Coates' Canons Blog: The Prison Rape Elimination Act and Its Impact on County Jails

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I have been getting many questions lately about the applicability and impact of the federal Prison Rape Elimination Act, or PREA. Specifically, people want to know the extent to which the law and its accompanying regulatory standards apply to local jails. This post provides some background on PREA and then discusses its applicability and enforceability. It concludes with a discussion of the standards themselves, with a focus on those that strike me as most likely to require substantial changes to current jail practices in North Carolina.

PREA was passed in 2003. Pub. L. No. 108-79, 117 Stat. 972 (2003). Congressional findings included in the law conservatively estimated that 13 percent of the 2.1 million persons incarcerated in America's prisons and jails have been sexually assaulted. Congress found that, among other things, sexual assaults against inmates traumatize victims, endanger public safety, increase recidivism, spread disease, and, ultimately, violate inmates' Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment. 42 U.S.C. § 15601. The law created a commission to study the issue, and then directed the Attorney General to issue national standards for the detection, prevention, reduction, and punishment of prison rape. Those standards call for a zero-tolerance policy toward prison rape—though by law they are not to impose substantial additional costs on federal, state, or local authorities. 42 U.S.C. § 15607.

After a decade of study, research, and public comment, the Attorney General issued the final PREA standards on June 20, 2012, which made them effective August 20, 2012. 28 C.F.R. pt. 115. The standards applied to Federal Bureau of Prisons facilities immediately upon their adoption. State compliance, by contrast, is to be enforced indirectly through a grant incentive. Namely, a state will lose five percent of federal grant money it would otherwise receive for prison purposes unless its governor can certify each year that the State has adopted and is in full compliance with PREA standards. 42 U.S.C. § 15607(c). Even if not compliant, a state may avoid losing that cut of its grant money by certifying that it will be used to bring the state into compliance in future years. The audit cycle for state certification begins August 20, 2013, with the first gubernatorial certification reports due August 20, 2014. (A couple of the substantive standards have a delayed effective date, as discussed below.)

Does PREA apply to local jails? Yes. The federal statute defines "prison" to include "any confinement facility of a Federal, State, or local government." 42 U.S.C. § 15609(7). Correspondingly, the PREA standards impose requirements on "agencies," which are defined as "the unit of a State, local, corporate, or nonprofit authority . . . with direct responsibility for the operation of any facility that confines inmates, detainees, or residents." 28 C.F.R. § 115.5. With those definitions in place, PREA and its standards apply to all local jails.

But applicability is not the same as enforceability. As discussed above PREA is enforced on the states through the threat of grant reductions, and those grant reductions are triggered by the governor's certification. The standards explicitly say that the governor's certification applies only to "facilities under the operational control of the State's executive branch." 28 C.F.R. § 115.501(b). The certification must include "facilities operated by *private* entities on behalf of the State's executive branch," *id.*, but it does not include *local government* entities that house state inmates. The Attorney General's overview of the standards notes that omission, saying that the governor's "certification, by its terms, does not encompass facilities under the operational control of counties, cities, or other municipalities." 77 Fed. Reg. 37106, 37115. So, North Carolina's locally-administered jails will not be directly included within the governor's annual PREA certification.

Does that mean jails are off the hook when it comes to PREA? No.

First of all, it is possible that the General Assembly might require jails to comply with PREA as a matter of state law. Pending legislation, H 585, would direct the state *prison* system and all *juvenile facilities* to comply with PREA, plain and simple. Some prior versions of the bill have also required jails to comply, and some versions have not. The most recent version of the bill takes what appears to be a middle ground, proclaiming it to be the policy of the General Assembly that

local jails “should comply” with PREA.

Regardless of how H 585 plays out, PREA may impact jails in several other ways.

Federal prisoners. Some North Carolina jails house federal inmates for the Federal Bureau of Prisons, the U.S. Marshals Service, or Immigration and Customs Enforcement. Those inmates are housed pursuant to contracts between the county and the United States. G.S. 162-34. PREA standards require that any agency “that contracts for the confinement of its inmates with private agencies or other entities, *including other government agencies*, shall in include in any new contract or contract renewal the entity’s obligation to adopt and comply with the PREA standards.” 28 C.F.R. § 115.12 (emphasis added). The contract must provide for “monitoring to ensure that the contractor is complying with the PREA standards.” *Id.* I have already heard from a couple of sheriffs that BOP has discussed including a PREA-compliance clause in its contracts with the counties. PREA compliance may be worthwhile for jails that make a lot of money housing federal inmates.

Statewide Misdemeanant Confinement Program (SMCP). The SMCP, discussed in detail here, is a program through which counties may volunteer to house certain misdemeanor inmates. Counties contract with the Department of Public Safety to house SMCP inmates under G.S. 148-32.1. Like the contracts with the federal government described above, SMCP contracts are contracts for the confinement of an agency’s inmates, and thus appear to be required under § 115.12 to include a PREA-compliance clause in any new or renewed contract. Today, 50 of North Carolina’s 100 counties participate in the SMCP.

Accreditation. Some North Carolina jails are accredited by national organizations like the American Correctional Association. PREA says that no accrediting agency may receive federal grant funds unless it adopts accreditation standards consistent with the PREA standards. 42 U.S.C. § 15608. As a result, any jail that has or is seeking accreditation may wind up effectively having to comply with PREA as a part of the accreditation process.

Civil liability. Even if there is no direct financial penalty for a local jail that fails to comply with PREA, there is some concern that the federal standards may evolve into a standard of care in civil actions related to inmate sexual abuse. That is a legitimate concern, but jails should also bear in mind that compliance with the standards does not establish a safe harbor from any civil claim related to sexual abuse.

So, even if there is no direct financial penalty to anyone for a jail’s failure to adopt the PREA standards, compliance may eventually be required (a) under potential state law, (b) as a matter of contract, (c) as part of the accreditation process, or (d) to minimize the risk of civil liability. Another possibility—not to be lost in all this technical discussion of federal regulations—is that a sheriff might decide to adopt the standards because he or she believes it is the right thing to do to protect the inmates and staff for whom he or she is responsible.

Of course, no evaluation of the impact of the standards would be complete without a review of the substantive standards themselves. The overarching theme of PREA is that covered agencies must adopt a written policy of zero tolerance toward all forms of sexual abuse and sexual harassment. 28 C.F.R. § 115.11. Sexual abuse and sexual harassment are defined broadly to include all the types of contact, threats, advances, displays, and comments you would expect. § 115.6. Some of the PREA standards will already be satisfied under sheriffs’ existing regulatory, statutory, and constitutional duties to protect the inmates in their custody. *See, e.g.*, G.S. 153A-224(a) (duty to protect prisoners from assaults by other prisoners). But some will not. The summary that follows emphasizes those standards that strike me as most likely to require substantial changes to current jail practices in North Carolina.

Supervision and monitoring. PREA standards do not set a specific staff-to-inmate ratio for jails, but they do require “adequate levels of staffing,” augmented by video monitoring where applicable. § 115.13. Facilities are required to adopt a policy of having intermediate or higher-level supervisors conduct unannounced rounds on both day and night shifts to deter staff sexual abuse and harassment. § 115.13(d). Supervisor rounds are not required under existing North Carolina regulations. *See* 10A NCAC 14J .0601 (requiring observations by detention officers twice per hour for all inmates, and four times per hour for inmates displaying certain behaviors).

Youthful inmates. Inmates under age 18 placed in adult jails must, under § 115.14, be housed in areas where they have no sight, sound, or physical contact with adult inmates through use of a shared dayroom, common space, shower area, or sleeping quarters. Outside of housing areas, facilities have two options under PREA: either maintain sight and sound

separation between youthful inmates and adult inmates, or provide direct staff supervision of the inmates. *Id.* These rules go beyond existing North Carolina regulations, which require only that male inmates under 18 be confined in separate cells from adult inmates during sleeping hours. 10A NCAC 14J .0303. Our regulations include no similar provision for women, and make no mention of separation or special supervision requirements outside of housing units. PREA discourages facilities from using isolation to comply with the segregation requirement. The standards also direct that young inmates be allowed daily large-muscle exercise, which goes beyond the three-days-per-week requirement that kicks in after 14 consecutive days of confinement under North Carolina regulations. 10A NCAC 14J .1004.

Cross-gender viewing and searches. Under § 115.15, facilities may not conduct cross-gender strip searches or visual body cavity searches, except in exigent circumstances or when performed by medical staff—an approach the School of Government has been recommending for almost 30 years. *See* Michael R. Smith, *Searches of Newly Admitted Detainees*, Jail Law Bulletin (Feb. 1986). As of August 20, 2015, facilities rated for over 50 inmates may not do cross-gender pat-down searches of women absent exigent circumstances. The deadline is August 21, 2017 for smaller facilities. § 115.15. PREA also requires a knock-and-announce rule for opposite gender entries into housing areas, and prohibits physical examinations solely to confirm the genital status of a transgender or intersex inmate. *Id.*

Hiring and promotion. Agencies may not hire, promote, or enlist the services of anyone with a record of any sexual abuse in a confinement facility, or of sexual abuse involving force or coercion in the community, if that person may come into contact with inmates. § 115.17. Before hiring a new employee an agency must conduct a criminal background check and make its best effort to contact all prior institutional employers for information on allegations of sexual abuse. The agency must also conduct background checks or conduct similar investigations on existing employees and contractors every five years. *Id.*

Education and training. Agencies must, under § 115.31, train all employees on a list of topics related to sexual abuse, including avoiding inappropriate relationships with inmates; communicating effectively with gay, lesbian, bisexual, transgender, intersex, or gender nonconforming inmates; and PREA reporting requirements. Refresher training is mandatory every two years. §115.31(c). Special training is required for jail investigators, § 115.34, and medical staff, § 115.35. Inmates must also be educated. Upon intake officers must inform inmates of their right to report sexual abuse, and more comprehensive information must be provided, either in person or by video, within 30 days. § 115.33.

Screening. All inmates must, within 72 hours of their arrival at the facility, be screened for their risk of being sexual abused or sexually abusive toward others. § 115.41. The National PREA Resource Center will make screening tools available on its website. If screening uncovers a prior history of victimization or abuse, staff must ensure that the inmate is offered a follow-up meeting with a medical or mental health provider within 14 days. § 115.81.

Inmate reporting. Agencies must provide multiple ways for inmates to privately report incidents of sexual abuse, including at least one way that allows reporting to a public or private entity that is not a part of the agency itself but can communicate with the agency, such that the reporting inmate may remain anonymous. § 115.51.

There are other standards, which are addressed in the many other resources and checklists available from the National PREA Resource Center. For instance, I found this handbook to be particularly helpful. There are also many opportunities for training and technical assistance. Ultimately, though, there is no substitute for reading the PREA standards themselves. They seem daunting at first, with over 125 pages in the Federal Register devoted to PREA. But the actual standards for adult prisons and jails are only 16 pages long, and a careful agency will certainly want to review them.

Links

- www.gpo.gov/fdsys/pkg/PLAW-108publ79/pdf/PLAW-108publ79.pdf
- www.law.cornell.edu/uscode/text/42/15601
- codes.lp.findlaw.com/uscode/42/147/15607
- www.gpo.gov/fdsys/pkg/CFR-2012-title28-vol2/pdf/CFR-2012-title28-vol2-part115.pdf
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