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**"LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUNG
PEOPLE IN STATE CUSTODY:
Making the Child Welfare and Juvenile Justice Systems Safe for All
Youth through Litigation, Advocacy and Education"**

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There are thousands of lesbian, gay, bisexual, and transgender³ ("LGBT") young people in the child welfare and juvenile justice systems throughout the country. Unfortunately these systems routinely subject LGBT youth to differential treatment, deny them appropriate services and fail to protect them from violence and harassment.⁴ Increasingly, through lawsuits and other system reform efforts, advocates around the country are calling attention to this issue in order to bring about much needed change.

For example, in 2003, a young transgender woman won a landmark lawsuit against the New York City Administration for Children's Services ("ACS") for not

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³ 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 assigned at birth. The phrase "gender identity" refers to one's internal identification or self-image of their gender. For most people, their gender identity is consistent with their sex assigned at birth; however, for transgender individuals, their gender identity differs from their assigned sex. A "transgender woman" is a transgender individual who identifies as female, and a "transgender man" is a transgender individual who identifies as male. Some transgender individuals experience clinically significant distress or impairment in important areas of functioning in relation to their gender identities. These individuals may be diagnosed with Gender Identity Disorder. 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 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.

⁴ The types of harassment that LGBT youth experience include verbal abuse, such as derogatory name calling, demeaning and insulting comments and threats of physical or emotional acts or negative consequences (including religious condemnation); physical abuse, including destroying property, pushing, hitting, and other acts of violence; sexual abuse, including unwanted sex acts, touching, pantomime and threats; and emotional abuse such as shunning or isolation.

allowing her to wear female attire in her all-boys group home.⁵ That same year, California passed a state law – the first of its kind in the country – that prohibits discrimination in the foster care system on the basis of sexual orientation and gender identity,⁶ and the Illinois Department of Children and Families Services promulgated a model Policy Guide that provides clear direction to child welfare staff and improves coordination of services for LGBT youth.⁷ And in 2006, three youth who either identified as or were perceived to be LGBT, were granted a preliminary injunction by a federal court in Hawai'i based partially on the court's finding that the Hawai'i Youth Correctional Facility's use of isolation to "protect" LGBT wards was unconstitutional.⁸

Two innovative national projects - *Fostering Transitions*, a joint initiative of the Child Welfare League of America ("CWLA")⁹ and Lambda Legal, and *The Model Standards Project*, a collaboration of Legal Services for Children (LSC)¹⁰ and the National Center for Lesbian Rights ("NCLR") - have each been working to improve the living conditions for LGBT young people in state custody around the country.¹¹ These national projects, as well as numerous state, local, and regional coalitions,¹² are utilizing a multi-disciplinary approach that brings together many of the stakeholders involved in the provision of state care. In addition to bringing lawsuits, these projects advocate for, among other things, training and education on LGBT issues and improvements in policies that will protect LGBT young people in state custody from discrimination. While these

⁵ *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003). Plaintiff argued that not being allowed to wear dresses and skirts caused her great psychological distress and amounted to illegal discrimination on the basis of her disability (Gender Identity Disorder) and sex under the New York State housing non-discrimination law, as well as a violation of her First Amendment freedom of expression. The court agreed and ordered ACS to make reasonable accommodations to allow her to dress and otherwise present herself consistently with her female gender identity.

⁶ The California Foster Care Non-discrimination Act, CAL. WELF. & INST. CODE § 16001.9(a)(22). Under this law, all foster youth and persons engaged in providing care and services to foster youth 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 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. Because training is crucial to enable service providers to fulfill their responsibilities to provide safe and nondiscriminatory care, placement, and services to foster youth, this law also mandates initial and ongoing training for all group home administrators, foster parents, and department licensing personnel. CAL. WELF. & INST. CODE §§ 16013(a), 1529.2(b)(3)(F), 529.2(b)(4)(F), 1563(c)(5), 1522.41(c)(1)(H).

⁷ Policy Guide 2003.02 *Assessment and Treatment of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youths*, February 3, 2003.

⁸ *R.G. v. Koller*, 415 F.Supp.2d 1129 (D.Hawai'i, 2006).

⁹ CWLA is the nation's oldest and largest advocate for children and youth, with a membership of more than 1,000 public and private agencies, including every state child welfare system.

¹⁰ LSC, founded in 1975, provides direct legal representation and social work services to children and youth in the San Francisco Bay Area, with a mission to provide free legal and social services to children and youth in order to stabilize their lives and help them realize their full potential.

¹¹ LSC and NCLR, in collaboration with the National Juvenile Defender Center ("NJDC") also recently started a new initiative, the *Equity Project*, to identify and promote strategies to ensure that LGBT youth receive excellent legal representation and fair and equitable treatment in juvenile delinquency courts.

¹² E.g., The Administration for Children's Services in New York City, LGBTQQ Action Group, the Los Angeles County Task Force to End Homophobia, the San Francisco-based Out of Home Youth Advocacy Coalition, the Rocky Mountain Equal Care Coalition in Colorado, the Safe Harbors Project in Connecticut, and the Alliance for LGBTQ Youth in Foster Care in Milwaukee, Wisconsin.

are not the first efforts to call attention to the needs of LGBT youth in state care,¹³ they represent the emergence of a coordinated national effort that is bringing about lasting positive systemic change that has greatly increased the capacity of the child welfare and juvenile justice systems to support and protect LGBT young people in their charge.

Part One: LGBT youth: At home, in the Community, in the System

*"I ran away a lot because my parents didn't like that I was gay. One time I had a physical fight with my dad and ended up in juvenile hall. Finally, I was kicked out for good and put into foster care."*¹⁴

*"Gay youth . . . are treated as the lowest of the low."*¹⁵

Despite the increased acceptance of LGBT people in contemporary society, LGBT youth still face rejection and hostility from their families, classmates, peers, and social institutions. Many LGBT young people in out-of-home care enter these systems for reasons directly related to their LGBT identities -- including youth who have been rejected, neglected or abused by their families of origin, and runaway or "throwaway" youth. A 1996 study found that 26% of LGBT youth were forced to leave their families of origin as a result of conflicts with their parents regarding their sexual orientation or gender identity.¹⁶ Another study found that over 30% of lesbian and gay youth reported suffering physical violence at the hands of a family member after "coming out."¹⁷ LGBT youth also face discrimination in schools, where all too often they are subjected to verbal

¹³ See Urban Justice Center, *"Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System,"* (May 2001)(hereinafter "*Justice for All?*"); Lambda Legal Defense and Education Fund, *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care* (2001)(hereinafter "*Youth in the Margins?*"); Child Welfare League of America, *Serving Gay & Lesbian Youths: The Role of Child Welfare Agencies* (1991) and *Serving Transgender Youth: The Role of Child Welfare Systems* (2000). In addition, notable pioneer organizations providing appropriate services to LGBT youth in state custody are Gay and Lesbian Social Services (GLASS), www.glassla.org in Los Angeles and the New York City branch of Green Chimneys Children's Services www.greenchimneys.org.

¹⁴ Anonymous bisexual youth, personal interview, Model Standards Project, Jan. 17 2003.

¹⁵ Anonymous gay youth, personal interview, Model Standards Project, March 12, 2003.

¹⁶ See Colleen Sullivan, *Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 *Law & Sexuality* 31, 57 (1996) (citing Paul Gibson, U.S. Dep't Health and Human Serv., *Gay Male and Lesbian Youth Suicide, in Report of the Secretary's Task Force on Youth Suicide* 113 (1989)).

¹⁷ See *Youth in the Margins*, at 11 (citing Philadelphia Lesbian and Gay Task Force, *Discrimination and Violence Against Lesbian Women and Gay Men in Philadelphia and the Commonwealth of Pennsylvania* (1996)). Whether an LGBT youth is accepted by his or her family or experiences violence or rejection, has a lasting affect on his or her health, development, and is often a factor that leads to involvement in state care. Many LGBT youth who are harassed and rejected by peers and/or family members develop mental health or substance abuse problems stemming from self-esteem issues and feelings of isolation. And youth with substance abuse and/or mental health issues are more likely to have family problems that result in child welfare involvement, become involved in the juvenile justice system, or end up living on the streets. A.R.D'Augelli, *Incidence and Mental Health Impact of Sexual Orientation Victimization of Lesbian, Gay, and Bisexual Youths in High School*, 17 *School Psychology Quarterly* 2, 148-176 (2002); Gary Remafedi, *Adolescent Homosexuality: Psychological and Medical Implications*, 79 *Pediatrics* 331 (1987).

and physical harassment at the hands of their peers.¹⁸ If school officials do not appropriately address this, an LGBT youth may enter the system for truancy,¹⁹ or for defending themselves against homophobic attacks.²⁰

Unfortunately, LGBT youth in the foster care and juvenile justice systems often experience further rejection, harassment, and discrimination at the hands of their peers as well as the caretakers and professionals charged with their care.²¹ A 1994 study in New York City found that 100% of LGBT youth in area group homes reported verbal harassment and 70% reported physical violence due to their sexual orientation or gender identity.²² LGBT youth in juvenile justice facilities face similar harassment and assault.²³ When LGBT youth seek assistance, they frequently encounter adults who ignore them or even blame them for the abuse they are experiencing.²⁴ In response, many LGBT youth resort to living on the streets.²⁵ Studies conducted in urban centers around the country have found that a shockingly disproportionate number – between 20% and 40% – of all homeless and runaway youth identify as LGBT.²⁶ Almost two-thirds of homeless LGBT

¹⁸ For example, a 2005 national school climate study found that over 90% of LGBT students reported being harassed or assaulted during the past year. Harris Interactive and GLSEN (2005). *From Teasing to Torment: School Climate in America, A Survey of Students and Teachers*. New York: GLSEN.

¹⁹ One study found that 28% of lesbian and gay youth dropped out of school due to peer harassment. See RC Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youths: Associations With School Problems, Running Away, Substance Abuse, Prostitution, and Suicide*, 62 *J. Consult. Clin. Psychol.* 26 (1994). See also Sullivan, *supra* note 16, at 57.

²⁰ LGBT students who were harassed at school were found to be more than three times as likely to carry a weapon to school, to seriously consider suicide, or to miss at least one day of school in the last 30 days because they felt unsafe. California Safe Schools Coalition, 2004 *Safe Place to Learn: Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Non-Conformity and Steps for Making Schools Safer*, p. 15, available at <http://www.casafeschools.org/SafePlaceToLearnLow.pdf>

²¹ See Gerald P. Mallon, *We Don't Exactly Get the Welcome Wagon: The Experience of Gay and Lesbian Adolescents in the Child Welfare System* (1998) and Al Desetta, *In the System and In the Life: A Guide for Teens and Staff to the Gay Experience in Foster Care* (2003).

²² See Joint Task Force of New York City's Child Welfare Administration and the Council of Family and Child Caring Agencies, *Improving Services for Gay and Lesbian Youth in NYC's Child Welfare System: A Task Force Report* (1994) (hereinafter *New York Task Force Report*).

²³ See Mary Curtin, *Lesbian and Bisexual Girls in the Juvenile Justice System*, 19 *Child and Adolescent Social Work Journal* 285 (2002); *Justice for All*; see also *R.G. v. Koller*, 415 F.Supp.2d 1129 at 1144 (D.Hawai'i, 2006) (“The record before the court contains extensive documentation of anti-LGBT sexual assaults, physical assaults and threats of sexual assault, including rape [at the Hawai'i Youth Correction Facility (HYCF)].”).

²⁴ See *R.G. v. Koller*, *supra* at 1145 (“Many incidents of verbal abuse and harassment occurred in the presence of HYCF staff or were reported to staff, but the paucity of disciplinary records submitted by defendants indicates that, with respect to the vast majority of instances, staff took no action.”).

²⁵ 56% of LGBT youth interviewed in a New York City study spent time living on the streets because they felt “safer” there than they did living in their group or foster home. See *Justice for All*, at 16 (citing *New York Task Force Report*).

²⁶ See Laurie Schaffner, *Violence and Female Delinquency: Gender Transgressions and Gender Invisibility*, 14 *Berkeley Women's L. J.* 40 (1999); *Youth in the Margins*, at 11; *Justice for All*, at 1; Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 *Am. J. Pub. Health* 773 (2002).

youth have previously been in a child welfare placement.²⁷ LGBT youth who runaway, or are homeless, are at an increased risk of other problems, including criminal victimization, physical and sexual assault, and arrest.²⁸

Although it is impossible to know their exact numbers, LGBT youth are over-represented in the child welfare and juvenile justice systems.²⁹ Yet these youth often remain invisible, both because they have been socialized to hide their identities and because many child welfare and juvenile justice professionals persist in the belief that they simply do not exist.³⁰ As a result, even well-meaning professionals often fail to provide supportive and appropriate services for LGBT young people.³¹

Part Two: Reforming the System: Litigation, Education, Policy

Advocates and attorneys from around the country are addressing these problems both through traditional legal approaches, including bringing litigation and advocating for legislation, as well as through innovative multi-disciplinary strategies that collaboratively work with a range of service providers and administrators to develop the tools and supports the system needs to create change from within. While these efforts have brought about significant advances, there is still much work to be done; the experiences of LGBT youth in state custody described above remain systemic.

A. Using Litigation to Protect LGBT Youth in State Custody and for Reform

²⁷ A 2004 study of 400 homeless LGBT youth in San Diego found that 64% reported having previously been in a child welfare placement. "Serving LGBTQ Youths in Foster Care---Challenges and Solutions," July 31, 2004, APA National Convention 2004. Another study in New York City found that 78% of LGBT youth living in group homes were removed or ran away from at least one prior placement because of hostility toward their sexual orientation or gender identity. See *Justice for All*, at 16 (citing *New York Task Force Report*).

²⁸ LGBT youth living on the streets often end up in the juvenile justice system following an arrest for committing non-violent survival crimes like prostitution and shoplifting. See *Justice for All*, at 18-20; Sullivan, at 41.

²⁹ See *Justice for All?*, at 6; *Youth in the Margins*, at 11; Laurie Schaffner, *Violence and Female Delinquency: Gender Transgressions and Gender Invisibility*, 14 Berkeley Women's L. J. 40 (1999).

³⁰ E.g., *Youth in the Margins*, at 103; Gerald P. Mallon, *We Don't Exactly Get the Welcome Wagon: The Experiences of Gay and Lesbian Adolescents in Child Welfare Systems* (1998).

³¹ When child welfare or juvenile justice professionals lack the proper guidance or training on providing appropriate services to LGBT youth, they may unknowingly cause harm. For example, without proper guidance, staff may respond to the harassment or assault of an LGBT youth by isolating or moving the LGBT youth to a more restrictive facility rather than addressing the underlying homophobia or transphobia. See note 51 *sub*. Uninformed or biased staff members may also try to segregate or isolate LGBT youth based on the erroneous assumption that LGBT youth will "prey" on other youth. LGBT youth often are not allowed access to supportive programs such as LGBT youth groups and community centers, or other social activities either because staff do not understand why these services are important or because they think it is not appropriate to support a young person's sexual orientation or gender identity. See *Youth in the Margins*, at 15; Mallon, *supra* note 21. Furthermore, transgender youth in state custody often are not allowed to dress or groom in accordance with their gender identity, not called by their name, and not placed appropriately in sex-segregated facilities.

Over the past several years attorneys have filed a number of important cases on behalf of LGBT youth in state custody.³² These cases apply the general civil rights principals afforded to all young people in state custody to the unique experiences of LGBT youth and often include state and local nondiscrimination claims. The following is a discussion of the ways attorneys and advocates can use both general child welfare protections and LGBT specific nondiscrimination protections in the courtroom and in the development of best practices, policies and training materials, to address the mistreatment of LGBT young people in state custody.

I. The Constitutional Right to Safety

All young people in state custody have a right to safety – a right that is conferred because of their unique legal status as wards of the state. This right to safety is grounded in the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution³³ and applies in both the child welfare³⁴ and juvenile justice context.³⁵

³² See e.g. *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) see discussion *infra* note 62; *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) see discussion *infra* note 5; *Rodriguez v. Johnson, et al*, No. 06CV00214 (S.D. NY filed Jan. 11, 2006) see discussion *infra* note 57; Unpublished Order Dismissing Writ of Habeus Corpus Without Prejudice, Family Court of the First Judicial Circuit, Hawaii, Judge Wong, March 17, 2005 (hereinafter “the Hawaii case”) see discussion *infra* note 47; and *R.G. v. Koller*, 415 F.Supp.2d 1129 (D.Hawai‘i, 2006) The Plaintiffs in *R.G.* are a 17-year-old male-to-female transgender girl, an 18-year-old lesbian, and an 18-year-old boy perceived to be gay. In their federal civil rights lawsuit against the Hawai‘i Youth Correctional Facility (HYCF), the plaintiffs allege that the defendants operate HYCF in the absence of policies and procedures, fail to supervise or train directors, administrators and staff and are responsible for (a) a pervasive climate of hostility, discrimination, and harassment against Plaintiffs based on their actual or perceived sexual orientation, sex, and/or transgender status in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (b) acts of religious preaching by HYCF staff in violation of the Establishment Clause of the First Amendment; (c) content-based and viewpoint-discriminatory silencing of Plaintiff’s speech regarding their lives as LGBT teenagers, in violation of their free speech rights under the First Amendment; and (d) interference with access to counsel and the courts in violation of the First, Sixth and Fourteenth Amendments. See complaint at 6, *R.G. v. Koller et al*, No. 05-566 JMS/LEK (D. HI filed Sept. 1, 2005). The plaintiffs also allege that staff at the Hawaii Department of Human Services (DHS) and HYCF ignored and sometimes even participated in an atmosphere of harassment, humiliation, and fear for lesbian, gay, bisexual, and transgender youth in the facility, despite repeated pleas by doctors and psychologists concerned about the wards’ safety and well-being. The plaintiffs are represented by the ACLU. *Id.* At the time of publication, the court appointed expert in this case was guiding the development and implementation of the policies, procedures, and training that are consistent with the court’s findings in its order granting preliminary injunction.

³³ In 1976, the U.S. Supreme Court ruled that a prison official’s deliberate indifference toward a prisoner’s known medical needs is a violation of the right to protection from “cruel and unusual punishment” under the Eighth Amendment to the U.S. Constitution. *Estelle v. Gamble*, 429 U.S. 97 (1976). In 1982, the U.S. Supreme Court ruled that people involuntarily committed to state mental institutions are also entitled to a standard of care that takes into consideration their complete dependence on the government for protection and necessary care. Since these patients are not convicted criminals, the Supreme Court reasoned that the Eighth Amendment’s protection from cruel and unusual punishment does not apply. Instead, the court found that the Fourteenth Amendment’s guarantee of liberty is a more appropriate basis for the right to the state’s protection from harm and the right to receive necessary services. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

³⁴ 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.* 489 U.S. 189 (1989). Although Joshua DeShaney was not in state custody, child protective services in his state had received several credible reports of suspected abuse yet chose not to intervene. After suffering permanent brain damage as a

A. The Right to Safety in the Child Welfare System

LGBT youth should be protected from emotional and physical harm in their child welfare placements

“My foster family took away my clothes, called me a ‘dyke’ and tried to remake me.”³⁶

“I had at least two fights a day. The boys used to do stupid things like throw rocks at me or put bleach in my food because I was gay. Once I was thrown down a flight of stairs, and I’ve had my nose broken twice. They even ripped up the only picture of my mother that I had.”³⁷

result of the abuse by his father, 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.” *Id* at 201 n.9. A Fourteenth Amendment right to safety in the child welfare system has been upheld by every circuit court that has been asked to decide the question since *DeShaney*. See e.g. *Howard et al. v. Malac, et al.*, 270 F.Supp.2d 132, 138, (D. Mass 2003) (citing *K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir. 2001) (holding that children in state custody have a liberty interest in being free from harm and the state has a duty to protect them); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987).³⁵ Unlike adult prisoners, children in the custody of the juvenile justice system have not been “convicted” of crimes. 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.”); 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.”). 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. For detained youth who are entitled to more protection than incarcerated adults, most courts analyze their conditions of confinement claims under the federal Due Process Clause of the Fourteenth Amendment. 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) (“[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). The United States Supreme Court has not yet decided the issue.

³⁶ 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.

³⁷ Al Desetta, *In the System and In the Life: A Guide for Teens and Staff to the Gay Experience in Foster Care*, 46-47 (2003).

LGBT youth in the child welfare system often face strong disapproval and rejection from their caretakers, and harassment and violence from the other young people in their placements. Like all youth in care, LGBT youth have the legal right to protection from harassment and abuse.³⁸ This right goes beyond protection from strictly physical harms and includes the right to protection from mental and emotional harm as well.³⁹ Caretakers of foster children also are required to protect foster children from harms that may exist outside the home.⁴⁰ If an LGBT youth experiences physical or emotional harm, either inside their home, in the community, or at school, the caseworker or placing agency that arranged for this placement could be held liable if they knew or should have known that by placing the youth in this home he or she would be at risk.

LGBT youth should not be sent to “conversion therapies” or denied supportive services

LGBT foster youth should not be denied appropriate medical or mental health care,⁴¹ or be forced to undergo inappropriate or unethical services that are damaging to their emotional well-being, including “conversion therapies” and other controversial practices intended to involuntarily change a person’s sexual orientation or gender

³⁸ See *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990) (“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....”); *Howard et al. v. Malac, et al.*, 270 F.Supp.2d 132, 138, (D. Mass 2003) (plaintiffs had viable substantive due process claim, as children “taken into state custody have the right not to be placed with foster parents having a known propensity to neglect or abuse children.”); *Hernandez ex rel, Hernandez v. Texas Department of Protective and Regulatory Services*, 380 F.3d 872, 880 (5th Cir. 2004) (explaining based on “special relationship” between foster children and the state, foster children have clearly established right to personal security and safe living arrangements); *Omar v. Lindsey*, 334 F.3d 1246, 1248 (11th Cir. 2003) (per curiam)(“[t]here is no doubt that foster children have a fourteenth amendment liberty interest in physical safety, including a freedom from the sort of shocking abuse Plaintiff endured.”).

³⁹ *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.”).

⁴⁰ *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.”).

⁴¹ *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. 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 of himself and needed the supervision and attention of an adult caregiver.”); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d at 851(explaining Constitution requires state officials to take steps to prevent children in state institutions from deteriorating physically or psychologically).

identity. These practices have been condemned by all of the major medical and mental health associations because they cause emotional harm.⁴² In addition, supportive services, such as peer support groups or other community resources that help to ameliorate feelings of isolation and depression, should not be withheld from an LGBT foster youth. Child welfare professionals should adhere to the professional standards and nondiscrimination principles related to the fair treatment of LGBT people espoused by the National Association of Social Workers, the Child Welfare League of America, and other organizations.⁴³

To ensure safety, child welfare professionals must monitor and supervise an LGBT youth's placement

Because LGBT young people, and those perceived to be LGBT, are especially vulnerable to mistreatment and harm from a variety of sources, both inside and outside their placements, it is imperative that child welfare workers provide appropriate oversight and supervision so that vulnerable young people are identified and adequately monitored. If child welfare professionals fail to monitor and supervise an LGBT youth's placement, and the child is subsequently injured, this could constitute a breach of the duty to protect, even in situations where the professional had no actual knowledge of a specific risk of harm.⁴⁴

⁴² E.g., In 1993, the American Academy of Pediatrics issued a Policy Statement on Homosexuality and Adolescence: "Therapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." In 1997, the American Psychiatric Association explained "there is no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation" and it developed a policy in opposition to "any psychiatric treatment, such as 'reparative' or 'conversion' therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon a prior assumption that the patient should change his/her homosexual orientation." Also in 1997, the American Psychological Association (APA) issued a *Resolution on Appropriate Therapeutic Responses to Sexual Orientation*, stating, "The APA opposes portrayals of lesbian, gay, bisexual youth and adults as mentally ill due to their sexual orientation and supports the dissemination of accurate information about sexual orientation, and mental health, and appropriate interventions in order to counter bias that is based in ignorance or unfounded beliefs about sexual orientation."

⁴³ National Association of Social Workers *Code of Ethics of 1999*: 4.02 Discrimination: Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, age, marital status, political belief, religion, or mental or physical disability; 6.04 Social and Political Action (d): Social Workers should act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of race, ethnicity, national origin, color, sex, sexual orientation, age, marital status, political belief, religion, or mental or physical disability; CWLA's *Standards of Excellence for Adoption Services*, 4.7 "Nondiscrimination in provision of services to adoptive applicants. 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 life style, 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." CWLA's *Standards of Excellence for Family Foster Care Services*: 3.18 "Nondiscrimination in selecting 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."

⁴⁴ *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) ("The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to

B. The Right to Safety in the Juvenile Justice System

LGBT youth should be protected from emotional and physical harm in their juvenile justice placements

“The Staff think that if a youth is gay, they want to have sex with all of the other boys. It’s not true. They would not help me when the other youth abused and raped me.”⁴⁵

Like young people in the child welfare system, LGBT youth in juvenile justice placements are entitled to protection from physical, emotional, and sexual abuse by other youth or facility staff.⁴⁶ 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.⁴⁷ In addition, juvenile

insure the continuing safety of that environment. The state's failure to meet that obligation, as evidenced by the child's injuries, in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment”); *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”). Monitoring requirements are also spelled out in state regulations and departmental policies and practice guidelines.

⁴⁵ Anonymous gay youth, personal interview, Model Standards Project, March 12, 2003

⁴⁶ See *R.G. v. Koller*, 415 F.Supp.2d at 1157 (finding facility violated plaintiff’s due process rights by allowing pervasive verbal, physical, and sexual abuse to persist); *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). See also *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). 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).

⁴⁷ See, e.g., *R.G. v. Koller*, 415 F.Supp.2d at 1158 (finding placing vulnerable LGBT youth in unit with aggressive boys amounts to deliberate indifference); *A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004) (finding sufficient evidence individuals were deliberately indifferent to the substantial risk of harm to 13 year old boy with mental illness who was placed in general population). In 2005, a young man who was experiencing anti-gay abuse petitioned for a Writ of Habeas Corpus to be removed from the Hawai’i Youth Correctional Facility (“HYCF”) because his constitutional right to safety was being violated. He was constantly verbally, physically, and sexually harassed and threatened while in the facility. Other young people in the facility regularly exposed themselves to him, pressured him for sexual favors, and acted out violently toward him whenever they had the opportunity. He eventually filed a written grievance. As is a common response in these situations, the facility administrator moved him to a single cell, but did nothing further to address the abuse. Not surprisingly, even after he was isolated, the attacks continued. After writing a second grievance and receiving no additional protection, he filed a writ seeking removal.

Although the judge who eventually heard his case dismissed his petition without prejudice based on a lack of sufficient evidence in the record (minor did not make himself available for cross-examination and did not adopt his previous written complaints), the court was particularly concerned that HYCF was aware of the ongoing abuse that he suffered because of his sexual orientation, yet took no adequate or reasonable steps to protect him. The court ordered HYCF to adopt policies and procedures to address this known problem, stating:

detention and correctional facilities also must have a sound classification system that provides safety, especially for vulnerable youth.⁴⁸

LGBT youth must be placed in appropriate juvenile justice settings and not isolated

“I was put in a room by myself because I was gay. I wasn’t allowed to be around anyone else.”⁴⁹

If an LGBT youth is placed in extended isolation, either as punishment for expressing their identity⁵⁰ or based on the unfounded and illogical myth that all LGBT youth are a danger to other youth, his or her constitutional rights have been violated.⁵¹ Although an LGBT youth may be especially vulnerable while in detention, automatically placing all LGBT youth in segregation “for their own safety” also is unconstitutionally

“The Court is concerned that the problems raised by this case are systemic and must be addressed by the HYCF with the adoption, with deliberate speed, of policies and operation procedures that are appropriate to the treatment of lesbian, gay, and transgender youths, that set standards for the conduct of youth correctional officers and other staff, and that provide on-going staff training and oversight. ...[A]n effective start to protection of Minor could have been something as simple as having a policy that required staff to immediately provide verbal reprimands to offending wards whenever staff observed offending wards’ verbal and physical mistreatment of Minor. The court is also concerned that ‘protective’ actions such as placing Minor in ‘isolation’ is not ‘protective,’ but punitive.”

The Petitioner in this case became one of the plaintiffs in R.G. All information about this case was gathered from an unpublished and redacted decision of the Family Court of the First Judicial Circuit in the State of Hawai‘i. There is no identifying information available. Unpublished Order Dismissing Writ of Habeus Corpus Without Prejudice, Family Court of the First Judicial Circuit, Hawaii, Judge Wong, March 17, 2005.

⁴⁸ 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. See also *Alexander S.*, 876 F. Supp. at 797- 798 (facilities must have a system for screening and separating aggressive juveniles from vulnerable juveniles); *R.G.v. Koller*, 415 F. Supp. 2d at 1158 (same).

⁴⁹ 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.

⁵⁰ In addition to isolation, forcing LGBT youth to dress differently than other youth in the facility, requiring LGBT youth to perform different chores, or singling out LGBT youth in any other way, are actions that a court would likely find unconstitutionally punitive. See, e.g., *Gerks v. Deathe*, 832 F.Supp. 1450 (W.D. Okla.1993) (finding due process rights of girl may have been violated for asking her to clean her own excrement); *Gary W. v. Louisiana*, 437 Supp. at 1230 (addressing types of work performed by youth).

⁵¹ 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. 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.”).

punitive, and a more effective and less stigmatizing and isolating response is legally required.⁵² Along these same lines, if an LGBT youth is labeled or treated as sex offender or housed with sex offenders⁵³ without adequate due process protections, such as a hearing, an evaluation by a qualified mental health professional, and an opportunity to appeal, the facility has violated the youth's constitutional rights.⁵⁴

LGBT youth in the juvenile justice system have the right to receive appropriate mental and physical health care

Like young people in the child welfare system, youth in detention and correctional facilities have the right to adequate medical and mental health care.⁵⁵ Facilities must provide general medical services for both prevention and treatment as well as any medical services that may be unique to LGBT youth.⁵⁶ An act or omission that constitutes a knowing disregard of a ward's health interests can be a constitutional violation. For example, a youth's right to medical care is violated if juvenile justice 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

⁵²See *R.G. v. Koller*, *supra* 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.”). A lawsuit on behalf of young people in a juvenile detention facility in Philadelphia in the 1970’s also addressed the use of isolation for protection and segregation and 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... 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.” Stipulation, *Santiago*.

⁵³In some juvenile detention facilities, LGBT youth who are not accused or convicted of a sex offense have been housed in sex offender units because they were perceived as having a “sexual” issue or problem merely because they are LGBT. See *Justice for All*, at 7. These practices are both discriminatory and extremely harmful and may cause permanent psychological damage. Unless a youth has a history of sex-offense adjudications, a juvenile justice facility should never arbitrarily label an LGBT youth as a sex offender, “sexually aggressive,” or any other euphemism used to describe sex offender status, simply because of their sexual orientation or gender.

⁵⁴In 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, 830 (9th Cir. 1997) (“We can 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.

⁵⁵See *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.

⁵⁶See *A.M.*, 372 F.3d at 584-85 (discussing lack of medical and mental health care for ward with mental illness); *Jackson v. Johnson*, 118 F. Supp. 2d at 289; *Alexander S.*, 876 F. Supp. at 788.

the necessary steps to address them, or if they ignore the instructions of the youth's treating physician.⁵⁷

In addition, a facility should have adequate policies governing the supervision and treatment of suicidal wards.⁵⁸ LGBT youth, especially those facing extreme forms of anti-LGBT abuse and harassment, may be at an increased risk for suicide.⁵⁹ Facility administrators and staff also must ensure anti-LGBT harassment and abuse that could exacerbate suicidal feelings is prevented.⁶⁰

II. The Constitutional Right to Equal Protection

*"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.'"*⁶¹

⁵⁷ Child welfare and juvenile justice professionals must provide some form of appropriate treatment for transgender youth diagnosed with Gender Identity Disorder. Even under the more restrictive minimally adequate medical care standard applicable to adult prisoners, courts have held that "transsexualism" constitutes a "serious medical need" therefore, deliberately denying access to transgender-related health care for prisoners amounts to cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. *See, e.g., Allard v. Gomez*, 9 Fed. Appx. 793 (9th Cir. 2001); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (holding that "[t]here is no reason to treat transsexualism differently from any other psychiatric disorder"); *Kosilek v. Malone*, 221 F.Supp. 2d 156 (Mass. Dist. Ct. 2001); *Wolfe v. Horne*, 130 F.Supp. 2d 648 (E.D. Pa. 2001); *Phillips v. Michigan Dep't. of Corr.*, 731 F.Supp. 792 (W.D. Mich. 1990). *See Rodriguez v. Johnson, et al*, No. 06CV00214, (S.D. NY filed Jan. 11, 2006). Plaintiff, a transgender young woman diagnosed with Gender Identity Disorder, filed this lawsuit against officials of the New York State Office of Children and Family Services alleging that the abrupt termination of her feminizing hormone treatment while she was in a juvenile detention facility caused physical and psychological harm. Plaintiff is represented by attorneys from Lambda Legal, Sylvia Rivera Law Project, and Debevoise & Plimpton. At the time of publication, this case has not been decided.

⁵⁸ The failure to provide mental health screening, sufficient mental health services, or policies governing the supervision and treatment of suicidal wards can contribute to the liability of facilities in cases brought forward by the families of young people who have committed suicide while in juvenile facilities. *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 A.M.*, 372 F.3d at 585, FN3 (finding that juvenile detention center has a duty to protect detainees from harm, whether self-inflicted or inflicted by others); *Dolihite v. Maughon*, 74 F.3d 1027 (11th Cir. 1996).

⁵⁹ 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>. Although LGBT youth may be at risk for suicide, LGBT youth should never automatically be placed on suicide watch or in isolation simply because they are LGBT.

⁶⁰ *See R.G. v. Koller*, 415 F.Supp.2d at 1157 (concerned lack of minimally adequate policies, procedures, and training to ensure ward safety resulted in severe harassment and abuse by staff and wards which exacerbated plaintiffs' suicidal feelings).

⁶¹ 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.

If an LGBT youth in state custody is refused access to a program because of his or her sexual orientation or gender identity or is treated differently in the provision of care and services, his or her constitutional right to equal protection has been violated.⁶² Furthermore, if child welfare or juvenile justice professionals fail to take action against anti-LGBT harassment because they are uneducated about LGBT issues and are uncomfortable addressing the situation, they believe that the LGBT youth brought the harassment upon him or herself simply by being openly LGBT, or they think LGBT youth in care should expect to be harassed, a court could find that the agency violated the youth's right to equal protection, in addition to his or her right to safety.⁶³

III. The Constitutional Right to Free Speech and Freedom of Religion

LGBT youth should be allowed to express their sexual orientation and gender identity while in state custody.

All youth have a constitutional right to freedom of speech and freedom of expression. Courts have found that this right includes the right to be open about one's sexual orientation⁶⁴ and the right to express one's gender identity through clothing and grooming.⁶⁵ 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

⁶² 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 where an LGBT youth in state custody, is 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 other students were protected from harassment and discrimination).

⁶³ 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. *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996). The plaintiffs alleged severe abuse -- including harassment, physical violence, and rape -- by peers, foster parents, and child welfare staff. The youth alleged 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 New York City child welfare system order to improve the standard of care for LGBT youth.

⁶⁴ *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).

⁶⁵ *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).

orientation or gender identity in order to receive services, or if they refuse to allow a transgender or gender-nonconforming youth to express his or her gender through clothing and accessories.⁶⁶

LGBT youth should not be required to participate in religious activities that condemn LGBT people

“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.”⁶⁷

“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 nuns come back to the house and lecture me.”⁶⁸

The First Amendment guarantees young people in state custody the right to religious freedom and the right to be free from religious indoctrination.⁶⁹ LGBT youth should never be forced to hide their identities from caretakers with religious objections, required to participate in religious activities that condemn homosexuality and gender difference, or intimidated or coerced into adopting any particular religious practices or beliefs.⁷⁰

IV. State Non-Discrimination Protections

“When I arrived at [the juvenile detention facility] they ripped the weave out of my hair, broke off my nails, wiped my makeup off, stripped me of my undergarments, and made me wear male underwear and clothes.”⁷¹

In addition to the legal protections available under the U.S. Constitution, LGBT youth in the child welfare and juvenile justice systems can also allege state and local law violations based upon nondiscrimination statutes and ordinances.⁷²

⁶⁶ Although there is not a large body of First Amendment case law in the child welfare or juvenile justice context, in the public school context, courts have held school officials liable for forcing LGBT youth to conceal their sexual orientation as a condition of enrollment, for not permitting a transgender student to dress in accordance with their gender identity, and for prohibiting students from bringing a same-sex date to the high school prom. *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).

⁶⁷ 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.

⁶⁸ Anonymous gay youth, personal interview, Model Standards Project, Feb 28, 2003

⁶⁹ See *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998) (holding that a practice of condoning or failing to prevent known proselytizing or religious indoctrination by prison staff would violate the Establishment Clause if plaintiff could make requisite factual showing).

⁷⁰ See *Bellmore v. United Methodist Children's Home and Department of Human Resources of Georgia*, Settlement Terms available at 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.”).

⁷¹ Anonymous Youth, Personal Interview, Model Standards Project, February 28, 2003.

⁷² Many of the non-discrimination laws, 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

For example, in California a youth who is denied a foster care placement because the youth is lesbian, gay, bisexual, or transgender, can bring a claim under the Foster Care Non-discrimination Act which makes it unlawful for county child welfare departments, group home facilities, and foster family agencies to discriminate on the basis of actual or perceived sexual orientation or gender identity.⁷³ Other states have nondiscrimination statutes that although not specifically directed at child welfare or juvenile justice systems, they are enforceable in these systems.⁷⁴

B. Non-Litigation Strategies to Effectuate Change for LGBT Youth in State Custody

While litigation can encourage system-wide reform, litigation alone is not enough to secure the changes necessary to protect and support LGBT youth in state care. Legal and child welfare organizations are now working in partnership to develop non-adversarial

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 *See Doe v. Bell* discussion *supra* note 5. Therefore, even if a particular state does not explicitly provide nondiscrimination protections based on sexual orientation or gender identity, LGBT youth in care may still be able to make a claim under the applicable state law based on their sex or disability.

⁷³ CAL. WELF. & INST. CODE § 16001.9(a)(22); CAL. WELF. & INST. CODE § 16013(a).

⁷⁴ 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. *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). Other states have non-discrimination laws that protect children and adults who are living in “institutional settings”, which may include juvenile justice facilities and group homes. *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). Still other states have non-discrimination laws that apply to businesses and other facilities considered to be “public accommodations.” *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); *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). 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. *See Doe v. Bell*, 754 N.Y.S.2d 846, 850 (recognizing residential foster care facility as “publicly-assisted housing accommodation” for purposes of disability discrimination claim under New York’s Human Rights Law).

multidisciplinary approaches for improving the care and outcomes of LGBT youth in the child welfare and juvenile justice systems. These grassroots efforts already have begun to make lasting positive changes. For example, several states including Massachusetts and Michigan now provide comprehensive training⁷⁵ on sexual orientation and gender identity to caseworkers, foster parents, group home staff, and direct service providers. Some jurisdictions, including Connecticut, Illinois, the City of Philadelphia, and Santa Clara County in California, have designated an LGBT point-person to conduct training and education on LGBT issues, as well as to address any other practical issues that may arise, including locating safe placements and appropriate services. A number of states and localities now include LGBT people in policies that prohibit discrimination and mistreatment in the child welfare and juvenile justice systems. In other places, advocates are developing explicit practice guidelines on how to work effectively with LGBT youth in state care.

Listening, Learning, and Educating Advocates and Providers:

In the last three years, two innovative collaborative projects have broken new ground in developing and disseminating resources to support systemic change for LGBT youth in the child welfare and juvenile justice systems: *Fostering Transitions*, the Child Welfare League of America (CWLA) and Lambda Legal's Joint Initiative; and the *Model Standards Project*, a collaboration of Legal Services for Children and the National Center for Lesbian Rights.

Fostering Transitions has made it a priority to engage LGBT youth voices and ideas for reform in its efforts to support LGBT youth and adults involved with the child welfare system. To that end, CWLA and Lambda Legal convened thirteen Listening Forums around the country between 2003-2004 to provide an opportunity for LGBT youth in care, as well as the adults who work with them, to share their real life experiences and create a picture of what life is really like for these young people. The stories and ideas shared during the Listening Forums will be published by CWLA in a report in 2006. This report will dispel the myth that LGBT youth do not exist and will be a resource for understanding, supporting, and advocating for LGBT youth in care. It will also demonstrate that there is consensus around the country, in big cities and small towns, that LGBT youth in state custody deserve more attention to their needs. To provide guidance to this project, CWLA and Lambda Legal assembled an Advisory Network comprised of individuals from around the country with a special interest in LGBT youth in child welfare systems. This Network now includes over 90 individuals committed to transforming the system, including caseworkers, agency executives, direct service

⁷⁵ Education and training on sexual orientation and gender identity for everyone living or working in the system has proven to be an effective means for combating homophobia and transphobia and improving the standard of care for LGBT youth in the child welfare and juvenile justice systems. An effective training curriculum on LGBT issues should include a discussion on myths and stereotypes, and the ways in which LGBT youth are mistreated and harmed while in care, often unintentionally. It should also include a discussion on the legal rights of LGBT youth in care and the professional practice standards such as those promulgated by CWLA, the National Association of Social Workers, the American Academy of Pediatrics, the American Psychological Association, and others. Training resources on LGBT youth are widely available through CWLA. www.cwla.org/programs/culture/glbqt.htm

providers, academics, attorneys, and LGBT young people who are or were in state custody. Members of the Network regularly consult with one another about the struggles that they encounter and the successful strategies that they are implementing. Through the Network, members are able to disseminate the many emerging resources and tools concerning LGBT youth in state care to individuals throughout the country who are actively working to reform these systems. Growing from this joint initiative, CWLA has planned additional events in 2006 to continue to raise awareness about LGBT youth. For example, this year CWLA will dedicate its entire annual best practices conference, “Finding Better Ways,” to LGBT youth. This national conference will showcase innovative programs and practices in child welfare and behavioral health care with the goal of finding more effective ways to work with LGBT youth and their families. CWLA has also dedicated its entire Spring 2006 edition of the Child Welfare Journal to LGBT issues.

The *Model Standards Project* is also committed to improving services and outcomes for LGBT youth in state care. Over the last three years, NCLR and Legal Services for Children have developed comprehensive recommendations about how child welfare and juvenile justice professionals can best serve and work with LGBT youth in state care. These recommendations, which will be published by CWLA in 2006 as part of their “Best Practices” series, draw on current research and informed practice⁷⁶ to provide guidance to child welfare and juvenile justice institutions, administrators and staff about how to provide safe and equitable environments for all youth, regardless of their sexual orientation or gender identity. The recommendations particularly focus on developing appropriate agency policies and practices, addressing the training needs of administrators and staff, and ensuring that programs respect the legal rights of LGBT youth.⁷⁷ Rather than addressing individual instances of discrimination, the Best Practices Guidelines empower agencies to look at their programs as a whole and incorporate appropriate supports for LGBT youth and their families throughout the range of services they provide. They enable agencies to make a cultural shift in their work, rather than merely create specialized services for LGBT youth. In conjunction with local multidisciplinary task forces, broader reform efforts, and the CWLA/Lambda Network, the Best Practices Guidelines will give child welfare and juvenile justice agencies across the country a powerful tool to help make this cultural shift to LGBT-inclusive programming and become the supportive systems that LGBT youth in state care need in order to develop into healthy and happy adults.

⁷⁶ The Best Practices Guidelines reflect a widely shared understanding of how child welfare and juvenile justice systems can be more responsive to LGBT youth. They were developed in consultation both with LGBT youth involved in state care and with the leading scholars and practitioners in the field. Over the course of three years, Model Standards Project staff conducted several focus groups and interviews with LGBT youth involved in these systems across the country. Staff also convened a national Advisory Committee composed of individuals with direct experience in the public agencies serving youth, including young people with direct systems experience and child welfare and juvenile justice professionals with a specific interest and expertise in the concerns of LGBT youth. In consultation with Advisory Committee members, project staff then collected additional research and materials, interviewed additional experts from around the country, and developed a draft set of guidelines, which were “piloted” in workshops and trainings nationally and reviewed by Advisory Committee members.

⁷⁷In addition, the Guidelines can be referenced in litigation when a court is looking to determine whether a state official has substantially departed from professional judgment.

Conclusion

For too long, LGBT young people in the child welfare and juvenile justice systems have been overlooked, ignored and mistreated. Because of the hard work of hundreds of advocates who have come together through coordinated national efforts, a cultural shift has begun. These advocates are creating effective nondiscrimination policies, best practices guidelines, and other resources to bring about changes that already have greatly increased the capacity of child welfare and juvenile justice systems to support and protect the LGBT youth in their charge. By combining the expertise and resources of individuals from the legal, child welfare, juvenile justice, social service and educational fields, we will continue to reform these systems to live up to their historic missions of protecting all youth and to ensure that the civil rights of LGBT youth are upheld.