



NATIONAL CENTER FOR LESBIAN RIGHTS

Bridging the Gap between Rights and Reality for Youth Incarcerated in California

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From 2002 through 2005, Antoine D., a bisexual youth, was subjected to serious acts of physical and mental abuse at the hands of California Youth Authority (CYA) staff and wards based on his sexual orientation.¹ Although Antoine was never accused of or charged with a sex offense, CYA automatically placed him in a sex offender unit, simply because of his sexual orientation. Because Antoine was labeled a sex offender and was known to be bisexual, he was targeted for sexual assault. Wards regularly exposed themselves to him, threatened him on the way to the showers, and propositioned him for sex. When Antoine refused to comply with these sexual demands, he was physically attacked. On one occasion, a youth slashed Antoine in the face, resulting in a wound that required hundreds of stitches to close and will leave him permanently scarred. Staff exacerbated the problem, calling him homophobic names, making sexualized references toward him in front of the other wards, and failing to take any steps to protect him from abuse other than placing Antoine in isolation. On numerous occasions, CYA staff confined Antoine to his cell for up to 23 hours a day and excluded him from school and other group activities “for his own safety”. Because he was unable to attend school, he completed less than half of the credits required to earn a high school diploma.

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¹ Interview with Antoine D., in San Francisco, Cal. (Aug. 9, 2005). *See also* *In re Antoine D*, 137 Cal.App.4th 1314 (2006).

For over two years Antoine did not tell anyone about what was happening. It wasn't until he was slashed in the face that his attorney became aware of the extent of the abuse. She immediately filed a motion to vacate his CYA commitment on the ground that CYA had failed to keep him safe or provide him with adequate education and treatment services. The trial court agreed that CYA failed to keep him safe, but by the time the court granted his motion, Antoine was already out on parole.²

All young people in juvenile justice facilities, including lesbian, gay, bisexual, and transgender (LGBT) youth, have a constitutional right to be safe in the institutions in which they are held.³ While California's juvenile justice facilities are generally unsafe for all youth,⁴ LGBT youth, like Antoine, must also deal with the ignorance and bias of staff members who lack a basic understanding of their particular safety risks and are too often outwardly hostile and abusive to them. Unfortunately, it is all too common for these facilities to isolate LGBT youth, place them in sex offender treatment because of their sexual orientation,⁵ single them out for embarrassing treatment, or allow them to be the victim of verbal, physical, and sexual abuse.

There is extensive case law addressing the conditions of confinement for youth that clearly speak to these types of discrimination.⁶ In addition to the right to protection from

² The trial court originally denied his motion based solely on concerns that it would lose jurisdiction over his case if it vacated his commitment. The court explained that without this concern, "[it] would have no problem doing what has been requested." *In re Antoine D*, 137 Cal.App.4th at 1320. On appeal, the court reversed and remanded the case holding that vacating Antoine's commitment would not affect the court's jurisdiction. *Id.* at 1324.

³ *See A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d 572 (3d Cir. 2004) (explaining facility is obligated to protect the welfare of children in its custody); *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1157 (D. Haw. 2006) (finding facility violated LGBT plaintiff's due process rights by allowing pervasive verbal, physical, and sexual abuse to persist); *Alexander S. v. Boyd*, 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, (10th Cir. 1982).

⁴ *See Barry Krisberg, Safety and Remedial Plan*, pp 24-27 (Sept.7, 2007), available at <http://prisonlaw.com/pdfs/DJJ5thSMReportAppAB.pdf>; California Office of Inspector General Report, *Special Review of High-Risk Issues at the Herman G. Stark Youth Correctional Facility*, (Feb. 2007), available at <http://www.oig.ca.gov/reports/pdf/HStark022207.pdf>; Barry Krisberg, *General Corrections Review*, expert report Farrell v. Hickman (Dec. 23, 2003), available at <http://prisonlaw.com/pdfs/CYA5.pdf>.

⁵ For example, in 2000, the N.A. Chaderijian CYA facility had the following published policy for its "Sex Treatment for Offenders Program (S.T.O.P.)": "The majority of young men in this program have been committed for sex offenses against others. This unit also houses young men who were committed for non-sexual offenses, but who, however have a history of being sexually victimized. In addition, the program provides an[] "Alternative Lifestyles" component for young men who have chosen to live a homosexual lifestyle." See Memorandum from N.A. Chaderijian (2000) (on file with author).

⁶ Youth in juvenile justice facilities are entitled to more protection than incarcerated adults, because like those who are involuntarily committed, they have not been "convicted of crime." Thus, most courts analyze their conditions of confinement claims under the federal 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. v. Boyd*, 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

physical, emotional, and sexual abuse, young people in juvenile justice institutions have a right to be free from unreasonably restrictive conditions of confinement including isolation,⁷ a right to receive adequate physical and mental health care,⁸ and a right to be treated equally and without discrimination.⁹ Courts have found that facilities violate youths' constitutional rights by placing LGBT youth in segregation or isolation "for their own safety"¹⁰ or by ignoring a particular youth's substantial risk of harm because the youth is young, has a mental illness, or is openly LGBT.¹¹ In addition, facilities should not label a youth as a sex offender or house a youth

S.Ct. 880 (1998); *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) ("[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."). *But see Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir. 1974) (applying the cruel and unusual punishment test of the Eighth Amendment).

⁷ Youth in juvenile detention or correctional facilities should not be placed in conditions that amount to punishment. 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 to determine if there is a violation. If it is not, it may be inferred that the purpose of the restriction is punishment. *Bell v. Wolfish*, 441 U.S. 520, 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."). Courts have found even short periods of isolation unconstitutional. *See Milonas v. Williams*, 691 F.2d at 941-42 (use of isolation rooms for periods less than 24 hours violated the 14th Amendment); *Hewett v. Jarrard*, 786 F.2d 1080 (11th Cir.1986) (juvenile isolated for seven days was entitled to damages for violation of 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).

⁸ *See Youngberg v. Romeo*, 457 U.S. 307 (1982); *Burton v. Richmond*, 276 F.3d 973 (8th Cir. 2002); *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.

⁹ Young people in the juvenile justice system have a right to equal protection. *See In re Gault*, 387 U.S. 1, 13 (1967) (recognizing that due process rights of Fourteenth Amendment apply to children as well as adults). Although there is not a large body of equal protection case law in the juvenile justice context, the right to equal protection for LGBT youth has been clearly established in the public school context. *See Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137-38 (9th Cir. 2003) (holding that students could maintain claims alleging discrimination on basis of sexual orientation under Equal Protection Clause where school district failed to protect the students to the same extent as other students); *Nabozny v. Podlesny*, 92 F.3d 446, 458, 460 (7th Cir. 1996) (holding student could maintain claims alleging discrimination on basis of gender and sexual orientation under Equal Protection Clause where school district failed to protect student from harassment and harm by other students to same extent that it protected other students due to student's gender and sexual orientation).

¹⁰ *See R.G.*, 415 F. Supp. 2d at 1154-56. In *R.G.*, the court stated:

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.

Id.

¹¹ *See, e.g., A.M.*, 372 F.3d at 580-81 (finding sufficient evidence that facility was deliberately indifferent to substantial risk of harm to thirteen-year-old boy with mental illness who was placed in general population); *R.G.*, 415 F. Supp. 2d at 1156 (finding that placement of vulnerable LGBT youth in unit with aggressive boys amounted to deliberate indifference).

with sex offenders without adequate due process protections, such as a hearing and an opportunity to appeal.¹²

Unfortunately, for many years, the California Youth Authority, now called the Department of Juvenile Justice (DJJ), has denied many of the youth in its custody these most basic and fundamental rights.¹³ Many of the youth in DJJ custody are not aware of their rights or what to do to enforce them. This should not be surprising, because California has not had a law that articulates the basic rights of youth in DJJ facilities or requires that DJJ inform youth about these rights. Without doing in-depth research of state and federal case law, state statutes, regulations, and policies, no person would understand all of the legal limitations on how facilities must treat young people day to day. Realistically, even older youth with a high school education are unlikely to have access to the kinds of research resources they would need in order to learn what their rights are. This in turn prevents youth from identifying and reporting violations to their families or attorneys or filing grievances or complaints with the facility.

Many advocates and organizers are working hard to address the unconstitutional and unsafe conditions in California's juvenile justice system.¹⁴ While much needed reforms are now underway, including new legislation that limits the number of young people who can be sent to these facilities¹⁵ and expands the purpose of DJJ to be more focused on family reunification,¹⁶

¹² In the adult context, the classification of an inmate as a "sex offender" has been found to have such stigmatizing consequences that unless the inmate has a sexual offense history, additional constitutional requirements must be met before this classification can take place. *See* Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997) (holding that inmates have a liberty interest at stake in being labeled a sex offender, particularly because the court could "hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender"). 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.

¹³ *See supra* note 4. In January 2003, the Prison Law Office filed a class action lawsuit against CYA in response to the horrendous conditions in state juvenile justice facilities. *See* Farrell v. Harper, No. RG 03079344 (Cal. Super. Ct. Alameda County amended complaint filed Sept. 23, 2003). In 2004, CYA officials signed a consent decree, agreeing to remedy the serious ongoing problems with conditions in CYA's facilities. The decree requires CYA to provide youth with adequate and effective care, treatment and rehabilitation services, including reducing violence and the use of force, improving medical and mental health care, reducing the use of lock-ups and providing better education programs. Subsequently, DJJ has finalized several remedial plans to correct problems with the system, and the Court has ordered DJJ to implement the plans. In addition, the case Special Master has filed five quarterly reports detailing current conditions at DJJ facilities, the most recent of which was filed October 2007. Unfortunately, DJJ has instituted few of the essential court ordered reforms over these last three years. On November 3rd, the Prison Law Office filed papers asking the court to appoint a receiver to assume key management functions over DJJ. *See* Brandon Bailey, *Activists Urge Court Takeover of State's Youth Prisons Too Little Accomplished After Three Years, They Say*, SAN JOSE MERCURY NEWS, November 4, 2007. For more information about this case visit: www.prisonlaw.com.

¹⁴ i.e. Ella Baker Center, Books Not Bars <http://ellabakercenter.org/page.php?pageid=2>; the Prison Law Office www.prisonlaw.com; the California Youth Justice Coalition <http://www.youth4justice.org/>; the Youth Law Center www.ylc.org; Center of Juvenile and Criminal Justice <http://www.cjcj.org/jjic/reforming.php>.

¹⁵ *See* Sen. Bill 81 (Reg. Sess. 2007-2008) (August 24, 2007). Effective September 1, 2007, youth may not be committed to DJJ facilities unless they have been found to have committed a serious and violent offense listed as one of the offenses for which a juvenile may be tried as an adult. Youth who are already in DJJ custody, but who would not be able to be committed under the new law, may now be recalled by their counties on an individual basis.

none of these efforts specifically address the problems of LGBT youth or respond to the difficulties that confined youth have in enforcing their basic rights on a day to day basis.

In 2006, the National Center for Lesbian Rights (NCLR) began working with Equality California to develop legislation to ensure that all youth in state juvenile justice facilities are protected from bias and animus and are better equipped to identify and report violations of their rights. The result of this effort was the passage of SB 518, the Juvenile Justice Safety and Protection Act.¹⁷ The governor signed SB 518 on October 13, 2007 making California the first state to adopt a comprehensive bill of rights for young people confined in juvenile justice facilities¹⁸ and one of the only states to statutorily prohibit discrimination and harassment based on sexual orientation and gender identity in juvenile justice facilities.¹⁹

There are four interconnecting parts to SB 518:

First, SB 518 establishes statutory protections from harassment and discrimination based on actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, and HIV status.²⁰

¹⁶ See Assem. Bill 1300 (Reg. Sess 2007-2008) (October 11, 2007), the Family Connection and Young Offender Rehabilitation Act. These amendments to the California Welfare & Institutions Code provide that DJJ services should promote family ties, require DJJ to consider proximity to family when making placement decisions, and make postage stamps and phone calls more accessible.

¹⁷ The bill was authored by Senator Carole Migden, sponsored by Equality California, and had broad support from youth and LGBT advocates from across California. SB 518 will go into effect on January 1, 2008.

¹⁸ Other states, such as Michigan and Virginia, have departmental policies that articulate the rights of youth in state juvenile facilities. See Michigan Department of Human Services, Bureau of Juvenile Justice, Rights for Youth under our Care, Custody and Supervision (available at http://www.michigan.gov/documents/FIA-BJJ-Rights_117329_7.pdf) (providing that “in addition to respect for all human rights prescribed by law,” all Michigan Bureau of Juvenile Justice staff must follow conduct guidelines, including: “We will always provide for youth’s basic needs; including food, clothing, shelter, medical care and security” and “We will always ensure that our staff maintain the highest ethical behavior including reporting of any[. . .]bias or prejudice because of race, ethnicity, gender, age, religion, disability, sexual orientation, or national origin”); [Commonwealth Of Virginia Board Of Juvenile Justice Policy Governing The Operation Of Programs And Facilities, Policy Number: 17-001: Summary Of Youth’s Rights (available at http://www.djj.state.va.us/About_Us/Initiatives/ombudsman.cfm) (providing that, among other rights, youth shall “be protected from personal abuse or humiliation, corporal or unusual punishment, mental abuse or punitive interference with the daily functions of living, such as eating or sleeping; and from personal injury, disease, property damage and harassment”).

¹⁹ In 2007, as part of a more expansive discrimination bill, Oregon also passed a law that prohibits discrimination based on sexual orientation and gender identity in juvenile justice facilities. See Oregon Statutes SECTION 20. ORS 179.750 (2) (prohibiting discrimination in state institutions, including juvenile justice facilities). In addition, other states such as Rhode Island and Minnesota have nondiscrimination statutes that although not specifically directed at the juvenile justice system, are enforceable in these systems. 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).

²⁰ See CAL. WELF. & INST. CODE § 224.73 (“All facilities of the Division of Juvenile Facilities shall ensure the safety and dignity of all youth in their care and shall provide care, placement, and services to youth without discriminating on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color,

Second, SB 518 codifies the expansive nature of rights for all youth confined in DJJ facilities by creating a Youth Bill of Rights. The Youth Bill of Rights enumerates 17 basic fundamental rights, almost all of which are also referenced in Constitutional case law or DJJ regulations.²¹

Third, SB 518 requires all DJJ facilities to inform youth of their rights during orientation and provide youth with a copy of these rights.²² In addition, each facility must post a listing of the rights codified under SB 518 in a conspicuous location.²³ The Office of the Ombudspersons

religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.”); CAL. WELF. & INST. CODE § 224.71(i).

²¹ Section 224.71 of California’s Welfare and Institution Code provides:

“It is the policy of the state that all youth confined in a facility of the Division of Juvenile Facilities shall have the following rights:

(a) To live in a safe, healthy, and clean environment conducive to treatment and rehabilitation and where they are treated with dignity and respect.

(b) To be free from physical, sexual, emotional, or other abuse, or corporal punishment.

(c) To receive adequate and healthy food and water, sufficient personal hygiene items, and clothing that is adequate and clean.

(d) To receive adequate and appropriate medical, dental, vision, and mental health services.

(e) To refuse the administration of psychotropic and other medications consistent with applicable law or unless immediately necessary for the preservation of life or the prevention of serious bodily harm.

(f) To not be searched for the purpose of harassment or humiliation or as a form of discipline or punishment.

(g) To maintain frequent and continuing contact with parents, guardians, siblings, children, and extended family members, through visits, telephone calls, and mail.

(h) To make and receive confidential telephone calls, send and receive confidential mail, and have confidential visits with attorneys and their authorized representatives, ombudspersons and other advocates, holders of public office, state and federal court personnel, and legal service organizations.

(i) To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.

(j) To have regular opportunity for age-appropriate physical exercise and recreation, including time spent outdoors.

(k) To contact attorneys, ombudspersons and other advocates, and representatives of state or local agencies, regarding conditions of confinement or violations of rights, and to be free from retaliation for making these contacts or complaints.

(l) To participate in religious services and activities of their choice.

(m) To not be deprived of any of the following as a disciplinary measure: food, contact with parents, guardians, or attorneys, sleep, exercise, education, bedding, access to religious services, a daily shower, a drinking fountain, a toilet, medical services, reading material, or the right to send and receive mail.

(n) To receive a quality education that complies with state law, to attend age-appropriate school classes and vocational training, and to continue to receive educational services while on disciplinary or medical status.

(o) To attend all court hearings pertaining to them.

(p) To have counsel and a prompt probable cause hearing when detained on probation or parole violations.

(q) To make at least two free telephone calls within an hour after initially being placed in a facility of the Division of Juvenile Facilities following an arrest.

CAL. WELF. & INST. CODE § 224.71.

²² See CAL. WELF. & INST. CODE § 224.72(a).

²³ See CAL. WELF. & INST. CODE § 224.72(b).

of the Division of Juvenile Justice shall design age-appropriate posters which include their toll-free telephone number and provide them to each DJJ facility for this purpose.²⁴

Finally, SB 518 requires the DJJ ombudsperson to investigate complaints, and to maintain a toll-free helpline that youth can call to report rights violations and unlawful conditions in facilities.²⁵ The ombudsperson also has to document the number, source, nature, and resolution of all complaints received, compile this information, and make it available to the legislature and the public.²⁶

On its own, this new law will not solve all of the problems at California's Department of Juvenile Justice – no single approach will be able to address the multitude of harms that young people are experiencing in these facilities. But SB 518 is an important piece of the overall picture. By ensuring that all youth, including LGBT youth, are better equipped to identify and report violations of their rights, SB 518 will help prevent young people like Antoine from suffering in silence.

²⁴ *See id.*

²⁵ *See* CAL. WELF. & INST. CODE §§ 224.74(a)(2), 224.74(a)(6).

²⁶ *See* CAL. WELF. & INST. CODE §§ 224.74(a)(5), 224.74(a)(7).