

June 29, 2023

Re: *SB 228 and Kansas Counties' Continued Obligations to Transgender and Intersex Individuals Housed in County Jails*

Dear County Sheriff or County Jail Administrator:



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Kansas

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On behalf of the ACLU of Kansas, we write to you because you may be contemplating policy changes in your county's jail regarding SB 228, a bill passed by the Kansas Legislature that is scheduled to take effect on July 1, 2023.

In anticipation of any potential changes in your facility/facilities regarding SB 228's provisions about how to categorize and house individuals in your jail, we felt it prudent to send this letter clarifying that SB 228's housing provisions do not relieve Kansas county sheriffs of their obligations under the U.S. Constitution or federal statute to protect transgender and intersex individuals housed in their jails.

I. Background

During the 2023 legislative session, the Kansas Legislature passed SB 228 over Governor Kelly's veto. While the general content of SB 228 deals with county reimbursement, modernizing statutory language, and modifying various jail procedures, one specific section amends other statutory language, requiring sheriffs to categorize and house individuals held in Kansas's county jails according to their reproductive capabilities.¹

Specifically, Section 3 of SB 228 amends K.S.A. 19-1903 to read that "[t]he sheriff of the county, or such sheriff's deputy, shall. . . keep separate rooms for each sex, female and male," and defines "sex" as used in this section as "an individual's biological sex, either male or female, at birth. A 'female' is an individual whose biological reproductive system is developed to produce ova, and a 'male' is an individual whose biological reproductive system is developed to fertilize the ova of a female."²

Of note, this language in SB 228 requires county sheriffs only to "keep separate rooms for each sex, female and male," but does not instruct sheriffs regarding specific housing determinations for each individual in the jail. In

¹ See SB 228, 2023 Kan. Sess. Laws ch. 83,
http://www.kslegislature.org/li/b2023_24/measures/documents/sb228_enrolled.pdf.

² *Id.*



other words, the amended statute provides sheriffs only with a definition of “male” and “female” and purports to require a bright line rule when making housing determinations.

However, federal national standards for prisons and jails make clear that bright line rules for determining appropriate housing—such as a rule requiring that housing decisions be based on an individual’s sex assigned at birth or reproductive capacity—violate federal law.³ Moreover, as explained below, housing and classification policies mandating that trans individuals be housed in spaces that do not align with their gender identity increase the likelihood that those individuals will experience physical or sexual abuse while incarcerated, potentially subjecting your office to legal liability.⁴

Regardless of the language of SB 228, Kansas sheriffs have a continued obligations to uphold the U.S. Constitution and follow federal law regarding the care and custody of transgender and intersex individuals in Kansas jails. The remainder of this letter describes these obligations and outlines best practices for creating safe environments for all individuals housed in Kansas jails.

II. Legal Obligations to Transgender and Intersex Individuals Housed in Kansas Jails

All local, state, and federal prisons and jails—including Kansas’s county jails—are subject to the provisions of the Prison Rape Elimination Act (“PREA”), a federal law that protects incarcerated individuals and aims to prevent, detect and eliminate sexual assault in correctional facilities across the country.⁵ PREA required the U.S. Department of Justice to create national standards to address prison and jail operations related to preventing, detecting, and responding to sexual abuse, which were originally promulgated in 2012.⁶ These national PREA standards explicitly address

³ See, e.g., Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(b)-(e) (2023).

⁴ See Megan Robertson, *Improper Housing and Inadequate Medical Treatment for Transgender Prisoners*, 24 GEO. J. GENDER & LAW 1 (2022), available at <https://www.law.georgetown.edu/gender-journal/online/volume-xxiv-online/improper-housing-and-inadequate-medical-treatment-for-transgender-prisoners/>.

⁵ See Prison Rape Elimination Act, 34 U.S.C. §§ 30301-30309 (2023).

⁶ See U.S. Dep’t of J. Final Rule, Prison Rape Elimination Act Prison and Jail Standards (May 17, 2012), https://www.prearesourcecenter.org/sites/default/files/content/prisonsandjailsfinalstandards_0.pdf.



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housing of transgender individuals. The standards require prisons and jails to make individual, case-by-case determinations about where to house trans or intersex people in their facility.⁷ The standards also require prisons and jails to seriously consider the trans or intersex person’s own views with respect to their safety regarding their housing assignment, and the standards provide trans and intersex individuals with the right to shower separately from other incarcerated individuals.⁸ Additionally, the standards require that housing and programming assignments for each incarcerated trans or intersex person be reassessed at least twice a year to review any threats to safety experienced by the incarcerated individual.⁹

As PREA is a federal law, SB 228 does not relieve your office from its obligation to comply with the national PREA standards. Indeed, if your jail is not in compliance with PREA, it risks losing federal grant funding.¹⁰ Because adopting a bright-line rule for carceral housing assignments based on an individual’s reproductive capabilities would violate PREA, doing so would put your facility at risk of losing thousands of dollars of federal funding.

Further, prisons and jails have a constitutional obligation to treat individuals housed in their facilities equally and to protect them from harm. The Supreme Court has long held that the Eighth Amendment provides incarcerated individuals with a right to be protected from violence and abuse—and noted that when corrections officials are deliberately indifferent towards an individual’s safety, they violate this Eighth Amendment right.¹¹ And these Eighth Amendment standards apply to jails housing pretrial detainees by way of the Fourteenth Amendment’s Due Process Clause—providing pretrial detainees the same protections from harm.¹² In *Farmer v. Brennan*, the Supreme Court held that there is an obvious risk of harm when placing a trans woman in the general population of a male prison, and that if the prison

⁷ Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(b)-(e) (2023).

⁸ Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(e)-(f) (2023).

⁹ Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(d) (2023).

¹⁰ See 34 U.S.C.A § 30308(a) (2023).

¹¹ See generally *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹² See *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1069–71 (9th Cir. 2016) (extending the *Kingsley* Court’s holding to failure-to-protect claims brought by pretrial detainees).



officials knew the woman was transgender, they could be held liable for deliberate indifference.¹³

And in a more recent Supreme Court decision, *Bostock v. Clayton County*, the Court recognizing that discrimination against transgender individuals is a form of sex discrimination and as such should receive heightened judicial scrutiny.¹⁴ Since this 2020 decision, a number of courts across the country have found that prisons and jails may be violating the Fourteenth Amendment’s Equal Protection Clause if they allow for cisgender (non-transgender) individuals to be housed in facilities that align with their gender identity, but do not allow the same for transgender individuals.¹⁵

These constitutional obligations are important—not only because every individual housed in Kansas’s county jails has constitutional rights that must be respected and protected, but because violation of these rights opens your county up to additional financial liability. For example, a trans woman held in a men’s jail in New York sued the county she was jailed in and was awarded \$60,000 in a settlement that required the county to change its jail policies and presumptively house people consistent with their gender identity.¹⁶

III. Policy Outcomes and Best Practices for Housing Transgender and Intersex Individuals

It is clear that Kansas county jails have constitutional and statutory obligations to protect the health and safety of transgender and intersex individuals housed in their facilities. Understanding these obligations and how to uphold them is important, as trans people are statistically more likely to be involved with the criminal punishment system and to be held in jail or

¹³ *Id.* at 847.

¹⁴ *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

¹⁵ See, e.g., *Tay v. Dennison*, 457 F. Supp. 3d 657, 682 (S.D. Ill. 2020) (holding that a transgender prisoner's placement in a men's prison was not substantially related to an important government interest even though the prisoner had a history of violent behavior); *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *12 (S.D. Ill. Nov. 7, 2018) (finding that a transgender female inmate's equal protection claim based on her placement in a men's prison had a “greater than negligible chance of success on the merits”).

¹⁶ See *Faith v. Steuben County Settlement Agreement*, https://www.nyclu.org/sites/default/files/field_documents/2020-07-22_faith_final_settlement_agreement_redacted.pdf.



prison and are statistically more likely to face physical or sexual abuse while incarcerated.¹⁷

Importantly, research shows that assigning these individuals housing based solely on their sex assigned at birth is detrimental to their health and safety. Such housing assignments result in trans individuals facing increased harassment and abuse.¹⁸ An estimated 35% of incarcerated transgender individuals reported one or more incidents of sexual victimization by another incarcerated individual or staff member in the past year of their incarceration—a percentage that is significantly higher than the rate reported for the general population of incarcerated individuals.¹⁹ And subjecting trans individuals to solitary confinement to address safety concerns is not a constitutionally viable solution, either. Subjecting individuals to prolonged solitary confinement because of their gender identity not only causes serious psychological harm and trauma, it also likely violates their constitutional protections and PREA.²⁰

Knowing these facts, it is evident that adopting policies that automatically assign housing based on sex assigned at birth and/or reproductive capabilities, as required by SB 228, will lead to serious health and safety concerns for transgender and intersex individuals housed in Kansas county jails. County sheriffs are obligated to keep individuals in their custody safe from abuse under federal law and the U.S. Constitution—and no state law relieves sheriffs of this duty. In order to comply with constitutional and federal requirements and properly address issues of physical and sexual abuse in your jail, we urge you to follow the national PREA standards for housing assignments of transgender and intersex individuals in your facilities.

¹⁷ See Evan Zavidow, *Transgender people at higher risk for justice system involvement*, VERA (May 10, 2016), <https://www.vera.org/news/gender-and-justice-in-america/transgender-people-at-higher-risk-for-justice-system-involvement>.

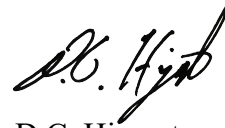
¹⁸ Megan Robertson, *Improper Housing and Inadequate Medical Treatment for Transgender Prisoners*, 24 GEO. J. GENDER & LAW 1 (2022), available at <https://www.law.georgetown.edu/gender-journal/online/volume-xxiv-online/improper-housing-and-inadequate-medical-treatment-for-transgender-prisoners/>.

¹⁹ *Id.*

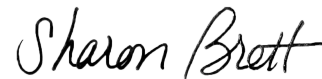
²⁰ See *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and their Legal Rights*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (2018), available at <https://transequality.org/transpeoplebehindbars>; see e.g., *Porter v. Pa. Dep't of Corr.*, 974 F.3d 431 (3d Cir. 2020); *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019); *Walker v. Shansky*, 28 F.3d 666 (7th Cir. 1994); *Sheley v. Dugger*, 833 F.2d 1420 (11th Cir. 1987); *Mukmuk v. Comm'r of Dep't of Corr. Servs.*, 529 F.2d 272 (2d Cir. 1976); see Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.43(a)-(e) (2023).

Thank you for your prompt attention to this letter. Should you wish to discuss this or any other related issues, please do not hesitate to contact us at dhiegert@aclukansas.org or sbrett@aclukansas.org.

Kind regards,



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