

SAFE SPACE Policy Toolkit

INTRO

Protecting LGBTI Individuals in Custody and in the Workplace

Federal, state, and local agencies are now making efforts to come into compliance with the federal Prison Rape Elimination Act (PREA) and recently added protections for gender identity and expression in the workplace under New York State Human Rights Law. Indeed, great care should be exercised by agency leaders, policy makers and human resource professionals as they review, assess, and update existing protocols for protecting the civil rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals.[^]

This Toolkit is particularly intended to be used as a guideline for law enforcement and corrections agency personnel in their development of safe and inclusive protocols for LGBTI individuals, both in their custody and in their employ.

This Toolkit is also intended to inform LGBTI individuals, their advocates, and service providers about their rights and responsibilities while in custody or in the workplace.

Ultimately, OHR intends this Toolkit to encourage community conversation around the important issue of the safety and inclusion of LGBTI individuals in Tompkins County.

For Law Enforcement &
Corrections Agencies

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TOMPKINS COUNTY Office of Human Rights



120 W. Martin Luther King, Jr. Street
Ithaca, New York 14850
607.277.4080
humanrights@tompkins-co.org
www.tompkinscountyny.gov/humanrights

LGBTI Toolkit prepared by:
Karen W. Baer, Director of Human Rights
Xavier Rusk, Paralegal Aide
Rebecca Sims, Program and Outreach Specialist



[^]For purposes of compatibility with the PREA framework, this toolkit will appropriate the LGTBI terminology.



POLICIES FOR PROTECTING LGBTI INDIVIDUALS IN CUSTODY

Recognizing that Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) inmates are particularly vulnerable to certain types of assault, harassment, and prolonged isolation because their appearance or manner does not always conform to traditional gender expectations, the Prison Rape Elimination Act (PREA).¹ was signed into law in 2003. The Act charged the Department of Justice (DOJ) with gathering data on the incidence of prison rape.² After nine years of study and commentary by experts, the DOJ promulgated a comprehensive set of regulations implementing the Act in May 2012 that now apply to federal, state, and local law enforcement agencies.³

To follow is a guideline for developing a PREA-directive policy intended to provide law enforcement agencies with best practices for protecting the civil rights of LGBTI individuals in custody. Furthermore, bringing into focus a department's obligations under PREA is a prerequisite for developing best practices when it comes to protecting the civil rights of LGBTI law enforcement officers in the workplace.

A. INCLUDE LGBTI-RELATED DEFINITIONS

Although not mandated by PREA, providing department employees with LGBTI-related definitions can be helpful.

- **Sex** is biological and assigned at birth based on a person's sex organs; i.e., female or male.
- **Gender Identity** means how an individual feels inside, whether feminine or masculine, regardless of the person's biological sex assigned at birth; i.e., feminine or masculine.
- **Gender Expression** is how society views another's gender identity based on cues like clothing, haircut, voice, behaviors, or name.
- **Gender nonconforming** means a person whose appearance or manner does not conform to traditional societal gender expectations or with the person's sex assigned at birth.
- **Transgender** is a person who identifies and expresses their gender differently from what is traditionally expected based on the sex they were assigned at birth.
- **Transitioning** takes place when a person modifies their physical characteristics or gender expression to satisfy the standard of membership

in a gender other than the one they were assigned at birth. Some transgender people seek medical treatment, while others do not.

- **Sexual Orientation** means the internal experience that determines one's physical, emotional or other attraction to men, women, both (bisexual) or neither (asexual). Everyone has a sexual orientation.
- **Gay** refers to a sexual orientation toward people of the same gender; can be used as an umbrella term for men and women.
- **Lesbian** refers to a woman whose primary sexual orientation is toward people of the same gender.
- **Bisexual** refers to a person whose primary sexual orientation is toward people regardless of gender.
- **Asexual** is a sexual orientation characterized by not feeling sexual attraction for partnered sexuality.
- **Intersex** refers to persons who naturally develop primary and secondary sex characteristics that do not fit society's definitions of simply female or male.
- **Questioning** means a person who is exploring or unsure about their sexual orientation, gender identity and/or gender expression.

B. REQUIRE INDIVIDUAL ASSESSMENTS FOR PLACEMENT OF LGBTI INDIVIDUALS

PREA regulations require adult prisons and jails and juvenile detention facilities to screen individuals within seventy-two (72) hours of intake to assess the individual's risk for sexual victimization or abuse.⁴ This screening "shall consider, at a minimum . . . whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex or gender nonconforming."⁵ Agencies are then charged with using this screening information to "inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive."⁶ Safety determinations must be made on an individualized basis.⁷

PREA regulations also require agencies to make individualized housing and program placements for all transgender and intersex individuals.⁸ This includes assignment of transgender and intersex

individuals to male or female facilities.⁹ All such program and housing assignments must “be reassessed at least twice each year to review any threats to safety experienced by the inmate”¹⁰ and an individual’s “own views with respect to his or her own safety shall be given serious consideration” in these assessments.¹¹

1. Implement protocols that identify transgender and intersex individuals through respectful and affirming intake procedures.

Sample Language: “Transgender individuals may be identified during admission/intake based on:

- A statement that the person is transgender or is really a different sex than assigned at birth;
- A request to be called by a name that is not traditionally associated with the person’s perceived sex or sex assigned at birth; or
- Any statements in arrest reports/jail or court records indicating the person is transgender or that the police were unsure of the person’s sex.”

2. Implement protocols that trigger routine and individualized assessments for the placement and program assignments of transgender and intersex individuals.

Sample Language: “Transgender women must be considered for placement in women’s facilities and transgender men for placement in men’s facilities.”

3. Implement protocols requiring that individual assessments include a detainee’s sense of their own safety in different placement options (i.e., male vs. female facilities, general population, protective custody).

Sample Language: “A transgender or intersex individual shall be provided with a form or screening questionnaire to be conducted or filled out in private that will allow the person to select the following:

- A preferred name;
- A preferred pronoun;
- Where the person would feel safest being housed; and
- The sex of staff that the person would feel safest performing searches and/or observed urine collection.”

4. Implement protocols that forbid inquiries into an individual’s medical transition, genital characteristics, or surgical status unless necessary for a medical evaluation.

Sample Language: “Officers shall not conduct any searches to determine an individual’s sex.”

5. Eliminate protocols that mandate placement of transgender and intersex individuals based solely on a person’s genital characteristics, sex assigned at birth, or gender designation on state issued identification cards or driver’s licenses.

6. Eliminate protocols that determine facility, housing, work, or bed assignments solely on the basis of an individual’s actual or perceived LGBTI status.

C. CREATE CLEAR GUIDELINES FOR SEARCHES AND SUPERVISION OF TRANSGENDER INDIVIDUALS

All cross-gender pat, strip and cavity searches are subject to strict guidelines under PREA.¹² First of all, agencies are prohibited from conducting cross-gender strip and cavity searches of females, except in exigent circumstances or when performed by a medical practitioner.¹³ The PREA also prohibits any search that is conducted for the sole purpose of determining an individual’s genital status.¹⁴ Also required is training of staff to conduct professional and respectful searches of transgender and intersex persons.¹⁵ Agencies are required to ensure that individuals are able to shower and undress without being viewed by staff of the opposite gender identity and that staff of the opposite gender identity announce themselves prior to entering any housing area.¹⁶ Regardless of where transgender and intersex individuals are housed, any policy or practice that forces transgender or intersex individuals to shower in group shower settings violates the PREA.¹⁷

PREA offers three policy options for conducting searches of transgender and intersex individuals: (i) searches are conducted only by medical staff; (ii) searches are conducted by female staff only, especially given there is no prohibition on the pat-searches female staff can perform (except in juvenile facilities); or (iii) asking transgender or transitioning inmates/residents to identify the gender of staff with whom they would feel most comfortable conducting the search.¹⁸

1. Implement protocols that routinely provide for an individualized determination of cross-gender search protections.

Sample Language: “Accommodations for transgender and transitioning inmates and detainees shall be duly noted and assessed on a case-by-case basis.”

2. Implement protocols that provide clear guidance on searches of transgender individuals including prohibitions on any searches for the sole purpose of examining or determining a transgender or intersex person’s genital characteristics.

Sample Language: “Under no circumstances shall any search be conducted solely for the purpose of determining a detainee’s genital characteristics.”

3. Implement protocols that allow transgender or intersex individuals to identify upon intake the gender of the officer that they would feel safest searching them.

Sample Language: “If a prisoner has been identified as transgender or intersex, or if staff is uncertain, the prisoner shall be asked at intake to indicate a preference as to the gender of the officer that will perform searches. In the event a search is required, preferences will be honored, absent exigent circumstances.”

4. Implement protocols that permit all transgender and intersex individuals to access private showers.

Sample Language: “Transgender and intersex prisoners shall be given the option to shower alone or in private showers.”

5. Implement protocols that require officers to inform transgender and intersex individuals of their rights.

Sample Language: “Absent exigent circumstances, before performing any level of search of transgender individuals, officers shall inform them of the right to express a preference for the gender of the officer who will conduct the search.”

Sample Language: “Officers shall keep a record of the advisement request for any gender preference (including preferred name and pronoun), whether the request was granted, and if the request was denied, then for what reason.”

D. SET LIMITS ON THE USE OF PROTECTIVE CUSTODY

The PREA regulations strictly regulate the use of protective custody (separation from others to address a current need for protection). Under PREA prisoners cannot be placed in “involuntary segregated housing” unless (1) an assessment of all available alternatives is made AND (2) within 24-hours of involuntary segregation, a determination has been made that no alternative means of separation is available.¹⁹ Where such placement is made voluntarily, it should be considered permissible under the PREA standard.

Under the PREA regulations, an individual should not be placed in involuntary segregated housing for more than 30 days.²⁰ When prisoners are placed in protective custody, they must be given full access to “programs, privileges, education, and work opportunities to the extent possible.”²¹

The regulations also prohibit agencies from “plac[ing] LGBTI inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.”²²

1. Implement protocols that prevent the use of prolonged involuntary protective custody.

Sample Language: “In general, individuals in custody shall not be subjected to involuntary segregated housing for more than 30 days.”

2. Implement protocols to ensure the availability of programming and services to all individuals housed in restrictive settings including voluntary protective custody and involuntary protective custody.

Sample Language: “When prisoners are placed in protective custody they shall be given full access to programs, privileges, education, and work opportunities to the extent possible.”

3. Implement protocols that call for the routine assessment of any protective custody policy that limits or otherwise restricts access to programs, work assignments, educational opportunities and/or other privileges.

Sample Language: “The Department shall routinely assess any protective custody policy that limits or otherwise restricts access to programs, work assignments, educational opportunities and/or other privileges.”

4. **Eliminate any protective custody protocol that does not have clear time limits and procedures for documenting the use of protective custody for LGBTI prisoners.**
5. **Eliminate any protective custody protocol that allows for involuntary placement in protective custody or administrative segregation solely on the basis of one’s actual or perceived LGBTI status or gender expression.**

E. AVOID OVER-REACHING PROTOCOLS THAT HARM LGBTI INDIVIDUALS

Though the PREA regulations include vitally important protections for LGBTI individuals in custodial settings, agencies should be careful about adopting policies that harm LGBTI and other individuals as part of the larger effort to end prison sexual abuse.

1. **Implement protocols that permit transgender, gender non-conforming and intersex individuals to access grooming items and accessories consistent with their gender identity regardless of where they are housed.**

Sample Language: “Transgender women in men’s facilities shall have access to mailroom, property, clothing, commissary, and other items available to women in women’s facilities.”

2. **Implement protocols that make condoms, lubricant, and other safer sex items available to individuals in custody.**

Sample Language: “Condoms, lubricant, and other safer sex items shall be made available to individuals in custody; the use of such items shall not be considered evidence of sexual abusiveness or victimization.”

3. **Eliminate protocols that treat consensual contact between individuals in custody as sexual abuse. Under PREA consensual contact between two individuals in custody is not considered sexual abuse.**
4. **Eliminate protocols that limit “cross-gender” expression because such expression “invites” sexual assault.**

POLICIES FOR PROTECTING LGBTI EMPLOYEES

NEW RULES in New York State.²³ On January 19, 2016, New York Human Rights Law was amended to include greater protections to (i) ensure equal pay for women; (ii) combat sexual harassment in the workplace; (iii) end gender discrimination in employment; (iv) make reasonable work accommodations available for pregnant women; and (v) provide stronger protections for employees who are victims of domestic violence.

In an effort to comply with these newest State protections, and as part of an employment policy review process, it will be important for departments to introduce protocols that create sex- and gender-inclusive workplaces.

Effective LGBTI employment policies, in particular, are designed to create a safe and productive workplace environment. Departments should set forth guidelines to address the needs of transgender and gender non-conforming employees and clarify how the law should be implemented in situations where questions may arise about how to protect the legal rights or safety of all employees.

The following guidelines²⁴ do not anticipate every situation that might occur with respect to LGBTI employees and the needs of each employee must be assessed on a case-by-case basis. The policy objective is to ensure the safety and inclusion of LGBTI employees while maximizing workplace integration and efficiency.

A. INCLUDE LGBTI-RELATED DEFINITIONS

Providing definitions related to LGBTI individuals is helpful for department officials and employees.

- **Sex** is biological and assigned at birth based on a person’s sex organs; i.e., female or male.
- **Gender Identity** means how an individual feels inside, whether feminine or masculine, regardless of the person’s biological sex assigned at birth; i.e., feminine or masculine.
- **Gender Expression** is how society views another’s gender identity based on cues like clothing, haircut, voice, behaviors, or name.
- **Gender nonconforming** means a person whose appearance or manner does not conform to traditional societal gender expectations or with the person’s sex assigned at birth.

- **Transgender** is a person who identifies and expresses their gender differently from what is traditionally expected based on the sex they were assigned at birth.
- **Transitioning** takes place when a person modifies their physical characteristics and gender expression to satisfy the standard of membership in a gender other than the one they were assigned at birth. Some transgender people seek medical treatment, while others do not.
- **Sexual Orientation** means the internal experience that determines one’s physical, emotional or other attraction to men, women, both (bisexual) or neither (asexual). Everyone has a sexual orientation.
- **Gay** refers to a sexual orientation toward people of the same gender; can be used as an umbrella term for men and women.
- **Lesbian** refers to a woman whose primary sexual orientation is toward people of the same gender.
- **Bisexual** refers to a person whose primary sexual orientation is toward people regardless of gender.
- **Asexual** is a sexual orientation characterized by not feeling sexual attraction for partnered sexuality.
- **Intersex** refers to persons who naturally develop primary and secondary sex characteristics that do not fit society’s definitions of simply female or male.
- **Questioning** means a person who is exploring or unsure about their sexual orientation, gender identity and/or gender expression.

1. Implement protocols in the workplace that promote and protect a discrimination-free workplace.

It is unlawful and a violation of New York State Human Rights Law to discriminate in any way against a job applicant or employee based on that individual’s actual or perceived sex, sexual orientation, gender identity, or gender expression. It is also unlawful to retaliate against any individual objecting to or for supporting enforcement of legal protections against discrimination in employment.

Sample Language: “The Department is committed to creating a safe and inclusive work environment for LGTBI and gender non-conforming employees.”

Sample Language: “The Department will not tolerate discrimination or retaliation based on sex, sexual orientation, gender identity, gender expression, or any other characteristics protected by federal, state, or local law.”

Sample Language: “Any incident of discrimination, harassment, or violence based on sex, sexual orientation, gender identity or gender expression shall be given immediate and effective attention, including, but not limited to, investigating the incident, taking suitable corrective action, and providing employees and staff with appropriate resources and training. Any incident of retaliation for an employee’s participation in the investigation process shall be treated likewise.”

2. Implement protocols in the workplace that protect the privacy of LGBTI individuals.

LGBTI employees have the right to discuss their sex, sexual orientation, gender identity, or gender expression openly, or to keep that information private. By law, an LGBTI employee gets to decide when, with whom, and how much to share their private information. Unless consent is expressly given, divulging an employee’s LGBTI status (such as the sex they were assigned at birth) can constitute a violation of confidential medical information under state and federal privacy laws.

Sample Language: “Management, human resources staff, and co-workers shall not disclose or discuss information that may reveal an employee’s sexual orientation, gender identity, or gender non-conforming behaviors to others.”

Sample Language: “An employee’s sexual orientation or gender identity information shall be deemed personal and confidential and shall only be shared with the employee’s consent or with co-workers who truly need to know in order to do their jobs.”

3. Implement protocols for promptly updating official records with updated transgender status information upon the request of transgender individuals.

A transgender employee has the right to be addressed by the name and pronoun corresponding to the employee’s gender identity. Certain types of records, like those relating to



payroll and retirement accounts, may require a legal name change before the person’s name can be changed. But most records can be changed to reflect a person’s preferred name without proof of a legal name change.

Sample Language: “Upon the request of a transgender employee, personnel files and other official records (including ID documents and nametags) shall be promptly updated to reflect a name, pronoun, or gender change.”

Sample Language: “As quickly as possible, the agency shall make every effort to update any photographs at the transitioning employee’s workplace so the transitioning employee’s gender identity and expression are represented accurately.”

Sample Language: “If a transgender or transitioning employee has questions about their agency records, ID documents, nametags, or uniforms, the employee should contact _____.”

4. Implement protocols to ensure transgender employees are addressed by their preferred name and pronoun.

An employee has the right to be addressed by the name and pronoun of their choosing and in accordance with the employee’s gender identity. A court-ordered name or gender change is not required. The intentional or persistent refusal to respect an employee’s gender identity (for example, intentionally refusing to address an employee by one’s preferred name or pronoun) constitutes gender harassment and is a violation of New York State Human Rights Law.

Sample Language: “Refusing to address transgender or transitioning employees by their preferred name or pronoun shall be a violation of this policy.”

5. Implement protocols that protect LGBTI employees responsible for sex-specific job assignments.

Based on New York State Human Rights Law, departments are mandated to assign sex-specific job tasks in accordance with an employee’s gender identity.

Sample Language: “In the case of transgender employees, sex-specific job assignments shall be classified and assigned reasonably in a manner consistent with the gender identity of the employee, not their sex assigned at birth.”

6. Implement an OHR Balancing Test for Accommodations Based on Sexual Orientation

At the time of this writing, no legal precedent or statutory mandate was found that significantly speaks to the issue of whether lesbian, gay, bisexual, or gender non-conforming officers also enjoy any express privilege or protection based on their sexual orientation when it comes to sex-specific job assignments. For example, is a department obligated to grant a lesbian, gender non-conforming officer’s request to search male detainees only? Or to accommodate a bi-sexual officer’s request to perform no searches at all? Due to the lack of guidance on this issue, OHR provides departments with the following measured approach in dealing with orientation-based requests arising in the workplace.

Sample Language: “When it comes to sex-specific job assignments related to search and custody protocols, the Department shall grant, on a case-by-case basis, any reasonable request for accommodation made by lesbian, gay, and bisexual employees based on their sexual orientation.”

Sample Language: “No preference or request shall be deemed reasonable when it —

- (i) materially violates PREA search and custody mandates;
- (ii) occurs under exigent circumstances;
- (iii) conflicts with the sex or gender preferences of LGBTI individuals in custody;
- (iv) limits equal opportunity for LGBTI employees in terms of salary and promotion assessments; or
- (v) creates an undue burden on the Department.”

7. Implement protocols that allow transgender employees to use restrooms and locker rooms corresponding to their gender identity.

Sample Language: “Employees shall have access to the restroom and locker room corresponding to their gender identity. Any employee who has a need or desire for increased privacy, regardless of the underlying reason, shall be provided access to a single-stall restroom or alternative changing area.”

8. Implement gender-neutral dress codes.

Transgender and gender non-conforming employees shall have the right to comply with dress codes in a manner consistent with their gender identity or gender expression.

Sample Language: “The Department shall not have dress codes that restrict employees’ clothing or appearance on the basis of gender.”

Sample Language: “All employees may behave, wear clothing, and exhibit hair styles consistent with their gender identity.”

Sample Language: “Department dress codes and grooming standards shall apply to all employees, regardless of their gender identity or gender expression.”

Sample Language: “The Department does not tolerate conduct, harassment, or retaliation based on an employee’s sex or gender non-conforming identities or expressions.”

9. Implement protocols that protect transgender employees transitioning on the job.

A designated human resource specialist should work with each transitioning employee individually to ensure a successful transition. Best practices include developing a gender plan with specific guidelines appropriate to an organizational structure, making sure to address:

- (i) Who is charged with helping a transitioning employee manage the workplace transition;
- (ii) What are the department’s expectations for staff, transitioning employees, and any existing LGBTI employee resource group in facilitating a successful workplace transition;
- (iii) What is the general procedure for implementing transition-related workplace changes, such as adjusting personnel and administrative records, and developing an individualized communication plan to share with coworkers and clients, if the LGBTI employee wishes to do so; and
- (iv) Are human resources staff trained to assist transitioning employees regarding changes to benefits, if any, and what benefits are currently available to transitioning employees (e.g. healthcare coverage, benefits deposit/payroll, employee assistance programs, or other benefits)?

Sample Language: “All employees who transition on the job shall expect the support of management and human resources staff.”

10. Provide health insurance benefit packages that don’t discriminate against LGBTI employees.

Sample Language: “The Department shall only enter into health insurance contracts that include coverage for domestic partnerships and transition-related care.”

ENDNOTES

- ¹ Prison Rape Elimination Act of 2003 (PL 108-79), codified at 42 U.S.C. §§ 15601 et. seq.
- ² For data collected, see Prison Rape Elimination Act (Sexual Violence in Correctional Facilities), Bureau of Justice Statistics (last visited November 18, 2013), available at <http://www.bjs.gov/index.cfm?ty=tp&tid=20> (listing Bureau of Justice Statistics data gathered since the act’s passage).
- ³ Nat’l Prison Rape Elimination Comm’n., Nat’l Prison Rape Elimination Comm’n Rep. 1 (June 2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.
- ⁴ 28 C.F.R. § 115.41(b); 28 C.F.R. § 115.241 (b); 28 C.F.R. § 115.341(a).
- ⁵ 28 C.F.R. § 115.41(d)(7).
- ⁶ 28 C.F.R. § 115.42 (a).
- ⁷ 28 C.F.R. § 115.42 (b).
- ⁸ 28 C.F.R. § 115.42 (c) (“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.”).
- ⁹ Id.
- ¹⁰ 28 C.F.R. § 115.42 (d).
- ¹¹ 28 C.F.R. § 115.42 (e).
- ¹² 28 C.F.R. § 115.15 (b) and 28 C.F.R. §115.215(b).
- ¹³ 28 C.F.R. § 115.15 (a).
- ¹⁴ 28 C.F.R. § 115.15 (e).
- ¹⁵ 28 C.F.R. § 115.15 (f).
- ¹⁶ 28 C.F.R. § 115.15 (d).
- ¹⁷ 28 C.F.R. § 115.42 (f).
- ¹⁸ PREA Resource Center, “Frequently Asked Questions,” <http://www.prearesourcecenter.org/faq#n1069>.
- ¹⁹ 28 C.F.R. § 115.43 (a).
- ²⁰ 28 C.F.R. § 115.43 (c).
- ²¹ 28 C.F.R. § 115.43 (b).
- ²² 28 C.F.R. § 115.42 (g).
- ²³ Article 15 of the Executive Law of the State of New York, §§ 290 – 301. <http://law.justia.com/codes/new-york/2014/exc/article-15/296>.
- ²⁴ Provisions of this model policy is promoted by the Transgender Law Center and based on a number of existing policies including those adopted by major employers like Ernst and Young, Chevron, and the federal Office of Personnel Management, as well as guidelines and model policies created by the California Safe Schools Coalition, and the Human Rights Campaign.