

Congress of the United States
House of Representatives
Washington, DC 20515

August 1, 2018

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

Re: Transgender Offender Manual

Dear Acting Director Hurwitz:

We write to express our deep concern that the Bureau of Prisons' (BOP) recent changes to its Transgender Offender Manual may be in violation of the Prison Rape Elimination Act (PREA), as well as the U.S. Constitution. We urge the agency to reverse course to avoid violating its constitutional obligations and to prevent transgender prisoners from being exposed to heightened risk for sexual abuse.

Prisoners should never face rape and sexual abuse as part of their sentence. In recognition of the extreme harm and horror caused by sexual victimization in confinement settings, both to individuals and society at large, Congress unanimously passed the bi-partisan PREA in 2003. As part of PREA, Congress explicitly acknowledged the Supreme Court's findings in *Farmer v. Brennan*, 511 U.S. 825 (1994), which held that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Eighth Amendment's prohibition on cruel and unusual punishments.¹

The problem of sexual victimization of prisoners has not abated since 2003. As the Bureau of Justice Statistics (BJS) is expected to release this month, as part of the *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15*, substantiated allegations of sexual victimization rose an astonishing 63% between 2011 and 2015.² The BJS has found that transgender prisoners are particularly vulnerable, with nearly 40% reporting experiencing sexual victimization while incarcerated in a 2011-2012 survey, compared to only 4% of all prisoners making such reports.

¹ "Prison Rape Elimination Act of 2003 (S. 1435)" Congressional Record 149: 112 (July 25, 2003) p. H7764-H7771.

² U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (2018). *PREA Data Collection Activities, 2018*.

In 2012, the U.S. Department of Justice published the final *National Standards to Prevent, Detect, and Respond to Prison Rape under the Prison Rape Elimination Act* in the Federal Register.³ These PREA Standards recognized that central to the goal of preventing, detecting, and responding to sexual abuse is safeguarding vulnerable prisoners from sexual abuse and sexual harassment. Transgender prisoners are noted as facing “particular vulnerabilities” and the standards were explicit that in determining whether to assign a transgender prisoner to a facility that houses male or female prisoners, “an agency may not simply assign the inmate to a facility based on genital status.”⁴ Instead, agencies must consider whether a placement would ensure an inmate’s health and safety on a case-by-case basis, giving “serious consideration to the inmate’s own views regarding his or her own safety.”⁵

The new BOP policy for transgender prisoners contravenes these guidelines, mandating that the Transgender Executive Council use “biological sex” – a term undefined in the policy or by PREA – for all initial facility designations. Presumably, the agency intended to refer to a prisoner’s assigned sex at birth to avoid the prohibition of using “genital status,” but failed to adequately define its intent. We are gravely concerned that the undefined term “biological sex” will function in practice as a moving target, one that opens the door to significant discrimination and animus as its meaning is allowed to shape-shift to keep transgender prisoners from ever being housed in accordance with their gender identity in violation of PREA’s standards.

The new policy further strains the PREA standards by specifically stating housing based on a prisoner’s gender identity “would be appropriate only in rare cases” and “where there has been significant progress towards transition as demonstrated by medical and mental health history.”⁶ While the revised policy appropriately requires a transgender prisoner’s views of their own safety be taken into consideration for “housing unit and programming assignments” it does so only after a facility designation has been made, contrary to the requirements of the PREA Standards, which explicitly require these concerns be considered in facility designation.

Among the revisions to the Transgender Offender Manual, only a single, telling sentence is eliminated: “The [Transgender Executive Council] will recommend housing by gender identity when appropriate.”⁷ Given these facts, we are deeply concerned that the BOP is seeking to violate the intent and letter of PREA by prohibiting housing based on gender identity entirely, absent any legitimate rationale.

The BOP has a constitutional requirement to protect the health and safety of all individuals in its charge – including transgender prisoners. The research is clear that transgender prisoners will

³ 34 U.S.C. § 30307(b).

⁴ 77 C.F.R. 37110.

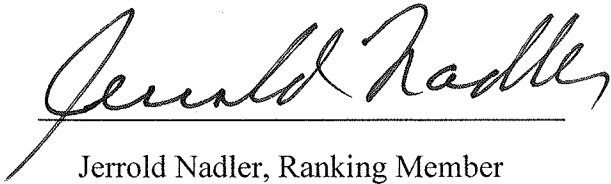
⁵ *Ibid.*

⁶ U.S. Department of Justice, Federal Bureau of Prisons. (2018). *Transgender Offender Manual*.

⁷ *Ibid.*

face grievous and unconstitutional harm if this policy is implemented as written. We urge the BOP to immediately reverse these changes, and ensure that transgender prisoners are housed appropriately and based on their individual needs.

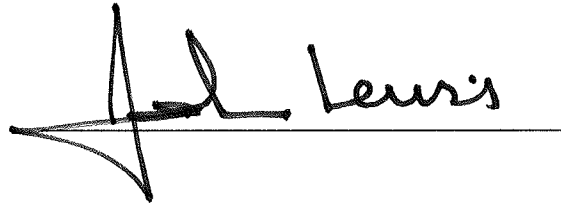
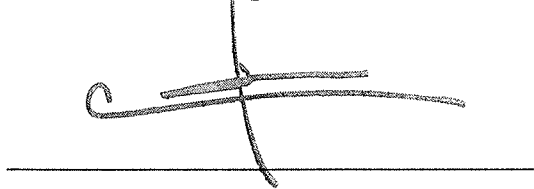
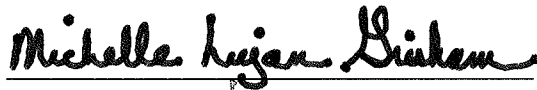
Sincerely,



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Committee on the Judiciary



Robert C. Scott, Ranking Member
Committee on Education and the Workforce



A. Donald McEwen



Kathleen M. O'Neil

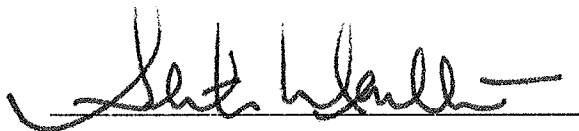




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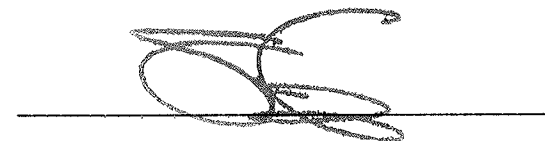
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