



Edward Byrne Memorial Justice Assistance Grant (JAG) Program Frequently Asked Questions (FAQs) Regarding the Prison Rape Elimination Act (PREA) Certification Requirement and 5 Percent Reduction

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JAG and PREA Overview

Why is Department of Justice (DOJ) grant funding affected by state efforts to comply with the National Standards to Prevent, Detect, and Respond to Prison Rape?

The PREA statute provides that a state (including U.S. Territories and the District of Columbia) whose governor does not certify full compliance with DOJ's National Standards to Prevent, Detect, and Respond to Prison Rape (PREA Standards), 34 U.S.C. 30307(e), is subject to the loss of 5 percent of any DOJ grant funds that it would otherwise receive for prison purposes.

Prior to October 15, 2024, a state whose governor could not certify full compliance with the PREA Standards had the option to submit an assurance that no less than 5 percent of impacted grant funds would be used by the state solely to adopt and achieve full compliance with the PREA Standards in future years. The Justice for All Reauthorization Act (JFARA) of 2016, which was enacted on December 16, 2016, included an amendment to the PREA statute that eliminated the assurance option.¹

How does this PREA requirement apply to JAG funds?

Any DOJ grant funding that may be used by states for prison purposes is affected by the PREA statute. Because JAG funding can be used for a variety of prison purposes, a 5 percent reduction to a state's JAG funding will be applied each year a governor does not certify full compliance with the PREA Standards.

If the governor does not certify full compliance, how would the 5 percent reduction of a state's JAG funding be assessed?

States that do not have a certification of full compliance would have the 5 percent PREA reduction assessed against the state's 60 percent share of JAG funding plus the less-than-\$10,000 allocation, but it 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 percent PREA reduction would be calculated as follows:

The mandatory VPT 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 state's 60 percent share of JAG funding.

The "less-than-\$10,000" allocation for state X, or \$250,000, is then added to the \$1,800,000, resulting in \$2,050,000.

¹ JFARA eliminated the assurance option on December 16, 2022. JFARA provided that, for 2 years following the assurance sunset, a governor who could certify that the state has had audits for at least 90 percent of facilities covered by the certification/assurance may request that the Attorney General allow submission of an emergency assurance. The emergency assurance ended on October 16, 2024.

The 5 percent PREA reduction is then assessed on the \$2,050,000 amount (\$2,050,000 x .05), resulting in a \$102,500 reduction for state X.

For the District of Columbia and the territories, the reduction will be assessed on the full JAG allocation because they do not have a mandatory variable pass-through requirement.

When does the PREA reduction take effect?

The first year of the 5 percent reduction was fiscal year (FY) 2014, which began on October 1, 2013, and ended on September 30, 2014. States have an ongoing obligation to work toward and achieve compliance with the PREA Standards; therefore, the PREA reduction will be applied each year that the governor does not certify full compliance with the PREA Standards.

When is the governor's certification due to DOJ?

The deadline for submission of a certification of adoption and full compliance with the PREA Standards is typically October 15 each year unless that date falls on a weekend, and then it will be due the next following business day.

What options does the governor have with regards to PREA compliance?

Pursuant to the PREA statute, the governor has the following options:

- (1) Submit to DOJ a certification that all confinement facilities under the governor's operational control are in full compliance with the PREA Standards.
- (2) Submit nothing to DOJ and accept a 5 percent reduction in such grants.

Pursuant to PREA Standard 115.501(a), governors shall make their certifications of compliance taking into consideration the results of the most recent PREA 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 the governor's control are in fact not in compliance with the PREA Standards.

Other than the PREA Standard described above requiring governors to "consider" the audit findings, neither the PREA statute nor the PREA Standards restrict the sources of information governors may use in deciding whether or how to certify compliance.

Governor's Certification Process

To what facilities in the state does the governor's PREA certification apply?

PREA Standards state, "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.” Some PREA Standards apply specifically at the facility level, while others apply at the agency level.

This 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?
- Does the state have a unified correctional system?
- Does the state agency contract with a facility to confine inmates or residents on its behalf, other than inmates or residents being temporarily held for transfer to or release from a state facility?

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

Please note that the PREA 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 PREA Standards, not PREA compliant.

What compliance information must be submitted with the governor’s certification?

Under the PREA amendment in JFARA,² the following documentation must be submitted with the governor’s certification:

- (1) A list of the prisons under the operational control of the executive branch of the state.
- (2) A list of the prisons that were audited during the most recently concluded audit year.
- (3) All final audit reports for prisons that were completed during the most recently concluded audit year.

² For additional information about the Justice for All Reauthorization Act, please visit www.bja.gov/ProgramDetails.aspx?Program_ID=76.

(4) A proposed schedule to complete an audit of all the prisons during the following 3 audit years.

Please note the term “prisons” is utilized in JFARA and intended to include all facilities under operational control of the state’s the executive branch.

What if a state is not fully compliant with the PREA Standards but is working toward full compliance?

Per the PREA amendment under JFARA, states had the option to provide a certification of full compliance, submit no certification to DOJ and lose 5 percent of their impacted grant funds as outlined earlier, or submit an assurance to come into compliance using the same 5 percent of impacted funds. Also, per JFARA, the assurance option and related emergency assurance option were eliminated on October 15, 2024.

Resources

Who can I contact for more information regarding PREA implementation?

For additional information concerning PREA, visit the BJA PREA webpage at <https://bja.ojp.gov/program/prea/overview>. You can also send inquiries to the PREA Management Office at PREACompliance@usdoj.gov.

Where can I find additional PREA resources?

National PREA Standards: <https://bja.ojp.gov/doc/prea-final-rule.pdf>