



# **THE LEGAL RIGHTS OF YOUNG PEOPLE IN STATE CUSTODY**

## **WHAT CHILD WELFARE AND JUVENILE JUSTICE PROFESSIONALS NEED TO KNOW WHEN WORKING WITH LGBT YOUTH**

*by*

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June 2006





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In 2003, a young transgender<sup>1</sup> woman sued the New York City Administration for Children's Services ("ACS") for not allowing her to wear female attire in her all-boys group home.<sup>2</sup> While in state care, she was prohibited from expressing her female gender identity in ways that did not conform with her birth sex, despite the fact that she had been previously diagnosed with Gender Identity Disorder.<sup>3</sup> The young woman alleged that not being allowed to wear dresses and skirts caused her great psychological distress and amounted to illegal discrimination on the basis of disability and sex under the New York State housing non-discrimination law, as well as a violation of her First Amendment freedom of expression. Without reaching her sex discrimination or First Amendment claims, the court found that in order to not discriminate against her based on her disability, ACS was required to make reasonable accommodations for her transgender status and had to permit her to dress and otherwise present herself consistently with her female gender identity.

In 2005, three youth who identified as, or were perceived to be, LGBT sued the Hawai'i Youth Correctional Facility ("HYCF") after experiencing anti-LGBT abuse while confined there.<sup>4</sup> Like so many other lesbian, gay, bisexual, and transgender ("LGBT") youth around the country, these youth were constantly verbally, physically, and sexually harassed and threatened while in the facility, by both the other youth and facility staff. As is a common response in these situations, the facility responded to the harassment by placing two of the plaintiffs in isolation, but did nothing further to address the abuse. Not surprisingly, when the youth were returned to the general population the attacks continued.

The federal judge who heard this case held 1) HYCF's use of isolation to "protect" LGBT wards was not within the range of acceptable professional practices and constituted punishment in violation of their Due Process rights, and 2) HYCF officials acted with deliberate indifference in violation of due process in allowing pervasive verbal, physical, and sexual abuse to persist against these youth. The judge was particularly concerned that HYCF was aware of the ongoing abuse, yet took no adequate or reasonable steps to protect these youth:

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\* A version of this article is scheduled for publication by the Child Welfare League of America in volume 85, issue 2, of *Child Welfare*, March/April 2006.

The court's conclusion that the defendants acted with deliberate indifference is based on the totality of the circumstances at HYCF. Specifically, it is based on the court's findings that the defendants were aware that conditions at HYCF were unsafe for the plaintiffs and that, with this knowledge, defendants failed to maintain: (1) policies and training necessary to protect LGBT youth; (2) adequate staffing and supervision; (3) a functioning grievance system; and (4) a classification system to protect vulnerable youth. ... [I]n light of ongoing abuse and harassment directed at LGBT youth at HYCF, the supervisory defendants' failure to adopt policies and procedures and to provide training regarding how to ensure the safety of LGBT wards supports a finding of deliberate indifference to plaintiffs' safety.<sup>5</sup>

There are thousands of LGBT youth in child welfare and juvenile justice systems throughout the country. Unfortunately these youth are routinely left unprotected from violence and harassment, subjected to differential treatment or denied appropriate services. An increasing number of advocates working with LGBT youth in state custody have brought this issue to light through lawsuits and system reform efforts. This article will describe the legal rights of young people in these systems, focusing on the particular scenarios that may arise when child welfare and juvenile justice professionals work with LGBT youth.

## I. THE CONSTITUTIONAL RIGHT TO SAFETY

The most basic of the fundamental civil rights guaranteed to all people in state custody is the right to safety – a right that is conferred to those in custody because of their unique legal status as wards of the state. The right to safety is grounded in the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution.<sup>6</sup> It imposes a corresponding affirmative duty on the state to protect those in its custody from harm. In the child welfare and juvenile justice contexts, this right is called the “substantive due process liberty interest in safety,” or the “right to safety” for short.

### A. The Right to Safety in Foster Care

The first, and thus far, only U.S. Supreme Court case to address the legal rights of children vis-a-vis the child welfare system is *DeShaney v. Winnebago County Dep't of Soc. Serv.* decided in 1989. Joshua DeShaney, a minor child, was severely abused and permanently injured by his biological father. Although Joshua was not in state custody at the time of the abuse, child protective services in his state had received several credible reports of suspected abuse yet chose not to intervene. His mother brought suit against the county for its failure to protect him. The U.S. Supreme Court ruled that child protective services could not be held liable for Joshua's injuries because they did not have a legal obligation to protect him. In a famous footnote the Court opined, “Had the State...removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect....We express no view on the validity of this analogy, however, as it is not before us in the present case.”<sup>7</sup>

Since the *DeShaney* decision every court that has considered the issue has found that children in the care and custody of the state have an affirmative right to safety, which imposes a corresponding duty on the state to provide protection from harm.<sup>8</sup> Even prior to *DeShaney*, lower courts in various jurisdictions had ruled that the state must protect children in foster care from harm and that the state's failure to do so is actionable.<sup>9</sup>

Based upon these and other published court decisions, it is now well settled that a young person has a legally enforceable right to safety while in foster care. This right includes, among other things, the right to protection against threats to a young person's physical, mental, and emotional well-being, the right to services to prevent harm, and the right to monitoring and supervision.

### **Right to protection of physical, mental, and emotional well-being**

Children in foster care have the right to be protected from physical and sexual abuse at the hands of foster parents, social workers, other foster children, and other individuals that provide care for foster children. In addition to protection from these physical harms, courts have determined that the state must also protect foster children from mental and emotional harm, which also can have gravely negative effects on a child's development.<sup>10</sup> The purpose of the child welfare system is to shield young people from abuse and neglect, and children are indeed removed by Child Protective Services from situations where their psychological and emotional well-being is threatened or harmed. Accordingly, it is now clear that a foster child's right to safety includes the right to a child welfare placement that protects the child's physical, mental, and emotional well-being.

This right applies equally to all children in the child welfare system, including those who are or who are perceived to be lesbian, gay, bisexual, or transgender. The physical and emotional well-being of these youth is at risk if the young person is harassed or mistreated based upon their actual or perceived sexual orientation or gender identity. LGBT youth in the child welfare system often face disapproval and rejection from their caretakers – including foster parents, kinship care providers and group home staff. As one young person described her experience: “My foster family took away my clothes, called me a ‘dyke’ and tried to remake me.”<sup>11</sup> Additionally, they may face harassment or mistreatment from the other young people in the placement: “Right now, I’m in a shelter. I don’t like it there because most people there are very homophobic... I got into a fight just because I’m gay, and people don’t accept that fact... I’m trying to get the heck out of there.”<sup>12</sup> In some instances, caseworkers and caretakers excuse this harassment as acceptable childish behavior, or worse, lay blame on the LGBT youth for openly identifying as LGBT or for acting in ways that do not conform to gender stereotypes. As one youth explained, “I told my social worker that I was beaten up and she said, ‘It’s your fault. Try not to be so feminine.’”<sup>13</sup> In situations where LGBT youth in foster care are mistreated and their physical or emotional well-being is harmed as a result, the caretakers, as well as the professionals responsible for making the placement decision and providing on-going monitoring of the placement, are legally responsible and may face liability in court.

The right to physical, mental, and emotional safety for children in state custody also extends outside of the foster home or placement and protects foster children from mistreatment by persons *other than* the foster parents or caretakers. This is so because there is an expectation that caretakers of foster children will supervise them appropriately and protect them from harms that may exist outside the home.<sup>14</sup> Therefore, professionals on a particular case are expected to place children in homes only where the caretakers are capable of providing protection from harm, particularly when a youth is vulnerable to mistreatment.

Child welfare professionals must exercise sound professional judgment in making placement decisions, taking into consideration the needs of a particular child, the unique environmental appropriateness of each placement, and any environmental cues or signals that might provide indications that a youth will be at risk in a particular placement. The professional must also be prepared to address harassment and mistreatment in school, the

neighborhood, and the community. If an LGBT youth is placed with caretakers who are unable or unwilling to provide them with protection from harm, both inside and outside the home, this youth's right to safety could be violated, and the caseworker or placing agency could be held liable if they knew or should have known of this risk.

### **Right to services to prevent harm**

The right to safety also includes the right to receive services to prevent physical or psychological harm or deterioration while in foster care.<sup>15</sup> Children removed from homes where they may have been abused or neglected often are in need of intervention and services. They may be suffering silently or in obvious pain as a result of their experiences. Professional services, including medical and mental health care, are vital to restoring a child's sense of safety and trust. In addition, some children do not adjust well to life in foster care placements and require additional support and services to help ease the transition.

A child has a right to receive necessary services in order to prevent psychological harm. This right is broad in scope. It takes into account a particular child's unique needs and also recognizes that some forms of harm are difficult to observe. Some services, such as counseling, are routinely provided to children in foster care and help avoid further trauma. Other services, such as counseling to help a child who has been negatively affected by parental rejection or abuse because of the child's actual or perceived sexual orientation or gender identity, may also be required. Further, it is clearly a violation of this right to provide services, including psychological counseling, that are damaging to a young person's emotional well-being.

Child welfare professionals must be vigilant to avoid contracting for services that use inappropriate or unethical practices when dealing with LGBT youth, such as so-called "conversion therapies" and other controversial practices intended to involuntarily change a youth's sexual orientation or gender identity.<sup>16</sup> As one young man described his experience: "In my first group home, they sat me down with a big family Bible and described to me why it was wrong to be gay."<sup>17</sup> Other inappropriate and unethical practices include the withholding of necessary services, or the failure to assist an LGBT young person in identifying community resources, peer support groups, and other resources in order to ameliorate feelings of isolation and depression.

### **Right to monitoring and supervision**

The right to safety includes the right to appropriate monitoring, supervision, and case planning.<sup>18</sup> The duty to protect young people in the child welfare system imposes a corresponding duty on the professionals involved to maintain regular contact with them in order to insure their continued safety.<sup>19</sup> In assessing whether a child welfare professional has fulfilled this duty, courts will take into consideration what the professionals should have known had they been fulfilling their professional obligations. Accordingly, failure to provide regular monitoring and supervision of a child's placement may rise to the level of a breach of the duty to protect, even in situations where the professional had no actual knowledge of the abuse because the professional deliberately failed to learn what was occurring in the placement.<sup>20</sup> If child welfare professionals fail to monitor and supervise an LGBT youth's placement and this youth is subsequently injured, this could constitute a breach of the duty to protect. A child injured in a foster home who was not properly monitored by child welfare professionals may sue the professionals and caretakers for damages.

LGBT young people in state custody are vulnerable to mistreatment and harm from a variety of sources, both inside and outside their placements. In order for a caseworker adequately to monitor the appropriateness of the placement, as well as the services that are being provided, it is imperative that there be regular communication, investigation, and supervision in each child's case. This is important for all children, but it is particularly important for LGBT youth, due to the high level of prejudice and misinformation regarding these youth. When working with a young person who is or may be perceived as LGBT, the caseworker must be prepared regularly to investigate the safety and appropriateness of the placement, the school, and the community within which the young person lives. The goal in working effectively with LGBT young people, whether "out of the closet" or not, is to provide a level of monitoring, supervision, and case management that takes into consideration the unique needs of each child and ensures that any mistreatment is quickly addressed at its source. By maintaining regular contact with a young person, the lines of communication are more likely to be open, and the caseworker is more likely to learn of harassment and abuse and be better prepared to take the necessary steps to stop it.

LGBT youth who have been in foster care stress the importance of developing and maintaining open communication. In the words of one such youth, "When I was in foster care, I was assaulted...because I 'came out'....In foster care, [the caseworkers] need to know first [that you're LGBT] so they can know where to put you and to make you feel safe."<sup>21</sup>

### **B. The Right to Safety in Juvenile Detention and Correctional Facilities**

Youth in juvenile detention and correctional facilities also have civil rights derived from the Fourteenth Amendment Due Process Clause of the U. S. Constitution. Unlike adult inmates, children in the custody of the juvenile justice system have not been "convicted" of crimes.<sup>22</sup> They are also understood to be less mature and responsible for their behavior than adults.<sup>23</sup> Therefore, the purpose and public policy of institutional confinement of children emphasizes rehabilitation and treatment rather than punishment, making the constitutional rights of institutionalized juveniles broader than those of adult inmates,<sup>24</sup> and more like those of young people in the child welfare system, mentally retarded individuals who are institutionalized<sup>25</sup> and adult pre-trial detainees.<sup>26</sup>

For convicted adults, conditions of confinement violate the U.S. Constitution when they amount to "cruel and unusual" punishment as proscribed by the Eighth Amendment.<sup>27</sup> Although courts sometimes look to adult cases when deciding cases involving detained or incarcerated children, it is clearly established that children in state custody are entitled to more protection than incarcerated adults, and most courts analyze their claims under the federal Due Process Clause using the framework developed in *Bell v. Wolfish*, *Youngberg v. Romeo*, and related cases.<sup>28</sup> These due process rights include the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, freedom from conditions that amount to punishment, access to treatment of mental and physical illnesses and injuries, and minimally adequate rehabilitation. These rights extend to children whether they are confined in juvenile detention centers, adult jails, training schools or other secure institutions for delinquent children.<sup>29</sup>

#### **Right to safe conditions of confinement**

Juveniles who are incarcerated or detained have the right to reasonably safe conditions of confinement, including the right to reasonable protection from the aggression of other juveniles or staff.<sup>30</sup> Accordingly, juvenile correctional staff have a duty to protect juveniles from harassment and violence at the hands of

other wards as well as staff. Staff cannot ignore a substantial risk of harm to a particular youth, especially if the youth is known to be vulnerable because he or she is young, has a mental illness, is openly LGBT, or is perceived to be LGBT.<sup>31</sup> In addition, juvenile justice administrators must ensure that they maintain reasonably safe conditions of confinement. To avoid liability, they should have adequate numbers of qualified staff who are sufficiently trained on issues of safety and establish policies and procedures that address youth safety, including a written policy or procedure for reviewing and following up on incident reports, and an adequate classification system. In order to protect LGBT youth from harassment and harm, it may be necessary to have non-discrimination policies and staff training that specifically address the needs of these youth.<sup>32</sup>

Juvenile detention and correctional facilities also must have a sound classification system to provide safety for youth, especially for LGBT youth who are often vulnerable to attack if placed with aggressive juveniles.<sup>33</sup> A facility should consider the age, size, offense history, and other risk factors, including sexual orientation, in its determination of the appropriate level of confinement for a particular juvenile and whether that particular juvenile needs to be segregated from more vulnerable youth because he or she presents a threat.<sup>34</sup> Classification of youth usually occurs at intake and requires periodic reviews to ensure that safety is maintained. Individuals who are charged with making classification decisions in a juvenile facility must have an understanding of the safety risks that LGBT youth face in detention and must take these risks into account when determining placements. Unfortunately, in many instances, this understanding is sorely lacking. Due to misinformation and prejudice, staff in many detention and correctional facilities may erroneously assume that gay youth are sexual predators or desire to have sexual relations with the other youth. As one youth explained, “The staff think that if a youth is gay, they want to have sex with all of the other boys, so they did not protect me from unwanted sexual advances.”<sup>35</sup> These stereotypes are not only false; they are extremely dangerous to LGBT youth, who are at high risk of being sexually and physically abused by other youth and who must be protected from this risk. Accordingly, LGBT youth should not be placed in an aggressive population, with known sex offenders, or with other youth who display anti-gay or anti-transgender animus.

### **Right to be free from unreasonably restrictive conditions of confinement**

Youth in juvenile justice facilities also have the right to be free from unreasonably restrictive conditions of confinement.<sup>36</sup> Conditions that unduly restrict a youth’s freedom of action and are not reasonably related to legitimate security or safety needs of the institution are unconstitutional.<sup>37</sup> A restriction violates this standard if it is arbitrary, discriminatory, or purposeless, or if it is a substantial departure from accepted professional judgment. A restriction that falls into one of these categories unconstitutionally impinges upon the individual’s liberty interests and is considered punitive in violation of the Fourteenth Amendment Due Process Clause.

The use of isolation within juvenile institutions for more than short periods may violate a youth’s right to be free from unreasonably restrictive conditions of confinement and constitute impermissible punishment.<sup>38</sup> Although institutions generally are permitted to use isolation briefly to remove disruptive or out-of-control individuals from the general population, the use of isolation as a form of punishment for breaking facility rules, or for any other purpose, receives close scrutiny by the courts.<sup>39</sup> One reason for this is that isolation can have damaging psychological effects on children, including extreme loneliness, anxiety, rage, and depression, because children have a very different perception of time and a lower capacity than adults to cope with sensory deprivations.

LGBT youth should never be placed in isolation because of their sexual orientation or gender identity or as punishment for expressing their identities.<sup>40</sup> The following statement provides an example of improper treatment: “I was put in a room by myself because I was gay. I wasn’t allowed to be around anyone else.”<sup>41</sup> It is an outdated myth that LGBT youth are a danger to other youth and should therefore be placed in isolation.<sup>42</sup> In light of the well-known adverse psychological and physical effects isolation has on young people, reliance on such misplaced stereotype, whether for administrative convenience or even a desire to protect LGBT youth from harassment and abuse, would be an insufficient basis to subject an LGBT youth to extended periods of isolation. If, on the other hand, an LGBT youth is harassed in a detention facility, it is constitutionally appropriate to segregate his or her harassers, since they pose a known threat to the safety of others. But, a facility should never punish the victim of harassment with isolation simply because doing so is cheaper or more convenient than providing adequate staffing, supervision, or training. Although an LGBT youth may be vulnerable while in detention, automatically placing all LGBT youth in segregation “for their own safety” is unconstitutionally punitive, especially if a more effective and less stigmatizing and isolating response is available.<sup>43</sup>

### **Right to mental and physical health care**

Juveniles who are confined in institutions have the right to adequate medical and mental health care. A juvenile detention or correctional facility has a duty to provide, or arrange for, treatment of mental and physical illnesses, injuries, and disabilities.<sup>44</sup> An act or omission that constitutes a knowing disregard of a ward’s health interests can be a constitutional violation. For example, if juvenile justice facility professionals know of a transgender youth’s significant mental or medical health needs, such as the needs that may attend a diagnosis of Gender Identity Disorder, but do not take the steps necessary to address them, or if they ignore the instructions of the treating physician, the facility is violating the youth’s right to medical care.<sup>45</sup> Facilities must provide appropriate treatment and accommodation for transgender wards or risk facing liability.

In addition, a facility must have appropriate mental health screening and sufficient mental health services. It must also have adequate policies governing the supervision and treatment of suicidal wards.<sup>46</sup> LGBT youth, especially those facing extreme forms of anti-LGBT abuse and harassment, may be at an increased risk for suicide.<sup>47</sup> Individuals responsible for conducting mental health screenings must be aware of this increased risk in order to ensure that LGBT youth who are suicidal receive the constitutionally required mental health services they need. They must also ensure that anti-LGBT harassment and abuse that could exacerbate suicidal feelings is prevented.<sup>48</sup>

### **Right not to be placed in conditions that amount to punishment**

Youth in juvenile detention or correctional facilities should not be placed in conditions that amount to punishment or be stigmatized or humiliated as part of their treatment.<sup>49</sup> Measures that may violate a youth’s constitutional rights include punishing a youth with degrading or humiliating tasks, restricting their personal appearance in ways that are unrelated to legitimate penological interests, or otherwise singling them out from the rest of the population for ridicule.<sup>50</sup> A youth in a detention or correctional facility should never be punished solely because he or she is openly LGBT. In addition, requiring LGBT youth to dress differently than the other youth in the facility, requiring LGBT youth to perform different chores, or singling out LGBT youth in any other way, are actions that are likely to be found to be unconstitutionally punitive. Staff and administrators also must refrain from violating an LGBT youth’s confidentiality by inappropriately revealing his or her sexual orientation or gender identity. In addition to being unethical, such conduct is unconstitutional and may place that young person at risk of serious harm.

LGBT youth also should not automatically be treated as sex offenders or housed with sex offenders, simply because they are gay or transgender. In the adult context, the classification of an inmate as a “sex offender” has been found to affect a liberty interest.<sup>51</sup> As one court explained in holding that an adult inmate has a protected liberty interest and is entitled to a hearing before being classified as a sex offender, “We can hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling of a prison inmate as a sex offender.”<sup>52</sup> Although no appellate decisions have addressed this issue in the juvenile justice context, juveniles are entitled to greater protections than adult inmates, and branding a juvenile with a sex offender label clearly would have the same, if not an even greater, stigmatizing effect. Accordingly, a youth should not be labeled or treated as a sex offender without adequate due process protections, such as a hearing, an evaluation by a qualified mental health professional with expertise in juvenile sex offender issues, and an opportunity to appeal. For LGBT youth, this means that unless the youth has a history of sex-offense adjudications, they should never be arbitrarily labeled as a sex offender, “sexually aggressive,” or any other euphemism used to describe sex offender status, simply because they are LGBT. This would result in a constitutional violation and could result in further physical harm, for which the institution would also be liable.

## II. OTHER CONSTITUTIONAL RIGHTS

In addition to the due process right to safety, LGBT youth in state custody enjoy other significant constitutional rights, including the right to freedom of speech and expression and the right to equal protection under the law. Child welfare and juvenile justice service providers should have an understanding of how these civil rights apply to LGBT youth in state custody.

### A. The Right to Equal Protection

All youth in state custody have a federal constitutional right to equal protection under the law.<sup>53</sup> This means that LGBT youth in child welfare and juvenile justice systems must be treated equally in the provision of placements and services and must be protected from harassment on an equal basis with other youth.<sup>54</sup> In practice, however, this right to equal treatment is often breached, either because staff and administrators are callous or indifferent toward the mistreatment of LGBT youth, or because they wrongly assume that LGBT youth are responsible for bringing such mistreatment upon themselves, simply by existing. One gay youth described his experience as follows: “I got jumped by a bunch of guys in my group home, and when I told the Director he said, ‘Well, if you weren’t a faggot they wouldn’t beat you up.’”<sup>55</sup> If a child welfare or juvenile justice professional fails to take action against anti-LGBT harassment because they believe that LGBT youth in care should expect to be harassed, or because they believe that the LGBT youth brought the harassment upon him or herself simply by being openly LGBT, or because the agency is uneducated about LGBT issues and is uncomfortable addressing the situation, there may be a violation of the youth’s right to equal protection, in addition to a potential violation of the right to safety.

This was exactly the kind of failure that was alleged in a 1998 class action lawsuit brought against the City of New York’s child protective services on behalf of LGBT youth in foster care.<sup>56</sup> The plaintiffs in that case, six LGBT foster youth, experienced severe abuse – including alleged harassment, physical violence, and rape -- by peers, foster parents, and child welfare staff. These young peoples’ appeals for protection were met with indifference, blame or isolation of the victims rather than the abusers. The youth alleged that they were denied equal protection on the ground that, if the abuse was based on something other than their sexual

orientation, the staff would have taken appropriate actions to protect them. The case ultimately settled out of court, resulting in monetary awards for damages and attorney's fees, as well as important policy and practice changes within the local child welfare system order to improve the standard of care for LGBT youth.

## **B. First Amendment Rights**

The First Amendment's guarantee of freedom of speech is one of the most fundamental civil rights in this country.<sup>57</sup> It guarantees the right to be open about one's sexual orientation<sup>58</sup> and the right to expressive conduct, such as dressing in the manner of one's choice.<sup>59</sup> In the public school context, courts have found school officials liable for denying this right to LGBT students who were forced to conceal their sexual orientation as a condition of enrollment, to transgender students who were not permitted to dress in accordance with their gender identity, and to students who were prohibited from bringing a same-sex date to the high school prom or who were not protected after coming "out of the closet."<sup>60</sup> Similarly, child welfare and juvenile justice professionals may violate a youth's First Amendment rights if they require an LGBT youth in state care to hide his or her sexual orientation or gender identity in order to receive services, or if they refuse to allow transgender or gender-nonconforming youth to express their gender through clothing and accessories.

The First Amendment also guarantees young people in state custody the right to religious freedom and the right to be free from religious indoctrination.<sup>61</sup> Many LGBT youth in state custody are forced to hide their identities from their caretakers and to join religious organizations that condemn homosexuality. As one young woman explained: "After 'coming out' to one of my foster families, I was told I was going to hell and forced to go to church with them. I became very 'closeted' after that and didn't tell any other foster families that I'm gay. I was in twenty-two different homes, many of them were very religious."<sup>62</sup> Another youth described a similar experience: "Three of my foster homes were very religious and they told me to go to church and read the bible and sometimes they would have the nuns come back to the house and lecture me."<sup>63</sup> In sum, foster families and group home staff are not permitted to intimidate or coerce a young person into adopting any particular religious practices or beliefs. Such practices not only violate the First Amendment, they also may violate a youth's right to safety if they are intended to shame, humiliate, or pressure a young person to alter his or her sexual orientation or gender identity.

## **III. STATE NON-DISCRIMINATION LAWS**

In addition to the protections the U.S. Constitution provides for young people in state custody, depending on the state where the young person lives, there may be additional protections that come from the state's constitution<sup>64</sup> or its statutes.

Some states have non-discrimination laws that explicitly protect LGBT youth in juvenile justice and child welfare systems. For example, in California, the Foster Care Non-discrimination Act makes it unlawful for county child welfare departments, group home facilities, and foster family agencies to discriminate on a number of bases, including actual or perceived sex, sexual orientation, gender identity, or HIV status.<sup>65</sup> Under this law, all foster children and persons engaged in providing care and services to foster children in California have the right to fair and equal access to all available child welfare services, placements, care, treatment, and benefits, and to be free from discrimination or harassment on these bases.<sup>66</sup>

Other states have protections that are less explicit, but that also may protect LGBT youth in state care. For example, a number of states have laws that protect individuals from discrimination by governmental agencies, which would include child welfare programs and juvenile detention and correctional facilities.<sup>67</sup> Other states

have non-discrimination laws that protect children and adults who are living in “institutional settings,” which may include juvenile justice facilities, treatment hospitals, group homes, and other such facilities that provide institutional care.<sup>68</sup> Still other states have non-discrimination laws that apply to businesses and other facilities considered to be “public accommodations.” Some of these laws explicitly include juvenile justice and child welfare programs within the definition of public accommodation,<sup>69</sup> while in other states, courts have interpreted these laws to apply to these programs.<sup>70</sup> Finally, child welfare and juvenile justice facilities may be prohibited from discriminating against LGBT youth in residential care pursuant to state laws prohibiting discrimination in housing, since such facilities provide publicly assisted housing accommodations.<sup>71</sup> In sum, regardless of whether a facility is considered a governmental agency or a public accommodation, child welfare and juvenile justice facilities may fall under a variety of state laws that prohibit sexual orientation or gender identity discrimination and require nondiscriminatory care.<sup>72</sup>

In addition to statutory protections from discrimination, some states have adopted policies or practice guides that include protections for LGBT youth in state care. For example, Connecticut policy provides: “The Department of Children and Families has an obligation to ensure fair, equal, and non-discriminatory treatment of all individuals who identify themselves as Lesbian, Gay, Bisexual, Transgender, Questioning and Intersex....”<sup>73</sup> This policy, and others like it in Illinois and Massachusetts, as well as in the cities of New York and Los Angeles, serve as clear statements of support for LGBT youth and demonstrate a commitment to providing non-discriminatory care.

#### IV. CONCLUSION

All young people in state custody are entitled to equal protection of the law and have the right to safety while in care. These rights, as well as other well-established constitutional and statutory rights apply to LGBT youth. If a child welfare or juvenile justice facility violates the rights of a youth in their care, anyone involved in the violation may be held liable. Child welfare and juvenile justice professionals must be aware of the constitutional and statutory rights of LGBT young people. They also must take these rights into consideration in both practice and policy making.

As discussed above, some of the actions that may violate the civil rights of LGBT young people in care include:

- failing to protect LGBT youth from harassment and violence at the hands of caretakers or other youth.
- requiring a young person to participate in controversial therapies intended to change their sexual orientation or gender identities.
- failing to assist an LGBT young person in identifying community supports and resources in order to ameliorate feelings of isolation and depression.
- automatically classifying LGBT youth as sex offenders or placing them in isolation
- not providing appropriate medical care for transgender youth.
- punishing LGBT youth for behaviors that non-LGBT youth are not punished for.
- moralizing, ignoring, or pathologizing LGBT youth.
- placing LGBT youth in humiliating, embarrassing, or dangerous situations.<sup>74</sup>

In the last few years, legal advocates have begun to bring lawsuits to address the serious abuses faced by LGBT youth in state care, and courts have begun to hold state agencies and professionals responsible for these

abuses. In the years ahead, it is inevitable that more such cases will be litigated and that facilities that violate the rights of LGBT youth will be held accountable -- thanks to increased advocacy on behalf of LGBT youth in state care and the development of national support networks,<sup>75</sup> publications, and best practice guidelines.<sup>76</sup> Courts can now look to these advocates and materials for additional guidance to determine standards of care expected of professionals working with LGBT youth in state custody.<sup>77</sup>

Agencies and facilities that provide care to youth in state custody must educate themselves on the needs of LGBT youth and the scope of their civil rights. They also must train providers on how to work with LGBT youth, enact non-discrimination policies, and establish practices that deal effectively with anti-LGBT abuse. These actions should be taken proactively, prior to any abuses of LGBT young people, rather than in response to complaints or in the course of time-consuming and resource-intensive litigation. Professionals who work for child welfare and juvenile justice agencies have a tremendous responsibility to protect the safety and well-being of all youth in their care, including those who are LGBT. Fortunately, these professionals now have access to a wealth of educational tools and materials to help them comply with professional standards of care for LGBT youth and ensure that the rights of these youth are protected.

# THE LEGAL RIGHTS OF YOUNG PEOPLE IN STATE CUSTODY

## WHAT CHILD WELFARE AND JUVENILE JUSTICE PROFESSIONALS NEED TO KNOW WHEN WORKING WITH LGBT YOUTH

### ENDNOTES

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<sup>1</sup> We use the term “transgender” to describe individuals who have a gender identity or gender expression that differs from that traditionally associated with their sex at birth. The phrase “gender identity” refers to one’s internal identification or self-image of their gender. Everyone has a gender identity. For most people, it is consistent with their assigned sex; however, for transgender individuals, their internal identification of their gender differs from their assigned sex. A “transgender woman” is a transgender individual who currently identifies as female, and a “transgender man” is a transgender individual who currently identifies as male.

<sup>2</sup> *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003).

<sup>3</sup> Some transgender youth experience clinically significant distress or impairment in important areas of functioning in relation to their gender identities. These youth may be diagnosed with “Gender Identity Disorder,” or “GID,” according to the American Psychiatric Association’s fourth edition and text revision of the *Diagnostic and Statistical Manual* (“DSM-IV-TR”). Gender Identity Disorder is described in the DSM-IV-TR as a “strong and persistent cross-gender identification” and “[p]ersistent discomfort with [one’s] sex or sense of inappropriateness in the gender role of that sex,” which causes “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *Id.* at 581. The DSM-IV-TR notes that “[i]n older children [with GID], failure to develop age-appropriate same-sex peer relationships and skills often leads to isolation and distress, and some children may refuse to attend school because of teasing or pressure to dress in attire stereotypical of their assigned sex. In adolescents and adults, preoccupation with cross-gender wishes often interferes with ordinary activities. Relationship difficulties are common, and functioning at school or work may be impaired.” *Id.* at 577.

<sup>4</sup> See *R.G. v. Koller*, 415 F.Supp 2d 1129 (D.Hawai’i 2006).

<sup>5</sup> *Id.* at 1157.

<sup>6</sup> The Fourteenth Amendment states in part, “No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The two clauses in the above sentence are often referred to as the Fourteenth Amendment Due Process and Equal Protection Clauses, respectively. The right to liberty in the Due Process Clause has been interpreted to include a variety of rights related to personal autonomy – such as safety, privacy, and intimate association with the people of one’s choosing. The evolving legal doctrine regarding the contours of the Fourteenth Amendment due process rights is often referred to as “substantive due process.”

<sup>7</sup> *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 201 n.9 (1989).

<sup>8</sup> A leading post-*DeShaney* case is *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). At seventeen-months old, K.H. contracted gonorrhea while in foster care in Illinois from one of her foster parents. The Seventh Circuit court held that K.H. stated a Fourteenth Amendment substantive due process claim: “This is not a positive liberties case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons....Here, in contrast, the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger...without thereby violating her rights under the due process clause...than it could...place a criminal defendant in a jail or prison in which his health or safety would be endangered....In either case the state would be a doer of harm rather than merely an inept rescuer....” *Id.* at 848-49.

<sup>9</sup> *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (“In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the Fourteenth Amendment. Children in foster homes...are isolated.... The children are helpless... [and] at the mercy of the foster parents... [I]t is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds.”).

<sup>10</sup> *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (“[A] child who is in the state’s custody has a substantive due process right to be free from unreasonable and unnecessary intrusion on both [his or her] physical and emotional well-being. Our conclusion is grounded in common sense: A child’s physical and emotional well-being are equally important. Children are by their nature in a developmental phase of their lives and their exposure to traumatic experiences can have an indelible effect upon their emotional and psychological development and cause more lasting damage than many strictly physical injuries.”).

<sup>11</sup> Anonymous youth participant at a CWLA/Lambda Regional Listening Forum Addressing the Needs of LGBTQ Young People and Adults Involved in the Child Welfare System. Since 2002, CWLA and Lambda have been working together on a multi-year national collaboration entitled, “Fostering Transitions: CWLA/Lambda Joint Initiative to Support LGBTQ Youth and Adults Involved with the Child Welfare System.” As part of this collaboration, CWLA and Lambda convened thirteen Regional Listening Forums in cities around

the country between September 2003 and December 2004. Each Listening Forum brought together diverse groups of stakeholders from each community for an in-depth discussion on the needs of LGBTQ youth and adults involved with the child welfare system. A published report summarizing the results of the Regional Listening Forums is available at [www.cwla.org/pubs/](http://www.cwla.org/pubs/).

<sup>12</sup> *Id.*

<sup>13</sup> Anonymous transgender youth, personal interview, Model Standards Project, February 2003. The Model Standards Project (MSP) is a collaboration of Legal Services for Children and the National Center for Lesbian Rights. In 2003, MSP staff interviewed more than 25 LGBTQ youth about their experiences in both the child welfare and juvenile justice systems.

<sup>14</sup> *Camp v. Gregory*, 67 F.3d 1286, 1296 (7th Cir. 1995) ("Commensurate with the parental obligation to supervise a child's activities outside the home is a duty on the part of the state not to place one of its charges with an adult that it knows will not or cannot exercise that responsibility.").

<sup>15</sup> *Norfleet v. Arkansas Dep't of Human Serv.*, 989 F.2d 289, 293 (8th Cir. 1993) ("In this case, a special custodial relationship...was created by the state when it took Taureen from his caregiver and placed him in foster care. Cases from this and other circuits clearly demonstrate that imprisonment is not the only custodial relationship in which the state must safeguard an individual's civil rights. In foster care, a child loses his freedom and ability to make decisions about his own welfare, and must rely on the state to take care of his needs. It cannot be seriously doubted that the state assumed an obligation to provide adequate medical care for Taureen; the reason Taureen was placed in foster care was precisely because he was not able to take care himself and needed the supervision and attention of an adult caregiver.").

<sup>16</sup> Attempts by child welfare and mental health professionals to alter a person's sexual orientation or gender identity through "conversion therapy" have been condemned by the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the American Counseling Association.

<sup>17</sup> Anonymous youth participant at a CWLA/Lambda Regional Listening Forum Addressing the Needs of LGBTQ Young People and Adults Involved in the Child Welfare System.

<sup>18</sup> *LaShawn A. v. Dixon*, 762 F. Supp. 959, 993 (D.D.C. 1991) ("[C]ertain services, such as appropriate placements and case planning, are essential to preventing harm").

<sup>19</sup> Monitoring requirements are also spelled out in state regulations and departmental policies and practice guidelines.

<sup>20</sup> See e.g. *Ray v. Foltz*, 370 F.3d 1079, 1083-84 (11th Cir. 2004); *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (finding agency personnel can be held responsible for injury of foster child if they had actual knowledge of abuse or they deliberately failed to learn what was occurring in the foster home).

<sup>21</sup> Anonymous youth participant at a CWLA/Lambda Regional Listening Forum Addressing the Needs of LGBTQ Young People and Adults Involved in the Child Welfare System.

<sup>22</sup> See *Kent v. United States*, 383 U.S. 541, 554 (1966) ("The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.").

<sup>23</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.").

<sup>24</sup> *Santana v. Collazo*, 714 F.2d 1172, 1180 (1st Cir. 1983) ("[B]ecause the state has no legitimate interest in punishment, the conditions of juvenile confinement...are subject to more exacting scrutiny than conditions imposed on convicted criminals."); see also *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the state has complied with the constitutional guarantees traditionally associated with criminal prosecutions.").

<sup>25</sup> The Supreme Court has held that a mentally retarded individual who was involuntarily committed to a state institution has a constitutionally protected liberty interest under the Fourteenth Amendment to reasonably safe conditions of confinement and freedom from unreasonable bodily restraint. *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).

<sup>26</sup> The Supreme Court held that the appropriate standard for assessing the constitutionality of the conditions under which pretrial detainees are confined emanates from the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment Cruel and Unusual Punishment Clause and requires a court to consider whether the conditions "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

<sup>27</sup> The Eighth Amendment prohibits the cruel and unusual punishment of adults convicted of crimes. *Whitley v. Albers*, 475 U.S. 312 (1986).

<sup>28</sup> The First, Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts have held that the appropriate standard to use in reviewing the conditions at juvenile facilities comes from the Due Process Clause of the Fourteenth Amendment. See *A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004); *Alexander S.*, 876 F. Supp. 773, 782 (D.S.C. 1995), *aff'd in part and rev'd in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998) ("[J]uveniles possess a clearly recognized liberty interest in being free from unreasonable threats to their physical safety."); *A.J. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1431-32 (9th Cir. 1987); *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1084-85 (11th Cir. 1986); *Santana v. Collazo*, 714 F.2d 1172,

- 1179 (1st Cir. 1983); *Milonas v. Williams*, 691 F.2d 931, 942, n. 10 (10th Cir. 1982). But see *Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir. 1974) (applying the cruel and unusual punishment test of the Eighth Amendment). The United States Supreme Court has not yet decided the issue.
- <sup>29</sup> See, e.g., *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1084-85 (11th Cir. 1986) (applying due process clause to conditions of confinement for juvenile confined pending trial on delinquency charges); *Milonas v. Williams*, 691 F.2d at 942, n. 10 (applying due process clause to conditions involving juveniles confined for crimes).
- <sup>30</sup> See *Alexander S.*, 876 F. Supp. at 797-798; *A.M.*, 372 F.3d at 787; *Guidry v. Rapides Parish Sch. Bd.*, 560 So.2d 125 (La. Ct. App. 1990) (holding that the failure to protect children from sexual behavior of other confined children may result in liability). Juveniles in confinement also have the right to reasonable protection from facility staff. Courts have held that facility staff are prohibited from using physical force against juveniles for any purpose other than to restrain a juvenile who is either physically violent and immediately a danger to himself or others, or who is physically resisting institutional rules. See *Pena v. N. Y. Div. for Youth*, 419 F. Supp. 203, 208 (S.D.N.Y. 1976) (holding that unless child is uncontrollable and constitutes a serious and evident danger to himself or others, use of physical restraints is prohibited); *Milonas v. Williams*, 691 F.2d 931, 935, 943 (10th Cir. 1982).
- <sup>31</sup> See, e.g., *A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d at 579 (noting a lack of training on identifying and protecting youth in the population who would be easily victimized in case brought on behalf of 13 year old with mental illness); *R.G. v. Koller*, 415 F. Supp. 2d 1129 (finding juvenile correctional facility did not take into account needs of LGBT youth who were abused).
- <sup>32</sup> See *R.G. v. Koller*, 415 F. Supp. 2d at 1157 (“[I]n light of ongoing abuse and harassment directed at LGBT youth at HYCF, the supervisory defendants’ failure to adopt policies and procedures and to provide training regarding how to ensure the safety of LGBT wards supports a finding of deliberate indifference to plaintiffs’ safety. Most notable is the complete lack of training for staff about their obligations to refrain from harassment and discrimination, to intervene in ward-on-ward harassment, and to investigate claims of harassment.”).
- <sup>33</sup> Appropriate classification is particularly important for the physical and emotional safety of transgender youth. In *R.G.* the transgender plaintiff was originally placed in the girls unit. Because of physical plant repairs, she was transferred to the general boys unit where she was subjected to physical and sexual assaults. The defendants’ own experts submitted declarations stating that in their expert opinion, they believed that male to female transgender wards, like the plaintiff, were “better off in O & A with the girls than anywhere else at HYCF and that the placement kept them physically and psychologically safe.” *R.G. v. Koller*, 415 F. Supp. 2d at 1145.
- <sup>34</sup> *Alexander S.*, 876 F. Supp. at 787 (facilities must have a system for screening and separating aggressive juveniles from vulnerable juveniles).
- <sup>35</sup> Anonymous youth, personal interview, Model Standards Project, March 2003.
- <sup>36</sup> See, e.g., *Alexander S.*, 876 F. Supp. at 798.
- <sup>37</sup> See *Id.*
- <sup>38</sup> See *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080 (11th Cir. 1986) (juvenile isolated for seven days was entitled to damages for violation of 14th Amendment); *Milonas v. Williams*, 691 F.2d at 941-42 (use of isolation rooms for periods less than 24 hours violated the 14th Amendment); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973) (solitary confinement of young adults held unconstitutional); *Inmates of Boys’ Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972).
- <sup>39</sup> See *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983).
- <sup>40</sup> A case on behalf of young people in a juvenile detention facility in Philadelphia resulted in a settlement under which the facility agreed no longer to place gay youth in isolation. *Santiago v. City of Philadelphia*, Civ. Act. No. 74-2589 (E.D. Pa. 1978). The settlement provided: “Homosexuals shall be protected from harassment, and shall not be stigmatized by putting them in isolation, segregating them by unit or otherwise discriminating against them....”
- <sup>41</sup> Anonymous youth participant at a CWLA/Lambda Regional Listening Forum Addressing the Needs of LGBTQ Young People and Adults Involved in the Child Welfare System.
- <sup>42</sup> “Attorneys representing gay or lesbian juveniles should be aware of the possibility that a youth’s homosexuality itself may be perceived as a danger to others, rather than the individual circumstances of the specific child. They should, of course, vigorously oppose any attempts by the institution to characterize gay or lesbian youths as dangerous or potential rapists.” *Santiago* stipulation, *supra* note 40.
- <sup>43</sup> See *R. G. v. Koller*, 415 F. Supp. 2d at 1155-56 (“After examining expert opinions and case law regarding the use of isolation on children, the court concludes that the defendants’ use of isolation was not within the range of acceptable professional practices and constitutes punishment in violation of the plaintiffs’ Due Process rights...The likely perception by teenagers that isolation is imposed as punishment for being LGBT only compounds the harm...Consistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to segregate LGBT wards from their abusers, cannot be viewed in any reasonable light as advancing a legitimate nonpunitive governmental objective.”).
- <sup>44</sup> See *A.M.*, 372 F.3d 572, 585 n.3; *Jackson v. Johnson*, 118 F. Supp. 2d 278 at 289; *Alexander S.*, 876 F. Supp. at 788.
- <sup>45</sup> See *A.M.*, 372 F.3d at 584-85 (discussing lack of medical and mental health care for ward with mental illness).
- <sup>46</sup> See *Viero v. Bufaro*, 925 F. Supp. 1374 (N.D. Ill. 1996) (finding officials not entitled to qualified immunity concerning suicide of boy with

- well-documented mental health needs who did not receive any services, medication, or close supervision); *see also Dolihite v. Maughon*, 74 F.3d 1027 (11th Cir. 1996).
- 47 In a recent survey of high school students in California, students who were harassed based on their actual or perceived sexual orientation were more than three times as likely seriously to consider suicide and have a plan for how they would do it compared with students who were not harassed. California Safe Schools Coalition, *Safe Place to Learn: Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Non-Conformity and Steps for Making Schools Safer*, available at <http://www.casafeschools.org/SafePlacetoLearnLow.pdf>.
- 48 Although LGBT youth may be at increased risk for suicide, LGBT youth should never automatically be placed on suicide watch simply because they are LGBT.
- 49 With the understanding that some restrictions of liberty may be constitutional, a court will look at whether a particular restriction is “reasonably related” to a legitimate governmental interest. If it is not, it may be inferred that the purpose of the restriction is punishment. *Bell*, 441 U.S. at 539. *See also Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (“Any institutional rules that amount to punishment of those involuntarily confined ...are violative of the due process clause per se.”).
- 50 *See, e.g., Gerks v. Deathe*, 832 F. Supp. 1450 (W.D. Okla. 1993) (due process rights may be violated by requiring child to clean her own excrement); *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1230 (E.D. La. 1976) (addressing types of work performed by youth).
- 51 *See Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997).
- 52 *Id.* at 829 (finding due process violation where inmate had never been convicted of a sex offense and had not had an opportunity to challenge his classification).
- 53 The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides: “No state shall...deny to any person within its jurisdiction the equal protection of the laws.”
- 54 Although there is not a large body of equal protection case law in the child welfare or juvenile justice context, the right to equal protection has been clearly established within the public school context. These cases illustrate the types of violations that would also be actionable in the child welfare and juvenile justice systems. For example, in the first federal appellate case addressing anti-gay violence in schools, a court awarded nearly a million dollars in damages to Jamie Nabozny, a student who suffered severe anti-gay abuse in his Wisconsin high school. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). In that case, school administrators told Nabozny that the abuse should be expected because he was openly gay. The court, however, disagreed explaining, “The Equal Protection Clause ... require[s] the state to treat each person with equal regard, as having equal worth, regardless of his or her status....We are unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation.” *Id.* at 456 and 458. This reasoning has obvious applications in situations involving state custody, where an LGBT young person in a group or foster home may be singled out for mistreatment on the basis of sexual orientation or gender identity. *See also Flores v. Morgan High School District*, 324 F.3d 1130 (9th Cir. 2003) (students could maintain claims alleging discrimination on basis of sexual orientation under Equal Protection Clause where school district failed to protect students to same extent that other students were protected from harassment and discrimination).
- 55 Anonymous youth participant at a CWLA/Lambda Regional Listening Forum Addressing the Needs of LGBTQ Young People and Adults Involved in the Child Welfare System.
- 56 *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996).
- 57 The First Amendment to the Constitution guarantees that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
- 58 *See Henkle v. Gregory*, 50 F. Supp. 2d 1067 (D. Nev. 2001) (allowing claims under Title IX for discrimination and harassment by other students and under First Amendment based on demands by school officials that student keep his sexual orientation to himself).
- 59 *See, e.g., Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. 2000) *aff’d sub nom. Doe v. Brockton Sch. Comm.*, 2000 WL 33342399 (Mass. App. Ct. 2000) (holding that transgender student had First Amendment right to wear clothing consistent with her gender identity and that treating transgender girl differently than biological girls was discrimination on the basis of sex).
- 60 *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000); *Doe v. Yunits*, 2000 WL 33162199 at \*3; *Fricke v. Lynch*, 491 F. Supp. 387 (D.R.I. 1980).
- 61 *See Bellmore v. United Methodist Children’s Home and Department of Human Resources of Georgia*, Settlement Terms available at [www.lambdalegal.org](http://www.lambdalegal.org). *See also R.G. v. Koller*, 415 F. Supp. 2d at 1160-1161 (“[T]he court is concerned by the evidence that members of the HYCF staff have promoted certain religious teachings to the plaintiffs.”).
- 62 Anonymous youth participant at a CWLA/Lambda Regional Listening Forum Addressing the Needs of LGBTQ Young People and Adults Involved in the Child Welfare System.
- 63 Anonymous youth, personal interview, Model Standards Project, February 2003.
- 64 The civil rights protections guaranteed by the federal constitution set the minimum level of protection a state must guarantee to its citizens. No state may choose to provide less constitutional guarantees. The rights established through state constitutional protections, including the liberty interest in safety, equal protection, and freedom of speech and of religion, often mirror the scope of

the rights guaranteed under the U.S. Constitution. Many state constitutional guarantees may, however, be more protective than analogous federal rights. In Oregon, for example, state courts have interpreted the state constitution's equal protection clauses to provide broader protections from sexual orientation discrimination than those guaranteed under the Equal Protection Clause of the U.S. Constitution. See *Tanner v. Oregon Health Serv. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998). In states such as these, LGBT youth in care may have a stronger case for sexual orientation discrimination under their state constitution than they would under the U.S. Constitution.

<sup>65</sup> CAL. WELF. & INST. CODE § 16001.9(a)(22).

<sup>66</sup> CAL. WELF. & INST. CODE § 16001.9(a)(22); CAL. WELF. & INST. CODE § 16013(a).

<sup>67</sup> See, e.g., R.I. GEN. LAWS § 28-5.1-7 (a) ("Every state agency shall render service to the citizens of this state without discrimination based on race, color, religion, sex, sexual orientation, gender identity or expression, age, national origin, or disability. No state facility shall be used in furtherance of any discriminatory practice nor shall any state agency become a party to any agreement, arrangement, or plan which has the effect of sanctioning those patterns or practices."); MINN. STAT. § 363A.02 (4) (prohibiting discrimination in public services based on race, color, creed, religion, national origin, sex, marital status, disability, sexual orientation, and status with regard to public assistance).

<sup>68</sup> See, e.g., IOWA CODE ANN. § 19B.12 (2) (prohibiting state employees from discriminating against a person in the care or custody of the employee or a state institution based on sex).

<sup>69</sup> See, e.g., LA. REV. STAT. § 51:2232 (10) (explicitly including as part of the Louisiana public accommodations nondiscrimination law any place which is supported directly or indirectly by government funds, although not inclusive of sexual orientation and gender identity).

<sup>70</sup> *Chisolm v. McManimom*, 275 F.3d 315, 325 (adult jail, like a hospital, is place of public accommodation under New Jersey's Law Against Discrimination); *Ortland v. County of Tehama*, 939 F. Supp. 1465, 1470 (California Unruh Act is applicable in claims against governmental agencies).

<sup>71</sup> See *Doe v. Bell*, 754 N.Y.S.2d at 850 (recognizing residential foster care facility as "publicly-assisted housing accommodation" for purposes of disability discrimination claim under New York's Human Rights Law).

<sup>72</sup> Many of the non-discrimination laws described above, like the California Foster Care Non-discrimination Act, explicitly include the terms "sexual orientation" and "gender identity" in the language of the law, or they include a term which incorporates these characteristics. Sometimes these statutes will also include the language "actual or perceived" in front of these terms in order to protect people from discrimination who are not actually LGBT, but are perceived to be. In states where "sexual orientation" or "gender identity" is not explicitly included in the language of a non-discrimination law, LGBT people are still protected from discrimination on the basis of other characteristics. For example, there are many states where courts have found that the discrimination an LGBT person experienced was unlawful sex-based discrimination. In addition, there are a number of states where courts have determined that discrimination against a transgender person diagnosed with Gender Identity Disorder is prohibited under disability discrimination protections. Therefore, even if your particular state does not explicitly provide nondiscrimination protections based on sexual orientation or gender identity, LGBT youth in care may still have the right to receive non-discriminatory services under the applicable state law based on their sex or disability.

<sup>73</sup> CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF CONNECTICUT POLICY MANUAL, Chapter 30-9 (2004).

<sup>74</sup> These examples are not intended to be exhaustive.

<sup>75</sup> As part of "Fostering Transitions: CWLA/Lambda Joint Initiative to Support LGBTQ Youth and Adults Involved with the Child Welfare System" CWLA and Lambda established a 100-member National Advisory Network of young people and professionals from around the country. Similar statewide and regional networks have been developed in California, Colorado, Connecticut, Wisconsin, New York, Washington, and Pennsylvania.

<sup>76</sup> For example, in June of 2006, CWLA will be publishing a "best practices guide" for working with LGBT youth in the child welfare and juvenile justice systems, co-authored by Legal Services for Children and the National Center for Lesbian Rights. In addition, CWLA develops and disseminates practice standards, known as the *CWLA Standards of Excellence for Child Welfare Services*. Some of these standards specifically address sexual orientation. Additional standards regarding LGBT youth are in development. *The Standard of Excellence for Family Foster Care Services*, Section 3.18 establishes a policy of nondiscrimination in the selection of foster parents: "The family foster care agency should not reject foster parent applicants solely due to their age, income, marital status, race, religious preference, sexual orientation, physical or disabling condition, or location of the foster home." *The Standard of Excellence for Adoption Services*, Section 4.7 states, "All applicants should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on their race, ethnicity or culture, income, age, marital status, religion, appearance, differing lifestyle, or sexual orientation. Applicants should be accepted on the basis of an individual assessment of their capacity to understand and meet the needs of a particular available child at the point of the adoption and in the future."

<sup>77</sup> In a 2004 decision in a class action lawsuit, the State Supreme Court of Washington upheld a lower court ruling that found officials had violated foster children's constitutional right to safety. *Braam ex rel. Braam v. Washington*, 81 P.3d 851 (Wash. 2003). In that case, the jury was permitted to review evidence of what professional standards require, including the *Standards of Excellence for Foster Family Care Services*, and the *Standards for Health Care Services for Children in Out of Home Care*, published by CWLA.