

Office of Juvenile Justice and Delinquency Prevention's Title II Part B Formula Grants Program
Frequently Asked Questions regarding the Prison Rape Elimination Act (PREA)

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 in the future.

2. Why does this requirement apply to Title II Part B Formula Grant 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 OJJDP’s Formula Grants program funding can be utilized for a variety of prison purposes, a 5% reduction or reallocation will be applied each year a Governor does not certify full compliance with the PREA standards.

3. 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), in deciding whether to provide DOJ with a certification of compliance, Governors shall take 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, then no reduction will be imposed.

4. 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.

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

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 is May 15, 2014.

6. 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.

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

Under 42 U.S.C. § 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.

8. How Will OJJDP implement the PREA reduction on Formula Grants funding.

PREA reductions for non-compliance will be taken from the portion of the Title II Part B Formula Grants funding that the state retains, to include funds for plan preparation and administration. The Juvenile Justice & Delinquency Prevention Act (42 U.S.C. § 5633(a)(5)) requires that, unless waived by the OJJDP Administrator, 66 2/3 of the funds shall be expended through (A) programs of units of local government (B) through programs of local private agencies, and (C) to provide funds for Indian tribes that perform law enforcement functions, States may retain 33 1/3 of the funding for state programming and administration activities. Funds allocated for the State Advisory Group (5% of the total allocation, per 42 U.S.C. 5632(d)) will not be affected.

The PREA reduction will occur on the portion of the funding that the state retains. Please note, for states that retain a higher portion (through the waiver) of funding, the PREA reduction will be placed on 5% of the total portion of funds that the state retains. For states that pass through a higher portion than the required 66 2/3, the PREA reduction will continue to be applied to 5% of the amount possible for the state to retain, which is 33 1/3.

9. If the Governor does not certify full compliance, how would the 5% reduction be assessed on a State's Title II Part B Formula Grants funding?

States without a certification of full compliance would have the 5% PREA reduction assessed against the state's 33 1/3 share of Formula Grants funding, but would exclude the required pass-through amount for the State Advisory Group (SAG) and local or Indian programming activities. Below is an illustration of how the PREA reduction is assessed:

- ♦ State of X receives \$100,000 in JJDP Formula grant funds:
 - 5% may be used for the State Advisory Group
 - ~\$5,000.00, leaving \$95,000 for programming
 - Of the \$95,000.00, 66 2/3 passed thru to localities
 - ~\$62,700.00
 - Leaving 33 1/3 in the state retained portion
 - ~\$32,300.00
 - The PREA reduction would occur on 5% of state retained portion of \$32,300
 - ~\$1,615.00 would be the PREA reduction

10. What happens relative to Title II Part B Formula Grants funding when the Governor submits the required Certification or Assurance?

Once the state submits an Assurance, OJJDP will invite those states to submit a separate application for those funds to be used towards PREA compliance activities.

Funds from states that do not provide DOJ with a Certification or Assurance to comply with PREA will be distributed proportionally to the other states that submit a Certification or Assurance.

11. What kinds of activities can PREA funds go towards?

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.

OJJDP will release a specific PREA funding document outlining how funds may be used in the coming weeks.

12. Can the PREA 5% allocation, be included in the standard OJJDP Formula Grants Program award for FY14?

The 5% allocation cannot be included in the FY14 Title II Part B Formula Grants Program 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, OJJDP 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. OJJDP staff will work with States on this application, and awards will be made by September 30, 2014.

13. What if the state is in compliance with all juvenile facilities and only out of compliance with adult facilities? Will OJJDP funding be impacted?

If a state is compliant with the standards as they apply to the state's juvenile facilities, and out of compliance only with adult facilities, the state would not be subject to the 5% reduction in OJJDP Formula Grant funding. In addition, under this scenario, states would have the option of using their Title II Part B Formula awards for adult facilities, but only to help in remedying any sight and sound violations of the PREA standards. If there are no problems with sight and sound violations in adult facilities and all juvenile facilities are fully compliance with PREA, there is no loss of OJJDP funding to the state.

Additional Questions on PREA and OJJDP

1. If a state has both juvenile and adult facilities subject to PREA standards, can the state certify or assure separately for each, or must each state submit only one certification/assurance for all facilities?

States will only be permitted to submit one certification for all facilities.

2. Please clarify which juvenile facilities must comply?

PREA directed the Attorney General to promulgate standards for all confinement facilities including, but not limited to, local jails, police lockups, and juvenile facilities. See 42 U.S.C. § 15607(a)(1). DOJ has promulgated standards for prisons and jails (28 C.F.R. §§ 115.11 – 115.93), lockups (28 C.F.R. §§ 115.111 – 115.193), residential community confinement facilities (28 C.F.R. §§ 115.211 – 115.293), and juvenile facilities (28 C.F.R. §§ 115.311 – 115.393).

Additionally, on May 17, 2012, the President directed "all agencies with federal confinement facilities that are not already subject to the Department of Justice's final rule" to develop rules or procedures that comply with PREA.

3. If a facility for youth is *not primarily used for youth* in the juvenile justice system but, rather, social services youth, may the facility be considered either a “juvenile facility” or “community confinement facility” under the standards?

No. A facility for juveniles that is not primarily used for the confinement of youth in the juvenile justice system is not covered by the PREA standards.

4. Do the standards apply to facilities that hold youth in the custody of a juvenile justice agency if those youth are not the totality of the population held in that particular facility? For example, are contracted secure juvenile facilities; contracted halfway houses, group homes, and community correctional facilities; and state department of social services secure facilities that provide services to juveniles who are under juvenile court jurisdiction through a contract with the state juvenile justice agency all covered? If so, to what extent?

The PREA standards make clear that a *juvenile facility* is one that is *primarily* used for the confinement of juveniles. If a majority of a facility’s residents are under the age of 18 (unless under adult court supervision *and* confined or detained in a prison or jail), it will fall within the scope of the juvenile facility standards, even if non-delinquent youth are part of the facility’s population. One example is a facility that houses 10 youth and only two of those youth are under the jurisdiction of juvenile justice agencies. According to the standard, because less than a majority of the youth in that facility are in the custody of the juvenile justice department, the facility does not need to comply with PREA juvenile facility standards. For example, if the facility is used to house individuals “as part of a term of imprisonment or as a condition of pre-trial release or post-release supervision...” then the community confinement standards would apply. See 28 C.F.R. § 115.5 (definition of community confinement facility).

In addition, as in all custodial settings, agencies have state and federal legal obligations to protect those in custody, irrespective of obligations under PREA.

Finally, PREA Standard 115.312 provides that “a public agency that contracts for the confinement of its residents with private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity’s obligation to adopt and comply with the PREA standards and any new contract or contract renewal shall provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards.”

5. Are foster homes that contract with juvenile justice agencies (as opposed to institutional residential placements) covered by the PREA standards?

No, foster homes are not covered by the standards.

6. When will the tools be available for juvenile jurisdictions? Will the auditing timeframe be extended for juvenile jurisdictions due to the above?

The Department is currently diligently working on making these juvenile tools available for jurisdictions. We hope to have the tools available in the coming weeks.

7. Are we to use the adult tool for juvenile facilities?

No, auditors should use the juvenile facility audit tool, which should be released in the coming weeks.

8. How many juvenile auditors have been certified and what is their geographic location?

As of March 26, 2014, 36 juvenile auditors have been certified. For a complete listing of those certified auditors, please visit the PREA Resource Center at www.prearesourcecenter.org.

9. Please discuss sight and sound in juvenile facilities under PREA. For purposes of the PREA standards, does there have to be separation of inmates under 18 from those inmates age 18 and over in juvenile facilities?

The answer is no. The juvenile facility standards do not have a corollary youthful inmate standard so in a facility that meets the definition of juvenile facility it is completely acceptable to mix the under 18s from the 18s and over. However, states are still required to adhere to all of the core requirements of the JJDP Act in order to receive Title II Part B Formula Grant awards without reduction.

10. 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.