

**THE LEGAL RIGHTS OF LESBIAN, GAY, BISEXUAL,
AND TRANSGENDER YOUTH IN THE
CHILD WELFARE SYSTEM**



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Lesbian, gay, bisexual, and transgender (LGBT) young people in the child welfare system, like all people in state custody, have clearly established civil rights under the U. S. Constitution, state and federal statutes and regulations, and agency policy. By examining how these rights apply to LGBT youth, child welfare professionals can gain a greater understanding of how to develop fair and appropriate policies and procedures to protect the rights and safety of LGBT youth.

LGBT YOUTH HAVE A RIGHT TO BE PROTECTED FROM EMOTIONAL AND PHYSICAL HARM IN THEIR CHILD WELFARE PLACEMENTS.

Like all young people in state custody, LGBT youth have a right to be safe in their child welfare placements.¹ Because young people in the child welfare system are under the care and protection of the state, social workers, foster parents, and other care providers have a legal responsibility to protect foster youth from physical, emotional, and sexual abuse at the hands of both adult caretakers and other youth in their placements.² To ensure that all service providers understand their legal obligations to protect LGBT youth, facilities should adopt non-discrimination policies and implement regular staff trainings that specifically addresses the needs of LGBT youth.³ Care providers also are required to protect foster children from harms that may exist outside the home.⁴ For example, if a foster youth is experiencing harassment and discrimination at school, service providers have an obligation to ensure that the situation is addressed appropriately. If an LGBT foster 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.

TO ENSURE CONTINUED SAFETY, CHILD WELFARE PROFESSIONALS MUST APPROPRIATELY MONITOR AND SUPERVISE AN LGBT YOUTH'S PLACEMENT.

The obligation to protect the safety and welfare of children in the child welfare system places a duty on child welfare professionals to maintain regular contact with the youth on their caseload to insure the continued safety of all youth in care.⁵ Because LGBT young people, and those perceived to be LGBT, are 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 youth who are at risk of

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harm are and continue to be safe and appropriately cared for. If child welfare professionals fail to monitor and supervise an LGBT youth's placement and this youth is subsequently injured, this could constitute a breach of the duty to protect if the professional had actual knowledge of the abuse or the professional *deliberately failed to learn* what was occurring in the placement.⁶

LGBT YOUTH IN THE CHILD WELFARE SYSTEM HAVE A RIGHT TO RECEIVE APPROPRIATE MEDICAL AND MENTAL HEALTH CARE AND SHOULD NOT BE SENT TO “CONVERSION THERAPIES” OR DENIED OTHER SUPPORTIVE SERVICES.

All youth in the child welfare system have a right to receive adequate physical and mental health care.⁷ This includes a right to receive health care that may be unique to LGBT youth. For example, child welfare institutions and other care providers should provide appropriate health care for a transgender youth. Also, a child welfare agency should not permit providers to ignore the instructions of a transgender youth's treating physician or otherwise choose not to provide the youth with necessary health care, as this act or omission may constitute a violation of the youth's right to health care.⁸

In addition, LGBT foster youth should not be forced to undergo inappropriate or unethical services that are damaging to their emotional well-being, including “conversion therapies” or other controversial practices intended to involuntarily change a person's sexual orientation or gender identity. These practices have been condemned by all of the major medical and mental health associations because they cause emotional harm.⁹ LGBT youth, especially those facing extreme forms of anti-LGBT abuse and harassment, may be at an increased risk for suicide.¹⁰ Thus, facility administrators must ensure that care providers respond in a timely and appropriate manner to all anti-LGBT harassment and abuse in order to alleviate conditions that could cause or exacerbate suicidal feelings.¹¹ In addition, care takers should not withhold supportive services, such as peer support groups or other community resources that would help to ameliorate feelings of isolation and depression for an LGBT foster youth.

LGBT FOSTER YOUTH HAVE A RIGHT TO BE TREATED EQUALLY AND WITHOUT DISCRIMINATION.

All youth in state custody have a federal constitutional right to equal protection under the law.¹² This means that child welfare providers must treat LGBT youth equally when determining placements, delivering services, and responding to complaints of harassment or abuse.¹³ Child welfare institutions should not refuse to accept a youth for placement because of the youth's sexual orientation or gender identity, nor should an institution treat an LGBT youth differently in its provision of care and services. For example, if a facility allows young people to participate in extracurricular activities, they must allow young people to participate in gay/straight alliances or other such school clubs. LGBT youth, like all youth in the child welfare system are entitled to the least restrictive placement appropriate and to assistance in achieving permanency. Child welfare professionals should not automatically place LGBT youth in congregate care settings, but rather should make individualized placement decisions in line with the youth's permanency goals.

In addition, child welfare professionals and care providers should appropriately respond to complaints of sexual orientation or gender identity harassment or abuse by peers, following the agency's adopted procedures for handling incidents of harassment or violence on other bases. Agency staff should never ignore LGBT related abuse, move LGBT youth from placement to placement rather than address the harassment, or tell youth that they should expect to be harassed because they are openly LGBT. To ensure equal treatment, child welfare professionals should also be aware of 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.¹⁴

LGBT YOUTH HAVE A RIGHT TO EXPRESS THEIR SEXUAL ORIENTATION AND GENDER IDENTITY.

All youth have a constitutional right to freedom of speech and freedom of expression,¹⁵ which includes the right to be open about one's sexual orientation¹⁶ and the right to express one's gender through clothing and grooming.¹⁷ Child welfare agencies and care providers should not require a youth to hide his or her sexual orientation or gender identity in order to receive services or refuse to allow transgender or gender-nonconforming youth to express their gender through their clothing and accessories.¹⁸

LGBT YOUTH IN CHILD WELFARE PLACEMENTS HAVE A RIGHT NOT TO PARTICIPATE IN RELIGIOUS ACTIVITIES THAT CONDEMN LGBT PEOPLE.

The First Amendment also guarantees young people in state custody a right to religious freedom and a right to be free from religious indoctrination.¹⁹ LGBT youth in the child welfare system should not be forced to hide their identities because of religious objections or be required to participate in religious activities that condemn homosexuality and gender difference. In addition, foster parents and other care providers must not be permitted to intimidate or coerce a young person into adopting any particular religious practices or beliefs.

CONCLUSION

Professionals who work for child welfare agencies or institutions have a tremendous responsibility to protect the safety and well-being of all youth in their care, including those who are LGBT. Accordingly, these agencies and institutions should educate themselves on the needs of LGBT youth and the scope of their civil rights. They also should enact non-discrimination policies, train child welfare staff, foster parents, and other care providers on how to work with LGBT youth, and establish practices that deal effectively with anti-LGBT abuse. These actions should be taken proactively, prior to any abuses of LGBT young people, rather than in response to complaints or in the course of time-consuming and resource-intensive litigation. Fortunately, there are a wealth of educational tools and materials available to help child welfare agencies comply with professional standards of care for LGBT youth and ensure that LGBT youth are provided with the protection and care they deserve. For more information or to learn more about these resources visit www.nclrights.org.

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ENDNOTES

- ¹ This right to safety is derived from the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *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...”); *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); *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.”); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987).
- ² See *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990) (finding that having removed a child from the custody of her parents, the state could not place her in a position of danger without violating her rights under the due process clause); *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.”).
- ³ See *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1157 (D.Hawai’i, 2006) (finding supervisory defendants’ failure to adopt policies and procedures and to provide training regarding how to ensure safety of LGBT wards supports a finding of deliberate indifference to plaintiffs’ safety); Unpublished Order Dismissing Writ of Habeas Corpus Without Prejudice, Family Court of the First Judicial Circuit, Hawaii, Judge Wong, March 17, 2005 (“The Court is concerned that the problems raised by this case are systemic and must be addressed ... 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.”).
- ⁴ *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.”).
- ⁵ *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 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.
- ⁶ See e.g. *Ray v. Foltz*, 370 F.3d 1079, 1083-84 (11th Cir. 2004).
- ⁷ See *Norfleet v. Arkansas Dep’t of Human Serv.*, 989 F.2d 289, 293 (8th Cir. 1993) (state has an obligation to provide appropriate medical care for children in foster care); *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).
- ⁸ Child welfare agencies 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. App. 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).
- ⁹ For example, 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.”
- ¹⁰ 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.

¹¹ See *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). See also *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).

¹² 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." In addition to the protections provided by the Equal Protection clause, some states also have statutes that prohibit discrimination against LGBT youth in juvenile justice facilities. For example, a number of states have laws that protect individuals from discrimination by governmental agencies, which may include child welfare agencies or institutions. 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 likely would include 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 the law is 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 institutions may be prohibited from discriminating against LGBT youth 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 (N.Y. Sup. Ct. 2003) (recognizing residential foster care facility as "publicly-assisted housing accommodation" for purposes of disability discrimination claim under New York's Human Rights Law).

¹³ 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 child welfare placements. 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 young person in a child welfare placement may be singled out for mistreatment on the basis of sexual orientation or gender identity.

¹⁴ 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."

¹⁵ The First Amendment to the Constitution guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

¹⁶ 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).

¹⁷ 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). Although it did not need to reach the plaintiff's First Amendment claim, a New York court found that an all boys group must make a reasonable accommodation in its dress code and allow the plaintiff, a transgender youth, to wear skirts and dresses. See *Doe v. Bell*, 754 N.Y.S.2d at 853. Of particular concern to the court in reaching this decision was adhering to plaintiff's prescribed medical treatment for Gender Identity Disorder, which called for her to wear feminine clothing as well as preventing the significant emotional distress plaintiff experienced when prohibited from wearing feminine attire. See *Id.*

¹⁸ 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. These cases illustrate the types of violations that may be actionable for youth in the child welfare system. *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).

¹⁹ See *Wilder v. Bernstein*, 848 F.2d 1338, 1347 (2d Cir. 1988).

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THE NATIONAL CENTER FOR LESBIAN RIGHTS—

YOUTH PROJECT has been advocating for LGBTQ youth in schools, foster care, juvenile justice settings, and the mental health system since 1993. The Project provides direct, free legal information to youth, legal advocates, and activists through a toll-free line; advocates for policies that protect and support LGBTQ youth in these different arenas; and litigates cases that are creating new legal protections for youth in schools, foster care, juvenile justice, and other settings.

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