



Lancaster County Corrections
3801 West O Street
Lincoln, NE 68528

June 29, 2017

Dear Jail Administrator:

AMERICAN CIVIL
LIBERTIES UNION of
NEBRASKA
FOUNDATION

134 S. 13TH ST. #1010
LINCOLN, NE 68508
T/ 402.476.8091
F/ 402.476.8135

LEGAL HELP LINE
1.855.557.ACLU (2258)

www.aclunebraska.org

The ACLU of Nebraska is a non-profit, non-partisan organization dedicated to promoting, protecting, and preserving civil rights and civil liberties guaranteed to all Nebraskans by the United States and Nebraska Constitutions. Such liberties include the rights of all inmates in Nebraska, no matter sexual orientation or gender identity. As such we are writing to every county jail facility with helpful information about the state of the law for transgender people who are behind bars.

Our office has received several intakes from transgender people and their families with concern regarding their rights in jail. Nationwide, transgender people are overrepresented in the criminal justice system³⁹¹. It is important to ensure each individual in your custody is treated equally, and granted all protection afforded to them by the law.

BACKGROUND AND DEFINITIONS:

In this letter, we will be referring to lesbian, gay, bisexual, transgender, queer and intersex people with the acronym "LGBTQI." The primary focus is providing you with information about transgender prisoners and detainees, but there are references to those other categories in many of the sources cited below.

What is being "transgender" or "intersex?" Leading public health experts recognize that a transgender person is an individual who may identify as a different gender as the one they were assigned at birth.³⁹² This means that although a transgender person may anatomically be classified as a man, they themselves identify as a woman, or vice versa. An intersex person is one whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female.

Medical and mental health experts can be used by your facility to verify the prisoner's "gender dysphoria" or "disorder of sex development." These labels are not favored by the LGBTQI population, but courts use these terms while upholding the constitutional obligation to provide care for these prisoners.

³⁹¹ <http://lgbtmap.org/policy-and-issue-analysis/criminal-justice-trans>

³⁹² <https://www.cdc.gov/lgbthealth/transgender.htm>

Because of the unique nature of these people's situation, there are special regulations and state and federal laws in place to ensure that transgender individuals are treated fairly during intake screening and provided the required medical materials for the duration of their sentence at any facility.

A primary resource for your facility is the Prison Rape Elimination Act (PREA), which provides specific regulations designed as protections for transgender detainees and prisoners.³ These regulations include specific procedures regarding any limits to cross-gender searches and screening that may arise during the initial assignment process.

HOUSING:

The National Inmate Survey found that 24.1% percent of transgender individuals experience violence from other inmates in the same housing unit, whereas only 2.0% of other inmates experience that same.⁴ In order to minimize the amount of physical and sexual violence transgender inmates may receive from other inmates correct housing assignments are imperative.

We frequently hear that transgender people are put into solitary confinement because the jail doesn't know what else to do with them to keep them safe. Alternately, we hear the jail puts the transgender person in a housing unit according to their external genital anatomy. Both practices violate the law.

The National PREA Resource Center put it this way: "Does a policy that houses transgender or intersex inmates based exclusively on external genital anatomy violate Standard 115.42(c) & (e)? Yes. In deciding whether to house 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."⁵

PREA regulations list the following screening factors to be considered within the first 72 hours of a prisoner's arrival at your facility as your staff is deciding how to assign the person to housing:

- 1) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
- 2) Whether the inmate has previously experienced sexual victimization;
- 3) The inmate's own perception of vulnerability.⁶

³ <https://www.aclu.org/files/assets/prea/012014-ACLU-PREA-Regulations.pdf>

⁴ <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=278>

⁵ <https://www.prearesourcecenter.org/node/3927>

⁶ <https://www.aclu.org/files/assets/prea/012014-ACLU-PREA-Regulations.pdf>

The use of prolonged restricted housing or room restriction or segregation is not an appropriate way to keep a transgender prisoner safe because long periods in isolation can be psychologically damaging to the individual. Research has shown that “placement in solitary confinement has documented negative outcomes for incarcerated people, including physical and mental health risks, such as higher risk of suicide attempt.”⁷ This is why there have been a number of successful lawsuits filed by transgender people who were kept in segregation in a mistaken effort to comply with PREA.

The Department of Justice has also forbidden use of restrictive housing solely because the person is transgender. Their guidance from January 2016 states “Inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations should not be placed in restrictive housing solely on the basis of such identification or status. When an inmate who is LGBTI or a gender nonconforming inmate faces a legitimate threat from other inmates, correctional officials should seek alternative housing, with conditions comparable to those of general population to the extent possible.”⁸

Your facility should have a written policy providing that a transgender prisoner will be individually examined upon intake for a case-by-case basis determination of whether they should be housed with the same gender they identify with. You should ensure there is at least one staff member who has been trained to specifically understand and work with a transgender prisoner. Housing decisions ultimately will be made on the factors above and solitary confinement should not be the default solution.

MEDICAL CONCERNS:

Transgender individuals require special medical and health care that other inmates may not. Most commonly, a transgender person will require hormone treatment or prescriptions that will support their gender identity.

The law is clear: transgender detainees and prisoners are constitutionally entitled to proper medical care if they have been diagnosed with Gender Dysphoria (the clinical term used by psychiatrists).

Because of the uniqueness of their medical needs, the Bureau of Prisons requires each transgender individual will receive individualized medical care and treatment while incarcerated; once an individual has been medically assessed and diagnosed with

⁷ <http://lgbtmap.org/policy-and-issue-analysis/criminal-justice-trans>

⁸ <https://www.justice.gov/archives/dag/file/815551/download> (page 102)

gender dysphoria they must be allowed access to any hormone or other medical treatment required for that individual.⁹

Despite the clear state of the law, we hear complaints from transgender people that they have not received their hormone support while in jail. The National Center for Transgender Equality reported in 2015 that nearly one in four transgender people who were taking hormones outside of jail were denied their medication while in prison, even though the court has ruled that disrupting a transgender individuals regular schedule of hormones should not be done unless there is clear and documented medical reason to do so.

Courts have been ruling in favor of transgender prisoners seeking hormone support all across the country, including in Nebraska and the Eighth Circuit (the federal circuit governing Nebraska).¹⁰

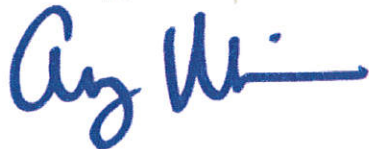
You should review this issue with your medical staff to ensure on-site or contract medical providers are familiar with the prescriptions necessary for a transgender prisoner to ensure seamless medical support.

CONCLUSION

Those in your facility have their life and wellbeing in your hands. We urge you to be proactive in reviewing the resources provided by the Department of Justice and the National PREA Resource Center to ensure transgender individuals are treated with respect and afforded their legal rights to humane treatment while in custody.

We always appreciate the opportunity to work proactively with government leaders whenever possible rather than having to resort to lengthy and costly civil right litigation. In conclusion thank you for your public service and consideration of this important matter. We are happy to be helpful if you have any follow up questions or concerns.

Sincerely,



Amy A. Miller
Legal Director

⁹ https://www.bop.gov/resources/pdfs/trans_guide_dec_2016.pdf

¹⁰ http://www.omaha.com/news/nebraska/nebraska-agrees-to-treat-transgender-prisoner-who-filed-lawsuit/article_42d4c2bc-c11a-540c-82e4-248ce792b63b.html