

**Edward Byrne Memorial Justice Assistance Grant (JAG) Program
Frequently Asked Questions (FAQs)
Regarding the
Prison Rape Elimination Act (PREA) certification requirement
and 5% reduction**

Updated April 12, 2016

1. What does the PREA statute require regarding State compliance with the DOJ National Standards to Prevent, Detect, and Respond to Prison Rape?

The PREA statute provides that a state whose governor does not certify full compliance with the DOJ National Standards to Prevent, Detect, and Respond to Prison Rape, 42 U.S.C. 15607(e), is subject to the loss of 5% of any DOJ grant funds that it would otherwise receive for prison purposes, unless the Governor submits to the Attorney General an assurance that such 5% will be used only for the purpose of enabling the state to adopt and achieve full compliance with the National PREA Standards in future years.

2. Why does this requirement apply to JAG funds?

Under PREA, States that receive Department of Justice grant funding for “prison purposes” must certify that they are in compliance with the DOJ National Standards to Prevent, Detect, and Respond to Prison Rape, 42 U.S.C. 15607(e), or else be subject to the loss or reallocation of specified funding. Because JAG funding can be utilized for a variety of prison purposes, a 5% reduction will be applied each year a Governor does not certify full compliance with the PREA standards.

3. If the Governor does not certify full compliance, how would the 5% reduction be assessed on a State’s JAG funding?

States without a certification of full compliance would have the 5% PREA reduction assessed against the state’s 60% share of JAG funding plus the less than \$10,000 allocation, but would exclude the mandatory variable pass-through (VPT) amount. Below is an illustration of how the PREA reduction is assessed:

If State X is to receive an initial state allocation of \$3,000,000, the 5% PREA reduction would be calculated as follows:

The mandatory pass-through amount of \$1,200,000 (based on State X’s mandatory 40-percent pass-through) is subtracted from the \$3,000,000; resulting in \$1,800,000.

The “less than \$10,000” allocation for State X, \$250,000, is then added to the \$1,800,000; resulting in \$2,050,000.

The 5% PREA reduction is then assessed on the \$2,050,000 amount ($\$2,050,000 \times .05$); resulting in a PREA penalty of \$102,500 for State X.

*For the District of Columbia and the territories, the reduction will be assessed on the full allocation because the entire allocation goes to the District and territorial governments.

4. If the State uses the 5% of its JAG funding towards PREA compliance, does it still need to meet the requirements of the JAG Program for that funding?

Yes, funds used for PREA compliance still need to meet the requirements of the JAG Program, which includes permissible uses of funds.

5. When does the PREA reduction take effect?

The first year of the 5% reduction is fiscal year 2014, which commences on October 1, 2013, and ends on September 30, 2014. States that implement PREA have an ongoing obligation for compliance and thus, the PREA reduction will be applied each year the Governor does not certify full compliance with the PREA standards.

6. When is the certification or assurance by the Governor due to DOJ?

Prior to FY 2016, the deadline for the submission of either a *Certification Regarding Adoption and Full Compliance with the National Standards to Prevent, Detect, and Respond to Prison Rape*, or *Assurance to Utilize Department of Justice Grants to Achieve Full Compliance with the National Standards to Prevent, Detect, and Respond to Prison Rape* by the Governor was May 15; however, this date is incongruent with the audit year, which is established in the Standards to end on August 19 each year. This incongruity required governors to submit a certification or an assurance prior to the end of the audit year based on incomplete audit data.

In order to streamline these processes and address the challenges and concerns voiced to DOJ by governors and others who have responsibilities related to PREA, DOJ has implemented an amended timeline in 2016 for a governor to provide DOJ with a certification or assurance. Beginning in 2016, the due date for certification and assurance submissions will occur at the beginning of the federal fiscal year that follows the completion of each audit year. In order to implement this timeline change, 2016 will be a transition year when governors will make two certification and/or assurance submissions.

1. 2016 Governor's Re-Certification/Assurance for Audit Year 2. For the first submission in 2016, governors are being asked to provide a certification or assurance to DOJ for Audit Year 2 (August 20, 2014 – August 19, 2015) of the first 3-year audit cycle. This transition year provides states/jurisdictions with a second opportunity to provide DOJ with a certification or assurance for Audit Year 2, but with the significant benefit of having a full audit year of audit data.

This submission—the first in 2016, but the second focused on Audit Year 2—will impact FY 2016 DOJ grant awards. This submission is due on March 31, 2016.

2. 2016 Governor’s Certification/Assurance for Audit Year 3. For the second submission in 2016, governors are being asked to provide a certification or assurance to DOJ for Audit year 3 (August 20, 2015 – August 19, 2016) of the first 3-year audit cycle, and these submissions will impact FY 2017 grant funds. This second submission will be due on October 15, 2016. Governors will receive a second letter from DOJ in summer 2016 with additional instructions.
7. What options does the Governor have with regards to PREA compliance?

Pursuant to the PREA statute, the governor has three options: 1) submit a certification that the State is in full compliance with the National PREA standards; 2) submit an assurance that not less than 5% of its DOJ funding for prison purposes shall be used only for the purpose of enabling the State to adopt and achieve full compliance with the PREA standards; or 3) accept a 5% reduction in DOJ grants that it receives for prison purposes.

Pursuant to PREA Standard 115.501(a), Governors shall make their certification of compliance taking into consideration the results of the most recent agency audit results. DOJ intends these audits to be a primary, but not the only, factor in determining compliance. For example, audit results for a particular period may show the selected one third of audited facilities in compliance; however, the governor may have determined that other facilities under his/her control are, in fact, not in compliance with the standards. Other than the standard described above requiring governors to “consider” the audit findings, neither the PREA statute nor the National PREA standards restrict the sources of information Governors may use in deciding whether or how to certify compliance.

It is important to note that if a Governor submits an assurance to DOJ that not less than 5% of the state’s DOJ funding for prison purposes will be used to support implementation of the National PREA standards, the state will not lose the funds, but the funds will be allocated to a PREA-specific award (see #11 below).

8. To what facilities in the State does the Governor’s PREA certification apply?

The PREA standards state that “The Governor’s certification [of full compliance with the PREA standards] shall apply to all facilities in the State under the operational control of the State’s executive branch, including facilities operated by private entities on behalf of the State’s executive branch.” 28 C.F.R. § 115.501(b). A “facility” is defined as “a place, institution, building (or part thereof), set of buildings, structure, or an area (whether or not enclosing a building or set of buildings) that is used by an agency for the confinement of individuals.” *Id.* at § 115.5. Some standards apply specifically at the facility level, while others apply at the agency level.

The definition of facility includes local detention and correctional facilities as well as State correctional facilities; however, not all facilities within a State are subject to the Governor's certification. The Governor's certification does not encompass those facilities outside the operational control of the governor; namely, those facilities that are under the operational control of counties, cities, or other municipalities, or privately-operated facilities not operated on behalf of the State's executive branch.

The term "operational control" is not defined in the PREA standards. The determination of whether a facility is under the operational control of the executive branch is left to a governor's discretion, subject to the following guidance. Generally, there are several factors that may be taken into consideration in determining whether a facility is under the "operational control" of the executive branch:

- Does the executive branch have the ability to mandate PREA compliance without judicial intervention?
- Is the State a unified correctional system?
- Does the State agency contract with a facility to confine inmates/residents on behalf of the State agency, other than inmates being temporarily held for transfer to, or release from, a State facility?

The above list is not exhaustive but it covers the majority of the situations that Governors may face in determining whether a facility or contractual arrangement is subject to the Governor's certification.

Please note that the standards require that any public agency that contracts for the confinement of its inmates with private agencies or other entities, including other government agencies, (1) include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards, and (2) provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards. 28 C.F.R. §§ 115.12, 115.112, 115.212, 115.312. A State confinement agency that fails to comply with these requirements is, by the terms of the standards, not PREA compliant.

9. What if a State is not fully compliant with the National PREA standards, but is working towards full compliance?

Under 42 USC 15607(e) (2) (B), the State may provide an assurance that 5% of DOJ funds that can be used for prison purposes will be used to achieve full compliance with the standards, so that a certification of compliance may be submitted in future years.

10. Are the costs associated with preparing for and conducting PREA audits an allowable use of the five percent allocation for prison purposes?

Yes. States may use the five percent allocation on activities intended to help them to achieve compliance with the PREA standards, including preparing for and conducting audits.

Allowable activities may also focus on addressing one or more of the major provisions of the PREA standards, which include:

- General prevention planning;
- Supervision and monitoring;
- Staffing of juvenile facilities;
- Juveniles in adult facilities;
- Cross-gender searches and viewing;
- Training and education;
- Screening;
- Reporting;
- Responsive planning;
- Investigations;
- Discipline;
- Medical and mental health care;
- Grievances;
- Lesbian, gay, bisexual, transgender, intersex (LGBTI), and gender nonconforming inmates; and
- Inmates with disabilities and limited English proficient (LEP) inmates.

11. If a State uses the 5% allocation, will that be included in the standard State JAG award?

The 5% allocation cannot be included in the State JAG award, as the PREA activities must be tracked separately. For those States that submit an assurance that not less than 5% of its DOJ funding for prison purposes shall be used only for the purpose of enabling the State to adopt and achieve full compliance with the PREA standards, BJA will provide solicitation guidance and require a separate funding application to be submitted which details the specific PREA-related activities to be carried out using these funds. BJA staff will work with States on this application, and awards will be made by September 30.

12. What can a state do with its remaining JAG PREA Reallocation funds if, after providing DOJ with an assurance, the state later comes into full compliance with the PREA Standards?

Per the PREA statute, any state that submits an assurance to OJP that it will reallocate 5% of certain formula grant funds (including JAG Formula funds) to enable itself to come into compliance with PREA will be allowed to retain those funds (which would otherwise have been forfeited as a penalty for PREA non-compliance). Once that state comes into full compliance with the PREA Standards, the Governor should provide the PREA Management Office with that state's PREA Certification of full compliance.

Upon receipt of that Certification, BJA will lift the PREA limitation on the JAG PREA Reallocation funds, and the State will be allowed to use any remaining JAG PREA Reallocation funds for any of the lawful purposes under JAG statute. Of course, a state

could also choose to continue to use their JAG PREA Reallocation for the purposes of maintaining PREA compliance. For example, a state could continue to pay for ongoing PREA facility audit requirements with these reallocation funds, should it choose to do so.

As a process, if a state chooses to use its remaining JAG PREA Reallocation funds for their originally intended purposes following the PREA Management Office's receipt of a Certification of full compliance, a grantee can submit a change of scope Grant Adjustment Notice (GAN) in the online Grants Management System (GMS). As part of the change of scope GAN, a copy of the Governor's Certification should be provided. Once the change of scope GAN has been approved by BJA, the grantee can then submit a revised budget GAN in GMS to request to relocate their funds to other approved JAG purpose activities consistent with the allowable formula

13. Can Management & Administration (M&A) funds be deducted from the PREA reallocation funds?

PREA reallocation funds cannot be used towards administrative costs, including indirect costs that are administrative in nature. Charging indirect costs to JAG PREA Reallocation awards is not allowable, except to the extent that a State can show that the indirect costs do not cover administrative costs.

14. Does my agency need to submit materials that we plan to publish that are funded by PREA Reallocation funds to BJA?

Yes. You must submit to BJA for review and approval any curricula, training materials, proposed publications, reports, or any other written materials that will be published, including web-based materials and web site content, through funds from this grant at least thirty (30) working days prior to the targeted dissemination date. Any written, visual, or audio publications, with the exception of press releases, whether published at the grantee's or government's expense, shall contain the following statements: "This project was supported by Grant No. <AWARD_NUMBER> awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice." The current edition of the DOJ Grants Financial Guide provides guidance on allowable printing and publication activities.

15. Who can I contact for more information regarding PREA implementation?

For additional information concerning PREA implementation, visit the National PREA Resource Center at www.prearesourcecenter.org, and/or send inquiries to the PREA Management Office at PREACompliance@usdoj.gov.