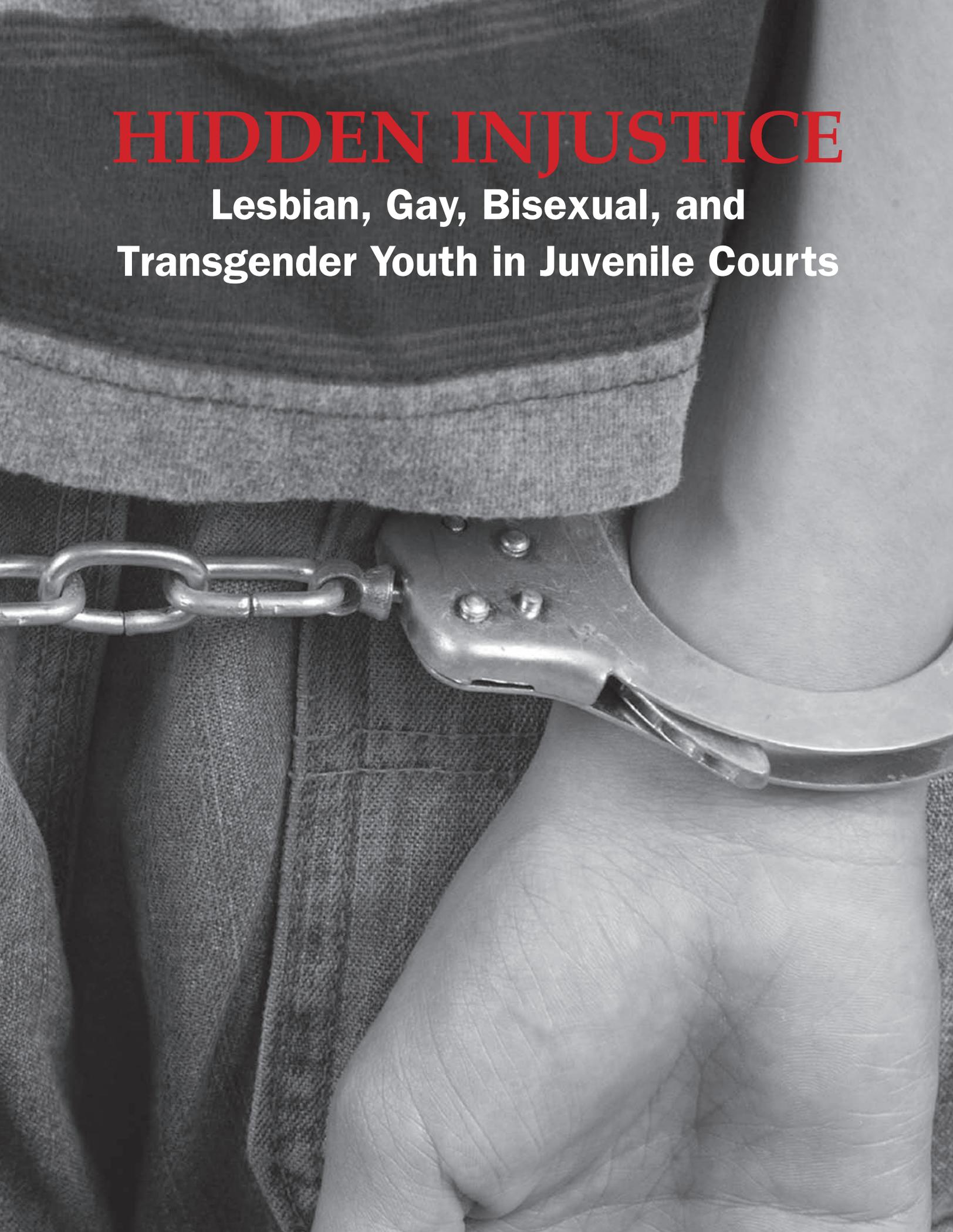


# **HIDDEN INJUSTICE**

**Lesbian, Gay, Bisexual, and  
Transgender Youth in Juvenile Courts**





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# Hidden Injustice

Lesbian, Gay, Bisexual, and  
Transgender Youth  
in Juvenile Courts



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Lesbian, Gay, Bisexual, and  
Transgender Youth  
in Juvenile Courts

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**Fall 2009**

Hidden Injustice: Lesbian, Gay, Bisexual, and  
Transgender Youth in Juvenile Courts  
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# Preface

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To promote leadership and provide guidance regarding lesbian, gay, bisexual, and transgender (LGBT) youth in the juvenile justice system, Legal Services for Children, the National Center for Lesbian Rights, and the National Juvenile Defender Center joined in 2005 to launch the **Equity Project**. The Equity Project represents a unique collaboration of individuals and organizations with diverse expertise relevant to LGBT youth in the juvenile justice system. In addition to the lead organizations, the Equity Project receives critical guidance from the Equity Project Advisory Committee (EPAC), which is comprised of individuals from across the country. EPAC includes individuals with expertise in juvenile court processing, professionals with experience working with LGBT youth in juvenile courts, and LGBT youth who have been in the juvenile justice system. The role of EPAC has been to advise project staff about substantive issues, strategize about project activities, and provide relevant contacts to help staff meet project goals. A list of EPAC members follows this preface.

The Equity Project is a multiyear initiative aimed at ensuring that LGBT youth who are in the juvenile justice system are treated with dignity, respect, and fairness. The Equity Project examines issues that impact LGBT youth throughout the duration of the juvenile court process, ranging from arrest through post-disposition. The goals of the Equity Project are to:

- Understand the needs, strengths, and experiences of LGBT youth involved in the juvenile justice system;
- Identify obstacles to the equitable treatment of LGBT youth in the juvenile justice system;
- Recommend concrete strategies for promoting the equitable treatment of LGBT youth in the juvenile justice system; and
- Educate juvenile justice system professionals through dissemination of policy and practice recommendations and tools.

To advance these goals, the Equity Project has been engaged in a multiyear effort to understand, analyze, and document both the experiences of LGBT youth in the juvenile justice system and the views and responses of the juvenile court professionals who work with them. It has been an eye-opening experience, as you will read in the coming pages.

While so many individuals and organizations contributed to the overall fabric of this report, Katayoon Majd, Jody Marksamer, and Carolyn Reyes wove it all together. We are very grateful for their hard work, determination, commitment, and leadership on the important issues and recommendations set forth in this report. We hope *Hidden Injustice* will provide new and useful information to the field and serve as a vehicle for dialogue and reform.

—Shannan Wilber  
Legal Services for Children

—Patricia Puritz  
National Juvenile Defender Center

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THE  
EQUITY  
PROJECT

*ensuring fairness & dignity for LGBT youth in the justice system*

Note: Organizational affiliations are provided for identification purposes only.

## Acknowledgments

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This project would not have been possible without the assistance of all the juvenile justice professionals and advocates who graciously shared their insights with us as we developed this report. We are grateful to the courageous LGBT youth who generously shared their experiences with us, inspiring and challenging us in our work on their behalf. We are especially indebted to an anonymous donor who generously supported this project and to the Out-of-Home Youth Fund of Tides Foundation that underwrote the production and distribution of this report. The entire Equity Project Advisory Committee, listed on the previous page, is applauded for devoting their time and expertise to this effort. We offer special thanks to Marty Beyer, Elizabeth Calvin, Barbara Fedders, Laura Garnette, Judge Paula Hepner, Maria Ramiu, and Andy Shookhoff for providing an in-depth review of an earlier draft of this report. Shannan Wilber and Patricia Puritz provided leadership and guidance on all aspects of this project, for which we are grateful.

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We offer special thanks to the individuals and organizations that recruited for, hosted, and conducted youth focus groups across the country. These individuals include Simon Costello and Andrew Montejo (Jeff Griffith Youth Center at the Los Angeles Gay and Lesbian Center); Mishi Faruqee (Children's Defense Fund); Joyful Freeman and colleagues (American Friends Service Committee); Darby Hickey (formerly of Different Avenues in the District of Columbia); DeAvery Irons (Correctional Association of New York); Dana Kaplan and Wesley Ware (Juvenile Justice Project of Louisiana); Catherine Lund and Karen Minns (formerly of Gay and Lesbian Adolescent Social Services in Los Angeles); Jude McNeil (Utah Pride Center); Jane Ottow (Children's Service Society of Wisconsin); Sabel Samone and Bamby Salcedo (Children's Hospital Los Angeles); Averria Scott (formerly of Gay and Lesbian Adolescent Social Services in Oakland); Andy Shookhoff (Vanderbilt Child and Family Policy Center in Nashville); Lane Simpson and Shaneka Taylor (Department of Children's Services in Nashville); and Rob Woronoff (Los Angeles).

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Former and current staff and interns at Legal Services for Children (LSC), National Center for Lesbian Rights (NCLR), and National Juvenile Defender Center (NJDC) deserve special mention. At the early stages of the project, Julia Kernochan (formerly of NJDC) provided valuable research assistance and helped develop project methodology. Emily Rodda at LSC, Joshua Delgado at NCLR, and Sarah Bergen at NJDC provided critical support on numerous aspects of this project and Shella Brenner at LSC guided the design and printing. We are also thankful for the efforts of the following interns who as-

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## Photography

This report makes use of licensed stock photography as well as still shots from self-made digital stories by youth in a DVD produced by the Center for Digital Storytelling and the Y.O.U.T.H. Training Project of San Francisco State's Bay Area Academy and distributed by the National Center for Lesbian Rights. All photography is for illustrative purposes only. All persons depicted are models except in photos from the NCLR Digital Stories DVD.

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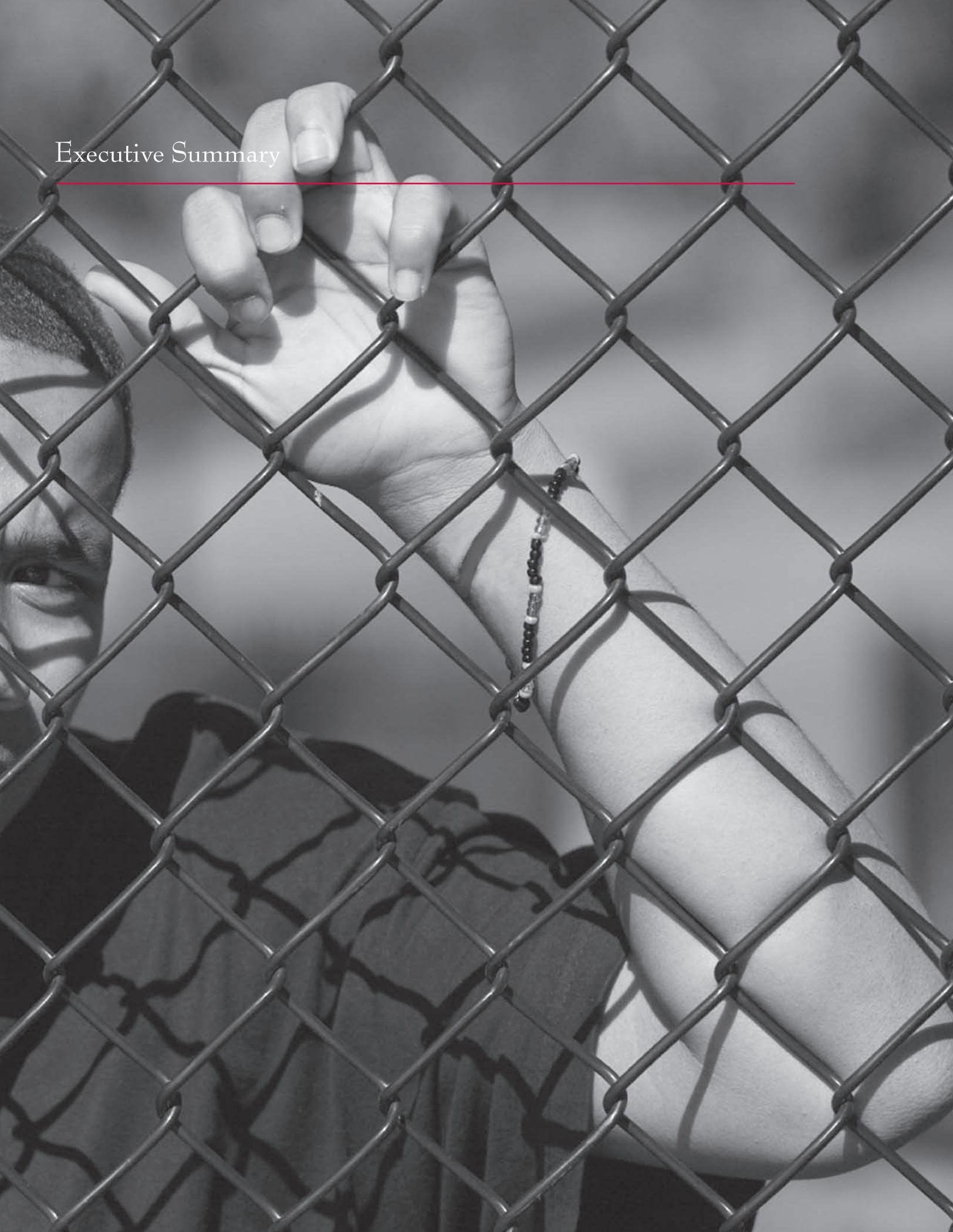
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Executive Summary

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# Executive Summary

The juvenile justice system is at a crossroads. After more than 20 years of increasingly punitive responses to youthful offending, reform efforts are underway in many jurisdictions to develop more fair and effective juvenile courts. Notably absent from these efforts, however, has been a focus on the unique experiences of lesbian, gay, bisexual, and transgender (LGBT) court-involved youth. The lack of leadership and professional guidance for juvenile justice professionals working with these youth is cause for concern. LGBT youth continue to face harmful discrimination in their homes, schools, and communities. These experiences can place LGBT youth at risk of juvenile court involvement and affect the course of their delinquency case. Without a firm grasp on the ways in which LGBT-related bias can impact youth's behavior and service needs, juvenile justice professionals remain unprepared to effectively serve these youth and fulfill their responsibilities to treat them fairly.

*Hidden Injustice* represents the first effort to examine the experiences of LGBT youth in juvenile courts across the country. The report is based on information collected from 414 surveys and 65 interviews with juvenile justice professionals, including judges, defense attorneys, prosecutors, probation officers, detention staff, and other juvenile justice advocates; focus groups and interviews of 55 youth who possess relevant firsthand experience; and an extensive review of relevant social science and legal research findings. The goals of this report are to:

1. Educate professionals working in the juvenile justice system about the continuing stigma against LGBT youth, the relevance of sexual orientation and gender identity in juvenile justice contexts, and the experiences of LGBT youth in the system;
2. Identify obstacles to fair and equitable treatment of LGBT youth in delinquency and status offense cases; and
3. Recommend concrete practice and policy reforms that will protect the rights of LGBT youth and ensure that the system responds effectively to them.

Several themes emerged from this project's data collection efforts. While a handful of jurisdictions and individuals are striving to enhance their capacity to work with LGBT youth, these are the exception rather than the rule. This report discusses how LGBT court-involved youth across the country often face denials of due process, unduly punitive responses, harmful services and programs, and unsafe conditions of confinement.



## Barriers to Fair and Effective Juvenile Justice Systems

A number of factors in the juvenile justice system negatively impact the experiences of LGBT court-involved youth. Rooted in lack of understanding of—and sometimes outright bias against—LGBT youth, these factors undermine the effectiveness of the juvenile justice system in working with LGBT youth.

### Common misconceptions about, and biases against, LGBT youth negatively impact how the juvenile justice system responds to them.

The juvenile justice system is characterized by a profound lack of acceptance of LGBT identity, based in large part on misconceptions about sexual orientation and gender identity. These include myths that youth, by virtue of their age, cannot be LGBT or that LGBT youth simply do not exist within the juvenile justice population. In reality, sexual orientation and gender identity for many individuals are established at young ages, and emerging research indicates that approximately 13 percent of youth in detention facilities across the country are LGBT. The failure of some juvenile justice professionals to recognize the existence of LGBT youth has left them ill equipped to meet the needs of this largely hidden population.

Another harmful myth is that sexual orientation and gender identity are matters of personal choice and therefore can be changed. This myth is refuted by the scientific research that finds sexual orientation and gender identity are deep-seated, inherent aspects of personal identity. Attempts to change either are futile and dangerous.

The lack of understanding of transgender youth is particularly striking. Some professionals do not understand the difference between transgender youth and lesbian, gay, or bisexual youth. Transgender individuals have a gender identity (i.e., a deeply-held, internal

sense of being male, female, or other) that differs from their assigned birth sex. According to medical experts, allowing transgender youth to express their core gender identity is critically important for their well-being. Yet some professionals mistake expressions of gender-nonconformity (through choice of hairstyle, clothing, mannerisms, and name) as rebellious behavior to be corrected rather than what it is: an appropriate reflection of core identity.



**Some professionals in the juvenile justice system attempt to change, control, or punish LGBT adolescent sexual orientation and gender identity.**

Perhaps the most damaging misconceptions about LGBT youth are those that equate LGBT identity with sexual deviance and mental illness, which the medical and mental health professions have roundly rejected. These biases can cloud decisions related to arrest, charging, adjudication, and disposition, with the cumulative effect of punishing or criminalizing LGBT adolescent sexuality and gender identity.

For example, evidence exists that police regularly target LGBT youth for arrest and selectively enforce laws against them. In particular, LGBT youth are disproportionately charged with, and adjudicated for, sex offenses in cases that the system typically overlooks when heterosexual youth are involved. Even in cases involving nonsexual offenses, courts sometimes order LGBT youth to submit to sex offense risk assessments or undergo sex offender treatment programs based merely on their sexual orientation or gender identity. Similarly, LGBT youth sometimes are ordered to participate in dangerous counseling sessions or programs that use unscrupulous measures in an attempt to force youth to change their sexual orientation or gender identity. The medical and mental health professions have unequivocally condemned such efforts because they are both ineffective and damaging.

**Family rejection of LGBT youth increases the risk of their involvement in the juvenile justice system and negatively impacts their cases.**

While many families support their LGBT children, studies indicate that numerous LGBT youth of all races and ethnicities experience family rejection because of their sexual orientation or gender identity. Family rejection has negative health and mental health outcomes and can lead to homelessness; these factors, in turn, can increase youth's risk of court involvement. In particular, youth who experience conflicts at home because they are LGBT are at risk of entering the system for status offenses (particularly ungovernability and running away), domestic disturbances, and survival crimes, such as shoplifting and prostitution.

Once LGBT youth have contact with the system, lack of family support increases the likelihood of formal processing rather than diversion, detention, and punitive dispositions. It comes as little surprise, then, that more than 90 percent of survey respondents identified lack of family support as a serious problem for LGBT youth in the juvenile justice system.

**Pervasive harassment of LGBT youth at school also impacts their involvement in the juvenile justice system.**

School environments often are particularly hostile toward LGBT students. The pervasive bullying and harassment that LGBT students experience—and school officials' related failures to keep students safe—have been well documented. To avoid victimization, many LGBT youth skip school only to find themselves facing truancy charges. Other LGBT students end up in the juvenile justice system on disorderly conduct or assault charges when they try to defend themselves against attacks by their classmates. In other instances, school

officials target LGBT youth disproportionately for punishment, referring them to juvenile court for minor misconduct that could more appropriately be handled at school.

Left unaddressed, the problems that LGBT youth have at school can unnecessarily prolong their involvement in the system and expose them to more restrictive dispositions. For example, conditions of probation commonly include a requirement that youth regularly attend school. LGBT youth who feel unsafe at school are forced to decide between skipping school to protect themselves and complying with the terms of probation.

**At every stage of the process, services and placements competent to serve LGBT youth are lacking.**

Programs and placements that competently serve LGBT youth are able to meet their needs, keep them safe, and treat them fairly and respectfully. Report findings indicate that juvenile justice professionals across the country are aware of few such programs, which undermines LGBT youth's prospects for rehabilitation. There are few mental health professionals with expertise in the unique issues facing LGBT youth, and even fewer resources for families who experience conflict over their child's sexual orientation or gender identity. The lack of trained professionals and appropriate programs and placements pushes LGBT youth deeper into the justice system and subjects them to unnecessarily punitive treatment. In many jurisdictions, for example, youth are detained or incarcerated not because they pose a threat to the community but because less restrictive out-of-home placements will not accept LGBT youth.

**LGBT youth are unnecessarily and disproportionately detained pending trial because of a lack of understanding of their life experiences.**

Pretrial detention is associated with significant harm, including risk of abuse, injury, and suicide, more restrictive dispositions, and increased recidivism. Statutes and professional standards provide that pretrial detention should be imposed only when a child poses a risk of flight or risk of danger to self or others. LGBT youth, however, are often detained in situations in which these legal standards are not met.

Report findings indicate that decision makers sometimes detain youth based on biases that LGBT youth are sexually predatory or cannot be kept safe in the community. In cases in which parents refuse to assume custody of their LGBT children, courts rely on detention as a default without considering possible alternative placements. In other instances, courts detain youth who have been subjected to abuse and harassment in prior placements. For example, probation officers and courts may view youth as flight risks when they have run away from prior placements, even if they fled to escape LGBT-related harassment. Inadequate access to competent counsel who may be able to address these issues further exacerbates these problems.



**LGBT youth experience egregious conditions of confinement in detention and other secure facilities.**

The youth and professionals interviewed for this report overwhelmingly agreed that secure facilities are particularly dangerous and hostile places for LGBT youth. Without anti-discrimination policies and training pertaining to LGBT youth, facilities are often unprepared to provide competent and equitable services to LGBT youth. As a result, staff and other youth regularly subject LGBT youth to shocking physical, sexual, and emotional abuse on the basis of their actual or perceived sexual orientation and gender identity. Facility staff also punish and ridicule youth based on their actual or perceived sexual orientation or gender identity. Many facilities inflict additional harm to youths' physical and emotional well-being by failing to provide transgender youth with medically necessary transition-related medical care.

Without proper training and policies, facility staff regularly make inappropriate decisions regarding the classification and housing of LGBT youth. Some facilities automatically segregate LGBT youth or place them in solitary confinement. Whether these practices are implemented to protect youth or based on the unfounded fear that LGBT youth will sexually prey on others, isolating LGBT youth solely on the basis of their sexual orientation or gender identity violates their constitutional rights and seriously compromises their emotional well-being. Transgender youth face an additional challenge because they are often placed in sex-segregated facilities according to their birth sex, rather than their gender identity. For transgender girls, in particular, automatic placement in boys' facilities places them at great risk of sexual abuse by other residents and facility staff.

### **Delinquency courts fail to protect the due process rights of LGBT youth, particularly the right to effective counsel.**

Defense counsel plays a critical role in protecting the rights of youth at every stage of a delinquency case, from the initial hearing through post-disposition. In addition to the well-documented failures of juvenile indigent defense systems that affect all juvenile respondents, a lack of LGBT-sensitive advocacy deprives many LGBT youth of their due process rights. Lack of education about LGBT youth undermines defenders' abilities to build effective attorney-client relationships. Some defenders allow their own biases about sexual orientation and gender identity, rather than their client's expressed interests, to guide their advocacy. These actions violate defense attorneys' ethical responsibilities to their clients. The failure to ensure that LGBT youth receive quality legal representation at all stages of their case makes them vulnerable to uncounseled guilty pleas, unnecessary detention and incarceration, and inappropriate services at disposition.

### **Core Recommendations**

Despite the significant barriers that exist, enhancing the capacity of juvenile justice professionals to ensure fair and effective decision making is achievable. The core recommendations below and the strategies for reform presented in the final chapter of this report are designed to guarantee due process protections and improve outcomes for *all* youth in delinquency proceedings, including LGBT youth. To help ensure the rights of youth and meet their rehabilitative needs in delinquency and status offense cases, the Equity Project recommends the following:

1. Juvenile justice professionals (including judges, defense attorneys, prosecutors, probation officers, and detention staff) must treat and ensure that others treat all LGBT youth with fairness, dignity, and respect, including prohibiting any attempts to ridicule or change a youth's sexual orientation or gender identity.
2. Juvenile justice professionals must promote the well-being of transgender youth by allowing them to express their gender identity through choice of clothing, name, hairstyle, and other means of expression and by ensuring that they have access to appropriate medical care if necessary.
3. Juvenile justice professionals must receive training and resources regarding the unique societal, familial, and developmental challenges confronting LGBT youth and the relevance of these issues to court proceedings. Trainings must be designed to address the specific professional responsibilities of the audience (i.e., judges, defense attorneys, prosecutors, probation officers, and detention staff).
4. Juvenile justice professionals must develop individualized, developmentally appropriate responses to the behavior of each LGBT youth, tailored to address the specific circumstances of his or her life.
5. All agencies and offices involved in the juvenile justice system (including courts, as well as prosecutor, defender, and probation offices, and detention facilities) must develop, adopt, and enforce policies that explicitly prohibit discrimination and mistreat-

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ment of youth on the basis of actual or perceived sexual orientation and gender identity at all stages of the juvenile justice process, from initial arrest through case closure.

6. Juvenile courts must commit to using the least restrictive alternative necessary when intervening in the lives of youth and their families and avoid unnecessary detention and incarceration.
7. Juvenile courts must collaborate with other system partners and decision makers to develop and maintain a continuum of programs, services, and placements competent to serve LGBT youth, including prevention programs, detention alternatives, and non-secure and secure out-of-home placements and facilities. Programs should be available to address the conflict that some families face over the sexual orientation or gender identity of their LGBT child.
8. Juvenile justice professionals and related stakeholders must ensure adequate development, oversight, and monitoring of programs, services, and placements that are competent to serve LGBT youth.
9. Juvenile courts must ensure the timely appointment of qualified and well-resourced counsel to provide zealous defense advocacy at all stages of delinquency proceedings.
10. Juvenile justice professionals must take responsibility for protecting the civil rights of LGBT youth, and ensuring their physical and emotional well-being and safety in out-of-home placements.
11. Juvenile justice professionals must adhere to all confidentiality and privacy protections afforded LGBT youth. These protections must prohibit disclosure of information about a youth's sexual orientation and gender identity to third parties, including the youth's parent or guardian, without first obtaining the youth's consent.

# Introduction

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# Introduction

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*“All members of the juvenile delinquency court shall treat youth, families, crime victims, witnesses and others with respect, dignity, courtesy, and cultural understanding.”*

—National Council of Juvenile and Family Court Judges<sup>1</sup>

Despite an improving social climate for lesbian, gay, bisexual, and transgender (LGBT) individuals, LGBT youth still face tremendous hostility and bias in their homes, schools, and communities. This societal discrimination places LGBT youth at risk of entering the juvenile justice system. Once these youth are in the system, a number of systemic failures converge to deprive them of their rights to due process and nondiscriminatory treatment. Rooted in a deep lack of understanding of—and sometimes bias against—LGBT youth, these failures can affect LGBT youth at every stage of a delinquency or status offense case.

## **A National Effort to Ensure Fairness, Dignity, and Respect for LGBT Youth in the Juvenile Justice System**

*Hidden Injustice* represents the first national effort to examine the treatment of LGBT youth in juvenile courts and provide guidance to professionals working in the juvenile justice system (particularly judges, defenders, prosecutors, probation officers, and detention workers). It builds on the important work of individuals who have tirelessly advocated for LGBT court-involved youth for years.<sup>2</sup> Nonetheless, a lack of leadership and professional guidance, from both within and outside the juvenile justice system, remains. As a result, even the most well-intentioned juvenile justice professionals are often unsure about how to proceed in cases involving LGBT youth.<sup>3</sup> The goals of this report are to:

1. Educate professionals working in the juvenile justice system about the continuing stigma against LGBT youth, the relevance of sexual orientation and gender identity in juvenile justice contexts, and the experiences of LGBT youth in the system;
2. Identify obstacles to fair and equitable treatment of LGBT youth in delinquency and status offense cases; and
3. Recommend concrete practice and policy reforms that protect the rights of LGBT youth and ensure the system responds effectively to them.

## **Why Read a Report on LGBT Youth in the Juvenile Justice System?**

Since sexual orientation and gender identity do not cause delinquent behavior, some juvenile justice professionals might question the need to read a report focusing on LGBT youth in the system. As this report details, understanding the ways in which sexual orientation and gender identity impact the experiences of LGBT youth, both within and outside the system, is critical. The rest of this section elaborates on the reasons.

**Juvenile justice professionals are already working with LGBT youth, but they don't always know it.**

Even though more LGBT youth are coming out at younger ages, this population remains largely hidden in the juvenile justice system. Many professionals are unaware that the youth with whom they work are LGBT, even though emerging research shows that LGBT youth represent as much as 13 percent of the total detained youth population.<sup>4</sup> The research underscores the likelihood that juvenile justice professionals work with some or all of the following youth, as Professor Barbara Fedders has described:

- Young people who are open about being LGBT in all facets of their lives;
- Young people who identify as LGBT but do not disclose those identities to juvenile justice professionals;
- Young people who come out as LGBT to their lawyers but ask that they not reveal those identities to others;
- Young people who experience same-sex desire, engage in same-sex sexual behaviors, or do not conform to gender norms, but do not personally identify as LGBT;
- Young people who are not LGBT but are perceived to be so by their peers, families, or communities; and
- Young people who are questioning their sexual orientation or gender identity.<sup>5</sup>

**Juvenile justice professionals are required to protect the rights of all youth, including LGBT youth.**

Regardless of their individual views about sexual orientation or gender identity, juvenile justice professionals owe LGBT youth in the system the same professional and ethical duties as those owed to other youth, including fair and unbiased treatment. The role of juvenile justice professionals is not to determine whether each youth they work with is LGBT, but rather to provide services in a manner that recognizes the possibility that any youth *might be* LGBT.

**Without an adequate understanding of the unique experiences of LGBT youth, juvenile justice professionals are unable to make sound decisions throughout the course of a case.**

Juvenile justice professionals need to understand the factors affecting a youth's development, decisions, and behaviors. These factors include age, mental and physical health, disabilities, experiences of trauma, socio-economic status, race, ethnicity, family circumstances, sexual orientation, and gender identity. For LGBT youth, societal LGBT-related stigma is a factor that may be relevant to their behavior and service needs.

## Understanding LGBT Terminology

**Sexual orientation** refers to a person's romantic and physical attraction to members of the same or different sex. A continuum of sexual orientation exists, from exclusively **heterosexual** (attraction to members of a different sex) to exclusively **homosexual** (attraction to members of the same sex) with degrees of **bisexuality** (attraction to same-sex or other-sex people) in between.

**Gender identity** is distinct from sexual orientation and refers to a person's internal, deeply felt sense of being male, female, something other, or in between. Everyone has a gender identity and for most, it is consistent with their anatomical sex. However, **transgender** individuals have a gender identity that is different from their assigned birth sex. The term also describes people whose gender expression does not conform to societal norms, although not all gender nonconforming individuals identify as transgender.

**LGBT** is an acronym for "lesbian, gay, bisexual, and transgender," often used to refer to individuals whose sexual orientation is not heterosexual or whose gender identity is non-conforming. Some people use the acronym **LGBTQ** to encompass the categories of "queer" and "questioning" as well. Historically used as a derogatory term, **queer** has been widely reclaimed, especially by younger LGBT people, as a positive social and political identity. It is sometimes used as an inclusive, or umbrella, term for all LGBT people. **Questioning** refers to the active process in which a person explores her or his own sexual orientation and/or gender identity and questions the cultural assumptions that they are heterosexual and/or gender conforming.

In addition, many young people, regardless of their sexual orientation, do not conform to gender stereotypes and may dress and behave in ways that society attributes to a different gender. These youth are often perceived to be LGBT and face some of the same risks of maltreatment as their LGBT peers.

### The juvenile justice system is not adequately protecting the rights of LGBT youth.

The pages that follow document the impact that lack of understanding and bias have on LGBT court-involved youth, based primarily on information gathered from the youth themselves and the professionals who work with them. Their experiences reveal that bias and misunderstanding about LGBT youth lead to denials of due process rights, developmentally inappropriate responses to youth behavior, and ineffective and harmful programs and services. Some examples include:

- Police arrested 16-year-old Marco<sup>6</sup> after he tried to defend himself against physical abuse by his father. The youth was charged with domestic assault, despite evidence that his father was beating him to punish him for being gay.

- A judge imposed a probation condition of no contact between 16-year-old Mary Beth and her girlfriend, not because of any relation to the underlying offense, but merely to end this same-sex relationship. When the youth allegedly violated the condition by sending a note to her girlfriend, the judge ordered her detained for four weeks.
- Destiny, a 16-year-old transgender youth, faced relentless sexual and physical abuse while incarcerated in a boys' facility. Her defense attorney refused to take any steps to ensure her safety. Rather than advocate for her release, he argued that her continued incarceration was necessary because of her nonconforming gender identity.
- A prosecutor argued in court that 14-year-old Adam needed to be placed in a restrictive setting reserved for youth at high-risk of sexual offending, merely because Adam is gay.
- Staff in a boys' detention facility expected Jackie, a young transgender girl to shower at the same time as the 13 boys from her unit. Fearing sexual assaults by the boys, she refused to shower with them. The staff refused to make any accommodations for her until the court ordered the facility to permit her to shower by herself.

These examples are unfortunately commonplace. Across the country, LGBT youth contend with biased treatment by juvenile court professionals, unduly punitive responses, harmful "treatment" services, and unsafe conditions of confinement. However, these systemic deficiencies *can* be overcome.

The recommendations in *Hidden Injustice* focus on the education of juvenile justice professionals and the development of LGBT-sensitive practices and policies to ensure that juvenile courts are equipped to respond to LGBT youth appropriately and effectively.

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## Endnotes

1. See, e.g., National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 25 (2005).
2. These individuals, many of whom serve on the Equity Project Advisory Committee (EPAC), have conducted innovative research, brought pioneering litigation, and advanced important policies that promote the equitable treatment of LGBT youth in the juvenile justice system. In particular, a 2001 report by the Urban Justice Center helped lay the foundation for this project: Randi Feinstein et al., *Justice for All? A Report on Lesbian, Gay, Bisexual, and Transgendered Youth in the New York Juvenile Justice System* (2001). It focused on the New York justice system, illustrating disparities in the treatment of LGBT youth, the scarcity of appropriate disposition options, and the lack of safety for LGBT youth in juvenile facilities.
3. Since the beginning of the Equity Project in 2005, more than 100 juvenile justice professionals have contacted representatives of the project with requests for assistance with cases involving LGBT youth.
4. Angela Irvine, Ceres Policy Research, *The Inappropriate Use of Secure Detention for Lesbian, Gay, Bisexual, Transgender, and Queer Youth*, presented at the Columbia University Gender on the Frontiers Symposium (Apr. 10, 2009) (available on file with authors). Results of this study will appear in *19 Columbia Journal of Gender & Law* (forthcoming 2010).
5. Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 Nev. L.J. 774, 780 (2006).
6. This report uses pseudonyms for youth.

# Methodology

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# Methodology

Research for this report included an extensive review of existing literature on LGBT youth, interviews with and surveys of juvenile justice professionals, and interviews with and focus groups of youth from across the country. The information obtained provides an important snapshot of the experiences and observations of LGBT youth and juvenile justice professionals nationwide.

## Literature Review

The Equity Project conducted a review of interdisciplinary literature related to LGBT youth and their treatment in the delinquency system. Part of this review involved social science research on external factors that might impact LGBT youth involvement in the system, such as family rejection, school harassment and violence, and health risk behaviors. In addition, the project conducted legal and policy research that is relevant to the rights and treatment of all youth in the juvenile justice system, as well as court-involved LGBT youth in particular.

## Surveys of Juvenile Justice Professionals

Equity Project staff developed five occupation-specific written surveys for judges, defenders, prosecutors, probation officers, and detention staff, as well as a sixth survey for juvenile justice professionals who serve in other capacities in the system. The surveys were six to seven pages in length, requested mostly non-narrative answers, and covered a wide variety of topics, including pathways leading LGBT youth into the juvenile justice system, the experiences of LGBT youth in the system, juvenile courts' responses to LGBT youth, barriers to inclusive and appropriate practices, and suggestions for reform. There were slight variations among surveys based on the specific duties of each professional group (see Appendix B for the survey for defenders). To encourage candor, project representatives assured participants that their responses would remain anonymous.



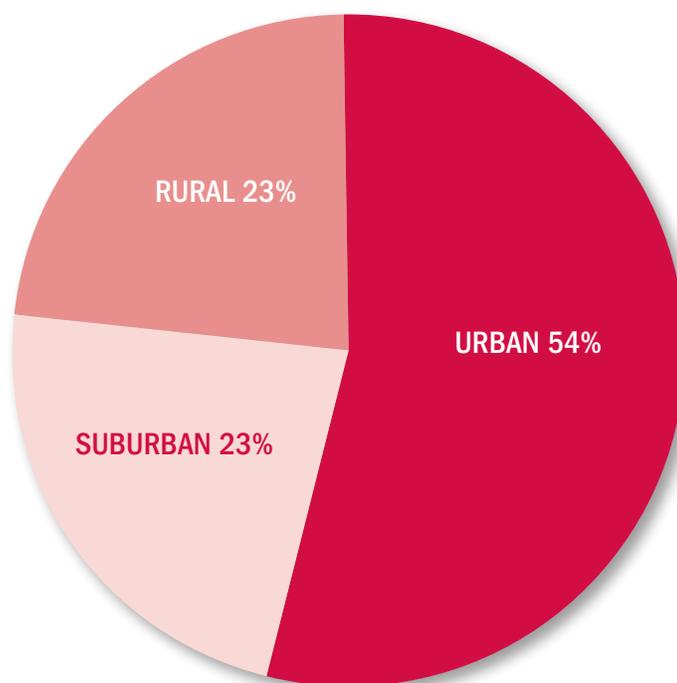
The surveys were distributed across the country at juvenile justice conferences and at trainings conducted by the Equity Project. In addition, requests to complete the survey electronically on the Equity Project website ([www.equityproject.org](http://www.equityproject.org)) were posted broadly over national list-serves, including those operated by the National Juvenile Defender Center, the Anne E. Casey Foundation's Juvenile Detention Alternative Initiative, and the National Juvenile Justice Network. Approximately 2,000 individuals received these requests.<sup>1</sup>

In total, 414 completed surveys were received, including surveys from 243 defenders, 51 probation officers, 49 juvenile justice professionals, 34 prosecutors, 20 judges, and 17 detention workers. Survey responses were received from 45 states.

### Interviews of Professionals

The Equity Project also conducted interviews with juvenile justice professionals, either in person or via telephone.<sup>2</sup> In total, project staff interviewed 65 juvenile justice professionals, including 22 juvenile defenders, 10 probation officers, 6 judges, 6 prosecutors, 4 detention workers, and 17 others. The other juvenile justice professionals included mental health counselors, program administrators for out-of-home placements and probation departments, program researchers, court personnel, a status offense intake officer, a civil rights attorney, and a correctional officer.

**Description of Service Area by Equity Project  
Survey Respondents**



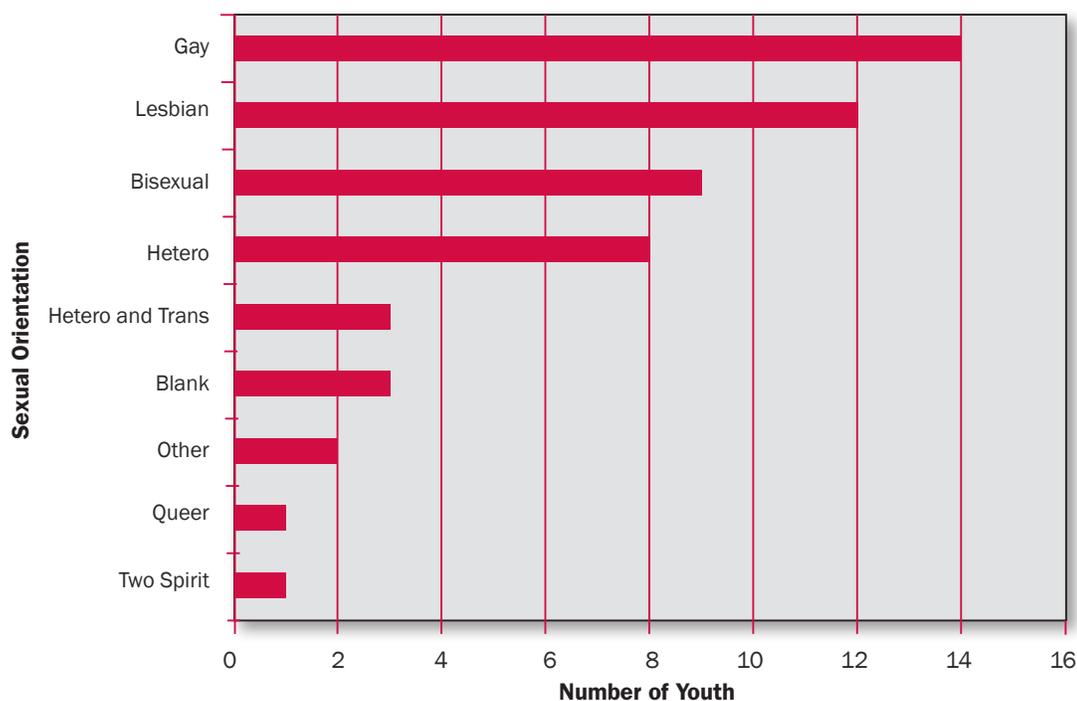
## Youth Focus Groups and Interviews

The project convened eight youth focus groups in six cities—New York, Los Angeles, Oakland, Salt Lake City, Seattle, and Nashville—and conducted individual interviews with youth in Louisiana and Utah. Local LGBT-serving organizations and advocates helped recruit previously court-involved LGBT youth for the focus groups. As a result, all youth participants were connected to and/or receiving the services of organizations with LGBT-specific programming. Partner organizations used word of mouth, recruitment flyers, and targeted requests to generate youth interest in the focus groups. Youth received \$20 gift cards (for movie theaters or discount stores) for their participation.

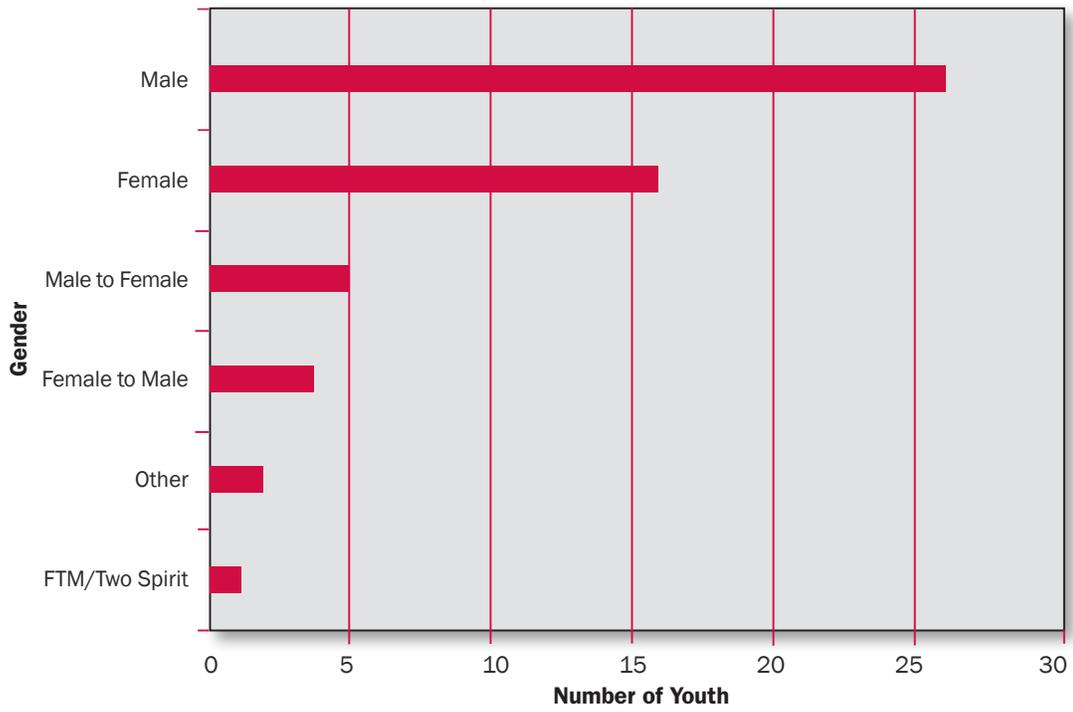
Focus groups were conducted using a standardized protocol that included questions about youth's experiences in the juvenile justice system, their views on the treatment of LGBT youth by juvenile justice professionals, the conditions in detention facilities, the relevance of their LGBT identity to their court cases, and their recommendations for reform. Project staff assured youth that their identities would remain confidential, explained how the information they provided would be used, and asked youth to sign an informed consent form before participating. In addition, every participant completed a brief demographic survey with questions about their age, race and ethnicity, gender identity, and sexual orientation, as well as basic information about their involvement in the justice system. (See Appendix C for the youth focus group survey.)

A total of 55 youth, ranging in age from 14 years old to 23 years old, participated in the focus groups and interviews. Information about the gender identity, sexual orientation, and race of participants is provided in the charts below.

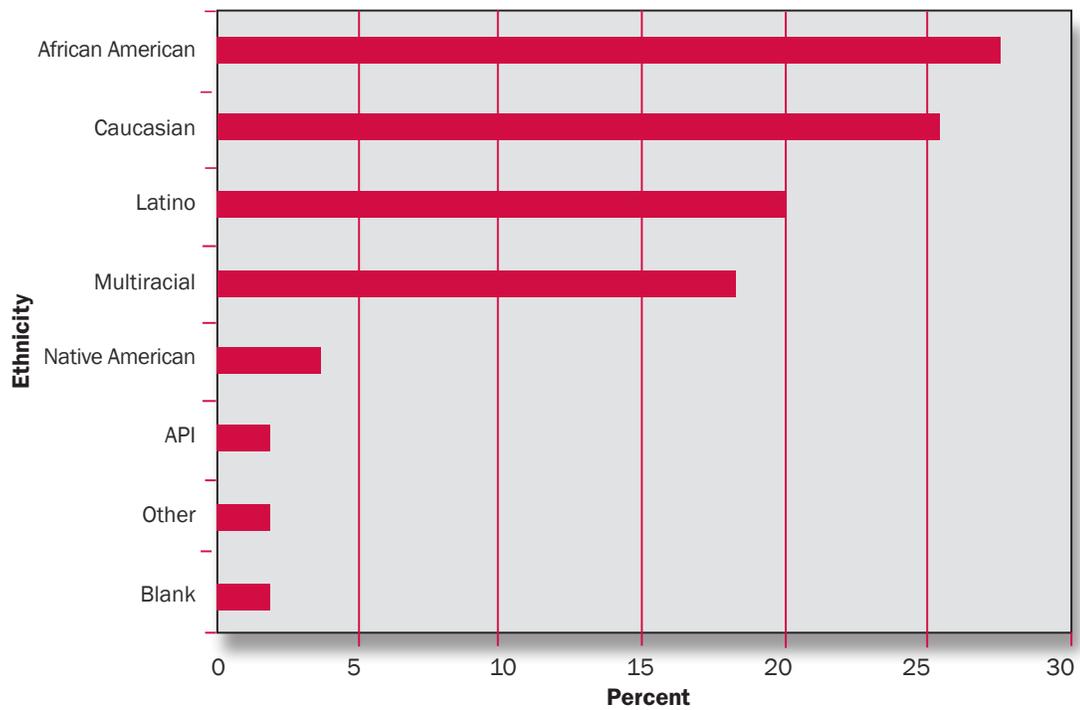
**Sexual Orientation of Youth Focus Group Participants**



Gender of Youth Focus Group Participants



Ethnicity of Youth Focus Group Participants



The youth who participated represent a wide range of experiences with the juvenile justice system. Sixteen of them had never had a delinquency case, although many of these youth had experienced interactions with police, some of which led to arrests. Of the remaining 39 participants, 10 had experienced one delinquency case, 7 had experienced two cases, 6 had three cases, 6 had four cases, and 10 had five or more cases. Thirty of the 39 youth had spent time in a detention facility before trial, and 5 had been incarcerated in secure confinement after disposition. Twenty-seven participants reported having been represented by a defense attorney, while 10 were unrepresented by counsel during their case. Two youth did not indicate whether they had legal representation.



### Youth Experiences with the Juvenile Justice System

| Percentage of court involved focus group participants who... |     |
|--|-----|
| Experienced two or more delinquency cases                    | 74% |
| Experienced five or more delinquency cases                   | 26% |
| Spent time in detention before trial                         | 77% |
| Were incarcerated in secure confinement after disposition    | 13% |
| Were unrepresented by counsel during their case              | 26% |

## **Correspondence with Professionals**

The final source of Equity Project data was obtained from juvenile justice professionals who contacted the Equity Project to ask questions about how to handle issues arising in particular cases involving LGBT youth or to share their observations about the experiences of LGBT court-involved youth.

## **Use of Names and Images in This Report**

To maintain participants' confidentiality, this report uses pseudonyms for all youth participants. Professionals are identified by occupation and, in some instances, geographic region, with the exception of Equity Project Advisory Committee members, who are identified by name because of their ongoing leadership and expertise on issues discussed herein.

This report makes use of licensed stock photography. All photography is for illustrative purposes only and all persons depicted are models except as noted in the photography credits on page viii.

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## **Endnotes**

1. This number is based on the estimated number of list-serv members, as well as attendees at trainings and conferences at which surveys were distributed.
2. Individuals interviewed included survey participants, attendees at a juvenile justice conference, and Equity Project Advisory Committee members.

# Chapter 1

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# Barriers to Fair and Effective Juvenile Justice Systems

*“Being in the juvenile justice system is about disrespect.”<sup>1</sup>*

—Kiana, a 16-year-old multiracial male-to-female transgender youth

*“If you are gay, you have to be better. And it’s a double whammy when you are black and gay [in the juvenile justice system].”<sup>2</sup>*

—Adam, a 14-year-old African-American gay male youth

Juvenile courts were created over a century ago based on the belief that youth are more amenable to treatment than adults and therefore should be treated in a separate system that provides rehabilitation rather than punishment.<sup>3</sup> In the early 1990s, however, legislators began calling for greater punishment of young offenders. States expanded the list of negative consequences that could result from juvenile adjudications and passed laws making it easier to prosecute youth in adult court.<sup>4</sup> States also adopted “zero tolerance” approaches to school discipline, which resulted in dramatic increases in the number of youth suspended and expelled from school for relatively minor offenses.

These changes came on the heels of a shift in federal policy toward status offenders in the 1980s, with an amendment to the Juvenile Justice and Delinquency Prevention Act that allowed for the incarceration of at-risk youth who violated court orders.<sup>5</sup> With that amendment, states increasingly treated at-risk youth like delinquent youth, though they were not accused of committing a delinquent offense. Today, although most states retain statutes, which explicitly provide that one purpose of juvenile courts is to provide treatment and rehabilitation,<sup>6</sup> juvenile adjudications can trigger negative short- and long-term consequences for youth that reflect a shift away from rehabilitation toward punishment.<sup>7</sup>

## **Broader Systemic Issues Impact the Experiences of LGBT Youth in the Juvenile Justice System**

Along with this shift in approach has surfaced a broad range of systemic issues for youth facing delinquency proceedings. Unfortunately, many youth involved in the juvenile justice system today experience denials of due process rights; overly punitive responses to minor and fairly typical adolescent behavior; inappropriate detention and incarceration (frequently in substandard facilities); an ever-growing list of collateral consequences; and racial, ethnic, and socio-economic disparities. While this report focuses on the specific challenges facing LGBT youth in the juvenile justice system, this chapter aims to situate the experiences of LGBT youth within the context of these broader systemic issues. Many of the injustices that LGBT youth experience in juvenile courts have their roots in the problems that affect all youth in the system.

**Youth's due process rights are subordinated to "best interest" rationales.**

For decades after they were first created, juvenile courts had unbridled discretion to determine the fate of youth appearing before them. Under the *parens patriae* ("state as parent") doctrine, the presumption was that judges would act in the best interests of the child, making due process rights unnecessary.<sup>8</sup> It was not until 1967 that the United States Supreme Court recognized that even the most benevolent intentions do not justify arbitrary procedures when a youth's liberty is at stake. In the landmark case *In re Gault*, the Court held that the Due Process Clause of the United States Constitution provides youth in delinquency cases with the right to counsel, the right to notice of charges, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.<sup>9</sup> In subsequent cases, the Court further expanded juveniles' due process rights, holding that the "beyond a reasonable doubt" standard of proof applied in delinquency cases<sup>10</sup> and that juveniles were protected from double jeopardy.<sup>11</sup> The Court stopped short, however, of granting youth the right to a jury trial.<sup>12</sup> It also found that preventive detention, in which a child may be held without bail, did not offend constitutional guarantees.<sup>13</sup> These cases as a whole clearly rejected the argument that the rehabilitative goals of juvenile courts could justify denying youth procedural rights in cases in which their liberty—and reputation—were at stake.<sup>14</sup>

More than 40 years later, too many delinquency proceedings fall far short of providing the due process protections required by *Gault*.<sup>15</sup> With alarming frequency, in many courts across the country, due process guarantees takes a back seat to perceived "best interests." Underlying this common practice in many cases is an unrealistic view that youth are better off in the system because they can access services unavailable in the community. As a result, many courtrooms are characterized by a lack of formality, minimal or no advocacy by youths' attorneys, and a disregard for protecting individual rights. For example, youth routinely waive their right to counsel and often plead guilty on their first day in court, without any meaningful understanding of the rights they are giving up.<sup>16</sup> Even when the court appoints counsel, a lack of resources, training, and support, along with crushing caseloads, limit the quality of representation that counsel can provide. The specific impact of these broken indigent defense systems on LGBT youth is discussed in Chapter 9, "Barriers to Zealous Defense Advocacy for LGBT Youth," of this report.

**The system has taken an increasingly punitive approach to youth behavior, including relatively minor misconduct that is fairly typical of adolescence.**

Current adolescent development research supports the fundamental premise of juvenile courts that society should respond to youth crime differently than adult crime; however, the juvenile justice system has taken an increasingly punitive approach to youth behavior, including relatively minor misconduct that is fairly typical of adolescence. Compared to adults, adolescents exhibit poorer judgment and are more impulsive, more susceptible to peer pressure, and more likely to take risks. In addition, most youth "grow out" of their delinquent behavior as they get older, even if they receive no intervention.<sup>17</sup> These differences are grounded in biological realities; as brain imaging research reveals, the areas of the brain responsible for impulse control and decision making are not fully developed until well into a person's twenties.<sup>18</sup> Despite the developmental research, the juvenile justice

system has steadily shifted away from rehabilitation and toward punishment in the last few decades, as was mentioned earlier in this report.<sup>19</sup>

**In the last 20 years, students have increasingly been referred to delinquency courts for minor misconduct that in the past would have been handled informally at school.<sup>20</sup>**

The passage of “zero tolerance” laws in the mid-1990s ushered in a new era of get-tough approaches to student misbehavior, which led to increased suspensions and expulsions.<sup>21</sup> Since then, states have created new delinquent offenses based on school-specific conduct, such as disrupting class or talking back to teachers, and many schools have placed law enforcement officers on campus, resulting in a surge in school arrests for minor misbehaviors such as “disturbing the peace” or “disorderly conduct.”<sup>22</sup> This increase in juvenile court referrals does not reflect an increase in serious crime on campus, and schools remain the safest places for youth.<sup>23</sup> Moreover, the policies have disproportionately impacted students of color even though research shows that they do not commit more offenses, or more serious offenses, than their peers.<sup>24</sup>

Rather than treating these non-dangerous misbehaviors in the courts, youth should be provided the services they need to address their behaviors at school and in the community.<sup>25</sup> In particular, school discipline practices, such as Positive Behavioral Interventions and Supports (PBIS), which teach and reinforce positive behaviors and craft individualized interventions for problem behavior, have been shown to improve attendance and academic achievement, decrease suspensions and expulsions, reduce school arrests, and reduce future delinquency and drug use.<sup>26</sup>

Like other youth, LGBT youth are impacted by the tendency to criminalize minor student misbehavior. For them, however, the problem is exacerbated by the harassment and abuse they face in school. Chapter 5, “Impact of Family Rejection and School Harassment on LGBT Youth Involvement in the Juvenile Justice System,” discusses the interplay between these policies and the pervasively hostile school environments with which LGBT youth must contend.

**The lines between status offenses and delinquent offenses continue to blur, with many youth formally petitioned and incarcerated for noncriminal misbehavior.**

Status offenses are noncriminal but undesirable behaviors by a minor that are unlawful as a result of the minor’s age. They include offenses such as ungovernability, running away, truancy, and alcohol possession. Approximately 40 states have a separate legislative category for status offenses, although these states differ in how they respond to these behaviors.<sup>27</sup> When legislatures started to pass status offender laws in the early 1960s, these laws were intended to provide preventative measures to keep at-risk youth out of the criminal justice system.<sup>28</sup> Yet in the last two decades, the number of status offender cases formally petitioned in court has doubled,<sup>29</sup> and in 2004, status offenders comprised approximately

18 percent of all juvenile arrests.<sup>30</sup> In addition, although the federal Juvenile Justice and Delinquency Prevention Act mandates that states receiving federal funds deinstitutionalize status offenders, a loophole that allows for the incarceration of youth who violate valid court orders has resulted in many youth being locked up for noncriminal offenses that pose no threat to public safety.<sup>31</sup>

Current research suggests that the best practice for addressing status offenses is to provide youth and their families with immediate interventions through community-based social services programs rather than relying on juvenile courts, yet few states have successfully adopted this approach.<sup>32</sup> LGBT youth are particularly vulnerable to these problems because they often enter the system on status offense charges stemming from factors like family rejection and school harassment, which are discussed in Chapter 5.

**The juvenile justice system has become the default system for handling youth with histories of trauma, mental health issues, or learning disabilities, even though the justice system is ill-equipped to serve these youth.<sup>33</sup>**

Youth with mental health issues, learning disabilities, and histories of trauma disproportionately comprise the population of youth in juvenile courts.<sup>34</sup> For many of these youth, juvenile courts intervene because other child-serving systems, including mental health, education, and child welfare systems, have failed to provide them with the treatment or services they need.<sup>35</sup> As a result, the juvenile courts have become an ineffective “dumping ground” for low-risk, high-needs youth.<sup>36</sup> This is particularly true for girls in the system, who experience high rates of trauma.<sup>37</sup> Girls are more likely than boys to be referred to the justice system for status offenses. Even though these youth pose little public safety risk, the number of girls detained in the last 10 years has dramatically increased.<sup>38</sup>

Rather than warehousing these youth in the juvenile justice system, the appropriate public agencies should provide treatment and services in settings that can more appropriately meet their needs. The impact of keeping youth in the delinquency system who would receive greater benefit from other services, and how this relates to the particular barriers to meeting the treatment needs of LGBT youth, is discussed in Chapter 6, “Lack of Services to Meet the Needs of LGBT Youth.”

**Youth involved in juvenile courts are increasingly subject to harsh, long-term collateral consequences, including sex offender registration.**

The traditional confidentiality protections of the juvenile justice system have been significantly eroded, and the consequences of an adjudication now reach far beyond the life of a case. Adjudicated youth are often precluded from public housing, expelled from school, and barred from military service and employment opportunities as a result of their youthful mistakes.<sup>39</sup> Juvenile adjudications can also be used to justify deportation of noncitizen youth and enhance sentences in adult court.<sup>40</sup> With the recent passage of the federal Adam Walsh Act, adolescents as young as 14 are now subject to mandatory sex offender registration, in some cases for the rest of their lives, for a range of sex offenses, including con-

sensual sex, public exposure, or inappropriate touching.<sup>41</sup> These registration requirements carry a heavy stigma that limits the youth’s future life opportunities without reducing recidivism or increasing public safety.<sup>42</sup> LGBT youth are particularly vulnerable to these new requirements, given the tendency of the system to criminalize LGBT adolescent sexuality and identity, which is discussed in more detail in Chapter 4, “Attempts to Change, Control, or Punish LGBT Adolescent Sexual Orientation and Gender Identity.”

**The juvenile justice system over-relies on detention and incarceration, even for youth who pose little or no danger to public safety.**

On any given day, 69,000 youth are held in correctional placements, and 26,000 are held in juvenile detention centers pre-trial or while awaiting placement after adjudication.<sup>43</sup> The detention and incarceration of many of these youth cannot be justified by public safety concerns. In 2003, for example, less than a quarter of detained and incarcerated youth were adjudicated for violent felonies, while 45 percent were locked up for status offenses, probation violations, misdemeanors, or low-level felonies that did not involve violence, weapons, or drugs.<sup>44</sup> In addition to the loss of liberty, detention and incarceration subject youth to the risk of serious physical and sexual abuse within the facilities.<sup>45</sup> The long-term



consequences are also severe: Youth who have been confined are more likely to recidivate and less likely to complete high school, obtain employment, and successfully transition into adulthood.<sup>46</sup>

Evidence exists that LGBT youth are over-represented in detention facilities for a number of reasons unrelated to their risk of flight, likelihood of reoffending, or danger posed to the community, as described in Chapter 7, “Harmful and Inappropriate Use of Pretrial Detention.” Once in detention or correctional facilities, LGBT youth are particularly vulnerable

to unconstitutional conditions of confinement, described in Chapter 8, “Unsafe and Unfair Conditions of Confinement for LGBT Youth.”



Rather than confining youth who pose little or no public safety risk, research supports providing youth with evidence-based programs in the community, which are not only effective, but also save money.<sup>47</sup> For those youth who do need a secure out-of-home placement, the “Missouri model,” which relies on smaller regional facilities that provide treatment focused on positive youth development, has been shown to be a more successful and cost-effective alternative than the traditional incarceration model.<sup>48</sup>

### **Racial and socio-economic disparities plague the justice system.**

It is well documented that youth of color nationwide, particularly African-American youth, are over-represented at every stage of the juvenile court process.<sup>49</sup> Beginning at the arrest decision, these racial and ethnic disparities intensify as youth further penetrate the system.<sup>50</sup> For example, in the two-year period between 2002 and 2004, African Americans comprised 16 percent of the general youth population nationally, but 28 percent of juvenile arrests, 30 percent of court referrals, 37 percent of youth in detention, 34 percent of youth processed in the juvenile courts, 30 percent of adjudicated youth, 35 percent of youth judicially waived to adult court, 38 percent of youth placed out of home, and 58 percent of youth incarcerated in adult prisons.<sup>51</sup> Studies have shown that these disparities are not attributable to higher rates of offending among youth of color.<sup>52</sup> In fact, one Office of Juvenile Justice and Delinquency Prevention (OJJDP) study found that white youth report selling drugs at *higher* rates than African-American youth, even though they are only half as likely to be arrested for drug offenses.<sup>53</sup>

Similarly, low-income youth are more likely to enter the system and receive the most severe dispositions.<sup>54</sup> Again, these disparities more likely reflect differences in policing practices and systemic responses to behavior rather than different offense rates. As one commentator noted: “It is the poor kid in trouble (especially if he is black) who is likely to end up in jail and the rich kid in trouble who is likely to end up in boarding school, a private drug program, or a mental health facility.”<sup>55</sup>

### **Building Momentum for Juvenile Justice Reform**

Though serious, the problems in the juvenile justice system are not intractable. Across the country, momentum has been building to substitute failed policies with fair, effective, and cost-efficient practices grounded in research about interventions that produce positive outcomes. The United States Supreme Court in 2005 held the juvenile death penalty unconstitutional in *Roper v. Simmons*, based on the fundamental truth that youth are different from adults.<sup>56</sup> *Roper* has reinvigorated advocates in their efforts to make the juvenile justice system more responsive to the developmental realities of youth. In addition, philanthropic foundations have provided impressive support to reform efforts across the country. For example, the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative (JDAI) has demonstrated that jurisdictions can reduce the number of children detained pretrial without any increase in offending and risk to the community.<sup>57</sup> With proven success in jurisdictions like Albuquerque, NM; Chicago; Portland, OR; and Santa Cruz, CA, JDAI is working in 100 sites across the country to develop alternatives to detention that reduce the population of confined youth.<sup>58</sup> The MacArthur Foundation Models for Change Initiative has also been working to build successful and replicable models of rational, fair, effective, and developmentally appropriate juvenile justice systems.

As states undertake reform, the unique experiences of LGBT youth must be considered. The basic principles underlying fair juvenile justice systems are the same for all youth, but without a true understanding of the challenges facing LGBT youth in the system, reform efforts may unintentionally leave behind some of the most vulnerable youth.

## Endnotes

1. Equity Project focus group, Kiana, a 16-year-old multiracial male-to-female transgender youth (May 1, 2008).
2. Equity Project focus group, Adam, a 14-year-old African-American, gay male youth (May 8, 2008).
3. See The Annie E. Casey Foundation, *A Road Map for Juvenile Justice Reform* 3 (2008), available at [http://www.aecf.org/~media/PublicationFiles/AEC180essay\\_booklet\\_MECH.pdf](http://www.aecf.org/~media/PublicationFiles/AEC180essay_booklet_MECH.pdf) [hereinafter *Casey Juvenile Justice Reform*]. See also Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577, 586 (2002).
4. Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 Fam. Ct. Rev. 466, 471 (2007).
5. Jessica R. Kendall, American Bar Association, *Families in Need of Critical Assistance: Legislation and Policy Aiding Youth Who Engage in Noncriminal Misbehavior* vii (2007).
6. Patrick Griffin, Linda Szymanski & Melanie King, National Center for Juvenile Justice, *National Overviews*, <http://www.ncjj.org/stateprofiles/overviews/faq9.asp>.
7. See Elizabeth Calvin et al., *Advocacy and Training Guide: Juvenile Defender Delinquency Notebook* 6 (2d ed. 2006).
8. See U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report* 87 (1999).
9. 387 U.S. 1 (1967).
10. *In re Winship*, 397 U.S. 358 (1970).
11. *Breed v. Jones*, 421 U.S. 519 (1975).
12. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).
13. *Schall v. Martin*, 467 U.S. 253 (1984).
14. See *Kent v. United States*, 383 U.S. 541 (1966) (rejecting the argument that the rehabilitative ideals of the juvenile courts justified arbitrary procedures, noting “the child [in juvenile court] receives the worst of both worlds” with “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children”).
15. Puritz & Majd, *supra* note 4, at 469-70.
16. American Bar Association Juvenile Justice Center, Youth Law Center, and Juvenile Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 45, 52 (1995).
17. See *Casey Juvenile Justice Reform*, *supra* note 3, at 6, 11.
18. Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 729 Wis. L. Rev. 740-43 (2007).
19. Over the last 15 years, the number of youth tried in adult court has significantly increased, totaling as many as 200,000 youth each year. See Campaign for Youth Justice, *National Statistics*, <http://www.campaign4youthjustice.org/nationalstats.html>.

- Although it is beyond the scope of this report, prosecution of youth as adults is a serious issue that exposes youth to a host of negative impacts, including the possibility of severe sentences and the risk of serious abuse in adult prisons. *See also* National Council on Crime and Delinquency, *Factsheet: Youth Under Age 18 in the Adult Criminal Justice System* (2006), available at [http://www.nccd-crc.org/nccd/pubs/2006may\\_factsheet\\_youthadult.pdf](http://www.nccd-crc.org/nccd/pubs/2006may_factsheet_youthadult.pdf). More research is needed to examine the impact of transfer policies on LGBT youth in particular.
20. *See* Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish Between Misbehavior and Criminal Conduct in School Referral Cases*, 9 UDC/DCSL L. Rev. 53, 53-56 (2007). *See also* Russell Skiba et al., American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations* 76 (2006), available at <http://www.apa.org/releases/ZTTFReportBODRevisions5-15.pdf>; Advancement Project, The Civil Rights Project & Harvard University, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* 15 (2000), [http://www.civilrightsproject.ucla.edu/research/discipline/opport\\_suspended.php#fullreport](http://www.civilrightsproject.ucla.edu/research/discipline/opport_suspended.php#fullreport).
  21. In 1994, the federal Gun-Free Schools Act was enacted, requiring the expulsion of students who brought firearms to school. *See* 20 U.S.C. § 7151 (2005). States responded by going beyond the mandates of the law and adopting “zero tolerance” policies that required expulsion for a host of other offenses, include drug possession, possession of weapons other than firearms, and other school-based offenses.
  22. Advancement Project, *Education on Lockdown: The Schoolhouse to the Jailhouse Track* 15 (2005).
  23. *See id.* at 11.
  24. *See id.* at 18-19; *see also* Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* 6 (2000), available at <http://www.indiana.edu/~safeschl/cod.pdf> (“If anything, African American students appear to receive more severe school punishments for less severe behavior.”); Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, *New Directions for Youth Development* 17, 31-32 (2001).
  25. *See* The Annie E. Casey Foundation, *Issue Brief: Reform the Nation’s Juvenile Justice System* 3, 5 (2009) [hereinafter *Casey Issue Brief*].
  26. *See* Mississippi Youth Justice Project, *Effective Discipline for Student Success: Reducing Student and Teacher Dropout Rates in Mississippi* 1, 5-6 (2008).
  27. Jessica R. Kendall, American Bar Association Juvenile Justice Center, *Families in Need of Critical Assistance: Legislation and Policy Aiding Youth Who Engage in Noncriminal Misbehavior* (2007).
  28. *See* Tina Chiu & Sara Mogulescu, Vera Institute of Justice, *Changing the Status Quo for Status Offenders: New York State’s Efforts to Support Troubled Teens* 1 (2004).
  29. Charles Puzzanchera, National Center for Juvenile Justice, *Trends in the Justice System’s Responses to Status Offending: OJJDP Briefing Paper* 2 (2007).
  30. Act4 Juvenile Justice, *The Juvenile Justice and Delinquency Prevention Act: A Fact Book* (2007), available at [http://www.act4jj.org/media/factsheets/factsheet\\_27.pdf](http://www.act4jj.org/media/factsheets/factsheet_27.pdf).
  31. *See* *Casey Issue Brief*, *supra* note 25, at 6.

32. See Sara Mogulescu & Gaspar Cao, Vera Institute of Justice, *Making Court the Last Resort: A New Focus for Supporting Families in Crisis* 2 (2008); see also Kendall, *supra* note 27, at 7.
33. *Casey Issue Brief*, *supra* note 25, at 5.
34. See *Casey Juvenile Justice Reform*, *supra* note 3, at 12.
35. See *id.* at 12-13.
36. See *id.* at 6, 12-13.
37. See Marty Beyer et. al, *A Better Way to Spend \$500,000: How the Juvenile Justice System Fails Girls*, 18 Wis. Women's L. J. 51, 52 (2003).
38. Alecia Humphrey, *Girls in the Juvenile Justice System: The Integration of Gender, Age & Crime*, 18 Wis. Women's L. J. 1, 1-2 (2003).
39. See Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?* 79 N.Y.U. L. Rev. 520, 542-576 (2004); see also Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 Wash. U. J. L. & Pol'y 327, 327-328 (2004); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 Nev. L. J. 1111, 1114-15 (2006); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) [hereinafter Adam Walsh Act, 120 Stat. 587] (mandating that youth transferred to criminal court and certain juveniles adjudicated delinquent in juvenile courts be included on both a national sex offender registry list and similar state lists; depending on the classification of the offender, the law requires registration for 15 years, 25 years, or life).
40. See Pinard, *supra* note 39; Berkheiser, *supra* note 3, at 646-49 (noting that all 50 states permit sentence enhancements in one form or another based on delinquency adjudications and the Federal Sentencing Guidelines counting juvenile adjudications as adult convictions).
41. Adam Walsh Act, 120 Stat. 587. See also *Casey Juvenile Justice Reform*, *supra* note 3, at 8.
42. Amanda Petteruti & Nastassia Walsh, Justice Policy Institute, *Registering Harm: How Sex Offense Registries Fail Youth and Communities* 12 (2008).
43. *Casey Juvenile Justice Reform*, *supra* note 3, at 10.
44. *Id.* at 8-9.
45. *Id.* at 9; see also Barry Holman & Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006); Barry Krisberg, National Council on Crime and Delinquency, *Breaking the Cycle of Abuse in Juvenile Facilities* (2009).
46. *Casey Juvenile Justice Reform*, *supra* note 3, at 9; Holman & Ziedenberg, *supra* note 45, at 4-7, 9-10.
47. *Casey Issue Brief*, *supra* note 25, at 3.
48. See *id.*
49. See Eileen Poe-Yamagata & Michael A. Jones, *Building Blocks for Youth, And Justice for Some: Differential Treatment of Minority Youth in the Justice System* 1-3 (2000); Amanda Burgess-Proctor, Kendal Holtrop, & Francisco A. Villarruel, Campaign for Youth Justice, *Youth Transferred to Adult Court: Racial Disparities* 7-11 (2007); Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a*

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50. Poe-Yamagata & Jones, *supra* note 49, at 4; Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report*, 188 (2006).
  51. Poe-Yamagata & Jones, *supra* note 49, at 3.
  52. *See Casey Juvenile Justice Reform*, *supra* note 3, at 15.
  53. *See Phillip Beatty, Amanda Petteruti, & Jason Ziedenberg, Justice Policy Institute, The Vortex: The Concentrated Impact of Drug Imprisonment and the Characteristics of Punitive Counties* 7 (2007).
  54. *See Barbara Bennett Woodhouse, Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DePaul L. Rev. 743, 756-57 (2002).
  55. *Id.* at 754.
  56. *Roper v. Simmons*, 543 U.S. 551 (2005).
  57. *Casey Issue Brief*, *supra* note 25, at 2-3.
  58. *Id.* at 3.

## Chapter 2

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## Professionals' Responsibility to Treat Youth in Juvenile Courts Fairly

All juvenile justice professionals have a role in ensuring that court-involved youth are treated fairly. Practice standards and ethical guidelines, as well as various state statutes, court rules, and case law, enumerate the responsibilities that juvenile justice professionals owe to LGBT youth and non-LGBT youth alike.

### Judges: Ensuring Fair and Impartial Courts

*"I try to make it plain to everyone in my court that everyone who enters is to be treated with respect."*<sup>1</sup>

—a juvenile court judge

Juvenile court judges play a critical role in ensuring a fair and impartial court process. The National Council for Juvenile and Family Court Judges (NCJFCJ), the largest professional organization of juvenile court judges, requires juvenile court judges to:

- Ensure the juvenile delinquency courts are places "where all . . . participants are treated with respect, dignity, and courtesy";<sup>2</sup>
- Develop and enforce "strict courtroom decorum and behavioral expectations for all participants";<sup>3</sup>
- Ensure all youth who appear before them receive the legal and constitutional rights to which they are entitled at every stage of court involvement;<sup>4</sup> and
- Provide all youth with access to counsel who are adequately trained and culturally competent.<sup>5</sup>

Similarly, each state's code of judicial conduct (or "judicial canons"), which define judges' responsibilities, require judges to be unbiased, fair, impartial, and objective and to ensure their courtrooms are free from bias, prejudice, and harassment against all youth who appear before them.<sup>6</sup> While these general prohibitions certainly apply to LGBT youth as well, several judicial canons specifically prohibit bias against LGBT individuals. For example, the American Bar Association's Model Code of Judicial Conduct, which many states have adopted, specifies that judges shall not "by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, **gender**, religion, national origin, ethnicity, disability, age, **sexual orientation**, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."<sup>7</sup> Under the Code, judges also must "require lawyers in proceedings before the court to refrain from manifesting [such] bias or prejudice, or engaging in harassment . . . against parties, witnesses, lawyers, or others."<sup>8</sup> Thirty-six states and the District of Columbia have adopted judicial canons with similar explicit prohibitions on bias based on sexual orientation and gender.<sup>9</sup> In addition, some courts have adopted nondiscrimination policies. In New Jersey, for instance, the state judiciary explicitly prohibits discrimination in any form against employees and court users based on gender identity or expression and sexual orientation.<sup>10</sup>

## Defenders: Protecting the Constitutional Rights of Their Clients

All youth in delinquency cases have a constitutional right to counsel who will zealously defend them and protect their due-process rights.<sup>11</sup> Juvenile defense attorneys have a duty to:

- Hold the juvenile justice system accountable to their clients and advocate for their fair and respectful treatment;<sup>12</sup>
- Advocate for their clients' expressed interests—not what the attorney believes is in their clients' "best interests"—and provide competent and diligent representation;<sup>13</sup>
- Provide vigorous representation at every stage of juvenile delinquency proceedings;<sup>14</sup> and
- Ensure that advocacy on behalf of LGBT clients addresses their needs.<sup>15</sup>



## Prosecutors: Pursuing Fair and Just Prosecution

The primary duty of the juvenile prosecutor is to seek justice by fully and faithfully representing the interest of the state "without losing sight of the philosophy and purpose of the [juvenile] court."<sup>16</sup> Like other members of juvenile delinquency courts, juvenile prosecutors are required to take steps in carrying out their work to ensure that the juvenile justice system treats all youth fairly and without discrimination.<sup>17</sup> This means that juvenile prosecutors have a responsibility to:

- Discharge their duties with fairness to all constituents;<sup>18</sup>
- Ensure that discretionary decisions, such as whether to file a petition, transfer a case to adult court, or offer a plea deal, are not inappropriately influenced by race or any other impermissible factors;<sup>19</sup> and
- Consider the "special interests and needs of the juvenile to the extent that they can do so without compromising [the safety and welfare of the community]."<sup>20</sup>

## Probation: Ensuring Fair Case Processing and Provision of Treatment

*“You have the right to be safe and to be treated fairly, regardless of your race, religion, national origin (what country you or your family came from), disability, sex (male, female, transgender) or sexual orientation (straight, gay, lesbian, or bisexual).”<sup>21</sup>*

—Los Angeles County Probation Department’s handbook for youth

*“[My probation officer] used to think I was lower than everybody just because I was a lesbian. . . . I want [probation officers] to understand we are the same, we are not different from anybody else.”<sup>22</sup>*

—Yvonne, a 15-year-old Latina lesbian youth

Juvenile probation departments play a vital role in juvenile court proceedings by facilitating referral to treatment services that meet the unique needs of individual adjudicated youth. Juvenile probation departments have a responsibility to take steps to ensure fair case processing and treatment for youth of color and other minorities.<sup>23</sup> Specifically, the American Correctional Association’s Code of Ethics requires probation officers to:

- Respect and protect the civil and legal rights of all probation youth;
- Refrain from discriminating against any individual because of race, gender, creed, national origin, religious affiliation, age, disability, or any other type of prohibited discrimination; and
- Respect, promote, and contribute to a workplace that is safe, healthy, and free of harassment in any form.<sup>24</sup>



## Detention: Ensuring Safe and Nondiscriminatory Treatment in Facilities

Juvenile detention facilities are required to provide adequate nutrition, health care, clothing, shelter, and education to all youth detained in their physical custody pending adjudication or awaiting placement.<sup>25</sup> In providing these basic needs, detention workers have a legal and ethical responsibility to ensure safety and fair treatment for all youth,<sup>26</sup> including protecting all youth in their care from physical, sexual, and emotional harm at the hands of other youth or facility staff. The National Juvenile Detention Association (NJDA) provides that detention workers must:

- Not tolerate “discrimination . . . or any form of child abuse”;<sup>27</sup>
- Refuse to remain silent when youths’ rights are violated and “speak on behalf of the affected youths”;<sup>28</sup> and
- Respond in a timely and appropriate manner to all harassment and abuse in order to alleviate conditions that could cause harm.<sup>29</sup>

## Endnotes

1. Anonymous juvenile judge comment, Survey for Judges: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Delinquency Courts, online Equity Project survey.
2. National Counsel of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases*, 123 (2005) [hereinafter *Juvenile Delinquency Guidelines*].
3. *Id.*
4. *Id.* at 32.
5. *Id.* at 25, 28.
6. See, e.g., Alabama Judicial Inquiry Commission, *Alabama Canons of Judicial Ethics*, Canon 3 (2006) (titled, "A judge should perform the duties of his office impartially and diligently.").
7. American Bar Association, *ABA Model Code of Judicial Conduct*, Rule 2.3(B) (2007) (emphasis added).
8. *Id.* at Rule 2.3 (C).
9. The thirty-six states with judicial canons that include sexual orientation are: Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. The fourteen states with judicial canons that do not include sexual orientation are: Alabama, Arkansas, Connecticut, Idaho, Illinois, Iowa, Louisiana, Michigan, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, and Washington.
10. Philip S. Carchman, Judiciary of the State of New Jersey, Policy Statement on Equal Employment Opportunity, Affirmative Action and Anti-Discrimination (2008), *available at* <http://www.judiciary.state.nj.us/eeo/October08PolicyStatement.pdf> ("The Judiciary respects the individual humanity and worth of each person who comes in contact with the courts. Discrimination in any form based on a person's gender identity or expression is prohibited . . . The Judiciary is committed to treating all employees and court users equally, with dignity and respect. Discrimination in any form against an individual on account of his or her affectional or sexual orientation is prohibited.").
11. See generally *In re Gault*, 387 U.S. 1, 36-37 (1967) (requiring counsel for juveniles to assist with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it); National Juvenile Defender Center & National Legal Aid and Defender Association, *Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems 1* (2008) [hereinafter *Ten Core Principles*]; Daniel J. Freed & Timothy P. Terrell, Institute of Judicial Administration-

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12. *Ten Core Principles*, *supra* note 11, at 3; NCJFCJ *Juvenile Delinquency Guidelines*, *supra* note 2, at 25.
  13. American Bar Association Center for Professional Responsibility, *Model Rules of Professional Conduct*, Rules 1.1- 1.3 (2009); *Juvenile Delinquency Guidelines*, *supra* note 2, at 30, 122.
  14. *Ten Core Principles*, *supra* note 11, at 1, 3; *Juvenile Delinquency Guidelines*, *supra* note 2, at 30-31.
  15. *Ten Core Principles*, *supra* note 11, at 1.
  16. James P. Manak, Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, *Juvenile Justice Standards Relating to Adjudication*, 263 (1996).
  17. *Id.*
  18. National District Attorneys Association, *National Prosecution Standards*, 11 (2nd ed. 1991), available at [http://www.ndaa.org/pdf/ndaa\\_natl\\_prosecution\\_standards\\_2.pdf](http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards_2.pdf) [hereinafter *National Prosecution Standards*].
  19. National District Attorneys Association, *Resource Manual and Policy Positions on Juvenile Crime Issues*, 8-9 (2002), available at [http://www.ndaa.org/pdf/ndaa\\_resource\\_manual\\_jj\\_crime\\_issues\\_2002.pdf](http://www.ndaa.org/pdf/ndaa_resource_manual_jj_crime_issues_2002.pdf).
  20. *National Prosecution Standards*, *supra* note 18, at 250.
  21. Los Angeles County Probation Department, *Your Handbook of Rules and Rights 4* (2008), available at <http://probation.co.la.ca.us/rar.pdf>.
  22. Equity Project focus group, Yvonne, a 15-year-old Latina, lesbian youth (May 4, 2008).
  23. National Center for Juvenile Justice, *Desktop Guide to Good Juvenile Probation Practice, Revised*, 115 (Griffin & Torbet, eds., 2002).
  24. American Correctional Association, *Code of Ethics* (1994), <http://www.aca.org/pastpresentfuture/ethics.asp>.
  25. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).
  26. *A.M. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 583, 585 (3rd Cir. 2004) (concluding that a lack of policies to address the safety and mental and physical health needs of youth in detention facilities could lead to constitutional violations); *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1157 (D. Haw. 2006) (finding facility violated LGBT plaintiffs' due process rights by allowing pervasive verbal, physical, and sexual abuse persist); *Alexander S. v. Boyd*, 876 F.Supp. 773, 787 (D.S.C. 1995) (stating that juveniles possess a clearly recognized liberty interest in being free from

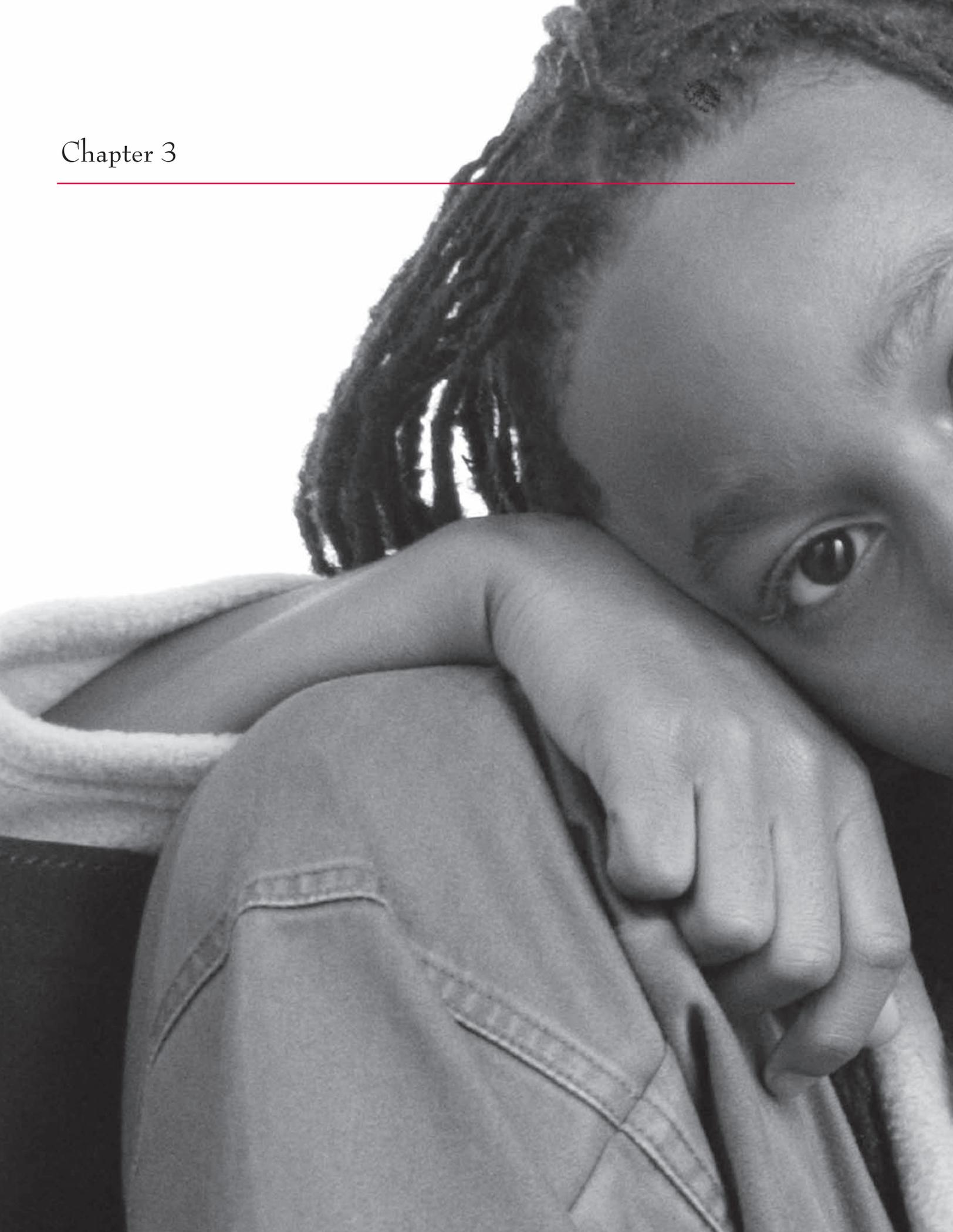
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unreasonable threats to their physical safety), *affirmed in part and reversed in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997).

27. National Juvenile Detention Association, *Code of Ethics*, 3 (2009), available at [http://www.npjs.org/docs/NJDA/NJDA\\_Code\\_of\\_Ethics.pdf](http://www.npjs.org/docs/NJDA/NJDA_Code_of_Ethics.pdf).
28. *Id.*
29. *Id.* See also *A.M.*, 372 F.3d at 583 (3rd Cir. 2004) (finding that failure to follow up on grievance reports contributes to a finding of liability based on deliberate indifference); *R.G.*, 415 F.Supp.2d at 1158 (same).

## Chapter 3

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# Common Misconceptions and Biases About LGBT Youth in the Juvenile Justice System

*“The hardest thing was finding acceptance from the state [justice] system because I had relationships with other guys.”<sup>1</sup>*

—Tyler, a 22-year-old Native-American gay male youth

Although juvenile justice professionals have a responsibility to ensure that all youth are treated fairly and appropriately,<sup>2</sup> Equity Project findings reveal that the system is hostile to LGBT youth of all races and socioeconomic backgrounds in unique ways. Approximately two-thirds of Equity Project survey respondents identified LGBT-related bias among court personnel as a “very serious” or “somewhat serious” problem.<sup>3</sup> In focus groups, youth described their first-hand experiences with professionals who they felt did not care about or understand them because of their sexual orientation or gender identity.

Underlying the biased treatment of LGBT youth in the juvenile justice system are common misconceptions about sexual orientation and gender identity. The stakes associated with these misconceptions are high; the effectiveness of juvenile courts depends upon professionals making decisions about each youth based on an authentic understanding, free from bias, about his or her individual needs and situation. Decisions driven instead by misconceptions undermine the goals of the system and deny youth their rights.

## **LGBT youth remain largely hidden in the juvenile justice system.**

*“I can honestly say that I have not come across LGBT issues. That doesn’t mean they don’t exist, but no one has addressed them.”<sup>4</sup>*

—a juvenile prosecutor

Until recently, LGBT youth have remained largely invisible in the juvenile justice system. As one defender noted, “The court system, police, probation, and child welfare all are happy to pretend these kids don’t really exist.”<sup>5</sup> One factor keeping LGBT youth invisible is the system’s long-standing lack of awareness of and attention to this population. In delinquency courts, “sexual orientation is never brought to light,” according to one prosecutor.<sup>6</sup> Professionals who have never been asked to pay attention to LGBT issues are unlikely to recognize that some youth with whom they work are LGBT. For example, one judge stated, “This is not our [the judges’] problem. I don’t really have anything to say about gay youth in my courtroom. I don’t think there have been any that I am aware of.”<sup>7</sup> His response is particularly noteworthy because some of his colleagues reported that several LGBT youth had been through the same court system in recent months.

**MYTH:** Few, if any, youth in the juvenile justice system are LGBT.

**FACT:** Approximately 13 percent of youth in juvenile detention facilities are LGBT, according to a recent study.

Another factor keeping LGBT youth hidden is that some youth choose not to disclose their sexual orientation or gender identity to juvenile justice professionals for fear of drawing unwanted attention to themselves, limiting their placement options, or suffering abuse in their placements. One juvenile defense attorney estimated having had more than 70 LGBT clients over the past two years. She explained, many youth are still “figuring things out and are still very much afraid to raise that issue.”<sup>8</sup> Similarly, Marlene Sanchez, Equity Project Advisory Committee member and executive director of the Center for Young Women’s Development in San Francisco, explained that the court-involved girls in her program often hide their sexual orientation at first because “[t]hey come to all organizations, including ours, not trusting us. They have had many experiences with social service organizations where they’ve been lied to a lot. They are trying to protect themselves and keep themselves safe.”<sup>9</sup> As a result, she said that only about a quarter of girls who identify as lesbian or bisexual feel comfortable revealing that information upon entering the program. Once program staff have built a relationship with the girls over time, they are more willing to be open about their sexual orientation or gender identity.

Perceptions among juvenile justice professionals about the number of LGBT youth with whom they have worked vary significantly. Most survey respondents reported having worked with at least a few LGBT youth over the past two years, and some professionals reported more regular contact with LGBT youth. For example, one juvenile justice professional in the southern region of the country reported that in the preceding month alone, the court in her jurisdiction had placed four transgender girls in the local detention facility.<sup>10</sup> Approximately 20 percent of the more than 400 people surveyed, however, reported not having worked with any LGBT youth in the last two years.

Although many juvenile justice professionals believed that they had not worked with LGBT youth, emerging research indicates that substantial numbers of LGBT youth enter the juvenile justice system across the country.<sup>11</sup> In the first study to examine the issue, Ceres Policy Research found that as many as 13 percent of youth in detention facilities are lesbian, gay, bisexual, transgender, or questioning (LGBTQ).<sup>12</sup> In comparison, most researchers surveying youth in schools estimate that between 4 percent and 8 percent of the overall youth population are LGBT.<sup>13</sup> While further research is necessary, the Ceres findings suggest that LGBT youth exist—and may actually be over-represented—in the juvenile justice system.

**Lack of information about adolescents’ understanding of their own sexual orientation and gender identity clouds perception.**

Contributing to the circumstances keeping youth invisible is the misconception that adolescents are too young to know that they are LGBT. In focus groups, several youth who

openly identified as LGBT reported that juvenile justice professionals refused to accept that they were LGBT. Fourteen-year-old Adam said that detention staff “just couldn’t accept [me] being gay”<sup>14</sup> and made comments to him such as, “Oh, you are young. You don’t know what you want.”<sup>15</sup> Another youth, Clarissa, said professionals questioned her overall trustworthiness because of her sexual orientation and gender identity. She explained, “Most of the facility and court staff that I ran into did not believe that I was solid in my sexuality, so the story that I was presenting [about my case] was not as credible.”<sup>16</sup> As one judge pointed out, such views reflect a perplexing double standard because the “system does not think LGB kids can know they are LGB, whereas they accept that kids know that they are heterosexual.”<sup>17</sup>

**MYTH:** By virtue of their age, youth cannot know they are LGBT.

**FACT:** Individuals become aware of their sexual orientation and gender identity at very young ages.

Adolescent development research refutes these views and demonstrates that both sexual orientation and gender identity are established at a very early age, although it may take youth some time to understand and become comfortable with their identity. Like heterosexual youth, lesbian, gay, and bisexual youth become aware of their sexual orientation based on their thoughts and emotions often long before they have their first sexual encounter. In fact, many youth report awareness of their sexual orientation by



age five.<sup>18</sup> Similarly, research indicates that a person’s gender identity is firmly established by age three,<sup>19</sup> and some youth self-identify as transgender as early as pre-school.<sup>20</sup>

According to a 2005 study, while the average age of first awareness of same-sex attraction is around 10, the average age of self-identification as gay or lesbian is 13.<sup>21</sup> In addition, the latest research shows that children are “coming out” (or disclosing their sexual orientation to others) at younger ages than in previous generations.<sup>22</sup>

## What Does It Mean for Youth to be “Questioning” Their Sexual Orientation or Gender Identity?

Youth who identify as “questioning” are in the process of actively exploring their sexual orientation and/or gender identity and questioning cultural assumptions about their identity. Many lesbian, gay, and bisexual people go through this process of questioning before coming out.<sup>23</sup>

Identity development for youth is not a static process, and a young person’s sexual orientation can be fluid. Not all youth who have same-sex attractions, experiences, or relationships self-identify as lesbian, gay, or bisexual.<sup>24</sup> Some youth may fear repercussions of self-identification or struggle with their own internalized homophobia. Others may be undergoing a typical adolescent process of trying to discover who they are.<sup>25</sup> Similarly, not all youth who have same-sex attractions or who identify as lesbian, gay, or bisexual during adolescence will continue to do so in adulthood. The fact that some youth might explore different identities as they navigate adolescence does not render their attractions and feelings any less legitimate.<sup>26</sup>

### Professionals’ failure to differentiate between sexual orientation and gender identity impacts youth experiences.

*“Society doesn’t recognize what the difference is between a gay person and a transgender person.”<sup>27</sup>*

—Luke, 15-year-old Asian-American female-to-male transgender youth

Equity Project findings indicate that juvenile justice professionals are often even less aware and accepting of transgender identity than lesbian, gay, and bisexual identity and sometimes confuse sexual orientation and gender identity. In focus groups, all of the transgender youth expressed frustration about the ignorance of the juvenile justice professionals they encountered. As Luke recounted, “[When my attorney] saw the letter from my doctor about being transgender, [he] panicked, and the probation officer didn’t understand. The probation officer didn’t even know what it was to be transgender!”<sup>28</sup>

#### MYTH:

Being transgender is the same as being gay.

#### FACT:

Gender identity is different from sexual orientation.

Several youth said they wished professionals understood basic terminology and the differences between gay and transgender identity. For example, Lily, who is a male-to-female



transgender 17-year-old, said she often encountered juvenile justice professionals who “put me in the gay category.” Although Lily explained to them, “I’m not gay, I’m transgender,” her attempts to educate them were unsuccessful.<sup>29</sup>

Sexual orientation and gender identity are not the same. Sexual orientation describes a person’s romantic and physical attraction to members of the same or different sex. Gender identity refers to a person’s internal, deeply felt sense of being male or female.<sup>30</sup> Most people’s gender identity corresponds with their birth sex and physical anatomy; however, transgender people’s gender identity differs from their birth sex. Accordingly, a **transgender girl** is a young person whose birth sex was male but who understands herself to be, and desires to live her life as, a female. Similarly, a **transgender boy** is a young person whose birth sex was female but who understands himself to be, and desires to live life as, a male. Most gender-nonconforming youth do not identify as transgender, however. While some (though certainly not all) lesbians dress and express themselves in a masculine manner and some gay boys dress and express themselves in a feminine manner, these youth are not necessarily transgender.

### Practice Tips: Names and Pronouns for Transgender Youth

One important aspect of gender identity expression is the name and pronoun by which an individual refers to himself or herself. The following list provides tips for professionals on how to demonstrate respect for a youth's gender identity through appropriate use of name and pronoun:

- Juvenile justice professionals should call transgender youth by the name and pronoun that the youth prefers, even if it differs from his or her legal name;
- If unsure of a youth's gender identity, court professionals should simply ask the youth about his or her gender identity and what pronoun and name the youth uses;
- Court professionals should never refer to a transgender youth as "he-she" or "it"; and
- All court-related records can include reference to a youth's legal name, but should use the youth's preferred name and pronoun throughout.

### Some professionals wrongly believe they can change a youth's sexual orientation or gender identity.

**MYTH:** Sexual orientation and gender identity are matters of personal choice, so youth can choose not to be LGBT.

**FACT:** Sexual orientation and gender identity are deep-seated, inherent aspects of personal identity; attempts to change either are both futile and harmful to youth.

One misconception that emerged in interviews is that LGBT youth choose to be LGBT, in some cases as an act of rebellion or an attempt to get attention. As Equity Project Advisory Committee (EPAC) member and adolescent psychology expert Marty Beyer explains, professionals who view sexual orientation and gender identity as matters of choice may try to coerce LGBT youth to stop being gay or attempt to "persuade [them] that they would have a better life and could avoid harassment if they were not LGBT."<sup>31</sup> Many youth from the focus groups said they had been asked questions by juvenile justice professionals such as "Why do you want to be like that?" and "Can't you just stop acting gay?"

While some debate exists, the prevailing scientific understanding is that the origin of sexual orientation is a complex interaction of biological and environmental factors.<sup>32</sup> Even though some people may choose not to act on their feelings or self-identify as lesbian, gay, or bisexual, individuals with same sex attractions cannot change their sexual orientation any more than heterosexual people can.<sup>33</sup>

Similarly, consensus exists among the health professions that a person’s gender identity is a deep-seated, inherent aspect of human identity and efforts to change gender identity are ineffective and likely to cause significant harm.<sup>34</sup> In the past, some professionals tried unsuccessfully to “cure” individuals using techniques designed to alter their cross-gender identification. Today, efforts to alter a person’s core gender are viewed as both futile and unethical.<sup>35</sup>

**The refusal to respect transgender youth is particularly pervasive among professionals.**

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| <p><b>MYTH:</b> Transgender youth are just “acting out” and trying to get attention through gender non-conforming clothing, hairstyle, and name choices.</p> | <p><b>FACT:</b> Medical research demonstrates the importance of allowing transgender youth to express their core gender identity.</p> |
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Equity Project findings indicate that transgender youth often face a backlash from juvenile justice professionals when they wear clothing or exhibit mannerisms and behaviors that are inconsistent with their birth sex. Professionals often mistakenly believe that these youth are acting out or seeking attention, rather than expressing a fundamental aspect of their identity. Medical research demonstrates that disrespecting, punishing, or prohibiting transgender youth from expressing their core gender identity causes them great distress.<sup>36</sup>

Some transgender people experience depression or severe emotional distress because their bodies do not match their gender identities. The diagnosis of gender identity disorder (GID), which can be made by a knowledgeable mental health professional, refers to “a strong and persistent cross-gender identification” and “persistent discomfort with [one’s birth] sex or sense of inappropriateness in the gender role of that sex.”<sup>37</sup> Safe and effective treatments are available for individuals who meet the diagnostic criteria for GID.<sup>38</sup> When transgender youth do not receive appropriate treatment or support for GID, serious negative consequences can result, including clinical depression, suicide attempts, and problems with relationships, school, and work.<sup>39</sup>

The World Professional Association for Transgender Health (WPATH) has developed a document, “Standards of Care for Gender Identity Disorders,”<sup>40</sup> which provides guidance to professionals on supporting transgender youth and adults through the process of recognizing their gender identity and “transitioning.” The term **transition** describes both the process and time period during which a transgender person starts living in line with his or her core gender. This can include changing one’s style of dress, hairstyle, and other aspects of physical appearance and using a new name (and pronoun), as well as seeking medical treatment (such as hormone therapy and /or surgery) to change one’s body.

The following list outlines specific recommendations from the WPATH “Standards of Care” and the medical and mental health professions for supporting transgender youth:

- **Names and pronouns.** The WPATH “Standards of Care” and experts in the field recommend that professionals support transgender youth in expressing their gender through using names and pronouns associated with their core gender identity.<sup>41</sup> Many transgender youth in the focus groups expressed frustration, however, that their lawyers, probation officers, judges, and detention workers refused to refer to them by their chosen name and preferred pronoun. For example, Kiana said that her probation officer treated her disrespectfully, “I would tell her my name is [Kiana] and my probation officer would say, ‘No, this is what we are going to call you, [a boy’s name], because this is what you are.’”<sup>42</sup>



Likewise, almost every professional interviewed for this project consistently referred to transgender youth by legal names and pronouns reflecting the youth’s birth sex, rather than the name and pronoun the youth preferred. In addition, some trivialized nonconforming gender identities; for example, one professional dismissively referred to a youth that he knew identified as a transgender girl as “the boy who wears dresses.”<sup>43</sup>

- **Clothing, appearance, and mannerisms.** Like names and pronouns, clothing is an important signifier of gender.<sup>44</sup> According to the WPATH’s Standards of Care, wearing clothing appropriate to one’s gender identity helps transgender people find more personal comfort.<sup>45</sup> A few judges who were interviewed understood this and changed dress code policies to allow gender nonconforming dress (e.g., allowing boys to wear earrings). Several interviewees, however, said juvenile courts discourage or prohibit expressions of gender nonconforming identity. One defender explained that the system “just kind of makes it known that when you come to court you have to wear the clothing that [is associated with] your birth gender.”<sup>46</sup> Some of the interviewees themselves stated that youth in court should dress to conform to their biological sex because not doing so contributes to the “already-tense environment” and “causes confusion.”<sup>47</sup>

*“When I would dress like a boy, my case would take longer and longer. For my last court hearing I dressed like a girl and they fit me right in. They treated me better when I dressed like a girl. That’s something I figured out on my own.”<sup>57</sup>*

—Kyle, a 17-year-old female-to-male transgender youth

- **Access to medical care.** Once a transgender youth who is diagnosed with GID has begun puberty, a knowledgeable medical care provider can assess whether medical treatment to enable the youth to physically transition is appropriate.<sup>48</sup> The purpose

of medical intervention for an individual with GID is to help the individual bring his or her physical body more in line with his or her internal gender identification to achieve lasting “personal comfort with the gendered self” and “maximize overall psychological well-being and self-fulfillment.”<sup>49</sup> National organizations such as the American Medical Association (AMA)<sup>50</sup> and the American Psychological Association (APA)<sup>51</sup> support these treatments, which they have found to be safe and effective.<sup>52</sup> According to the APA, GID treatments are not “cosmetic” or “experimental” but rather are a “medical necessity . . . for appropriately evaluated individuals.”<sup>53</sup>

**Lack of access to medical care is a particular problem for transgender youth in detention and correctional facilities (see Chapter 8).**

Project findings indicate that juvenile justice professionals overwhelmingly lack understanding about the medical needs of transgender youth. For example, Kyle, a 17-year old transgender female-to-male youth, asked his attorney to secure a court order that would allow him to obtain the hormone treatment his doctor recommended. His attorney, who assumed he was a lesbian and admitted to the youth, “I’m ignorant,” offered little help.<sup>54</sup> The judge in Kyle’s case was also dismissive, repeatedly referring to prescription hormones as “drugs” as if to equate them to illicit narcotics. Ultimately, Kyle was unable to get the health care he needed until he was released from state custody at age 18.

Transgender youth who lack access to appropriate medical care sometimes buy hormones on the street from individuals who are not physicians. Injecting hormones without medical supervision can cause serious medical conditions, including HIV infection from using dirty needles and other life-threatening complications that result from inappropriate dosages or poor quality hormones.<sup>55</sup> In addition, some youth engage in prostitution in exchange for street hormones or to earn enough money to buy hormones.<sup>56</sup> To prevent transgender youth from these risks, the juvenile justice system should provide them with access to knowledgeable health care providers, for treatments deemed medically necessary. Accessing appropriate medical care may require a court order.

**Some professionals do not understand that LGBT identity represents a normal aspect of human experience.**

**MYTH:** LGBT youth are mentally ill and sexually predatory.

**FACT:** LGBT identity is normal and does not reflect any underlying pathology.

Arguably the most detrimental myth about LGBT youth is that which equates LGBT identity with pathology. Despite the clear consensus among all mainstream health and mental health professions that LGBT identity represents a normal aspect of human ex-

perience,<sup>58</sup> numerous interviewees expressed concern that some juvenile justice professionals view LGBT youth as mentally ill or sexually predatory. In at least two jurisdictions, every youth “suspected” of being LGBT is required to undergo a mental health evaluation. In a case involving a young lesbian who assaulted her family after her family had objected to her sexual orientation, the judge explained that “the whole case was about sensationalizing lesbians. . . . [The prosecution] played it like she was a deranged lesbian lunatic.”<sup>59</sup>

Youth in the Equity Project focus groups reported having similar experiences of being treated as crazy, dangerous, or unstable in delinquency courts. One young bisexual man, Sam, explained in frustration, “In juvenile hall [staff] ask you, ‘Have you been molested,’ and then they say, ‘Oh, that’s why you are gay.’ Why can’t I just be myself and people be okay with that?”<sup>60</sup>

Over 35 years of objective scientific research demonstrate that lesbian, gay, and bisexual identities fall within the range of normative sexual development and are not associated with mental disorders or emotional or social problems,<sup>61</sup> or caused by prior sexual abuse or other trauma.<sup>62</sup> (In actuality, many LGBT youth experience sexual abuse and trauma *after* coming out to individuals in their families, communities, schools, and other institutions.<sup>63</sup>) Research similarly confirms that no inherent connection exists between an individual’s sexual orientation and the likelihood that he or she will commit a sexual offense. Studies using a variety of psychological mea-

asures indicate that gay people are not more likely than heterosexuals “to possess any psychological characteristics that would make them less capable of controlling their sexual urges, refraining from the abuse of power, obeying rules and laws, interacting effectively with others, or exercising good judgment in handling authority.”<sup>64</sup> In addition, transgender individuals do not have serious underlying psychopathology



that causes or influences their transgender identity. Numerous studies over the last 20 years have found that “[t]he incidence of reported psychiatric problems [for transgender people undergoing treatment] is similar to that seen in the general population.”<sup>65</sup>

### **Spotlight on Reform: Training Juvenile Justice Professionals on LGBT Issues**

Acknowledging the need to provide fair and respectful services to LGBT youth, some jurisdictions have implemented comprehensive training for juvenile justice professionals on issues that affect LGBT youth. Approximately 23 percent of the more than 400 people surveyed reported that their jurisdictions had offered training that addressed LGBT issues within the last two years. While these developments are a sign of progress, more training is needed to ensure professionals across the country are prepared to communicate effectively with LGBT youth, respond to their individual needs, and provide appropriate rehabilitation and treatment services. In fact, more than 80 percent of Equity Project survey respondents, including judges, defenders, prosecutors, probation officers, and detention staff, indicated that they would like to receive training on working with LGBT youth.

A few examples of jurisdictions that are effectively implementing trainings on LGBT youth follow:

**Hawai’i.** As a result of the 2007 settlement in the civil rights lawsuit *R.G. v. Koller*, which involved the abuse and harassment of LGBT youth in Hawai’i’s correctional facility, every staff person at the juvenile correctional facility and the staff of youth-serving agencies participated in comprehensive one-day mandatory trainings on working with LGBT youth. Although not required by the settlement terms, the Chief Judge of the Family Court also agreed to implement a nondiscrimination policy for the detention facility and staff of the juvenile detention facility; probation officers and judges also participated in training. Although Hawai’i is a small state with only one juvenile correctional facility and one main juvenile detention center, at the time of this report’s publication, Hawai’i was the only state to implement nondiscrimination policies in all of its juvenile facilities and train a range of system professionals on LGBT youth. EPAC member Dr. Marty Beyer developed the curriculum and delivered the trainings with another EPAC member, Dr. Bob Bidwell, and local youth advocates.

**New York.** EPAC member Judge Paula Hepner formed in 2004 the Family Court Advisory Council’s Juvenile Justice Subcommittee Working Group on LGBTQ Youth in New York City. The workgroup, which she chairs, brings together prosecutors, judges, Administration for Children’s services staff, detention agencies, Department of Juvenile Justice staff, probation officers, youth advocates, and service providers. The workgroup has developed and implemented a training program for Family Court professionals in each New York City borough. The group has also provided training for judges at a local judicial training institute and summer Judge Camp. In addition, last year, the workgroup provided training for prosecutors focused on helping them understand the full context in cases involving LGBT

youth. Topics included working on cases in which parents are the complainants, displaying sensitivity to the victims of hate crimes, and interviewing parents, youth, and others in an inclusive and respectful manner. At the time of publication, the working group was also training probation department staff and planning to present to the panel of assigned counsel later in the year.

**Utah.** The Utah Pride Center is working directly with Utah's Juvenile Justice System (JJS) and the court to educate court staff and juvenile justice personnel on LGBT youth issues. After a youth advocate called the center requesting resources to support a transgender youth in a JJS detention facility, the center persuaded the JJS training manager and the Department of Children and Family Services (DCFS) to collaborate on training JJS and DCFS staff. The Pride Center has already delivered LGBT youth cultural competence training to all staff working in JJS in every region of Utah. Although not mandatory, the trainings were consistently well attended. The Pride Center is developing an advanced curriculum and will start trainings on these advanced topics for JJS staff in late 2009. In addition, the Pride Center is developing an LGBT cultural competence training for court staff for late 2009. Utah's governor and the head of the State Department of Human Services have both approved the curricula.

## Endnotes

1. Equity Project focus group, Tyler, a 22-year-old Native-American gay male youth (Apr. 17, 2008).
2. National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases*, 25 (2005) [hereinafter *Juvenile Delinquency Guidelines*].
3. Twenty-seven percent of those surveyed thought anti-LGBT bias of court personnel was a very serious problem for LGBT youth. Thirty-eight percent thought it was somewhat of a problem. This view was not universal. For example, one judge noted, "In 23 years I have not seen any bias of any substance at all in this topic arena. . . . No one is picking on these kids, and they are not being cast in with a bunch of rednecks who hate them. We literally do not see this bias you seem to want to find." Anonymous juvenile judge comment, Survey for Judges: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Delinquency Courts, online Equity Project survey [hereinafter Survey for Judges]. Similarly, another judge commented, "I can't see a problem. The assertion that there must be one is absurd." *Id.* In addition, a prosecutor who declined to complete the survey told the Equity Project that "by creating this survey, and looking for issues that do not exist, you are placing these individuals as a group into a spotlight that they most likely do not wish to experience." Anonymous juvenile prosecutor comment, Survey for Prosecutors: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Delinquency Courts, online Equity Project survey [hereinafter Survey for Prosecutors].
4. Anonymous juvenile prosecutor comment, Survey for Prosecutors, *supra* note 3.
5. Anonymous juvenile defender comment, Survey for Defenders: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Delinquency Courts, online Equity Project survey [hereinafter Survey for Defenders].
6. Equity Project interview with a juvenile prosecutor (July 26, 2007).
7. Equity Project interview with a juvenile judge (July 26, 2007).
8. Equity Project interview with a juvenile defender (July 11, 2007).
9. Equity Project interview with Marlene Sanchez (Aug. 28, 2008).
10. Equity Project interview with a juvenile justice professional (July 26, 2007).
11. See, e.g., Shannan Wilber, Caitlin Ryan, & Jody Marksamer, *Child Welfare League of America Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care* (2006); Randi Feinstein, et al., *Justice for All? A Report on Lesbian, Gay, Bisexual, and Transgendered Youth in the New York Juvenile Justice System* (2001); Angela Irvine, Ceres Policy Research, *Youth Hype Drug and Alcohol Use Survey: Summary of Findings Related to LGBQ, Latino, and Foster Youth in Santa Cruz, CA* (2008) (available on file with authors); Angela Irvine, Ceres Policy Research, *The Inappropriate Use of Secure Detention for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Youth* (2009), presented at the Columbia University Gender on the Frontiers Symposium (April 10, 2009) (available on file with authors) [hereinafter *Inappropriate Use of Secure Detention*] Results of the 2009 Ceres Policy Research study will appear in *19 Columbia Journal of Gender & Law* (forthcoming 2010).
12. *Inappropriate Use of Secure Detention*, *supra* note 11.
13. See Human Rights Watch, *Hatred in the Hallways: Violence and Discrimination Against*

*Lesbian, Gay, Bisexual and Transgender Students in U.S. Schools* 18 (2001); Massachusetts Department of Elementary and Secondary Education, *Massachusetts Youth Risk Behavior Survey* 67 (2007) <http://www.doe.mass.edu/cnp/hprograms/yrbs/05/default.html>. The Massachusetts study was conducted in 51 schools; results are based on the responses of 3,522 students. It found that 4 percent of ninth through twelfth graders that participated described themselves as LGB, and 5 percent of students reported having same-gender physical contact.

14. Equity Project focus group, Adam, a 14-year-old African-American, gay male youth (May 8, 2008).
15. *Id.*
16. Equity Project focus group, Clarissa, under 18 years old, genderqueer youth (June 2, 2008). (See Appendix A for the definition of "genderqueer.")
17. Equity Project interview with a juvenile court judge (Sep. 25, 2007).
18. Caitlyn Ryan & Rafael M. Diaz, *Family Responses as a Source of Risk and Resiliency for LGBT Youth*, presentation at the pre-conference Institute on LGBTQ Youth, Child Welfare League of America 2005 National Conference, Washington, D.C. (2005).
19. Gerald P. Mallon & Teresa DeCrescenzo, *Transgender Children and Youth: A Child Welfare Practice Perspective*, 85 *Child Welfare* 215, 218 (2006); Wilber et al., *supra* note 11, at 2.
20. Stephanie Brill & Rachel Pepper, *The Transgender Child: A Handbook for Families and Professionals* 16-17 (Cleis Press Inc. 2008).
21. Ryan & Diaz, *supra* note 18.
22. *Id.*
23. *Id.*
24. Caitlyn Ryan, *LGBT Youth: Health Concerns, Services and Care*, 20 *Clinical Research & Regulatory Affairs* 137, 139 (2003).
25. Caitlyn Ryan & Donna Futterman, *Lesbian & Gay Youth: Care & Counseling* 9 (Columbia University Press 1998).
26. American Psychological Association, *Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality* 3-4 (2008), available at <http://www.apa.org/topics/sorientation.pdf> [hereinafter *Answers About Sexual Orientation*].
27. Equity Project focus group, Luke, a 15-year-old Asian-American, female-to-male transgender youth (May 1, 2008).
28. *Id.*
29. Equity Project focus group, Lily, a 17-year-old Latina and white, male-to-female transgender youth (May 1, 2008).
30. American Psychological Association, *Answers to Your Questions About Transgender Individuals and Gender Identity* 1-2 (2006), available at <http://www.apa.org/topics/Gender3.pdf>.
31. Equity Project interview with Marty Beyer, Ph.D. (Nov. 27, 2007).

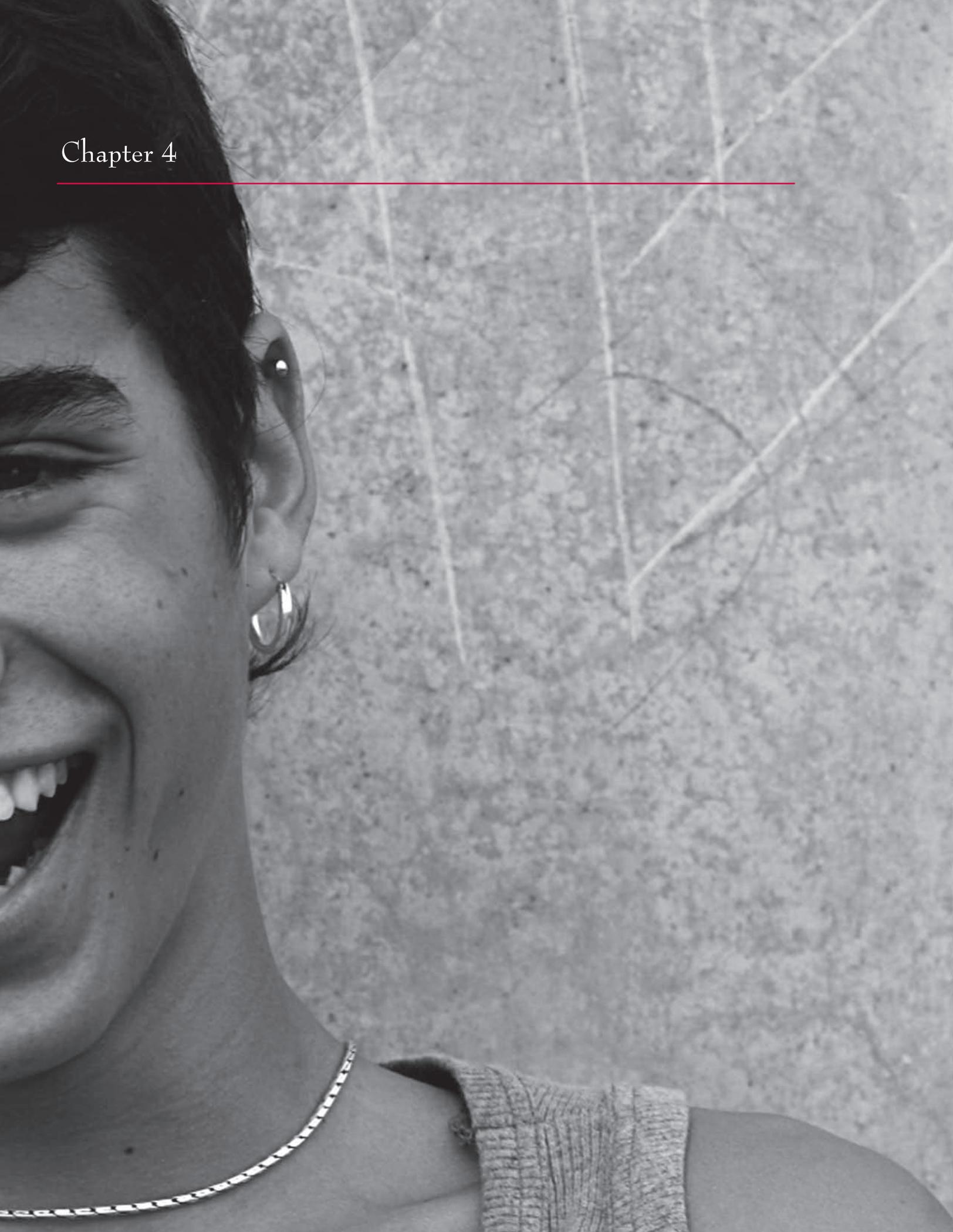
32. Barbara L. Frankowski, *Sexual Orientation and Adolescents*, 113 *Pediatrics* 1827, 1827-32 (2004), available at <http://pediatrics.aappublications.org/cgi/reprint/113/6/1827>; *Answers About Sexual Orientation*, *supra* note 26, at 2; American Psychiatric Association, *Gay/Lesbian/Bisexuals*, <http://healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx> [hereinafter *Gay/Lesbian/Bisexuals*].
33. See American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 35-41(2009), available at <http://www.apa.org/pi/lgbcpublications/therapeutic-response.pdf> [hereinafter *Task Force Report on Therapeutic Responses*]; American Psychological Association, *APA Help Center: Sexual Orientation and Homosexuality* 1 (2009) <http://www.apahelpcenter.org/articles/pdf.php?id=31> [hereinafter *Sexual Orientation & Homosexuality*].
34. Gianna E. Israel & Donald E. Tarver II, *Transgender Care: Recommended Guidelines, Practical Information, and Personal Accounts* 134-5 (Temple University Press 1997); Gerald P. Mallon, *Practice with Transgendered Children*, in *Social Services with Transgendered Youth* 49, 55-6 (Gerald P. Mallon, ed., 1999).
35. *See id.*
36. Mallon, *supra* note 34, at 51; Israel & Tarver, *supra* note 34, at 134-5; Brill & Pepper, *supra* note 20, at 74-5; Walter Meyer III et al., *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders* 8-9 (6th ed. 2001) [hereinafter *Standards of Care*]
37. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 576, 581 (4th ed., text revision 2000) [hereinafter *APA, DSM-IV-TR*].
38. *See generally Standards of Care*, *supra* note 36; Walter O. Bockting & Eli Coleman, *A Comprehensive Approach to the Treatment of Gender Dysphoria*, in *Gender Dysphoria: Interdisciplinary Approaches in Clinical Management* 131 (W.O. Bockting & E. Coleman eds., 1992).
39. *APA, DSM-IV-TR*, *supra* note 37, at 578; Israel & Tarver, *supra* note 34, at 132-3.
40. *See Standards of Care*, *supra* note 36. The Harry Benjamin International Gender Dysphoria Association changed its name to the World Professional Association for Transgender Health in 2006.
41. *Id.* at 9; *see also* Teresa DeCrescenzo & Gerald P. Mallon, *Serving Transgender Youth: The Role of the Child Welfare System* 19 (Child Welfare League of America 2000).
42. Equity Project focus group, Kiana, a 16-year-old multiracial male-to-female transgender youth (May 1, 2008).
43. Equity Project interview with a detention worker (July 26, 2007).
44. Brill & Pepper, *supra* note 20, at 94.
45. *See Standards of Care*, *supra* note 36, at 12.
46. Equity Project interview with a juvenile defender (July 5, 2007).
47. *See, e.g.*, Equity Project interview with a probation officer (Feb.14, 2008).
48. *See Standards of Care*, *supra* note 36, at 9-11.
49. *Id.* at 1.

50. See American Medical Association, "Resolution 122: Removing Financial Barriers to Care for Transgender Patients" (2008) [hereinafter *AMA Resolution 122*].
51. American Psychological Association, "Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination," (adopted Aug. 2008), <http://www.apa.org/pi/lgbc/policy/transgender.html> [hereinafter *APA Transgender Policy Statement*].
52. See *AMA Resolution 122*, *supra* note 50, at 2, n. 7; *APA Transgender Policy Statement*, *supra* note 51. See also World Professional Association for Transgender Health, "WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.," 2 (2008).
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54. Equity Project focus group, Kyle, a 17-year-old white bisexual female-to-male transgender youth (May 4, 2008).
55. Mallon & DeCrescenzo, *supra* note 19, at 224-225; Wilber et al., *supra* note 11, at 58.
56. *Id.* See also Rebecca Klein, *Group Work Practice with Transgendered Male to Female Sex Workers*, in *Social Services With Transgendered Youth*, 95, 96-9 (Gerald P. Mallon, ed., 1999).
57. Equity Project focus group, Kyle, a 17-year-old white bisexual female-to-male transgender youth (May 4, 2008).
58. See e.g., *Task Force Report on Therapeutic Responses*, *supra* note 33, at 11; American Academy of Child & Adolescent Psychiatry, *Facts For Families: Gay, Lesbian, and Bisexual Adolescents* (2006), <http://www.aacap.org/page.ww?section=Facts%20for%20Families&name=Gay,%20Lesbian%20and%20Bisexual%20Adolescents>; *Sexual Orientation and Homosexuality*, *supra* note 33, at 2; American Medical Association, *Resolution 506: Policy Statement on Sexual Orientation Reparative (Conversion) Therapy* (April 2000), <http://www.ama-assn.org/meetings/public/annual00/reports/refcome/506.rtf>.
59. Equity Project interview with a juvenile court judge (Sep. 25, 2007).
60. Equity Project focus group, Sam, an 18-year-old African-American-multiracial, bisexual male youth (May 5, 2008).
61. See *Task Force Report on Therapeutic Responses*, *supra* note 33, at 1-2, 11; *Sexual Orientation and Homosexuality*, *supra* note 33 at 2; Gregory M. Herek & Linda D. Garnets, *Sexual Orientation and Mental Health*, 3 *Ann. Rev. Clinical Psychol.* 353, 359 (2007).
62. See *Gay/Lesbian/Bisexuals*, *supra* note 32 (According to the American Psychiatric Association, sexual abuse does not appear to be more prevalent among children who grow up to identify as lesbian, gay, or bisexual than it does for their heterosexual counterparts.)
63. Ritch C. 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.* 261, 263 (1994); Meg Earts, *Stressors in the Lives of GLBTQ Youth*, 14:4 *Transitions* 1, 3 (June 2002), available at <http://www.advocatesforyouth.org/storage/advfy/documents/transitions1404.pdf>.
64. Gregory M. Herek, *Facts About Homosexuality and Child Molestation*, [http://psychology.ucdavis.edu/rainbow/html/facts\\_molestation.html](http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html); Linda Goldman, *Coming Out, Coming In: Nurturing the Well-Being and Inclusion of Gay Youth in Mainstream Society* 42-3 (Routledge 2008); Nathaniel McConaghy, *Paedophilia: A*

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65. Collier M. Cole, Michael O'Boyle, Lee E. Emory, & Walther J. Meyer III, *Comorbidity of Gender Dysphoria and other Major Psychiatric Diagnoses*, 26 *Archives of Sexual Behavior* 13, 21 (1997) (citing three studies with similar findings completed over the span of 13 years); George R. Brown, *Transvestism and Gender Identity Disorder in Adults*, in *Treatments of Psychiatric Disorders, Third Edition*, 2034-35 (Glen O. Gabbard, M.D. ed., 2007).

## Chapter 4

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## Attempts to Change, Control, or Punish LGBT Adolescent Sexual Orientation and Gender Identity

*“My social worker is the best thing in my life. When my social worker said it is in the law book that you cannot be punished or disrespected for being gay, it gave me power. That is the best thing my social worker and judge did for me.”<sup>1</sup>*

—Brianna, 17-year-old black-Asian lesbian youth

Chapter 3, “Common Misperceptions and Biases About LGBT Youth in the Criminal Justice System,” describes commonly held misconceptions about LGBT youth. When juvenile justice professionals make decisions related to arrest, charging, adjudication, and disposition based on these misconceptions, the practical effect is to punish or “criminalize” LGBT adolescent sexuality or gender identity.

### Police Targeting and Abuse of LGBT Youth

*“If there is a condom on you, the cops will say [you’re involved in] prostitution.”<sup>2</sup>*

—Jason, 22-year-old white and Latino gay male youth

With discretion over arrest and release decisions, police officers serve as gatekeepers to the juvenile justice system, yet they do not always apply this discretion fairly. According to a 2005 Amnesty International report, police regularly profile LGBT youth as criminals, and selectively enforce laws relating to public sexual expression or conduct and minor “quality of life” offenses, such as loitering, public drunkenness, public urination, and littering.<sup>3</sup> In addition, police are more likely to abuse LGBT youth, particularly transgender youth and LGBT youth of color, than LGBT adults.<sup>4</sup>

Consistent with these research findings, almost 70 percent of Equity Project survey respondents indicated that police mistreatment was a “very serious” or “somewhat serious” problem for LGBT youth.<sup>5</sup> Several interviewees also agreed that police in their jurisdiction often target LGBT youth. Some believed that police were more likely to arrest and charge LGBT youth for crimes because “they equate homosexuality with deviancy.”<sup>6</sup> As one prosecutor explained, “It has been my experience when officers encounter LGBT juveniles in arrest-type situations, the police normally assume that their LGBT status . . . is an influence as a background factor in their criminal activity.”<sup>7</sup> In focus groups, youth described experiencing such police harassment. For example, 16-year-old Yvette described a disturbing encounter that she and her friends had with the police. When approached by the police, Yvette’s friend explained to the officer, “I’m not doing nothing.” In response, the police pepper-sprayed and arrested her. Yvette concluded that “the whole situation happened because we were gay.”<sup>8</sup> Another youth, Russell, who is bisexual, reported:

[When the police officer] found out that I was bi[sexual], he called another officer to the scene and they just kind of went off to the side and started talking about it. He came back and he patted me down and threw me in the car and told me I was going to jail. The whole way to jail he kept telling me I was sick and disgusting.<sup>9</sup>

Many transgender youth reported that the police profile them as prostitutes. Russell explained, “[There are] popular streets that are for trans [youth] and police recognize that. . . . Cops will stop you and ask what you are doing there. . . . The cops will keep asking, ‘You’re working, right?’”<sup>10</sup> Another youth, Tyler, said that a police officer stopped him as he was walking on the street, dressed in drag (i.e. wearing a wig, dress, make-up, etc.), and insisted on seeing identification. “[The police officer] said that the reason he stopped me was suspicion of soliciting sex. . . . I had to show him evidence that I was going to a drag show before they let me go. . . . Whenever I would dress up in drag, [the police harassment] was horrible.”<sup>11</sup>

In some instances, transgender youth reported police openly mocking them in an attempt to provoke a response. One youth, Kyle, remarked that police have “no respect” for transgender youth: “I think they purposely call you . . . by your biological sex just to mess with you and make you angry so they have a reason to take you in.”<sup>12</sup> Another transgender youth, Lily, described the following incident:

The officers were making fun of me. They were saying I had makeup on [and asking] “What is he?” I could hear them. The cops were calling me “he-she.” And I couldn’t talk back to the cop. I didn’t have that ability. And I felt if I talked back to the cop it would make my situation worse. The cops shouldn’t make fun of people like that. It was very hurtful.<sup>13</sup>

## Overcharging LGBT Youth with Sex Offenses

*“If it’s two boys and they’re both young or it’s two girls, there’s a tendency to assume it’s abuse. [With] opposite genders they’re more likely to say ‘Well, you know, they’re experimenting.’ [With same-sex behavior] there’s a tendency to put the worst spin on it.”<sup>14</sup>*

—a juvenile defender

In every state, age-of-consent laws prohibit sexual activity with youth under a certain age based on the presumption that youth do not have the capacity to give consent.<sup>15</sup> In many states, these laws apply to consensual sexual activity between youth of similar ages who are both under the age of consent.<sup>16</sup> These laws are not always applied evenly, however. Youth in state custody, youth involved in interracial relationships, and LGBT youth are more likely to be prosecuted for age-appropriate consensual sexual activity than other youth.<sup>17</sup> In 29 states, an adjudication for a sex offense subjects a youth to registration as a sex offender, which significantly limits the youth’s future employment and life opportunities.<sup>18</sup>

Several defenders who were interviewed had represented LGBT youth who were charged with consensual sex offenses under circumstances in which they believed heterosexual youth would most likely not have been charged. In these cases, the defenders expressed concern that prosecutors had pursued these cases against their LGBT clients more vigorously than the cases merited. In one such case, two boys were prosecuted for having

consensual oral sex in the back of a classroom. The defense attorney for one of the boy's explained, "They both got hammered . . . It was clearly the case that the prosecutor wouldn't give the kid a deal because it was a "gay" crime in a school. . . . I think [straight youth] would have gotten a better deal."<sup>19</sup>

In some such cases, defenders believed that the parents of alleged offenders or victims encouraged the prosecutions because they viewed adolescent same-sex sexual conduct as "abhorrent."<sup>20</sup> As one defender put it, "In many households, the idea of consensual sex between same-sex kids just freaks everybody out."<sup>21</sup> Another defender agreed:

I really do think that when parents find out that little Johnny is having sex with little Susie, it's time to have a talk. When they find out he's having sex with little Jimmy, they just don't know what to do. People seem to be more hysterical about that.<sup>22</sup>

As a result, parents sometimes turn to the courts because "[t]here's a sense the court can control the sexuality of the children [by bringing] the hammer down."<sup>23</sup>

### Inappropriate and Harmful Dispositions

*"Gay youth stay in residential or corrections sex offender programs longer, and their normal behavior of being attracted to a same-sex partner is seen as offender behavior."<sup>24</sup>*

—a juvenile probation officer

The National Council for Juvenile and Family Court Judges (NCJFCJ) *Delinquency Guidelines* provide that juvenile delinquency courts must ensure that each disposition is "in line with the circumstances of the individual offense" and "with dispositions of similar offenses" and "minimizes the possibility of bias."<sup>25</sup> Judges should order only those services that have been shown to be effective at producing "positive behavior change in delinquent youth and reduc[ing] recidivism."<sup>26</sup> Yet Equity Project findings indicate that courts sometimes order LGBT youth to undergo harmful and inappropriate services based on biased views about sexual orientation and gender identity.

### Unnecessary Sex Offender Treatment

Many interviewees and survey respondents said that even LGBT youth with no sex offense history are ordered to submit to risk assessments designed to predict the likelihood of future sex offending and undergo sex offender treatment even when no indications of risk exist. Miscategorizing youth as sex offenders can have seriously damaging effects. One youth, Adam, said that the prosecutor in his case argued in court that he should be placed in a more restrictive setting for high-risk youth "so [he] won't become a pedophile."<sup>27</sup> Another defender described a transgender client who showed no aggres-

sion and committed no sexual offenses, yet the judge inexplicably “sent the kid to the center where we send deviant youth who are likely to commit sexual offenses against children.”<sup>28</sup> Youth labeled as sex offenders may also be subject to longer stays in out-of-home placements. As one young man, Dale, explained, he tried to tell the judge that he was gay, by saying, “I’ll never stop liking boys.” The judge thought he meant “I’ll never stop offending against boys.”<sup>29</sup> As a result, the judge did not give him an early release from secure confinement.

Even for those youth whose underlying offense involved sexual behavior, courts should exercise caution before ordering youth to restrictive placements for high-risk sex offenders. The NCJFCJ *Delinquency Guidelines* explain that some sex offenses are “youthful exploration or indiscretions.” When youth act out of simple curiosity or in reaction to abuse, “it is very important for the juvenile justice system not to harm the child further by inadvertently putting the youth together with serious and aggressive sexual offenders.”<sup>30</sup>

## Reparative Therapy

Several interviewees reported that courts had also ordered LGBT youth to undergo counseling to address—and sometimes to change—their “sexual identity confusion” or “gender confusion.”<sup>31</sup> Every major health and mental health organization, including the American Medical Association, American Psychological Association, American Academy of Child and Adolescent Psychiatry, American Counseling Association, and American Psychoanalytic Association, has condemned all forms of such counseling, often referred to as “reparative therapy.”<sup>32</sup>

### Policy Statements from the Medical and Mental Health Professions

The American Medical Association opposes “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 the a priori assumption that the patients should change his or her homosexual orientation.”<sup>33</sup>

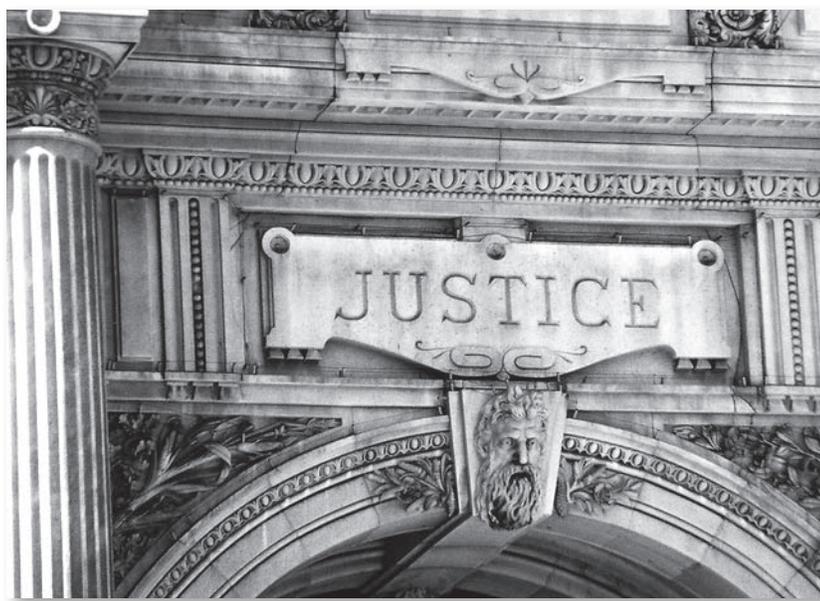
The American Academy of Child and Adolescent Psychiatry notes, “Parents need to clearly understand that [homosexual] sexual orientation is not a mental disorder. . . . Therapy directed specifically at changing sexual orientation is not recommended and may be harmful for an unwilling teen. It may create more confusion and anxiety by reinforcing the negative thoughts and emotions with which the youngster is already struggling.”<sup>34</sup>

The American Counseling Association “opposes the promotion of ‘reparative’ therapy as a cure for individuals who are homosexual.”<sup>35</sup>

The American Psychoanalytic Association believes that “[p]sychoanalytic technique does not encompass purposeful efforts to ‘convert’ or ‘repair’ an individual’s sexual orientation.”<sup>36</sup>

In particularly egregious cases, judges have hospitalized LGBT youth in an attempt to stop their same-sex attractions. One probation officer worked with a lesbian youth who was having sex with another girl; prior to adjudication, the judge, with the parents' approval, ordered that she be placed in a private hospital for 14 days so she could be "treated and diagnosed for this behavior."<sup>37</sup>

Interviewees described several incidents in which facility staff tried to change the sexual orientation of youth in their care. A defender reported that the staff in a residential placement gave a 15-year-old boy a women's lingerie catalog with the explicit purpose of teaching him appropriate sexual desire.<sup>38</sup> In other instances, professionals used coercive tactics that relied on religion to attempt to "convert" youth. For example, a defender reported that the first day a gay client spent in a facility, the counselor handed him "a religious tract on why homosexuality is wrong."<sup>39</sup>



Detention staff also try to change the gender identity of transgender youth, explicitly including such efforts in the youth's treatment plans. For example, an attorney from the South represented a male-to-female (MTF) transgender youth who was detained in a boys' facility. The youth's "treatment plan" stated that she was to receive "help with gender confusion and appropriate gender identity," which included staff prohibiting her from growing her hair out or having any feminine accessories.<sup>40</sup> The same attorney reported that another client—a gender-nonconforming lesbian—had a similar treatment plan "even though she fully accept[ed] that she [wa]s a female, fe[lt] that she [wa]s a female, and seemed to have no confusion about her gender."<sup>41</sup> In another case, a mental health evaluator encouraged the court and facility staff to help a transgender youth, who had been diagnosed with GID, to understand that it was not appropriate to "act like a girl" while incarcerated in a boy's facility.<sup>42</sup>

## Endnotes

1. Equity Project focus group, Brianna, a 17-year-old black-Asian, lesbian youth (May 5, 2008).
2. Equity Project focus group, Jason, a 22-year-old white-Latino, gay youth (Apr. 22, 2008).
3. Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the U.S.* 33 (Sep. 2005).
4. *Id.* at 2.
5. Twenty-nine percent reported police mistreatment as a “very serious” problem, and 40 percent reported it as a “somewhat serious” problem.
6. Equity Project interview with a juvenile defender (July 10, 2007).
7. Equity Project interview with a juvenile prosecutor (Apr. 17, 2008).
8. Equity Project focus group, Yvette, a 16-year-old Latina, lesbian youth (Apr. 11, 2008).
9. Equity Project focus group, Russell, a 21-year-old white bisexual male youth (Apr. 17, 2008).
10. Equity Project focus group, Lily, a 17-year-old Latina-white male-to-female transgender youth (May 1, 2008).
11. Equity Project focus group, Tyler, a 22-year-old Native American, gay male youth (Apr. 17, 2008).
12. Equity Project focus group, Kyle, a 17-year-old white bisexual female-to-male transgender youth (May 4, 2008).
13. Lily, *supra* note 10.
14. Equity Project interview with a juvenile defender (July 17, 2007).
15. Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex Offender Registration and Community-Notification Laws to Juveniles*, 91 Cal. L. Rev. 163, 186 (2003). *See also* Franklin E. Zimring, *An American Tragedy: Legal Responses to Adolescent Sexual Offending* 17 (2004) (almost all states prohibit sexual intercourse with youth under age 16, and more than one third set age of consent at 17 or 18); Sarah Tofte, *No Easy Answers* 72-73 (Human Rights Watch, 2007).
16. Garfinkle, *supra* note 15, at 186. In a majority of states, lewd-conduct laws also prohibit all sexual activity with individuals under the age of 14, even if both parties are underage. *Id.* As Garfinkle notes, these laws do not reflect the research on adolescent sexual development which finds that “[c]hildhood sex play is not psychologically harmful under ordinary circumstances and is probably a valuable psychosocial experience in developmental terms.” *Id.* (internal citation omitted). *See also* Zimring, *supra* note 15, at 17 (noting that only about half the states permit peer sexual contact between older teens because prosecution for consensual sexual activity requires an age gap (varying from two to five years) between the offender and victim).
17. *See* Garfinkle, *supra* note 15, at 187 (“The lack of a clear distinction between consensual and nonconsensual illegal sexual behavior results in an often arbitrary distinction between perpetrators and victims, with the majority of perpetrators being low-income boys, most of whom are already being observed by the juvenile justice system and thus subject to extra scrutiny”); Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave MacMillan 2005).
18. Amanda Petteeruti & Nastassia Walsh, Justice Policy Institute, *Registering Harm: How Sex Offense Registries Fail Youth and Communities* 5 (2008).
19. Equity Project interview with a juvenile defender (July 24, 2007).

20. Equity Project interview with a juvenile defender (July 31, 2007).
21. Equity Project interview with a juvenile defender (July 24, 2007).
22. Equity Project interview with a juvenile defender (July 5, 2007).
23. Equity Project interview with a juvenile defender (July 6, 2007).
24. Anonymous juvenile prosecutor comment, Survey for Prosecutors: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Delinquency Courts, online Equity Project survey.
25. National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 135 (2005) [hereinafter *Juvenile Delinquency Guidelines*].
26. *Id.* at 136.
27. Equity Project focus group, Adam, a 14-year-old African-American gay male youth (May 5, 2008).
28. Equity Project interview with a juvenile defender (July 5, 2007).
29. Equity Project focus group, Dale, a 15-year-old white, gay male youth (July 11, 2008).
30. *Juvenile Delinquency Guidelines*, *supra* note 25, at 150.
31. See also Coalition for Juvenile Justice, *Handle with Care: Serving the Mental Health Needs of Young Offenders* 37 (2000) (“Gay youth talk of therapists who try to ‘cure’ them of their sexual orientation.”).
32. See American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 11-12 (2009), available at <http://www.apa.org/pi/lgbcc/publications/therapeutic-response.pdf>; Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 Nev. L. J. 774, 788 n. 72 (2006).
33. American Medical Association, *Resolution 506: Policy Statement on Sexual Orientation Reparative (Conversion) Therapy* (Apr. 2000), <http://www.ama-assn.org/meetings/public/annual00/reports/refcome/506.rtf>.
34. American Academy of Child & Adolescent Psychiatry, *Facts for Families: Gay, Lesbian and Bisexual Adolescents* (2006), <http://www.aacap.org/page.ww?section=Facts%20for%20Families&name=Gay,%20Lesbian%20and%20Bisexual%20Adolescents>.
35. Joy S. Whitman, et al., *American Counseling Association: Ethical Issues Related to Conversion or Reparative Therapy* (May 22, 2006), <http://www.counseling.org/pressroom/newsreleases.aspx?aguid=b68aba97-2f08-40c2-a400-0630765f72f4>.
36. American Psychoanalytic Association, *Position Statement: Reparative Therapy* (2006), [http://www.apsa.org/ABOUT\\_APSAA/POSITION\\_STATEMENTS/REPARATIVE\\_THERAPY.aspx](http://www.apsa.org/ABOUT_APSAA/POSITION_STATEMENTS/REPARATIVE_THERAPY.aspx).
37. Equity Project interview with a probation officer (Feb. 7, 2008).
38. Correspondence to the Equity Project from a defender (Mar. 12, 2008).
39. Equity Project interview with a juvenile defender (July 5, 2007).
40. Equity Project interview with a juvenile justice professional (Feb. 25, 2008).
41. *Id.*
42. Jody Marksamer, *And by the Way, Do You Know He Thinks He’s a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Delinquency Courts*, 5:1 Sexuality Research & Social Policy 72, 81 (2008).

Chapter 5

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# Impact of Family Rejection and School Harassment on LGBT Youth Involvement in the Juvenile Justice System

Juvenile justice professionals' lack of awareness about the experiences of LGBT youth negatively impacts their ability to work effectively with these youth. More than 79 percent of survey participants listed lack of understanding of LGBT issues by juvenile court personnel as a "very serious" (45 percent) or "somewhat serious" (34 percent) problem in the juvenile justice system. As EPAC member and Brooklyn, New York Judge Paula Hepner explained, "Because prosecutors, probation officers, attorneys, and judges are not sufficiently informed, they proceed inappropriately in cases involving LGBT youth, primarily because they do not understand the 'back' story, not usually because of overt bias."<sup>1</sup>

Understanding the "back story"—or the context within which youth live and act—is critical for effective juvenile court decision making for all youth in the system. For LGBT youth in particular, an added obstacle to fair and individualized treatment is the failure of juvenile justice professionals to understand that societal biases against LGBT youth can negatively impact adolescent development and lead to family rejection and school victimization. These factors can place LGBT youth at risk of contact with the juvenile justice system, and once in the system can negatively influence the trajectory of their cases.

## **Stigma, Rejection, and Harassment Negatively Impact the Development of LGBT Youth**

The stigma, rejection, and harassment that many LGBT youth face in their families, schools, and communities can negatively impact their psychosocial development and behavior. During adolescence, LGBT youth, like their non-LGBT peers, undergo complex physical, psychosocial, cognitive, and sexual changes and must learn to master a range of skills.<sup>2</sup> LGBT youth have the added challenge of contending with these developmental changes while simultaneously negotiating the difficulties of living with a stigmatized identity.

LGBT-related stigma, rejection, and harassment have social, behavioral, and health-related consequences that can increase risk behaviors, such as substance abuse and unprotected sex, and intensify psychological distress and risk for suicide.<sup>3</sup> Equity Project Advisory Committee (EPAC) member Dr. Marty Beyer, a child and adolescent psychologist, explains that adolescents are particularly susceptible to the harm of rejection and harassment because they are in the process of developing their identity. For adolescents, rejection and harassment are traumatic experiences that can delay development and influence their reactions and interactions at home, at school, and in the community. Trauma can lead to depression, substance abuse and hypervigilance (i.e., being on the alert for rejection and threat).<sup>4</sup> Trauma also places adolescents at risk of relationship and school problems that can lead to delinquency.<sup>5</sup>

Understanding these contextual factors helps professionals recognize the root causes of the behaviors that bring youth into the system and make informed decisions about appropriate juvenile court interventions. A developmentally sound approach to juvenile court practice—which takes into account the impact of trauma on youth behavior—allows the

system to provide more effective services. As Dr. Beyer explains, youth might react to their experiences of trauma in ways that can lead them into the juvenile justice system. For example, some common responses to trauma include being flooded with anger from the past that is out of proportion to the present provocation, being self-protective when threatened, and perceiving others as hostile. Professionals working in the justice system should not simplistically view youth's reactive responses to trauma as behaviors requiring punishment. Instead, they should help the youth to make peace with the past; understand their own trauma-related anxiety, hypervigilance, and depression; and learn new, productive responses to rejection and provocation.<sup>6</sup>

## Family Rejection

*“People [working in the juvenile justice system] need to have a better understanding of what LGBT youth are going through, not just what they did.”<sup>7</sup>*

— Jason, a 22-year-old white and Latino gay male youth

More than 9 out of 10 survey respondents identified lack of parental support as a “very serious” or “somewhat serious” problem for LGBT youth in the juvenile justice system.

### **Family rejection leads to negative outcomes for youth and impacts all aspects of the court process.**

While many families support their LGBT children, some parents have difficulty coming to terms with their child's sexual orientation and gender identity. Parents have compared the sense of loss and devastation they feel upon learning their child is LGBT to mourning the death of a child.<sup>8</sup> One study found that 45 percent of parents were angry, sick, or disgusted when first learning of their child's sexual orientation or gender identity.<sup>9</sup> Another study showed that approximately 30 percent of LGBT youth were physically abused by family members as a result of their sexual orientation or gender identity.<sup>10</sup> LGBT youth of all races and ethnicities have experienced family rejection and isolation.<sup>11</sup>

Family rejection of LGBT youth is a significant risk factor that can negatively impact health and mental health outcomes. Researchers from the Family Acceptance Project—the first major study of LGBT adolescents and their families—have documented the impact of family responses to children's emerging LGBT identities.<sup>12</sup> Not surprisingly, they found that family acceptance is an important protective factor, and family rejection leads to serious negative outcomes for LGBT youth. Lesbian, gay, and bisexual young adults who experienced high levels of family rejection during adolescence were 8.4 times more likely to have attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sex compared with peers reporting no or low levels of rejection.<sup>13</sup> Family acceptance and rejection also significantly affected self-esteem, access to social support, and life satisfaction.<sup>14</sup>

### **Family rejection underlies a number of specific offenses with which LGBT youth are charged.**

LGBT youth who experience conflicts at home because of their sexual orientation or gender identity are at risk of entering the system for specific categories of charges like status offenses, domestic disturbances, and survival crimes.

#### **Ungovernability or incorrigibility**

Numerous interviewees observed that inter-family conflicts stemming from parents' refusal to accept a child's sexual orientation or gender identity frequently lead to prosecutors filing charges of ungovernability (also called incorrigibility). This offense refers to youth who are beyond the control of their parents or guardians. One intake officer reported that 9 out of 10 LGBT youth entering the system in her jurisdiction have been charged with ungovernability, curfew violations, or truancy, based primarily on the parents' objections to their children's sexual orientation.<sup>15</sup> One defender summed up the problem in this way:

I somewhat blame the judicial system in that they're [telling youth], "You're not obeying your parents." But if your parents order you not to be gay, how do you do that? If they tell you how to be and you refuse to be who you're not, they charge you with being beyond control.<sup>16</sup>

Acknowledging the serious harm that lack of family support can cause a child, some judges said they offer counseling to families who are struggling to accept their child's LGBT identity "so that the parent can deal with their own feelings, and respect their child for who they are."<sup>17</sup> One judge who has presided over several such ungovernability cases explained:

I try to have a lengthy conversation in front of the child with the parents. I tell the parents how good their child is and how they are lucky that their child is so good. . . . Sexual orientation is secondary and shouldn't be an issue.<sup>18</sup>

Other judges, however, are ill-equipped to respond to these family conflicts. In one case in which a mother could not accept her daughter's lesbianism, the presiding judge did not order any services to address the interfamilial conflict and simply responded, "Well ma'am, you just have to talk to your daughter. You, young lady, have to understand where your mother is coming from."<sup>19</sup>

#### **Runaways, homelessness, and survival crimes**

Family rejection can also lead to homelessness. Studies have shown that LGBT youth are disproportionately represented in the homeless youth population, making up between 20 and 40 percent of all homeless youth.<sup>20</sup> These young people may be on the run from abusive families and/or foster care placements where they have experienced verbal and physical abuse on account of their actual or perceived sexual orientation or gender identity. Once



on the street, LGBT youth often have nowhere to turn for help or protection. Studies have shown that homeless LGBT youth experience discrimination, as well as assaults by peers, when trying to access services for homeless youth.<sup>21</sup> Few services are available specifically for homeless LGBT youth; for example, in New York City, where there are approximately 7,000 LGBT youth who are homeless, only 26 beds are specifically allocated to LGBT individuals.<sup>22</sup> Homelessness also exposes LGBT youth to a high risk of victimization, including assault, robbery and rape. Among homeless youth, LGBT youth report the highest rates of victimization, risk, and health concerns.<sup>23</sup>

Research shows that leaving home as a result of family rejection is the greatest predictor of future involvement with the juvenile justice system for LGBT youth.<sup>24</sup> In a study of LGBT homeless youth, 39 percent reported they had been “kicked out” of their home because of their sexual orientation or gender identity, and 45 percent reported involvement with the juvenile justice system.<sup>25</sup> Interviews with professionals echoed the research findings; many professionals reported that conflicts between parents and their children over LGBT identity led to youth running away, which is a status offense that can result in court intervention. LGBT youth who are homeless often commit “survival crimes,” such as theft, prostitution, and drug sales, to obtain life necessities like adequate housing and food.

### Shoplifting

Several of the defenders, probation officers, and juvenile justice professionals had worked with homeless LGBT youth who turned to shoplifting for their basic life necessities, such as toothpaste and deodorant. Moreover, a few people mentioned that shoplifting charges often occur when youth could not otherwise obtain clothing items associated with the opposite sex, and one judge remarked that charges against transgender youth in her courtroom mostly related to shoplifting.<sup>26</sup>

### Prostitution

Like other youth who are homeless, LGBT youth sometimes turn to sex work for survival.<sup>27</sup> One defender noted that every client she has represented with a prostitution charge has been LGBT, and many others commented on the fact that transgender youth, in particular, are often arrested for prostitution. One explanation for the prostitution charges is that LGBT youth are disproportionately represented among the runaway population.

The experience of one youth, George, illustrates that pervasive abuse and rejection marginalize LGBT youth and place them at risk of commercial sexual exploitation.<sup>28</sup> When he was five years old, George's father abandoned him, leaving him in the care of an abusive aunt and uncle. For years, George endured the beatings and verbal abuse of family, whom he describes as "the monsters waiting for me at home," because he is gay. He thought of school as his sanctuary until a teacher sexually assaulted him. At age 14, determined to find new meaning and a new home, he fled to Hollywood, where he lived on the streets and worked as a prostitute to survive. After two years, he was arrested and placed in an LGBT group home, where he felt like he was given a second chance. George is a survivor, but as he admits, "For the past ten years, [the history of prostitution] has haunted me. It's one of those labels you can't live down—ever."



### Substance abuse

Family rejection can also contribute to drug use, which can lead to status offense or drug possession charges.<sup>29</sup> Research suggests a high rate of substance abuse by youth who have been traumatized in an effort to numb their feelings and past memories.<sup>30</sup> Professionals discussed in interviews what they viewed as a relatively high rate of substance use by LGBT youth and said that they believed youth were “self-medicating.” One defender attributed drug use by LGBT youth to “a general feeling of being disenfranchised” because of societal biases against them.<sup>31</sup>

### Domestic disputes

*“I told [my lawyer] that my aunt and mother kicked me out because I was gay and put a restraining order on me to stay out of the house. I had a good lawyer. [He] helped me get support and helped me fight the restraining order.”<sup>32</sup>*

—Jesus, a 19-year-old Latino gay youth

For youth who live daily with parental rejection and abuse, turmoil at home can lead to arguments that result in domestic violence charges. For instance, one defender represented a 16-year-old boy whose father did not accept the fact that his son was gay.<sup>33</sup> The conflict had twice erupted into physical altercations, which resulted in the police arresting the youth even though indications existed that the father was abusing him. In another case, the prosecutor charged a lesbian youth with assault after she had a dispute with her mother about having a girlfriend. The youth’s defense counsel believed that the prosecutor proceeded with the case because the youth was a lesbian. The defender also noted that her client’s disposition “[wa]s definitely harsher than a heterosexual kid would have gotten.”<sup>34</sup>

### Lack of family involvement in the delinquency case also negatively impacts LGBT youth.

*“The biggest problem does not come from systematic components (i.e. police, court, probation), but from parents that have trouble accepting their child’s orientation.”<sup>35</sup>*

—a juvenile court prosecutor

Once youth enter the system, family support—or lack thereof—affects the course of their cases. Despite evidence demonstrating that families play a critical role in the success or failure of their children in delinquency cases, the courts, probation agencies, and correctional systems rarely engage families in the process of making decisions or developing disposition plans.<sup>36</sup> The high rate of family rejection for LGBT youth in the system only exacerbates this common problem and increases the likelihood that the system will subject LGBT youth who lack family support to disproportionately harsh sanctions at every stage of the process.<sup>37</sup>

## School Harassment

*“My mom [told the judge I was gay]. She told him I wouldn’t go to school and I got kicked out. [But the problem was] I was getting harassed at school. My PO lied and said it wasn’t as bad [at school] as it was.”<sup>38</sup>*

—Andrew, a 17-year-old Latino gay male youth

Like rejection at home, harassment at school is another factor which is external to the justice system but can place LGBT youth at risk of juvenile court involvement and negatively impact the course of their delinquency cases.

### **LGBT youth’s experiences at school also impact their involvement in the juvenile courts.**

The school system and juvenile justice system have become inextricably linked in ways that undermine the effectiveness of each system. Schools today often rely on the court system to handle minor student misconduct that historically would have been handled informally by the school. These school-referral cases have clogged juvenile court dockets, reduced academic achievement, and saddled youth with a host of negative consequences that flow from juvenile court involvement.<sup>39</sup> Like other youth, LGBT youth are impacted by the tendency to criminalize student behavior. For them, however, the problem is exacerbated by the harassment and abuse they face in schools.

### **LGBT youth face pervasive harassment and violence in schools.**

LGBT youth are often subjected to relentless bullying and harassment by classmates. Not only do schools often fail to intervene in student-on-student harassment, but school personnel themselves also engage in harassment.<sup>40</sup> An extensive survey of students in Massachusetts high schools found that lesbian, gay, and bisexual youth are more than twice as likely to report having been in a physical fight at school in the previous year and three times more likely to report having been injured or threatened with a weapon at school in the past year than their non-LGB peers.<sup>41</sup> Similarly, a 2007 national survey of self-identified LGBT youth aged 13 through 20 found that:

- Nearly three fourths of respondents heard homophobic remarks in their schools frequently or often;
- 86 percent reported being verbally harassed (e.g., called names or threatened) at school because of their sexual orientation, and 67 percent of students were verbally harassed because of their gender expression;
- 44 percent of students had been physically harassed (e.g., pushed or shoved) at school in the past year because of their sexual orientation and 30 percent because of their gender expression;

- 22 percent reported being physically assaulted (e.g., punched, kicked, injured with a weapon) because of their sexual orientation and 14 percent because of their gender expression;
- 61 percent of youth felt unsafe in their schools because of their sexual orientation; and
- 38 percent felt unsafe because of their gender expression.<sup>42</sup>

In Equity Project focus groups, youth recounted similar experiences of harassment in their schools. Yvette explained, “[School security] is so disrespectful; I can’t even put my arm around my girl. They say it’s not appropriate, but the boys are all nasty and rub up on the girls and the security say nothing.”<sup>43</sup> Another girl from the same school, Gisela, agreed, pointing out that security will tell groups of girls who openly identify as lesbians that they cannot congregate in the bathroom, whereas girls not perceived to be lesbian are not treated the same.<sup>44</sup>

#### **LGBT youth who are victimized in school are also at risk of school failure.**

School failure significantly increases the chances of youth becoming involved in the juvenile justice system and negatively affects their prospects for a successful transition to adulthood. The lack of safety in schools for LGBT youth can lead to lower academic achievement and disengagement from school,<sup>45</sup> with those students experiencing the most harassment also showing the lowest academic achievement. For example, one survey found that students more frequently facing harassment because of their sexual orientation or gender expression had grade point averages almost half a grade lower than students experiencing less frequent harassment.<sup>46</sup> In addition, nearly one third of LGBT students who drop out of high school do so to escape harassment.<sup>47</sup> Once youth drop out, they are a heightened risk for juvenile court involvement.<sup>48</sup>

#### **LGBT youth who skip school to avoid harassment face truancy charges.**

LGBT youth are likely to skip school to avoid the physical and verbal torment that awaits them there. In one study, 32.7 percent of LGBT students reported that they had missed school in the past month because they felt unsafe, compared to 4.5 percent of a national sample of secondary school students.<sup>49</sup> These youth are vulnerable to arrest on truancy charges, as well as violations of a common probation condition that requires daily school attendance. One prosecutor noted that if school harassment is driving a youth’s truancy, punishing the youth by formally processing him is not likely to make him go to school. Until the underlying harassment is addressed, the youth’s decision to skip school remains a rational one, grounded in the desire to protect himself.

#### **LGBT youth who defend themselves against harassment and violence at school face charges.**

In some instances, LGBT youth have fought back to defend themselves at school, and the system has respond by charging them, rather than the instigator, with disorderly

conduct or assault. One defender remarked that he had seen cases in which LGBT youth were bullied for long periods of time, and the school police responded by asking the bullied youth accusatory questions like, “Why were they calling you a faggot? Why would they think that?”<sup>50</sup> This same defender said that school officials accused another one of her clients of being “so provocative that the kids couldn’t help but pick on him” because he wore nail polish.<sup>51</sup>

Project findings indicate that a lack of understanding about the violence and harassment that LGBT youth face at school can lead to other inappropriate responses to youths’ behavior. For example, having endured constant harassment at school, Kevin, a female-to-male transgender youth, eventually “snapped” and punched a classmate who taunted him because of his masculine appearance. Rather than interpreting Kevin’s actions in the context of the harassment he had suffered, the system perceived him merely as a “danger to society” and incarcerated him. As Kevin recalled, no one ever bothered to ask him to explain his behavior.<sup>52</sup>



### **LGBT youth are targeted for disproportionate punishment by school personnel.**

A mix of factors, including the adoption of “zero tolerance” discipline policies, placement of law enforcement officers on campus, creation of new categories of school-specific offenses, and failure to provide appropriate special education and other services have converted many juvenile courts into de facto school disciplinarians. As a result of anti-LGBT bias, LGBT youth might be particularly impacted by these punitive responses to typical adolescent behavior.

For example, one defender had a client who was a transgender girl. She was astounded by the vehemence with which the school administrators targeted this youth. As she explained, “He (sic) [uses] his cell phone and he gets arrested, where most kids would just have the phone confiscated. And the principal is physically aggressive toward him, so he has a long record, but it’s mostly things that are provoked.”<sup>53</sup> Another defender described an incident in which a transgender female client named Raquel, other female classmates,

and the school quarterback were wrestling and tickling each other in the hallway at school. At some point, Raquel allegedly touched the quarterback on his upper thigh and everyone laughed. Later that week, the quarterbacks' parents threatened to (but did not) sue the school because of the incident and because Raquel allegedly told the quarterback she wanted to kiss him. The following week, the principal told Raquel he was suspending her because of her "girl hairdo."<sup>54</sup> Although the defender and other youth advocates negotiated with the school to allow her back at school the next day, the principal immediately suspended Raquel again, this time accusing her of "sexual assault" on the quarterback because of the incident in the hallway the previous week. The two other girls who were wrestling with Raquel were not suspended.

**For LGBT youth in the justice system, problems at school are counted against them in the course of the case.**

Regardless of the offense with which a youth is charged, school-related problems can affect the course of a young person's court case. As EPAC member Kim Forte, a defense attorney in the Juvenile Rights Practice of New York's Legal Aid Society, explained, "If an LGBT youth is having problems at school, it makes it so that everything with their court case snowballs into a big avalanche."<sup>55</sup> For example, one common condition of probation is regular school attendance, and when youth skip school to protect their own safety, their probation is often revoked without concern for the reasons that they did not attend school. Mishi Faruqee, EPAC member and advocate with the Children's Defense Fund, agreed that homophobia, harassment and mistreatment outside of the system are "one of the biggest problems" because "these factors are counted against a youth when they enter the system."<sup>56</sup>

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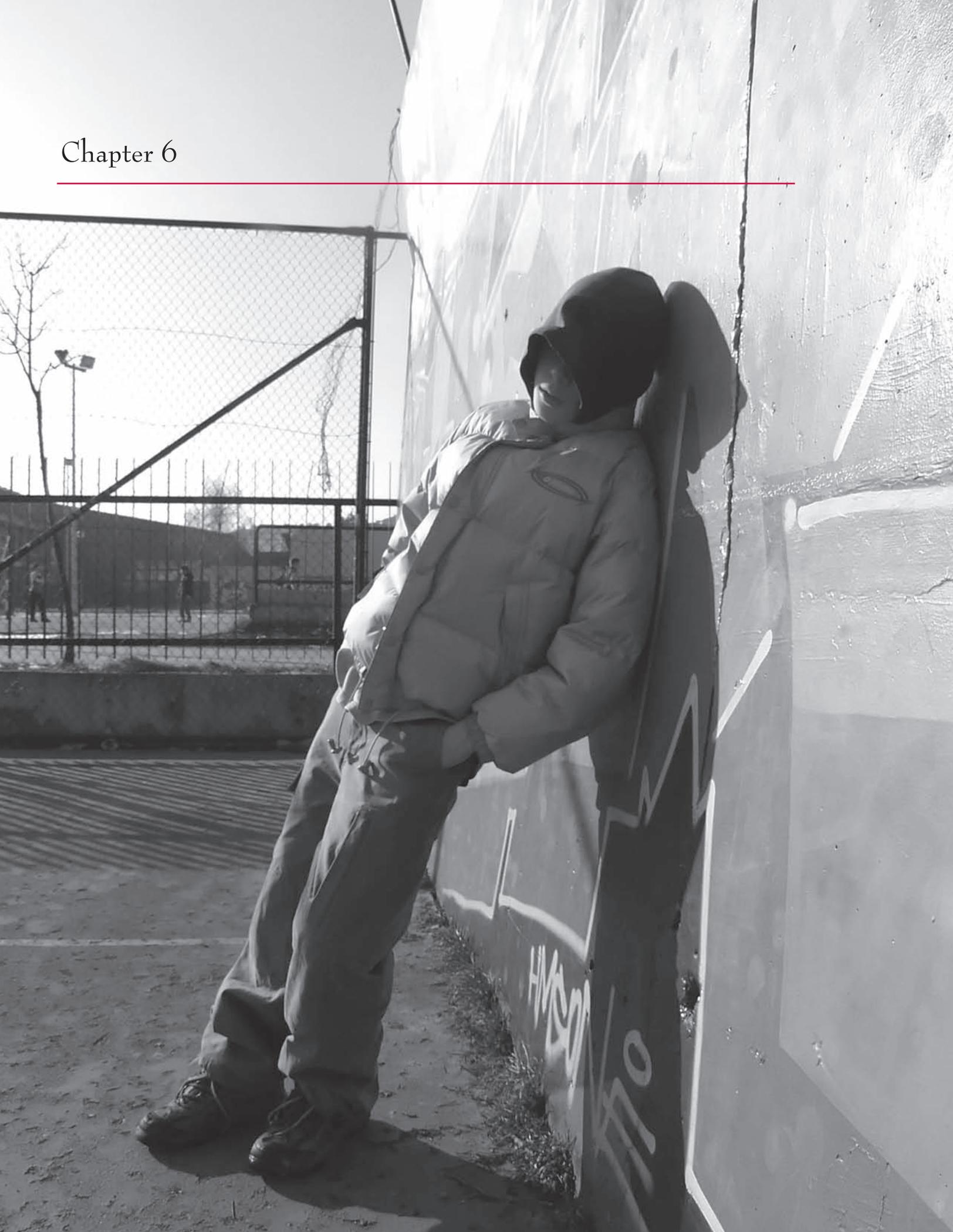
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## Chapter 6

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## Lack of Services to Meet the Needs of LGBT Youth

*“[LGBT youth] are often rejected and disenfranchised by the very agencies that should be serving them.”*

—Coalition for Juvenile Justice<sup>1</sup>

To achieve their rehabilitative purpose, juvenile courts must tailor interventions to meet the individualized treatment needs of the youth under their jurisdiction.<sup>2</sup> Dispositions should implement effective delinquency prevention strategies and provide a continuum of *effective and least intrusive* responses to reducing recidivism.<sup>3</sup> However, juvenile courts should not maintain jurisdiction in individual cases solely as a means to access services. As the National Council of Juvenile and Family Court Judges (NCJFCJ) *Juvenile Delinquency Guidelines* emphasize, the delinquency system should “divert cases to alternative systems whenever possible and appropriate” so that only serious or chronic offenses should reach disposition.<sup>4</sup>

A lack of effective programs impedes the juvenile justice system’s ability to provide effective treatment to youth. Partly because of the pervasive lack of programs based in the community, the juvenile justice system relies primarily on incarceration of youth—an intervention that has proven both ineffective and profoundly harmful. Commentators have noted that the lack of mental health services in the community has inappropriately converted the juvenile justice system into the *de facto* mental health system.<sup>5</sup> Even where alternatives to incarceration exist, their effectiveness varies widely. Although some jurisdictions have implemented evidenced-based practices in community settings, many continue to rely on ineffective and unaccountable community-based programs. For LGBT youth, these general barriers are compounded by the fact that there are few programs, placements, or services that are competent to serve them.

### **What Makes Programs, Placements, or Services Competent to Serve LGBT Youth?**

Experts agree that effective interventions “must be designed with appropriate developmental and cultural understanding,”<sup>6</sup> which includes sensitivity to a youth’s race, culture, gender, and sexual orientation.<sup>7</sup> Programs and placements that are competent to work with LGBT youth ensure that LGBT youth are safe, treated fairly, and have their needs met. Specifically, competent programs:

- Are designed with the understanding that at least some of the youth served will be LGBT;
- Do not make assumptions about the sexual orientation and gender identity of individual youth;
- Do not rely on gender, race, or other stereotypes but make individualized assessments of the strengths and needs of each client;
- Unequivocally prohibit any attempts to change a youth’s sexual orientation and gender identity;

- Adopt and enforce nondiscrimination policies;
- Implement protocols that maintain the confidentiality of information regarding a youth's sexual orientation and gender identity;
- Require training of all service providers on issues related to sexual orientation and gender identity;
- Address developmental, physical, social and emotional concerns of LGBT youth;
- Understand and address the impact of societal bias on LGBT youth development;
- Provide LGBT youth with help in addressing issues of family rejection, school harassment, and societal stigma; and
- Provide support to families of LGBT youth or refer families to appropriate programs.

Some jurisdictions have begun identifying and developing more LGBT-competent services and placements. In one jurisdiction, for example, a judge reported that a colleague has recruited LGBT-friendly foster homes, and others in the jurisdiction have “been supportive of her efforts.”<sup>8</sup> In other jurisdictions, agencies have opened group homes specifically for LGBT youth. One young woman, Brianna, said developing a “gay youth home” was “the best thing they ever did” because the staff support LGBT youth’s sexual orientation and gender identity “with no questions asked.”<sup>9</sup> She explained, “I was very comfortable in this group home. I said I’m gay and they said ‘Alright, we were looking for kids like you.’”<sup>10</sup> As other professionals and youth agreed, specialized placements can ensure that LGBT youth are protected from physical and emotional abuse.<sup>11</sup>

However, not all youth want to be placed exclusively with other LGBT youth, nor do all LGBT youth require the level of services provided in a group setting. Moreover, the existence of specialized placements for LGBT youth does not absolve the juvenile justice system of its responsibility to develop less restrictive placements and to ensure that other placements demonstrate competence to work with LGBT youth.<sup>12</sup> Some professionals interviewed for this project stated that the creation of specialized placements only marginalizes LGBT youth. As one youth, Reynaldo, who had been in a group home for LGBT youth, pointed out, “If they think you are gay and they sentence you to placement, they send you to a gay place, but maybe you don’t want to go there and your needs are not being met.”<sup>13</sup> Group homes and programs that are competent to serve LGBT youth, although not designed exclusively for them, can also provide appropriate services and treatment.

**Many jurisdictions lack programs and out-of-home placements competent to serve LGBT youth, which can lead to unnecessary case petitions, pretrial detention, and out-of-home placements.**

*“It’s ignorance on our part not knowing what resources are out there. There may be resources in the community, but if they are out there, we don’t know about them.”<sup>14</sup>*

—a juvenile court judge

Unfortunately, a scarcity of programs competent to serve LGBT youth impedes the ability of youth to access the services they need and unnecessarily prolongs their involvement in

the juvenile justice system. Equity Project findings indicate a lack of appropriate services and placements at all stages of the continuum.

### **Lack of diversion options**

Approximately 63 percent of the professionals surveyed stated either that the diversion programs in their jurisdiction were not competent to work with LGBT youth or that they did not know of any LGBT-competent diversion programs. With few diversion options, the system is more likely to formally charge and process LGBT youth when diversion would be more appropriate.

### **Lack of disposition programs**

Only 37 percent of survey respondents knew of disposition programs or resources in their jurisdictions that they believed could serve LGBT youth appropriately. Whether respondents simply lack awareness of programs that do exist or there are no such programs in their jurisdictions is unclear. Either way, the end result is the same; the system fails to provide LGBT youth with appropriate services that can meet their individualized needs.

### **Lack of appropriate out-of-home placements**

Approximately 82 percent of all Equity Project survey participants reported that the lack of LGBT-competent placements was a serious problem for LGBT youth in the juvenile justice system. In addition, 74 percent identified lack of placements that will accept LGBT youth as a serious problem. Professionals encountered many facilities that refused to accept LGBT clients because they were afraid that they could not keep LGBT youth safe, thought LGBT youth, especially transgender youth, would be disruptive to their programming, or believed that LGBT youth would sexually prey on other youth in the program. As a result, some LGBT youth are placed in settings that are more restrictive than necessary. In one case, a probation officer recommended that a transgender youth be placed in a nonsecure group



home. When no group homes in the state were willing to accept her, the court ordered her placed in the state's highest-security facility because it is legally required to accept any referred youth.<sup>15</sup> In another case, a defender had a gay client who was described as "flamboyant," but not violent or otherwise high risk. The defender said it was very difficult for her to find a competent program for him because "most of the places that would normally take such a kid were scared that because he was gay they couldn't keep him safe."<sup>16</sup>

Numerous interviewees also stated that probation departments have detained LGBT youth after disposition for periods of up to a year or more because other placements refused to accept custody of them or were not appropriate for them. Not only does this unjustifiably prolong the amount of time youth are exposed to the harms of detention, but their rehabilitation and eventual release from court jurisdiction are also delayed as long as they are detained.

**A lack of mental health professionals and evaluators competent to serve LGBT youth also prevents those youth who have mental health needs from obtaining treatment.**

Not all LGBT youth require mental health services. For those who do, evaluators and counselors with expertise in working with LGBT youth are critical for ensuring that they receive thoughtful and appropriate treatment. Unfortunately, the Coalition for Juvenile Justice found that "counseling and other services are virtually worthless [for LGBT youth] because they either ignore or criminalize the youth's sexuality."<sup>17</sup> Many of the professionals interviewed agreed with this assessment. One defender in a rural area explained:

If [the youth are] having gender identity or sexual orientation issues, [they're provided] just generic counseling . . . To my knowledge there's not a counselor in the area that deals specifically with [LGBT youth]. I think it absolutely would be beneficial. Several of our places that offer services in the community are Christian-based, which is all fine and good, but there may not be quite the level of acceptance.<sup>18</sup>

Another defender from a rural area in the Northwest explained that, "LGBT youth end up in mental health facilities [because] there's just nowhere else to send kids to get therapy for any issue because these are the only counselors available. There is no one else for a teen to discuss this situation with."<sup>19</sup>

Mental health evaluators with LGBT expertise also are in short supply. Seventy-seven percent of Equity Project survey respondents reported that they were unaware of any evaluators in their jurisdictions who have specialized knowledge in working with LGBT youth. One defender explained that mental health evaluators often lack an understanding of typical adolescent development and are "proceeding from the presumption that

healthy sexual development is heterosexual, and that LGBT kids need mental health treatment because of their ‘other’ sexual preferences.”<sup>20</sup> As a result, several other defense attorneys remarked that mental health evaluations of LGBT clients often implied that their LGBT identity “made them more disturbed” or reflected defiant behavior, particularly for girls who identified as bisexual.<sup>21</sup> Once a youth is labeled “defiant,” the court often imposes harsher dispositions based on the perception that he or she is less likely to comply with services.

### **Appropriate counseling for families of LGBT youth is lacking.**

*“My mom made me uncomfortable by making me wear dresses, and . . . she wouldn’t let me be me. . . . [N]ow, my mom has to go to counseling and therapy to learn to accept me. . . . She is starting to understand. Now she’s like ‘I love my daughter.’ It feels good to accomplish that.”<sup>22</sup>*

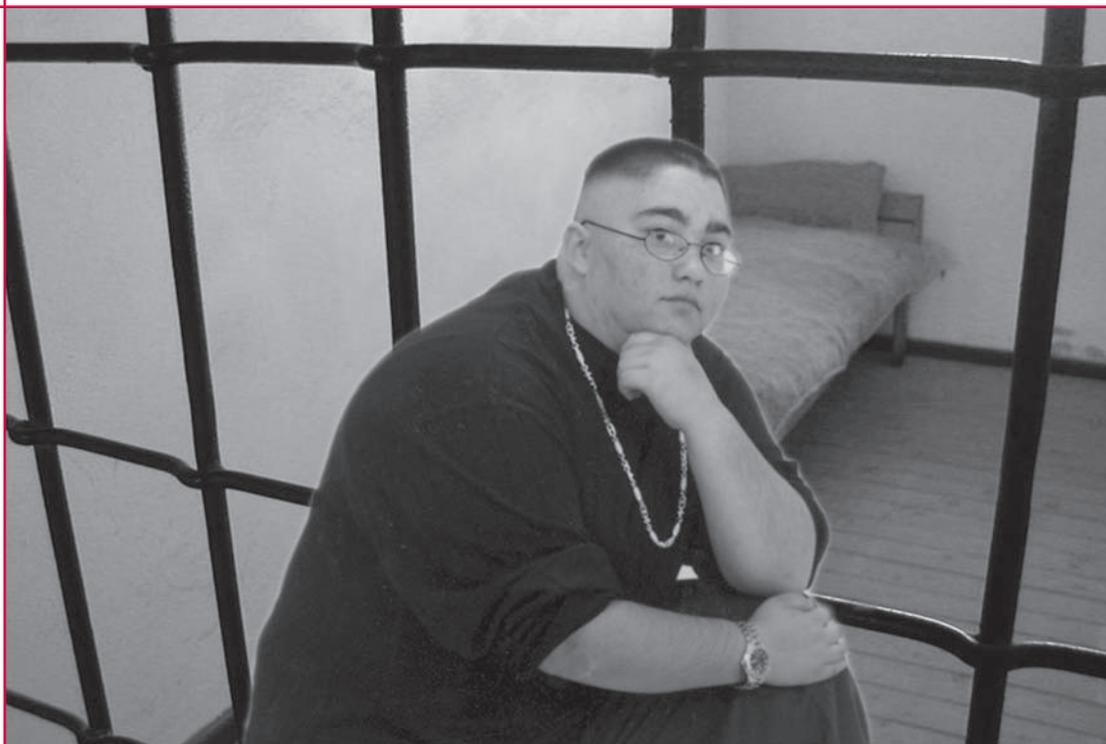
—Precious, a 17-year-old black-Asian lesbian youth

Effective disposition planning requires consideration of the youth’s and family’s strengths and needs.<sup>23</sup> The system should engage families in the process by encouraging them to participate in the development and implementation of their child’s disposition.<sup>24</sup> In fact, judges in many jurisdictions can require parents to participate in family treatment, counseling, and appointments with probation.<sup>25</sup>

#### **Practice Tips: Interventions to Strengthen Families**

In appropriate cases, the juvenile justice system should provide families with interventions that will help resolve familial conflicts stemming from a child’s sexual orientation or gender identity. In particular, juvenile justice professionals should:

- Engage families in the court process; don’t let families simply disengage because their child is LGBT;
- Provide support and guidance to parents and caregivers to help them adjust to their child’s sexual orientation or gender identity;
- Educate families on the positive impacts of family acceptance, as well as the negative impacts of family rejection on youth;
- Refer parents and caregivers to counseling to address feelings, attitudes, and behaviors toward their children’s sexual orientation and/or gender identity;
- Provide intensive home-based services to address any crisis situation presented by the family’s discovery of the youth’s sexual orientation and/or gender identity; and
- Support LGBT youths’ connections to their extended families.<sup>26</sup>



Juvenile courts struggle to appropriately engage families in general. For LGBT youth in particular, the lack of appropriate counseling for families who are struggling to come to terms with their child's sexual orientation or gender identity poses a serious barrier to treatment. One juvenile justice professional explained, "It's really hard for the parents. They are not sure what kind of life their kid will face, but the parents have to realize that they can't expect their kid to be someone they are not."<sup>27</sup> One judge explained, "You could have a family that says 'we don't want her home until she straightens out.' How do you get to that family? [The youth is] going to keep running because she's not treated well. All of that comes into play. Family is critical for a lot of the issues."<sup>28</sup> Without professional resources to help families learn to come to terms with their children's identities, judges are often left to address these issues in whatever way they can. One judge lamented, "We don't have resources. The biggest resource we have is me fussing at parents for not accepting their children for being gay or lesbian."<sup>29</sup> Where services exist, they can be helpful. A few people mentioned in interviews that family counseling, including services provided in the home, have helped strengthen the parent-child relationship.

### **A Note on the Danger of Basing Prosecution Decisions on a Youth's Need for Services**

The responsibility of the juvenile justice system to provide court-involved youth with necessary treatment services is undisputed. Because many families lack access to adequate mental health services in their communities, some juvenile justice professionals have come

to view the justice system as the default mental health system. As a result, they willingly take shortcuts around due process to provide youth with the services that are available in the justice system.

One prosecutor, for example, explained that he was more likely to petition an LGBT youth's case when family conflicts existed because juvenile court involvement "is a necessary step . . . to get family counseling in order to address the relational stress that LGBT issues cause on many families." This practice, however, is fundamentally unfair. Juvenile adjudications bring with them the awesome prospect of loss of liberty, as well as a host of other short- and long-term consequences that can negatively impact an individual's life outcomes.

Deciding to file a case (or encouraging youth to plead guilty) merely to secure services ignores these harsh realities and deprives youth of due process. Moreover, using the juvenile justice system in this way distorts the purpose of the system. When juvenile court processing is not otherwise necessary, youth should receive services outside of the justice system.

### **Practice Tip: Respecting the Privacy Rights of LGBT Youth**

The decision to reveal information about a youth's sexual orientation and gender identity belongs to the youth alone. Some youth will freely reveal this information to everyone in a case; others might not feel as comfortable discussing their LGBT-identity or might want to keep it from professionals or their parents. One young woman named Claire explained that she did not tell anyone working on her case that she is a lesbian because she was afraid of what her parents would do if they learned this information from others in court.<sup>30</sup>

Juvenile justice professionals should respect each youth's privacy and never disclose a youth's sexual orientation or gender identity unless the youth has given them permission. This principle applies even in situations in which professionals conclude that revealing information about a youth's sexual orientation or gender identity against a youth's wishes is "in the youth's best interests." Doing so could compromise a youth's safety at home, in placement, at school, and even in the courthouse, as well as violate his or her trust. Equity Project findings revealed instances in which professionals have relayed highly sensitive and personal information, such as a youth's HIV status or LGBT identity, without consulting with the youth or protecting the youth's privacy rights to the greatest extent possible.

Juvenile justice professionals should take the following steps to protect the privacy rights of LGBT youth:

- Professionals should abide by all applicable ethical guidelines and confidentiality laws regarding disclosure of case information. Even if no legal or ethical prohibition on disclo-

sure exists, professionals should, with the youth's consent, share only that information which is necessary to achieve a particular purpose, such as identifying an appropriate placement.

- Defense attorneys, in particular, are bound by the duty of loyalty to their clients, the attorney-client privilege, and the duty to engage in client-directed representation. Defense attorneys are therefore ethically bound to allow the client to decide whether to disclose his or her sexual orientation or gender identity in the course of the case.
- The court should honor requests to redact information about a youth's sexual orientation or gender identity in court records.
- Defense attorneys should ensure that clients understand who has access to court records or other documents that contain personal information.

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19. Equity Project interview with a juvenile defender (July 27, 2007).
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21. Equity Project interview with a juvenile defender (July 6, 2007).
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23. *Juvenile Delinquency Guidelines*, *supra* note 2, at 134.
24. *Id.* at 134-35.
25. *Id.* at 141.
26. Adapted from Wilber et al., *supra* note 11, at 15-25.
27. Equity Project interview with a juvenile justice professional (July 26, 2007).
28. Equity Project interview with a juvenile court judge (Feb. 22, 2008).
29. Equity Project interview with a juvenile court judge (Feb. 21, 2008).
30. Equity Project focus group, Claire, a 21-year-old white lesbian female youth (June 2, 2008).

## Chapter 7

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## Harmful and Inappropriate Use of Pretrial Detention

*“[T]here is no value in detention as a deterrent to delinquency. The child who will be deterred by a stay in detention is the same child who is affected positively by his court appearances before the judge.”<sup>1</sup>*

—Institute of Judicial Administration-American Bar Association  
Juvenile Justice Standard 3.3

Restraints on a youth’s freedom pending trial are generally contrary to public policy.<sup>2</sup> Most state statutes provide that pretrial detention should be used only to ensure that alleged delinquents appear in court or to minimize the risk of serious reoffending while current charges are pending.<sup>3</sup> Youth who do not meet these standards must be released to their parent, guardian, or caregiver, or other suitable nonsecure placement.<sup>4</sup> Professional standards and guidelines provide that detention decisions should be based on objective, evidence-based criteria, and jurisdictions should develop an array of alternatives to detention that can ensure public safety and youth’s appearance in court.<sup>5</sup>

However, for a number of reasons, including lack of alternatives or a desire to punish youth, many jurisdictions inappropriately detain youth pending adjudication.<sup>6</sup> Despite the fact that the U.S. crime rate is lower than it has been in 20 years, 500,000 youth are detained every year in facilities across the country.<sup>7</sup> Many of these youth are not “high risk,” and approximately 70 percent are detained for nonviolent offenses.<sup>8</sup> The overreliance on detention has a grossly disproportionate impact on youth of color who, according to a 2005 study, represent over two thirds of the youth in detention.<sup>9</sup>

### Critical Implications of Detention for LGBT Youth

The decision to detain a young person pending adjudication has critical implications. Numerous studies have shown that youth in detention are at risk of abuse, injury, and suicide.<sup>10</sup> Chapter 8 discusses how this is particularly true for LGBT youth. Time spent in detention also increases the chances that a particular youth will engage in delinquent behavior in the future,<sup>11</sup> undermining the rehabilitative purpose of the juvenile justice system. Detained youth are cut off from their pro-social connections to the community, including participation in extracurricular school activities, mentoring programs, and religious activities.<sup>12</sup> Detention also negatively affects youths’ court cases because detained youth are less able to assist in preparing for trial, less likely to make a positive impression on the judge, and more likely to receive harsher dispositions than youth who are released pending trial.<sup>13</sup>

### Emerging Research on LGBT Youth in Detention

In 2007, the Annie E. Casey Foundation Juvenile Detention Alternatives Initiative (JDAI) funded a national study by Ceres Policy Research to (1) determine how many lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth are detained in juvenile facilities and (2) determine whether LGBTQ youth are experiencing different patterns of detention when compared with heterosexual and gender-conforming youth.<sup>14</sup>

The study took place in six JDAI jurisdictions: Portland, Oregon; Albuquerque, New Mexico; Minneapolis, Minnesota; Santa Cruz, California; Las Vegas, Nevada; and Birmingham, Alabama. Over the course of eight months, researchers collected more than 2000 anonymous surveys from youth in detention facilities in these jurisdictions at the time of intake. The surveys included demographic questions, as well as questions about youth's history of school discipline, school-based bullying, family conflict, running away, and homelessness. In addition, the surveys asked youth to indicate the reasons they had been arrested over the last twelve months.

Completed in early 2009, the study found that approximately 13 percent of the youth surveyed were LGBTQ.<sup>15</sup> A breakdown of the total number by gender revealed that 11 percent of boys and 23 percent of girls were "not straight" as the researchers defined that term. Compared with their heterosexual peers, LGBTQ youth in detention were:

- Twice as likely to have been removed from their homes because someone was hurting them (11 percent of straight youth, compared with 23 percent of LGBTQ youth);
- Almost twice as likely to have lived in a foster or group home (18 percent of straight youth, compared with 32 percent of LGBTQ youth);
- More than twice as likely to have been detained in juvenile facilities for running away from their home or placement (12 percent of straight youth, compared with 28 percent of LGBTQ youth); and
- Four times as likely to have been detained in juvenile facilities for prostitution (2 percent of straight youth, compared with 9 percent of LGBTQ youth).

Another study by Ceres Policy Research in 2007 also found that lesbian, gay, bisexual, and questioning (LGBQ) youth are more likely than heterosexual youth to be detained. The researchers surveyed 428 students, 14-to-17 years of age, from 14 schools in Santa Cruz County, California, with the purpose of examining the link between alcohol and drug use, school suspension and expulsion, and juvenile detention among youth in the county.<sup>16</sup> Although not the focus of the study, the data revealed that LGBQ youth were disproportionately detained in Santa Cruz County. Thirty-eight percent of LGBQ youth surveyed, compared to only 9 percent of all youth surveyed, had been arrested and detained. In addition, LGBQ youth were more than twice as likely to have been detained for drug- or alcohol-related offenses.<sup>17</sup>

### **Factors Leading to the Unnecessary Detention of LGBT Youth**

Approximately half of Equity Project survey respondents indicated that overuse of detention was a "very serious" or "somewhat serious" systemic problem for LGBT youth in the juvenile justice system, and numerous interviewees reported cases in which LGBT youth were detained even though they posed no flight or safety risk. Equity Project findings indicate that the juvenile justice system inappropriately detains LGBT youth for a variety of reasons.

### **LGBT youth are frequently detained because they lack family support.**

Detaining a youth merely because his or her family refuses to allow him or her back home is inappropriate and unnecessary. Instead, the court should order placement of the young person in kinship care, foster care, or another nonsecure environment.<sup>18</sup> Yet Equity Project findings indicate that lack of family support for many LGBT youth is a significant factor leading to their detention. Several defenders who were interviewed described LGBT clients who were detained solely because their families disapproved of their sexual orientation or gender identity and refused to allow them to return home. For example, when one father told the judge in court that he did not want his son in his home because he was gay, the judge ordered the youth detained without considering alternative placements. The case involved a domestic battery charge, and the defender commented, “In [any other case like this], the judge would have sent everyone home and told them to go to counseling, but his Dad was just really anti-gay.”<sup>19</sup>

### **Courts inappropriately detain LGBT youth out of concern for their safety.**

In other instances, courts detain LGBT youth based on a misconception that it will serve their best interests. As one defender explained, “The court here really believes it’s a benevolent court, and so to protect these kids from being out on the street or being in a family situation that may not be ideal,” LGBT youth are detained frequently.<sup>20</sup> Another juvenile justice professional noted that lesbians, in particular, are more likely to be detained because decision makers in the system “want to protect girls” and view lesbianism “as risky behavior or harm to self.”<sup>21</sup>

#### **Practice Tips for Judges at Detention Hearings Involving LGBT Youth**

At detention hearings, judges must be cognizant of the experiences and concerns of LGBT youth who appear before them. In particular, judges should:

- Protect the confidentiality of information related to the youth’s sexual orientation or gender identity. Does the youth self-identify as LGBT? If so, who knows the youth is LGBT? Is the youth comfortable with open discussions of his or her sexual orientation or gender identity in court proceedings? If not, how can the youth’s LGBT identification be kept private during the detention hearing?
- Ensure a defense attorney represents the youth at the detention hearing.
- Explore whether family conflicts exist over the youth’s sexual orientation or gender identity. If the parent or custodian refuses to accept the youth back into the home because of the conflict, can services be provided to the family? Can other relatives or individuals close to the youth safely serve as a temporary placement for the youth? If not, are any LGBT-competent nonsecure placements available?
- Reject recommendations for detention that are based on unfounded biases about LGBT youth.

- Consider whether a youth's problems at school might be related to LGBT-stigma. If the youth has a poor attendance record, is it related to harassment or abuse based on the youth's actual or perceived sexual orientation or gender identity?
- Understand the youth's immediate medical needs, if defense counsel or other parties raise the issue in court. Is a transgender youth receiving hormone or other medical treatments, whether medically prescribed or not? If the youth is placed out-of-home, how can the court ensure the continuation of treatment?
- Ensure that LGBT youth are not placed in detention facilities unless staff can keep them safe and treat them respectfully. If the LGBT youth is currently detained, has the youth been treated respectfully? Have staff isolated or segregated the youth? Has the youth experienced abuse because of his or her LGBT identity? Can the detention facility adequately protect an LGBT youth from physical and sexual assault? Does the youth have any mental health issues, including a trauma history that further compromises the youth's safety in detention? If detained, is it necessary to issue an order requiring the facility not to discriminate against the LGBT youth and to ensure the youth's physical and emotional safety?
- Explore whether additional steps are needed to ensure the safety of transgender youth in detention.
- Will the facility house youth according to her or his gender identity rather than birth sex? Is an order needed to require the facility to respect a transgender youth's gender expression or to ensure the youth receives appropriate medical care?

**Experiences of abuse and harassment increase the likelihood that LGBT youth who are at low-risk of flight or reoffending will be detained.**

In deciding whether a youth is a flight risk, judges often consider whether a youth has a history of running away, poor school attendance, or substance abuse.<sup>22</sup> Problems at home and in the community increase the likelihood that a judge will consider the youth a flight risk, even if the underlying offense in the case is nonviolent. LGBT youth's experiences of rejection or harassment at home, at school, or in the community can skew the flight risk determination. For example, some LGBT youth skip school frequently to avoid harassment, a factor which is counted against them at detention hearings. Similarly, many LGBT youth have run away from home or out-of-home placements to escape abuse or harassment based on their sexual orientation or gender identity. These youth might be detained as a flight risk even though they have run from situations that were harmful for them. As one defender explained, "I have had a substantial number of gay [clients] that were already runaways, and it's considered to be an AWOL history, and that makes it more likely they will be held, although that doesn't necessarily mean they are more likely to skip court."<sup>23</sup>

In some jurisdictions, detention decisions are based primarily on results of risk-screening instruments that are administered at intake. Although these instruments are intended to provide an objective basis for detention decisions, some individuals interviewed by Equity Project staff raised concerns that screening tools in their jurisdictions led to the unneces-

sary detention of LGBT youth. Equity Project Advisory Committee (EPAC) member Laura Garnette, former Director of Juvenile Probation in Santa Cruz County, California, explained:

Probation officers should be aware that LGBT youth may score high on these instruments even if they are not a flight risk or a risk to public safety, but rather because many LGBT youth have a runaway history, poor school attendance, drug or alcohol use, or no family to pick them up—all of which add points to their total score. This makes it critical that probation officers ask additional questions to get the real story. A gay kid who ran away from home because his family is abusing him doesn't need detention; he needs a safe and supportive home.<sup>24</sup>

### **Detention determinations for LGBT youth are sometimes based on bias.**

In some cases, biases against LGBT youth underlie the detention determination. A juvenile defender described clients who were detained unnecessarily “when court counselors—whose opinion the judge takes very seriously—categorized the youth’s LGBT identity as an ‘instability’ or ‘acting-out behavior.’”<sup>25</sup> In addition, one probation officer said that she believes LGBT youth are more likely to require detention than non-LGBT youth because often they “are more aggressive and more confrontational.”<sup>26</sup> Sometimes biases are built into the risk-screening instruments; for example, one defender criticized the screening tool in her northeastern state because it scores youth as “higher risk” if they have had sexual experiences with someone of the same sex.<sup>27</sup>

### **Many jurisdictions lack alternatives to detention that are appropriate for LGBT youth.**

Juvenile courts should have a continuum of alternatives to secure detention available for youth who, for safety reasons, cannot be released to their parent or custodian without some type of services.<sup>28</sup> Over the last few years, some jurisdictions have developed a variety of alternatives to detention, but in many places such alternatives are still sorely lacking. Promising alternatives to detention include electronic monitoring, shelter care, community supervision by youth advocates, nightly reporting to community centers, and referral to caseworkers rather than to court or probation personnel.<sup>29</sup> Numerous individuals interviewed for this project expressed frustration about the fact that their jurisdictions lacked sufficient detention alternatives generally, or that the programs in their jurisdictions refused to accept, or were otherwise unsupportive of, LGBT youth. Without adequate alternatives, EPAC member and defense attorney Kim Forte explained, “Many LGBT youth end up in detention when they don’t need to be there. We need to have alternative placements for LGBT youth that are friendly and safe and have trained staff.”<sup>30</sup>



## Endnotes

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2. *Id.*
3. See Elizabeth Calvin et al., *Advocacy and Training Guide: Juvenile Defender Delinquency Notebook* 144 (2d ed. 2006), available at [http://www.njdc.info/delinquency\\_notebook/interface.swf](http://www.njdc.info/delinquency_notebook/interface.swf).
4. National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 30 (2005) [hereinafter *Juvenile Delinquency Guidelines*].
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9. Holman & Ziedenberg, *supra* note 7, at 3, 12.
10. See Eileen Poe-Yamagata & Michael A. Jones, *Building Blocks for Youth, And Justice for Some: Differential Treatment of Minority Youth in the Justice System* (2000).
11. See Calvin et al., *supra* note 3, at 142.
12. *Id.*
13. *Id.*
14. Angela Irvine, Ceres Policy Research, *The Inappropriate Use of Secure Detention for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Youth* (2009), presented at the Columbia University Gender on the Frontiers Symposium (Apr. 10, 2009) (available on file with authors) [hereinafter *Inappropriate Use of Secure Detention*] Results of the 2009 Ceres Policy Research study will appear in *19 Columbia Journal of Gender & Law* (forthcoming 2010).
15. This 13 percent number includes some youth categorized by the researcher as “not straight” based on their responses to other questions on the survey, rather than on the youth self-identifying as LGBTQ. Youth categorized as “not straight” either answered every other demographic question on the survey, but skipped the question asking about sexual orientation, or they answered “yes” to the question, “Have you ever been bullied or harassed at school because of your sexual orientation (being lesbian, gay, etc.)”

16. Angela Irvine, Ceres Policy Research, *Youth Hype Drug and Alcohol Use Survey: Summary of Findings Related to LGBQ, Latino, and Foster Youth in Santa Cruz, CA* (2008) (available on file with authors).
17. *Id.* at 6.
18. *Juvenile Delinquency Guidelines*, *supra* note 4, at 76.
19. Equity Project interview with a juvenile defender (July 2, 2007).
20. Equity Project interview with a juvenile defender (July 2, 2007).
21. Equity Project interview with a juvenile justice professional (Mar. 7, 2008).
22. *See Calvin et al.*, *supra* note 3, at 144-145.
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24. Equity Project interview with Laura Garnette (Jan. 6, 2008).
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26. Equity Project interview with a juvenile justice professional (Feb. 14, 2008).
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28. *See Juvenile Delinquency Guidelines*, *supra* note 4, at 81-83.
29. *See* The Annie E. Casey Foundation, *Detention Reform: A Cost-Saving Approach* (2007), available at [http://www.aecf.org/upload/PublicationFiles/jdai\\_facts1.pdf](http://www.aecf.org/upload/PublicationFiles/jdai_facts1.pdf). *See also* The Annie E. Casey Foundation, *Detention Reform: An Effective Public Safety Strategy* (2007), available at [http://www.aecf.org/upload/PublicationFiles/jdai\\_facts2.pdf](http://www.aecf.org/upload/PublicationFiles/jdai_facts2.pdf); The Annie E. Casey Foundation, *Fact Sheet: A Roadmap for Juvenile Justice* (2008), available at <http://www.aecf.org/~media/PublicationFiles/FINAL%20%20%202008%20Juvenile%20Justice%20Fact%20Sheet%20%20%20with%20logo.pdf>.
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Chapter 8

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# Unsafe and Unfair Conditions of Confinement for LGBT Youth

*“We have a way harder life when we’re incarcerated. Straight people have a hard time here, but homosexuals are raped, get food thrown at them, are jumped, humiliated, God knows what will happen to them.”<sup>1</sup>*

—Dale, 15-year-old white gay male youth

The United States Constitution extends critical rights to detained and incarcerated youth, including the right to be free from physical, emotional, and sexual abuse, as well as unreasonably restrictive conditions of confinement. Confined youth also have the right to receive adequate health care and fair and nondiscriminatory treatment.<sup>2</sup> Juvenile justice professionals have a corresponding responsibility to protect these rights. Detention staff must provide safe and fair conditions of confinement.<sup>3</sup> In most jurisdictions, judges also have statutory responsibility to monitor the treatment of confined youth.<sup>4</sup> Similarly, defense attorneys have a responsibility to challenge any deprivation of rights that clients suffer in secure facilities.<sup>5</sup>

Although these rights and responsibilities are clear, youth confined in detention and secure facilities face serious, well-documented harms. Many facilities are overcrowded, provide minimal training to staff, and offer little or no supervision or programming to youth.<sup>6</sup> Medical care is notoriously poor, and meaningful mental health treatment is denied to many incarcerated youth.<sup>7</sup> Countless youth experience assaults, rapes, and beatings by other youth and staff.<sup>8</sup>

In 2006, a groundbreaking lawsuit exposed the egregious treatment of LGBT youth confined in the Hawai’i Youth Correctional Facility (HYCF). In *R.G. v. Koller*, three LGBT youth filed a lawsuit in federal district court challenging the failure of facility staff to protect them from relentless physical, emotional, and sexual abuse by other youth.<sup>9</sup> The court granted the youths’ motion for a preliminary injunction, finding that they would likely prevail at trial in showing the facility violated their due process rights. Specifically, the court found that HYCF (1) failed to protect the plaintiffs from physical and psychological abuse, (2) used isolation as a means to protect LGBT youth from abuse, (3) failed to provide policies and training necessary to protect LGBT youth, (4) did not have adequate staffing and supervision or a functioning grievance system, and (5) failed to use a classification system that protects vulnerable youth.

Equity Project findings indicate that the experiences of the plaintiffs in *R.G. v. Koller* were not unique. Professionals interviewed for this report overwhelmingly agreed that LGBT youth face particularly acute abuse, harassment, isolation, and disrespect because of their sexual orientation or gender identity.

## LGBT Youth Suffer Physical, Sexual, and Emotional Abuse in Facilities

*"It's really hard to be in detention. People want to fight and they [call you names, like] gay bitch."*<sup>10</sup>

—Brianna, a 17-year-old black-Asian lesbian youth

LGBT youth are particular targets for violence within facilities. Approximately 80 percent of Equity Project survey respondents indicated that lack of safety in detention was a serious problem for LGBT youth, and more than half of detention workers surveyed reported having personal knowledge of instances in which detained LGBT youth were mistreated because of their sexual orientation or gender identity. Interviews also revealed a widespread pattern of bullying, harassment, and name-calling of LGBT youth by staff and other youth in detention and correctional institutions. These findings support similar results from past studies. In 2001, the Urban Justice Center documented pervasive verbal and physical harassment and abuse from staff and peers of incarcerated LGBT youth in New York.<sup>11</sup> Eight years later, a publication of the National Council on Crime and Delinquency found that many openly LGBT youth in California juvenile facilities had been sexually assaulted while incarcerated, and staff regularly failed to respond appropriately.<sup>12</sup> As Captain Young, Equity Project Advisory Committee (EPAC) member and youth advocate, explained:

There are problems with the system for all youth, but it's worse for LGBTQ youth. Being LGBTQ in juvenile hall is a forbidden taboo. LGBTQ youth are not told, "It's OK to be who you are." Instead they get the message that they're bad. LGBTQ youth are harassed, isolated, charged with crimes for having relationships, punished and have their privileges revoked for no reason, placed on medication, or jumped by other youth who've been ordered by staff to jump them.<sup>13</sup>

When abuse or harassment occurs, facility administrators have a legal responsibility to ensure that staff intervene promptly to protect the safety of residents.<sup>14</sup> Some facilities have taken seriously this responsibility to protect LGBT youth. Staff in one facility administer a weekly checklist to all youth to determine, for example, whether youth have been harassed by staff or peers and whether they are depressed or lonely. This checklist reportedly has helped create a culture in which youth feel comfortable expressing safety concerns to a detention supervisor. Another facility allows young gay boys with nonviolent offenses to participate in programming with the girls' unit if they feel safer doing so. A few jurisdictions, including King County, Washington; San Francisco; Los Angeles; New York City; New York state; Hawai'i; the District of Columbia; and Michigan,<sup>15</sup> have taken affirmative steps such as developing nondiscrimination policies to protect LGBT youth in detention and correctional facilities.

Unfortunately, ample evidence exists that many other secure detention and correctional facilities fail to keep LGBT youth safe.<sup>16</sup> Interviews with juvenile justice professionals revealed many instances of facility staff across the country who failed to intervene to stop the abuse of LGBT youth. One defender stated, "For years, staff in [our] facilities have allowed kids to bully kids in the dining hall and harass them,"<sup>17</sup> and other professionals stated that facility staff accuse LGBT youth who report abuse of lying or exaggerating.

EPAC member and defense attorney Jennifer Riley-Collins described the experiences of a gay client who was violently assaulted in a facility. The guards allowed her client to shower by himself to prevent further abuse, but one day as he left the shower, another youth sexually assaulted him with a broom handle, causing injuries that required immediate medical attention. Rather than investigating the incident and ensuring the youth was safe, the facility staff accused him of lying. Ms. Riley-Collins turned to the courts for help, but the judge required the youth to undergo a forensic examination before he would intervene. It was only after the exam confirmed that the youth had, in fact, been assaulted, that Ms. Riley-Collins was able to secure her client's release from the facility.<sup>18</sup> She explained, "It was like pulling teeth to get this kid out, even though everyone, including the head of the Department of Juvenile Justice, clearly knew what had happened."<sup>19</sup>

Facility staff sometimes instigate or facilitate fights or sexual abuse between youth. Seventeen-year-old Reynaldo explained that staff in facilities tell other youth when someone is gay so that they will beat up the gay youth.<sup>20</sup> Several other youth and professionals reported that staff let other youth into the rooms of LGBT youth, knowing that they will attack the youth. In one particularly violent episode, one youth, Robert, said a staff member allowed a few boys into a bisexual youth's cell to assault him. Robert recalled, "I woke up and saw blood on the walls and on the ground. I heard [the beating] going on the whole night. Even the curtains were bloody."<sup>21</sup>

### Practice Tips: Preventing Harassment in Secure Facilities

To create a climate of nonviolence and respect for all residents and ensure the safe integration of LGBT youth into their facilities, staff should:

- Adopt policies that prohibit discrimination and harassment based on sexual orientation or gender identity. (See Model Policy and Practice Guidelines, Appendix E.)
- Affirm and model the principle that every person is entitled to respect and dignity and that disrespect and intolerance of any kind is prohibited.
- Closely supervise youth and maximize opportunities for interaction with staff.
- Provide a range of supportive and programmatic services that meet the needs of individual youth and keep them engaged in meaningful activities.
- Take swift action to stop bias or harassment on the basis of sexual orientation or gender identity or gender expression when it occurs and address the underlying issues.
- Provide diversity training for all youth in the facility. Make available reading material that includes positive images of youth from different backgrounds and fosters acceptance and appreciation of diversity.
- Develop activities and educational programs to celebrate the history, achievements, and struggles of historically marginalized communities (such as communities of color, women, and LGBT individuals.)
- Create an orientation video that celebrates diversity and describes the harms that result from name-calling, bullying, and harassment.

## LGBT Youth Experience Pervasive Disrespect and Unfair Treatment

*“On my juvenile hall record, they put a big ‘H’ [for homosexual].”<sup>22</sup>*

—Andrew, a 17-year-old Latino gay male youth

All youth in state custody have a federal constitutional right to equal protection under the law,<sup>23</sup> which means that juvenile justice providers must not impermissibly discriminate against youth when determining placements, delivering services, and responding to complaints of harassment or abuse. However, Equity Project findings demonstrate that facilities discriminate against LGBT youth in several ways.

### Facility staff punish LGBT youth for benign behaviors that they mistakenly assume are sexually predatory.

*“If I was talking to another girl, they’d think something sexual was happening. Once I was put on isolation for two weeks, they thought I was getting too close to a female. . . that made me feel real depressed.”<sup>24</sup>*

– Devon A., a lesbian youth, quoted in *Custody and Control*

A consistent theme in interviews was that detention staff often “sexualize” LGBT youth, or perceive benign interactions by LGBT youth as sexual overtures towards others. One young man, Joseph, explained, “Every time I was interacting or having a fun time with someone, everyone thought I was flirting with that person. Just because I am out and open, doesn’t mean that I am always flirting with someone. It doesn’t always mean that I am attracted to someone who I am interacting with.”<sup>25</sup> According to EPAC member Marynella Woods, a social worker in the juvenile division of the San Francisco Public Defender’s Office, staff in detention facilities “are often watching [lesbian youth] to make sure they’re not flirting with the other girls.”<sup>26</sup> A young bisexual woman, Lucy, described being accused of flirting every time she talked to another girl, even though she was merely trying to avoid being “singled out” as a “loner girl.”<sup>27</sup>

These false assumptions lead to discriminatory treatment. Interviewees reported that some staff forced LGBT youth to shower separately or prohibited them from sitting next to other youth because of a fear that they would somehow try to “make the other youth gay.” And 22-year-old Tyler said he was forbidden from interacting with other gay youth because “everyone felt that I was encouraging their sexuality, I was influencing them to be more gay or more lesbian.”<sup>28</sup>

Another theme that emerged from our interviews was that staff tend to overreact to developmentally appropriate displays of affection, such as hugging or hand-holding, between girls in particular. The American Civil Liberties Union and Human Rights Watch also documented that staff singled out lesbian youth for expressing affection toward others in a 2008 report about girls in New York juvenile justice facilities. This report found that staff members punished girls whom they perceived to be lesbians for writing letters or blowing kisses at other girls because this was seen as “lesbian behavior.”<sup>29</sup> EPAC member Dr.

Marty Beyer explained, “Staff view this type of activity as predatory behavior, rather than what it is—a longing for closeness typical of girls as they develop.”<sup>30</sup>

**Facility staff punish, ridicule, and prevent transgender youth from expressing their gender identity.**

*“When I arrived at the 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.”<sup>31</sup>*

– a 17-year-old male-to-female transgender youth  
(interview conducted by the Model Standards Project, 2003)

*“Every little tiny thing I did I would get in trouble. I think it’s because I’m transgender and they didn’t understand.”<sup>32</sup>*

–Michael, a 17-year-old female-to-male transgender youth

Medical experts agree that preventing transgender youth from expressing their gender identity or punishing them for doing so increases the distress they experience; undermines their emotional stability; and interferes with their care, treatment, and rehabilitation.<sup>33</sup> For this reason, a New York court in 2003 ordered an all-boys group home to make a reasonable accommodation in its dress code and allow the plaintiff, a transgender girl, to wear skirts and dresses.<sup>34</sup> The court was particularly concerned with the importance of adhering to the plaintiff’s prescribed medical treatment for gender identity disorder, which called for her to wear feminine clothing.<sup>35</sup>

In the juvenile justice system, however, project findings indicate that facilities routinely force transgender youth to conform to societal gender norms despite the serious harms that can result. All of the transgender youth in the focus groups reported that facility staff refused to call them by their preferred name and pronoun. One trans-



gender girl, Kiana, explained, “I never had problems with boys; I had problems with the staff. They were really unprofessional [and] would call me ‘him,’ ‘he,’ [and] say ‘Why is he in here?’”<sup>36</sup>

Because transgender youth do not fit societal gender norms, often facility staff view them as threatening or sexually predatory and discipline them when they express their gender identity. One detention staff person recounted forcing a transgender girl to dress in a stereotypically masculine manner as soon as she arrived at the facility. This staff person commented that after cutting the youth’s hair and getting the youth out of the dress, “He fit right in with the boys. There [weren’t] any problems.”<sup>37</sup> Several transgender girls reported that the staff placed them on lockdown or gave them disciplinary tickets for having long hair, wearing their hair in braids, or wearing their pants too tight.<sup>38</sup> In one boys’ detention facility, a juvenile justice advocate explained that “there was a large effort—a ‘campus-wide decision’—to inform everyone on the campus that no one was to call this [transgender] youth a girl because that was ‘unacceptable.’ And if anyone did call her ‘girl,’ they would be reported.”<sup>39</sup>

## Facilities Make Inappropriate Decisions about Housing and Classification of LGBT Youth

In addition to the pervasive abuse and harassment that LGBT youth face in facilities, inappropriate decisions about housing and classification deprive them of their rights. In particular, some facilities isolate or segregate LGBT youth from others, and most automatically place transgender youth according to their birth sex, rather than gender identity, without examining the impact this might have on the youth’s safety and well-being.

### Some facilities isolate or segregate LGBT youth.

*“As soon as they found out that I was gay, they singled me out. They had me go to this one isolated room. I remember thinking at that point, “Oh my God, they are doing this because I am gay.”*<sup>40</sup>

—Tyler, a 22-year-old Native-American gay male youth

Confined youth have the right to be free from unreasonably restrictive conditions,<sup>41</sup> and conditions or practices that amount to punishment.<sup>42</sup> According to the American Psychiatric Association, which opposes the practice, isolation of youth within juvenile justice facilities “is a form of punishment and is likely to produce lasting psychiatric symptoms.”<sup>43</sup> As the court in *R.G. v. Koller* noted, the practice of isolating LGBT youth—even to protect them from their abusers—violates due process.

Given the pervasive harassment and abuse directed at LGBT youth, protecting their safety is unquestionably a legitimate concern. However, instead of isolating LGBT youth, facility staff must implement more effective and fair safeguards. The safety of all confined youth is best achieved by ensuring appropriate staff-to-resident ratios; modeling respectful be-

havior; providing close supervision of residents; promptly intervening to interrupt any disrespect, harassment or abuse directed at other youth; and keeping youth meaningfully engaged in constructive programming.

Project findings indicate, however, that many facilities across the country isolate LGBT youth in an attempt to keep them safe. Some facilities have informal policies to automatically segregate all youth who self-identify as LGBT or are perceived to be LGBT. Well-intentioned juvenile justice professionals often view isolation as the only solution for protecting LGBT youth against abuse and harassment. As one probation officer explained, “If a situation is violent, then there is a need to protect the youth being affected by the violence, and although segregation of the targeted youth is not necessarily the best or only solution, it happens.”<sup>44</sup> Another defense attorney said such isolation was necessary because the detention facility in her jurisdiction “is a horrid, absolutely terrible place” that lacks the supervision necessary to ensure safety.<sup>45</sup>

In focus groups, youth described the negative repercussions they faced from such isolation. Claire, a 21-year-old, noted, “If ultimately the goal is to get these kids out of the system and keep them out, then alienating them is not going to help in any way.”<sup>46</sup> Several youth explained that by isolating them, the facility only drew attention to the youth and made them more vulnerable to abuse. Twenty-two-year-old Tyler explained:

It was horrible because I was the only one in detention that had my own room and everyone was wondering, “Why doesn’t he have a roommate?” Of course, if you’re smart you try to keep to yourself and not talk about why you are in there. But that is kind of a dangerous situation because then the rumors start. I remember being accused of all kinds of things that were not even close to the reasons I was in there. But I knew in my heart that the only reason I didn’t have a roommate was because I’m gay. And it was their way of probably trying to protect me in some way. I think even more so they were making a statement that it’s not okay to be gay.<sup>47</sup>

Like Tyler, many LGBT youth experience segregation and isolation (or as one youth put it, “the rounding up of the homosexuals”)<sup>48</sup> as a form of punishment. The court in *R.G. v. Koller* recognized that “[t]he likely perception by teenagers that isolation is imposed as punishment for being LGBT only compounds the harm.” As the court found, “Consistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to segregate LGBT wards from their abusers, cannot be viewed in any reasonable light as advancing a legitimate nonpunitive governmental objective.”<sup>49</sup>

Interviewees from several jurisdictions reported that facilities routinely segregate LGBT youth from others, not to protect them, but because they hold a common but discredited stereotype that LGBT youth are sexually predatory. One youth, Frankie, put it simply, “They were afraid that I would rape my cellmate [because of my sexual orientation and gender identity.]”<sup>50</sup> An administrator at a 24-bed detention facility that has two beds per room said she usually placed a bisexual or lesbian youth in a room by herself. She

explained that this practice arose because when lesbian girls were placed in rooms with other girls, parents became upset, believing “there would be sexual activity and the lesbian youth would try to make their daughter lesbian.”<sup>51</sup> In another jurisdiction, a probation officer explained that he helped design a housing policy that requires every LGBT youth to sleep by him or herself at night, although “during the day the LGBT youth is treated the same as everyone else.”

**Many facilities automatically house transgender youth according to their birth sex without evaluating the impact this might have on the youth.**

*“[We] have a hard enough time housing males and females on the same campus much less MTF or FTM youth with females and males, respectively. Boys and girls are generally kept separately from each other and so for this particular population there has not been very much done. The accepted rationale is ‘Boys are boys and girls are girls, so boys will live with boys and girls will live with girls.’”<sup>52</sup>*

—a juvenile justice professional

The classification and housing of transgender youth raise unique issues. Most secure facilities are segregated by sex, and intake staff must decide whether to assign transgender youth according to their gender identity or birth sex. EPAC member Dr. Bob Bidwell is a pediatrician at the Hawai’i Youth Correctional Facility (HYCF).<sup>53</sup> He believes that male-to-female transgender youth should be housed with other girls because:

Such a placement increases the likelihood of keeping the child physically safe . . . As an adolescent medicine and pediatric physician who is concerned about the development of youth, I am concerned about the effects of being placed based on anatomy rather than gender identity. There is significant psychological harm to one who identifies as male or female and who is then told by the “system” that he or she is, in fact, the other gender. Such a practice goes against the prevailing recommendations of pediatrics, psychology, social workers, and other youth-serving professionals that individuals should be treated in accordance with their identified gender.<sup>54</sup>

The housing of female-to-male transgender youth raises more difficult issues, according to Dr. Bidwell. “Ideally, transgender boys would be housed with the other boys, and in certain circumstances this may be possible,” but because of the high level of violence in many boys’ facilities and the high risk of physical and sexual abuse that transgender boys could face if the other boys learned that they were not born male, most transgender boys would be safer in girls’ facilities.<sup>55</sup> In project focus groups, many of the transgender boys echoed these concerns about their safety if housed with boys. As Jamal explains, “My body has changed, but I’m not going to be ignorant [about what it would be like in the boys’ unit] because I know how the males are.”<sup>56</sup> According to Dr. Bidwell, “If a transgender boy cannot be safe with the boys, he can be placed with the girls, but only if his male identity is acknowledged and respected by the staff and other youth.”<sup>57</sup> The transgender boys who

spoke with Equity Project representatives, however, explained that staff in girls' facilities regularly refuse to provide the necessary level of respect for gender nonconforming youth.

### Practice Tips: Housing and Classification of Transgender Youth

The following recommendations are designed to help guide staff in detention and correctional facilities in making housing and classification decisions for transgender youth:

- Intake staff in detention and correctional facilities should not automatically house transgender youth according to their birth sex.
- Individualized housing and classification decisions should be made based on the transgender youth's emotional and physical well-being, prioritizing the youth's evaluation of his or her safety.
- Staff should also consider the youth's privacy concerns, available housing options, and recommendations from the youth's mental health providers regarding appropriate housing or classification. Some facilities have developed specialized committees with particular expertise on these issues to make placement decisions for transgender youth.
- In most cases, facilities should house transgender youth according to their core gender identity rather than their birth sex. However, in some cases, it may be necessary to place transgender youth according to birth sex to protect their physical and emotional well-being. This is particularly true for transgender boys who face high risk of assault in boys' facilities if the other boys discover they are transgender.
- Facilities must accommodate transgender youth by providing access to private bathrooms and showers, when necessary, or a single room for sleeping. Privacy accommodations should not prevent transgender youth from full integration into the facilities' daily programming.
- Facilities might consider housing a transgender youth in a mixed-gender unit or program. Such placements reduce a transgender youth's vulnerability to violence and harassment and avoid some other difficulties associated with gender-segregated placements.

The psychological and physical harms resulting from the inappropriate placement of transgender youth may include significant stress from being forced to conform to societal gender roles, as well as physical and sexual abuse perpetrated by residents and facility staff. Transgender youth identified the related issue of privacy as a particular concern. "Showers were a big deal because it's open space and you can't pull your curtains,"<sup>58</sup> Fox, a female-to-male transgender youth explained. One young transgender girl with developed breasts was expected to shower at the same time as the 13 boys from her unit during her detention in a boys' facility.<sup>59</sup> Fearing sexual assaults by the boys, she refused to shower with them, but the staff would not make any accommodation for her. It was not until her lawyer obtained a court order that she was finally allowed to shower by herself.

Most facilities simply house youth according to their birth sex and do not consider alternative arrangements. Some have never given the matter any consideration. In facilities that have considered the issue, the most common explanations for housing transgender girls with boys were that it is not safe to house them in the girls unit and that the law requires it. Both explanations are based on the misperception that transgender girls are really boys. For example, one juvenile justice professional explained, “It’s against the law to put these boys with the girls.”<sup>60</sup>

A few facilities that house transgender girls in boys’ units do attempt to provide appropriate services to these youth by involving transgender girls in the facility’s daytime girls’ programming. As a detention consultant and former probation officer explained, “You have to be innovative for certain folks so they don’t get targeted or hurt, in any way, either mentally or physically.”<sup>61</sup> Several professionals expressed a desire to support transgender youth but were uncertain about how to properly protect them in secure facilities. One judge clearly supported a transgender girl in his courtroom; for example, he assigned her a new probation officer because her previous one refused to respect her gender expression. But in the same case, the judge justified placing her in a boys’ detention facility because “we didn’t think it was safe to place her with the other girls. We couldn’t put someone clearly gendered a boy in girls’ detention.”<sup>62</sup>

### **Spotlight on Reform: Conditions of Confinement— The New York Example**

The Correctional Association of New York coordinates the Juvenile Justice Coalition, a coalition of advocacy groups focused on systemic reform. During the Coalition’s strategic planning efforts in 2003, the group adopted LGBT youth as one of the five priority areas and formed a working group dedicated to improving the system’s response to this population. The coalition has lobbied the New York legislature to raise awareness of the abuses experienced by LGBT youth in state institutions and detention facilities; advocated for the adoption of the New York City Department of Juvenile Justice’s (DJJ) Anti-discrimination Policy for LGBT Youth and conducted training for youth on the policy; and drafted the Incarcerated Youth Bill of Rights to codify the rights enumerated in the DJJ policy.

In 2007, the Correctional Association met with Gladys Carrion, who was then the new commissioner of the Office of Children and Family Services (OCFS), the agency responsible for both child welfare and juvenile justice services in New York State. At Ms. Carrion’s suggestion, a workgroup was created to address issues related to LGBT youth in OCFS custody. The workgroup, which met every two months, was comprised of juvenile justice professionals as well as organizations with expertise on LGBT issues. Since its founding, the workgroup has:

- Revised OCFS guidelines related to LGBT youth and drafted an OCFS policy statement incorporating these guidelines, which passed in March 2008;

- Created a youth-friendly insert about the policy for the residence manual distributed to young people upon entering a juvenile justice facility;
- Monitored training efforts on the policy and guidelines;
- Developed a resource guide for young people leaving the facilities;
- Assisted OCFS in the development of a questionnaire focused on parents' relationship to their children regarding their children's sexual orientation and gender identity; and
- Created a Pride Kit with a list of speakers and activities for celebrating LGBT Pride Month in the facilities.

At the time of this writing, the OCFS policy is the most comprehensive of its kind. The policy:

- Prohibits discrimination based on actual or perceived sexual orientation, gender expression or gender identity.
- Includes revised guidelines for good childcare practices for LGBT youth.
- Mandates OCFS to provide strength-based training to all DJJ staff, the ombudsman's office, and other appropriate OCFS staff on LGBTQ issues.
- Requires OCFS to provide all youth in its facilities and aftercare programs with written and verbal information regarding the policy.
- Establishes an LGBTQ Decision-Making Committee within the Bureau of Behavioral Health Services, which is in charge of placement decisions and uniforms for transgender youth.
- Ensures that OCFS will have designated units within its facilities with staff trained to provide services for LGBTQ youth.
- Includes specific guidelines for working with transgender youth, addressing issues such as initiation and continuation of hormone treatment; clothing, hair, and other personal grooming; language and name; individual bedrooms and bathroom facilities and showering, as well as search issues.<sup>63</sup>

## Facilities Fail to Ensure the Medical Needs of Transgender Youth Are Met

*"[Gender identity disorder] if left untreated, can result in clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death."*<sup>64</sup>

—American Medical Association

*"I said I'm going to get sick if I don't get my hormones, but no one cared."*<sup>65</sup>

—Kiana, a 16-year-old multiracial male-to-female transgender youth

All youth in detention and correctional facilities have the right to adequate medical and mental health care, and facilities must provide general medical services for both prevention and treatment.<sup>66</sup> For transgender youth, these services might include providing medi-

cal care related to a diagnosis of gender identity disorder. Denying appropriate treatment to these youth poses serious risk of negative health and social consequences, including depression, suicide attempts, and self-treatment, as described in Chapter 3. The American Psychological Association has issued a policy statement supporting “access to appropriate treatment in institutional settings for people of all gender identities and expressions, including access to appropriate health care services including gender transition therapies.”<sup>67</sup> Yet as Dr. Bidwell explained:

Too often detention and correctional facilities just don’t know what to do with a transgender youth and so they just do nothing. There are resources that they could use to learn about transgender youth and their medical and psychological needs. Instead, it seems a lot easier just to ignore the youth’s needs and insist the youth conform to his or her biological gender, while offering no support or protection from the harassment by staff and other youth that inevitably occurs.<sup>68</sup>

A lack of understanding of the critical importance of hormone treatment is one problem. Some transgender youth obtain hormones on the street. When they enter detention facilities, the sudden withdrawal from hormones can have serious negative health consequences. One defender reported that she represented a male-to-female transgender client who was repeatedly arrested for soliciting sex to obtain hormones. Although she was finally able to obtain a prescription for hormones, the detention facility refused to fill it and wouldn’t allow her to take them.<sup>69</sup>

### ***Rodriguez v. Johnson and the Importance of Hormone Treatment***

*Rodriguez v. Johnson* involved a secure facility in New York that abruptly terminated a transgender young woman’s hormone treatment when she arrived at the facility. The abrupt withdrawal from the medical care she had been receiving for almost four years led to nausea, headaches, and increased facial hair, as well as severe mental distress. Despite her attorney’s efforts, the facility continued to refuse to provide her with this medically necessary treatment. In 2006, she filed a lawsuit against officials of the New York State Office of Children and Family Services (OCFS) for their failure to provide her with adequate medical care.<sup>70</sup> The case eventually settled out of court. The settlement included monetary damages for the young woman and an agreement by the state to implement changes to ensure the safety and appropriate treatment of transgender youth in its care.<sup>71</sup> OCFS has since adopted a comprehensive policy to ensure facilities meet the needs of confined LGBT youth. For further discussion of this policy, see the “Spotlight on Reform: Conditions of Confinement—The New York Example” text box on Page 110).

## Endnotes

1. Equity Project focus group, Dale, a 15-year-old white, gay male youth (July 11, 2008).
2. See *R.G. v. Koller*, 415 F. Supp.2d 1129, 1157 (D. Haw. 2006); *A.M. v. Luzerne*, 372 F.3d 572, 579 (3rd Cir. 2004); *Alexander S. v. Boyd*, 876 F. Supp. 773, 782 (D.S.C. 1995) *aff'd in part and rev'd in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997).
3. All but one detention staff person surveyed for this report acknowledged that they have this responsibility.
4. National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 144, 177 (2005) [hereinafter *Juvenile Delinquency Guidelines*].
5. See Elizabeth Calvin et al., *Advocacy and Training Guide: Juvenile Defender Delinquency Notebook* 245 (2nd ed. 2006), available at [http://www.njdc.info/delinquency\\_notebook/interface.swf](http://www.njdc.info/delinquency_notebook/interface.swf); Daniel J. Freed & Timothy P. Terrell, Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, *Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, 173-75 (1996) [hereinafter *Juvenile Justice Interim Status Standards*]; *Juvenile Delinquency Guidelines*, *supra* note 4, at 181, 184-87.
6. See generally Calvin et al., *supra* note 5; Parent et al., Office of Juvenile Justice and Delinquency Prevention, *Conditions of Confinement: Juvenile Detention and Corrections Facilities: Research Report* 49 (1994).
7. See, e.g., *A.M.*, 372 F.3d at 584-585; Calvin et al., *supra* note 5.
8. See Barry Krisberg, *Special Report: Breaking the Cycle of Abuse in Juvenile Facilities* (National Council on Crime and Delinquency, 2009); Parent et al., *supra* note 6; *R.G.*, 415 F.Supp.2d at 1144-45; *A.M.*, 372 F.3d at 588.
9. *R.G.*, 415 F. Supp.2d at 1133.
10. Equity Project focus group, Brianna, a 17-year-old black-Asian, lesbian female youth (May 5, 2008).
11. Randi Feinstein, et al., *Justice for All? A Report on Lesbian, Gay, Bisexual, and Transgendered Youth in the New York Juvenile Justice System* 2 (Urban Justice Center 2001).
12. Krisberg, *supra* note 8, at 3.
13. Equity Project interview with Captain Young (Dec. 28, 2007).
14. *R.G.*, 415 F.Supp.2d at 1162; *A.M.*, 372 F.3d at 581, 583.
15. Michigan's policy covers sexual orientation, but not gender identity.
16. Feinstein et al., *supra* note 11, at 32-34; Shannan Wilber, Caitlin Ryan, & Jody Marksamer, *Child Welfare League of America Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care* 6-8 (2006); Krisberg, *supra* note 8, at 2-3.
17. Equity Project interview with a juvenile defender (July 5, 2007).
18. Equity Project interview with Jennifer Riley-Collins (Dec. 7, 2007).
19. *Id.*
20. Equity Project focus group, Reynaldo, a 17-year-old Native American, straight male youth (May 4, 2008).
21. Equity Project focus group, Robert, an African-American straight male youth (age not provided) (Apr. 22, 2008).
22. Equity Project focus group, Andrew, a 17-year-old Latino, gay male youth (May 4, 2008).
23. U.S. Const. amend. XIV, § 1.
24. Human Rights Watch & American Civil Liberties Union, *Custody and Control:*

- Conditions of Confinement in New York's Juvenile Prisons for Girls* 76 (2008) [hereinafter *Custody and Control*].
25. Equity Project focus group, Joseph, a 21-year-old white, genderqueer youth (Apr. 17, 2008).
  26. Equity Project interview with Marynella Woods (Dec. 3, 2007).
  27. Equity Project focus group, Lucy, a 19-year-old white bisexual female youth (Apr. 17, 2008).
  28. Equity Project focus group, Tyler, a 22-year-old Native American, gay male youth (Apr. 17, 2008).
  29. *Custody and Control*, *supra* note 24, at 75.
  30. Equity Project interview with Marty Beyer, Ph.D. (Nov. 27, 2007).
  31. Interview with 17-year-old male-to-female transgender youth, Legal Services for Children for the Model Standards Project (Feb. 28, 2003).
  32. Equity Project focus group, Michael, a 17-year-old white, female-to-male transgender youth (Apr. 11, 2008).
  33. Gianna E. Israel & Donald E. Tarver II, *Transgender Care: Recommended Guidelines, Practical Information, and Personal Accounts* 132–41 (Temple University Press 1997); Walter Meyer III et al., *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders* 12 (6th ed. 2001) [hereinafter *Standards of Care*].
  34. *Doe v. Bell*, 754 N.Y.S.2d 846, 853 (N.Y.S.C. 2003).
  35. *Id.*
  36. Equity Project focus group, Kiana, a 16-year-old multiracial male-to-female transgender youth (May 1, 2008).
  37. Equity Project Interview with juvenile detention staff (July 26, 2007).
  38. See also Jody Marksamer, *And by the Way, Do You Know He Thinks He's a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Delinquency Courts*, 5:1 *Sexuality Research & Social Policy* 72, 82 (2008).
  39. Equity Project interview with a juvenile justice professional (Apr. 10, 2008).
  40. *Id.*
  41. *Alexander S.*, 876 F.Supp. at 798; *R.G.*, 415 F.Supp.2d at 1152.
  42. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); 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”).
  43. American Psychiatric Association, *News Release No. 09-12: Incarcerated Juveniles Belong in Juvenile Facilities* (Feb. 27, 2009), available at <http://www.psych.org/MainMenu/Newsroom/NewsReleases/2009NewsReleases/IncarceratedJuveniles.aspx>.
  44. Equity Project interview with a juvenile probation officer (Feb. 21, 2008).
  45. Equity Project interview with a juvenile defender (July 2, 2007).
  46. Equity Project focus group, Claire, a 21-year-old white lesbian female youth (June 2, 2008).
  47. Equity Project focus group, Tyler, a 22-year-old Native-American, gay male youth (Apr. 17, 2008).
  48. Correspondence from youth advocate to the Equity Project (Feb. 17, 2008) (quoting a youth with whom he worked).
  49. *R.G.*, 415 F.Supp.2d at 1155-56.
  50. Equity Project focus group, Frankie, a 22-year-old Native-American, two-spirit, queer female-to-male transgender youth (June 2, 2008) (See Appendix A for a defini-

- tion of *two-spirit*).
51. Equity Project interview with juvenile detention staff (Apr. 5, 2008).
  52. Equity Project interview with a juvenile justice professional (Feb. 25, 2008).
  53. HYCF has placed every transgender girl except one with other girls for the past 16 years. In 2007, the facility adopted a written policy relating to LGBT youth that commits the facility to making placement decisions related to all transgender youth on a case-by-case basis.
  54. Declaration of Robert J. Bidwell at 14, 19, *R.G. v. Koller*, 415 F.Supp.2d 1129 (D. Haw. 2006) (No. 05-566).
  55. Correspondence from Robert Bidwell to Legal Services for Children (July 4, 2006) (on file with the authors).
  56. Equity Project focus group, Jamal, a 19-year-old African-American, female-to-male transgender youth (May 1, 2008).
  57. Bidwell, *supra* note 55.
  58. Equity Project focus group, Fox, a 21-year-old, female-to-male transgender youth (June 2, 2008).
  59. Interview with anonymous youth, Legal Services for Children for the Model Standards Project (Feb. 2003).
  60. Equity Project interview with a juvenile justice professional (July 26, 2007).
  61. Equity Project interview with a juvenile justice professional (Mar. 6, 2008).
  62. Equity Project interview with a juvenile judge (Feb. 22, 2007).
  63. New York State Office of Children and Family Services, “Policies and Procedures: Lesbian, Gay, Bisexual, Transgender and Questioning Youth” (Mar. 17, 2008), *available at* [http://srlp.org/files/LGBTQ\\_Youth\\_Policy\\_PPM\\_3442\\_00.pdf](http://srlp.org/files/LGBTQ_Youth_Policy_PPM_3442_00.pdf).
  64. American Medical Association, “Resolution 122: Removing Financial Barriers to Care for Transgender Patients” (2008).
  65. Equity Project focus group, Kiana, a 16-year-old multiracial male-to-female transgender youth (May 1, 2008).
  66. *See Youngberg v. Romeo*, 457 U.S. 307 (1982); *A.M.*, 372 F.3d at 572, 585 n.3; *Jackson v. Johnson*, 118 F. Supp. 2d 278, 289 (D.N.Y. 2000); *Alexander S.*, 876 F. Supp. at 788.
  67. American Psychological Association, “Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination,” (adopted Aug. 2008), <http://www.apa.org/pi/lgbq/policy/transgender.html>.
  68. Equity Project interview with Dr. Robert Bidwell (Nov. 27, 2007).
  69. Equity Project interview with a juvenile defender (July 2, 2007).
  70. Complaint at 2–3, 6, *Rodriguez v. Johnson*, No. 06CV00214 (S.D.N.Y. filed Jan. 11, 2006) (on file with author).
  71. Settlement Agreement, *Rodriguez v. Johnson*, No. 06CV00214 (S.D.N.Y. settled Nov. 13, 2006) (on file with author).

## Chapter 9

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# Barriers to Zealous Defense Advocacy for LGBT Youth

*“No single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel.”<sup>1</sup>*

—President Johnson’s Commission on Law Enforcement and Administration of Justice, 1967

*“I wish my lawyer was more understanding of LGBT youth instead of just saying it’s a confusion thing—a stage in life you’ll grow out of.”<sup>2</sup>*

—Russell, a 21-year-old white bisexual male youth

Among the firmly established due process rights afforded youth in delinquency proceedings, the right to counsel, first extended in *In re Gault*,<sup>3</sup> is arguably the most critical. As national standards recognize, juvenile defenders are “essential to the administration of justice and to the fair and accurate resolution of issues at all stages of [the] proceedings,”<sup>4</sup> serving as an important check on abuses of the state and holding the juvenile justice system accountable. Without effective legal representation, a young person stands little chance of defending herself and invoking her due process rights.<sup>5</sup> Since juvenile courts have become more punitive over the last few decades, the stakes associated with denial of the right to counsel today are even higher than in years before.

Despite the importance of counsel’s role, national and state assessments of juvenile indigent defense systems have consistently identified systemic barriers that limit access to—and quality of—counsel.<sup>6</sup> Youth regularly appear unrepresented in many courts because they are permitted, and even encouraged, to waive their right to counsel without understanding the consequences of doing so.<sup>7</sup> Inconsistent appointment practices, overwhelming caseloads, inadequate pay, and insufficient defender resources negatively impact the quality of legal representation that youth receive.<sup>8</sup> Underlying these barriers is a deeply entrenched court culture of paternalism which continues to allow shortcuts to due process to advance what professionals believe is in the child’s “best interests.” As a result, a shocking lack of defense advocacy pervades many courtrooms.

For all youth, including LGBT youth, the denial of effective legal representation can increase the likelihood of false confessions, unconstitutional guilty pleas, wrongful convictions, and harmful detention and incarceration.<sup>9</sup> For LGBT youth, additional barriers to quality representation have unique implications.

## **Defense Counsel: an Essential Role in Protecting the Rights of LGBT Youth**

Juvenile defenders play a highly specialized and complex role in the juvenile court system. They must thoroughly investigate each case; regularly communicate with and counsel clients; advise clients of the collateral consequences of an adjudication; prepare a defense; represent clients at all critical stages of the case; protect the clients’ due process rights; advocate for the most appropriate disposition consistent with the client’s expressed interests;

ensure the state's compliance with court orders; ensure the safety of youth in facilities; advocate for clients' educational, mental health, and other needs; and expose and challenge the underlying systemic biases pervading the juvenile justice system.<sup>10</sup>

Juvenile defenders owe their clients the same ethical duties of loyalty, communication, and diligence as those owed by adult criminal defenders.<sup>11</sup> Numerous professional standards and guidelines make clear that juvenile defenders must represent the clients' expressed interests, not what the defender believes is in the clients' best interests.<sup>12</sup>

To discharge these duties effectively, defenders must understand the varied identities of their clients. Just as defenders must understand the influence that gender, race and ethnicity, immigration status, religion, and socio-economic status may have on each individual client, so too must they understand the role that sexual orientation and gender identity play in their clients' lives. In addition, they must understand the ways in which biases of the justice system render LGBT youth particularly vulnerable to abuse and discrimination.<sup>13</sup> As one defender described, "We must be constantly vigilant [about fighting discrimination] across the system."<sup>14</sup>

Experts have begun to examine the contextual issues related to sexual orientation and gender identity that might arise during the course of delinquency representation. The University of Nevada, Las Vegas Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham convened a working group in 2006 to discuss the role of sex and sexuality in representing children. The working group made three broad recommendations to assist lawyers in ensuring every client has equal access to services and receives fair and respectful treatment in court:

1. Lawyers should strive to ensure that their own internal biases do not compromise the quality and effectiveness of their advocacy;
2. Lawyers should seek to remedy bias or discrimination against their client based on gender, sexual orientation, gender identity, or sexual conduct; and
3. Lawyers should advocate for law and policy changes to promote systems of care that are fair, safe and respectful of each child's dignity.<sup>15</sup>

While a youth's sexual orientation and gender identity are not necessarily relevant in every case, defenders must keep in mind the numerous ways in which the issues can impact the various stages of a case. Some examples include:

- **Charging Decisions.** Defenders should be aware of the potential for discriminatory or inappropriate charges against LGBT youth, such as cases involving consensual sex, and move to dismiss discriminatory charges on constitutional and statutory grounds. Understanding the factors that lead youth into the system, such as harassment at school or familial rejection, will help defenders argue that the case is better handled outside the court system.

- **Detention Decisions.** Defenders should vigorously advocate for their clients' interests at detention hearings. For example, other parties might recommend detention based on the fact that alternative programs in the jurisdiction will not accept the youth. In such cases, the defender should argue that the legal standard for detention has not been met and offer creative alternatives to the court, such as placing the youth with noncustodial relatives. Defenders should also ensure that LGBT clients are not placed in detention facilities that are abusive or discriminatory.
- **Mitigation.** Thorough investigation will help uncover mitigating factors. Abuse and harassment at school, rejection by families, and homelessness of LGBT youth can serve to mitigate the charges in particular cases.
- **Disposition.** Defenders should consult with their clients to create the most appropriate recommendations for disposition. Defenders should advocate against any placements that will be harmful to their clients, including those that are not sensitive to LGBT youth. Defenders should also present expert testimony and reports to counter any recommendations for harmful treatment services that are not consistent with professionally accepted medical and mental health practices.
- **Post-Disposition.** Defenders should ensure the safety and respectful treatment of youth in placements. If necessary, they should advocate for changing a youth's placement. Defenders should thoroughly investigate—and defend against—any allegations of probation violations.

### Spotlight on Reform: Role of the Legal Community in Addressing LGBT Youth Issues

The GLBT Bar Association of Washington, QLaw, formed the At-Risk Youth Committee in 2007 to address the legal needs of Washington's at-risk LGBT youth. The committee, which meets monthly, has created a web-based resource ([www.qlawyouth.org](http://www.qlawyouth.org)) with information and resources to assist at-risk LGBT youth and their advocates. The committee has revised the judge's bench guide on sexual orientation and the law to include a section on youth law that addresses issues affecting LGBT youth and has conducted training for judges based on the guide. Committee members also meet with youth at a local LGBT drop-in center and residential facility to discuss legal issues raised by the young people. Finally, QLaw has a foundation that funds law students in summer positions to work on behalf of at-risk LGBT youth.

Several defenders described their efforts to engage in sensitive advocacy for LGBT clients. For example, some defenders have affirmatively challenged the intolerance they witnessed in their jurisdictions by advocating for LGBT-supportive services for their clients instead of inappropriate anger management classes. Others have challenged discriminatory comments made in the courtroom, reprimanded marshals for mocking LGBT youth, and displayed "safe zone" stickers and posters in their offices that signal respect and support for LGBT individuals.

### Case Study: LGBT-Sensitive Defense Representation

In 2008, an attorney achieved a groundbreaking victory for her 15-year-old transgender client, Mariana, who was detained while awaiting placement in a long-term residential treatment facility in another state. Mariana, who identified as female, had shown a persistent cross-gender identification for years. After meeting with her, the attorney requested—and the court ordered—that Mariana undergo an assessment by a local clinic specializing in LGBT health care.

The clinic issued a report indicating a diagnosis of gender identity disorder and recommending the standard treatments for youth with this diagnosis. Based on the clinic's report, the defender successfully argued that it was in Mariana's best interest to receive transition-related health care treatment. The court ordered that the youth could receive puberty-delaying hormone therapy and transgender-supportive counseling. The judge also noted the importance of affirming Mariana's identity in accordance with accepted medical practice, ordering the facility staff to refer to the youth by her preferred name and female pronouns, allow her to keep her hair long, and permit her to dress in a manner consistent with her gender identity. In addition, the order required the facility to ensure Mariana's safety and privacy when using the shower and bathroom and prohibited physical searches by staff to determine her physical anatomy.<sup>16</sup>

According to the attorney, the order "has been pivotal for [her] client's development and well-being. It has allowed her to receive the standard transition-related medical and mental health treatment she needs, and it has given her hope that the courts and foster care system are capable of affirming and respecting her identity."<sup>17</sup> A redacted copy of the court order can be found in Appendix D.

### Broken Juvenile Indigent Defense Systems Hamper Effective Representation of LGBT Youth

The well-documented problems with juvenile indigent defense delivery systems across the country affect all youth, including LGBT youth. For LGBT youth, an added obstacle to effective legal representation in juvenile courts is the lack of LGBT-sensitive advocacy on the part of some juvenile defense attorneys.

#### Some defenders advocate directly against their client's expressed interests based on their own opinions about sexual orientation and gender identity.

*"My lawyer doesn't know me, but he knows I'm gay. He knows I want to leave this place, but he told the court 'don't let him leave there.' I don't think that's fair."*<sup>18</sup>

– Adam, a 14-year-old African-American gay male youth

The defense attorney is responsible for giving youth a voice in court and representing the youth's interests at every stage of the process. The duty to represent the expressed

interests of the client means that the youth, not the attorney, directs the representation. In the context of LGBT youth, the defender's role is not to determine whether each client is LGBT, or to convince LGBT youth that they would be better served by hiding, revealing, or changing their sexual orientation or gender identity.<sup>19</sup> Rather, the defender's role is to effectively counsel their clients about all their legal options and the potential advantages and disadvantages of each option, and to advocate in a manner that respects all clients, regardless of sexual orientation or gender identity.<sup>20</sup> As Professor Barbara Fedders has explained:

[T]he transgender girl may make us . . . uncomfortable, because we want to protect her from herself. "Doesn't she know that kids will pick on her for wearing dresses? And why does she think she is a girl?" "What went wrong with her upbringing?" "Isn't this just a phase?" We must confront the fact that, in a delinquency case, a transgender girl will possibly face detention. . . . advise her of the realities of confinement, allow her to make her own decisions about how to dress and express herself, and then do everything possible to ensure that she is safe.<sup>21</sup>

Defenders' ethical and professional responsibilities to their clients, not their personal views on sexual orientation and gender identity, should guide their advocacy. Seventeen-year-old Janelle, a transgender girl, described having had a positive experience with her defense attorney who was able to put aside her initial discomfort with Janelle's gender identity. As Janelle put it, "I had a good attorney . . . When she first met me, she tripped, but then she got to know me and said, 'We got to get you out of here and put you in a program that is right for you.'"<sup>22</sup> Janelle's attorney was able to advocate successfully for her removal from an inappropriate program and help get her the therapy and medical care she needed to start her gender transition.<sup>23</sup>

For other LGBT youth, however, defenders' reluctance to represent their clients' expressed interests deprives them of the right to be heard. Youth and professionals described instances in which defenders advocated for outcomes directly contradictory to what their clients wanted because they lacked sufficient understanding of sexual orientation or gender identity issues.



### Case Study: The Danger of “Best Interests” Representation

When 16-year-old Mary Beth defended herself against sexual harassment by classmates at school because she was a lesbian, she was arrested for disorderly conduct.<sup>24</sup> At her initial delinquency hearing, Mary Beth, like many other youth, waived her right to an attorney, pled guilty, and was placed on indefinite probation, including house arrest after school. A month later, Mary Beth violated the probation terms by leaving the house after school. At the probation revocation hearing, she again waived her right to an attorney and pled to the violation. The school resource officer asked that the court order Mary Beth not to have contact with her girlfriend as a condition of probation. (Mary Beth’s mother believed that the girlfriend’s father was pushing for the no-contact order because he disapproved of their relationship.) With no zealous advocate in the courtroom to fight for her, the judge entered the no-contact order.

Two weeks later, Mary Beth was arrested for violating the no-contact order by allegedly sending notes to her girlfriend. As a result, the court ordered that she be detained and appointed a public defender. Although Mary Beth had a right to challenge the detention, her defender waived the detention hearing without consulting her. At a subsequent hearing in the case, the prosecutor argued that Mary Beth was suicidal and should be placed in foster care or in secure confinement presumably for her own protection, and not returned home. Mary Beth’s court-appointed defender did not object, stating that it was fair to keep her in a facility if she was suicidal. The defender told Mary Beth and her mother that she believed the no-contact order was reasonable and tried to convince her to plead guilty to violating probation. Ultimately, Mary Beth pled to the charges and went home, although she was assigned to an alternative school and ordered to attend counseling. The attorney’s refusal to zealously defend Mary Beth’s rights clearly violated her ethical obligations to her client, even though she may have believed she was doing what was “for the best.”

Similarly, defenders who believe that LGBT identity is an indicator of pathology or dangerousness have failed to contest their clients’ detention or incarceration. A defense attorney who represented a boy who was in a relationship with another boy referred to his own client as a “sexual predator” and a “perpetrator” when talking with other colleagues involved in the case. Even though his client was anxiously awaiting release from secure care, the defense attorney mistakenly assumed his client wanted to remain incarcerated. In court, the attorney said his client was a “homosexual” who did not want to be released to his mother because he feared she would try to “turn him” (or change his sexual orientation) if he returned home. Although it was true that the boy had conflicts with his mother, he never told his defense attorney that he wanted to remain incarcerated; in fact, he had been working closely with a youth advocate to find a group home placement for him.<sup>25</sup>

### **The lack of detention advocacy exposes LGBT youth to unnecessary and dangerous pre-trial detention.**

Defenders have a duty to represent clients at detention hearings, which includes discussing options with the client, exploring the least restrictive release options, and alerting the court of appropriate alternatives to detention.<sup>26</sup> Acknowledging the importance of counsel at this stage of a case, the NCJFCJ *Juvenile Delinquency Guidelines* call for counsel to be appointed prior to the detention hearing and with enough time for the defender to prepare for the hearing.<sup>27</sup> In some jurisdictions, though, youth appear unrepresented at detention hearings because the court does not appoint counsel until after the detention decision<sup>28</sup> or the youth waive their right to counsel. Late appointments of counsel also mean that attorneys often meet their clients only moments before the detention hearing, making it virtually impossible to prepare an effective, well-informed defense or to provide the court with a suitable alternative to detention. When a defense attorney is not prepared to advocate for alternatives to secure detention, judges may simply rely on the recommendations of probation officers without giving the youth an opportunity to be heard. The lack of effective advocacy at the detention hearing contributes to high rates of detention for all youth.<sup>29</sup>

In addition to these general problems that can affect any youth, LGBT youth may not receive effective advocacy at detention hearings because their attorneys do not know what questions to ask their clients, fail to build the trust needed to obtain relevant information, and are not familiar with detention alternatives that are appropriate for LGBT youth.<sup>30</sup> In addition, many attorneys are not aware of the heightened risk of abuse that many LGBT youth face in detention and how to present this information to the court.

#### **Practice Tips for Defenders: Providing LGBT Youth with Zealous Advocacy at Initial Detention Hearings**

At detention hearings, defense attorneys play a crucial role in representing their clients' interests. The following tips are designed to guide attorneys in providing zealous advocacy at this critical stage of a delinquency case. In general:

- Be familiar with risk-screening instruments and their potentially disparate impact on LGBT youth.
- Keep informed of alternatives to detention for LGBT youth and present these alternatives to the court at detention hearings.
- Stay abreast of current research on the harmful effects of detention for all youth, including LGBT youth.
- Keep informed about the conditions in the facilities in your jurisdiction, particularly as to whether facilities have policies of nondiscrimination based on sexual orientation and gender identity, treat all youth fairly, and engage in practices that ensure the safety of all youth.

When interviewing youth prior to detention hearings:

- Remember you will not necessarily know that a youth is LGBT. Talk to youth without his or her parents present in a setting that provides the greatest amount of privacy possible. Clearly explain and maintain attorney-client confidentiality.
- Find out if your client is afraid for her or his safety if detained and why.
- If your client was detained after arrest, ask if he or she was harassed or mistreated while in detention and investigate the circumstances.
- Ask about attendance and performance at school and obtain school records. If the youth is not attending school, ask why.
- Ask about the youth's home life. If the youth does not get along with her or his family, ask why.
- If your client tells you that he or she is LGBT, respond in a way that indicates that you will fully advocate for him or her. Ask your client who else knows his or her sexual orientation or gender identity and tell your client you will not reveal this information in court or elsewhere without his or her permission.
- If your client is transgender, ask what name and pronoun the youth uses and if the youth requests, ask the judge to use the youth's preferred name and pronoun. Discuss with the youth the advantages and disadvantages of wearing gender-non-conforming clothing during court hearings or while in placement in order to assist the youth in making an informed decision. Ask the youth about any hormones or other transition-related medications he or she is currently taking and ensure the youth receives them if detained or in any other placement.
- If the youth's family is not accepting of her or his sexual orientation or gender identity and returning home is not an option, explore alternatives, such as at the home of a relative or mentor or other appropriate placement. Investigate possible options before the hearing.
- Inform the youth of his or her rights in detention and explain that he or she should contact you if he or she has problems.

During the hearing:

- If you have your client's consent, educate the judge, if appropriate, about the high risk of abuse for LGBT youth in detention facilities and explain that transgender youth are particularly vulnerable to abuse.
- If your client does not want his or her parents or others to hear in court that he or she is LGBT but you think it is important for the judge to know, ask the judge to have a discussion in chambers.
- Challenge the application of the risk criteria used to make detention decisions if they have a disparate impact on LGBT youth.
- Argue for the least restrictive placement possible.

### **The lack of disposition advocacy exposes LGBT youth to inappropriate and harmful programs and services.**

The purpose of disposition hearings is to develop the least restrictive treatment and rehabilitation plans for adjudicated youth that meet their educational, emotional, and physical needs and protect the community.<sup>31</sup> To be effective, disposition interventions must be developmentally and culturally appropriate and tailored to individual youth's needs.<sup>32</sup> Similar to their responsibilities at detention hearings, defenders have a duty to advocate for the most appropriate dispositions consistent with their clients' expressed interests and unique needs.<sup>33</sup>

Unfortunately, many youth do not receive effective dispositional advocacy. Often defense attorneys do not have enough time to get to know their clients well enough to assess their needs or locate appropriate services for them. Because of heavy caseloads and a lack of resources, defenders may not be aware of new services and alternatives to incarceration in their jurisdiction or have time to prepare adequate dispositional plans to present to the court. In addition, defenders may lack access to experts to conduct independent evaluations of their clients to determine treatment needs and challenge recommendations for incarceration.<sup>34</sup> When defense attorneys do not provide judges with alternative dispositions, youth are in danger of unnecessary incarceration in facilities that are not safe, do not meet their needs, are highly restrictive, and are far from home.<sup>35</sup>

In addition to these general problems, LGBT youth may not receive effective advocacy at disposition hearings because their attorneys do not know how to communicate with them, are uncomfortable reaching out to local LGBT services, or are not aware of any programs or services in their jurisdiction that can competently work with LGBT youth. For further discussion of lack of services, see Chapter 6.



## Practice Tips for Defenders: Providing LGBT Youth with Zealous Advocacy at Disposition Hearings

Defense attorneys have an obligation to actively seek out and advocate for alternatives to incarceration that best serve the specific needs and requests of each individual client, including LGBT youth. To meet this obligation, juvenile defenders should:

- Be familiar with community-based programs and resources that provide competent and nondiscriminatory services to LGBT youth.
- Develop relationships with their LGBT clients built on trust and mutual respect.
- Explain all possible disposition options to their LGBT clients after adjudication and solicit input from the youth about the services with which the youth feels most comfortable.
- Request additional evaluations or expert witnesses if necessary to prepare for the disposition hearing.

During disposition hearings, defenders should:

- Inform the court of their clients' individual needs and expressed interests regarding treatment and placement alternatives.
- Zealously advocate against any placements that are not sensitive to LGBT youth or cannot keep LGBT youth safe.
- Present expert testimony and reports to challenge any recommendations for incarceration or other harmful treatment services that are not consistent with professionally accepted medical and mental health practices for LGBT youth.
- Recommend services and placements outside of the jurisdiction if there are no appropriate services available locally and if consistent with their client's expressed interests.

### **The lack of post-disposition representation in many jurisdictions leaves LGBT youth vulnerable to institutional harassment and abuse.**

During the post-dispositional stage, access to counsel is critical for ensuring the state's compliance with orders to provide services, advocating for additional and more appropriate services, and addressing unsafe conditions of confinement. National standards confirm that youth should be represented at this critical stage of a delinquency proceeding.<sup>36</sup> For LGBT youth who are in out-of-home placements, access to counsel after disposition is particularly important given the significant risk of abuse and harassment these youth face (see Chapter 8).

### Case Study: Effective Post-disposition Representation

Antoine was 17-years-old when he was adjudicated for second-degree robbery and committed to the California Youth Authority (CYA). Even though he was never accused of or charged with a sex offense, CYA automatically placed him in a sex offender unit solely because he was bisexual. During his confinement, the staff and other youth subjected him to physical, sexual, and mental abuse, threats, and verbal harassment because of his sexual orientation. He was forced to perform oral sex on another resident. Whenever Antoine refused to comply with sexual demands made by other residents, the other residents physically attacked him. On one occasion when Antoine defended himself, facility staff responded by placing him in solitary confinement. In a particularly severe assault, another youth slashed Antoine in the face with a razor blade, creating a wound that required hundreds of stitches to close and will leave him permanently scarred. After this attack, staff placed Antoine in solitary confinement while he recovered and then prohibited him from leaving his unit for the remaining six months of his confinement.

Antoine's attorney filed a motion with the juvenile court, seeking to vacate this placement because CYA had failed to provide Antoine with the treatment the court had ordered, and the facility failed to protect him. Because Antoine had been confined to his cell and excluded from education and other activities for up to 23 hours a day for several months, he had not received an adequate education. When the motion was denied because of jurisdictional issues, his attorney appealed, ultimately securing Antoine's placement at a transitional living facility designed to meet the needs of homeless LGBT youth.<sup>37</sup>

### Case Study: Systemic Impact of Post-disposition Defence Advocacy

The history of the federal lawsuit *R.G. v. Koller*, discussed in Chapters 5 and 8, illustrates the powerful impact that one defense attorney can have on an entire system. In 2005, a youth who was perceived to be gay told his defender that he was experiencing constant verbal, physical, and sexual abuse in the Hawai'i Youth Correctional Facility (HYCF). The youth filed a grievance about the abuse, but the facility did nothing to protect him except place him in isolation. After his second grievance went unaddressed, his defender filed a writ of *habeas corpus* seeking his removal from the facility. She argued that the facility was violating his constitutional right to safety because other residents were regularly exposing themselves to him, pressuring him for sex, and physically abusing him. Although the judge ultimately dismissed the petition without prejudice for procedural reasons, she expressed particular concern about HYCF's failure to protect the youth and warned the facility that if the allegations in the petition were true, the facility was violating the youth's rights. Noting the apparent systemic nature of the problem, the judge advised the facility to adopt policies and procedures to ensure the fair and appropriate treatment of LGBT youth in its care.<sup>38</sup> The defender's advocacy in this delinquency case laid the ground work for the groundbreaking civil rights case, and her client became one of the plaintiffs in *R.G. v. Koller*.

While these case studies highlight examples of effective practice in many jurisdictions, youth receive no post-disposition representation at all—either because the attorney’s appointment ends at disposition or because the attorney does not have the time and resources to represent youth effectively at that stage.<sup>39</sup> Some offices even have a stated policy that defenders cannot “re-open” a case after adjudication, although many state laws are clear that youth should be represented throughout the course of their disposition. As youth advocate and Equity Project Advisory Committee member Wesley Ware explained, “[P]ost-disposition is a critical stage during which youth should be represented, but the state still does not provide the resources to make this a reality. If youth call their public defenders when they have problems within the facilities, they are often told that their cases are closed or that they should sue the facilities on their own.”<sup>40</sup>

### **Case Study: The Harms of Ineffective Post-disposition Representation**

The case of Destiny, a 16-year-old African-American transgender girl, demonstrates the grave consequences of inadequate post-disposition representation. Destiny’s involvement with the juvenile court system began at age 12 and over the course of the next four years, she repeatedly re-entered the system for shoplifting women’s clothing and jewelry and fighting back against abuse at school. Even though Destiny had not committed any violent or sexual offenses, the court ordered that she be housed in the state’s highest-security juvenile facility for boys because no other placement would accept a transgender girl. During the year she was incarcerated, Destiny was regularly sexually assaulted and physically threatened by other youth, harassed by staff, and punished for her gender expression. Destiny’s court-appointed attorney never advocated for programs to meet her needs, never visited her in the facility, and never challenged the abusive conditions of her confinement. Despite his refusal to advocate on her behalf, the court denied Destiny’s requests for a new attorney.

The National Center for Lesbian Rights (NCLR) subsequently agreed to represent Destiny. When NCLR submitted a report with local co-counsel about the sexual assaults perpetrated against Destiny, her court-appointed attorney remarkably suggested to the judge that Destiny was exaggerating. He told the judge, “I think this young man has a lot of things—and I use the word *man*—to think about so I would just ask the court to be cautious in any decision that it makes.”<sup>41</sup> Not only had the court-appointed attorney demonstrated a complete disrespect for Destiny’s gender identity and failed to act when he became aware of Destiny’s abuse, he argued in favor of continued commitment in the facility where she was clearly unsafe. As a result, the court continued Destiny’s commitment at the facility until she completed the program.

### Spotlight on Reform: Protecting the Rights of LGBT Youth After Disposition

The Juvenile Justice Project of Louisiana (JJPL), a juvenile justice reform organization, launched in 2006 the LGBTQ and HIV/AIDS Project focused on protecting the rights of incarcerated LGBTQ youth and youth living with HIV/AIDS in secure care facilities in Louisiana. The objectives of the project are to ensure that LGBTQ youth in the juvenile justice system receive quality representation in delinquency proceedings, reform the secure care facilities to provide quality services addressing the specific needs of LGBTQ youth or youth living with HIV/AIDS from entry to post-release, and significantly reduce the number of incidents of violence and harassment experienced by this population in secure confinement. To these ends, the project has provided individual legal advocacy; training and education for public defenders, police officers, drug and family court staff, detention center staff, probation officers, and district attorneys; and is writing a report about LGBTQ youth in secure confinement in Louisiana.<sup>42</sup>

#### **Lack of understanding about LGBT issues and lack of resources can undermine a defender's ability to build effective attorney-client relationships.**

*"My attorney didn't know that I didn't get along with my mom, and her mistake was she tried to put me back at home, and I refused. I thought she wouldn't understand why I was having a problem with my mother, so I didn't tell her."*<sup>43</sup>

—Janelle, a 17-year-old Latina-white, male-to-female transgender youth

A meaningful trusting attorney-client relationship is the fundamental underpinning of effective advocacy. When defenders are unprepared to work with LGBT youth, the attorney-client relationship suffers. As the project's focus groups revealed, youth often sense the discomfort that their defenders feel in dealing with LGBT issues. One lesbian youth, Shavonne, explained, "Even my [defense attorney] would look at me funny. He wouldn't say anything but he'd look at me like, 'That's a girl?' He probably thought I didn't notice but I did."<sup>44</sup> Other youth also felt that their defenders did not understand them or were apathetic to their concerns. As Kyle explained, "Defenders are ignorant. Because you are LGBT, they don't work as hard because they don't know what to do. They don't try to defend you as much."<sup>45</sup>

Some of the difficulty that juvenile defenders have in working with LGBT youth stems from a lack of training. As one defender remarked, "We have training on talking with our clients, but there's nothing specific to trying to develop relationships with [LGBT] clients. [J]ust having a little question list that would have some kind of appropriate questions to bring up [would help] because I don't really know where to begin."<sup>46</sup> There has been some progress toward recognizing the importance of training on these issues. In

particular, the “Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems,” developed by American Council of Chief Defenders and National Juvenile Defender Center, recognizes that the special issues presented by lesbian, gay, bisexual, and transgender youth require increased awareness and training to ensure that advocacy on their behalf addresses their needs. And the state



of Virginia in 2007 adopted “Standards for Juvenile Defense Counsel,” which require that counsel “be knowledgeable about and seek ongoing training in . . . the issues of lesbian, gay, bisexual, and transgender youth in the juvenile justice system.”<sup>47</sup> However, a general lack of defender training, as well as a lack of training on representing LGBT youth in particular, remains a significant problem.

Other impediments to building trusting relationships for even well-meaning defense attorneys relate to the general lack of time and resources to devote to each individual case. Since attorneys are often appointed late in the process, they regularly must conduct initial client meetings at the courthouse only minutes before the detention hearing and often in the hallway with no privacy. Defender Kim Forte lamented the lack of private interview space for defenders at the courthouse in her jurisdiction, explaining that, “LGBT youth may not feel comfortable talking with their attorneys about their experiences of discrimination and about their identity in this space, so the defense attorney will not have all of the facts that he or she might need.”<sup>48</sup>

## Practice Tips for Defenders: Talking with Youth about Sexual Orientation or Gender Identity<sup>49</sup>

While many young people are openly LGBT in some areas of their lives, it is not likely that LGBT youth involved in the juvenile court will immediately offer this information to everyone. Although defenders may think that a youth is LGBT, they should not make assumptions based on how a youth looks or acts. Rather, defenders should take the following steps to ensure sensitive advocacy:

- Inform youth of the attorney-client privilege and confidentiality and maintain client confidentiality.
- Explain to the youth in language that she or he can understand the attorney's duties of loyalty and communication, including the responsibility to consult with clients regarding their legal options.
- Spend enough time with clients to develop a trusting relationship. Follow through on commitments to them.
- Explain that defenders need to know as much as possible about them to be able to advocate for their interests and convey a nonjudgmental attitude. Ask open-ended questions.
- Do not make assumptions about a youth's sexual orientation or gender identity. Avoid language that assumes anything about a youth's sexual orientation or gender identity. For example, rather than asking a youth "Do you have a boyfriend?" ask "Do you have a boyfriend or girlfriend?" or "Are you dating or in a relationship with anyone?"
- Signal affirmation of all sexual orientations or gender identities through posters, stickers, or other office displays that include LGBT youth.
- If a youth raises issues related to sexual orientation or gender identity, remain open and supportive.
- Ask youth what name they would like to be called and what pronoun they prefer.
- Remember that the youth is the gatekeeper of this information. Always ask her or his permission before revealing this information to others.<sup>50</sup>

### **Practice Tips for Defenders: Responding to LGBT Bias in the Courtroom<sup>51</sup>**

All juvenile justice professionals have a role to play in ensuring that LGBT youth do not face discrimination in the justice system. Defense attorneys in particular have specific legal and ethical responsibilities to their clients. To fulfill these responsibilities, defenders should take the following steps when advocating for their LGBT clients:

- Immediately respond to jokes or other disrespectful comments about your client's actual or perceived sexual orientation or gender identity. Note your objection for the record.
- Challenge disproportionate and punitive juvenile court responses to consensual sexual conduct, particularly when based on gender, sexual orientation, and race.
- Advocate for youths' right to express their sexual orientation and gender identity in court, including requesting that court professionals address clients with their preferred names and pronouns, if so directed by client.
- Oppose assumptions made about the sexual activity of clients based on gender, sexual orientation, or race.
- Oppose introduction of evidence of sexual orientation or sexual conduct when not relevant or when used to punish or embarrass youth.
- Challenge assumptions that youth should be placed in secure facilities "for their protection."
- Cite research, expert testimony, and accepted professional standards that support fair treatment of LGBT youth.

## Endnotes

1. See Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577, 634-35 (2002) (quoting the National Report of President Johnson's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 86-87 (1967)).
2. Equity Project focus group, Russell, a 21-year-old white, bisexual male youth (Apr. 17, 2008).
3. *In re Gault*, 387 U.S. 1 (1967).
4. See Lee Teitelbaum, Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, *Juvenile Justice Standards Relating to Counsel for Private Parties* 69 (1996) [hereinafter *Juvenile Justice Standards Relating to Counsel*]; see also *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person").
5. See Berkheiser, *supra* note 1, at 86-87.
6. All assessments by the National Juvenile Defender Center can be found at [www.njdc.info](http://www.njdc.info).
7. See American Bar Association Juvenile Justice Center, Youth Law Center, and Juvenile Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 45, 52 (1995) [hereinafter *A Call for Justice*].
8. See Elizabeth Calvin, et al., *Advocacy and Training Guide: Juvenile Defender Delinquency Notebook* 3 (2006).
9. See Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 Rutgers L. Rev. 175 (2007).
10. See generally Calvin et al., *supra* note 8.
11. American Bar Association Model Rules of Professional Conduct: Preamble (zealous advocacy), 1.4 and 2.1 (communication), 1.6 (confidentiality), & 1.7 - 1.12 (loyalty) (2002) (requiring attorneys maintain a normal attorney-client relationship with young clients "as far as reasonably possible").
12. See *Juvenile Justice Standards Relating to Counsel*, *supra* note 4, at 75-76; National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 30 (2005) [hereinafter *Juvenile Delinquency Guidelines*]; National Juvenile Defender Center & National Legal Aid and Defender Association, *Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems* at principle 1 (2008) [hereinafter *Ten Core Principles*]. For more in-depth discussion of the ethical duties of juvenile defenders, see Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 81, 245, 256 (2005); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399, 1412, 1424 (1996); Martin Guggenheim, *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301, 1312 (1996).
13. See Barbara Fedders, *Coming Out For Kids: Recognizing, Respecting, and Representing LGBT Youth*, 6 Nev. L. J. 774, 775 (2006).
14. Equity Project interview with a juvenile defender (June 28, 2007).
15. Report of the Working Group on the Role of Sex and Sexuality, 6 Nev. L. J. 642, 644 (2006) [hereinafter *Report of Sex and Sexuality Working Group*].

16. Redacted family court order, transgender girl (2008) (on file with authors).
17. Correspondence from attorney to Equity Project (Apr. 14, 2008) (on file with authors).
18. Equity Project focus group, Adam, a 14-year-old African-American, gay male youth (May 5, 2008).
19. See Fedders, *supra* note 13, at 799-803.
20. See *id.*
21. *Id.*, at 801.
22. Equity Project focus group, Janelle, a 17-year-old Latina-white, male-to-female transgender youth (May 1, 2008).
23. *Id.*
24. Notes on file with author Jody Marksamer.
25. Equity Project interview with youth advocate Wesley Ware (Jan. 17, 2008).
26. Daniel J. Freed & Timothy P. Terrell, Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, *Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, 139 (1996) [hereinafter *Juvenile Justice Interim Status Standards*].
27. *Juvenile Delinquency Guidelines*, *supra* note 12, at 30.
28. See National Juvenile Defender Center, *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 2* (2002) (Noting that under Virginia law, counsel need not be appointed until after the initial advisement hearing, which, for detained youth, is combined with the detention hearing. After the appointment, counsel may request a reconsideration of the detention decision through a detention review hearing; however such hearings are rarely conducted. Thus, most children are detained without benefit of counsel.); see also National Juvenile Defender Center, *Legal Strategies to Reduce the Unnecessary Detention of Children* (2004) [hereinafter *NJDC Legal Strategies*].
29. See NJDC *Legal Strategies*, *supra* note 28, at 3-38 (describing effective methods of advocacy for defenders to reduce juvenile detention rates).
30. See generally Fedders, *supra* note 13.
31. Josephine Gittler, Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, *Juvenile Justice Standards Relating to the Juvenile Probation Function: Intake and Predisposition Investigative Services*, 169-70 (1996); Calvin et al., *supra* note 8, at 228-29; *A Call for Justice*, *supra* note 7, at 36.
32. *Juvenile Delinquency Guidelines*, *supra* note 12, at 135.
33. *Id.* at 137; *Ten Core Principles*, *supra* note 12, at principle 8.
34. *A Call for Justice*, *supra* note 7, at 52.
35. Calvin et al., *supra* note 8, at 148-49.
36. See *Juvenile Delinquency Guidelines*, *supra* note 12, at 25; *Juvenile Justice Interim Status Standards*, *supra* note 26, at 140; National Association of Counsel for Children, *NACC Policy Agenda: Juvenile Justice Policy* (1997), [http://www.naccchildlaw.org/?page=Policy\\_Agenda](http://www.naccchildlaw.org/?page=Policy_Agenda); *Ten Core Principles*, *supra* note 12, at principle 1.
37. *In re Antoine D.*, 137 Cal.App.4th 1314, 1319-1320 (Cal. App. 1st Dist. 2006) (further notes on file with author).
38. Unpublished order dismissing writ of habeas corpus without prejudice, Family Court of the First Judicial Circuit, Hawai'i, Judge Wong, Mar. 17, 2005; see also Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgendered Young People in*

- State Custody: Making the Child Welfare and Juvenile Justice Systems Safe For All Youth Through Litigation, Advocacy, and Education*, 79 Temp. L. Rev. 415, 427 n. 49 (2006).
39. See *A Call For Justice*, *supra* note 7, at 26.
  40. Equity Project interview with Wesley Ware (Jan. 17, 2008).
  41. Jody Marksamer, *And by the Way, Do You Know He Thinks He's a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Juvenile Delinquency Courts*, 5 Sexuality Research & Social Policy 72, 77 (2008).
  42. For more information on the upcoming report from the Juvenile Justice Project of Louisiana's LGBTQ Project, visit <http://jjpl.org/new/>.
  43. Equity Project focus group, Janelle, a 17-year-old Latina-white, male-to-female transgender youth (May 1, 2008).
  44. Equity Project focus group, Shavonne, a 21-year-old African-American-multiracial lesbian female youth (Apr. 11, 2008).
  45. Equity Project focus group, Kyle, a 17-year-old white bisexual female-to-male transgender youth (May 4, 2008).
  46. Equity Project interview with a juvenile defender (July 6, 2007).
  47. Commonwealth of Virginia, *Practice Standards of Practice for Indigent Defense In Non-Capital Criminal Cases at the Trial Level* 38, 2.2 (z).
  48. Equity Project interview with Kim Forte (Dec. 3, 2007).
  49. See Jody Marksamer & Shannan Wilber, *The Model Standards Project: Defending LGBTQ Youth*, [http://www.nclrights.org/site/DocServer/msp\\_attyguideyouth0105.pdf?docID=1562](http://www.nclrights.org/site/DocServer/msp_attyguideyouth0105.pdf?docID=1562). See also Marynella Woods, *10 Tips: Working with LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Questioning) Youth*, available at [http://www.equityproject.org/pdfs/top\\_10\\_tips.pdf](http://www.equityproject.org/pdfs/top_10_tips.pdf).
  50. Some defender offices regularly inquire about sexual orientation and gender identity on client intake forms. This can be an effective practice in offices that regularly train their staff on LGBT-related issues. It is important to understand, however, that many youth are not comfortable coming out to others with whom they have not yet developed a trusting relationship.
  51. *Report of Sex and Sexuality Working Group*, *supra* note 15, at 644.

## Chapter 10

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## Recommendations for Guaranteeing Due Process and Improving Outcomes for Court-Involved Youth

Despite the outstanding work of many dedicated juvenile justice system professionals who have tirelessly advocated on behalf of LGBT youth, many LGBT youth across the country continue to face bias, harassment, and unfair treatment throughout the course of their delinquency cases. In addition, many well-meaning juvenile justice professionals lack an understanding of the unique challenges confronting LGBT youth, which limits their ability to fulfill their professional and ethical responsibilities.

Collaborative action is needed to address the systemic deficiencies that undermine fairness and equity for LGBT youth in the nation's juvenile courts. By implementing practice and policy reforms, individuals and jurisdictions can protect the due process rights of LGBT youth in juvenile courts, divert as many youth as possible out of the juvenile justice system, and meet the individualized treatment and rehabilitative needs of adjudicated youth. The recommendations set forth in this chapter are intended to guarantee due process protections and improve outcomes for all court-involved youth generally, and for LGBT youth, in particular.

### Core Recommendations

The following core recommendations are designed to enhance the capacity of juvenile justice professionals to work effectively with LGBT youth. To help ensure the rights of LGBT youth and meet their rehabilitative needs in delinquency and status offense cases, the Equity Project recommends the following:

1. Juvenile justice professionals (including judges, defense attorneys, prosecutors, probation officers, and detention staff) must treat—and ensure others treat—all LGBT youth with fairness, dignity, and respect, including prohibiting any attempts to ridicule or change a youth's sexual orientation or gender identity.
2. Juvenile justice professionals must promote the well-being of transgender youth by allowing them to express their gender identity through choice of clothing, name, hairstyle, and other means of expression and by ensuring that they have access to appropriate medical care if necessary.
3. Juvenile justice professionals must receive training and resources regarding the unique societal, familial, and developmental challenges confronting LGBT youth and the relevance of these issues to court proceedings. Trainings must be designed to address the specific professional responsibilities of the audience (i.e., judges, defense attorneys, prosecutors, probation officers, and detention staff).
4. Juvenile justice professionals must develop individualized, developmentally appropriate responses to the behavior of each LGBT youth, tailored to address the specific circumstances of his or her life.
5. All agencies and offices involved in the juvenile justice system (including courts, as well as prosecutor, defender, and probation offices, and detention facilities) must develop, adopt, and enforce policies that explicitly prohibit discrimination and mistreat-

- ment of youth on the basis of actual or perceived sexual orientation and gender identity at all stages of the juvenile justice process, from initial arrest through case closure.
6. Juvenile courts must commit to using the least restrictive alternative necessary when intervening in the lives of youth and their families and avoid unnecessary detention and incarceration.
  7. Juvenile courts must collaborate with other system partners and decision makers to develop and maintain a continuum of programs, services, and placements competent to serve LGBT youth, ranging from prevention programs to alternatives to detention to nonsecure and secure out-of-home placements and facilities. Programs should be available to address the conflict that some families face over the sexual orientation and gender identity of their LGBT child.
  8. Juvenile justice professionals and related stakeholders must ensure adequate development, oversight and monitoring of programs, services, and placements competent to serve LGBT youth.
  9. Juvenile courts must ensure the timely appointment of qualified and well-resourced counsel to provide zealous defense advocacy at all stages of delinquency proceedings.
  10. Juvenile justice professionals must take responsibility for protecting the civil rights, and ensuring the physical and emotional well-being and safety, of LGBT youth placed in out-of-home placements.
  11. Juvenile justice professionals must adhere to all confidentiality and privacy protections afforded LGBT youth. These protections must prohibit disclosure of information about a youth's sexual orientation and gender identity to third parties, including the youth's parent or guardian, without first obtaining the youth's consent.

## Strategies for Reform

Each stakeholder within the juvenile justice system has responsibility for implementing practice and policy reforms to ensure that all youth, including LGBT youth, are treated with dignity, fairness, and respect. Depending on the particular role of the professionals within the system, however, the specific strategies for reform will vary. The strategies below are directed toward particular categories of professionals within the juvenile justice system, based on their specific duties.

### Juvenile Courts, Judges and Bench Officers

#### Support the creation of a continuum of community-based, LGBT-competent resources

- Ensure that all court-based services such as mental health programs, drug or alcohol abuse services, and status offender programs, provide effective and nondiscriminatory services to LGBT youth.
- Keep informed of community-based programs and resources (including diversion programs, out-of-home placements, and aftercare services) that are equipped to

work with LGBT youth and provide effective nondiscriminatory services. Ensure that defense attorneys, prosecutors, and probation officers are familiar with these resources as well.

- Require mental health professionals with whom the court contracts to obtain training in competently providing services to LGBT youth.

#### **Insist on decorum and respect in the courtroom**

- Ensure that all professionals, regardless of their personal views, treat LGBT youth with dignity and respect in court. Immediately respond to instances of discrimination, including comments made in court that belittle, ridicule, or otherwise demonstrate bias towards LGBT youth.
- Where applicable, indicate on court documents a transgender youth's preferred name along with the legal name.

#### **Adhere to constitutional and statutory due process provisions**

- Ensure the timely appointment of well-resourced, qualified counsel to represent LGBT youth at all stages of delinquency cases.
- Conduct all judicial colloquies using developmentally appropriate language and insist that any waivers of rights by youth meet the knowing, voluntary, and intelligent standard.

#### **Reduce the over-reliance on detention and incarceration**

- Make detention decisions based on appropriate legal standards (i.e., risk of dangerousness or flight). In cases in which these standards are not met but returning home is not an option, explore viable alternatives to detention.
- Support the creation of alternatives to detention that will keep LGBT youth in their communities with the lowest level of supervision necessary, such as informal daily reporting centers, curfews, placement in foster homes, or counseling.
- Where applicable, participate with other stakeholders on committees that develop or adopt screening tools used to make detention decisions. Any such tools must be based on objective, evidence-based factors and should not have a disparate impact on LGBT youth.

### **Juvenile Defense Attorneys**

#### **Provide client-centered defense advocacy throughout the duration of each case**

- Zealously represent the child's expressed legal interests, after counseling the client to understand the benefits and drawbacks that could accompany any particular course of action. This includes respecting the clients' decisions about whether, how, and to whom they choose to disclose their sexual orientation and gender identity.
- Provide comprehensive representation throughout the duration of the case, including but not limited to representation at the initial and detention hearings, pre-adjudi-



catory motions hearings, adjudication, disposition, and post-disposition. To provide effective representation, defenders must carry reasonable caseloads, and have access to support staff, investigators, experts, and social workers to assist with case investigation and preparation. Moreover, the court must appoint counsel at the earliest stage of cases, and representation must continue through the post-disposition phase.

- Maintain up-to-date lists of LGBT-competent services in the jurisdiction, as well as programs or placements that have been unsupportive of LGBT youth. Share this information with courts, probation officers, and prosecutors. Advocate for those services and placements that are LGBT-competent and against those which are not.

### **Develop meaningful lawyer-client relationships**

- Establish a meaningful, trusting relationship with clients and assure the youth of the confidential nature of the attorney-client relationship. Successful attorney-client relationships can only be built if defenders spend—and are afforded—sufficient time with clients.
- Be aware of personal biases regarding race, ethnicity, class, immigration status, sexual orientation, and gender identity. Defenders should not allow these biases to negatively influence the representation of clients.

## **Juvenile Prosecutors**

### **Ensure fair prosecution**

- In addition to training on LGBT issues for all staff in the prosecutor's office, such as investigators, paralegals, social workers, disposition specialists, police liaisons, and anyone who may interview complainants, all staff should receive training on how to identify hate-based offenses against LGBT youth, including those perpetrated by family members.
- Consider the risk factors associated with adolescent LGBT identities when deciding whether to divert, dismiss, or petition a case, assessing culpability, and making disposition recommendations.
- Develop LGBT-competent diversion programs and resolve cases outside the formal court process to the extent possible.

## **Juvenile Probation Agencies and Officers**

### **Ensure fair case processing**

- Consider sexual orientation and gender identity when making disposition recommendations to ensure that youth are not placed in programs that are damaging to them, and instead are placed in programs and provided services that appropriately address their individual concerns.
- Explore possible alternatives to detention and incarceration and recommend the least restrictive disposition necessary in each case.

- For youth alleged to have violated probation conditions, thoroughly explore the reasons for the behavior and consider whether harassment or abuse associated with sexual orientation or gender identity have contributed to the behaviors before asking the court to revoke probation.

### **Ensure services and programs provided to youth are LGBT-competent**

- Support the creation of a continuum of community-based, LGBT-competent programs, including diversion programs.
- Require that all contracts with community-based providers and other governmental agencies specifically include LGBT-competent services and prohibit discrimination against LGBT youth.
- Address family conflicts by providing services to families struggling to accept the sexual orientation or gender identity of youth. Secure funding for community-based, LGBT-sensitive conflict resolution programs and counseling services to resolve family conflicts.

## **Detention and Other Secure Facilities**

### **Ensure that youth are safe and treated with respect**

- Prohibit, and swiftly respond to, the verbal, physical, and sexual abuse of LGBT youth by staff and other youth. Create a culture of respect for all youth within the facility. (See also “Practice Tips: Preventing Harassment in Secure Facilities” in Chapter 8.)
- Provide a written explanation of the facility’s nondiscrimination policies (once adopted) to youth when they enter the facility.
- Gather data on the number of LGBT youth in detention and their experiences to assess youth needs through anonymous surveys or other measures that will protect privacy and confidentiality.
- Provide LGBT-competent programming and services within facilities. Do not attempt to change a youth’s sexual orientation or gender identity, punish youth for expressing sexual orientation or gender, or require youth to undergo sex offender counseling based solely on the youth’s sexual orientation or gender identity.

### **Make appropriate and individualized housing decisions**

- Develop policies and protocols regarding the appropriate housing and classification of LGBT youth in facilities. Develop and implement evidence-based intake processes to identify youth who are vulnerable to physical and sexual assault for purposes of classification. Utilize LGBT-competent health and mental health screening tools.
- Insist on individualized classification and housing decisions. Prohibit blanket policies regarding the housing of LGBT youth, or those perceived to be LGBT, including policies that allow for the automatic housing of transgender youth according to their birth sex. Prohibit placement of LGBT youth, based solely on their sexual orientation

or gender identity, in sex-offender units or with violent or sexually aggressive youth.

- Develop responses to abuse or harassment (or threat of abuse or harassment) of LGBT youth that do not rely on the isolation or segregation of LGBT youth. Place vulnerable youth in the least restrictive environment necessary to ensure safety and provide the youth with equal access to facility services.

#### **Provide adequate oversight and advocacy**

- Remove any barriers that impede access to counsel for youth in the facility.
- Develop grievance procedures regarding complaints related to discrimination, harassment, and physical or sexual abuse. Investigate and provide meaningful follow-up on all complaints. Track complaints in a manner that identifies the sexual orientation and gender identity of the alleged victim and abuser while ensuring confidentiality of this information.

#### **Provide appropriate medical care**

- Provide all youth with access to quality medical care. Ensure access to medical personnel who are knowledgeable about the particular health needs of transgender youth. Continue to provide all transition-related medical treatments that transgender youth started prior to entering the facility. Provide any necessary authorization for the initiation of transition-related treatments when they are medically necessary according to accepted professional standards.
- Engage health and mental health professionals in monitoring the well-being of LGBT youth, advocating on their behalf, and taking steps to ensure their safety in facilities. Medical staff should ask all youth about safety, both in the facility and the youth's homes. Medical staff should routinely ask about sexual activity, sexual orientation, and gender identity of all youth.
- Provide counseling services that address self-acceptance and validation, concerns about disclosure of sexual orientation or gender identity, family relationships, healthy intimate relationships, and sexual decision making.

### **Bar Associations**

- Pass resolutions supporting legislative and policy changes that will improve the system's response to LGBT youth (such as the adoption of nondiscrimination policies by justice system agencies, enactment of legislation that rolls back punitive responses to minor misbehavior, and the creation of a continuum of care for all youth, including LGBT youth).
- Host continuing legal education events, and develop subcommittees to address issues related to LGBT youth in the juvenile justice system.



## LGBT Advocates and Juvenile Justice Advocates

- Ensure that local juvenile justice systems implement the recommendations provided in this report. Pursue litigation and policy advocacy when necessary to ensure the fair and respectful treatment of LGBT youth in the juvenile justice system.
- Advocate for the enactment of legislation that would address the criminalization of adolescent sexual behavior. This includes advancing policies that (1) respond to juveniles engaged in prostitution with social services rather than criminal sanctions; (2) address out-dated age of consent laws that expose adolescents to sanctions for engaging in consensual sexual behavior with other adolescents; and (3) exempt juveniles from harmful sex offender registration and community notification laws.
- Educate law enforcement personnel about the particular issues facing LGBT youth to ensure respectful treatment and prevent police profiling of LGBT youth as prostitutes and unnecessary arrests.
- Encourage professional organizations, such as the American Academy of Pediatrics, the National Commission on Correctional Health Care, the National Council of Juvenile and Family Court Judges, and the American Bar Association, to take supportive positions on LGBT issues.

## Policy Makers

- Ensure the passage of nondiscrimination laws that specifically address actual or perceived sexual orientation and gender identity.
- Establish an independent ombudsperson or similar oversight program for secure facilities that is not administered by the same agency that oversees the institutions.
- Ensure that a continuum of community-based, LGBT-competent programs is available and properly funded.
- Develop status offender systems that treat at-risk youth outside the court system and provide them and their families with culturally-competent community-based services.
- Eliminate zero tolerance laws and require that schools provide interventions to improve student behavior before referring to juvenile court except for the most serious criminal offenses. Pass legislation giving schools incentives and resources to develop such interventions.

# Appendices

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# Appendices

## Appendix A: Glossary of LGBT and Juvenile Justice Terms

**adjudication:** A guilty finding in a juvenile delinquency case; the equivalent of a “conviction” for an adult accused of a crime.

**adjudicatory hearing:** A hearing to determine if the facts support the allegation(s) made against a youth; the equivalent of an adult criminal trial.

**ally:** An individual who is not lesbian, gay, bisexual, or transgender and is supportive of the LGBT community.

**arrest:** The taking of a youth into involuntary custody for questioning or detainment by a person, with legal authority, usually law enforcement. Also see *taken into custody*.

**assessment tools:** In-depth information gathering and diagnostic instruments used by trained professionals to determine needs, diagnoses, and strengths.

**birth sex:** The sex, male or female, noted on an individual’s birth certificate.

**bisexual:** A person who is emotionally, romantically, and sexually attracted to both men and women.

**coming out:** The process of disclosing one’s sexual orientation or gender identity to others. Because most people in our society are presumed to be heterosexual, coming out is typically not a discrete event, but a lifelong process.

**confidentiality protection:** The practice of guarding the confidentiality of a youth’s involvement in the juvenile delinquency system, typically regulated by state statute. Confidentiality protections are typically not comprehensive; most include exemptions that provide for a youth’s record of delinquency involvement to be made available to schools, youth agencies, law enforcement officials, prosecutors, and victims under certain circumstances.

**criminal court:** A court with jurisdiction over adults being accused of committing criminal acts. Increasingly, juveniles are being tried in criminal court.

**delinquency petition:** A petition filed by a prosecutor specifying the violation of law that a youth is alleged to have committed and asking for the youth to be declared “delinquent” by the juvenile court.

**delinquent act:** An act that violates a state’s criminal laws committed by a youth who falls within juvenile court jurisdiction.

**detention facility:** An institution in which juveniles may be held while delinquency proceedings are underway; the equivalent of a “jail” in the adult correctional system.

**detention hearing:** The first juvenile delinquency court hearing regarding an alleged delinquent youth who was placed in detention at the time the delinquency petition was filed

or at the time the youth was arrested. The purpose of the hearing is to determine, among other things, whether the youth should be detained during the pendency of his or her case.

**disposition:** The equivalent of “sentencing” in the adult criminal system.

**disposition hearing:** The hearing at which the juvenile delinquency court makes orders regarding the consequences that an adjudicated youth receives as a result of committing a delinquent act. The probation officer, prosecutor, and juvenile are permitted to propose disposition plans. Recommendations might include, for example, probation, drug treatment, restitution, or residential placement.

**diversion:** The handling of a case involving a youth through nonjudicial alternative interventions. If the youth successfully completes the diversion requirements, the petition is either dismissed or not filed.

**gay:** A person whose emotional, romantic, and sexual attractions are primarily for individuals of the same sex, typically in reference to men and boys, although in some contexts, still used as a general term for gay men and lesbians.

**gender expression:** A person’s expression of his or her gender identity (see below), including characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions.

**gender identity:** A person’s internal, deeply felt sense of being male or female.

**gender identity disorder:** A diagnosable medical condition where an individual has a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the opposite sex, as well as a persistent discomfort about one’s assigned birth sex or a sense of inappropriateness in the gender role of that sex. In addition, the individual must be evidencing clinically significant distress or impairment in social, occupational, or other important areas of functioning.

**gender nonconforming:** Having or being perceived to have gender characteristics and/or behaviors that do not conform to traditional or societal expectations. Gender nonconforming people may or may not identify as LGBT.

**gender roles:** Social and cultural beliefs about appropriate male or female behavior, which children usually internalize between ages 3 and 7.

**genderqueer:** A term of self-identification for people who do not identify with the restrictive and binary terms that have traditionally described gender identity (for instance, male or female only). Also see *gender nonconforming*, *queer*, and *transgender*.

**homophobia:** Literally, “fear of homosexuals,” but in recent decades, broadened as a term for prejudice against LGBT people.

**homosexual:** A term used to refer to a person based on his or her same-sex sexual orientation, identity, or behavior. Many LGBT people prefer not to use this term—especially as a noun—because of its historically negative use by the medical establishment.

**intake:** The initial screening and assessment of a juvenile who is alleged to have violated the law or a court order.

**legal guardian:** An adult who is not a child’s biological or adoptive parent, but has been given legal authority by a court to provide care and have custody of a child. In some jurisdictions a child’s biological or adoptive parent may also be referred to as the child’s legal guardian.

**lesbian:** A woman or girl whose emotional, romantic, and sexual attractions are primarily for other women or girls.

**LGBT:** Common acronym for Lesbian, Gay, Bisexual, and Transgender—persons that despite their differences are often discriminated against in similar ways. Sometimes written to include “Q” for Questioning and/or Queer, “I” for Intersex, and/or “A” for Ally. May also be written as GLBT.

**nonsecure detention:** An unlocked facility that does not restrict movement into or out of the facility and is used to detain an alleged or adjudicated delinquent youth until the juvenile delinquency court orders the youth’s release.

**post-disposition review:** Hearings held after the juvenile delinquency court has ordered probation, treatment services, or placement, to ensure that the youth, parents, probation service, and placement providers are following through with the court-ordered plan. This review can be through progress reports, progress hearings, or dispute resolution alternatives.

**pre-disposition report:** A report to the court on the youth’s offense, family history, community involvement, and recommendations for disposition.

**probation:** The status of a delinquent youth placed on community supervision. Youth are supervised by a juvenile probation officer based on an order of the court.

**queer:** A historically derogatory term for a gay man, lesbian, or gender-nonconforming person. The term has been widely reclaimed, especially by younger LGBT people, as a positive social and political identity. It is sometimes used as an inclusive, or umbrella, term for all LGBT people; more recently, *queer* has become common as a term of self-identification for people who do not identify with the restrictive and binary terms that have traditionally described sexual orientation (for instance, gay, lesbian, or bisexual only). Some LGBT community members still find *queer* an offensive or problematic term. Also see *genderqueer*.

**questioning:** An active process in which a person explores her or his own sexual orientation and/or gender identity and questions the cultural assumptions that she or he is heterosexual and/or gender conforming. Many LGBT people go through this process before “coming out.” Not all people who question their identities end up self-identifying as LGBT.

**referral:** The process of directing a youth to the court system based on an allegation of a criminal law violation.

**reparative therapy:** An intervention designed to “cure” LGBT youth of their sexual orientation. Reparative therapy is opposed by the American Academy of Pediatrics, the American Psychiatric Association, and other major professional associations, because it is harmful and ineffective. Agencies should not permit staff, caregivers, community providers, or contractors to use these interventions with youth.

**secure facility:** A locked facility with physical features that restrict the movement of youth who are either detained pretrial or have already been adjudicated delinquent.

**self-identification:** One’s own identification of one’s gender identity or LGB sexual orientation. Increasingly, LGBT youth are self-identifying during preadolescence or early adolescence.

**sex offender:** Someone who commits a sex-based crime. LGBT youth are sometimes wrongly treated as sex offenders by mere virtue of their sexual orientation or gender identity.

**sex roles:** See *gender roles*.

**sexual orientation:** A term describing a person’s emotional, romantic, and sexual attraction, for members of the same sex or a different sex. More appropriate than “sexual preference.”

**status offense:** An offense that would not be a crime if committed by an adult (e.g., truancy, running away from home, being out of control of parents, defying school rules).

**taken into custody:** The physical control of a youth who is detained by a law enforcement officer due to a violation of law or a court order. Also see *arrest*.

**transgender person:** A person whose gender identity (his or her understanding of him or herself as male or female) does not correspond with his or her anatomical sex. A transgender woman is a woman whose birth sex was male but who understands herself to be female. A transgender man is a man whose birth sex was female but who understands himself to be male.

**transition:** The time period when a transgender person starts living as the gender she or he identifies as. Often includes a change in style of dress, selection of new name, a request that people use the correct pronoun, and possibly hormone therapy and/or surgery.

**transsexual:** A term for someone who transitions from one physical sex to another, to bring his or her body more in line with his or her innate sense of his or her gender identity. It includes those who were born male but whose gender identity is female, and those who were born female but whose gender identity is male. Transsexual people have the same range of gender identities and expressions as others. Many transsexual people refer to themselves as transgender.

**two-spirit:** A term used by some LGBT American Indians to refer to their LGBT identities. Historically, in some American Indian traditions, “two spirit” people were those gifted with the privilege of housing both feminine and masculine spirits in one body, making them inherently sacred people.

## Appendix B: Survey for Defenders

### SURVEY FOR DEFENDERS

#### Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Delinquency Courts

As a juvenile defense attorney, you are uniquely situated to provide information about the experiences of your clients in juvenile delinquency courts. This survey asks for your experiences with and observations about youth whom you have represented in delinquency and status offense cases who identify as—or are perceived to be—lesbian, gay, bisexual, or transgender (LGBT). As you may not always know how a youth identifies himself or herself, please consider both the experiences of youth who have told you they are LGBT, as well as youth whom you, court personnel or detention staff have perceived to be LGBT. Also, please include the experiences of LGBT youth you know of, even if they were not your clients.

This work is being conducted by the Equity Project, a national initiative to examine how LGBT youth are treated in delinquency and status offense cases. Your responses, which will be kept confidential, will be used to produce a report with recommendations about the treatment and court processing of LGBT youth. When the survey asks for numbers or percentages, please provide your best estimate.

#### Key Terms

Lesbian: A woman whose emotional, romantic, and sexual attractions are primarily for other women.

Gay: A person whose emotional, romantic, and sexual attractions are primarily for individuals of the same sex. More often used in reference to males.

Bisexual: A person who is emotionally, romantically, and sexually attracted to both men and women.

Gender Identity: A person's internal identification or self-image as male or female

Sexual Orientation: An enduring emotional, romantic, sexual, and affectional attraction to others that is shaped at an early age. It varies from exclusively homosexual to bisexual to exclusively heterosexual.

Transgender: An umbrella term that can be used to describe people whose gender expression is non-conforming and/or whose gender identity is different from their assigned sex at birth. This term can include transsexuals, cross-dressers, and others whose gender expression varies from traditional or societal expectations.

1. Please list the number of delinquency clients you have represented and the number of years you have practiced as a delinquency attorney.  
       \_\_\_\_\_ delinquency clients                      \_\_\_\_\_ years of delinquency experience
2. During the last two years, how many of your delinquency clients have self-identified as or have you perceived to be:
 

|                |                   |
|----------------|-------------------|
| lesbian _____  | gay _____         |
| bisexual _____ | transgender _____ |

Equity Project Defender Survey

**Client Interviews**

3. How often do you ask your clients about their sexual orientation or gender identity?  
 always  only when I think it might be relevant  
 sometimes  never  
 only when the client brings it up
4. Do you feel comfortable talking with youth with whom you work about their sexual orientation or gender identity?  
 yes  no  no opinion/don't know

**Police Contacts and Charges**

5. In your opinion, are police in your jurisdiction more or less likely to mistreat (e.g., disrespect, harass or abuse) LGBT youth than non-LGBT youth?  
 less likely  don't know  
 equally likely  
 more likely

6. In your experience, are LGBT youth less, equally, or more likely than non-LGBT youth to be to be charged with:

|   |             |                |             |            |
|---|-------------|----------------|-------------|------------|
| Prostitution                            | less likely | equally likely | more likely | don't know |
| Consensual sexual activity              | less likely | equally likely | more likely | don't know |
| Sexual assault/Rape                     | less likely | equally likely | more likely | don't know |
| Shoplifting                             | less likely | equally likely | more likely | don't know |
| Alcohol or drug-related offenses        | less likely | equally likely | more likely | don't know |
| Aggravated assault                      | less likely | equally likely | more likely | don't know |
| Gun-related offenses                    | less likely | equally likely | more likely | don't know |
| School-related offenses                 | less likely | equally likely | more likely | don't know |
| Status offenses (e.g. truancy, runaway) | less likely | equally likely | more likely | don't know |
| Disorderly conduct                      | less likely | equally likely | more likely | don't know |

7. In your experience, what are the two most common offenses with which LGBT youth are charged?  
 1.  
 2.

**Screening Tools**

8. Prior to adjudication, does your jurisdiction use any screening tools (e.g., mental health, risk of violence, or detention screens) that inquire into the youth's sexual orientation or gender identity?  
 yes  no  don't know

Equity Project Defender Survey

9. Who has access to the information obtained from the screening tools used prior to the initial hearing? (Check all that apply.)

- |   |   |
|---|---|
| <input type="checkbox"/> intake workers | <input type="checkbox"/> probation officers       |
| <input type="checkbox"/> prosecutors    | <input type="checkbox"/> mental health evaluators |
| <input type="checkbox"/> defenders      | <input type="checkbox"/> don't know               |
| <input type="checkbox"/> the court      |   |

**Pre-trial Detention**

10. In your experience, are LGBT youth more or less likely than non-LGBT youth to be held in detention following an arrest?

- |   |                                     |
|---|-------------------------------------|
| <input type="checkbox"/> less likely    | <input type="checkbox"/> don't know |
| <input type="checkbox"/> equally likely |                                     |
| <input type="checkbox"/> more likely    |                                     |

11. In your experience, are LGBT respondents more or less likely than non-LGBT respondents to be held in detention pending adjudication?

- |   |                                     |
|---|-------------------------------------|
| <input type="checkbox"/> less likely    | <input type="checkbox"/> don't know |
| <input type="checkbox"/> equally likely |                                     |
| <input type="checkbox"/> more likely    |                                     |

12. Has your jurisdiction developed any specific policies regarding the detention of LGBT youth? (Check all that apply.)

- policies regarding with whom LGBT youth in detention should be housed
- policies regarding the privacy rights of LGBT youth in detention
- anti-discrimination or anti-harassment policies regarding LGBT youth in detention
- policies regarding clothing or personal appearance for LGBT youth
- policies regarding training of detention staff on LGBT sensitivity
- other \_\_\_\_\_
- no policies of which I am aware of

13. Are LGBT youth in your jurisdiction segregated from other youth in detention facilities?

- |  |                                     |
|--|-------------------------------------|
| <input type="checkbox"/> in every case | <input type="checkbox"/> seldom     |
| <input type="checkbox"/> usually       | <input type="checkbox"/> never      |
| <input type="checkbox"/> occasionally  | <input type="checkbox"/> don't know |

14. Do you think LGBT should be segregated from other youth in detention facilities?

- yes
- no
- it depends
- don't know

15. With whom are transgender youth in detention facilities or group homes housed?

- with youth of their gender identity (e.g., transgender girls with girls)
- with youth of the same anatomical sex (e.g., transgender girls with boys)
- with no other youth (isolated)
- it depends
- don't know

16. Are you aware of youth being mistreated (e.g., disrespected, harassed, abused) in detention facilities because of their actual or perceived sexual orientation or gender identity?  
yes      no

#### Mental Health Evaluations

17. In your jurisdiction, are judges more likely or less likely to order mental health evaluations for LGBT youth than for non-LGBT youth?  
less likely      don't know  
equally likely  
more likely
18. In any of your cases, has a judge ordered an LGBT respondent to undergo an evaluation to assess the youth's risk for predatory sexual behavior?  
yes      no
19. If so, did you feel these orders were appropriate?  
yes      no
20. Have you read any mental health evaluations in which you felt the evaluator seemed biased against a youth because he or she identified as or was perceived to be LGBT?  
yes      no
21. Are you aware of any mental health experts/evaluators in your jurisdiction with particular expertise on issues related to LGBT youth?  
yes      no

#### Adjudication

22. Are prosecutors in your jurisdiction more or less likely to offer favorable plea deals to LGBT respondents than to non-LGBT respondents?  
more favorable offers to LGBT youth      don't know  
less favorable offers to LGBT youth  
no difference
23. Has a respondent's LGBT identity or perceived identity ever been raised at trial? (check all that apply)  
yes, by defense  
yes, by prosecution  
no

#### Disposition

24. Has a respondent's LGBT identity ever affected your disposition recommendations?  
yes      no      I don't make disposition recommendations

25. Generally, do LGBT youth receive more or less severe dispositions than non-LGBT youth for similar offenses?  
 less severe                       don't know  
 same  
 more severe
26. At disposition, are LGBT youth more or less likely to be sent to a secure facility than non-LGBT youth?  
 less likely                       don't know  
 equally likely  
 more likely
27. Are you aware of instances in which an LGBT respondent has been held in detention after disposition because other placements were unwilling or unable to provide competent services to LGBT youth?  
 yes                       no                       don't know
28. In your experience, are judges more or less likely to order LGBT youth to undergo sex offender or other similar treatment than non-LGBT youth?  
 less likely                       don't know  
 equally likely  
 more likely
29. Are you aware of any dispositional programs or resources in your jurisdiction that are competent to serve LGBT youth?  
 yes                       no

#### Court Atmosphere

30. Which of the following professionals, if any, have ever objected to a client's gender-nonconforming behavior or appearance in the courtroom (i.e. a youth who is listed as "male" in the court file, but is wearing a skirt or make-up and has long hair, or a youth who requests to be referred to with a pronoun (he/she) that differs from that listed in their file? (choose all that apply)  
 judge                       prosecutor  
 defender                       probation officer  
 self                       other  
 none
31. Are you aware of any official delinquency court policies in your jurisdiction regarding LGBT youth?  
 yes                       no

32. To your knowledge, what efforts have courts in your jurisdiction made to communicate that the courtroom is a safe or nondiscriminatory environment for LGBT youth? (Choose all that apply.)

- Adopted a nondiscrimination policy
- Made statements from the bench regarding nondiscrimination
- Provided LGBT-friendly stickers or posters
- Responded immediately to discriminatory or hostile comments
- Other \_\_\_\_\_
- Not aware of any efforts

**Training**

33. In the past two years, has training on LGBT youth been offered in your jurisdiction?  
 yes       no       don't know

34. In the past two years, have you received any training on working with LGBT youth?  
 yes       no

35. Would you like to receive training on working with LGBT youth?  
 yes       no

**Systemic Issues**

36. Listed below are problems some people believe exist for LGBT respondents in delinquency cases. In your opinion, how serious is each one?

|   |      |          |            |
|---|------|----------|------------|
| overuse of detention  | very | somewhat | not at all |
| lack of safety in detention/programs                              | very | somewhat | not at all |
| lack of placements that accept LGBT youth                         | very | somewhat | not at all |
| lack of LGBT-supportive placements                                | very | somewhat | not at all |
| lack of understanding about LGBT issues by court personnel        | very | somewhat | not at all |
| anti-LGBT bias of court personnel                                 | very | somewhat | not at all |
| lack of family support  | very | somewhat | not at all |
| police mistreatment (disrespect, abuse, harassment, overcharging) | very | somewhat | not at all |

37. Please list the three things that would most improve the court system overall for LGBT youth.

- 1.
- 2.
- 3.

**Demographics**

38. What best describes the type of city/county in which you work? [check all that apply]  
 urban  
 suburban  
 rural

39. In which state do you work?

40. Please check all that apply:

- Yes, you may contact me to discuss these issues in more detail.
- No, please do not contact me.
- I would like to receive a copy of the final Equity Project report and recommendations.
- I would like to be on the Equity Project email list.

**Optional Contact Information**

Name:

Title and Organization:

Mailing address:

Telephone:

E-mail:

Please return this survey to an Equity Project representative or send it to us at the address below. The Equity Project will keep your responses confidential; we will never release or use your personal identifying information.

*The Equity Project is a collaboration of*  
**Legal Services for Children**  
**National Center for Lesbian Rights**  
**National Juvenile Defender Center**  
**[www.equityproject.org](http://www.equityproject.org)**

Please send completed surveys to: The Equity Project c/o National Juvenile Defender Center  
1350 Connecticut Ave. NW, Suite 304 Washington, D.C. 20036

Equity Project Defender Survey

## Appendix C: Youth Focus Group Survey



ensuring fairness & respect for LGBT youth in the justice system

### YOUTH FOCUS GROUP SURVEY (DO NOT PUT YOUR NAME ON THIS SURVEY)

1. Age \_\_\_\_\_

2. Race/Ethnicity

- African American
- Asian American/Pacific Islander
- Latino/a
- Multiracial \_\_\_\_\_
- White
- Native American
- Other Racial or Ethnic Identity \_\_\_\_\_

3. Gender

- Male
- Female
- Transgender  
(circle one: MTF or FTM)
- Other Gender Identity \_\_\_\_\_

4. Sexual Orientation

- Lesbian
- Gay
- Bisexual
- Queer
- Questioning
- Heterosexual/Straight
- Other Sexual Orientation \_\_\_\_\_

5. How many juvenile delinquency cases did you have?

Circle: 1 2 3 4 5 or more

6. How old were you when you were involved in the juvenile justice system \_\_\_\_\_

7. Where were you involved in the juvenile justice system?

State \_\_\_\_\_ County \_\_\_\_\_

8. Did you have a lawyer/public defender?  yes  no

9. What were you arrested for?

\_\_\_\_\_

10. Have you spent time in juvenile hall?  yes  no

11. Have you spent time in a juvenile camp?  yes  no

12. Focus group location \_\_\_\_\_ Date \_\_\_\_\_

**Appendix D: Redacted Court Order Regarding Transgender Youth**

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

|                            |                         |
|----------------------------|-------------------------|
| _____                      | :                       |
| In the Matter of           | : FAMILY COURT DIVISION |
| MINOR’S LEGAL NAME,        | :                       |
| Minor Child. (DOB: _____ ) | :                       |
|                            | : Petition # D          |
|                            | :                       |
|                            | : # J                   |
| _____                      |                         |

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2008, following a hearing held before the Court on \_\_\_\_\_, 2008, it is hereby ORDERED and DECREED that:

1. [LGBT health clinic] shall provide [legal name aka preferred name] with all recommended transition-related treatments in accordance with the medical and mental health assessments performed by [LGBT health clinic] providers on [date] and memorialized in the [date] report provided to the Court and attached hereto. These treatments shall include puberty-delaying hormone therapy and transgender-supportive counseling. The [LGBT health clinic]’s [date] report and recommendations are incorporated by reference and attached hereto.
2. The City of Philadelphia Department of Human Services shall provide transportation for [legal name aka preferred name] from [juvenile detention facility] to [LGBT health clinic] for such medical treatments.
3. Upon [legal name aka preferred name]’s transfer to [new placement], [new placement] shall provide the subject youth with all transition-related treatments recommended by [LGBT health clinic] in accordance with the medical and mental health

assessments performed by [LGBT health clinic] providers on [date]. These treatments shall be limited to the treatments recommended by [LGBT health clinic] in the attached report dated [date] and shall include puberty-delaying hormone therapy and transgender-supportive counseling.

4. The City of Philadelphia Department of Human Services, or its authorized representative, is hereby authorized to execute on behalf of [legal name aka preferred name] any and all forms necessary, including medical release and consent forms, to permit the administering of the medication for puberty-delaying hormone therapy treatment.

5. [Legal name aka preferred name] shall be referred to by the youth's preferred name, [preferred name], and by female pronouns, in accordance with the youth's gender identity. All written documentation should include the youth's preferred name, [preferred name], as well as the youth's legal name recognized by the court, but should use the youth's preferred name and pronoun throughout.

6. [New placement] shall permit [legal name aka preferred name] to dress and present in a manner that is consistent with the youth's gender identity and shall not require [legal name aka preferred name] to have a male haircut.

7. Consistent with the facility's security policies, [new placement] shall provide [legal name aka preferred name] with safety and privacy when using the shower and bathroom and when dressing and undressing. [Legal name aka preferred name] shall not be physically searched for the purpose of determining the youth's physical anatomy.

8. There shall be no radical unproven procedures involved in this treatment and no procedures that do not fall within the framework of "general acceptance of the scientific community."

---

, J.

## Appendix E: Model Non-Discriminatory Services Policy

### Model Policy & Practice Guidelines for Providing Non-Discriminatory Services to Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth in Juvenile Justice Facilities

#### I. Purpose

In accordance with state and federal laws, each youth under the jurisdiction of [facility] has the right to live in an environment free of harassment and discrimination. [This facility] is committed to providing a healthy and accepting setting for all youth placed in its care by training staff, instituting policies, and educating youth to respect each other. [This facility] does not tolerate discrimination or harassment by employees, volunteers, contract providers, or youth.

The purpose of these Policy and Practice Guidelines is to establish operational practices that reinforce [this facility's] commitment to respect the dignity of lesbian, gay, bisexual, and transgender (LGBT) youth, create a safe environment for all members of the [facility] community, and ensure that all youth have equal access to all available services, placement, care, treatment, and benefits provided by [this facility].

#### II. Policy

- It shall be the policy of [facility] to maintain and promote a facility that provides the highest quality of services to youth regardless of their actual or perceived sexual orientation or gender identity. LGBT youth confined at [facility] shall receive fair and equal treatment, without bias and in a professional and confidential manner based on principles of sound professional practice.
- Employees, volunteers, and contractors that offer services to youth confined at [facility] shall not discriminate against or harass any youth in their care based on a youth's actual or perceived sexual orientation or gender identity.
- [Facility] employees shall protect youth from discrimination, physical and sexual harassment or assault, and verbal harassment by other youth, based on a youth's actual or perceived sexual orientation or gender identity.
- [Facility] will take all reasonable steps within its control to meet the diverse needs of all confined youth and provide an environment in which all individuals are treated with respect and dignity, regardless of sexual orientation or gender identity.

#### III. Practice Guidelines for Providing Services to LGBT Youth

##### A. General Facility Operations

- All youth, regardless of sexual orientation or gender identity, need to feel safe in their surroundings in order to fully benefit from facility programming. [Facility] shall establish and maintain a culture where the dignity of every youth is respected and all youth feel safe. Employees shall create opportunities for dialogue with youth and staff about all forms of diversity to increase tolerance and respect.

- [Facility] will promote the positive adolescent development of all youth in its care. Actions that support positive adolescent development include: modeling desired behavior such as demonstrating respect for all youth; reinforcing respect for differences amongst youth, encouraging the development of healthy self-esteem in youth, and helping youth manage the stigma sometimes associated with difference.
- Employees should model positive behavior when interacting with LGBT youth and remind all youth that anti-LGBT threats of violence, actual violence, or disrespectful or suggestive comments or gestures, will not be tolerated.
- [Facility] intends to provide a safe and non-discriminatory environment where youth can learn and grow. Employees of [facility] shall not prohibit or discourage communication or interaction between youth of the same sex that is not also prohibited or discouraged between youth of different sexes. Expressions of romantic or emotional attraction between youth of the same sex that do not include sexual activity are not prohibited and shall not result in punishment.
- [Facility] shall include LGBT-affirming books, magazines, movies, and other materials in [facility] library. All youth shall be made aware of these materials and shall have access to them when requested. Where possible, employees shall display materials, such as “safe zone” or “hate-free zone” posters that convey to youth that the facility maintains an LGBT-friendly environment. [Facility] shall ensure that employees are made aware of local LGBT resources and reach out to the LGBT community to find organizations the facility can contract with to provide supportive services to LGBT youth.
- [Facility] shall provide LGBT youth with access to educational, rehabilitative, recreational, and other programming on the same bases as other youth. Youth shall not be denied qualification for or access to programming based on sexual orientation or gender identity.

#### **B. Confidentiality**

- Employees shall not disclose a youth’s sexual orientation or gender identity to other youth at the facility or to outside parties, individuals, or agencies, such as health care or social service providers or a youth’s family and friends, without the youth’s permission, unless such disclosure is necessary to comply with state or federal law.
- Any disclosure of confidential information related to a youth’s LGBT identity shall be limited to information necessary to achieve the specific beneficial purpose.
- This confidentiality restriction does not prevent individuals working at [facility] from discussing a youth’s needs or services with other staff members or when resolving a grievance.

#### **C. Intake**

- Staff should be aware that LGBT youth are in various stages of awareness and comfort with their sexual orientation and gender identity. Youth intake interviewers shall sensitively inquire about fears the youth may have of being

harassed in the facility, but intake workers should not directly ask youth if they are LGBT. Some youth will disclose that they are LGBT. If a youth discloses their sexual orientation or gender identity, the intake worker should talk with the youth about it in an open and non-judgmental fashion and determine if the youth has particular concerns or needs related to being LGBT.

#### **D. Youth Placement**

- Placement decisions for LGBT youth shall occur as soon as possible after intake so the youth is not at risk while awaiting a decision regarding placement. All classification and placement decisions for youth confined at [facility] shall be individualized, based on good juvenile correctional practices, and shall prioritize the youth's physical and emotional well-being.
- Youth shall not be prohibited from having a roommate based on a youth's actual or perceived sexual orientation. If a youth is fearful of rooming with a particular youth, he or she will be provided a different roommate or a single room, if available. This assignment will be made in accordance with classification procedures and facility safety and security needs.
- LGBT youth shall not be placed in isolation or segregation as a means of keeping them safe from discrimination, harassment, or abuse. LGBT youth shall not be treated or classified as sex offenders unless required by a court.
- Transgender youth shall not automatically be housed according to their birth sex. [Facility] staff shall make housing decisions for transgender youth based on the youth's individualized needs and should prioritize the youth's emotional and physical safety taking into account the youth's perception of where he or she will be most secure, as well as any recommendations from the youth's health care provider. Generally, it is most appropriate to house transgender youth based on their gender identity. If necessary to ensure their privacy and safety, transgender youth shall be provided a single room, if available.

#### **E. Names and Language**

- Employees, volunteers, and contractors, when working with youth at [facility] shall use respectful language and terminology that does not further stereotypes about LGBT people.
- Employees, volunteers, and contractors of [facility], in the course of their work, shall not refer to youth by using derogatory language in a manner that conveys bias towards or hatred of LGBT people. In particular, employees of [facility] shall not imply to or tell LGBT youth that they are abnormal, deviant, or sinful, or that they can or should change their sexual orientation or gender identity.
- Transgender youth shall be referred to by their preferred name and the pronoun that reflects the youth's gender identity, even if their name has not been legally changed. All written documentation about a transgender youth shall utilize the youth's preferred name as well noting the youth's legal name recognized by the court.

#### **F. Clothing and Gender Presentation**

- Youth shall be allowed to dress and present themselves in a manner consistent

with their gender identity. [Facility] shall provide youth with institutional clothing, including undergarments, appropriate for the youth's gender identity and gender presentation.

- Grooming rules and restrictions, including rules regarding hair, make-up, shaving, etc., shall be the same in male and female units. Transgender girls shall not be required to have a male haircut, or to wear masculine clothing. Transgender boys shall not be required to maintain a female hairstyle, to wear make-up, or to wear feminine clothing.

#### **G. Bathrooms and Showers**

- Consistent with the facility's reasonable and necessary security policies, [facility] shall provide transgender youth with safety and privacy when using the shower and bathroom and when dressing and undressing. Transgender youth shall not be required to shower or undress in front of other youth and shall be permitted to use single occupancy bathrooms and showers, if available. Such accommodation shall be provided in a sensitive manner.

#### **H. Medical and Mental Health Care**

- [Facility] shall provide transgender youth with access to medical and mental health care providers who are knowledgeable about the health care needs of transgender youth, if the youth requests assessment or treatment. [Facility] will provide all recommended transition-related treatments in accordance with the medical and mental health assessments performed by the youth's health care provider and will provide transportation for the youth to receive such treatments, if necessary.
- If prior to arriving at the facility a transgender youth has been receiving transgender-related medical care, such as hormone therapy or supportive counseling, [facility] medical staff shall consult with the youth's medical providers and shall continue to provide the youth with all transition related treatments that are medically necessary according to the youth's provider and accepted professional standards. Hormone therapy shall continue at current levels pending this consultation.
- [Facility's] health care providers shall facilitate exploration of gender or sexuality issues with LGBT youth in the same manner as with other youth: by being open and non-judgmental.
- In accordance with accepted health care practices which recognize that attempting to change a person's sexual orientation or gender identity is harmful, [facility] shall not employ or contract with mental health providers who attempt to change a youth's sexual orientation or gender identity.
- LGBT youth shall not participate in sex offender treatment or counseling unless required to do so by a court. All sex offender treatment shall not discriminate based on sexual orientation and gender identity and shall not criminalize or pathologize LGBT identity.

#### **I. Search Issues**

- LGBT youth shall not be physically searched in a manner that is humiliating or

degrading or for the purpose of determining the youth's physical anatomy.

- Transgender youth may request that either a male or female staff member conduct a strip search, if such search is required. [Facility] shall accommodate this request when possible and consistent with maintaining the security of the facility.

#### **IV. Procedures**

##### **A. Training of Employees, Volunteers, & Contractors**

- In order for employees, volunteers, and contractors to have the awareness and capacity to effectively work with LGBT youth in this facility, all facility administrators, employees, volunteers, and contractors are required to attend training on working with LGBT youth. This training should teach participants: 1) the goals and requirements of the facilities Nondiscrimination Policy and Practice Guidelines Regarding LGBT Youth; 2) how to work with LGBT youth in a respectful and nondiscriminatory manner; and 3) how to recognize, prevent, and respond to harassment against LGBT youth.
- All employees and administrators of [facility] shall receive training about LGBT youth during their orientation and as part of their continuing education requirements. These trainings shall be taught by a qualified trainer with expertise in working with LGBT youth.
- All new facility administrators, employees, volunteers, and contractors shall receive a copy of the Policy and Practice Guidelines with their orientation materials. Current administrators, employees, volunteers, and contractors shall receive a copy of the Policy and Practice Guidelines before it is to go into effect.

##### **B. Policy Dissemination to Youth**

- At the time of intake, [facility staff] shall verbally inform all youth about the facility's Policy and Practice Guidelines, including the youth's rights and responsibilities under this policy and the procedures for reporting violations. Each youth shall receive a copy of the Policy and Practice Guidelines [and all other policies related to grievance procedures] during intake. Additional copies of the policy shall also be provided to youth when requested.

##### **C. Responsibilities of Employees and Contractors to Respond to and Report Harassment**

- Employees of [facility] shall promptly and appropriately intervene when a youth physically, verbally, or sexually abuses or harasses another youth based on the youth's actual or perceived sexual orientation or gender identity.
- All employees and contractors shall be required to report all incidents in violation of this policy in accordance with facility operating procedures. Failure to report an incident may result in disciplinary or other consequences.
- [Facility] employees have an obligation to report conduct by other employees and contractors that may be in violation of this policy to the other individual's supervisor and the [facility] administration.

#### **D. Reporting Procedures for Youth**

- Youth shall be able to report violations of this policy following established facility grievance procedures. Grievance procedures shall protect confidentially of youth and contain other measures to prevent retaliation.

#### **E. Enforcement**

- Supervisory and management staff shall treat all reports of violations of this policy seriously. The [facility] administration shall promptly and effectively respond to grievances filed by youth and shall take swift action according to established procedures when employees or contractors report violations.

#### **F. Scope**

- This policy shall apply to all employees and volunteers of [facility], to employees or representatives of any agency providing services on behalf of youth at [facility], including but not limited to the Department of Health, Department of Education, their contractors, volunteers, and any other relevant agencies or departments which have contact with youth confined at [facility].

#### **V. Definitions**

For purposes of the Policy and Practice Guidelines, the following definitions apply:

##### **Bisexual**

A person who is emotionally, romantically, and sexually attracted to both males and females.

##### **Contractor**

Any person who is employed directly by an agency or organization that has a contract or Memorandum of Understanding with the [facility].

##### **Discrimination**

Any act, policy, or practice that, regardless of intent, has the effect of subjecting any youth to differential treatment as a result of that youth's actual or perceived sexual orientation or gender identity.

##### **Employee**

Any person who is employed directly by [facility].

##### **Gay**

A person who primarily is emotionally, romantically, and sexually attracted to individuals of the same sex, typically in reference to boys or men.

##### **Gender Expression**

The manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, etc. Gender expression is a separate concept from sexual orientation and gender identity. For example, a female may have a very masculine appearance, but may identify as a heterosexual female.

**Gender Identity**

A person's internal, deeply felt sense of being male or female, regardless of the person's sex at birth.

**Gender Identity Disorder (GID)**

A diagnosable medical condition for individuals who are experiencing high levels of distress because they have a strong and persistent desire to be a different sex and a persistent discomfort with their birth sex. According to accepted professional standards, treatments, such as supportive counseling, hormone therapy, and sex reassignment surgery are medically necessary for many youth or adults who have GID.

**Harassment**

Includes, but is not limited to, name-calling; disrespectful gestures, jokes, or comments; inappropriate touching; threats of physical or emotional acts or negative consequences (including religious condemnation); physical abuse; sexual abuse, including unwanted sex acts, touching, pantomime, and threats; and emotional abuse, such as shunning or isolation. Attempting to change a youth's sexual orientation or gender identity is also a form of harassment.

**Lesbian**

A girl or woman who primarily is emotionally, romantically, and sexually attracted to girls or women.

**Sexual Orientation**

A person's emotional, romantic, and sexual attraction, to individuals of the same sex or of a different sex.

**Transgender**

A person whose gender identity (their understanding of themselves as male or female) does not correspond with their birth sex. A transgender girl is a girl whose birth sex was male but who understands herself to be female. A transgender boy is a boy whose birth sex was female but who understands himself to be male.

**Volunteer**

Any person who provides services free of charge to [facility].

**Youth**

Any person committed to the custody and care of [facility], any person who is subject to supervision by [facility], or any person who is in the custody of the state who receives services from the [facility].

**VI. Severability**

The provisions of the Policy and Practice Guidelines shall be severable. If any provision or portion of this policy or its application to any person or circumstance is held invalid, the remainder of this policy or the application of the provision to other persons or circumstances is not affected.



## **EQUITY PROJECT PARTNERS**

Legal Services for Children  
[www.lsc-sf.org](http://www.lsc-sf.org)

1254 Market Street, 3rd Floor  
San Francisco, CA 94102  
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fax 415.863.7708

National Center for Lesbian Rights  
[www.nclrights.org](http://www.nclrights.org)

870 Market Street, Suite 370  
San Francisco, CA 94102  
tel. 415.392.6257  
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National Juvenile Defender Center  
[www.njdc.info](http://www.njdc.info)

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THE  
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*ensuring fairness & dignity for LGBT youth in the justice system*