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Crime & Delinquency



PREA Standards and Policy Development Guidelines for Lesbian, Gay, Bisexual, Transgender and Intersex Inmates

Professor Brenda V. Smith
Lorie Brisbin
December 18, 2012

Presented by: The Project on Addressing Prison Rape
in collaboration with the
National PREA Resource Center

Welcome and Agenda for Webinar

PRESENTER:

Prof. Brenda V. Smith, Director
Project on Addressing Prison Rape

Lorie Brisbin, Correctional Program Specialist
National Institute of Corrections

AGENDA:

- 2:00 p.m. – 2:15 p.m. Welcome and Conventions
- 2:15 p.m. – 3:15 p.m. Adult LGBTI PowerPoint and Discussion
- 3:15 p.m. – 3:30 p.m. Questions



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Information about the PRC and Disclaimer

PRC was established through a cooperative agreement between the Bureau of Justice Assistance and the National Council on Crime and Delinquency. The mission of the PRC is to assist adult prisons and jails, juvenile facilities, lockups, community corrections, and tribal facilities in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, monitoring, responses to incidents, and services to victims and their families.

The information provided in the webinar is the viewpoint of The Project on Addressing Prison Rape and Lorie Brisbin, and does not necessarily represent the opinion of the Bureau of Justice Assistance, the Department of Justice, or the PREA Resource Center.



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Conventions

The conventions for this webinar are:

- Your microphone should be on mute.
- If you are joining us by phone and Internet please be sure the telephone button is checked under the audio section of the webinar tool box.
- If you are joining only by phone you are on mute—you will not be able to ask questions, but if you email your question to jyarussi@wcl.american.edu we can address it.
- If you have a question during the webinar, use the chat box feature to send your question to Jaime Yarussi (listed as WCL Organizer).
- If you have technology issues, send an email message to Jaime Yarussi (jyarussi@wcl.american.edu) or call at 202-274-4385.

If your question is not answered during the webinar, we will respond after the session.

We will prioritize pre-submitted questions during the webinar and post them along with the webinar archive.



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Introduction -- Getting Out in Front of the Issue

- Agencies need to get ahead on this issue
- Be proactive about developing LGBTI polices
- Commitment from agency leadership is essential to the development and success of LGBTI polices
- The “wait and see approach” is not a suitable strategy for dealing with LGBTI populations



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Introduction – Different Approaches

Optimal: Agencies who are committed to provide safe and respectful environments for all inmates, including LGBTI inmates and see it as good practice

Middle of the Road: Agencies attempting to meet the standards by closing the gap between PREA and current agency policy

Defensive: Agencies who have had incidents related to LGBTI inmates



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Key Elements for Getting Ahead on the Issue

- Policy Development
- Training
 - LGBTI 101
 - Attitudes, Feelings and Culture
 - Behavior Change
- Operational Practices
- Evaluation



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Defining LGBTI Populations



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Important Terminology

LGBTI: An acronym that refers to sexual minorities, including lesbian, gay, bisexual, transgender and intersex

Gender expression: a person's expression of his/or 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 or female

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



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Important Terminology Continued

Questioning: active process in which a person explores her or his own sexual orientation and/or gender identity and questions the cultural assumptions that they are heterosexual and/or gender conforming

Intersex: an individual born with external genitalia, internal reproductive organs, chromosome patterns, and/or endocrine systems that do not seem to fit typical definitions of male or female

Transgender: person whose gender identity differs from their birth sex

- Transgender woman: person whose birth sex was male but who understands herself to be, and desires to live her life as, a female
- Transgender man: person whose birth sex was female but who understands himself to be, and desires to live his life as, a male



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The PREA Standards and LGBTI Inmates in Custody



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PREA Standards

History of the Prison Rape Elimination Act

- Focus on prevention, detection, response, and monitoring of prison rape.
- Provides standards to prisons, jails, lock-ups, community confinement, and juvenile facilities to address prison rape.
- Federal facilities must comply, while state and local facilities stand to lose funding if non-compliant.



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PREA Standards

History of the Prison Rape Elimination Act

- 2003: PREA legislation passes
- 2004: First meeting of the National Prison Rape Elimination Commission (NPREC)
- 2004-2009: Information gathering and hearings held by the NPREC
- June 2009: Report and draft standards published by NPREC
- 2009-2012: Establishment and convening of PREA Work Group



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PREA Standards

History of the Prison Rape Elimination Act

2010:	DOJ opens public comment period for NPREC standards
Feb. 2011:	Draft DOJ standards released
Feb.-Apr. 2011:	Public comment period
May 2012:	Final DOJ standards released
June 20, 2012:	Final standards published in the Federal Register
Aug. 20, 2012:	Standards applicable to BOP
2013-2014:	First audit cycle



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PREA Standards

Key PREA Standards

28 C.F.R. § 115.15: Limits to cross-gender viewing and searches

28 C.F.R. § 115.31: Employee training

28 C.F.R. § 115.41: Screening for risk of victimization and abusiveness.

28 C.F.R. § 115.42: Use of Screening Information



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PREA Standards

28 C.F.R. § 115.15: Limits to cross-gender viewing and searches

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) As of August 20, 2015, or August 20, 2017 for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.

(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.



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28 C.F.R. § 115.15: Limits to cross-gender viewing and searches

(d) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit.

(e) The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined 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.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs



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PREA Standards

28 C.F.R. § 115.31: Employee training

(a) The agency shall train all employees who may have contact with inmates on:

- (1) Its zero-tolerance policy for sexual abuse and sexual harassment;
- (2) How to fulfill their responsibilities under agency sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures;
- (3) Inmates' right to be free from sexual abuse and sexual harassment;
- (4) The right of inmates and employees to be free from retaliation for reporting sexual abuse and sexual harassment;
- (5) The dynamics of sexual abuse and sexual harassment in confinement;
- (6) The common reactions of sexual abuse and sexual harassment victims;
- (7) How to detect and respond to signs of threatened and actual sexual abuse;
- (8) How to avoid inappropriate relationships with inmates;



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28 C.F.R. § 115.31: Employee training

(9) How to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming inmates; and

(10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

(b) Such training shall be tailored to the gender of the inmates at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male inmates to a facility that houses only female inmates, or vice versa.



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PREA Standards

28 C.F.R. § 115.31: Employee training

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide each employee with refresher training every two years to ensure that all employees know the agency's current sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.

(d) The agency shall document, through employee signature or electronic verification, that employees understand the training they have received



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28 C.F.R. § 115.41: Screening for Risk of Victimization and Abuse

(a) All inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.

(b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

(c) Such assessments shall be conducted using an objective screening instrument.



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PREA Standards

28 C.F.R. § 115.41: Screening for Risk of Victimization and Abuse

(d) The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:

- (1) Whether the inmate has a mental, physical, or developmental disability;
- (2) The age of the inmate;
- (3) The physical build of the inmate;
- (4) Whether the inmate has previously been incarcerated;
- (5) Whether the inmate's criminal history is exclusively nonviolent;
- (6) Whether the inmate has prior convictions for sex offenses against an adult or child;
- (7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
- (8) Whether the inmate has previously experienced sexual victimization;
- (9) The inmate's own perception of vulnerability; and
- (10) Whether the inmate is detained solely for civil immigration purposes.



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28 C.F.R. § 115.41: Screening for Risk of Victimization and Abuse

(e) The initial screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the agency, in assessing inmates for risk of being sexually abusive.

(f) Within a set time period, not to exceed 30 days from the inmate's arrival at the facility, the facility will reassess the inmate's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening.

(g) 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.



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PREA Standards

28 C.F.R. § 115.41: Screening for Risk of Victimization and Abuse

(h) Inmates may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(1), (d)(7), (d)(8), or (d)(9) of this section.

(i) The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the inmate's detriment by staff or other inmates.



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28 C.F.R. § 115.42: Use of Screening Information

(a) The agency shall use information from the risk screening required by § 115.41 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.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

(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.



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PREA Standards

28 C.F.R. § 115.42: Use of Screening Information

(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

(e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex 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.



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LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability

Farmer v. Brennan, 511 U.S. 825 (1994)

Facts

- A male-to-female transgender woman was moved to the general population in a federal penitentiary, where she was beaten and raped by another inmate



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LGBTI Inmates

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Eighth Amendment Liability

Farmer v. Brennan, 511 U.S. 825 (1994)

Legal Claims

- Bivens Action: Eighth Amendment

“[R]espondents either transferred petitioner to USP–Terre Haute or placed petitioner in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner, as a transsexual who ‘projects feminine characteristics,’ would be particularly vulnerable to sexual attack”



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Legal Claims

- Defendants
 - Warden of USP–Terre Haute (official capacity)
 - Director of the Bureau of Prisons (official capacities)
 - Warden of FCI–Oxford (personal and official capacities)
 - Director of the Bureau of Prisons North Central Region Office (personal and official capacities)



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LGBTI Inmates

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Eighth Amendment Liability

Farmer v. Brennan, 511 U.S. 825 (1994)

Holding

- Court creates the deliberate indifference test
 - “official knows of and disregards an excessive risk to inmate health or safety”
 - “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”



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Farmer v. Brennan, 511 U.S. 825 (1994)

Holding

- Court remands the case for further findings whether the officials were deliberately indifferent



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LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability

Greene v. Bowles, 361 F.3d 290 (6th Cir. 2004)

Facts

- Pre-operative male-to-female transsexual inmate at Warren Correctional Institution was placed in protective custody to guard against attacks from other inmates, due to her feminine characteristics
- A maximum security inmate who was a known predator was placed in the protective custody unit and attacked Greene
 - Beat her with a mop handle and struck her with a fifty-pound fire extinguisher.



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LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability

Greene v. Bowles, 361 F.3d 290 (6th Cir. 2004)

Legal Claims

- 42 USC § 1983
 - Eighth Amendment
 - Fourteenth Amendment

Holding

- Triable issue of fact as to whether the warden was deliberately indifferent, based on knowledge of:
 - Greene's status as a vulnerable offender
 - Attacker's status as a predatory inmate



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LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability – Transgender Care

Kosilek v. Spencer, --- F. Supp. 2d ----, 2012 WL 4054248 (D. Mass. Sept. 16, 2012)

- Court found that prison officials at the Massachusetts Department of Corrections had been deliberately indifferent to a male-to-female transgender inmate's serious medical need by denying gender-reassignment surgery
- Court ordered the DOC to provide gender-reassignment surgery
- The DOC is appealing the decision



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LGBTI Inmates

Why PREA Standards are Good Practice

Bureau of Prisons Changes Transgender Policy

- In May of 2011, the Bureau of Prisons released a statement rejecting the “freeze frame” approach to treating Gender Identity Disorder and Gender Dysphoria
- Directed all BOP facilities to conduct an individualized assessment of the inmate’s needs and provide adequate treatment, including:
 - Real life experience
 - Hormone therapy
 - Surgical intervention
 - Counseling



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Policy and Operational Practices



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Policy and Operational Practices

Non-discrimination

Agencies should develop “zero tolerance” policies for discrimination and mistreatment of inmates and staff on the basis of sexual orientation or gender identity.

Good non-discrimination policies:

- Ensure that all are treated with fairness, dignity, and respect – including staff
- Specifically prohibit sexual orientation and gender identity as basis for discrimination
- Prohibit staff attempts to change inmates’ sexual orientation or gender identity
- Make staff responsible for protecting the civil rights of LGBTI inmates
- Require incident reporting for complaints of harassment, discrimination, and abuse
- Provide training and resources regarding the unique societal, familial, and developmental challenges confronting LGBTI inmates



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Policy and Operational Practices

Intake and Risk Assessment

During intake, agencies must identify inmates at risk for sexual abuse.

Good risk assessment policies:

- Gather information about the inmate's sexual orientation and gender identify
- Periodically update information on inmates in custody
- Train employees conducting intakes on LGBTI sensitivity
- Permit medical practitioners to physically examine inmates to gather information about gender identity only in the course of a regular medical exam
- Accommodate the concerns of LBGTI inmates in terms of safety, name, pronoun, shower preference, and searches
- Use screening tools which are developed specifically for LBGTI inmates



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Policy and Operational Practices

Classification

Classification policies separate vulnerable inmates from aggressive inmates.

Good classification policies:

- Balance inmates' physical and emotional well-being and safety of other inmates
- Are objective and free of individual biases
- Prohibit blanket policies regarding LGBTI inmates' classification
- Only place inmates into sex-offender programs/units based on articulated criteria (i.e., court orders)
- Consider the physical layout and privacy issues when making placement determinations
- Place vulnerable inmates in the least restrictive environment necessary to ensure safety
- Provide the inmates with equal access to facility services and programs
- Have a contingency plan for when the facility is crowded
- Do not exclusively rely on the isolation or segregation of LGBTI inmates to ensure safety



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Policy and Operational Practices

Housing Specifications for Transgender and Intersex Inmates

Transgender and intersex inmates may have special housing needs, where facility capacity can accommodate them.

Good housing policies:

- Make housing determinations based on factors in addition to a person's current genital status
- Evaluate factors relating to the inmate's emotional and physical well-being
- Review the inmate's privacy concerns, available housing options, and recommendations from the inmates' mental health providers
- When possible, provide access to private showering and single rooms for sleeping
- When possible, house according to gender identity rather than sex at birth
- Determine reclassification needs based on requests by inmates or victimization



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Policy and Operational Practices

Respectful Communication

Staff and volunteers should use language and terminology that does not perpetuate LGBTI stereotypes.

Good communication policies:

- Have a zero tolerance policy that includes sexual harassment
- Direct staff on how to address LGBTI inmates, using respectful and appropriate language
- Permit inmates to express themselves through clothing or grooming (within the bounds of safety for all inmates)
- Adhere to all confidentiality and privacy protections under applicable state law
- Allow for information sharing necessary to achieve a particular purpose (i.e., identifying an appropriate placement in another facility)
- Provide programming and services to eligible LGBTI inmates



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Policy and Operational Practices

Medical and Mental Health Care

All inmates, including LGBTI inmates, must have access to health care that addresses their specific needs.

Good medical and mental health care policies:

- Provide access to services that address self-acceptance, disclosure of sexual orientation or gender identity, family relationships, healthy intimate relationships, and sexual decision-making
- Direct medical staff to assess inmate's safety
- Direct those conducting medical screening to inquire about inmate's sexual activity, sexual orientation, and gender identity
- Provide gynecological and obstetrical care
- Provide confidential HIV, STD testing and care
- Provide counseling to inmates experiencing sexual trauma
- Provide mental health evaluations that assess an array of mental health issues, including those related to sexual orientation and gender identity
- Provide relevant care for transgender inmates



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Policy and Operational Practices

Privacy and Safety

LGBTI inmates may require additional privacy and safety measures.

Good privacy and safety policies:

- Address the levels of staffing and supervision
- Address the safety and privacy needs of LGBTI inmates in toileting, showering, and sleeping
- Give transgender or intersex inmates the option of choosing to be strip searched by staff members of either gender
- Address search procedures and privacy needs of LGBTI inmates
- Require that inmates' grievances are tracked, and collect and analyze information on grievances related to searches



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Policy and Operational Practices

Sexual Abuse of LGBTI Inmates

Staff must be able to recognize sexual abuse and distinguish abuse from other sexual behavior.

Good sexual abuse prevention policies:

- Prohibit the sexual abuse of inmates in custody
- Train staff on sexuality and sexual behaviors of inmates
- Require investigation of all reports of abuse
- Have multiple reporting avenues, including at least one third party
- Have external reporting mechanisms
- Address the management of inmates who report
- Define the roles and responsibilities of the investigative process into allegations of sexual abuse
- Require referral of allegations of potential criminal activity for review by the prosecutor
- Establish a sexual assault response team (SART)
- Provide ongoing medical and mental health care for inmates who have been sexually victimized
- Specify treatment or needs for LGTBI inmates



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Recommendations

Serving LGBTI Inmates

- Have policies regarding respectful communications with and between inmates
- Enforce policies swiftly and consistently
- Address non-coercive sex between inmates
- Provide appropriate medical and mental health care
- Provide access to community support



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Resources from The Project on Addressing Prison Rape: Training for Staff

National Training Curricula

- *Investigating Staff Sexual Abuse of Offenders*
<http://www.wcl.american.edu/endsilence/training.cfm>
- *Sexual Abuse of Youth in Custody*
http://www.wcl.american.edu/endsilence/juvenile_training.cfm
- Responding to Inmate on Inmate Sexual Abuse [forthcoming]
<http://www.wcl.american.edu/endsilence/training.cfm>

Correctional Officer Handbook

- *Breaking the Code of Silence: Correctional Officers' Handbook on Identifying and Addressing Sexual Misconduct*
<http://www.wcl.american.edu/endsilence/handbooks.cfm>

Regional Training

- *Gender Responsive Strategies for Serving Inmates in Custody*
Location: Milwaukee, WI – March 2013



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Resources from the National Institute of Corrections

Lesbian, Gay, Bisexual, Transgender and Intersex Offenders resource page available at: <http://nicic.gov/LGBTI>

Annotated Bibliography of resources available at: <http://nicic.gov/Library/026518>

Video Broadcast: LGBTI Populations–Their Safety, Your Responsibility
November 7, 2012.
<http://nicic.gov/Library/026763>

Smith, Brenda V. et. al. *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Custodial Settings* (forthcoming) white paper available at: <http://www.wcl.american.edu/endsilence/webinars.cfm>

For more information on NIC resources contact Lorie Brisbin at lbrisbin@bop.gov or 202-514-0099.



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Questions



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Evaluation and Follow-up

We would like your feedback!

- An evaluation survey is posted at:
<http://www.surveygizmo.com/s3/1113941/PREA-Standards-and-Policy-Development-Guidelines-for-Lesbian-Gay-Bisexual-Transgender-and-Intersex-Inmates-Webinar>
- Surveys should be completed by
Friday, January 4, 2013 at 5:00 p.m. EDT.

A follow-up email will be sent immediately following this webinar. That email will include the link for the evaluation survey as well as a link to the recording and PowerPoint for this session.

If you watched this webinar in a group, please forward the link for evaluation to the whole group.



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Contact Information

For more information about the **National PREA Resource Center**:
www.prearesourcecenter.org; or ask questions at info@prearesourcecenter.org

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