/therapeutic-response.pdf> [14] [hereinafter *APA Task Force Report on Therapeutic Responses*]; American Psychological Association, "Sexual Orientation and Homosexuality," <http://www.apa.org/helpcenter/sexual-orientation.aspx> [15].

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[31] The World Professional Association for Transgender Health, *The Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, vers 7, (WPATH, 2012), [hereinafter *WPATH Standards of Care*].

[32] See, WPATH, *Standards of Care*, 8–9.

[33] WPATH, *Standards of Care*, 8–10. These are examples of some of the types of medical care recommended for the treatment of gender dysphoria. Not all transgender people undergo medical treatments as part of transition. The actual treatment

needs and the timing of treatment will depend on the individual person and can only be determined in collaboration with a qualified medical professional.

[34] Mallon, *Social Work Practice*, 51.; Israel and Tarver, *Transgender Care*, 134–35; Brill and Pepper, *The Transgender Child*, 74–75.

[35] See generally, WPATH *Standards of Care*, 7.; Walter O. Bockting and Eli Coleman, “A Comprehensive Approach to the Treatment of Gender Dysphoria,” in *Gender Dysphoria: Interdisciplinary Approaches in Clinical Management*, eds. W.O. Bockting and E. Coleman (Hayworth Press, 1993): 131.; Wylie C. Hembree et al., “Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline,” *Journal of Clinical Endocrinology and Metabolism* 94, (2009): 3132, 3153–3154.; American Psychological Association, *Transgender, Gender Identity, and Gender Expression Non-Discrimination 3* (2008), <http://www.apa.org/about/policy/transgender.aspx> [18] [hereinafter *APA Resolution*]; *AMA Resolution 122*, 2, n. 7.

[36] *AMA Resolution 122*, 1–2. See generally, American Psychological Association, *Policy Statement: Transgender, Gender Identity, and Gender Expression Non-Discrimination* (2008), <http://www.apa.org/about/policy/transgender.aspx> [19] [hereinafter *APA Transgender Statement*].

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[39] Allen J. Beck and Candace Johnson, *Sexual Victimization Reported By Former State Prisoners, 2008*, NCJ 237363, (Washington, DC: Bureau Of Justice Statistics, 2012): 6, <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf> [21].

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[41] See generally, Patricia Boland, *Vulnerability to Violence among Gay, Lesbian, and Bisexual Youth*, NASP Resources, http://www.nasponline.org/resources/crisis_safety/neat_vulnerability.aspx [23].

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[44] See, Meg Earls, “The Facts: GLBTQ Youth,” (Washington, DC: Advocates for Youth, 2005), <http://www.advocatesforyouth.org/storage/advfy/documents/fsglbt.pdf> [25].

[45] See generally, “Homeless Youth: Fact Sheet #13,” (Washington, DC: National Coalition for the Homeless, 2008), <http://www.nationalhomeless.org/publications/facts/youth.pdf> [26].

[46] See generally, G. Kruks, “Gay and Lesbian Homeless/Street Youth: Special Issues and Concerns,” *Journal of Adolescent Health* 12 (1991), 515.

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[48] Centers for Disease Control, “Lesbian, Gay, Bisexual and Transgender Health.”

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[52] See, National Prison Rape Elimination Commission, *National Prison Rape Elimination Commission Report* (Washington, DC: NPREC, 2009), 73–4 (hereinafter *Commission Report*), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [30]; Valerie Jenness, Cheryl L. Maxson, Kristy N. Matsuda, and Jennifer Macy Sumner, “Violence in California Correctional Facilities: An Empirical Examination

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[59] Beck and Johnson, *Sexual Victimization*.

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[69] See generally, *Commission Report*.

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[73] *Commission Report*, 73.

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Source URL: <http://info.nicic.gov/lgbti?q=node/3>

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Chapter 2. LGBTQI Youth under Custodial Supervision

Many corrections professionals are unaware that the youth they work with identify as lesbian, gay, bisexual, transgender, questioning, and intersex (LGBTQI), and many juvenile justice agencies do not have policies nor do they provide training for their staff that pertains to LGBTQI youth. Research shows that LGBTQI youth represent as much as 15 percent of the total population of adjudicated youth.^[82] Secure detention facilities can be particularly dangerous and hostile places for LGBTQI youth. Without policies and training, staff are unprepared to provide safe and professional care to this population. Transgender youth and youth with intersex conditions face additional challenges in detention because of housing and medical care.

As other detained youth, transgender and intersex youth are generally placed in sex-segregated facilities according to external genitalia rather than gender identity.^[83] When transgender girls or girls with intersex conditions are placed in facilities for boys, they are at very high risk for physical and sexual abuse by other youth and staff. In addition, some facilities do not provide transgender youth with medically necessary, transition-related health care.^[84] Appropriate policies and procedures as well as staff training, however, can better equip agencies to make decisions that are balanced regarding both the safety of LGBTQI youth and the agency as a whole.

Appropriate policies and procedures as well as staff training, however, can better equip agencies to make decisions that are balanced regarding both the safety of LGBTQI youth and the agency as a whole.

A school district in Maine made accommodations for a young trans-girl attending public school, which allowed her to use the female restroom. When the school attempted to change its policy, to disallow the trans-girl's use of the female restroom, the resulting court case found that barring her access to the bathroom simply because the student was transgender was a violation of the state's human rights law.^[85]

LGBTQI youth in the juvenile justice system have established rights under the U.S. Constitution, state and federal statutes and regulations, and through court precedent. Understanding these rights can help juvenile justice agencies and staff develop appropriate policies and procedures for working with LGBTQI youth and provide for their safety and rehabilitation.

Constitutional Law

The U.S. Constitution extends critical rights to all detained youth. Juvenile justice agencies have an enhanced responsibility to ensure that youth in their custody are safe and free from unreasonably restrictive conditions of confinement.^[86] Youth in juvenile justice settings are entitled to more protection than incarcerated adults, and courts use the 14th Amendment due process clause to analyze conditions of confinement claims.^[87] Under the 14th Amendment, juvenile facilities are required to provide all youth in their custody with reasonable conditions of confinement and freedom from unreasonable bodily restraint, and to protect their right to be free from abuse and to receive adequate health care and fair and nondiscriminatory treatment.^[88] Finally, confined youth maintain their right to freedom of expression and freedom of religion under the 1st Amendment. In 2006, an important piece of litigation exposed a pattern and practice of sexual and physical victimization of LGBTQI youth confined in the Hawaii Youth Correctional Facility (HYCF). In *R.G. v. Koller*, three LGBTQI youth filed a lawsuit in the U.S. District Court for the District of Hawaii, challenging the failure of facility staff to protect them from physical, emotional, and sexual abuse by other youth.^[89] Ultimately, the court found that there was a pervasive climate of hostility toward, discrimination against, and harassment of youth based on their actual or perceived sexual orientation, sex, or transgender status. The court also found that acts of religious preaching by staff were content based and presented a discriminatory viewpoint that silenced the youth's speech regarding their lives as LGBTQI teenagers, their feelings, and their important relationships.^[90]

In *R.G. v. Koller*, the court found that the Hawaii Youth Correctional Facility:

- Failed to protect the plaintiffs from physical, sexual, and psychological abuse.
- Used isolation as a means to protect LGBT youth from abuse.
- Failed to provide the policies and training necessary to protect LGBT youth.

- Did not have adequate staffing and supervision or a functioning grievance system.

Failed to use a classification system that protects vulnerable youth.[91]

Freedom from Abuse

Correctional administrators have a legal responsibility to ensure that staff members intervene promptly to protect the safety of residents.[92] If staff members are aware that a youth is being subjected to harassment or abuse, they must respond with appropriate actions designed to stop the harassment or abuse, especially if the targeted youth is known to be vulnerable because he or she is young, has a mental illness, is openly LGBTQI, or is perceived to be LGBTQI.[93] For that reason, agencies should have a sound classification system that prevents the placement of vulnerable youth (such as LGBTQI youth) with aggressive youth who may be abusive.[94]

Freedom from Isolation

All youth under supervision have a right to be free from unreasonably restrictive conditions of confinement, including isolation. Numerous courts have concluded that the use of administrative segregation or isolation in juvenile settings—even for short periods of time—is cruel, harmful, and unconstitutional.[95] Facilities and staff may violate this constitutional right if they place LGBTQI youth in isolation, either as punishment for expressing their identity or based on the myth that LGBTQI youth are sexually aggressive or a danger to other youth.[96] Placing all LGBTQI youth in segregation or isolation to protect them from abuse[97] or using isolation to separate LGBTQI youth from their abuser(s)[98] also violates a youth’s constitutional rights.

As one court has explained it, placing youth in isolation in response to an incident of abuse is akin to “attempting ... to remedy one harm with an indefensible and unconstitutional solution.” Although an LGBTQI youth may be at risk of violence in a juvenile facility, the Constitution requires a more effective and less stigmatizing response than isolation.[99]

All youth under supervision have a right to be free from unreasonably restrictive conditions of confinement, including isolation.

Staff should not treat LGBTQI youth as sex offenders, house them with sex offenders, or send them to sex offender treatment programs because of their gender identity or sexual orientation.[100] Facilities may violate youth’s constitutional rights by labeling or treating LGBTQI youth as sex offenders or housing them with sex offenders without adequate due process protections such as a hearing, an evaluation by a qualified mental health professional, and an opportunity to appeal the designation or placement.

The Right to Adequate Medical Care

All detained youth have a right to receive adequate medical and mental health care,[101] including health care that may be unique to that youth.[102] Agencies should provide appropriate medical and mental health care to transgender youth who are diagnosed with gender dysphoria, including access to medical providers with specific experience in evaluating and treating gender dysphoria in adolescents. In the adult context, courts have found that “transsexualism” constitutes a “serious medical need”; therefore, deliberately denying access to transgender-related health care amounts to cruel and unusual punishment.[103] Given the applicable legal standard for youth, agencies must provide appropriate care to address youth’s medical and mental health needs with regard to gender identity.

Health care shall:

- “respect and protect the civil and legal rights of all individuals.”
- “refrain from discriminating against any individual because of race, gender, creed, national origin, religious affiliation, age, disability, or any other type of prohibited discrimination.”
- “respect, promote, and contribute to a workplace that is safe, healthy, and free of harassment in any form.”[104]

Freedom of Speech and Expression

All youth have a constitutional right to freedom of speech and freedom of expression, which includes the right to be open about one’s sexual orientation[105] and the right to express one’s gender through clothing and grooming practices.[106] Because youth in custodial settings are still meeting adolescent development markers, it may be harmful to youth’s development to require them to hide their sexual orientation or gender identity. Policies that do not allow youth—especially gender-nonconforming youth—to express their gender through clothing and accessories can be counterproductive to normal adolescent development.[107] In particular, self-expression through clothes and grooming is a normal part of adolescent development, and juvenile justice agencies should consider this when developing policies that are rigid regarding clothing and grooming practices. Safety of all youth is paramount, but safety is not necessarily inconsistent with allowing youth to express themselves through clothing and grooming,

when appropriate.

The Right to Religious Freedom

The 1st Amendment guarantees youth in juvenile facilities the right to religious freedom and the right to be free from religious indoctrination.^[108] Juvenile justice agencies that require LGBTQI youth to hide their identities or participate in religious activities that they object to, that condemn homosexuality and gender differences, or that try to convert LGBTQI youth may violate youth's 1st Amendment rights. Additionally, staff members who intimidate or coerce LGBTQI youth into adopting a particular religious practice or belief also violate the 1st Amendment.^[109]

Reparative Therapies

Churches and other religious groups have routinely engaged in the practice of conversion therapy in an attempt to change an individual's sexual attraction from homosexual to heterosexual.^[110] In 2012, one of the largest and most prominent of these conversion groups, Exodus International, announced that it would no longer practice or promote conversion therapy.^[111] To explain the group's disassociation from conversion therapy, Alan Chambers (president of Exodus International) stated that "'99.9 percent' of the people he had met through Exodus International either had not changed their sexual attraction or still struggled with temptation."^[112]

To further acknowledge the ineffectiveness of conversion therapy, California became the first state to ban sexual orientation change efforts for minors. The California law states that "[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."^[113] The law further states that any effort to change sexual orientation "by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider."^[114] Mental health professionals challenged this law on constitutional grounds in two separate cases in the U.S. District Court for the Eastern District of California; the presiding judges reached opposite conclusions.^[115] The Ninth Circuit resolved this issue in 2014, determining that such statutes should be subject to the rational basis level of scrutiny.^[116]

National Prison Rape Elimination Act Standards

PREA requires juvenile justice agencies to screen youth for risk of sexual victimization and abusiveness. At a minimum, the intake screening must ascertain any gender-nonconforming appearance and consider whether the resident is or is perceived to be LGBTQI,^[117] the youth's perception of his or her own vulnerability,^[118] and any additional information that "may indicate heightened needs for supervision, additional safety precautions, or separation from certain other residents."^[119] The facility shall not place LGBTQI youth "in particular housing, bed, or other assignments solely on the basis of such identification or status" nor consider LGBTQI status "as an indicator of likelihood of being sexually abusive."^[120]

In deciding whether to assign a transgender or intersex youth to a particular facility for male or female residents, and in making other housing and programming assignments, the agency should consider—on a case-by-case basis—whether a placement would ensure the youth's health and safety and whether the placement would present management or security problems. The transgender or intersex youth's "own view with respect to his or her own safety shall be given serious consideration."^[121] Lastly, transgender and intersex youth must be able to use the toilet and shower separately from other residents.^[122] Agencies must reassess these placement and programming assignments for transgender and intersex youth at least twice per year.^[123] If a youth is isolated due to the risk of sexual victimization or abusiveness, the facility must document the basis for its concern for the youth's safety and provide the reasons why "no alternative means of separation can be arranged."^[124] Every 30 days, the facility must review each isolated youth's situation to determine whether the need for continued separation from the general population persists.^[125]

A juvenile agency is not permitted to "search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status." A resident's genital status can only be ascertained "during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner."^[126] Furthermore, the agency must train staff to conduct cross-gender searches and searches of transgender and intersex residents in a "professional and respectful manner, and in the least intrusive manner possible, consistent with security needs."^[127]

Finally, the PREA Standards provide guidance for agencies on staff training, investigations, and data collection with regard to LGBTQI residents. Each agency must train employees who may have contact with youth to communicate effectively and professionally with those who identify as LGBTQI.^[128] Agencies are permitted to prohibit all sexual activity but may not "deem such activity to constitute sexual abuse if it determines that the activity is not coerced."^[129] When conducting incident reviews of abusive sexual acts, the agency must "[c]onsider whether the incident or allegation was motivated by ... gender identity; lesbian, gay,

bisexual, transgender, or intersex identification, status, or perceived status ... or was motivated or otherwise caused by other group dynamics at the facility.”^[130]

Other Governing Principles: State Human Rights Law and Professional Codes of Ethics

In addition to the protections provided by the U.S. Constitution, some states also have statutes or regulations that prohibit discrimination based on sexual orientation and gender identity or expression in juvenile justice facilities. State laws that provide protection for LGBTQI youth in custody include (1) nondiscrimination laws specific to juvenile facilities or state-funded programs, (2) nondiscrimination laws for people in institutional settings, (3) public accommodation laws, and (4) housing laws.^[131]

Codes of ethics of the American Correctional Association (ACA) and the National Partnership for Juvenile Services (NPJS) outline the responsibilities that juvenile justice professionals owe to all youth in their care, including LGBTQI youth.^[132] The NPJS Code of Ethics requires juvenile detention workers to: “(1) advocate for policies that ensure the legal and human rights of justice-involved youth; (2) educate justice-involved youth, professionals and others about policies and practices that either promote or violate these rights; (3) refuse to remain silent when these rights are violated, and they speak on behalf of the affected youths; and (4) support the rights of justice-involved youth to be served in a psychologically and physically safe and secure environment.”^[133]

Elements of Legally Sound and Effective Policy and Practice

All LGBTQI policies should be based on the following guiding principles:^[134]

- Respectful interactions among youth and between staff and youth.
- Do no harm.
- Safety of youth who are vulnerable.
- Targeted to your legal obligations and what staff are required to do by law.

In addition, all LGBTQI policies should include the following elements:

- Statement of purpose.
- Enumeration of included groups.
- Prohibitions.
- Requirements.
- Scope of applicability.
- Definitions.
- Responsibilities.
- Enforcement and sanctions (for both staff and youth).
- Training and dissemination methods.

The following areas should be addressed when developing, revising, or implementing facility policies to ensure the safety of LGBTQI youth in custodial settings:

- Nondiscrimination.
- Intake.
- Risk assessment.
- Classification.
- Communication.
- Medical care.
- Mental health care.
- Privacy.
- Safety.

These areas are discussed in greater detail below. Each section includes a discussion of the purpose for adopting a specific policy and a list of questions to consider when drafting or revising policies and procedures. Policies should fill the gap between what is required under the law and what should be done as good correctional practice. Appendix D includes examples of agency policies that address some of these issues.

Nondiscrimination Policies

Juvenile justice agencies should develop, adopt, and enforce policies that include zero tolerance for discrimination and mistreatment of youth and staff that results from actual or perceived sexual orientation and gender identity or expression. These policies should specifically prohibit harassment and abuse of youth and staff by staff or other youth.

Following are questions to ask about an agency's nondiscrimination policy:

| Nondiscrimination Policy Checklist | YES | NO |
|--|------------|-----------|
| Does the agency have a nondiscrimination policy for youth, employees, or volunteers? | | |
| Does the agency policy require that all individuals who enter the agency are treated with fairness, dignity, and respect regardless of real or perceived sexual orientation? | | |
| Does the agency policy explicitly list sexual orientation and gender identity or expression as prohibited bases for discrimination? | | |
| Does the agency policy prohibit attempts by staff to ridicule or change a youth's sexual orientation or gender identity? | | |
| Does the agency policy define staff duty to provide safe and healthy environments in which all individuals are treated with respect and dignity? | | |
| Does the agency policy define staff responsibility for protecting the civil rights of LGBTQI youth while in custody, and for ensuring their physical and emotional well-being and safety in juvenile facilities? | | |

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| Does the agency policy define the elements of incident reporting to include complaints of harassment, discrimination, and abuse? | | |
| Does the agency policy provide training and resources regarding the societal, familial, and developmental challenges confronting LGBTQI youth? | | |
| Does the agency policy address the collection and analysis of data regarding the needs of LGBTQI youth in its custody? | | |

If the answer to most of these questions is “yes,” it is likely that the agency is close to being in line with federal and state laws and regulations as well as constitutional provisions for LGBTQI youth. If the answer to even some of these questions is “no,” it may indicate that the agency has some work to do in this area, and a policy revision based on the legal rights outlined above and in the PREA Standards is in order.



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Intake, Risk Assessment, and Classification

Intake and Risk Assessment

Identifying safety concerns for LGBTQI youth is a priority in determining risk. Agencies should develop and implement intake processes to identify LGBTQI youth and those perceived to be LGBTQI who are vulnerable to physical and sexual assault.

Following are questions to ask about an agency’s intake and risk assessment policy and practice:

| Intake and Risk Assessment Policy Checklist | YES | NO |
|---|------------|-----------|
| During intake and initial classification, does the agency ascertain information about the youth’s sexual orientation and/or gender identity? | | |
| During the youth’s confinement, does the agency periodically update information regarding the youth’s sexual orientation and gender identity? | | |
| Do the agency employees who | | |

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| conduct initial screening and classification receive training regarding sensitivity in conducting interviews with LGBTQI youth? | | |
| Does the agency policy require that a youth's sexual orientation and/or gender identity be verified by multiple sources prior to classification? | | |
| Are medical health practitioners the only staff permitted to physically examine youth to gather information about gender identity?[135] | | |
| Does the agency policy have a process to document and accommodate the concerns of LGBTQI youth in terms of safety, name, pronoun, toileting, showering, and searches? | | |
| Do the agency medical and mental health staff use screening tools that are developed specifically for LGBTQI youth? | | |
| Does the agency provide all youth an orientation that discusses diversity and describes the harms that result from name- calling, bullying, and harassment? | | |

If the answer to even some of these questions is “no,” the agency will need to rewrite its policy to be more in line with the PREA Standards that address risk assessment and screening. Risk assessment and screening are crucial to the safety of LGBTQI youth, especially when those are the tools and policies in place to inform housing options for youth in custody. All screening tools should include vulnerability assessments, the types of housing decisions that can be made by staff, and a stipulation as to when an assessment requires moving a decision up the chain of command. Housing and classification are key to ensuring the safety of youth.



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Classification

Juvenile facilities must have sound classification systems that separate vulnerable youth from aggressive youth. In classifying youth, facilities must not infringe on the youth's right to be free from unreasonably restrictive conditions (such as isolation) and practices that amount to punishment without due process (such as automatic placement based on gender identity). Facilities should use all information obtained during intake to make all housing, bed, program, education, and work assignments for youth, with the goal of keeping all youth physically and emotionally safe.

Following are questions to ask about an agency's classification policy:

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| Classification Policy Checklist | YES | NO |
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| <p>Is the agency classification policy based on individualized needs that balance the youth's physical and emotional well-being with the safety of all other youth?</p> | | |
| <p>Is the agency classification process objective and free of individual biases?</p> | | |
| <p>Is the agency classification process defined in written policies and procedures?</p> | | |
| <p>Does the agency prohibit blanket policies regarding the classification of LGBTQI youth or those perceived to be LGBTQI?</p> | | |
| <p>Does the agency classification policy govern the placement of youth into sex offender programs or units based on articulated criteria, including orders of the court?</p> | | |
| <p>Do the agency classification and housing policy and procedures consider physical layout and privacy issues when determining the location for LGBTQI youth?</p> | | |
| <p>Does the agency place vulnerable youth in the least restrictive environment necessary to ensure safety and provide the youth with equal access to facility services?</p> | | |
| <p>Do the agency classification protocols address how youth in various classifications are housed if the facility is crowded?</p> | | |
| <p>Do the agency classification and housing protocols consider privacy concerns when assigning housing for LGBTQI youth?</p> | | |
| <p>Does the agency develop responses to abuse or harassment (or threat of abuse or harassment) of LGBTQI youth that do not</p> | | |

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| rely on the isolation or segregation of these youth? | | |
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As discussed above, confined youth have the right to be free from unreasonably restrictive conditions^[136] and conditions or practices that amount to punishment.^[137] Accordingly, instead of isolating LGBTQI youth, facility staff should implement more effective and fair safeguards such as “ensuring appropriate staff-to-resident ratios; modeling respectful behavior; providing close supervision of residents; promptly intervening to interrupt any disrespect, harassment, or abuse directed at other youth; and keeping youth meaningfully engaged in constructive programming.”^[138] It is also essential (for safety and security as well as mental health care) that LGBTQI youth are not automatically treated as sex offenders, housed with sex offenders, or sent to sex offender treatment programs simply because of their gender identity or sexual orientation.^[139]

Agencies should make housing determinations based on a number of factors, not based on LGBTQI status alone.^[140] Additionally, agencies should not use youth’s self-identification as LGBTQI “as an indicator of likelihood of being sexually abused or abusive.”^[141]



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Housing Specifications for Transgender and Intersex Youth

Determining gender-appropriate placements for transgender and intersex youth can be difficult. A handful of juvenile justice agencies have clearly written policies concerning housing placements for these youth.^[142] Agencies should make determinations for housing these youth on a case-by-case basis. Additionally, PREA Standards advise agencies to make provisions for transgender and intersex youth to use the toilet and shower separately.^[143]

Following are questions to ask about an agency’s classification policy for transgender and intersex youth:

| Classification for Transgender and Intersex Youth Policy Checklist | YES | NO |
|--|------------|-----------|
| Do the agency classification and housing policies include evaluation of a person’s current genital status in making placement decisions? | | |
| Does the agency make individualized housing determinations based on other factors in addition to a person’s current genital status? | | |
| Do the agency classification and housing policies include factors that relate to the youth’s emotional and physical well-being and that prioritize the youth’s evaluation of his or her safety? | | |
| Do the agency classification and housing policies include a review of youth’s privacy concerns, available housing options, and recommendations from the youth’s mental health providers regarding appropriate housing or classification? | | |

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| Does or can the agency provide access to private toilet and shower facilities, when necessary, or a single room for sleeping, while allowing youth to have full access to the facility's daily programming? | | |
| Does or can the agency house transgender youth according to gender identity rather than birth sex? | | |
| When it is necessary, can the agency place transgender youth safely according to birth sex and protect their physical and emotional well-being? | | |
| Can the agency safely house transgender youth in a mixed-gender unit or program? | | |
| Does the agency determine reclassification needs based on requests by youth or based on victimization? | | |

Individualized decision-making is key in making appropriate and ultimately safe housing decisions for LGBTQI youth. Currently, some agencies have policies that specifically call for individualized placement decisions for transgender and intersex individuals.



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Respectful Communication

All policies for the safety and care of LGBTQI youth include components of respectful communication with and among all youth. Staff and volunteers should always be examples to youth, and should use respectful language and terminology that do not promote stereotypes about LGBTQI people or convey bias or hatred toward them. Additional elements of communication and harassment policies are inclusive language and attention to names and pronouns. If professionals are unsure of a youth's gender identity, they should simply ask the youth about it and about the pronoun and name the youth uses.

Following are questions to ask about an agency's respectful communication policy for youth:

| Respectful Communication with Youth Policy Checklist | YES | NO |
|--|------------|-----------|
| Does the agency have a zero-tolerance policy for sexual harassment, including harassment by staff and youth-on-youth harassment? | | |

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| Does the agency policy include direction to staff on how to address LGBTQI youth using respectful and appropriate language? | | |
| If the agency policy permits youth to wear clothing other than issued clothing, does the agency policy permit youth to express themselves through clothing or grooming (within the bounds of safety for all youth)? | | |
| Does the agency policy address confidentiality of information, including staff disclosure relating to the privacy and confidentiality of LGBTQI youth? | | |
| Does the agency policy adhere to all confidentiality and privacy protections afforded LGBTQI youth under applicable state law? | | |
| Does the agency policy allow for sharing the information necessary to achieve a particular purpose, such as identifying an appropriate placement in another facility? | | |
| Does the agency policy provide for eligible LGBTQI youth to access programming and services within facilities? | | |



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Juvenile agencies can allow youth to express their gender identity by giving them choices about clothing (including undergarments), hairstyle, and personal grooming. Agencies should give males and females the ability to choose from available clothing and grooming items (e.g., boxers or briefs, shaving supplies, and hair products). Allowing transgender youth to express their gender identity through choice of clothing (if such a choice is available), name, hairstyle, and other means of expression can contribute to positive mental health.

Confidentiality is a key component of honest communication with LGBTQI youth. Some youth will freely reveal private information to anyone who asks; others might not feel as comfortable discussing their identity, or they might want to keep it from friends or parents. Staff should respect this and hold in confidence a youth's sexual orientation or gender identity unless youth have given them permission to discuss it. This principle applies even in situations where staff feel that revealing information about a youth's sexual orientation or gender identity is in the youth's best interests. Doing so could immediately compromise a youth's safety in the facility and later compromise his or her safety at home or at school. Within the agency, any disclosure of information related to a youth's LGBTQI status should be limited to information necessary to achieve a specific beneficial purpose for that youth; in these circumstances, the information should only be disclosed to individuals who have a need to know.

Medical and Mental Health Care

At a minimum, policies on medical and mental health should provide all youth with access to quality medical care. LGBTQI youth should have opportunities to receive counseling as well as medical health care that meets their unique needs. Agencies should not attempt to change a youth's sexual orientation or gender identity, punish youth for expressing their sexual orientation or gender identity, or require youth to undergo sex offender counseling based solely on the youth's sexual orientation or gender identity.

Following are questions to ask about an agency's medical and mental health care policy for LGBTQI youth:

| Medical and Mental Health Care Policy Checklist | YES | NO |
|--|------------|-----------|
| Do the agency medical and mental health protocols include opportunities for LGBTQI youth to access services that address self-acceptance and validation, concerns about disclosure of sexual orientation or gender identity, family relationships, healthy intimate relationships, and sexual decision-making? | | |
| Does the agency policy promote the hiring of medical and mental health professionals who have expertise and/or experience in working with LGBTQI youth? | | |
| In assessing a youth's medical and/or mental health status, does the agency policy direct medical staff to include an assessment of the youth's safety? | | |
| Do the agency medical and mental health protocols direct those conducting medical screening to inquire about the youth's sexual activity, sexual orientation, and gender identity, both before and during confinement? | | |
| Do the agency medical protocols provide for gynecological and obstetrical care? | | |
| Do the agency medical protocols provide for HIV and STD testing, care, and confidentiality? | | |
| Do the agency medical and mental health protocols provide for counseling for sexual trauma that occurred either before or during confinement? | | |

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| Do the agency medical and mental health protocols provide for mental health evaluations that include assessment of an array of mental health diagnoses, including gender dysphoria? | | |
| Do the agency medical protocols address medical care for transgender youth, including evaluation of their care prior to incarceration? | | |

At a minimum, agencies should ensure that youth have access to medical providers who are knowledgeable about the particular health needs of LGBTQI youth—especially transgender youth and youth with intersex conditions. If a transgender youth or a youth with intersex conditions requests an evaluation or treatment, facility staff should provide the youth with access to appropriate professionals and should provide all medically necessary treatment recommended. If the facility cannot provide treatment on site, then the youth should be transported to the provider. If a transgender youth or a youth with an intersex condition has been receiving medical or mental health services (such as hormone treatments) prior to arriving at the facility, the facility should consult with the youth’s medical providers and continue to provide medically necessary treatment.



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Privacy and Safety

Facilities should provide access to private bathrooms and showers (when necessary) or a single room for sleeping. Privacy accommodations should not prevent LGBTQI youth from full integration into the facility's daily programming. In general, policies that are integral to addressing the safety and privacy issues and concerns of LGBTQI youth include:

- Cross-gender supervision.
- Use of facilities—bathrooms, showers, etc.
- Search procedures.
- Undressing.

Following are questions to ask about an agency’s privacy and safety policy for youth:

| Privacy and Safety Policy Checklist | YES | NO |
|--|------------|-----------|
| Does the agency practice cross-gender supervision of youth? Explain your answer. | | |
| Does the agency policy address levels of staffing and supervision? | | |
| Does the agency policy address the safety and privacy needs of LGBTQI youth in regard to toileting, showering, and sleeping? | | |
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| If a strip search is necessary, do transgender or intersex youth have the option of choosing the gender of the staff person that will conduct the search? | | |
| Does the agency policy address search procedures and privacy needs of LGBTQI youth? | | |
| Does the agency policy require that youth grievances be tracked, and does the agency collect and analyze information on grievances related to searches? | | |

To develop sound policy in these areas, facility administrators should focus on ways the facility can protect the privacy, dignity, and safety of LGBTQI youth. Policies should avoid subjecting transgender youth to unnecessary risks of physical and emotional harm. Facilities should act on a case-by-case basis and encourage staff members to work with transgender youth to determine the best solution for accessing the bathroom, showering, changing clothing, searches, and drug testing that protects their privacy, dignity, and safety.



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Sexual Abuse of LGBTQI Youth

Not all sexual behaviors between youth in facilities can be categorized as sexual abuse. Many times, youth voluntarily engage in sexual activities. Exploring sexuality and sexual identity is a key component of adolescent development. Therefore, agencies should have policies that require staff to determine whether an incident of sexual behavior between youth is sexual abuse or non-coercive voluntary sexual activity. Although voluntary sexual activity between youth may violate agency policies, it may not violate state criminal laws and is not prohibited by the PREA Standards. However, it is important to recognize there is a continuum regarding youth’s engagement in sexual behavior while in custody. Sexual behavior between youth can be non-abusive or abusive; however, it can also be strategic (e.g., sex for trade) or coerced (e.g., sex for protection). On any given day, encounters can move along the continuum—consensual one day and coercive the next. Therefore, agencies must recognize these elements of sexual behavior in custody and have policies that pay special attention to the fact that LGBTQI youth have increased vulnerability to abuse.

Following are questions to ask about an agency’s sexual abuse policy for youth:

| Sexual Abuse Policy Checklist | YES | NO |
|--|------------|-----------|
| Does the agency policy prohibit the sexual abuse of youth in custody? | | |
| Does the agency policy stipulate that staff must receive training regarding the sexuality and sexual behaviors of youth? | | |
| Does the agency policy require the investigation of all reports of violations of | | |

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| policy regarding sexual abuse? | | |
| Does the agency have multiple methods for youth to report sexual abuse, including avenues for third-party, independent reporting? | | |
| Does the agency policy address the treatment and management of youth who report allegations of sexual abuse? | | |
| Does the agency policy define acceptable sexual behavior for youth and sanctions for violations? | | |
| Does the agency policy define the roles and responsibilities of the investigative process into allegations of sexual abuse? | | |
| Does the agency policy (or the investigative entity's policy) require referral of allegations of potential criminal activity for review by the prosecutor? | | |
| Does the agency policy require a review of reports and investigations of sexual abuse? | | |
| Does the agency policy establish a sexual assault response team (SART)? | | |
| Do the agency protocols provide for ongoing medical and mental health care for youth who have been sexually victimized while in custody? | | |
| Does the agency policy recognize particularly vulnerable populations, such as LGBTQI youth, and identify their need for treatment? | | |



Endnotes

[82] Angela Irvine, “‘We’ve Had Three of Them’: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System,” *Columbia Journal of Gender and Law* 19, (2010): 675.

[83] See, Jody Marksamer, “And by the Way, Do You Know He Thinks He’s a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Delinquency Courts,” *Sexuality Research & Social Policy* 5, no. 1 (2008): 72, 82 http://www.equityproject.org/pdfs/and_by_the_way_article.pdf [2]; Majd, Marksamer, and Reyes, *Hidden Injustice*, 108–10.

[84] See, Marksamer, “And by the Way,” 81.; Majd, Marksamer, and Reyes, *Hidden Injustice*, 111–12; Complaint at 2–3, 6, *Rodriguez v. Johnson*, No.06CV00214 (S.D.N.Y. filed Jan. 11, 2006) (on file with author).

[85] *Doe v. Regional School Unit 26*, 2014 WL 325906 (M.E. 2014).

[86] See, *Kent v. United States*, 383 U.S. 541, 554 (1966) (“The theory of the District’s Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal.”); See also, *Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977) (“Eighth Amendment scrutiny is appropriate only after the state has complied with the constitutional guarantees traditionally associated with criminal prosecutions.”) (internal citations omitted).

[87] The First, Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts have held that the appropriate standard to use in reviewing the conditions at juvenile facilities comes from the Due Process Clause of the 14th Amendment, not from the 8th Amendment. See, *A.M. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572 (3rd Cir. 2004) (finding appropriate standard for juvenile abused in detention was 14th Amendment due process, rather than 8th Amendment); Alexander S., 876 F. Supp. 773, 782 (D.S.C. 1995), aff’d in part and rev’d in part on other grounds, 113 F.3d 1373 (4th Cir. 1997), cert. denied, 118 S.Ct. 880 (1998) (adopting the 14th Amendment as the appropriate standard for evaluating juvenile conditions of confinement); A.J. v. Kierst, 56 F.3d 849, 854 (8th Cir. 1995) (agreeing that Due Process Clause of 14th Amendment governs evaluation of conditions for confined juveniles); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1431–32 (9th Cir. 1987) (resolving split in authorities by selecting 14th Amendment standard instead of 8th Amendment standard); *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1084–85 (11th Cir. 1986) (noting conditions of confinement for juveniles affect liberty interests protected by the 14th Amendment); *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983) (stating juveniles not convicted of crimes maintain due process interest in their liberty); *Milonas v. Williams*, 691 F.2d 931, 942, n. 10 (10th Cir. 1982) (noting confined juveniles maintain due process liberty interests). But see, *Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir. 1974) (applying the cruel and unusual punishment test of the 8th Amendment). The United States Supreme Court has not yet decided the issue.

[88] See, *A.M.*, 372 F.3d at 579 (acknowledging detained youth had liberty interest in personal security and well-being under the 14th Amendment); Alexander S., 876 F. Supp. at 782 (“[J]uveniles possess a clearly recognized liberty interest in being free from unreasonable threats to their physical safety.”); *Milonas*, 691 F.2d at 942, n. 10 (“[B]ecause the state has no legitimate interest in punishment, the conditions of juvenile confinement...are subject to more exacting scrutiny than conditions imposed on convicted criminals.”).

[89] See generally, *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1133 (D. Haw. 2006).

[90] *R.G. v. Koller*.

[91] *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Hawaii 2006).

[92] *R.G. v. Koller* at 1162; *A.M.*, 372 F.3d at 581, 583.

[93] See, *Koller*, 415 F. Supp. 2d at 1158 (finding placing vulnerable LGBTI youth in unit with aggressive boys amounts to deliberate indifference); *A.M.*, 372 F.3d at 579. (finding sufficient evidence individuals were deliberately indifferent to the substantial risk of harm to 13 year old boy with mental illness who was placed in general population).

[94] See, *Alexander S.*, 876 F. Supp. at 797–98 (facilities must have a system for screening and separating aggressive juveniles from vulnerable juveniles); *Koller*, 415 F. Supp. 2d at 1158 (same).

[95] See, *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986) (juvenile isolated for seven days was entitled to damages for violation of 14th Amendment); *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983); *Milonas*, 691 F.2d at 942–43 (use of isolation rooms for periods less than 24 hours violated the 14th Amendment); *D.B. v. Tenksbury*, 545 F. Supp. 896, 905 (D.Or.1982); *Feliciano v. Barcelo*, 497 F. Supp. 14, 35 (D.P.R. 1979); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973) (solitary confinement of young

adults held unconstitutional).; *Offenders of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972).; *Lollis v. N.Y. State Dep't of Soc. Serrvs.*, 322 F. Supp. 473, 480 (S.D.N.Y. 1970).

[96] Youth in juvenile detention or correctional facilities should not be placed in conditions that amount to punishment or be stigmatized or humiliated as part of their treatment. With the understanding that some restrictions of liberty may be constitutional, a court will look at whether a particular restriction is “reasonably related” to a legitimate governmental interest to determine if there is a violation. If it is not, it may be inferred that the purpose of the restriction is punishment. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).; *See also, Milonas*, 691 F.2d at 942 (“Any institutional rules that amount to punishment of those involuntarily confined ... are violative of the due process clause per se.”).

[97] *Koller*, 415 F. Supp. 2d at 1156.

[98] *Koller*.

[99] *Koller*. at 1162; *A.M.*, 372 F.3d at 581, 583.

[100] For adults, courts have found that the classification of a prisoner as a “sex offender” has such stigmatizing consequences that unless the prisoner has a sexual offense history, additional constitutional protections must be met before this classification can take place. *See, Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997) (“We can hardly conceive of a state's action bearing more ‘stigmatizing consequences’ than the labeling of a prison inmate as a sex offender.”). Confined juveniles receive greater constitutional protections than adult inmates. Therefore, branding a juvenile with a sex offender label clearly would have the same, if not an even greater, stigmatizing effect.

[101] *See, Youngberg v. Romeo*, 457 U.S. 307 (1982).; *Burton v. Richmond*, 276 F.3d 973 (8th Cir. 2002).; *A.M.*, 372 F.3d at 585 n.3; *Jackson v. Johnson*, 118 F. Supp. 2d 278 at 289.; *Alexander S.*, 876 F. Supp. at 788.

[102] *See, A.M. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 584–85 (3rd Cir. 2004) (discussing lack of medical and mental health care forward with mental illness).; *Jackson v. Johnson*, 118 F.Supp.2d at 289; *Alexander S.*, 876 F. Supp. 773, 788 (D.S.C. 1995), *aff'd* in part and *rev'd* in part on other grounds, 113 F.3d 1373 (4th Cir. 1997).

[103] Juvenile justice professionals must provide some form of appropriate treatment for transgender youth diagnosed with gender dysphoria. Even under the more restrictive minimally adequate medical care standard applicable to adults, courts have held that “transsexualism” constitutes a “serious medical need” therefore, deliberately denying access to transgender-related health care for people amounts to cruel and unusual punishment under the 8th Amendment of the U.S. Constitution.; *See, Allard v. Gomez*, 9 Fed. Appx. 793 (9th Cir. 2001).; *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (holding that “[t]here is no reason to treat transsexualism differently from any other psychiatric disorder”); *Wolfe v. Horne*, 130 F. Supp. 2d 648 (E.D. Pa. 2001).; *Phillips v. Michigan Dep't. of Corr.*, 731 F. Supp. 792 (W.D. Mich. 1990).

[104] American Correctional Association, “Code of Ethics,”

http://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/Code_of_Ethics/ACA_Member/AboutUs/Code_of_Ethics.aspx?hkey=61577ed2-c0c3-4529-bc01-36a248f79eba [3].

[105] *See, Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1078 (D. Nev. 2001) (permitting claims under Title IX for discrimination and harassment by other students and under 1st Amendment based on demands by school officials that student keep his sexual orientation to himself to proceed through summary judgment).

[106] *See, Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (transgender student had 1st Amendment right to wear clothing consistent with her gender identity and that treating transgender girl differently than biological girls was discrimination on the basis of sex).

[107] While 1st Amendment case law in the juvenile justice context is limited, in the public school context, courts have held school officials liable for forcing LGBTI youth to conceal their sexual orientation as a condition of enrollment, for not permitting a transgender student to dress in accordance with her gender identity, and for prohibiting students from bringing a same-sex date to the high school prom. These cases illustrate the types of violations that may be actionable for youth in the juvenile justice context. *LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).; *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000).; *Yunits*, 2000 WL 33162199 at *3.; *Fricke v. Lynch*, 491 F. Supp. 387 (D.R.I. 1980).

[108] *See, Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998) (finding a violation of the Establishment Clause if a plaintiff could make a factual showing that a facility condoned or ignored religious proselytizing by prison staff).

[109] *See, R.G. v. Koller*, 415 F. Supp.2d 1129, 1160–61 (D. Haw. 2006) (“[T]he court is concerned by the evidence that members of the HYCF staff have promoted certain religious teachings to the plaintiffs.”).

[110] Hagerty, “Evangelicals Fight Over Therapy.”

[111] Hagerty, “Evangelicals Fight Over Therapy.”

[112] Hagerty, “Evangelicals Fight Over Therapy.”

[113] West's Annotated California Business and Professional Code § 865.1.

[114] West's Annotated California Business and Professional Code § 865.2.

[115] *Compare Welch v. Brown*, No. CIV 2:12–2484 WBS KJN (E.D. Cal., Dec. 3, 2012) (finding that the statute was subject to strict scrutiny and issuing preliminary injunction barring its enforcement against the plaintiffs), *with Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB (E.D. Cal., Dec. 4, 2012) (holding found that the statute was subject to rationality review, and denying a preliminary injunction).

[116] *See, Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).

[117] 28 C.F.R § (115.341)(c)(2).

[118] 28 C.F.R § (115.341)(c)(10).

[119] 28 C.F.R § (115.341)(c)(11).

[120] 28 C.F.R § (115.342)(c).

[121] 28 C.F.R § (115.342)(f).

[122] 28 C.F.R § (115.342)(g).

[123] 28 C.F.R § (115.342)(e).

[124] 28 C.F.R § (115.342)(h)(1–2).

[125] 28 C.F.R § (115.342)(i).

[126] 28 C.F.R § (115.315)(f).

[127] 28 C.F.R § (115.315)(e).

[128] 28 C.F.R § (115.341)(a)(9).

[129] 28 C.F.R § (115.378)(g).

[130] 28 C.F.R § (115.386)(d)(2).

[131] SB 518 Jan 2008 [prohibits harassment and discrimination based on actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, and HIV status in all California Department of Juvenile Justice (DJJ) facilities]; R.I. Gen. Laws § 28-5.1-7 (a) [Every state agency shall render service to the citizens of this state without discrimination based on race, color, religion, sex, sexual orientation, gender identity or expression, age, national origin, or disability. No state facility shall be used in furtherance of any discriminatory practice nor shall any state agency become a party to any agreement, arrangement, or plan which has the effect of sanctioning those patterns or practices]; Minn. Stat. § 363A.02 (4) [prohibits discrimination in public services based on race, color, creed, religion, national origin, sex, marital status, disability, sexual orientation, and status with regard to public assistance.]; Iowa Code Ann. § 19B.12 (2) [prohibiting “state employees from discriminating against a person in the care or custody of the employee or a state institution based on sex.”]; *See, Chisolm v. McManimom*, 275 F.3d 315, 325 (adult jail, like a hospital, is place of public accommodation under New Jersey’s Law Against Discrimination); *Ortland v. County of Tehama*, 939 F. Supp. 1465, 1470 (California Unruh Act is applicable in claims against governmental agencies); *Doe v. Bell*, 754 N.Y.S.2d 846, 850 (N.Y. Sup. Ct. 2003) (recognizing residential foster care facility as “publicly-assisted housing accommodation” for purposes of disability discrimination claim under New York’s Human Rights Law).

[132] National Partnership for Juvenile Services, “Code of Ethics,” (July 10, 2012), <http://npjs.org/wp-content/uploads/2013/01/NPJS-Code-of-Ethics.pdf> [4]; ACA, “Code of Ethics.”

[133] NPJS, “Code of Ethics.”; *See also*, *A.M. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 583 (3rd Cir. 2004) (finding that failure to follow up on grievance reports contributes to a finding of liability based on deliberate indifference); *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1158 (D. Haw. 2006) (same).

[134] National Institute of Corrections, Subject Matter Expert Group Meeting Minutes, January 27–28, 2011, Washington, DC: 11–13.

[135] Although PREA permits medical examiners to physically examine youth to ascertain information about their gender identity, pediatric physicians question whether subjecting a youth to such an examination is medically safe practice. *See*, Brenda V. Smith and Robert Bidwell, *PREA Standards and Policy Development Guidelines for Lesbian, Gay, Bisexual and Transgender Youth in Custody*, presentation, November 13, 2012, The Project on Addressing Prison Rape, <http://www.prearesourcecenter.org/training-and-technical-assistance/webinars/1094/prea-standards-and-policy-development-guidelines-for> [5].

[136] *Alexander S.*, 876 F. Supp. at 798; *R.G.*, 415 F. Supp. 2d at 1152.

[137] *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *See also*, *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (“any institutional rules that amount to punishment of those involuntarily confined . . . are violative of the due process clause per se”).

[138] *See*, Majd, Marksamer, and Reyes, *Hidden Injustice*, 106–107.

[139] For adults, courts have found that the classification of a prisoner as a “sex offender” has such stigmatizing consequences that, unless the prisoner has a sexual offense history, additional constitutional protections must be met before this classification can take place. *See*, *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997) (“We can hardly conceive of a state's action bearing more ‘stigmatizing consequences’ than the labeling of a prison inmate as a sex offender.”). Confined juveniles receive greater constitutional protections than adult inmates. Therefore, branding a juvenile with a sex offender label clearly would have the same, if not an even greater, stigmatizing effect.

[140] 28 C.F.R. § (115.342)(c) (2012).

[141] 28 C.F.R. § (115.342)(c).

[142] NY OCFS, HYCF, Santa Clara County, DC juvenile facilities all have specific policies that speak to housing of TG youth in juvenile facilities.

[143] 28 C.F.R. § 115.342)(g).

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Links:

[1] <http://info.nicic.gov/sites/info.nicic.gov.lgbti/files/LGBTQI-Youth-under-Custodial-Supervision-Checklists.pdf>

[2] http://www.equityproject.org/pdfs/and_by_the_way_article.pdf

[3] http://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/Code_of_Ethics/ACA_Member/AboutUs/Code_of_Ethics.aspx?hkey=61577ed2-c0c3-4529-bc01-36a248f79eba

[4] <http://npjs.org/wp-content/uploads/2013/01/NPJS-Code-of-Ethics.pdf>

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Chapter 3. LGBTI Adults under Custodial Supervision

Similar to staff in juvenile facilities, many adult correctional professionals are ill prepared to work with inmates who identify as lesbian, gay, bisexual, transgender, and intersex (LGBTI), and most agencies do not have policies or provide training for staff related to working with LGBTI inmates. Without essential policies and training, staff members are unprepared to provide safe and professional care to this population, especially given the challenges that LGBTI inmates present in securing safe housing and medical and mental health care.

The Law

As all other incarcerated individuals, those who identify as LGBTI and are held in adult facilities have rights under the U.S. Constitution and under state and federal statutes and regulations. Understanding how these rights apply to LGBTI people can help criminal justice professionals develop policies and procedures that provide for the safety of LGBTI people and can also help correctional agencies meet their legal obligations.

Constitutional Law

The 8th Amendment to the U.S. Constitution gives citizens the right to be free from cruel and unusual punishment, which includes safety and adequate medical care in correctional settings.^[144] Additionally, the U.S. Constitution provides the right to receive nondiscriminatory treatment under the 5th and 14th Amendments, and limited rights to privacy under the due process clause. Individuals also retain limited rights to freedom of religion, expression, and association, even while incarcerated.

Spreading rumors that a person is gay has been held to state a claim of deliberate indifference under the 8th Amendment because, “in the prison context ... one can think of few acts that could be more likely to lead to physical injury than spreading rumors of homosexuality.”^[145]

8th Amendment Protections from Physical and Sexual Abuse

Corrections agencies have a responsibility to protect inmates from abuse at the hands of other inmates and staff, including volunteers and contractors. Agency officials can be held liable under the 8th Amendment’s cruel and unusual punishment clause if they are deliberately indifferent and fail to protect inmates. In 1994, the U.S. Supreme Court held that it is unlawful for prison officials to be deliberately indifferent to the sexual abuse of a transgender inmate who was repeatedly raped and beaten by other inmates.^[146] The Court explained that officials are liable for abuse of inmates when “the official knows of and disregards an excessive risk to inmate health or safety.”^[147] An excessive risk exists when an inmate belongs to “an identifiable group of people who are frequently singled out for violent attack by other inmates.”^[148] Since that finding, numerous courts have found that an inmate’s LGBTI status or gender nonconformity alone may be sufficient to put agency officials on notice of that individual’s vulnerability and need for protection.^[149] Failure to take adequate

protective measures in the face of this vulnerability can and generally does constitute deliberate indifference. [150] In 2004, the Sixth Circuit noted that “placing a transgender woman in protective custody with inmates who have assaulted other inmates resulted in a substantial risk to her safety and could amount to deliberate indifference.”[151]

Use of Administrative Segregation for Protection

Although it is permissible to place vulnerable inmates in administrative segregation in some circumstances, agency officials will not be able to rely on this measure as long-term protection for LGBTI inmates.

Whether it violates the U.S. Constitution to place vulnerable inmates in administrative segregation depends on the purpose of segregation, the availability of alternatives to provide protection, the harshness or restrictiveness of the conditions in segregation, the duration of segregation, and whether the appropriateness of segregation for a particular inmate is regularly reviewed.[152] Agency officials may, however, segregate LGBTI inmates as a temporary measure when there are specific circumstances, such as upon admission (while determining an appropriate long-term placement) or immediately following an assault and during a pending investigation.[153]

Corrections agencies have a responsibility to protect inmates from abuse at the hands of other inmates and staff, including volunteers and contractors.

Medical Care for LGBTI Inmates

On multiple occasions, the U.S. Supreme Court found that deliberate indifference to a person’s serious medical needs violates the 8th Amendment.[154] An inmate is denied medical care when officials either refuse to provide medical care or are so incompetent that they fail to provide care, in effect. However, this does not suggest that an LGBTI inmate is entitled to the care of his or her choosing. Courts have recognized that the denial of “desired accommodations and medical treatment” does not violate inmates’ rights under the 8th or 14th Amendment.[155] One example is the refusal to provide hormone therapy for transgender inmates. On the other hand, courts have recognized that transgender inmates with gender dysphoria have a serious medical condition and that failure to treat inmates with this condition is a violation of the 8th Amendment.[156] As with any other medical condition, courts will generally defer to the medical staff’s treatment choices, but only if these choices result in treatments that are adequate and effective for a particular inmate’s gender dysphoria needs.[157]

Factors such as the length of imprisonment and custody are also relevant. The treatment required in a short-term jail or lockup will differ from that required in a prison. Medical care for inmates with gender dysphoria should be based on an individualized medical evaluation that determines what care is medically necessary for particular inmates. To meet this standard, correctional administrators should avoid policies that only permit prescribed treatments (such as psychotherapy or antidepressants) to treat gender dysphoria. Policies that specifically prohibit hormone therapy for inmates with gender dysphoria, especially those who were not receiving hormones at the time of incarceration, are not in accordance with the standards of care for gender dysphoria.[158] A federal district court found that a prison may not adopt a “rigid, freeze-frame policy,” where inmates with gender dysphoria have access only to the specific treatments they received prior to incarceration.[159]

Some courts have found that the harmful physiological and psychological effects stemming from the discontinuation of hormone therapy amount to deliberate indifference. Conversely, the U.S. District Court for the Western District of Texas has ruled that an inmate with gender identity disorder (GID) was not entitled to receive hormone therapy, stating that the inmate’s “disagreement with the course of treatment pursued by prison medical staff does not constitute a viable claim for deliberate indifference to serious medical needs under the 8th Amendment.”[160]

Courts have found that correctional policies that restrict certain treatments for all inmates with gender dysphoria “irrespective of an inmate’s serious medical need or the [prison medical professional’s] clinical judgment” are impermissible.^[161] As one court explained, “there is no exception to [the 8th Amendment] for serious medical needs that are first diagnosed in prison.”^[162] Additionally, if the treatment prescribed after a medical evaluation is not consistent with the patient’s diagnosis, or when the evaluation is conducted by someone without appropriate knowledge of gender dysphoria, inmates can challenge the adequacy of the medical evaluation and treatment.^[163]

Court findings indicate that agencies may not deny treatment for inmates with gender dysphoria based on a generalized or unsubstantiated security concern, or based on concerns that relate to the inmate’s transgender status or gender expression. When treatment would present a security risk, corrections officials must balance these concerns against the medical necessity of the treatment.^[164] Finally, medical treatment may not be denied to a person with gender dysphoria simply because it is expensive or because it might be unpopular or controversial to prescribe such treatment.^[165]

Agency officials can be held liable for deliberate indifference to a person’s serious medical need by denying, delaying, or intentionally interfering with his or her medical treatment.^[166]

The U.S. District Court for the Eastern District of Wisconsin held that “a reasonable jury could find that the defendants were deliberately indifferent to Konitzer’s serious medical need when they failed to provide [her] with the second step of treatment from the standards of care, the real-life experience...”^[167]

Gender Presentation and Expression

Denying inmates with gender dysphoria the ability to fully adopt the gender role and presentation consistent with their gender identities can constitute a denial of necessary medical care and a violation of the 8th Amendment.^[168]

Another treatment frequently available for individuals with gender dysphoria is “Real Life Experience.”^[169] This treatment consists of expressing the gender that is consistent with one’s gender identity in all aspects of everyday life. Some courts have recognized that Real Life Experience is a legitimate and often essential form of treatment for gender dysphoria in the correctional context and may at times be medically necessary and constitutionally required.^[170] In contrast, the U.S. District Court of Kansas has held that a biologically male inmate did not have a constitutional right to receive cosmetics and female clothing.^[171]

In *Kosilek v. Maloney*, the U.S. District Court for the District of Massachusetts determined that Real Life Experience was possible in prison, based on the testimony of medical experts that prison is an inmate’s “real life.”^[172] In 2012, the same court found that prison officials had been deliberately indifferent to Kosilek’s serious medical need and ordered the Massachusetts Department of Corrections to provide gender-reassignment surgery.^[173] The First Circuit recently overturned this case, but the court found that reasonable minds would differ on these important medical determinations, leaving room for different findings on another set of facts. The U.S. District Court for the Western District of Virginia reached an opposite conclusion, ruling on summary judgment that Ophelia De’Lonta, a male to female transgender inmate, was not entitled to surgical intervention to treat her severe GID.^[174] The Fourth Circuit, however, reversed and remanded the lower court’s ruling, finding that De’Lonta is entitled to a hearing on the merits of her case.^[175]

Searches and Discrimination

Agencies that permit conjugal visits may not prohibit conjugal visits for legally married same-sex couples if other married couples are provided opportunities for conjugal visits.^[176]

Inmates in state prisons cannot be denied the right to marry someone of the same sex if marriage between same-sex individuals is legal in that state.[177]

If correctional officers target LGBTI people for unnecessarily public strip searches, it can violate the rights of inmates to be free from cruel and unusual punishment. Some courts have found that inmates have a clearly established right “not to be subjected to a humiliating strip search in full view of several (or perhaps many) others unless the procedure is reasonably related to a legitimate penological interest.”[178] In *Merivether v. Faulkner*, the Seventh Circuit held that a male-to-female transgender inmate stated a valid 8th Amendment claim, where a correctional officer repeatedly demanded that the inmate strip in front of inmates and other officers for the sole purpose of viewing her body.[179] The court found this was sufficient to state an 8th Amendment claim because the searches were “maliciously motivated” and not related to security matters.[180]

Courts have found that discrimination in providing services and privileges based on sexual orientation is a violation of constitutionally held rights. For example, correctional agencies may not prohibit visits by same-sex partners or include restrictions on affection between individuals of the same sex during visits where these same restrictions do not apply to heterosexual couples.

Courts have also ordered agencies to stop enforcing policies that prohibit visitation by same-sex partners of inmates. Denying such visits for the purposes of security is not constitutional.[181] Similarly, the Ninth Circuit denied a prison’s motion to dismiss in a challenge to a state’s complete ban on same-sex hugging and kissing among inmates and visitors who were not blood related, rejecting the contention that the policy bore a “common-sense” relation to prison security.[182] Some state departments of corrections, including the California Department of Corrections and Rehabilitation, have opted to extend conjugal visits to registered domestic partners.[183] Some agencies, however, retain policies that limit conjugal visits to legally married inmates.[184]

Courts have also prohibited other forms of discrimination. Agencies cannot deny LGBTI people permission to attend religious services because of their sexual orientation,[185] nor can they fire or refuse to hire eligible inmates based solely on their sexual orientation.[186] Similarly, agencies cannot punish inmates because of their sexual orientation.[187]

Confidentiality and Disclosure of Medical Information

The constitutional right to privacy protects information concerning an inmate’s sexual orientation, and correctional officers may not arbitrarily disclose this information. Courts have recognized a similarly strong privacy interest in disclosure of one’s sexual orientation. Courts have clearly recognized that, even in the correctional context, a person has a “particularly compelling” constitutional privacy interest in certain highly personal information, including one’s transgender identity or HIV status,[188] and disclosing such information without a legitimate penological reason is unconstitutional.[189]

In *Powell v. Shriver*, a transgender woman housed in a women’s prison was casually “out-ed” as transgender and HIV-positive by staff, which led to a pattern of harassment by staff and inmates and violated her right to privacy. In that case, the Second Circuit specifically acknowledged the “excruciatingly private and intimate nature of transsexualism” and that such disclosure may put inmates at heightened risk of abuse; the court found that the disclosure violated privacy rights of inmates.[190]

Correctional agencies may not prohibit visits by same-sex partners or include restrictions on affection between individuals of the same sex during visits where these same restrictions do not apply to heterosexual couples.

Access to Materials with LGBTI Content

Providing access to LGBTI materials is often covered by the 1st Amendment. Courts find that agencies may restrict an inmate's right to receive publications that may cause a threat to the daily operation of a facility, [191] but restrictions are limited to publications that would potentially interfere with security, order, or discipline. Agencies may not prohibit material solely because it contains LGBTI content; they can, however, generally prohibit sexually explicit materials.[192] A publication that discusses LGBTI issues or sexual orientation is not necessarily sexually explicit; agencies must have other reasons for excluding such content.

National Prison Rape Elimination Act Standards

The final PREA Standards include specific provisions for LGBTI and gender-nonconforming inmates according to facility type. Each correctional setting offers a varying degree of protection for LGBTI inmates. These are the minimum standards that must be met to be compliant with PREA. However, agencies can and should develop policies and practices that take into account the needs of LGBTI populations in their own facility.

Adult Prisons and Jails

The final PREA Standards require adult prisons and jails to conduct an intake screening within 72 hours of an inmate's arrival to assess that inmate's risk for sexual victimization or abuse. Specifically, the Standards provide that "the intake screening shall consider, at a minimum ... whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming." [193] Furthermore, "an inmate's risk level shall be reassessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the inmate's risk of sexual victimization or abusiveness." [194] Inmates may not be disciplined for refusal to answer or failure to disclose complete information in response to questions regarding sexual orientation. Importantly, an agency may not place LGBTI inmates in "dedicated facilities, units, or wings solely on the basis of such identification or status" [195] unless that placement is consistent with an existing consent decree, legal settlement, or legal judgment. [196]

The PREA Standards also include protections specific to transgender and intersex inmates. First, they indicate that, "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." [197] The "inmate's own view with respect to his or her own safety shall be given serious consideration." [198] Finally, transgender and intersex inmates must be able to use the toilet and shower separately from other inmates. Agencies must assess placement and programming assignments for transgender and intersex inmates at least twice per year. [199]

The PREA Standards also place limits on cross-gender viewing and searches. Agencies may not "search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status." [200] The facility is permitted to determine an inmate's genital status "during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner." [201] The agency must train its staff in how to conduct cross-gender searches and searches of transgender and intersex people "in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs." [202]

The Standards provide guidance for agency staff on employee training, investigation of sexual activity, and data collection responsibilities with regard to LGBTI inmates. All agencies are required to train employees on effective and professional communication with inmates, specifically LGBTI inmates. [203] Agencies are

permitted to prohibit all sexual activity, but may not “deem such activity to constitute sexual abuse if it determines that the activity is not coerced.”[204] Finally, in collecting data on sexual incidents, the facility “shall consider whether the incident or allegation was motivated by ... gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status ... or was motivated or otherwise caused by other group dynamics at the facility.”[205]

Lockups

As do all individuals confined in a lockup, LGBTI individuals in such a facility[206] receive more limited protections under the Standards due to the temporary nature of these facilities. Agency staff must screen detainees for risk of sexual victimization or abuse. Staff must ask the detainee about his or her own perception of vulnerability[207] and must consider the detainee’s physical build and appearance to determine the risk of sexual victimization.[208]

A lockup facility is not permitted to “search or physically examine a transgender or intersex detainee for the sole purpose of determining the detainee’s genital status.”[209] The facility is permitted to determine an inmate’s genital status “during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.”[210] Furthermore, the lockup must train staff to conduct cross-gender, transgender, and intersex searches in a “professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.”[211]

Finally, in conducting sexual abuse incident reviews, the lockup must “[c]onsider whether the incident or allegation was motivated by . . . gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status . . . or was motivated or otherwise caused by other group dynamics at the lockup.”[212]

Staff must ask the detainee about his or her own perception of vulnerability and must consider the detainee’s physical build and appearance to determine the risk of sexual victimization.

Community Corrections

The Standards also require that LGBTI residents of community confinement facilities[213] be screened for risk of sexual victimization and abuse. The intake screening must consider whether the resident is or is perceived to be LGBTI or questioning.[214] Facilities must reassess a resident’s risk level “when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the resident’s risk of sexual victimization or abusiveness.”[215]

When making housing and programming assignments for a transgender or intersex resident, “the agency shall consider on a case-by-case basis whether a placement would ensure the resident’s health and safety, and whether the placement would present management or security problems.”[216] The facility shall not place LGBTI residents “in dedicated facilities, units, or wings solely on the basis of such identification or status”[217] unless such placement is consistent with a consent decree, legal settlement, or legal judgment.[218] The facility must give serious consideration to the transgender or intersex resident’s view about his or her safety.[219] Finally, transgender and intersex residents must be permitted to use the toilet and shower separately from other residents.[220]

The Standards place limits on cross-gender viewing and searches. “The facility shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident’s genital status. The facility is permitted to determine an inmate’s genital status “during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical

examination conducted in private by a medical practitioner.”^[221] “The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex residents, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.”^[222]

The Standards also provide guidance for agency staff on training, investigation, and data collection with regard to LGBTI residents. The facility must train employees who may have contact with LGBTI residents to communicate effectively and professionally with them. Agencies are permitted to prohibit all sexual activity, but may not “deem such activity to constitute sexual abuse if it determines that the activity is not coerced.”^[223] When conducting incident reviews, the agency must “[c]onsider whether the incident or allegation was motivated by . . . gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status . . . or was motivated or otherwise caused by other group dynamics at the facility.”^[224]

Elements of Legally Sound and Effective Policy and Practice

All policies should be based on the following guiding principles:^[225]

- Respectful interactions between inmates, residents, and staff; between inmates; and between residents.
- Do no harm.
- Safety of vulnerable inmates or residents.
- Adoption of accepted correctional practice.
- Accountability in operations.
- Recognition of the agency’s legal obligations.

In addition, all policies should include the following elements:

- Statement of purpose.
- Enumeration of included groups.
- Prohibitions.
- Requirements.
- Scope of applicability.
- Definitions.
- Responsibilities.
- Enforcement and sanctions (for both staff and inmates or residents).
- Training and dissemination methods.

The following areas should be addressed when developing, revising, or implementing policies to ensure the safety of LGBTI inmates or residents in custodial settings:

- Nondiscrimination.
- Intake screening.
- Risk assessment, classification, and housing.
- Program participation.
- Respectful communication with LGBTI populations.
- Medical care.
- Mental health care.
- Privacy and safety.
- Transportation.
- Inmate orientation.

- Staff training.
- Volunteer and contractor training.

Each of these areas is discussed in greater detail below. Each section includes a discussion of the purpose for adopting a specific policy and a list of questions to consider when drafting or revising policies and procedures. Policies should fill the gap between what is required under the law and what should be done as good correctional practice. Appendix D includes examples of agency policies that address some of these issues.

Nondiscrimination Policies

Agencies should develop, adopt, and enforce policies that explicitly prohibit discrimination and mistreatment of inmates or residents on the basis of sex, age, race, national origin, disability, and actual or perceived sexual orientation and gender identity. These policies should specifically prohibit harassment and abuse of inmates or residents by staff or other inmates or residents based on gender identity or sexual orientation.

Following is a list of questions to ask about an agency’s nondiscrimination policy:

| Nondiscrimination Policy Checklist | YES | NO |
|--|------------|-----------|
| Does the agency have a nondiscrimination policy for employees, inmates, residents, and/or volunteers? | | |
| Does the agency policy require all LGBTI inmates or residents to be treated with fairness, dignity, and respect? | | |
| Does the agency policy prohibit attempts by staff to ridicule or change an inmate’s or resident’s sexual orientation or gender identity? | | |
| Does the agency policy define staff duty to provide safe and healthy environments in which all individuals are treated with respect and dignity? | | |

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| <p>Does the agency policy define staff responsibility for protecting the civil rights of LGBTI inmates or residents while in custody, and ensuring their physical and emotional well-being and safety in facilities?</p> | | |
| <p>Does the agency policy define the elements of incident reporting to include complaints of harassment, discrimination, and abuse?</p> | | |
| <p>Does the agency policy provide training and resources regarding the societal, familial, and developmental challenges confronting LGBTI inmates or residents?</p> | | |
| <p>Does the agency policy address the collection and analysis of data regarding the needs of LGBTI inmates or residents in its custody?</p> | | |
| <p>Does the agency use the collected data and analysis to make decisions?</p> | | |
| <p>Does the agency policy require equal access to programming for LGBTI inmates or residents (not dependent on classification)?</p> | | |
| <p>If the agency policy permits conjugal visiting for heterosexual couples, does the policy also permit conjugal</p> | | |

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| visits for same-sex couples? | | |
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If the answer to most of these questions is “yes,” it is likely that the agency is close to being in line with federal and state laws and regulations as well as constitutional provisions for LGBTI inmates or residents. If the answer to even some of these questions is “no,” it may indicate that the agency has some work to do in this area, and a policy revision based on the legal rights outlined above and in the PREA Standards is in order.



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Intake, Risk Assessment, and Classification

Intake and Risk Assessment

Identifying safety concerns for LGBTI inmates or residents is an important factor in determining risk. Agencies should develop and implement intake processes to identify and assess risk for LGBTI inmates or residents who are vulnerable to physical and sexual assault, taking the inmate’s or resident’s assessment of risk into consideration.

Following is a list of questions to ask about an agency’s intake and risk assessment policy:

| Intake and Risk Assessment Policy Checklist | YES | NO |
|---|------------|-----------|
| During intake and initial classification, does the agency ascertain information about the inmate’s or resident’s sexual orientation and/or gender identity? | | |
| During the course of the inmate’s or resident’s incarceration, does the agency periodically update information regarding his or her sexual orientation and gender identity? | | |
| Do the agency employees who conduct initial screening and classification receive training regarding sensitivity in conducting interviews with LGBTI inmates or residents? | | |
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| Does the agency policy require that an inmate's or resident's sexual orientation and/or gender identity be verified by multiple sources prior to classification? | | |
| Are medical practitioners the only staff permitted to physically examine inmates or residents to gather information about gender identity? | | |
| Does the agency policy have a process to document and accommodate the concerns of LGBTI inmates or residents in terms of safety, name, pronoun, toilet and shower preference, and searches? | | |
| Do the agency medical and mental health staff use screening tools that are developed specifically for LGBTI inmates or residents? | | |
| Does the agency policy require diversity training for employees that includes the impact of name-calling and harassment? | | |

If the answer to even some of these questions is “no,” the agency will need to revise its policy to be more in line with the PREA Standards that address risk assessment and screening. Under the PREA Standards, the intake screening must, at a minimum, consider whether the inmate or resident is or is perceived to be LGBTI or gender nonconforming.^[226] Risk assessment and screening are crucial to the safety of LGBTI inmates and residents, especially when those are the tools and policies in place to inform housing options in custody. All screening tools should include vulnerability assessments, the types of housing decisions that staff can make, and a stipulation as to when an assessment requires moving a decision up the chain of command. Housing and classification determinations are key to ensuring safety and limiting agency liability.



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Classification

Given the actual and potential harassment and abuse directed toward LGBTI inmates or residents, protecting their safety is unquestionably a legitimate concern.

Following is a list of questions to ask about an agency's classification policy:

| Classification Policy Checklist | YES | NO |
|---|------------|-----------|
| <p>Is the agency classification policy based on individualized needs that balance the inmates' or residents' physical and emotional well-being and safety?</p> | | |
| <p>Is the agency classification process objective and free of individual biases?</p> | | |
| <p>Is the agency classification process defined in written policies and procedures?</p> | | |
| <p>Does the agency prohibit blanket policies regarding the classification of LGBTI inmates or residents, or those perceived to be LGBTI?</p> | | |
| <p>Does the agency classification policy govern the placement of inmates or residents into sex-offender programs or units based on articulated criteria, including orders of the court?</p> | | |
| <p>Do the agency classification and housing policy and procedures consider physical layout and privacy issues when determining the location for an LGBTI inmate or resident?</p> | | |
| <p>Does the agency place vulnerable inmates or residents in the least restrictive environment necessary to ensure safety and provide the inmates or residents with equal access to facility services?</p> | | |
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| Do the agency classification procedures address how inmates or residents in various classifications are housed if the facility is crowded? | | |
| Do the agency classification and housing procedures consider privacy concerns when assigning housing for LGBTI inmates or residents? | | |
| Does the agency develop responses to abuse or harassment (or threat of abuse or harassment) of LGBTI inmates or residents that do not rely on the isolation or segregation of these inmates or residents? | | |

Some agencies respond to safety concerns by placing LGBTI inmates in administrative segregation or protective custody. However, instead of isolating LGBTI inmates, staff should consider other strategies as outlined in classification policies. The safety of inmates or residents can be achieved by ensuring appropriate staff-to-inmate ratios; modeling respectful behavior; providing close supervision of inmates or residents; promptly intervening to interrupt any disrespect, harassment, or abuse directed at other inmates or residents; and keeping inmates or residents meaningfully engaged in constructive programming.

Additionally, LGBTI inmates should be classified and housed in sex offender units or programs only as consistent with the agency's policies or court orders. It is not appropriate to house LGBTI inmates in sex offender units solely because of their gender identity or sexual orientation.



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Housing

Determining gender-appropriate housing for transgender and intersex inmates or residents may be a challenge. Some state and local correctional and law enforcement agencies have written policies concerning the housing of transgender and intersex inmates. These policies incorporate an individualized approach to housing, as recommended by the National Prison Rape Elimination Commission and the final PREA Standards.

Following is a list of questions to ask about an agency's classification and housing policies for transgender and intersex inmates or residents:

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| Classification and Housing Checklist for Transgender and Intersex | YES | NO |
|--|------------|-----------|

Inmates or Residents

Do the agency classification and housing policies include evaluation of a person's current genital status in making placement decisions?

Do the agency classification and housing policies include factors relating to the inmate's or resident's emotional and physical well-being, and that prioritize the inmate's or resident's evaluation of his or her safety?

Do the agency classification and housing policies include a review of an inmate's or resident's privacy concerns, available housing options, and recommendations from the inmate's or resident's mental health providers regarding appropriate housing or classification?

Does or can the agency provide access to private toilet and shower facilities, when necessary, or a single room for sleeping, while allowing inmates or residents to have full access to the facility's daily programming?

Does or can the agency place transgender inmates or residents according to their core gender identity rather than their birth sex?

When it is necessary, can the agency place transgender inmates or residents safely according to birth sex to protect their physical and emotional well-being?

Does the agency house transgender inmates or residents in a mixed-gender unit

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| or program? | | |
| Does the agency determine reclassification needs based on requests by inmates or residents or based on victimization? | | |

Individualized decision-making is key in making appropriate and ultimately safe housing decisions for LGBTI inmates and residents. Currently, some agencies have policies that specifically call for individualized placement decisions for transgender and intersex individuals.



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Respectful Communication

Respectful communications between staff and inmates or residents should be the agency’s objective, including how LGBTI inmates are addressed based on their gender preference.

Following is a list of questions to ask about an agency’s respectful communication policy for inmates or residents:

| Respectful Communication with LGBTI Inmates or Residents Policy Checklist | YES | NO |
|--|------------|-----------|
| Does the agency have a zero-tolerance policy for sexual harassment, including harassment by staff and inmate-on-inmate or resident-on-resident harassment? | | |
| Does the agency policy include direction to staff on how to address LGBTI inmates or residents using respectful and appropriate language? | | |
| If the agency policy permits inmates or residents to wear clothing other than issued clothing, does the policy permit them to express themselves through clothing or | | |

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| grooming (within the bounds of safety for all inmates or residents)? | | |
| Does the agency policy address confidentiality of information, including staff disclosure relating to the privacy and confidentiality of LGBTI inmates or residents? | | |
| Does the agency policy adhere to all confidentiality and privacy protections afforded LGBTI inmates or residents under applicable state law? | | |
| Does the agency policy allow for sharing the information necessary to achieve a particular purpose, such as identifying an appropriate placement in another facility? | | |
| Does the agency policy provide for eligible LGBTI inmates or residents to access programming and services within facilities? | | |

LGBTI policies should consider addressing transgender inmates or residents by the name and pronoun that the inmate prefers. If an agency's policies allow inmates or residents to wear clothing other than that issued by the institution, consideration should be given to permitting inmates or residents to express their gender identity through clothing. Also, where appropriate, agencies may consider allowing inmates or residents to express their gender identity in matters of grooming.

Correctional staff should respect each inmate's or resident's privacy and should never disclose an inmate's or resident's sexual orientation or gender identity unless the inmate or resident has given them permission, or unless security or another important agency interest requires the disclosure.



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Medical and Mental Health Care

At a minimum, policies on medical and mental health should provide all inmates and residents with access to appropriate medical and mental health care. LGBTI inmates or residents identified as needing mental health or medical care should receive the care they need. Agencies should work to ensure that medical

personnel are knowledgeable about the health needs of LGBTI inmates or residents—especially transgender inmates or residents.

Following is a list of questions to ask about an agency’s medical and mental health care policy for inmates or residents:

| Medical and Mental Health Care Policy Checklist | YES | NO |
|--|------------|-----------|
| <p>Do the agency medical and mental health protocols include opportunities for LGBTI inmates or residents to access services that address self-acceptance and validation, concerns about disclosure of sexual orientation or gender identity, family relationships, healthy intimate relationships, and sexual decisionmaking?</p> | | |
| <p>Does the agency policy promote the hiring of medical and mental health professionals who have expertise and/or experience in working with LGBTI inmates or residents?</p> | | |
| <p>In assessing an inmate’s or resident’s medical and/or mental health status, does the agency policy direct medical staff to include an assessment of an inmate’s or resident’s safety?</p> | | |
| <p>Do the agency medical and mental health protocols direct those conducting medical screening to inquire about the inmate’s or resident’s sexual activity, sexual orientation, and gender identity, both before and during incarceration?</p> | | |
| <p>Do the agency medical protocols provide for gynecological and obstetrical care?</p> | | |
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| Do the agency medical protocols provide for HIV and STI testing, care, and confidentiality? | | |
| Do the agency medical and mental health protocols provide for counseling for sexual trauma that occurred either before or during incarceration? | | |
| Do the agency medical and mental health protocols provide for mental health evaluations that include assessment of an array of mental health diagnoses, including gender dysphoria? | | |
| Do the agency medical protocols address medical care for transgender inmates or residents, including evaluation of their care prior to incarceration? | | |

At a minimum, agencies should ensure that inmates or residents have access to medical personnel who are knowledgeable about the particular health needs of LGBTI people. LGBTI inmates or residents should have access to appropriate professionals who can provide all medically necessary treatment. If the facility cannot provide treatment on site, then the inmates or residents should be transported to the provider. Any medical care an LGBTI inmate or resident receives prior to arriving at the facility, such as hormone treatments, should be continued upon arrival at the facility after consultation with the appropriate medical providers.



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Privacy and Safety

Agency policy should address how transgender inmates or residents are housed by assessing their safety and privacy during toileting, showering, and sleeping. In general, policies that are integral to addressing the safety and privacy issues and concerns of LGBTI inmates or residents include:

- Cross-gender supervision.
- Use of facilities—bathrooms, showers, etc.
- Search procedures.
- Undressing.

Following is a list of questions to ask about an agency’s privacy and safety policy for inmates:

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| Privacy and Safety Policy Checklist | YES | NO |
|--|------------|-----------|
| Does the agency practice cross-gender supervision of inmates or residents? Explain your answer. | | |
| Does the agency policy address levels of staffing and supervision? | | |
| Does the agency policy address the safety and privacy needs of LGBTI inmates or residents in regard to toileting, showering, and sleeping? | | |
| Does the agency policy address how pat and strip searches of LGBTI inmates or residents are conducted? | | |
| Does the agency policy address search procedures and privacy needs of LGBTI inmates or residents? | | |
| Does the agency policy require that inmate or resident grievances be tracked, and does the agency collect and analyze information on grievances related to searches? | | |

The key to developing sound policy in these areas is to focus on ways in which the facility can protect the privacy, dignity, and safety of LGBTI inmates or residents during all facility procedures. Policies should avoid subjecting transgender inmates or residents to unnecessary risk of physical and emotional harm. This may need to be done on a case-by-case basis where staff members work with the transgender inmate or resident to determine the best solution for accessing the bathroom, showering, changing clothing, submitting to searches, and drug testing that protects their privacy, dignity, and safety.



Sexual Abuse of LGBTI Inmates or Residents

It is important for agencies to recognize all elements of sexual behavior in custody and to have policies that manage these behaviors. Policies should also pay special attention to the LGBTI inmate's or resident's increased vulnerability to abuse, reporting mechanisms, investigations, and discipline, if necessary.

Following is a list of questions to ask about an agency's sexual abuse policy for inmates:

| Sexual Abuse Policy Checklist | YES | NO |
|--|------------|-----------|
| Does the agency policy prohibit the sexual abuse of inmates or residents in custody? | | |
| Does the agency policy stipulate that staff must receive training regarding the sexuality and sexual behaviors of inmates or residents? | | |
| Does the agency policy require the investigation of all reports of violations of policy regarding sexual abuse? | | |
| Does the agency have multiple methods for inmates or residents to report sexual abuse, including avenues for third-party, independent reporting? | | |
| Does the agency policy address the management of inmates or residents who report allegations of sexual abuse? | | |
| Do the agency inmate or resident disciplinary procedures address discipline for those who have sustained violations of recanting previous allegations? | | |
| Does the agency policy define the roles and responsibilities of the investigative process into allegations of | | |

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| sexual abuse? | | |
| Does the agency policy (or the investigative entity's policy) require referral of allegations of potential criminal activity for review by the prosecutor? | | |
| Does the agency policy require a review of reports and investigations of sexual abuse? | | |
| Does the agency policy establish a sexual assault response team (SART)? | | |
| Do the agency protocols provide for ongoing medical and mental health care for an inmate or resident who has been sexually victimized while in custody? | | |
| Does the agency policy recognize particularly vulnerable populations, such as LGBTI inmates or residents, and specify treatment for them? | | |

In correctional settings, there is a continuum of sexual behaviors that may include nonabusive or abusive sexual contact. It is important that agencies recognize this continuum of sexual behaviors in custody, have policies that reflect the continuum, and pay special attention to the increased vulnerability of LGBTI inmates or residents.



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Endnotes

[144] Adults who are in pre-trial detention and have not been convicted of a crime are entitled to the higher level of protection that is provided to juveniles in facilities under the 14th Amendment Due Process Clause. Adults in pre-trial detention should not be placed in conditions that amount to punishment or be stigmatized or humiliated while detained. *See, Bell v. Wolfish*, 441 U.S. 520, 539 (1982).

[145] *Thomas v. District of Columbia*, 887 F. Supp. 1, 4 (D.D.C. 1995). *See also, Montero v. Crusie*, 153 F. Supp. 2d 368, 378 (S.D.N.Y. 2001).

[146] *See, Farmer v. Brennan*, 511 U.S. 825 (1994) (explaining prison officials permitting the beating or rape of one person by another serves no legitimate penological objective and is outside of evolving standards of decency).

[147] *Farmer v. Brennan*, at 843.

[148] *Farmer v. Brennan*.

[149] *See, Taylor v. Michigan Dep't of Corr.*, 69 F.3d 76, 87 (6th Cir. 1995) (knowledge of an inmate's "feminine mannerisms or homosexual orientation" put official on notice of risk of physical and sexual assault).

[150] *See, Green v. Bowles*, 361 F.3d 290, 294–95 (6th Cir. 2004) (transsexual victim had raised a triable issue of fact as to deliberate indifference "because of her status as a vulnerable offender"); *Johnson v. Johnson*, 385 F.3d 503, 527 (5th Cir. 2004) (finding a deliberate indifference claim where prison officials continued to house a gay person in the general population where he was gang raped and sold as a sexual slave for over 18 months).

[151] *Green*, 361 F.3d at 294.

[152] *See, Estate of DiMarco v. Wyoming Dept. of Corr.*, 473 F.3d 1334, 1342–43 (10th Cir. 2007) (finding segregation of person with an intersex condition was permissible because it was primarily to protect her; the prison had not previously dealt with an intersex person; alternatives such as transfer were impracticable; person was not denied access to all programs or services; and her segregation was regularly and meaningfully reviewed); *Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir. 1987); *Farmer v. Carlson*, 685 F. Supp. 1335 (D. MD 1988) (finding temporary segregation of transgender person awaiting transfer to another facility was not unconstitutional).

[153] *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401, *2 (6th Cir. 1997) (table of unreported decisions).

[154] *Estelle v. Gamble*, 429 U.S. 97 (1976).

[155] *Long v. Nix*, 877 F. Supp. 1358 (S.D. Iowa 1995).

[156] *See, Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (assuming without deciding that GID presents a serious medical need); *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Praylor v. Texas Dept. of Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005) (assuming without deciding that GID presents a serious medical need); *Phillips v. Mich. Dept. of Corr.*, 932 F.2d 969 (6th Cir. 1991), *aff'd*, 731 F. Supp. 792 (W.D. Mich.1990); *Meriwether*, 821 F.2d at 413 (GID is "a very complex medical and psychological problem," there is "no reason to treat [GID] differently than any other psychiatric disorder."); *White v. Farrier*, 849 F.2d 322, 325–327 (8th Cir. 1988); *Allard v. Gomez*, 9 F. Appx. 793, 794 (9th Cir. 2001); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995). No circuit has held otherwise.

[157] *See, Praylor v. Texas Dept. of Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005) (denying relief because of absence of evidence of medical necessity in inmate's specific case); *Murray*, 106 F.3d at 401 (refusing to second-guess appropriateness of hormone dosage levels determined by physician); *See, De'Lonta*, 330 F.3d at 635 (finding that the Prozac prescribed to the plaintiff was not clearly provided to her for the purpose of treating GID needs, nor was it a reasonable method for addressing these needs); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 188 (D. Mass. 2002) (concluding that pharmacological evaluation does not constitute treatment

for plaintiff's GID).

[158] *Allard v. Gomez*, 9 Fed. Appx. 793, 795 (9th Cir. 2001) (holding that denial of medical care based on a blanket rule constitutes deliberate indifference).

[159] *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 162 (D. Mass. 2002).

[160] *Young v. Adams*, 693 F. Supp.2d 635, 641 (W.D. Tex. 2010).

[161] *Fields*, 2011 WL 3436875, at *7 (quoting district court). *See also, Barrett v. Coplan* 292 F. Supp. 2d 281, 286 (D. N.H. 2003) (holding plaintiff stated claims upon which relief may be granted by alleging defendants denied her medical care based on a policy that prohibited hormone treatment for GID).; *Houston v. Trella*, No. 04-CV-1393, 2006 WL 2772748 at 8 (D.N.J. Sept. 25, 2006) (holding that plaintiff in immigration detention has a viable claim if decision to deny hormone therapy was based on a non-medical reason such as an existing policy).; *Kosilek*, 221 F. Supp. 2d at 186 (D. Mass. 2002) (finding policy that precludes possibility that plaintiff will ever have hormone treatment initiated, when hormone treatment is a professionally recognized form of treatment that may be necessary for people diagnosed with GID, may be found to violate the 8th Amendment).

[162] *Brooks v. Berg*, 270 F. Supp. 2d 302 (N.D.N.Y. 2003), vacated in part on other grounds, 289 F. Supp. 2d 286 (N.D.N.Y. 2003). Two courts have found that such "freeze-frame" policies do not amount to a violation of Equal Protection. *See, O'z'etax v. Ortiz*, 170 Fed. Appx. 551 (10th Cir. 2006).; *Farmer v. Hawk-Sanyer*, 69 F. Supp. 2d 120 (D.D.C. 1999). These cases have no bearing on prisons' duty to provide adequate medical care for inmates with GID under the 8th Amendment.

[163] *Barrett*, 292 F.Supp.2d at 286 (finding plaintiff asserted sufficient facts to state a claim based on prison not prescribing any of the treatments enumerated in the professionally recognized standards of care for GID).; *Kosilek*, 221 F. Supp. 2d at 161, 167 (finding that because plaintiff was only seen by social worker and psychiatrist who did not have experience diagnosing GID, "qualified physicians have never evaluated" plaintiff and thus there was no individualized medical evaluation).

[164] *See, Kosilek*, 221 F. Supp. 2d at 191; *Tates v. Blanas*, No. S-00-2539, 2003 WL 23864868, *10 (E.D. Cal. Mar. 11, 2003) (officials could not deny transgender woman a bra where they failed to balance security risks against medical needs, and where other women were issued bras).; *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011).

[165] *Kosilek*, 221 F. Supp. 2d at 182.

[166] *See, Estelle v. Gamble*, 429 U.S. 97 (1976).

[167] *Konitzer v. Frank*, 711 F.Supp.2d 874, 908 (E.D. Wis. 2010).

[168] *See, Konitzer v. Frank*, 711 F. Supp. 2d 874 (E.D. Wis. 2010) (holding that prison officials' denial of plaintiff's requests for makeup, women's undergarments, and facial hair remover might give rise to an 8th Amendment violation for deliberate indifference to a serious medical need, given that such elements of expression/presentation were part of the "real life experience" prescribed by the Standards of Care).

[169] *See generally, WPATH, Standards of Care*.

[170] *Konitzer*, 711 F. Supp. 2d at 874; *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000), *aff'd*, 2000 WL 33342399 (Mass. Appl. Ct. Nov. 30, 2000).; *Logan v. Gary Community School Corp.*, No. 2:07-CV-431, 2008 WL 4411518 (N.D. Ind. Sept. 25, 2008). Other courts have held that in the prison context

these expressive interests can be curtailed for a legitimate penological purpose.; *Turner v. Safley*, 482 U.S. 78 (1987).

[171] *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986).

[172] *Kosilek*, 221 F. Supp. 2d at 874.

[173] *Kosilek*.

[174] *De'Lonta v. Johnson*, 2011 WL 5157262 (W.D. Va. Oct 28, 2011).

[175] *De'Lonta v. Johnson*, 2013 WL 310350 (4th Cir. 2013).

[176] *Doe v. Sparks*, 733 F. Supp. 227 (W.D. Pa. 1990).

[177] *Turner v. Safely*, 482 U.S. 78 (1987).

[178] *Farmer v. Perrill*, 288 F.3d 1254, 1260 (10th Cir. 2002) (emphasis in original) (transgender woman was regularly searched in full view of other inmates whenever she returned from the common area). Other courts are in accord.; *Mays v. Springborn*, 575 F.3d 643 (7th Cir. 2009).; *Hayes v. Marriott*, 70 F.3d 1144 (10th Cir. 1995).; *Elliott v. Lynn*, 38 F.3d 188 (5th Cir. 1994).; *Cornwell v. Dablberg*, 963 F.2d 912 (6th Cir. 1992).; *Franklin v. Lockhart*, 883 F.2d 654 (8th Cir. 1989).; *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988).

[179] 821 F.2d 408 (7th Cir. 1987).

[180] 821 F.2d 408 (7th Cir. 1987).

[181] *Doe v. Sparks*, 733 F. Supp. 227, 232–34 (W.D. Pa. 1990)

[182] *Whitmire v. State of Arizona*, 298 F.3d 1134 (9th Cir. 2002).

[183] California Department of Corrections and Rehabilitation, “Visiting a Friend or Loved One in Prison,” 3 <http://www.cdcr.ca.gov/Visitors/docs/InmateVisitingGuidelines.pdf> [2].

[184] Mississippi Department of Corrections, http://www.mdocr.state.ms.us/conjugal_visits.htm [3]. [The Mississippi Department of Corrections no longer offers conjugal visits, effective February 1, 2015.]

[185] *See, Phelps v. Dunn*, 965 F.2d 93, 100 (6th Cir. 1992) (holding that a genuine issue of material fact existed as to whether a gay person alleging he was denied permission to attend religious services was denied because he was gay).

[186] *See, Kelley v. Vaughn*, 760 F. Supp. 161, 163–64 (W.D. Mo. 1991) (denying prison’s motion to dismiss on the ground that a gay person, bringing an action against the prison’s food service manager to challenge his removal from his job as bakery worker, might have a valid equal protection claim).; *Johnson v. Knable*, 862 F.2d 314 (4th Cir. 1988)(vacating lower court’s summary judgment dismissal of an equal protection claim brought by a gay person noting that “[i]f [the plaintiff] was denied a prison work assignment simply because of his sexual orientation, his equal protection rights may have been violated”).

[187] *See, Howard v. Cherish*, 575 F. Supp. 34, 36 (S.D.N.Y. 1983) (a gay person who claimed he was punished because he was gay would have had a claim under § 1983 if he had been able to show that he was discriminated against solely because of his sexual orientation).

[188] See, *Powell v. Shriver*, 175 F.3d 107 (2d Cir. 1999). See also, *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001) (holding that inmates have a privacy interest in HIV status).

[189] *Powell*, 175 F.3d at 113–14.

[190] *Powell v. Shriver*, 175 F.3d 107 (2d Cir. 1999).

[191] *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

[192] See, *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) (upholding regulations prohibiting people from possessing sexually explicit materials on grounds that regulation was “reasonably related to legitimate penological interests”); *Allen v. Wood*, 970 F. Supp. 824, 831 (E.D. Wash. 1997) (granting defendant prison’s motion for summary judgment on ground that prison regulations prohibiting certain sexually explicit materials satisfied the reasonable relation standard).

[193] 28 C.F.R. § 115.41(c)(7) (2012).

[194] 28 C.F.R. § 115.41(g).

[195] 28 C.F.R. § 115.41(g).

[196] 28 C.F.R. § 115.41(g).

[197] 28 C.F.R. § 115.42(c).

[198] 28 C.F.R. § 115.42(e).

[199] 28 C.F.R. § 115.42(d).

[200] 28 C.F.R. § 115.15(e).

[201] 28 C.F.R. § 115.15(d).

[202] 28 C.F.R. § 115.15(e).

[203] 28 C.F.R. § 115.31(a)(9).

[204] 28 C.F.R. § 115.78(g).

[205] 28 C.F.R. § 115.86(d)(2).

[206] Lockup means a facility that contains holding cells, cell blocks, or other secure enclosures that are: (1) Under the control of a law enforcement, court, or custodial officer; and (2) primarily used for the temporary confinement of individuals who have recently been arrested, detained, or are being transferred to or from a court, jail, prison, or other agency. 28 C.F.R. § 115.5.

[207] 28 C.F.R. § 115.141(c).

[208] 28 C.F.R. § 115.141(d)(3).

[209] 28 C.F.R. § 115.15(d).

[210] 28 C.F.R. § 115.15(d).

[211] 28 C.F.R § 115.115(e).

[212] 28 C.F.R § 115.186(c)(2).

[213] Community confinement facility means a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community correctional facility (including residential reentry centers), other than a juvenile facility, in which individuals reside as part of a term of imprisonment or as a condition of pre-trial release or post-release supervision, while participating in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during nonresidential hours. 28 C.F.R § 115.5.

[214] 28 C.F.R § 115.241(d)(7).

[215] 28 C.F.R § 115.241(g).

[216] 28 C.F.R § 115.242(c).

[217] 28 C.F.R. § 115.242(f).

[218] 28 C.F.R § 115.241(c).

[219] 28 C.F.R § 115.242(d).

[220] 28 C.F.R § 115.242(e).

[221] 28 C.F.R § 115.242(e).

[222] 28 C.F.R § 115.215(f).

[223] 28 C.F.R § 115.278(g).

[224] 28 C.F.R § 115.286(d)(2).

[225] *See, supra* note 110.

[226] 28 C.F.R § 115.41(c)(7).

[227] Transgender women are not cross-dressers or drag queens. Drag queens are men, typically gay men, who dress like women for the purpose of entertainment. Be aware of the differences between transgender women, cross-dressers, and drag queens. Use the term preferred by the individual. Do not use the word "transvestite" at all, unless someone specifically self-identifies that way.

Source URL: <http://info.nicic.gov/lgbti/?q=node/5>

Links:

[1] <http://info.nicic.gov/sites/info.nicic.gov/lgbti/files/LGBTI-Adults-under-Custodial-Supervision-Checklists.pdf>

[2] <http://www.cdcr.ca.gov/Visitors/docs/InmateVisitingGuidelines.pdf>

[3] http://www.mdoc.state.ms.us/conjugal_visits.htm

Appendices

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Appendix A. Glossary

Asexual: a person who is not romantically or sexually attracted to another person of any gender.

Bisexual: a person who is romantically or sexually attracted to both males and females.

Cross dresser: a person who wears clothing, jewelry, or makeup not traditionally associated with their anatomical sex, and who generally has no intention or desire to change their anatomical sex.

Gay: exclusively attracted to others of the same sex. Most commonly used to refer to men who are attracted to other men, but may also be used to refer to women who are attracted to other women (lesbians).

Gender: a socially constructed concept classifying behavior as either “masculine” or “feminine,” unrelated to one’s genitalia.

Gender conforming: when gender identity, gender expression and sex assigned at birth “match” according to social norms.

Gender dysphoria (formerly gender identity disorder): the formal diagnosis used by psychologists and physicians to describe persons who experience significant discontent with the sex they were assigned at birth and/or their gender roles associated with that sex.

Gender expression: a person’s external expression of their gender identity, including appearance, dress, mannerisms, speech, and social interactions.

Gender identity: distinct from sexual orientation and refers to a person’s internal, deeply felt sense of being male, female or something else.

Gender non-conforming: gender characteristics or behaviors that do not conform to those typically associated with a person’s biological sex.

Gender “norms”: the expectations associated with “masculine” or “feminine” conduct, based on how society commonly believes males and females should behave.

Gender variant behavior: conduct that is not normatively associated with an individual’s biological sex.

Heterosexual: sexual or romantic attraction to the opposite sex.

Homosexual: an increasing derogatory term with an historical negative context for sexual, emotional, or romantic attraction to persons of the same sex. Not recommended for use.

Intersex: an uncommon condition in which a person is born with external genitalia, internal reproductive organs, chromosome patterns, or an endocrine system that does not fit typical definitions of male or female.

LGBTI: acronym for a group of sexual minorities including lesbian, gay, bisexual, transgender, and intersex individuals. Many variations of this acronym may be used depending on context.

Lesbian: commonly refers to women typically attracted to other women (the term “gay” may also be used to describe these individuals).

Queer: historically a negative, derogatory term, it has been reclaimed by some LGBTI individuals particularly among youth. Its use is not recommended, especially in a professional environment.

Questioning: an active process in which a person explores his or her own sexual orientation or gender identity and questions the cultural assumptions that they are heterosexual or gender conforming. LGBTQ or LGBTQI is often associated with adolescents and young adults.

Sex: the designation of a person as either male or female based on anatomical make-up, including genitalia, chromosomes, and reproductive system.

Sexual orientation: an enduring personal quality that inclines people to feel romantic or physical attraction to persons of the opposite sex or gender, the same sex or gender, or both.

SOGI: acronym for sexual orientation and gender identity.

Transgender: an umbrella term for persons whose gender identity differs from their assigned sex at birth. May be used interchangeably with “transsexual” depending on context.

Transgender girl/woman: a person whose birth sex was male but who understands herself to be female and desires to live her life as a female.

Transgender boy/man: a person whose birth sex was female but who understands himself to be male and desires to live his life as a male.

Transition: sometimes used to describe the process people go through to change their gender expression or physical appearance. May refer to everything from changing identity documents to medical intervention (e.g., hormones, surgery).

Transsexual: a person whose physical anatomy does not match his or her gender identity, and seeks medical treatment (sex reassignment surgery or hormones). May be used interchangeably with “transgender” depending on the context.

Transvestite: a person who mainly cross dresses for pleasure in appearance and sensation.

Two spirit: a term used by some Native Americans to identify LGBTI and gender variant persons within their community. Historically, in some cultural traditions, two spirit people were viewed as privileged and sacred.

Appendix B. Case Law Digest

Juvenile Case Law

1. *Minimal Conditions for Confinement for Detained Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Youth*

R.G. v. Koller, 2006 WL 905225 (D. Hawaii Mar. 1, 2006) (preliminary injunction order). Prohibiting the facility from discriminating against youth based on LGBTI status and using isolation to control the LGBTI population, and ordering the facility to develop policies and procedures for LGBTI youth.

2. *Protection from Sexual Assault*

A.M. v. Luzerne County, 372 F.3d 572 (3d Cir. 2004). Finding that staff members were deliberately indifferent to sexual assaults on youth in the detention facility.

3. *Right to Medical and Rehabilitative Treatment under 14th Amendment*

Farrell v. Allen, RG 03079344 (Superior Court of California Alameda County Nov. 19, 2004) (unpublished consent decree). Developing a comprehensive plan to address severe problems within the (then) California Youth Authority by implementing policies and procedures designed to provide appropriate medical and psychological treatment and rehabilitative care for all youth.

Bowers v. Boyd, 876 F. Supp. 773 (D.S.C. 1995). Ordering the South Carolina Department of Juvenile Justice to develop policies and procedures to better protect youth in their custody.

4. *Medical and Mental Health Treatments for Youth with Gender Identity Disorder*

Complaint, *Rodriguez v. Johnson*, No. 06CV00214 (S.D.N.Y. filed Jan. 11, 2006). Ending in a settlement agreement, wherein the New York State Office of Children and Family Services was required to implement a system-wide change to ensure treatment for transgender youth.

Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2013). Finding that a California statute that prohibits the licensing of mental health facilities that offered sexual orientation change therapies was constitutional.

5. *Segregation of LGBTI Youth*

In re Antonie D, 137 Cal. App. 4th 1314 (Cal. App. 1 Dist.6 2006). Permitting a bisexual juvenile detainee to challenge the juvenile court’s refusal of his request to be placed in a facility that could better accommodate LGBTI youth.

6. *Use of Isolation for Protection*

R.G. v. Koller, 2006 WL 905225 (D. Hawaii Mar. 1, 2006) (preliminary injunction order)—Prohibiting the use of isolation to control the LGBTI population.

7. *Housing Transgender Youth*

R.G. v. Koller, 2006 WL 905225 (D. Hawaii Mar. 1, 2006) (preliminary injunction order). Prohibiting the facility from discriminating against youth based on LGBTI status when making housing determinations.

8. *Sex Nonconforming Dressing Practices in Youth*

Doe v. Bell, 754 N.Y.S.2d 846 (N.Y. Sup. 2003). Recognizing that a juvenile detainee with gender identity disorder (GID) must be permitted to wear feminine clothing as part of her treatment, and finding the center’s safety concerns underlying the policy prohibiting her from wearing feminine clothing was not a rational basis for rejecting the accommodation.

Doe v. Yunits, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000). Granting a preliminary injunction to a biologically male student with GID, permitting him to wear feminine clothing to his public high school.

Hood v. Department of Children and Families, 2014 WL 757914 (M.D. Fla. 2014). Finding that denial of plaintiff's (a civilly committed juvenile) request for female gendered clothing before diagnosis did not violate her 8th Amendment rights.

Doe v. Yunits, 2000 WL 33162199 (Mass. Super. 2000). Finding that a junior high school dress code could not prohibit a transgender student from wearing clothing approved for both male and female students.

Doe v. Bell, 754 N.Y.S. 2d 846 (N.Y. Sup. Ct. 2003). Finding that exempting a transgender foster child from a male foster home's dress code was appropriate and an exemption a state-operated facility was required to make.

9. Facility Access for Transgender Youth

Doe v. Regional School Unit 26, 2014 WL 325906, M.E. 2014). Finding that a school's denial of access to female bathroom facilities to a female identified trans child violated that child's human rights.

Adult Case Law

1. Discrimination Based on Sexual Orientation under the 14th Amendment

Brown v. Johnson, 743 F.2d 408 (1984). "Blanket ban against holding of group worship services by church which ministered to spiritual needs of homosexual persons was reasonably related to state's interest in maintaining internal security in prison, in view of undisputed testimony linking inmate homosexuality with prison violence."

Fitzpatrick v. Curry, 2006 WL 2990283 (W.D. Mich. Oct. 16, 2006). Finding that a homosexual inmate could not sustain an Equal Protection claim against prison officials, as he was unable to establish that prison officials allowed the inmate to be raped due to his sexual orientation.

Davis v. Prison Health Services, 679 F.3d 433 (6th Cir. 2012). Finding improper the termination of a prisoner's participation in a work program due to his sexual orientation.

2. Protection from Sexual Assault under the 8th Amendment

Farmer v. Brennan, 511 U.S. 825 (1970). Establishing the standard of "deliberate indifference" to address claims brought by sexually abused inmates under the 8th Amendment.

Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004). Finding a deliberate indifference claim where prison officials continued to house a gay person in the general population, where he was gang raped and sold as a sex slave for over 18 months.

Greene v. Bowels, 361 F.3d 290 (6th Cir. 2004). Remanding an 8th Amendment case brought by a preoperative male-to-female transsexual who was sexually assaulted while incarcerated in a male prison, to determine whether the warden knew of the risk presented by housing a transsexual inmate in the same unit with a predatory inmate.

Taylor v. Michigan DOC, 69 F.3d 76 (6th Cir. 1995). Finding a triable issue of fact, where a mildly mentally retarded inmate with youthful looking features and a seizure disorder was raped in a prison, where the warden and his subordinates should have been aware of the dangerous conditions posed to vulnerable inmates.

Taylor v. Beard, No. 2:13-cv-00925 DAD P., 2013 WL 6491524 (E.D. Cal. Dec. 10, 2013). Finding that the fear on which a request for transfer is based must be more than a generalized fear of potential violence. In this case the petitioner, bisexual male, requested a transfer because he was in fear for his safety due to his sexuality.

3. Violation of the 8th Amendment, Deliberate Indifference to Serious Medical Need for Treatment of Transgender Inmates Providing Continuing Hormonal Treatment

Fields v. Smith, 712 F. Supp. 2d 830 (E.D. Wis. 2010). Holding that correctional officers violated inmate's 8th and 14th Amendment rights by enforcing a state statute preventing Department of Corrections medical personnel from providing hormone therapy or sexual reassignment surgery to inmates with GID.

Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997). Holding that absent special circumstances, inmates are not entitled to curative treatment for gender dysphoria under the 8th Amendment.

Phillips v. Michigan Dept. of Corrections, 731 F. Supp. 792 (W.D. Mich. 1990). Granting a preliminary injunction to an inmate with GID, ordering correctional officials to provide estrogen therapy.

DeLonta v. Angelone, 330 F.3d 630 (4th Cir. 2003). Permitting a transgender inmate who had engaged in self-mutilation to proceed in her claim that correctional officials who withdrew her hormone therapy were deliberately indifferent to her serious medical need.

Barrett v. Coplan, 292 F. Supp. 2d 281 (D.N.H. 2003). Holding that an inmate with GID adequately stated a claim under the 8th Amendment, where treatment was denied due to a policy that prohibited any hormone or surgical treatment for inmates suffering from GID.

Kosilek v. Spencer, 740 F.3d 733 (1st Cir. 2014). Finding that a combination of hormone and other therapies may adequately treat a transgender inmate's GID, and as such SRS was not necessary.

4. Request for Hormonal Treatment Where Hormone Usage Does Not Pre-date Incarceration

Farmer v. Moritsugu, 163 F.3d 610 (D.C. Cir. 1998). Finding that a Bureau of Prisons (BOP) medical director was entitled to qualified immunity from liability, where his denial of a transsexual prisoner's request for treatment aligned with constitutional BOP medical policy.

Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986). Holding that an inmate did not have a constitutional right to transfer to a women's facility, to receive cosmetics and female clothing, or to receive hormone treatment or a sex change operation.

Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002). Finding that treatment plan for an inmate with GID was inadequate to meet the inmate's serious medical need, as the treatment plan was made pursuant to a blanket policy prohibiting hormones that had not been prescribed prior to incarceration.

Brooks v. Berg, 270 F. Supp. 2d 302 (N.D. N.Y. 2003), *vacated in part on other grounds*, 289 F. Supp. 2d 286 (N.D. N.Y. 2003). Recognizing that prison officials who failed to provide treatment to a transsexual inmate were deliberately indifferent to his serious medical needs, where the decision not to treat the inmate was not based on sound medical judgment.

Young v. Adams, 693 F. Supp. 2d 635 (W.D. Tex. 2010). Finding that an inmate with GID was not entitled to receive hormone therapy.

Gammett v. Idaho State Board of Corrections, 2007 WL 2186896 (D. Idaho Jul. 27, 2007). Granting a preliminary injunction for a transsexual inmate who had castrated himself, ordering correctional officers to provide treatment for his GID.

Phillips v. Michigan Dept. of Corrections, 731 F. Supp. 792 (W.D. Mich. 1990). Finding that GID diagnosis constituted "serious medical need" and failure to supply hormone therapy could amount to deliberate indifference in the face of that need.

De'Lonta v. Johnson, 708 F.3d 520 (4th Cir. 2013). Finding that inmate was entitled to doctor's diagnosis regarding GID and possible medical treatments including gender reassignment surgery.

5. Right to Gender Reassignment Surgery

De'Lonta v. Johnson, 2013 WL 310350 (4th Cir. 2013). Remanding case to lower court and requiring a hearing on the merits of a male-to-female transgender inmate's suit demanding that the Virginia Department of Corrections provide her with sexual reassignment surgery.

Kosilek v. Spencer, 2012 WL 4054248 (D. Mass. Sept. 16, 2012). Holding that transsexual inmate displayed a serious medical need and was therefore entitled to gender reassignment surgery. NOTE: This case is now superseded by *Kosilek v. Spencer*, 740 F.3d 733 (1st Cir. 2014), in regards to inmate access to sexual reassignment surgery, though other aspects of the holding are still good law.

6. Right to Marry for All Inmates

Turner v. Safely, 482 U.S. 78 (1987). Striking down a prison's marriage regulation prohibiting inmates from marrying other inmates or civilians without the prison superintendent's determination that there were compelling reasons for marriage.

Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002). Finding that a prisoner had no federal or state constitutional right that would require the prison warden to allow the inmate to provide his wife with a sperm specimen for artificial insemination.

Bradbury v. Wainwright, 718 F.2d 1538 (11th Cir. 1983). Permitting inmates to challenge the Florida Department of Corrections' administrative regulation restricting inmate marriage.

7. Segregation of Adult LGBTI Inmates

Estate of DiMarco v. Wyoming Dept. of Corr., 473 F.3d 1334, 1342–43 (10th Cir. 2007). Finding that segregation of a person with an intersex condition was permissible because it was primarily to protect her, the prison had not previously dealt with an intersex person, alternatives such as transfer were impractical, the person was not denied access to all programs or services, and her segregation was regularly and meaningfully reviewed.

Gay Inmates of Shelby County v. Barksdale, 819 F.2d 289 (6th Cir. 1987). Finding that an injunction ordering correctional officials to create an intake classification scheme to identify and house LGBTI inmates, rather than segregating LGBTI inmates, was an appropriate remedy.

Farmer v. Carlson, 685 F. Supp. 1335 (M.D. Pa. 1988). Holding that prison officials did not violate a transsexual inmate's 8th or 14th Amendment rights by placing that inmate in administrative segregation for 4.5 months.

8. Strip Searches for Transgender Inmates Performed by Staff of the Same Biological Gender

Konitzer v. Frank, 711 F. Supp. 2d 874 (E.D. Wis. 2010). Stating that prison officials were not required to ensure that strip searches of a biological male inmate suffering from GID be performed only by female officers.

Farmer v. Perrill, 288 F.3d 1254 (10th Cir. 2002). Prohibiting prison officials from performing strip searches of a preoperative, male-to-female transsexual in a humiliating fashion.

9. Visits with Partners

Whitmire v. Arizona, 298 F.3d 1134 (9th Cir. 2002). Refusing to dismiss a homosexual partner's equal protection challenge to a prison regulation prohibiting same-sex kissing and hugging among nonfamily members during prison visits, in the absence of evidence proving a rational connection between the visitation policy and correctional safety.

Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990). Declaring a prison's policy of denying visitation with same-sex partners constitutionally invalid.

Morales v. Pallito, 2014 WL 1758163 (D.Vt.). Finding that although prison inmates retain many of their constitutional rights, "such protections are restricted by valid penological objectives."

10. Outing Inmates as LGBTI or HIV Positive

Powell v. Shriver, 175 F.3d 107 (2d Cir. 1999). Finding that guards who disclosed an inmate's transsexual status were deliberately indifferent to the inmate's

safety.

Thomas v. District of Columbia, 887 F. Supp.1 (D.D.C. 1995). Holding that an inmate could sustain an 8th Amendment claim against a guard who spread a rumor that the inmate was homosexual.

Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000). “[O]fficer's threat to disclose arrestee's suspected homosexuality violated arrestee's constitutional right to privacy.”

11. Allowable Grooming Practices Nonconforming with Biological Gender for Transgender Inmates

Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986). Holding that an inmate did not have a constitutional right to receive cosmetics and female clothing.

Cole v. Flick, 758 F.2d 124 (3d Cir. 1985). Stating that the prison officials' belief in a correlation between long hair and predatory homosexuals was unreasonable.

Pollock v. Marshall, 845 F.2d 656 (6th Cir. 1988). Upholding a prison regulation requiring short haircuts based on the prison's legitimate penological interests of “quick identification, removal of place to hide small contraband, prevention of sanitation problems, and homosexual attacks.”

Appendix C. Resources

Publications—General and Adult

American Bar Association. 2010. *ABA Standards for Criminal Justice on the Treatment of Prisoners*, 3rd ed. ^[1] Washington, DC: American Bar Association. [Position statement that any examination of a transgender person to determine that person's genital status should be performed in private by a qualified medical professional, and only if the person's genital status is unknown to the correctional agency.]

American Medical Association House of Delegates. 2008. “Resolution 122: Removing Financial Barriers to Care for Transgender Patients.” ^[2] [Resolution supporting health insurance coverage for treatment of gender identity disorder.]

American Medical Association House of Delegates. 2000. “Resolution 506: Policy Statement on Sexual Orientation Reparative (Conversion) Therapy.” ^[3] [Resolution opposing conversion therapy designed to change sexual orientation.]

American Psychiatric Association. “LGBT – Sexual Orientation.” ^[4] [Guide on sexual orientation, coming out, and stigma based on sexual orientation.]

American Psychiatric Association. 2000. *Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision (DSM-IV-TR)*. Arlington, VA: American Psychiatric Association. [Classification and description of mental disorders.]

American Psychiatric Association. August 16, 2012. “APA Issues Official Positions Supporting Access to Care and the Rights of Transgender and Gender Variant Persons.” ^[5] [Position statement on appropriate care for transgender people.]

American Psychoanalytic Association. 2006. “Position Statement: Reparative Therapy.” ^[6] [Position statement that psychoanalytic techniques do not include attempts to “convert” or “repair” an individual's sexual orientation.] <http://www.apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender> ^[7].

American Psychological Association. “Sexual Orientation and Homosexuality.” ^[8] [Guide to provide information to aid people to better understand sexual orientation and the harmful impact of prejudice and discrimination.] <http://www.apa.org/helpcenter/sexual-orientation.aspx> ^[8].

American Psychological Association. August 2008. “Transgender, Gender Identity, and Gender Expression Non-Discrimination.” ^[9] [Policy statement supporting the legal and social recognition of transgender individuals, and encourages psychologists to not only provide treatment but to work against discrimination.] <http://www.apa.org/about/policy/transgender.aspx> ^[9].

American Psychological Association. “Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality.” ^[10] [Guide that answers common questions about sexual orientation, coming out, and same sex relationships.] <http://www.apa.org/topics/lgbt/orientation.pdf> ^[11].

American Psychological Association. August 2009. *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation.* ^[12] [Review of literature and studies on sexual orientation change efforts and finding that efforts to change sexual orientation are not successful and can actually cause harm.] <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> ^[12].

Association for Lesbian, Gay, Bisexual, and Transgender Issues in Counseling. 2009. *Competencies for Counseling with Transgender Clients* ^[13]. Alexandria, VA. [Guidelines for counseling transgender clients.] http://www.counseling.org/Resources/Competencies/ALGBTIC_Competencies.pdf ^[13].

Bockting, Walter O., and Eli Coleman. 1992. “A Comprehensive Approach to the Treatment of Gender Dysphoria.” In Walter O. Bockting and Eli Coleman (eds.), *Interdisciplinary Approaches in Clinical Management*. Binghamton, NY: Haworth Press, 131. [Book chapter presenting a new treatment model for those with gender dysphoria focusing on assessment, management of psychiatric disorders, identity formation and management, and aftercare.]

Brown, George R. 2007. “Transvestism and Gender Identity Disorder in Adults.” In Glen O. Gabbard (ed.), *Gabbard's Treatments of Psychiatric Disorders*, 3rd ed. Washington, DC: American Psychiatric Press, Inc.

Center for Gender and Sexuality at Columbia Law School. 2014. “A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV” ^[14]. [A report offering comprehensive federal policy recommendations to address cycles of criminalization and discriminatory treatment faced PLWH and LGBT people.]

Cole, Collier M., Michael O'Boyle, Lee E. Emory, and Walther J. Meyer III. 1997. “Comorbidity of Gender Dysphoria and Other Major Psychiatric

Diagnoses.” *Archives of Sexual Behavior* 26, no. 1:13–26. [A study finding that individuals suffering from gender dysphoria do not suffer from coexisting psychiatric illnesses (such as schizophrenia or major depression) at significantly higher rates than the general population.]

Columbia Human Rights Law Review. 2009. “[A Jailhouse Lawyer’s Manual, Special Information for Lesbian, Gay, Bisexual, and Transgender People](http://www3.law.columbia.edu/hrlr/JLM/Chapter_30.pdf) [15].” *Columbia Human Rights Law Review* (8th ed.). [An overview of several resources and remedies for LGBT people.] http://www3.law.columbia.edu/hrlr/JLM/Chapter_30.pdf [15].

Fenway Institute. 2014. “[Asking Sexual Orientation Questions on State Risk Factor Surveys Allows 27 States to Document Health Disparities Affecting Sexual Minorities](#) [16].” [A report on states asking questions in order to develop programs, policies, and services to address local health disparities.]

FORGE. 2014. “[Forensic Exam Webinar: Navigating Forensic Exams and Advocacy with Transgender Survivors of Sexual Assault](#).” [17] [A webinar discussing how treating transgender sexual assault victims may differ from other survivors in body configurations.]

Gay and Lesbian Advocates and Defenders. 2012. [Resources for Prisoners and Ex-Offenders in New England](#). [18] [State by state resource guide for current and former inmates in New England.]

Grant, Jaime M., Lisa A. Moffet, and Justin Tanis. 2011. [Injustice at Every Turn: A Report of the National Transgender Discrimination Survey](#). [19] Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force. [Survey of 6,450 transgender and gender non-conforming individuals reporting incidents of discrimination based on sexual identity.]

Herek, Gregory M. “[Facts about Homosexuality and Child Molestation](#) [20].” [Fact sheet discrediting the stereotype that LGBT individuals are a special danger to children.]

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American Civil Liberties Union: <http://aclu.org> [63]

American Institute of Bisexuality: <http://www.americaninstituteofbisexuality.org/> [64]

BJS: Bureau of Justice Statistics: <http://bjs.gov/index.cfm?ty=dcdetail&iid=406> [65]

Equality Federation: <http://equalityfederation.org/> [66]

Equal Employment Opportunity Commission: <http://www.eeoc.gov/> [67]

Family Equality Council: <http://www.familyequality.org/> ^[68]

Fenway Health: <http://www.fenwayhealth.org/site/PageServer> ^[69]

Gay & Lesbian Alliance Against Defamation: <http://www.glaad.org/> ^[70]

Gay and Lesbian Medical Association: <http://www.glma.org/> ^[71]

Gender Equity Resource Center: <http://genecq.berkeley.edu/home> ^[72]

Human Rights Campaign: <http://www.hrc.org/> ^[73]

Lambda Legal Defense and Education Fund: <http://www.lambdalegal.org/> ^[74]

National Institute of Corrections: <http://nicic.gov/lgbti> ^[75]

National Center for Lesbian Rights: <http://www.nclrights.org> ^[76]

National Center for LGBT Health: <http://www.lgbthealth.net/> ^[77]

National Center for Transgender Equality: <http://www.transequality.org/> ^[78]

PFLAG: <http://community.pflag.org/> ^[79]

The Center for HIV Law & Policy: <http://hivlawandpolicy.org/resources/view/539> ^[80]

The Equity Project: <http://equityproject.org/> ^[81]

The FBI: Federal Bureau of Investigations: http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/hate_crimes ^[82]

Intersex Society of North America: <http://www.isna.org/> ^[83]

Prison Library Project: <http://prisonlibraryproject.org> ^[84]

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The National PREA Resource Center: www.prearesourcecenter.org ^[86]

Sylvia Rivera Law Project: www.slrp.org ^[87]

TGI Justice: Transgender Gender Variant Intersex Justice: <http://www.tgijp.org/> ^[88]

Transgender Law and Policy Institute: <http://www.transgenderlaw.org/index.htm> ^[89]

Transgender Law Center: <http://transgenderlawcenter.org/> ^[90]

White House: <http://www.whitehouse.gov/lgbt> ^[91]

Williams Institute: <http://williamsinstitute.law.ucla.edu> ^[92]

Appendix D. Issues to Watch: The Impact of Non-Custodial LGBTI Developments on Corrections

Employment Rights: Federal and State Government

Obama Signs Executive Order On LGBT Job Discrimination

Jennifer Bendery
Huffington Post
July 21, 2014

President Barack Obama signed an executive order banning workplace discrimination against millions of lesbian, gay, bisexual, and transgender employees of federal contractors and the federal government.

http://www.huffingtonpost.com/2014/07/21/obama-gay-rights_n_5605482.html ^[93].

Maryland Senate Passes Gender Identity Bill, 32-15

John Riley
Metro Weekly
March 4, 2014

The Maryland Senate passed a bill Tuesday morning that prohibits discrimination in employment, housing, credit, and public accommodations based on a person's gender identity or expression, capping off an eight-year legislative fight to get such a measure passed in the upper chamber.

<http://www.metroweekly.com/poliglot/2014/03/maryland-senate-passes-gender-identity-bill-32-15.html> [94].

Roadcloud v. City of Philadelphia

Roadcloud v. City of Philadelphia, No. 13-00777, 2014 WL 43759 (E.D. Pa. Jan. 6, 2014)

An openly gay female corrections officer sued for discrimination based on gender, sexual harassment and a hostile work environment; claiming her supervising officer made continual disparaging remarks in front of other co-workers—including comments on her sexual orientation and sexual activity—and shamed her for not complying with gender norms.

Educational Institutions

Transgender and Gender Non-Conforming Students: Your Rights at School

National Center for Transgender Equality

April 2014

The United States Department of Education clarified that Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity. This will hopefully help prevent some LGBT youth from entering the juvenile justice system by providing avenues for advocacy within school systems.

http://transequality.org/Resources/KnowYourRightsSchools_April2014.pdf [95].

Transgender First-Grader Wins the Right to Use Girls' Restroom

Ed Payne

CNN

June 24, 2013

A transgender first-grader who was born a boy but identifies as a girl has won the right to use the girls' restroom at her Colorado school. The Colorado Rights Division ruled in favor of Coy Mathis in her fight against the Fountain-Fort Carson School District. Coy's parents had taken her case to the commission after the district said she could no longer use the girls' bathroom at Eagleside Elementary. In issuing its decision, the state's rights division said keeping the ban in place "creates an environment that is objectively and subjectively hostile, intimidating or offensive."

<http://www.cnn.com/2013/06/24/us/colorado-transgender-girl-school/index.html> [96].

Barring Transgender Student from Using Girls' Bathroom Violates Maine Law

Eugene Volokh

The Washington Post

January 30, 2014

Maine law bans discrimination in places of public accommodation based on "sexual orientation," which includes "gender identity or expression." The court held this means transgender people were entitled to use the restrooms appropriate to their gender identity, rather than their biological sex.

<http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/30/barring-transgender-student-from-using-girls-bathroom-violates-maine-law/?print=1> [97].

Religion

Transgender Priest Preaches at National Cathedral

NBC-4 Washington, DC

June 23, 2014

A transgender Episcopal priest made history Sunday with a sermon at the Washington National Cathedral. The Right Rev. Gene Robinson, the first openly gay Episcopal bishop, presided at the service, which was part of the cathedral's celebration of LGBT Pride Month. The Very Rev. Gary Hall, dean of the cathedral, says he hopes Partridge's appearance "will send a symbolic message in support of greater equality for the transgender community."

http://www.nbcwashington.com/news/local/Transgender-Priest-to-Preach-at-National-Cathedral-264101211.html?_osource=SocialFlowFB_DCBrand [98]

Arizona Governor Vetoes Bill on Refusal of Service to Gays

Fernanda Santos

The New York Times

February 26, 2014

Arizona, Gov. Jan Brewer (R-AZ) vetoed a bill that would have given business owners the right to refuse service to gay men, lesbians and other people on religious grounds.

http://www.nytimes.com/2014/02/27/us/Brewer-arizona-gay-service-bill.html?_r=0 [99].

Rights for Same Sex Couples

Ohio Ban on Gay Marriage Struck Down

The Associated Press

April 4, 2014

A federal judge says he will issue a ruling forcing Ohio to recognize out-of-state gay marriages.

http://www.cleveland.com/open/index.ssf/2014/04/ohios_ban_on_gay_marriage_to_b.html [100].

New Insurance Rights For Same-Sex Couples

The Associated Press

March 14, 2014

Addressing gay and lesbian concerns, the Obama administration moved to expand health insurance access for same-sex couples and close a loophole that threatened to leave some HIV/AIDS patients without coverage.

http://www.npr.org/templates/story/story.php?storyId=290121737&utm_medium=Email&utm_source=share&utm_campaign=storyshare [101].

Judge Deems Virginia's Same-Sex Marriage Ban Unconstitutional

Sarah Aarhun and Ben Brumfield

CNN

February 14, 2014

A federal judge in Virginia has struck down the commonwealth's ban on same-sex marriage as unconstitutional, according to court documents.

<http://www.cnn.com/2014/02/13/politics/virginia-same-sex-marriage-unconstitutional/index.html> [102]

Kansas House Passes Bill Allowing Refusal of Service to Same-Sex Couples

Ben Brumfield and Dana Ford

CNN

February 13, 2014

House Bill 2453 explicitly protects religious individuals, groups, and businesses that refuse services to same-sex couples, particularly those looking to marry.

<http://www.cnn.com/2014/02/13/us/kansas-bill-same-sex-services/index.html> [103]

U.S. Expands Legal Benefits, Services for Same-Sex Marriages

Evan Perez

CNN

February 10, 2014

The U.S. government expanded recognition of same-sex marriages in federal legal matters, including bankruptcies, prison visits and survivor benefits.

<http://www.cnn.com/2014/02/08/politics/holder-same-sex-marriage-rights/index.html> [104]

***United States v. Windsor*, 133 S. Ct. 2675 (2013)**

The Supreme Court's decision declared Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. In February, 2014, Attorney General Eric H. Holder extended the federal government's recognition of same-sex marriages to the 34 states that have not recognized same sex marriage. This ruling could affect visitation rights—especially conjugal visitation where allowed—for federal and state inmates. It could also affect federal benefits administered at the state level.

Appendix E. Sample Policies

We are providing a list of agency policies that are addressing the needs of LGBTI adult and youth in custody. These are not “model” policies and only represent the approaches of the particular agencies. For a copy of any of the policies not available online please email us at endsilence@wcl.american.edu [105].

Jail

Cook County. 2011. “Management of Inmates with Gender Identity Disorder,” No. 64.5.43.0.

Cumberland County Sheriff's Office. 2009. “Transgender Inmates,” No. D-243A.

Dane County Sherriff's Office. 2015. LGBTI and Gender Non-Conforming Intake and Housing” and No. 612.05.

Denver Sheriff Department. 2012. “Transgender and Gender-Variant Inmates,” http://thecrimereport.s3.amazonaws.com/2/28/d/1701/gray_transgender_prison_rape_pdf_attachment.pdf [106].

District of Columbia Department of Corrections. 2014. “Gender Classification and Housing,” Policy Number 4020.3E.

Harris County Sheriff's Office. 2014. “Lesbian, Gay, Bisexual, Transgender and Intersex,” Policy 413.

Kern County Sheriff's Office. 2014. “Searches of Transgender or Intersex Inmates.” Issue 14-51.

Santa Rosa County. 2014. "PREA LGBTI," General Order O-0008, <http://santarosasheriff.org/wp-content/uploads/2013/08/LGTBI-Policy.pdf> [107].

Prison

California Department of Corrections and Rehabilitation. 2013. *Operations Manual*, http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html [108].

District of Columbia Department of Corrections. 2011. "Gender Classification and Housing," No. 4020.3C, http://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC_PS_4020_3C_Gender_Classificationand_Housing_01112012_wsigg.pdf [109].

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Michigan Department of Corrections. 2010. "Gender Identity Disorders in Prisoners," No. 04.06.184, http://www.michigan.gov/documents/corrections/0406184_340784_7.pdf [112].

Minnesota Department of Corrections. 2007. "Evaluation and Placement of Transgender Offenders," No. 202.045, http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=202.045.htm [113].

Ohio Department of Rehabilitation and Correction. 2013. "Medical Legal Issues," No. 68-MED-09, http://www.drc.ohio.gov/web/drc_policies/documents/68-MED-09.pdf [114].

Oregon Department of Corrections. 2014. "Nonconforming Gender (Inmate)," Policy 291-210-0010, http://arcweb.sos.state.or.us/pages/rules/oars_200/oar_291/291_210.html [115].

Washington State Department of Corrections. 2012. "Health Services Management," No. DOC 600.000, <http://www.doc.wa.gov/Policies/default.aspx?show=600> [116].

Police Departments and Lock-ups

Boston Police Department. 2013. "Transgender Policy," Number SO 13-025.

Little Rock Police Department. 2013. "Interactions with Transgender, Intersex and Gender Non-Conforming Individuals," General Order 327.

Los Angeles Police Department. "Police Interactions with Transgender Individuals," Notice 1.2.

Miami Beach Police. "Transgender Interactions," SOP #050.

New York City Police Department. 2012. "Revision to Patrol Guide 208-05: Arrests General Search Guidelines," PG 208-05.

Juvenile

Alameda County Social Services Agency. 2007. "Department of Children and Family Services LGBTQ Policy," <http://pathwaytohome.org/adoption/LGBTQPolicyFinalapproved3-6-07.pdf> [117].

Colorado Department of Human Services Division of Juvenile Corrections. 2014. "Non-Discriminatory Services to Lesbian, Gay, Bisexual, Transgender, Questioning, and Intersex (LGBTQI) Juvenile." Policy S 13.9, <http://www.colorado.gov/cs/Satellite/CDHS-ChildYouthFam/CBON/1251647962462> [118].

Cook County Juvenile Detention Center. 2014. "Lesbian, Gay, Bisexual, Transgender, Questioning, Intersex (LGBTQI) Residents." Policy V5C11P02.

Kansas Juvenile Justice Authority. 2013. "Searches and Contraband Control," Section 12-103.

Massachusetts Department of Youth Services. 2014. "Prohibition of Harassment and Discrimination Against Youth," Policy 03.04.09.

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Appendix F. Training Matrices

| | | | | | | | |
|--|---|---|---|---|---|---|---|
| State Laws | X | X | X | X | X | X | X |
| Agency Policy | X | X | X | X | X | X | X |
| Operational Practices <ul style="list-style-type: none"> • Classification • Searches • Supervision of LGBTI offenders/youth | X | | | | | | |
| Medical and Mental Health Care <ul style="list-style-type: none"> • Treatment protocols | X | | | X | | | |
| Managing Vulnerable Inmates <ul style="list-style-type: none"> • Risks for LGBTI inmates/youth | X | X | X | X | X | X | X |
| Human Resource Issues <ul style="list-style-type: none"> • Unions • Collective bargaining | X | | X | | | | |
| Civil Liability | X | X | X | X | X | X | X |

2. Recommended Training for Youth

| Subject | Audience | | | |
|---|------------|------------|-------------|-------------|
| | Boys 10–15 | Boys 16–19 | Girls 10–15 | Girls 16–19 |
| Understanding LGBTI Youth <ul style="list-style-type: none"> • Definitions and terminology • Addressing myths about LGBTI inmates/youth Effective interventions: harassment | X | X | X | X |
| Commitment to Safety | X | X | X | X |

| | | | | |
|---|------------------------------------|---|------------------------------------|---|
| <ul style="list-style-type: none"> • Agency values • Available resources • What to expect • Agency policy | | | | |
| <p>Adolescent Development and Sexuality</p> <ul style="list-style-type: none"> • Appropriate activities • Healthy boundaries • Appropriate relationships • Sexually transmitted diseases • Healthy choices • LGBTIQQ • Sexual arousal (what to do) • Physical • Emotional • Cognitive • Gender differences • Hygiene | Only some portions of this section | X | Only some portions of this section | X |
| <p>Culture</p> <ul style="list-style-type: none"> • Adolescent culture • Agency culture • Bullying • Red flags • Religious beliefs • Values • Terminology/communication • Drugs • Diversity | Only some portions of this section | X | Only some portions of this section | X |
| <p>Victimization</p> <ul style="list-style-type: none"> • Prevention • Past victimization • Protecting oneself • Medical treatment | X | X | X | X |

Source URL: <http://info.nicic.gov/lgbti/?q=node/6>

Links:

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