

The Legal Rights of LGBT Youth in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know

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Youth in state custody, regardless of their sexual orientation or gender identity, have federal and state constitutional and statutory rights. These rights guarantee a young person safety in their placement as well as freedom from deprivation of their liberty interest. Many lesbian, gay, bisexual, and transgender (LGBT) youth have these rights violated on a regular basis. Many cases in both the child welfare and juvenile justice contexts have resulted in extensive and time-consuming consent decrees as well as sizable damages awards. Knowledge of a youth's legal rights can help providers avoid legal liability while creating a safer and healthier environment for LGBT youth. This article provides a general overview of the successful federal legal claims that youth in the child welfare and juvenile justice systems have made, discussion of the rights generated as a result, particle application of these rights to the experiences of LGBT youth with hypothetical scenarios, a focus on specific rights that emanate from certain state laws, and a focus on specific concerns of transgender youth.

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In 2003, a young transgender woman sued the New York City Administration for Children's Services (ACS) for not allowing her to wear female attire in her all-boys group home (*Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003)). While in state care, she was prohibited from expressing her female gender identity in ways that did not conform with her birth sex, despite the fact that she had been previously diagnosed with Gender Identity Disorder, (GID) in which transgender youth experience clinically significant distress or impairment in important areas of functioning in relation to their gender identities (American Psychological Association, 1994). The young woman maintained that not being allowed to wear dresses and skirts caused her great psychological distress and amounted to illegal discrimination on the basis of disability and sex under the New York State housing nondiscrimination law, as well as a violation of her First Amendment freedom of expression (N.Y. Exec. 3296 (18)(2)). Without reaching her sex discrimination or First Amendment claims, the court found that in order to not discriminate against her based on disability, ACS was required to make reasonable accommodations for her transgender status and to permit her to dress and otherwise present herself consistently with her female gender identity.

In 2005, three juveniles, who were either identified or perceived as lesbian, gay, bisexual, or transgender and who had been confined at the Hawaii Youth Correctional Facility (HYCF), sued the facility after experiencing anti-LGBT abuse while in state custody (*R.G. v. Keller*, 415 F. Supp. 2d 1129). Like so many other lesbian, gay, bisexual, and transgender (LGBT) youth around the country, these youth were constantly verbally, physically, and sexually harassed and threatened while in the facility. Other young people in the facility regularly exposed themselves to them, pressured them for sexual favors, and acted out violently toward them whenever they had the opportunity. As is a common response in these situations, the facility administrator moved them to a single cell but did nothing further to address the abuse. Unsurprisingly, the attacks continued even after they were isolated.

The federal judge who eventually heard their case was particularly concerned that HYCF was aware of the ongoing abuse, yet took no adequate or reasonable steps to protect the youth:

The court's conclusion that the defendants acted with deliberate indifference is based on the totality of the circumstances at HYCF. Specifically, it is based on the court's findings that the defendants were aware that conditions at HYCF were unsafe for the plaintiffs and that, with this knowledge, defendants failed to mention: (1) polices and training necessary to protect LGBT youth, (2) adequate staffing and supervision, (3) a functioning grievance system, and (4) a classification system to protect vulnerable youth. By highlighting these shortcomings, the court does not mean to suggest that the constitution requires particular policies or safeguards such as a grievance or classification system. Rather, it is the supervisory defendants' failure to adopt *any* professionally acceptable methods of maintaining order and safety at HYCF that constitutes deliberate indifference.

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

The Constitutional Right to Safety

The most basic, fundamental civil right guaranteed to all people in state custody is the right to safety—a right conferred because of

their unique legal status as wards of the state. The right to safety is grounded in the due process clause of the Fourteenth Amendment to the U.S. Constitution: "No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It imposes a corresponding affirmative duty on the state to protect those in its custody from harm. In the child welfare and juvenile justice contexts, this right is called the "substantive due process liberty interest in safety," or the "right to safety" for short.

The Right to Safety in Foster Care

The first and, thus far, only U.S. Supreme Court case to address the legal rights of children *vis-à-vis* the child welfare system is *DeShaney v. Winnebago County Dep't of Soc. Serv.* in 1989. Joshua DeShaney, a minor child, was severely abused and permanently injured by his biological father. Although Joshua was not in state custody at the time of the abuse, child protective services in his state had received several credible reports of suspected abuse, yet chose not to intervene. His mother brought suit against the county for its failure to protect him. The U.S. Supreme Court ruled that child protective services could not be held liable for Joshua's injuries because they did not have a legal obligation to protect him. In a famous footnote, the Court opined, "Had the State...removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect... We express no view on the validity of this analogy, however, as it is not before us in the present case" (*DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 201 n.9 (1989)).

Since the *DeShaney* decision, every court that has considered the issue has found that children in the care and custody of the state have an affirmative right to safety, which imposes a corresponding duty on the state to provide protection from harm (e.g., see *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990)). Even prior to *DeShaney*, lower courts in various jurisdictions had

ruled that the state must protect children in foster care from harm and that the state's failure to do so is actionable (*Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987)).

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

Right to protection of physical, mental, and emotional well-being. Children in foster care have the right to be protected from physical and sexual abuse at the hands of foster parents, social workers, other foster children, and other individuals that provide care. In addition to protection from these physical harms, courts have determined that the state must also protect foster children from mental and emotional harm, which can have gravely negative effects on a child's development (*B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989)). The purpose of the child welfare system is to shield young people from abuse and neglect, and children are indeed removed by child protective services from situations where their psychological and emotional well-being is threatened or harmed. Accordingly, a foster child's right to safety includes the right to a child welfare placement that protects the child's physical, mental, and emotional well-being.

This right applies equally to all children in the child welfare system, including those who are or who are perceived to be LGBT. The physical and emotional well-being of these youth is at risk if they are harassed or mistreated based on their actual or perceived sexual orientation or gender identity. LGBT youth in the child welfare system often face disapproval and rejection from their caretakers, including foster parents, kinship care providers, and group home staff. As one young person described her experience, "My foster family took away my clothes, called me a 'dyke' and tried to remake me" (CWLA & Lambda Legal, 2002). Additionally, they may

face harassment or mistreatment from the other young people in the placement: "Right now, I'm in a shelter. I don't like it there because most people there are very homophobic...I got into a fight just because I'm gay, and people don't accept that fact...I'm trying to get the heck out of there"(CWLA & Lambda Legal, 2002). In some instances, caseworkers and caretakers excuse this harassment as acceptable childish behavior, or worse, lay blame on the youth for openly identifying as LGBT or acting in ways that do not conform to gender stereotypes. As one youth explained, "I told my social worker that I was beaten up and she said, 'It's your fault. Try not to be so feminine'" (Legal Services for Children & The National Center for Lesbian Rights, 2003). In situations where LGBT youth in foster care are mistreated and their physical or emotional well-being is harmed as a result, the caretakers as well as the professionals responsible for making the placement decision and providing ongoing monitoring are legally responsible and may face liability in court.

The right to physical, mental, and emotional safety for children in state custody also extends outside of the foster home or placement and protects foster children from mistreatment by persons *other than* foster parents or caretakers. Caretakers of foster children are expected to supervise appropriately and protect them from harms that may exist outside the home (*Camp v. Gregory*, 67 F.3d 1286, 1296 (7th Cir. 1995)). Therefore, professionals on a particular case are expected to place children only in homes where the caretakers are capable of providing protection from harm, particularly when a youth is vulnerable to mistreatment.

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

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

Right to services to prevent harm. The right to safety also includes the right to receive services to prevent physical or psychological harm or deterioration while in foster care (*Norfleet v. Arkansas Dep't of Human Serv.*, 989 F.2d 289, 293 (8th Cir. 1993)). Children removed from homes where they may have been abused or neglected often are in need of intervention and services. They may be suffering silently or in obvious pain as a result of their experiences. Professional services, including medical and mental health care, are vital to restoring a child's sense of safety and trust. In addition, some children do not adjust well to life in foster care placements and require additional support and services to help ease the transition.

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

Child welfare professionals must be vigilant to avoid contracting for services that use inappropriate or unethical practices when dealing with LGBT youth, such as so-called "conversion therapies" and other controversial practices intended to involuntarily change a youth's sexual orientation or gender identity, which have been condemned by the American Psychiatric Association, the American Psychological Association, the National Association of Social

Workers, and the American Counseling Association. As one young man described his experience: "In my first group home, they sat me down with a big family Bible and described to me why it was wrong to be gay" (CWLA & Lambda Legal, 2002). Other inappropriate and unethical practices include the withholding of necessary services and the failure to assist an LGBT young person in identifying community resources, peer support groups, and other resources to ameliorate feelings of isolation and depression.

Right to monitoring and supervision. The right to safety includes the right to appropriate monitoring, supervision, and case planning (*LaShawn A. v. Dixon*, 762 F. Supp. 959, 993 (D.D.C. 1991)). The duty to protect young people in the child welfare system imposes a corresponding duty on the professionals involved to maintain regular contact with them to insure their continued safety. Monitoring requirements also spelled out in state regulations and departmental policies and practice guidelines. In assessing whether a child welfare professional has fulfilled this duty, courts will take into consideration what the professionals should have known had they been fulfilling their professional obligations. Accordingly, failure to provide regular monitoring and supervision of a child's placement may rise to the level of a breach of the duty to protect, even in situations where the professional has no actual knowledge of a specific risk of harm (*Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987)). A child injured in a foster home and not properly monitored by child welfare professionals may sue the professionals and caretakers for damages.

LGBT young people in state custody are vulnerable to mistreatment and harm from a variety of sources, both inside and outside their placements. In order for a caseworker to monitor adequately the appropriateness of the placement, as well as the services being provided, regular communication, investigation, and supervision must occur in each child's case. That is important for all children, but it is particularly important for LGBT youth, because of the high

level of prejudice and misinformation about these youth. When working with a young person who is or may be perceived as LGBT, the caseworker must be prepared regularly to investigate the safety and appropriateness of the placement, the school, and the community within which the young person lives. The goal in working effectively with LGBT young people, whether "out of the closet" or not, is to provide a level of monitoring, supervision, and case management that takes into consideration the unique needs of each child and ensures that any mistreatment is quickly addressed at its source. By maintaining regular contact with a young person, the lines of communication are more likely to be open, and the caseworker is more likely to learn of harassment and abuse and be better prepared to take the necessary steps to stop it.

LGBT youth who have been in foster care stress the importance of developing and maintaining open communication. In the words of one such youth, "When I was in foster care, I was assaulted...because I 'came out'...In foster care, [the caseworkers] need to know first [that you're LGBT] so they can know where to put you and to make you feel safe" (CWLA & Lambda Legal, 2002).

The Right to Safety in Juvenile Detention and Correctional Facilities

Youth in juvenile detention and correctional facilities also have civil rights derived from the Fourteenth Amendment due process clause. Unlike adult inmates, children in the custody of the juvenile justice system have not been "convicted" of crimes (*Kent v. United States*, 383 U.S. 541, 554 (1966)). They also are understood to be less mature and responsible for their behavior than adults (*Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)). Therefore, the purpose and public policy of institutional confinement of children emphasizes rehabilitation and treatment rather than punishment, making the constitutional rights of institutionalized juveniles broader than those of adult inmates, and more like those of young people in the child welfare system, individuals who are

mentally impaired and institutionalized, and adult pretrial detainees (*Santana v. Collazo*, 714 F.2d 1172, 1180 (1st Cir.1983); *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

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, which prohibits the cruel and unusual punishment of adults convicted of crimes (*Whitley v. Albers*, 475 U.S. 312 (1986)). Although courts sometimes look to adult cases when deciding cases involving detained or incarcerated children, they have established clearly that children in state custody are entitled to more protection than incarcerated adults, and most courts analyze their claims under the federal due process clause using the framework developed in *Bell v. Wolfish*, *Youngberg v. Romeo*, and related cases.* These due process rights include the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, freedom from conditions that amount to punishment, access to treatment of mental and physical illnesses and injuries, and minimally adequate rehabilitation. These rights extend to children whether they are confined in juvenile detention centers, adult jails, training schools, or other secure institutions for delinquent children (*H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1084-85 (11th Cir. 1986); *Milonas v. Williams*, 691 F.2d 931, 942, n. 10 (10th Cir. 1982)).

Right to safe conditions of confinement. Juveniles who are incarcerated or detained have the right to reasonably safe conditions of confinement, including the right to reasonable protection from the

*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);

aggression of other juveniles or staff (*Alexander S.*, 876 F. Supp. 773, 797–798, (D.S.C. 1995); *Guidry v. Rapides Parish Sch. Bd.*, 560 So.2d 125 (La. Ct. App. 1990); *Pena v. N. Y. Div. for Youth*, 419 F. Supp. 203, 208 (S.D.N.Y. 1976); *Milonas v. Williams*, 691 F.2d 931, 935, 943 (10th Cir. 1982)). Accordingly, juvenile correctional staff have a duty to protect juveniles from harassment and violence. 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 (*A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004) *R.G. v. Roller*, 415 F. Supp. 2d, 1129.). In addition, juvenile justice administrators must ensure that they maintain reasonably safe conditions of confinement. To avoid liability, they should have adequate numbers of qualified staff who are sufficiently trained on issues of safety. They also should establish policies and procedures that address youth safety, including a written policy or procedure for reviewing and following up on incident reports. To protect LGBT youth from harassment and harm, non-discrimination policies and staff training that specifically address the needs of these youth may be necessary (*R.G. v. Koller, supra*).

Juvenile detention and correctional facilities also must have a sound classification system to provide safety for youth, especially for LGBT youth who are often vulnerable to attack if placed with aggressive juveniles. A facility should consider the age, size, offense history, and other risk factors, including sexual orientation, in determining the appropriate level of confinement for a particular juvenile and whether that particular juvenile needs to be segregated from more vulnerable youth because he or she pre-

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). Also, see *Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir.1974) for application of the cruel and unusual punishment test of the Eighth Amendment. The U.S. Supreme Court has not yet decided the issue.

sents a threat (*Alexander S.*, 876 F. Supp. at 787). Classification of youth usually occurs at intake and requires periodic reviews to ensure that safety is maintained. Individuals who are charged with making classification decisions in a juvenile facility must have an understanding of the safety risks that LGBT youth face in detention and must take these risks into account when determining placements. Unfortunately, in many instances, this understanding is sorely lacking. Because of misinformation and prejudice, staff in many detention and correctional facilities may erroneously assume that gay youth are sexual predators or desire to have sexual relations with the other youth. As one youth explained, "The staff think that if a youth is gay, they want to have sex with all of the other boys, so they did not protect me from unwanted sexual advances" (Legal Services for Children and the National Center for Lesbian Rights, 2003). These stereotypes are not only false, they are extremely dangerous to LGBT youth, who are at high risk of being sexually and physically abused by other youth and who must be protected. Accordingly, LGBT youth should not be placed in an aggressive population, with known sex offenders, or with other youth who display antigay or antitransgender animus.

Right to be free from unreasonably restrictive conditions of confinement. Youth in juvenile justice facilities also have the right to be free from unreasonably restrictive conditions of confinement. Conditions that unduly restrict a youth's freedom of action and are not reasonably related to legitimate security or safety needs of the institution are unconstitutional (*Alexander S.*, 876 F. Supp. at 798). A restriction violates this standard if it is arbitrary, discriminatory, or purposeless, or if it is a substantial departure from accepted professional judgment. A restriction that falls into one of these categories unconstitutionally impinges upon the individual's liberty interests and is considered punitive in violation of the Fourteenth Amendment due process clause.

The use of isolation within juvenile institutions for more than short periods may violate a youth's right to be free from unreason-

ably restrictive conditions of confinement and constitute impermissible punishment (*H.C ex rel. Hewett v. Jarrard*, 786 F.2d 1080 (11th Cir.1986); *Milonas v. Williams*, 691 F.2d at 941-42; *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973); *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972)). Although institutions generally are permitted to use isolation briefly to remove disruptive or out-of-control individuals from the general population, the use of isolation as a form of punishment for breaking facility rules, or for any other purpose, receives close scrutiny by the courts (*Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983)). Isolation can have damaging psychological effects on children, including extreme loneliness, anxiety, rage, and depression, because children have a very different perception of time and a lower capacity than adults to cope with sensory deprivations.

LGBT youth should never be placed in isolation because of their sexual orientation or gender identity or as punishment for expressing their identities (*Santiago v. City of Philadelphia*, Civ. Act. No. 74-2589 (E.D. Pa. 1978)). The following statement provides an example of improper treatment: "I was put in a room by myself because I was gay. I wasn't allowed to be around anyone else" (CWLA & Lambda Legal, 2002). It is an outdated myth that LGBT youth are a danger to other youth and should therefore be placed in isolation (*Santiago stipulation, supra*). In light of the well-known adverse psychological and physical effects isolation has on young people, reliance on such a misplaced stereotype, whether for administrative convenience or even a desire to protect LGBT youth from harassment and abuse, would be an insufficient reason to subject an LGBT youth to extended periods of isolation. If, on the other hand, an LGBT youth is harassed in a detention facility, segregating his or her harassers is constitutionally appropriate, because they pose a known threat to the safety of others. A facility should never punish the victim of harassment with isolation simply because it is cheaper or more convenient than providing adequate staffing, supervision, or training. Although an LGBT youth may be vulnerable while in detention, automatically plac-

ing all LGBT youth in segregation “for their own safety” is unconstitutionally punitive, especially if a more effective and less stigmatizing and isolating response is available (*R.G. v. Koller*, 415 F. Supp. 2d, 1129).

Right to mental and physical healthcare. Juveniles who are confined in institutions have the right to adequate medical and mental health-care. A juvenile detention or correctional facility has a duty to provide or arrange for treatment of mental and physical illnesses, injuries, and disabilities (*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). An act or omission that constitutes a knowing disregard of a ward’s health interests can be a constitutional violation. For example, if juvenile justice facility professionals know of a transgender youth’s significant mental or medical health needs, such as the needs that may attend a diagnosis of GID, but do not take the steps necessary to address them, or if they ignore the instructions of the treating physician, the facility is violating the youth’s right to medical care (*A.M.*, 372 F.3d at 584-85). Facilities must provide appropriate treatment and accommodation for transgender wards or risk facing liability.

In addition, a facility must have appropriate mental health screening and sufficient mental health services. It also must have adequate policies governing the supervision and treatment of suicidal wards (*Viero v. Bufaro*, 925 F. Supp. 1374 (N.D. Ill. 1996); *Dolihite v. Maughon*, 74 F.3d 1027 (11th Cir. 1996)). LGBT youth, especially those facing extreme forms of anti-LGBT abuse and harassment, may be at an increased risk for suicide. 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 to seriously consider suicide and have a plan doing it, compared with students who were not harassed (O’Shaughnessy, Russell, Heck, Calhoun, & Laub, 2004). Individuals responsible for conducting mental health screenings must be aware of this increased risk to ensure that LGBT youth who are suicidal receive constitutionally required mental health

services. They also must ensure that anti-LGBT harassment and abuse that could exacerbate suicidal feelings is prevented. LGBT youth, however, should never automatically be placed on suicide watch simply because they are LGBT.

Right not to be placed in conditions amounting to punishment. Youth in juvenile detention or correctional facilities should not be placed in conditions that amount to punishment or be stigmatized or humiliated as part of their treatment. With the understanding that some restrictions of liberty may be constitutional, a court will look at whether a particular restriction is "reasonably related" to a legitimate governmental interest. If it is not, it may be inferred that the purpose of the restriction is punishment (*Bell v. Wolfish*, 441 U.S. 520, 539; *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982)). Measures that may violate a youth's constitutional rights include punishing a youth with degrading or humiliating tasks, restricting their personal appearance in ways that are unrelated to legitimate penological interests, or otherwise singling them out from the rest of the population for ridicule (*Gerks v. Deathe*, 832 F. Supp. 1450 (W.D. Okla. 1993); *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1230 (E.D. La. 1976)). A youth in a detention or correctional facility should never be punished because he or she is openly LGBT. In addition, requiring LGBT youth to dress differently than the other youth in the facility, requiring LGBT youth to perform different chores, or singling out LGBT youth in any other way are actions likely to be found to be unconstitutionally punitive. Staff and administrators also must refrain from violating an LGBT youth's confidentiality by inappropriately revealing his or her sexual orientation or gender identity. In addition to being unethical, such conduct is unconstitutional and may place that young person at risk of serious harm.

LGBT youth also should not automatically be treated as sex offenders or housed with sex offenders, simply because they are gay or transgender. In the adult context, the classification of an inmate as a "sex offender" has been found to affect a liberty in-

terest (*Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997)). One court explained that holding that an adult inmate has a protected liberty interest and is entitled to a hearing before being classified as a sex offender: "We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender" (*Neal v. Shimoda*, 131 F.3d 829 (9th Cir. 1997)). Although no appellate decisions have addressed this issue in the juvenile justice context, juveniles are entitled to greater protections than adult inmates, and branding a juvenile with a sex offender label clearly would have the same, if not an even greater, stigmatizing effect. Accordingly, a youth should not be labeled or treated as a sex offender without adequate due process protections, such as a hearing, an evaluation by a qualified mental health professional with expertise in juvenile sex offender issues, and an opportunity to appeal. For LGBT youth, that means unless they have a history of sex-offense adjudications, they should never be arbitrarily labeled as a sex offender, "sexually aggressive," or any other euphemism used to describe sex offender status, simply because they are LGBT. That would result in a constitutional violation and possible further physical harm, for which the institution also would be liable.

Other Constitutional Rights

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

The Right to Equal Protection

All youth in state custody have a federal constitutional right to equal protection under the law. The equal protection clause of

the Fourteenth Amendment to the U.S. Constitution provides: "No state shall...deny to any person within its jurisdiction the equal protection of the laws." LGBT youth in child welfare and juvenile justice systems must be treated equally in the provision of placements and services and protected from harassment on an equal basis with other youth.

Although a large body of equal protection case law does not exist 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 antigay violence in schools, a court awarded nearly \$1 million dollars in damages to Jamie Nabozny, a student who suffered severe antigay 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.* as 456 and 458). This reasoning has obvious applications in situations involving state custody, where an LGBT young person in a group or foster home may be singled out for mistreatment.

In practice, however, this right to equal treatment often is breached, either because staff and administrators are callous or indifferent toward the mistreatment of LGBT youth, or because they wrongly assume that LGBT youth are responsible for bringing such mistreatment upon themselves, simply by existing. One gay youth described his experience as follows: "I got jumped by a bunch of guys in my group home, and when I told the director he said, 'Well, if you weren't a faggot they wouldn't beat you

up” (CWLA & Lambda Legal, 2002). If a child welfare or juvenile justice professional fails to take action against anti-LGBT harassment because they believe that LGBT youth in care should expect to be harassed, because they believe that the youth brought the harassment on himself or herself simply by being openly LGBT, or because the agency is uneducated about LGBT issues and is uncomfortable addressing the situation, the youth’s right to equal protection may be violated, in addition to the right to safety.

This exact kind of failure 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 in that case, six LGBT foster youth, experienced severe abuse—including alleged harassment, physical violence, and rape—by peers, foster parents, and child welfare staff. These young peoples’ appeals for protection were met with indifference, blame, or isolation of the victims rather than the abusers. The youths 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 attorneys’ fees, as well as important policy and practice changes within the local child welfare system to improve the standard of care for LGBT youth.

First Amendment Rights

The First Amendment’s guarantee of freedom of speech (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”) is one of the most fundamental civil rights in this country. It guarantees the right to be open about one’s sexual orientation and the right to expressive conduct, such as dressing in the manner of one’s choice (*Henkle v. Gregory*, 50 F. Supp. 2d 1067 (D. Nev. 2001); *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)). In the public school context, courts have found school officials liable for denying this right to LGBT students who were forced to conceal their sexual orientation as a condition of enrollment, to transgender students who were not permitted to dress in accordance with their gender identity, and to students who were prohibited from bringing a same-sex date to the high school prom or were not protected after coming "out of the closet" (*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)). Similarly, child welfare and juvenile justice professionals may violate a youth's First Amendment rights if they require an LGBT youth in state care to hide his or her sexual orientation or gender identity in order to receive services, or if they refuse to allow transgender- or gender-nonconforming youth to express their gender through clothing and accessories.

The First Amendment also guarantees young people in state custody the right to religious freedom and the right to be free from religious indoctrination (*R.G. v. Koller*, 415 F. Supp. 2d 1129; *Bellmore v. United Methodist Children's Home and Department of Human Resources of Georgia*, 2003). Many LGBT youth in state custody are forced to hide their identities from their caretakers and join religious organizations that condemn homosexuality. As one young woman explained, "After 'coming out' to one of my foster families, I was told I was going to hell and forced to go to church with them. I became very 'closeted' after that and didn't tell any other foster families that I'm gay. I was in 22 different homes, many of them were very religious" (CWLA & Lambda Legal, 2002). Another youth described a similar experience: "Three of my foster homes were very religious and they told me to go to church and read the Bible and sometimes they would have the nuns come back to the house and lecture me" (Legal Services for Children and the National Center for Lesbian Rights, 2003). In sum, foster families and group home staff are not permitted to intimidate or coerce a

young person into adopting any particular religious practices or beliefs. Such practices not only violate the First Amendment, they also may violate a youth's right to safety if they are intended to shame, humiliate, or pressure a young person to alter his or her sexual orientation or gender identity.

State Nondiscrimination Laws

In addition to the protections provided by the U.S. Constitution for young people in state custody, additional protections may come from the state's constitution or its statutes. In Oregon, for example, state courts have interpreted the state constitution's equal protection clauses to provide broader protections from sexual orientation discrimination than those guaranteed under the equal protection clause of the U.S. Constitution (*Tanner v. Oregon Health Serv. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998)).

Some states have nondiscrimination laws that explicitly protect LGBT youth in juvenile justice and child welfare systems. For example, in California, the Foster Care Nondiscrimination Act makes it unlawful for county child welfare departments, group home facilities, and foster family agencies to discriminate on a number of bases, including actual or perceived sex, sexual orientation, gender identity, or HIV status (Cal. Welf. & Inst. Code § 16001.9(a)(22)). Under this law, all foster children and persons engaged in providing care and services to foster children in California have the right to fair and equal access to all available child welfare services, placements, care, treatment, and benefits, and to be free from discrimination or harassment on these bases (Cal. Welf. & Inst. Code § 16001.9(a)(22); Cal. Welf. & Inst. Code § 16013(a)).

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

Laws § 28-5.1-7 (a); Minn. Stat. § 363A.02 (4)). Other states have nondiscrimination laws that protect children and adults who are living in "institutional settings," which may include juvenile justice facilities, treatment hospitals, group homes, and other such facilities providing institutional care (Iowa Code Ann. § 19B.12 (2)).

Still other states have nondiscrimination laws that apply to businesses and other facilities considered to be "public accommodations." Some of these laws explicitly include juvenile justice and child welfare programs within the definition of public accommodation (La. Rev. Stat. § 51:2232 (10)), while in other states, courts have interpreted these laws to apply to these programs (*Chisolm v. McManimom*, 275 F.3d 315, 325; *Ortland v. County of Tehama*, 939 F. Supp. 1465, 1470)). 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, because such facilities provide publicly assisted housing accommodations (*Doe v. Bell*, 754 N.Y.S.2d 846, 850). In sum, regardless of whether a facility is considered a governmental agency or a public accommodation, child welfare and juvenile justice facilities may fall under a variety of state laws that prohibit sexual orientation or gender identity discrimination and require nondiscriminatory care.**

***Many of the nondiscrimination laws described, like the California Foster Care Nondiscrimination Act, explicitly include the terms "sexual orientation" and "gender identity" in its language, or they include a term that incorporates these characteristics. Sometimes these statutes also will include the language "actual or perceived" 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 nondiscrimination law, LGBT people are still protected from discrimination on the basis of other characteristics. For example, many state courts have found that the discrimination an LGBT person experienced was unlawful sex-based discrimination. In addition, a number of state courts have determined that discrimination against a transgender person diagnosed with Gender Identity Disorder is prohibited under disability discrimination protections. Therefore, even if a state does not explicitly provide nondiscrimination protections based on sexual orientation or gender identity, LGBT youth in care may still have the right to receive nondiscriminatory services under the applicable state law based on their gender or disability.*

In addition to statutory protections from discrimination, some states have adopted policies or practice guides that include protections for LGBT youth in state care. In Connecticut, for example, "The Department of Children and Families has an obligation to ensure fair, equal, and nondiscriminatory treatment of all individuals who identify themselves as Lesbian, Gay, Bisexual, Transgender, Questioning and Intersex..." (Connecticut Department of Children and Families, 2004, p.1). This policy, and others like it in the states of Illinois and Massachusetts and the cities of New York and Los Angeles, serve as clear statements of support for LGBT youth and demonstrate a commitment to providing nondiscriminatory care.

Conclusion

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

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

- Failing to protect LGBT youth from harassment and violence at the hands of caretakers or other youth.
- Requiring a young person to participate in therapies intended to change their sexual orientation or gender identities.
- Failing to assist an LGBT young person in identifying community supports and resources in order to ameliorate feelings of isolation and depression.
- Automatically classifying LGBT youth as sex offenders or placing them in isolation.

- Not providing appropriate medical care for transgender youth.
- Punishing LGBT youth for behaviors for which non-LGBT youth are not punished.
- Moralizing, ignoring, or pathologizing LGBT youth.
- Placing LGBT youth in humiliating, embarrassing, or dangerous situations.

In the last few years, legal advocates have begun to bring lawsuits to address the serious abuses faced by LGBT youth in state care, and courts have begun to hold state agencies and professionals responsible for these abuses. In the years ahead, more such cases inevitably will be litigated, and facilities that violate the rights of LGBT youth will be held accountable, thanks to increased advocacy on behalf of LGBT youth in state care and the development of national support networks, publications, and best practice guidelines. Courts can now look to these advocates and materials for additional guidance to determine standards of care expected of professionals working with LGBT youth in state custody.^{***}

Agencies and facilities that provide care to youth in state custody must educate themselves on the needs of LGBT youth and the scope of their civil rights. They also must train providers on how to work with LGBT youth, enact nondiscrimination policies, and establish practices that deal effectively with anti-LGBT abuse. These actions should be taken proactively, prior to any abuses, rather than in response to complaints or in the course of time-consuming and resource-intensive litigation. Professionals who work for child welfare and juvenile justice agencies have a

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

tremendous responsibility to protect the safety and well-being of all youth in their care, including those who are LGBT. Fortunately, these professionals now have access to a wealth of educational tools and materials to help them comply with professional standards of care for LGBT youth and ensure that the rights of these youth are protected.

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