



they include specific protections for transgender prisoners. With transgender rights frequently the focus of national news reports, it is a good time to look at issues faced by those in custody.

According to the National Transgender Discrimination Survey, 16 percent of transgender adults have been in prisons or jails, while just 2.7 percent of all adults have been in prison, and 10.2 percent of all adults have been under any kind of criminal justice supervision at all, including probation. Transgender people, especially those in lower-income brackets and members of minority groups, report facing disrespect, harassment, discriminatory arrests, and physical and sexual assault by law enforcement personnel at very high rates.

# TRANSGENDER AND BEHIND BARS

BY PETER CLEARY, ESQ.

We've all heard (or even told) the tasteless jokes regarding prison showers; they have been in circulation for decades. However, as officers of the court, we know that prison rape and the treatment of members of the LGBT community in our nation's jails and prisons are most definitely not laughing matters.

In 2003, Congress passed the Prison Rape Elimination Act (PREA) to address the widespread problem of sexual assault and harassment in prisons, jails, police lock-ups, community corrections facilities and immigration detention centers. In May 2012, after nearly a decade of study, the U.S. Department of Justice issued final regulations to implement PREA. These regulations are known as the PREA Standards. The PREA Standards apply at the federal, state and local levels;

The U.S. Constitution requires that prisons and jails protect prisoners from violence at the hands of other prisoners and staff. If prison officials do not uphold this duty to protect, they are in violation of the Eighth Amendment of the U.S. Constitution's prohibition on cruel and unusual punishment. For example, in a case involving the repeated rape and beating of a transgender prisoner by other prisoners, the U.S. Supreme Court held that prison officials cannot be deliberately indifferent to the sexual abuse of transgender prisoners. *Farmer v. Brennan*, 511 U.S. 825 (1994).

Furthermore, in *Green v. Hooks*, 6:13-cv-17, 2013 WL 4647493, (S.D. Ga. Aug 29, 2013), The court held that allegations that defendants were

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aware that the transgender plaintiff feared for her life and that “prison is dangerous for transgender inmates,” stated a plausible case of deliberate indifference. In *Lojan v. Crumbsie*, 12 CV. 0320 LAP, 2013 WL 411356, (S.D.N.Y. Feb. 1, 2013) the court held that mere knowledge that the plaintiff was transgender was sufficient to put prison officials on notice that she was susceptible to physical attack.

### Housing Issues

Jails and prisons, as a rule, separate prisoners by sex; this is almost always based on a prisoner’s external genital characteristics or assigned sex at birth, regardless of the prisoner’s gender identity or presentation. However, the PREA Standards require prisons and jails to make individualized housing and program placements for all transgender and intersex prisoners; this requirement applies when assigning them to male or female facilities.

Staff also must consider housing and program assignments at least twice a year to review any threats to safety experienced by the prisoner, and they must take into account a prisoner’s own view of his/her safety. The PREA Standards also make clear that staff cannot make housing or program placements based solely on a prisoner’s LGBT status.

Many correctional facilities house transgender prisoners in long-term segregation, claiming they are doing so to protect the prisoners from violence. Prisoners who are placed in administrative segregation are often kept in their cells for nearly 24 hours each day and cannot participate in educational classes, employment and other programming available to most other inmates. Although jails have a lot of control when it comes to the decision to put prisoners in administrative segregation, prisoners do have some protections. The PREA Standards do not allow staff to place prisoners in administrative segregation against their will, unless they have found — within the first 24 hours of involuntary segregation — that there is no other way to keep the prisoner safe.

### Medical Care Issues

In addition to issues of physical safety, transgender inmates have special medical needs that pose significant constitutional and logistical issues.

Thanks to the exhaustive legal research done by the ACLU’s National Center for Transgender Equality, the Eighth Amendment requires prisons to provide adequate health care for prisoners’ serious medical needs. A staff member of the prison or an outside contractor violates the Constitution by

causing a prisoner significant injury or unnecessary and wanton infliction of pain (*see Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002)), by exposing a prisoner to a substantial risk of future harm by denying the prisoner medical treatment or offering care that is so incompetent it amounts to no care at all. *See Edwards v. Snyder*, 478 F.3d 831, 832 (7th Cir. 2007). *See Also Soneeya v. Spencer*, 851 F. Supp. 2d 228, 248 248 (D. Mass. 2012.).

According to the ACLU, courts have consistently found that gender dysphoria (GD) presents a serious medical need that may require treatment in order to comply with the Eighth Amendment. *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (“We assume for purposes of this appeal that transsexualism constitutes a serious medical need.”); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995) (prison officials must provide treatment to address the medical needs of transsexual prisoner); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987) (recognizing transsexualism as a serious medical need that should not be treated differently than any other psychiatric disorder); *Phillips v. Michigan Dep’t of Corrections*, 731 F. Supp. 792, 799 (W.D. Mich. 1990) (complete refusal by prison officials to provide a person with GD with any treatment at all would ground an Eighth Amendment claim).

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The ACLU also notes that many transgender prisoners struggle to get prison medical staff to diagnose them with gender dysphoria.

In addition, the Constitution does not grant a prisoner his or her choice of treatment for GD, and more often than not, a court will defer to the medical judgment of prison health care providers. *See Briones v. Grannis*, CV 09-08074-VAP(VBK), 2010 WL 3636139, at \*6 (C.D. Cal. Sept. 14, 2010) (failure to provide transgender prisoner with the specific type of hormone treatments she

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requested did not constitute an Eighth Amendment violation).

The ACLU notes that, while prisoners may not be able to receive the exact medical treatments they prefer, medical treatment for prisoners diagnosed with GD should be consistent with accepted medical standards regarding the treatment of

GD in general. *See Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) (“[M]edical treatment may so deviate from the applicable standard of care as to evidence a physician’s deliberate indifference.”); *Estate of Cole v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996) (Eighth Amendment violation where treatment represents “such a substantial departure from accepted professional judgment, practice, or

standards as to demonstrate that the person responsible did not base the decision on such a judgment”); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (Eighth Amendment guarantees medical care “at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards”).

The ACLU has found that courts have begun to interpret this standard as requiring that prisoners who are already undergoing hormone therapy for GD at the time of incarceration cannot be abruptly taken off such treatment unless there is a clear medical reason for doing so. *See e.g. De'Lonta*, 330 F.3d at 634-35; *Wolfe v. Horn*, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001); *Phillips*, 731 F. Supp. at 800 (“Taking measures which actually reverse the effects of years of healing medical treatment ... is measurably worse [than failing to provide such treatment in the first place.]”)

In summary, although some legal protections for transgender prisoners do exist, the inadequate implementation of these protections, as well as the strong bias that remains against transgender people, make today’s prisons complicated and - in many cases - dangerous environments for transgender prisoners.

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