

United States Senate

August 9, 2018

Mr. Hugh Hurwitz
Acting Director
Federal Bureau of Prisons
320 First St., NW
Washington, DC 20534

Dear Mr. Hurwitz,

We are alarmed to learn about a change in the Federal Bureau of Prisons (BOP) Transgender Offender Manual which could put individuals at risk of sexual abuse while incarcerated.¹ The revised manual now states that a person's "biological sex" – a term undefined in the policy or the *Prison Rape Elimination Act* (PREA) – will be used to initially determine where that person will be housed. The revised manual also says that assigning an individual to a prison facility based on the person's identified gender is appropriate "only in rare cases."

This change is not in line with BOP's own stated commitment to a "zero tolerance policy against sexual abuse" nor its obligations under both federal law and the U.S. Constitution's prohibition on cruel and unusual punishment under the 8th Amendment. On its website, BOP notes that, "an incarcerated individual has the right against being pressured by anyone to engage in sexual acts and does not have to tolerate sexually abusive behavior...regardless of the inmate's age, size, race, ethnicity, gender or sexual orientation, he/she has the right to be safe from sexually abusive behavior."²

At highest risk for sexual abuse in detention are transgender people. The Justice Department's own statistics show that 40% of transgender people in prisons are sexually abused each year. In the largest survey of transgender and gender nonconforming adults to date, respondents who were incarcerated reported sexual assault by facility staff or other incarcerated people at rates five to six times higher than non-transgender incarcerated people.³ Given your own data on sexual assault, this change to the policy seems likely to put these individuals at grave risk and opens BOP up to lawsuits related to this abuse.

The new policy is also in contravention of PREA.⁴ PREA was enacted by Congress to address the problem of sexual abuse of persons in the custody of federal and state correctional agencies. PREA directs BOP to develop standards for detection, prevention, reduction and punishment of prison rape, among other things. PREA includes provisions specific to vulnerable groups, including transgender people. It requires that housing decisions for transgender people in prison

¹ <https://www.bop.gov/policy/progstat/5200.04.pdf>

² https://www.bop.gov/inmates/custody_and_care/sexual_abuse_prevention.jsp

³ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). "The Report of the 2015 U.S. Transgender Survey." Washington, DC: National Center for Transgender Equality.

⁴ P.L. 108-79

be made on a case-by-case basis, seriously considering all factors relevant to keeping them safe, including their gender identity and their own view of where they would be safest.

While BOP's revised policy states that determinations must still be made on a case-by-case basis, the policy changes all but mandates that individuals are to be housed according to their sex assigned at birth, which is likely to put transgender people at greater risk of physical and sexual assault. We would like to understand the basis for BOP's decision, given the Justice Department's own data on sexual assault in corrections facilities, particularly for transgender people. Specifically, we would like to know:

1. Do you have statistical data or other evidence showing transgender people in prison genuinely pose a risk of physical or sexual assault to their non-transgender peers that would help us understand how this decision will promote the security of the larger prison population?
2. How do you reconcile this policy change with data from the Bureau of Justice Statistics showing that almost 40% of transgender people in prison were sexually victimized, and how do you reconcile this policy change with the fact that one of the goals of assigning transgender people to housing consistent with their gender identity is to reduce such victimization?
3. PREA states that prison officials must make a genuine, individual, case-by-case assessment of whether a transgender person is most safely and appropriately housed with members of their own, self-identified gender. The law also forbids the dangerous practice of automatically segregating transgender people. How will you ensure that the new BOP policy of making an initial determination based on "biological sex" is not in conflict with this federal law?
4. If an incarcerated transgender person is sexually or otherwise assaulted in a facility that does not correspond to their gender identity, will BOP immediately reassign that individual to a facility consistent with their gender identity, and what other steps will BOP take to comply with its obligations under PREA and the U.S. Constitution?

In the absence of satisfactory answers to these critically important questions, we urge BOP to immediately reverse these policy changes, and ensure that transgender people are housed appropriately and based on their individual needs. Thank you for your attention to this important matter. We look forward to your response.

Sincerely,



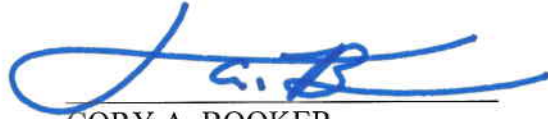
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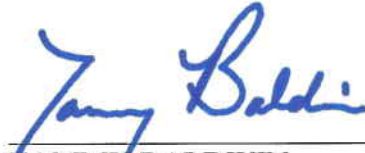
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