



Texas Board of Criminal Justice  
PREA Ombudsman Office  
P.O. Box 99  
Huntsville, TX 77342-0099

March 24, 2022

re: TDCJ forced “voluntary” protective custody, [REDACTED] [REDACTED], TDCJ # [REDACTED]

To the Texas Board of Criminal Justice PREA Ombudsman Office:

I am writing on behalf of a transgender woman, Ms. [REDACTED] [REDACTED], Texas Department of Criminal Justice (TDCJ) number [REDACTED], currently incarcerated at the Hughes Unit.

Trans Pride Initiative (TPI) will continue to reiterate the following as long as TDCJ continues to harm transgender persons by denying their gender identity. The only professional and ethical way to address Ms. [REDACTED] is by using a female title such as Ms. and by using she/her/hers pronouns in referring to her as per training materials for PREA § 115.31,

Pronoun usage is important to consider when working with LGBTI, and especially transgender, inmates

- Using the correct pronoun is a way to show respect and to demonstrate acknowledgment of their gender identity
- Best practices suggest that transgender females . . . be addressed as “she” and referred to as “her”
- Transgender males . . . should be addressed as “he” and referred to as “him”<sup>1</sup>

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1. See the National PREA Resource Center training materials covering “Unit 5: Effective and Professional Communication with Inmates,” available at <https://www.prearesourcecenter.org/sites/default/files/content>



TBCJ Ombudsman letter dated September 2, 2021, identified as related to inquiry 21-6106-04, indicates staff are “trained” to refer to all persons in TDCJ custody as “inmate [last name]” and to use gender neutral pronouns, which although it doesn’t meet training recommendations is better than the total refusal to recognize the existence of trans persons. However, the Ombudsman also used manipulative language to indicate “training” is considered to meet PREA standards. The Ombudsman not only fails to address that “training” very often does not reflect implementation, but also implies that “training” addresses issues of actual harm. Such manipulation is a deliberate act to cover up harm, abuse, and other violence against transgender and other persons in TDCJ custody. The value of “training” can only be measured by its implementation, and to use “training” to cover up inappropriate actions promotes further violence, and arguably supports and even encourages the violence endemic in the system.

The refusal by TDCJ staff and their contractors to use proper forms of address in referring to transgender persons, and to not only fail to use gender neutral references but to intentionally misgender trans persons in TDCJ custody after their gender identity has been asserted by the inmate and advocates, is without doubt harming transgender persons, and further it encourages violence, including sexual violence, against trans prisoners. A recent study strongly affirmed that use of chosen names for transgender persons reduces depressive symptoms and suicidal behavior.<sup>2</sup> For both institutional and non-institutional settings, when a chosen name was used, there was a 5.37% decrease in depressive symptoms, a 29% decrease in suicidal thoughts, and a 56% decrease in suicidal behaviors. Denying an affirming name and pronouns is harm, and TDCJ as well as their contractors who participate in such denial are actively participating in such harm.

This harm stems from and is directly abetted by Joseph Penn and Lannette Linthicum who, with abusive and deliberate intent to harm, intentionally disregard current DSM standards and claim as a means of inculcating and exercising personal bias and medical negligence that gender dysphoria is considered in TDCJ to be a “mental illness.”<sup>3</sup> This direct contradiction of the DSM has no purpose but inflict further harm and encourage medical neglect of trans persons.

Additional research has shown that, among other beneficial effects, using appropriately gendered references can help avoid verbal and sexual harassment.<sup>4</sup> Interactions with law enforcement show that even those tasked with “protection” contribute substantially to harm,

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2. Russell, S. T., Pollitt, A., Li, G., & Grossman, A. H. (2018). Chosen name use is linked to reduced depressive symptoms, suicidal ideation, and suicidal behavior among transgender youth. *Journal of Adolescent Health, 63*(4):503-505. Available online, doi: 10.1016/j.jadohealth.2018.02.003.
3. CMHC Committee Meeting Minutes, June 16, 2016, wherein Dr. Margarita de la Garza-Graham “asked if gender dysphoria would be classified as a mental illness. Dr. Joseph Penn, Mental Health Director, UTMB replied, yes.” Linthicum implied agreement and support for this abusive practice; not one CMHC Committee member voiced objection to this abuse.
4. Fein, L. A., Salgado, C. J., Alvarez, C. V., & Estes, C. M. (2017). Transitioning transgender: Investigating the important aspects of the transition: A brief report. *International Journal of Sexual Health, 29*, 80-88. Available online, doi:10.1080/19317611.2016.1227013.



with 58% of all law enforcement verbally harassing, physically or sexually assaulting, or otherwise mistreating persons they knew or assumed were transgender.<sup>5</sup> Using appropriate names and pronouns can be especially important in prison settings, where one study has shown that 80% of gender diverse prisoners report verbal harassment by staff, and 30% report physical or sexual assault by staff.<sup>6</sup> The latter number is reinforced nationally by James et al. (2016).

The continued and regularly repeated use of language by TDCJ and its contractors that intentionally harms transgender persons constitutes sexual harassment under PREA standards as it includes “[r]epeated verbal comments . . . by a staff member, contractor, or volunteer, including demeaning references to gender.” Occasional mistakes in identifying one’s gender are understandable; repeated misgendering—as is done in letters and emails from both the Office of the Ombudsman and the PREA Ombudsman Office and in conversations with TDCJ and contractor staff—in spite of extensive evidence of harm, including increased mental health issues and suicidal ideation, is nothing less than intentional and premeditated sexual harassment for the sole purpose of carrying out violent and forced adherence to gender stereotypes by the agency.

As noted above, failure to respect one’s gender may be considered to fail PREA requirements to protect transgender persons, who are at increased risk for sexual abuse and other violence, and may constitute an Eighth Amendment violation. A recent statement of interest by the DOJ concerns Eighth Amendment violations by prison systems like TDCJ that refuse to adequately consider the safety of transgender persons in their custody:

Prison officials have an obligation under the Eighth Amendment to the U.S. Constitution to protect all prisoners from sexual abuse and assault by assessing the particular risks facing individual prisoners and taking reasonable steps to keep them safe. *Farmer v. Brennan*, 511 U.S. 825, 843-45 (1994). This duty includes transgender prisoners. . . . Prison officials violate the Constitution by [] categorically refusing to assign transgender prisoners to housing that corresponds to their gender identity even if an individualized risk assessment indicates that doing so is necessary to mitigate a substantial risk of serious harm, and (2) failing to individualize the medical care of transgender prisoners for the treatment of gender dysphoria.<sup>7</sup>

## Issue Summary

Ms. [REDACTED] reports that over the last three years, she has requested a number of times to be removed from TDCJ safekeeping designation, and each time she has been refused. Safekeeping is a designation that qualifies as “protective custody” under the federal PREA Standards. TDCJ appears to have considered safekeeping to be “voluntary” and thus not subject to reporting

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5. James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

6. Emmer, P., Lowe, A., & Marshall, R.B. (2011). *This is a Prison, Glitter is Not Allowed: Experiences of Trans and Gender Variant People in Pennsylvania’s Prison Systems*. Philadelphia, PA: Hearts on a Wire Collective.

7. Leary, P.D. et al.(2021). Statement of Interest of the United States, *Diamond v. Ward et al.*, Case 5:20-cv-00453-MTT, Document 65.



requirements under PREA § 115.43, but the refusal to grant a request to relinquish safekeeping designation substantiates that TDCJ safekeeping status is not voluntary, thus requiring:

- that persons designated for safekeeping status shall have access to all “programs, privileges, education, and work opportunities to the extent possible”;
- the documentation of opportunities limited, the duration of the limitations, and the reasons for the limitations; the documentation of the basis for concern for the incarcerated person’s safety and why no alternative means of separation can be arranged;
- and review every 30 days of the need for separation from general population.

Hughes Unit administration, including Senior Warden [REDACTED] [REDACTED], provided false information to PREA auditor [REDACTED] [REDACTED] concerning protective custody restrictions and compliance with PREA § 115.43, deliberately obfuscating unit non-compliance with Standard 115.43 because at least one person was in involuntary protective custody at the time of the audit and being denied opportunities required to be provided.

PREA auditor [REDACTED] [REDACTED] failed entirely to rightfully consider protective custody restrictions in the most recent audit of Hughes Unit, even falsely claiming the unit “exceeds expectations” for compliance with PREA Standard 115.43.

### **Request for Redress**

We are requesting that a determination be made specifically for Ms. [REDACTED] whether her safekeeping designation is “voluntary” or “involuntary,” and if voluntary, we are requesting that her request to be removed from safekeeping be immediately granted, and that she be granted access to all programs, privileges, education, or work opportunities for which she is qualified.

We are requesting that Ms. [REDACTED] be monitored for a minimum of six months for retaliation for this complaint or for any other reason, and monitored for interference with her access to any programs, privileges, education, or work opportunities for which she is qualified.

We are requesting that TDCJ be required to clearly identify safekeeping as “voluntary,” “involuntary,” or “conditionally involuntary” in policy.

We are requesting that if TDCJ safekeeping designation is voluntary, that requests to be removed from safekeeping designation be granted unless there is a clear and documented reason showing that the person making such a request is not competent to make decisions in the best interest for their own safety.

We are requesting that if TDCJ safekeeping designation is involuntary, or if it is considered involuntary for some persons, that all units under TDCJ administration be required to fully document opportunity limitations, need for protective custody designation, and 30-day reviews for all persons involuntarily designated for safekeeping.



We are requesting that the December 2021 PREA audit of Hughes Unit be rejected for its failure to identify non-compliance under PREA § 115.43, and for the intentional misrepresentation of involuntary protective custody by Hughes Unit administration.

## **Description of Issue**

Ms. [REDACTED] has reported that over the last three years, she has made a number of requests to be removed from safekeeping. She reports that each time she has requested removal, she has been refused. Ms. [REDACTED] reports that she never asked to be placed on safekeeping, she was simply assigned safekeeping at intake on Boyd Unit.

Ms. [REDACTED]'s reasons for requesting removal of the safekeeping designation are that she wishes to pursue educational opportunities that are denied persons with a safekeeping designation, she wishes to be assigned a job because she is depressed not being able to have a job, she wishes to have the opportunity to pursue vocation and trade opportunities, and that she would like to apply to be housed in the faith-based pod at Hughes Unit.

Ms. [REDACTED] states that the refusals and the denial of opportunities affect her mental health and escalate thoughts of self-harm and suicide.

Safekeeping designation qualifies as “protective custody” under the federal PREA Standards, as discussed in § 115.43 “Protective custody.” This interpretation has also been confirmed in communications with the National PREA Resource Center (NPRC).<sup>8</sup> The first paragraph under the protective custody discussion in the PREA Standards states:

(a) Inmates at high risk for sexual victimization shall not be placed in *involuntary* segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment [emphasis added].

Under § 115.43, there are extensive reporting requirements for use of involuntary segregated housing, including documentation of the opportunities that are limited, the duration of those limitations, and the reasons for these limitations. In addition to these general requirements, for each individual thus designated for involuntary segregation, the facility is to document the reason for the segregation, the reason no alternative can be provided, and the facility must review the legitimacy of the need for segregation every 30 days.

TDCJ appears to claim that safekeeping is voluntary to get around the reporting requirements, but issues like this substantiate that in fact, safekeeping designation is not voluntary, or is conditionally voluntary. Much of the time, TPI works with persons being denied access programs, privileges, education, and work opportunities where those persons want to remain in safekeeping status, but TDCJ is able to deny these under the claim that safekeeping is voluntary. Regardless of our perception that such denials are inhumane and in violation of the goals of

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8. November 12 and 14, 2021. Personal communication (telephone call and email), Nell Gaither and Phebia Moreland, Senior Program Manager, National PREA Resource Center.



PREA, the Standards do not appropriately address this issue. However, in the case of Ms. [REDACTED], she does not want to maintain her safekeeping status but is being refused, making the safekeeping designation involuntary.

TPI has recently discussed this issue and protective custody in general with NPRC staff,<sup>9</sup> and was sent explanations about protective custody that included the following explanation of the purpose of protective custody:

**Purpose of the Protective Custody Standard:**

- To ensure that facilities do not automatically or routinely **involuntarily segregate** inmates at high risk of sexual victimization or restrict their access to programming or other available activities based on their at-risk status.
- To require facilities that use **involuntary segregated housing** only do so as a last resort until an alternative means of separation from likely abusers can be arranged; placing time limits on the use of segregation and requiring periodic reviews on the continued need for segregation helps ensure that inmates are not penalized because of their at-risk status [emphasis in original].

In our discussions, the NPRC emphasized the voluntary versus involuntary nature of protective custody status. The conversation emphasized the reporting requirements for *involuntary* protective custody, which is what safekeeping designation is in the case of Ms. [REDACTED]. Because Ms. [REDACTED] is being held in involuntary segregation, and has been held in such designation for more than 30 days, TDCJ is required to adhere to PREA § 115.43 paragraphs (b) through (e) of the section:

(b) Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:

- (1) The opportunities that have been limited;
- (2) The duration of the limitation; and
- (3) The reasons for such limitations.

(c) The facility shall assign such inmates to involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

(d) If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, the facility shall clearly document:

- (1) The basis for the facility's concern for the inmate's safety; and
- (2) The reason why no alternative means of separation can be arranged.

(e) Every 30 days, the facility shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

The PREA audit conducted by [REDACTED] [REDACTED] during October 2021, with a final report date of December 4, 2021, took place while Ms. [REDACTED] was being held in involuntary protective

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9. November 12 and 14, 2021. Personal communication (telephone call and email), Nell Gaither and Phebia Moreland, Senior Program Manager, National PREA Resource Center.



custody and during a time that Ms. [REDACTED] was actively objecting to her involuntary protective custody designation. The PREA audit report identifies 546 persons in protective custody at the time of the audit; there is no separate listing for “safekeeping status,” so it is not known if this number includes safekeeping persons or only those persons in what TDCJ identifies as “restrictive housing.” The audit count of incarcerated persons in protective custody should have include at least Ms. [REDACTED] if “protective custody” is only inclusive of involuntary designations, and all safekeeping persons if it includes voluntary designations. The audit states that:

Standard 115.43: Protective Custody

All Yes/No Questions Must Be Answered by the Auditor to Complete the Report

115.43 (a)

- Does the facility always refrain from placing inmates at high risk for sexual victimization in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers?  Yes  No
- If a facility cannot conduct such an assessment immediately, does the facility hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment?  Yes  No

115.43 (b)

- Do inmates who are placed in segregated housing because they are at high risk of sexual victimization have access to: Programs to the extent possible?  Yes  No
- Do inmates who are placed in segregated housing because they are at high risk of sexual victimization have access to: Privileges to the extent possible?  Yes  No
- Do inmates who are placed in segregated housing because they are at high risk of sexual victimization have access to: Education to the extent possible?  Yes  No
- Do inmates who are placed in segregated housing because they are at high risk of sexual victimization have access to: Work opportunities to the extent possible?  Yes  No
- If the facility restricts any access to programs, privileges, education, or work opportunities, does the facility document the opportunities that have been limited? (N/A if the facility never restricts access to programs, privileges, education, or work opportunities.)  Yes  No  NA
- If the facility restricts any access to programs, privileges, education, or work opportunities, does the facility document the duration of the limitation? (N/A if the facility Never restricts access to programs, privileges, education, or work opportunities.)  Yes  No  NA
- If the facility restricts any access to programs, privileges, education, or work opportunities, does the facility document the reasons for such limitations? (N/A if the facility never restricts access to programs, privileges, education, or work opportunities.)  Yes  No  NA

115.43 (c)

- Does the facility assign inmates at high risk of sexual victimization to involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged?  Yes  No
- Does such an assignment not ordinarily exceed a period of 30 days?  Yes  No



115.43 (d)

- If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, does the facility clearly document the basis for the facility's concern for the inmate's safety?  Yes  No
- If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, does the facility clearly document the reason why no alternative means of separation can be arranged?  Yes  No

115.43 (e)

- In the case of each inmate who is placed in involuntary restrictive housing because he/she is at high risk of sexual victimization, does the facility afford a review to determine whether there is a continuing need for separation from the general population EVERY 30 DAYS?  Yes  No

Auditor Overall Compliance Determination

- Exceeds Standard (Substantially exceeds requirement of standards)
- Meets Standard (Substantial compliance; complies in all material ways with the standard for the relevant review period)
- Does Not Meet Standard (Requires Corrective Action)

Additionally, the section "Findings (By Provision)" only addresses "protective custody" as restrictive housing and does not discuss safekeeping designation at all.

This appears to show that either the Hughes Unit administration was deliberately deceiving the auditor, especially since UCC was well aware of the involuntary placement in safekeeping status due to a September 29, 2021, meeting on this very subject. The audit report also indicates the auditor was severely remiss in understanding the parameters of safekeeping as protective custody, and in investigating whether persons were being held in protective custody voluntarily or involuntarily.

Our most recent data shows that Hughes Unit had 192 persons in safekeeping status as of August 31, 2016, and as of the same date there were 2,042 persons in safekeeping status Allred, Boyd, Clemens, Daniel, Estelle, Hughes, McConnell, Michael, Mountain View, Pack I, Powledge, Ramsey I, Stiles, and Telford units.<sup>10</sup> We expect a similar number of persons that may be affected by this issue to be in current TDCJ custody.

## Conclusion

Ms. [REDACTED] reports that over the last three years, she has requested a number of times to be removed from TDCJ safekeeping designation, and each time she has been refused. Safekeeping is a designation that qualifies as "protective custody" under the federal PREA Standards. TDCJ appears to have considered safekeeping to be "voluntary" and thus not subject to reporting requirements under PREA § 115.43, but the refusal to grant a request to relinquish safekeeping designation substantiates that TDCJ safekeeping status is not voluntary, thus requiring:

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10. February 6, 2018. Personal communication, Nell Gaither and undisclosed requester sharing data obtained by Texas Public Information Act.





- that persons designated for safekeeping status shall have access to all “programs, privileges, education, and work opportunities to the extent possible”;
- the documentation of opportunities limited, the duration of the limitations, and the reasons for the limitations; the documentation of the basis for concern for the incarcerated person’s safety and why no alternative means of separation can be arranged;
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Hughes Unit administration, including Senior Warden [REDACTED] [REDACTED], provided false information to PREA auditor [REDACTED] [REDACTED] concerning protective custody restrictions and compliance with PREA § 115.43, deliberately obfuscating unit non-compliance with Standard 115.43 because at least one person was in involuntary protective custody at the time of the audit and being denied opportunities required to be provided.

PREA auditor [REDACTED] [REDACTED] failed entirely to rightfully consider protective custody restrictions in the most recent audit of Hughes Unit, even falsely claiming the unit “exceeds expectations” for compliance with PREA Standard 115.43.

We are requesting that a determination be made specifically for Ms. [REDACTED] whether her safekeeping designation is “voluntary” or “involuntary,” and if voluntary, we are requesting that her request to be removed from safekeeping be immediately granted, and that she be granted access to all programs, privileges, education, or work opportunities for which she is qualified.

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We look forward to receiving communication from your office that this issue is being addressed in a manner that will move the agency closer to ending the TDCJ-sanctioned discrimination and abuse of transgender persons, which in addition to constituting violence in itself, encourages violence from TDCJ staff and other incarcerated persons and fails to meet PREA guidelines requiring zero tolerance of sexual abuse and sexual harassment.

Sincerely,

<p><b>TPI Incident Number</b> •2021-00381, Protective custody results in program denial</p>
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Nell Gaither, President  
Pronouns: she/her/hers  
Trans Pride Initiative

cc: TBCJ Office of the Ombudsman  
TDCJ Safe Prisons/PREA Manager  
TDCJ Region VI Director  
National PREA Resource Center