



How the Prison Rape Elimination Act Helps LGBT Immigrants in Detention

By Sharita Gruberg April 2, 2014

More than a decade after Congress passed the Prison Rape Elimination Act, or PREA,¹ the U.S. Department of Homeland Security, or DHS, published standards to prevent, detect, and respond to sexual abuse and assault in immigration detention facilities.² A congressional mandate requires Immigration and Customs Enforcement, or ICE, to detain 34,000 immigrants every day who may be subject to removal under immigration law.³ The 249 facilities⁴ in which ICE holds immigrants are currently covered by a patchwork of standards,⁵ and prior to the establishment of the PREA standards in March, no one standard bound all facilities.⁶

Protection from sexual abuse in immigration detention is particularly important for lesbian, gay, bisexual, and transgender, or LGBT, individuals as they are among the most vulnerable to sexual abuse in confinement.⁷ DHS introduced PREA standards in early March to establish a “zero tolerance standard” for rape and to protect immigrants in detention facilities from sexual abuse.⁸ These standards are an important step toward protecting immigrants, but further reforms are still needed.

Sexual assault in immigration detention

Immigrants in detention facilities are particularly vulnerable to sexual abuse due to their isolation, the fact that they are in the custody of the agency that determines whether they can stay in or are deported from the United States, and in the case of asylum seekers, the trauma they may have faced in their country of origin.⁹ Olga Tomchin, a Soros justice fellow at the Transgender Law Center, described the particular vulnerability of transgender immigrants in detention:

Detained transgender immigrants, including our clients, frequently experience such intolerable conditions in ICE custody that they desperately agree to give up their cases and risk persecution and death after deportation rather than remain in solitary one day longer. ICE is clearly incapable of detaining trans people with even minimum levels of dignity and safety and thus must no longer detain trans immigrants.¹⁰

Prior to DHS's creation of PREA standards, investigations into sexual abuse in immigration detention from both the government and from outside organizations have found high incidence of abuse, as well as inadequate reporting and investigation mechanisms.

The American Civil Liberties Union found that 200 allegations of sexual abuse in immigration detention facilities have been reported to government officials since 2007.¹¹ A recent report from the Government Accountability Office, or GAO, on sexual abuse in immigration detention found 215 allegations of sexual assault between 2010 and 2012.¹² It also indicated that reports of sexual assault in immigration detention facilities were not properly investigated, with only 7 percent of them substantiated.

The National Immigrant Justice Center filed a mass civil rights complaint with DHS in 2011 that reported incidents of sexual assaults against LGBT immigrants in detention facilities, including the sexual assault of one individual by a guard while she was in solitary confinement. She was assaulted again in the same facility three months after she was granted withholding of removal, which allows her to temporarily remain in the country without risk of deportation.¹³ A Freedom of Information Act request conducted by the Center for American Progress revealed nearly 200 reports of abuse against LGBT immigrants in detention since 2008, including numerous reports of sexual assault and sexual harassment.¹⁴

The Prison Rape Elimination Act

In response to the disturbing rate of sexual assault in detention, Congress unanimously¹⁵ passed the Prison Rape Elimination Act¹⁶ in 2003. The law's purpose was to "provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape."¹⁷ PREA created the National Prison Rape Elimination Commission to draft national standards, which were published in June 2009, to prevent, detect, and punish prison rape.¹⁸ In its report on sexual abuse in confinement, the commission found high rates of sexual abuse in prisons and significantly higher rates of sexual abuse against gay prisoners than against heterosexual prisoners, highlighting the particular vulnerabilities immigrants had to sexual assault in immigration detention facilities.¹⁹ In 2012,²⁰ the U.S. Department of Justice, or DOJ, took the commission's draft standards and published a final rule to prevent, detect, and respond to prison rape.²¹

Importantly, the commission's draft standards were not limited to confinement facilities under DOJ's jurisdiction.²² In his May 17, 2012, memorandum, "Implementing the Prison Rape Elimination Act," President Barack Obama clarified that in addition to the DOJ, all federal confinement facilities must work with the attorney general to create rules to prevent, detect, and respond to sexual abuse in confinement facilities.²³ As a result of this memorandum and direction in the Violence Against Women Reauthorization Act of 2013, DHS was required to publish a final rule that adopted national standards for the detection, prevention, reduction, and punishment of sexual abuse in immigration detention facilities.²⁴

U.S. Department of Homeland Security's PREA standards

On December 6, 2012, DHS opened its proposed PREA standards for public comment.²⁵ In response, a coalition of LGBT organizations submitted comments on “protecting lesbian, gay, bisexual, transgender, intersex, and gender nonconforming people from sexual abuse and harassment in immigration detention.”²⁶ On March 7, 2014, 15 months after issuing the draft standards, DHS published its final standards.²⁷ The final standards include many important protections for LGBT immigrants in detention facilities that will apply to immigrants in DHS-owned facilities and to ICE headquarters within 60 days of publication. However, it is unclear when, if ever, they will apply to contract facilities run by private companies—such as the Corrections Corporation of America and the GEO Group, Inc.—as well as to the bed space rented from local or county facilities, which house the majority of immigrants in DHS custody.²⁸ ICE houses immigrants in eight ICE-owned facilities and seven detention facilities it contracts with private companies; 52 percent of the annual detainee population is housed in space contracted with state and local government facilities.²⁹ The standards require that any “new contracts, contract renewals or substantive contract modifications” comply with these standards, but unfortunately, most of DHS’s contracts have autorenewals or will not be up for renewal for decades.³⁰ In other words, many immigrants in DHS custody are housed in facilities that will never be required to comply with the PREA standards. Despite these limitations, the standards include some important protections, detailed in the following sections, and they should be enforced in all facilities that DHS uses to detain immigrants.

Zero-tolerance policy for sexual abuse

The PREA standards require DHS to have a written zero-tolerance policy toward all forms of sexual abuse, and each facility the standards cover is required to have a written policy mandating zero tolerance and an outline of the facility’s approach to preventing, detecting, and responding to inappropriate conduct. Coordination of reporting requirements is a critical component of addressing sexual assault in immigration detention facilities, since the GAO’s review found that 40 percent of allegations were never reported to ICE headquarters by ICE field offices.³¹ While written policies and procedures are an important first step, it is more important that the policies are strictly adhered to and that facilities actually practice zero tolerance.

For LGBT immigrants in particular, an important standard is the one that includes voyeurism by a staff member, contractor, or volunteer as a form of sexual abuse. The prohibition of voyeurism protects immigrants in detention from inappropriate visual surveillance, such as requiring detainees to expose their buttocks, genitals, or breasts for reasons unrelated to official duties. DHS’s inclusion of voyeurism in the definition of sexual abuse was an important change made to the draft policy in order to capture the full scope of prohibited behavior.

Safe placement standards

The standards prohibit making placement decisions for transgender immigrants solely based on identity documents or physical anatomy. Under PREA, facility placement decisions will be made by considering a variety of factors, including individuals' gender self-identification, health, safety needs, and the advice of a medical or mental health practitioner. For transgender women, who are frequently housed among men simply because of their assigned sex at birth, this standard is an important safeguard.³² Without it, they are 13 times more likely to be at risk of sexual assault.³³ Additional risks transgender women face when placed in male facilities include being required to shower with men,³⁴ being forced to strip naked in front of men, and being subjected to harassment by guards because of their transgender identity.³⁵ When placement in a detention facility is unavoidable, transgender immigrants should be placed in facilities based on their personal gender identification. This standard moves toward meeting this goal by taking self-identification into consideration, rather than solely relying on assigned sex at birth. However, it falls short of fully relying on self-identification in placement decisions.

Another PREA standard that considers the particular vulnerability of LGBT immigrants in detention facilities is the one that includes an immigrant's LGBT status in risk assessments. DHS uses a Risk Classification Assessment, or RCA, to evaluate potential vulnerabilities of apprehended individuals, and the assessment determines whether detention, custody under alternatives to detention, or supervised release is preferable.³⁶ This standard illustrates DHS's recognition that LGBT immigrants are at heightened risk of sexual abuse in immigration detention facilities. Unfortunately, perceived LGBT status is not included in the risk assessment. Immigrants who are perceived as being LGBT are at as much risk of being targeted for abuse as those who identify as LGBT.³⁷

Furthermore, commenters expressed concern³⁸ that since vulnerable groups such as LGBT people are disproportionately at risk of sexual abuse in detention,³⁹ they should only be detained in extraordinary circumstances and should be placed in alternatives to detention—ranging from community-monitoring programs to monitoring through ankle bracelets—whenever possible. Unfortunately, Congress's bed quota has limited DHS's discretion in deciding whether vulnerable immigrants should be placed in alternatives to detention rather than in detention facilities.⁴⁰ DHS Secretary Jeh Johnson's recent testimony before Congress, in which he said he sees the 34,000-bed requirement as meaning that we should maintain the capability to detain 34,000 individuals but not that those individuals necessarily have to be detained, indicates an encouraging shift toward placement decisions based on RCAs rather than on arbitrary quotas.⁴¹

Standards on training and searches

Cross-gender pat-down searches are prohibited for women except in exigent circumstances, and cross-gender strip searches and visual body cavity searches are prohibited for both men and women except in exigent circumstances. This standard aims to protect immigrants from inappropriate physical contact from guards. In consideration of the particular forms of sexual abuse that transgender people in detention face—described in the previous section—searching or physically examining a detainee for the sole purpose of determining the detainee’s gender is prohibited. This standard prioritizes gender self-identification and protects the dignity of transgender immigrants.

In addition to search protections, the standards include provisions that require staff to be trained on appropriate ways to interact with LGBT people, which, until the PREA standards were applied, was not required in immigration detention facilities. Law enforcement staff must be trained on how to appropriately conduct pat-down searches of transgender detainees, and employees, contractors, and volunteers must be trained on how to communicate effectively and professionally with LGBT detainees.

Reporting requirements

The inclusion of reporting requirements in the standards seeks to remedy the reporting failures found in the GAO report and also provides much-needed data on incidents of sexual abuse in detention.⁴² Under the standards, incident reviews must be completed within 30 days of an investigation and include whether the incident was motivated by sexual orientation or gender identity. There is currently no public data on the number of LGBT immigrants in immigration detention facilities or the risks they face. The only information comes from Freedom of Information Act requests and interviews with attorneys. The PREA standards will provide important data and help shed light on the treatment of LGBT immigrants in detention facilities.

ICE has used solitary confinement to protect LGBT immigrants from abuse in detention.⁴³ Rather than protecting LGBT immigrants, research has shown that solitary confinement leads to “hyperresponsivity to external stimuli,” paranoia, psychosis, and self-harm and that after “15 days ... some of the harmful psychological effects of solitary confinement may become irreversible.”⁴⁴ In response to a *New York Times* article⁴⁵ that found 300 immigrants are held in isolation every day—many for 23 hours—DHS issued a new directive on the use of solitary confinement that created oversight and reporting requirements for the practice.⁴⁶ Under the PREA standards, facilities must now notify a regional ICE supervisor no later than 72 hours after initial placement into administrative segregation when the placement was made on the basis of vulnerability to sexual abuse or assault, and they are required to review the placement to determine whether less-restrictive alternatives exist. Unfortunately, the standards are not as robust as DHS’s directive, which explicitly prohibits the use of solitary confinement solely based on an individual’s sexual orientation or gender identity.

One of the most important new reporting requirements is the one that states that every three years an external audit must be conducted to ensure compliance with the standards. This measure ensures that not only DHS but also an independent third party assesses immigration detention facilities; no other detention standard is audited externally to ensure compliance. And until the standards govern all contract facilities, many facilities that detain immigrants will not be subject to an external audit.

Conclusion

While DHS's Prison Rape Elimination Act standards are a long-awaited and overall positive step forward to improve conditions for detained LGBT immigrants, standards are only as effective as their implementation. It remains to be seen how effective these standards will be, especially since we do not know when or if the standards will apply to contract facilities. Furthermore, while the PREA standards are a good first step, additional measures are still needed to protect LGBT immigrants in DHS custody from sexual abuse. In order to effectively protect these individuals, they should be released or placed in alternatives to detention whenever possible. Detention should be limited to circumstances in which it is mandatory under the law, not circumstances in which facilities want to fulfill congressional quotas.

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