

HEINONLINE

Citation:

Heather Squatriglia, Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System: Incorporating Sexual Orientation and Gender Identity into the Rehabilitative Process, 14 Cardozo J.L. & Gender 793 (2008)

Content downloaded/printed from [HeinOnline](#)

Thu Feb 7 21:53:52 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM: INCORPORATING SEXUAL ORIENTATION AND GENDER IDENTITY INTO THE REHABILITATIVE PROCESS

HEATHER SQUATRIGLIA*

I. INTRODUCTION

While there has been increased acceptance of lesbian,¹ gay,² bisexual³ and transgender⁴ (“LGBT”) youth in our society, these youth still face harassment and stigmatization from their families, peers, and schools. Many LGBT youth enter the juvenile justice system for reasons directly related to their sexual orientation and/or gender identity. These youth are often rejected, neglected, or abused by their guardians and choose a life on the streets rather than remain in hostile environments. LGBT youth often face hostility and discrimination in school. When youth feel threatened, either by verbal or physical abuse at school, they are at-risk for involvement with the juvenile justice system due to truancy. Put in impossible situations with respect to home and school, many LGBT youth choose to fend for themselves on the streets. These youth are at-risk for further victimization, including physical and sexual assault and are at greater risk for arrest and involvement in the juvenile justice system.

* J.D., Benjamin N. Cardozo School of Law, 2008. The author wishes to thank Meg Maurus and Lynly Egey for their love and support.

¹ The term “lesbian” refers to “[a] woman who feels romantically, emotionally, and sexually attracted to other women; a descriptive and socially acceptable label that homosexual women often prefer because it offers an identity separate from that of homosexual men; a term originating from Lesbos, an Aegean island and the home of the Greek poet Sappho, a woman who loved women.” GIRL’S BEST FRIEND FOUNDATION AND ADVOCATES FOR YOUTH, CREATING SAFE SPACE FOR GLBTQ YOUTH: A TOOLKIT (2005) [hereinafter GIRL’S BEST FRIEND], <http://www.advocatesforyouth.org/publications/safespace/safespace.pdf>, at 65.

² The term “gay” refers to “[m]en who feel romantic, emotional, and sexual attraction to other men; a term used to proclaim self-acceptance and self-affirmation.” *Id.* at 64.

³ Bisexuality is defined as “[f]eeling romantic, emotional, and sexual attraction to both males and females.” *Id.* at 63.

⁴ Transgender is defined as “[a]n umbrella term for all who feel that they are outside the boundaries of biological sex and culturally determined gender expression; may include transsexuals, crossdressers, Two-Spirit people, drag performers, etc, and people who do not identify with their biological sex.” *Id.* at 67.

Once LGBT youth enter the juvenile justice system they often face further rejection, harassment, and abuse by the very officials charged with their care. There is often a lack of sensitivity on the part of the adults responsible for their care. When LGBT youth seek protection from harassment in juvenile justice facilities they are often blamed for bringing the abuse on themselves. They are told to “act normal” and conform to “acceptable” expressions of sexual orientation and gender expression.⁵

LGBT youth enter the juvenile justice system for many reasons that are directly related to their sexual orientation and/or gender identity. LGBT youth often face rejection from both their families and peers, many stop attending school due to homophobic harassment or choose homelessness rather than abusive, homophobic home settings. Many commit survival crimes—shoplifting, petit larceny, prostitution—to support themselves on the streets. Others are at risk for involvement in the juvenile justice system due to chronic truancy. All of these risk factors, the products of social stigmatization and bias, can subject LGBT youth to juvenile justice system involvement and prolong their placement in delinquency facilities.⁶

It is the proposition of this Note that, given the relationship between sexual orientation and/or gender identity and involvement of LGBT youth in the juvenile justice system, the system must address the specific needs of these youth as part of the rehabilitative process. The purpose of the juvenile justice system⁷ is rehabilitative, not retributive.⁸ LGBT youth are at risk for involvement in the juvenile justice system largely because of their sexual orientation⁹ and/or gender identity.¹⁰ Sexual orientation and gender identity are integral parts of every person’s core being and must be addressed as part of the rehabilitative process. LGBT youth who are stigmatized for their sexual orientation often act out against

⁵ See DVD: *Breaking the Silence: Lesbian Gay, Bisexual, Transgender, and Queer Foster Youth Tell Their Stories*. (National Center for Lesbian Rights September 2005) (on file with the author).

⁶ See N.Y. FAM. CT. ACT § 353.3(1) (2007) “In any case in which the respondent has been placed pursuant to section 353.3 the respondent, the person with whom the respondent has been placed, the commissioner of social services, or the division of youth may petition the court to extend such placement.”

⁷ The term “juvenile justice system” refers to the organization of detention facilities, group homes, probation and other alternative to detention programs whose purpose is to serve youth adjudicated to be juvenile delinquents as well as the Family Court and other institutions charged with making such findings.

⁸ *In re Gault*, 387 U.S. 1 (1967).

⁹ “Sexual orientation is a feeling of attraction to others, based on biological sex and gender expression, over which individuals have no choice and different from sexual behavior; romantic, sexual and emotional attraction to others, categorized by the sex of the person to whom one is attracted—such as heterosexual (attracted to the opposite sex); homosexual (attracted to the opposite sex); or bisexual (attracted to individuals irrespective of their sex).” *GIRL’S BEST FRIEND*, *supra* note 1, at 67.

¹⁰ Gender identity is “[a]n individual’s innermost sense of self as male or female, as lying somewhere between these two genders, or as lying somewhere outside gender lines altogether.” *Id.* at 64.

themselves and others. A juvenile justice system that recognizes the difficulties experienced by adolescents in general, and LGBT youth specifically, is necessary to successfully guide youth towards becoming happy, health and fully realized adults.

The very purpose of the juvenile justice system requires that the sexual orientation and or gender identities of LGBT youth be fostered as part of the rehabilitative process. It is no longer sufficient that LGBT youth be merely tolerated or accommodated. Their sexual orientation and/or gender identity is a necessary part of their conception of self. If the purpose of the system is to intervene in a troubled youth's life and guide them towards becoming contributing members of society, then the juvenile justice system must support LGBT youth in the exploration and expression of their sexual orientation and gender identity.

The time has come to support LGBT youth. While much work has been done towards securing tolerance and ensuring the safety of these youth in delinquency facilities, we must now move forward towards a system that supports youth in their sexual orientation and gender identities. LGBT specific programming that addresses the needs of sexual health and overcomes stigmatization and harassment is necessary to fulfill the rehabilitative goals of the juvenile justice system.

A. The History and Purpose of the Juvenile Justice System

The purpose of the juvenile justice system is rooted in social welfare. Hence, the proceedings in family court are civil rather than criminal:

[t]he Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge.¹¹

It is understood that children in the juvenile justice system are less mature than adults and that it is therefore unreasonable to hold them to the same level of responsibility for their actions. For this reason, the purpose of institutional confinement with respect to children is rehabilitation and treatment.¹²

Children in state custody have constitutionally protected due process rights. Along with the right to safe conditions of confinement, freedom from unreasonable physical restraint, and access to treatment for mental and physical illness,¹³ youth

¹¹ *Kent v. United States*, 383 U.S. 541, 554 (1966).

¹² *Id.*

¹³ In a recent decision the New York County Family Court determined medical treatment extends to sex reassignment surgery ("SRS"). "The Court determines that the Commissioner's [of the Administration for Children's Services] unsupported denial of coverage for SRS reflects inadequate solicitude for this young woman's diagnosed condition, the treatment prescribed by her physicians and

also have a right to adequate rehabilitation.¹⁴ This Note argues that the right to rehabilitation requires that the sexual orientation and gender identity of youth in the juvenile justice system be supported as part of the rehabilitative process. Youth confined in the juvenile justice system have the right to appropriate medical care and mental health services.¹⁵

A detention facility violates a ward's constitutional rights if it knowingly disregards that ward's health needs.¹⁶ In the same way that a facility must provide appropriate medical and mental health services or risk legal liability, that facility must also provide meaningful rehabilitative services or else face liability.

Normal adolescent development requires friendship, dating, and the development of romantic attachments—this is no different for LGBT youth.¹⁷ LGBT youth need peer acceptance, support, and validation. Like all adolescents, LGBT youth need support as they learn about themselves and explore their feelings regarding their sexual identities. A supportive environment that encourages LGBT youth to connect with their community and their peers is part of the rehabilitative process.

B. Overview of a Delinquency Proceeding

In New York City, youth are arraigned in Family Court and appointed an attorney if they cannot afford counsel.¹⁸ At the arraignment, the Family Court

the accumulated knowledge of the medical community and is therefore irrational and unreasonable." The court also found that deferral of the procedure would "jeopardize life or essential function or cause severe pain" [and] . . . the daily psychic pain suffered by petitioner coupled with her inability to progress in life in a body that does not match with her self-concept certainly meets the requirement." *Decision of Interest: ACS Ordered to Arrange, Pay for Sex Reassignment Surgery for Pre-Operative Transsexual in Its Care*, 237 N.Y.L.J. 21 (2007).

¹⁴ *McKeiver v. Pennsylvania*, 403 U.S. 528, 552 (1971):

Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties.

See also Rudy Estrada & Jody Marksamer, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to When Working with LGBT Youth*, CHILD WELFARE (2006), available at http://www.nclrights.org/site/DocServer/LegalRights_LGBT_State_Custody.pdf?docID=1741.

¹⁵ See *Alexander S.v.Boyd*, 876 F.Supp. 773, 788 (D.S.C. 1995)("Among the traditionally recognized liberty interests of the Plaintiff class that survive confinement is the right to minimally adequate health care.").

¹⁶ Estrada & Marksamer, *supra* note 14, at 7.

¹⁷ ROB WORONOF, RUDY ESTRADA, & SUSAN SOMMER, OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH IN CARE 48 (2006), <http://www.cwla.org/programs/culture/outofthemargins.pdf>.

¹⁸ All background information on the juvenile justice system in New York City is taken from

judge reviews the youth's current and past arrest record to determine disposition.¹⁹ Parental involvement, school performance, and community involvement are all factors that the judge considers when making a determination on disposition.

Once arraigned, the youth is either remanded to parental custody or placed in either a secure or non-secure facility run by the New York City Department of Juvenile Justice.²⁰ Once again, LGBT youth are at disadvantage and are more likely to be placed in a facility due to parental estrangement. Secure facilities have locks on the doors, implement restrictive hardware—handcuffs and shackles—and in many ways resemble adult prisons. The notorious Spofford Juvenile Center, now called “Bridges,” is an example of a secure facility.²¹ Non-secure facilities are for youth who either have no home to return to or have an unsuitable home environment. The nature of their offenses does not require the restrictive setting of a secure facility. The residents of a non-secure facility may leave the facility if escorted by a staff member.

If at trial the judge finds the charges against the accused youth to be true, the court may adjourn in contemplation of: (1) dismissal for up to six months, with an eye towards ultimate dismissal;²² (2) conditional discharge, where the respondent is released without placement or probation but subject to certain requirements;²³ (3) probation where the court determines that placement is not necessary and that rehabilitative services may be administered through probation;²⁴ or (4) placement in a facility run by the Office of Children and Family Services..

The Office of Children and Family Services (“OCFS”) oversees secure, limited secure, and non-secure facilities throughout New York State. Secure detention is the most restrictive level of custody and is usually reserved for youth with extensive prior involvement in the juvenile justice system or who have committed serious offenses. Limited secure is less restrictive and generally houses youth who are considered less violent or who are transitioning back to their communities. Non-secure is the least restrictive and generally consists of residential group homes.

JUSTICE FOR ALL?: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM (2001), <http://www.urbanjustice.org/pdf/publications/lesbianandgay/justiceforallreport.pdf>.

¹⁹ “‘Dispositional hearing’ means a hearing to determine whether the respondent requires supervision, treatment or confinement.” N.Y. FAM. CT. ACT §301(2)(7) (2007).

²⁰ “‘Secure detention facility’ means a facility characterized by physically restricting construction, hardware and procedures.” N.Y. FAM. CT. ACT §301.2(4) (2007); “‘Non-secure detention facility’ means a facility characterized by the absence of physically restricting construction, hardware and procedures.” N.Y. FAM. CT. ACT § 301.2(5) (2007).

²¹ See Malika J. Kelly, THE CORRECTIONAL ASSOCIATION OF NEW YORK, *BROKEN PROMISES, BROKEN SYSTEM: 10 REASONS NEW YORK CITY SHOULD CLOSE THE SPOFFORD YOUTH JAIL*, iii (2004), http://www.correctionalassociation.org/JJP/publications/Broken_Promises.pdf.

²² See N.Y. FAM. CT. ACT § 315.3 (2007).

²³ See N.Y. FAM. CT. ACT § 353.1 (2007).

²⁴ See N.Y. FAM. CT. ACT § 353.2 (2007).

The Family Court judge determines the length of the youth's sentence but OCFS can extend the sentence until the youth's twenty-first birthday.²⁵ Extension of placement is based on the youth's behavior while in custody. Upon release, the youth is placed in an "after-care" program that transitions the youth back into the community.

C. LGBT Youth and the Juvenile Justice System

According to an Office of Juvenile Justice and Delinquency Prevention report, there were 96,655 juvenile delinquents in residential placements in 2003.²⁶ While there are no concrete statistics on the number of LGBT youth in delinquency facilities, it is estimated that between four to ten percent of the juvenile justice population identify as LGBT.²⁷ It is likely that the percentage is higher because LGBT youth are overrepresented in populations that are at risk for involvement with the juvenile justice system. Many LGBT youth enter the system for reasons directly related to their sexual orientation and/or gender identity. Neglect and abuse by their families, rebellious behavior, and substance abuse put LGBT youth at higher risk of involvement with the juvenile justice system.²⁸ Thirty-three percent of LGBT youth placed in foster care and juvenile justice facilities are there as a result of substance abuse, behaviors associated with "acting out," or family violence.²⁹

Once these youth enter the system, they are often subject to stigmatization and harassment because of their sexual orientation or gender identity. While some effort has been made to control the harassment and violence that these youth face, more must be done. The purpose of the juvenile justice system is rehabilitative, not

²⁵ See N.Y. FAM. CT. ACT § 353.3(1) (2007) ("In any case in which the respondent has been placed pursuant to section 353.3 the respondent, the person with whom the respondent has been placed, the commissioner of social services, or the division of youth may petition the court to extend such placement"). See also N.Y. FAM. CT. ACT § 353.3(6) (2007) ("Successive extensions of placement under this section may be granted, but no placement may be made or continued beyond the respondent's eighteenth birthday without the child's consent and in no event past the child's twenty first birthday").

²⁶ In New York, "juvenile delinquent" means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court" N.Y. FAM. CT. ACT § 301.2(1) (2007); Office of Justice and Delinquency Prevention, *Census of Juveniles in Residential Placement Databook*, http://ojjdp.ncjrs.org/ojstatbb/cjrp/asp/Age_Sex.asp (last visited Jan. 27, 2007).

²⁷ RANDI FIENSTEIN, ANDREA GREENBLATT, LAUREN HASS, SALLY KOHN, & JULIANNE RANA, *JUSTICE FOR ALL?: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM* 6 (2001), <http://www.urbanjustice.org/pdf/publications/lesbianandgay/justiceforallreport.pdf>.

²⁸ See Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth through Litigation, Advocacy and Education*, 79 TEMP. L. REV. 415 (2006); FIENSTEIN ET AL., *supra* note 26; SHANNAN WILBER, CAITLIN RYAN & JODY MARKSAMER, *SERVING LGBT YOUTH IN OUT-OF-HOME CARE: CWLA BEST PRACTICE GUIDELINES* (2006), <http://nclrights.org/publications/pubs/bestpracticeslgbtyouth.pdf>.

²⁹ WILBER ET AL., *supra* note 28, at 4.

retributive. LGBT youth are at risk for involvement in the juvenile justice system largely because of their sexual orientation. LGBT youth that are stigmatized on the basis of their sexual orientation often act out against themselves and others. A delinquency program that recognizes the difficulties brought about by adolescents in general and LGBT youth specifically is necessary to successfully guide youth towards becoming happy, healthy, and fully realized adults.

II. INCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY IN REHABILITATION

Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.³⁰

The juvenile justice system was initially created to rehabilitate at-risk youth.³¹ The rehabilitative process was seen as a way to help youth "develop" character.³² Common law has recognized a distinction between juvenile offenders and their adult counterparts and there has historically been an irrebuttable presumption that children under the age of seven do not possess the necessary maturity to form criminal intent.³³ This common law presumption was at the heart of the development of a separate system of juvenile courts that focus on rehabilitation and nurture rather than punishment.³⁴ It is a core belief of the traditional juvenile justice system that children in the delinquency system require special protection and treatment.³⁵ This assumption led to the creation of juvenile

³⁰ *Roper v. Simmons*, 543 U.S. 551, 570 (2005). See also *Belotti v. Baird*, 443 U.S. 622 (1979) (Court reasons why children should be treated differently from adults (1) vulnerability specific to childhood (2) impaired judgment due to immaturity (3) the importance of parenting). See also *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982):

Adolescents, particularly in the early, middle, and teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youth may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.

³¹ "Rehabilitate" 1. To restore (a handicapped or delinquent person) to useful life through education and therapy. 2. To reinstate the good name of. 3. To restore to the former rank, privileges or rights of. AMERICAN HERITAGE DICTIONARY 1096 (New College ed. 1976); See MICHAEL CORRIERO, JUDGING CHILDREN AS CHILDREN: A PROPOSAL FOR A JUVENILE JUSTICE SYSTEM 127 (2006). ("Our nation's juvenile justice system was based on the premise that juveniles can and should be rehabilitated. Indeed, the cornerstone of this movement was that it is in the best interests of both juveniles and society that young offenders be rehabilitated, insulated from publicity and the retributive atmosphere of adult courts.").

³² See *In re Gault*, 387 U.S. 1 (1967).

³³ See generally WAYNE R. LAFAVE, & AUSTIN W. SCOTT, JR., CRIMINAL LAW (2d ed. 1986).

³⁴ See Craig Hemmens, Eric J. Fritsch, & Tory J. Craig Hemmens, *The Rhetoric of Juvenile Justice Reform* 18 QUINNIPIAC L. REV. 661 (1999).

³⁵ *Id.* See also Cynthia M. Conward, *Where Have All the Children Gone? A Look at Incarcerated*

courts and juvenile detention facilities separate from the criminal system. Juvenile proceedings are generally under the jurisdiction of the family court and typically heard by judges specifically charged to adjudicate juvenile cases.³⁶

The rehabilitative view of the juvenile justice system recognizes that the root cause of delinquent activity can be traced back to the child's social environment, specifically school, home, and family.³⁷ In this view, delinquency is caused by social disadvantages such as poverty, lack of education, and/or parental neglect or abuse.³⁸ This model of juvenile justice assumes that the delinquent can be treated.³⁹ It embraces a positive view of society that sees delinquency as a symptom of distress in a child's life—remedy the distress and the symptom will be cured. The State does not punish, it reforms.⁴⁰

The rehabilitative model assumes that the State is in the best position to help delinquent youth. Typically, the State has the responsibility to act "in the best interests of the child" where necessary.⁴¹ The State is also charged with providing coordinated care for children with emotional and/or behavioral disorders and demands:

[e]ffective collaboration among state and local health, mental hygiene, education, juvenile justice, probation of care and other human services agencies directed at improving outcomes for children with emotional and/or behavioral disorders and their families leading to full participation in their communities and schools.⁴²

This mandate necessitates that juvenile court judges have wide discretion to coordinate the necessary agencies and act in the best interest of the child. This wide degree of latitude allows courts to impose indeterminate sentences—"dispositions"—that can be extended if a judge thinks it is in the youth's "best interest."⁴³ The possibility exists that LGBT youth are at risk for extended placement based upon their sexual orientation or gender identity.

Youth in America, 27 WM. MITCHELL L. REV. 2435 (2001).

³⁶ See N.Y. FAM. CT. ACT (2007).

³⁷ See Hemmens et al., *supra* note 34.

³⁸ *Id.*

³⁹ See generally Larry Cunningham, *Substantive Limitations on the Power of Family Courts to Commit Delinquent Juveniles to State Custody: Analysis and Critique*, 55 SYRACUSE L. REV. 87 (2004).

⁴⁰ See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 107. ("[A] court concerned with juvenile affairs serves as a rehabilitative and protective agency of the state.")

⁴¹ N.Y. FAM. CT. ACT § 301.1 (2007) "Purpose: The purpose of this article is to establish procedures in accordance with due process of law (a) to determine whether a person is a juvenile delinquent and (b) to issue an appropriate order of disposition for any person who is adjudged a juvenile delinquent. In any proceeding under this article, the court shall consider the needs and best interests of the respondent as well as the need for protection of the community."

⁴² N.Y. SOC. SERV. LAW 483-c(1) (2003).

⁴³ See N.Y. FAM. CT. ACT §§ 353.3(1), 353.3(6) (2007).

A. Providing LGBT with Inclusive Programming as Part of the Rehabilitation Process

LGBT youth involved in the juvenile justice system have a right to a system that promotes their health and emotional well-being. Faced with rejection from their families, harassment at school, suicide, substance abuse problems, and racial and socio-economic prejudice, it is the duty of the juvenile justice system to help these youth to succeed as healthy, contributing members of their communities. To achieve this, the juvenile justice community must implement programs that specifically serve LGBT youth. This includes programs that help all youth to make responsible choices about sex regardless of their sexual orientation or gender identity.

Adolescence is a time when youth develop several key factors of their identity. It is the development of these factors that help youth become sexually healthy adults. Sexual health is defined by an appreciation of one's body, responsibility for one's actions, appropriate and respectful communication with others, and the capacity to express love and intimacy.⁴⁴ All of these characteristics are rehabilitative goals that the juvenile justice system should be concerned with when promoting the best interests of youth in their care. LGBT youth that have respect for their bodies—as opposed to shame brought on by homophobic and heterocentric attitudes—are encouraged to practice healthy, safe behaviors such as abstinence from substance abuse and safe sex practices. If LGBT youth are supported in their sexual health they have the opportunity to identify their own values separately from any societal disapproval of their sexual orientation or gender identity. When an adolescent is encouraged to decide for herself what she believes is “right” one of the major factors of delinquent behavior is extinguished: peer pressure.⁴⁵ A sexually healthy adolescent distinguishes personal beliefs from that of peers and is thus able to make better choices. Once LGBT youth are supported in their sexual health, they are able to recognize self-destructive behavior. Understanding their own sexual orientation and gender identity in a supportive environment will meet the mandated goals of the juvenile justice system—helping delinquent youth become contributing members of their communities. Policy makers and those involved in the juvenile justice system must recognize that sexual development is an integral part of development for all adolescents and that LGBT

⁴⁴ NAT'L COMMISSION ON ADOLESCENT SEXUAL HEALTH, *FACING FACTS: SEXUAL HEALTH FOR AMERICA'S ADOLESCENTS* 14 (1995), http://www.siecus.org/pubs/Facing_Facts.pdf [hereinafter *FACING FACTS*].

⁴⁵ See MICHAEL A CORRIERO, *JUDGING CHILDREN AS CHILDREN: A PROPOSAL FOR A JUVENILE JUSTICE SYSTEM* 21 (2006). (“The idea that one’s perception of self-worth as a teenager often does not come from within but from without, is an important observation on the nature of adolescence. It explains one of the major causes of juvenile criminal behavior—peer pressure. The key to resisting peer pressure is the capacity to believe in one’s self, one’s destiny.”).

specific programming is an integral part of rehabilitating youth.⁴⁶

The juvenile justice cannot treat all youth the same because all youth simply do not have the same needs. Just as programming has been developed to address the needs of pregnant girls in the juvenile justice system, so must the specific needs of LGBT youth be addressed. Sexual orientation and gender identity must be integrated into the services plan of all youth in state care. Detention facilities should create educational programming that addresses differences in sexual orientation and gender identity and teaches sensitivity to those differences. Juvenile justice service providers should partner with LGBT service groups so that youth can create relationships with these organizations and build a network to draw on when their placement is complete.

B. How LGBT Youth Enter the Juvenile Justice System

There is evidence strongly suggesting that LGBT youth are at greater risk of entering the juvenile justice system and are more likely to face harassment once in the system. This is not because LGBT youth are somehow predisposed to delinquent behavior, but rather due to the pressure put on these youth by the prejudice and ignorance of institutions that ostensibly exist to nurture. The sexual orientation and/or gender identity of LGBT youth effectively serves to funnel them into the juvenile justice system.

While there has been a marked increase in acceptance and tolerance of homosexuality, LGBT youth still suffer harassment and abuse at home and at school. Youth often face extremely negative reactions from their families when they come out.⁴⁷ Parental disapproval of their child's sexual orientation and gender identity can often result in a youth being forced to leave home.⁴⁸ Research suggests that delinquent activity and substance abuse by LGBT youth is more commonly precipitated either by being kicked out of their homes or running away.⁴⁹

⁴⁶ See FACING FACTS, *supra* note 44.

⁴⁷ Twenty-eight percent of fathers and twenty percent of mothers were found either reject or be completely intolerant of their children who came out. ELLEN & TOBIAS CAHILL, NATIONAL LESBIAN AND GAY TASK FORCE, FAMILY POLICY: ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDERED FAMILIES, 102 (2003), <http://www.thetaskforce.org/reslibrary/familypolicy.cfm> (citing A. R. D'AUGELLI, ENHANCING THE DEVELOPMENT OF LESBIAN, GAY AND BISEXUAL YOUTHS, IN PREVENTION OF HETEROSEXISM AND HOMOPHOBIA (E. Rothblum & L. Bonds eds., 1996)).

⁴⁸ A Lambda Legal Defense and Education Fund Publication found that twenty-six percent of LGBT youth were forced to leave their families of origin due to parental conflicts over the youth's sexual orientation or gender identity. Thirty percent of LGBT youth report physical abuse by a family member as a result of coming out. THE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER ADOLESCENTS IN FOSTER CARE 11 (2001), http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/28.pdf.

⁴⁹ FIENSTEIN ET AL., *supra* note 27, at 15.

C. Harassment and Abuse in School Can Put LGBT Youth At-Risk of Involvement in the Juvenile Justice System

LGBT youth face homophobia and heterosexism in the educational system. Homophobic slurs and harassment by other students because of a student's actual or perceived sexual orientation are common.⁵⁰ LGBT youth are also more likely to be threatened with physical violence than other students.⁵¹ Faced with such a hostile school environment, many youth become chronic truants at risk for court involvement.⁵²

Chronic truancy is a ground for Person in Need of Supervision Status (PINS). Section 712 of the New York Family Court Act defines a PINS as:

[a] person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority⁵³

The problems that are attendant upon that stigmatization—harassment and physical threats of violence at school, familial and social stigmatization, behavioral problems, and substance abuse—put LGBT youth at high risk for PINS petitions.⁵⁴ Parental disapproval of a child's sexual orientation or gender identity is no longer sufficient grounds for a PINS petition. However, parental stigmatization of LGBT youth is often at the root of the PINS petition. Many LGBT youth are chronically truant due to harassment at school. Studies have shown that as many as one in three LGBT youth have reported harassment at school as a result of their sexual orientation or gender identity.⁵⁵ Homophobic remarks from other peers and faculty are common and LGBT youth are more likely to be physically threatened or assaulted at school.⁵⁶ Youth who are harassed or assaulted due to their sexual

⁵⁰ According to a 2003 survey conducted by the Gay, Lesbian and Straight Education Network (GLSEN), eighty-four percent of high school students who self-identify as LGBT reported verbal harassment due to their sexual orientation. Ninety-one and a half percent of LGBT students reported hearing homophobic remarks frequently or often in school. GLSEN, *The 2003 National School Climate Survey: The School Related Experiences of Our Nation's Lesbian, Gay, Bisexual, and Transgendered Youth* (2003), <http://www.glsen.org/cgi-bin/iowa/all/library/record/1413.html>.

⁵¹ A Massachusetts study conducted in 2001 showed that LGBT students were more than three times as likely to be in a physical fight that resulted in medical treatment. LGBT students are also more than twice as likely as other students to be physically threatened at school. Peter A. Hahn, *The Kids Are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities*, 14 B.U. PUB. INT. L.J. 117, 122 (2004).

⁵² The same study found that LGBT youth were more than twice as likely as other students to skip school in the last thirty days due to feeling unsafe at school or on route to school. *Id.*

⁵³ N.Y. FAM. CT. ACT § 712 (2008).

⁵⁴ FIENSTEIN ET AL., *supra* note 27, at 17.

⁵⁵ SHANNAN WILBER, CAITLIN RYAN & JODY MARKSAMER, *SERVING LGBT YOUTH IN OUT-OF-HOME CARE: CWLA BEST PRACTICE GUIDELINES* 4 (2006), <http://nclrights.org/site/docserver/bestpracticeslgbtyouth.pdf?docID=1322>.

⁵⁶ *Id.*

orientation and gender identity have little or no connection to their schools and have fewer resources to help them remain in school.⁵⁷ An LGBT student is 4.9 times more likely to have school absences within thirty days than a heterosexual student.⁵⁸

D. LGBT Youth, Homelessness, and the Juvenile Justice System

Problems at school are often exacerbated by a lack of parental support or outright rejection of the child's identity. Parents are often hostile and disgusted when their child comes out.⁵⁹ The lack of supportive homes or school environments encourages LGBT youth to enter homelessness. A study of LGBT youth in the New York City child welfare system found that fifty-six percent of the youth surveyed felt that the streets were sometimes safer than group homes or foster care.⁶⁰ Shame or outrage on the part of parents often negatively impacts LGBT youth on their dispositions. There is often little involvement on the part of these parents when their children are in court.⁶¹ Family Court judges are unable to parole youth to Alternative to Detention programs if a family member will not assume responsibility for the youth.⁶² In which case, the judges must remand the youth to detention.⁶³

LGBT youth often enter the juvenile justice system for reasons other than delinquency. For many LGBT youth, their sexual orientation is a direct cause of entering the foster care system. Once in foster care, LGBT youth often enter homophobic placements and subsequently run away. Once these youth have run from their placements, homelessness is the inevitable next step.

Parental anger or disgust with respect to their child's sexual orientation or gender identity may result in abuse or neglect.⁶⁴ A finding of abuse or neglect will often result in placement of the youth in foster care, ostensibly to provide the safety that was missing from the home. However, one study of LGBT youth in the custody of the Administration for Children's Services in New York City found that

⁵⁷ *Id.*

⁵⁸ FIENSTEIN ET AL., *supra* note 27, at 13.

⁵⁹ *Id.*

⁶⁰ WILBER ET AL., *supra* note 56, at 5.

⁶¹ FIENSTEIN ET AL., *supra* note 27, at 13.

⁶² Alternative to Detention programs ("ATD") are the primary non-secure option for pre-adjudicated youth in New York City. The ATD centers in New York City are run primarily as schools that require youth to attend classes and counseling from 8:00 a.m. to 4:00 p.m. The Family Court judge may choose to send a young person to an ATD program while their case is pending in Family Court. ATD requires parental supervision, if such supervision is not available, youth will likely be remanded to a secure facility. JUVENILE JUSTICE PROJECT OF CORRECTIONAL ASSOCIATION OF NEW YORK, *RETHINKING JUVENILE DETENTION IN NEW YORK CITY: A REPORT BY THE JUVENILE JUSTICE PROJECT OF THE CORRECTIONAL ASSOCIATION OF NEW YORK* 12-13 (2002), http://www.correctionalassociation.org/jjp/publications/rethinking_detention.pdf.

⁶³ FIENSTEIN ET AL., *supra* note 27, at 13.

⁶⁴ *Id.* at 17.

seventy-eight percent of LGBT youth were either removed from their placements or ran away due to hostility toward their sexual orientation or gender identity.⁶⁵ Faced with hostile or violent placements, many LGBT youth run away and enter homelessness.⁶⁶

E. Risk Factors Specific to LGBT Youth: Criminal Activity, Mental Health, and Substance Abuse Issues

Once LGBT youth begin living on the streets, their means of survival often turns criminal. Many youth turn to prostitution and theft to survive and hard choices become all too familiar to youth forced into the margins of society. LGBT youth abuse drugs and alcohol at significantly higher rates than the youth population as a whole.⁶⁷ Substance abuse in turn makes these youth more likely to commit crimes because either their judgment is impaired or they must support their habit.

Many LGBT youth suffer from serious mental health issues directly attributable to harassment and stigmatization. Thirty percent of all suicides in the United States are committed by LGBT youth.⁶⁸ One Massachusetts study found that forty percent of high school students who identified as LGBT had attempted suicide, compared with ten percent of students who identified as heterosexual.⁶⁹ A survey of high school students in California found that students who experienced harassment based on their sexual orientation or gender identity were three times more likely to seriously consider suicide than students who did not experience such harassment.⁷⁰

⁶⁵ *Id.* at 16.

⁶⁶ Of fifty four youth, profiled in a book by Gerald Mallon, half reported that they had lived on the streets rather than a hostile child welfare setting. Incidents of expulsion from the family home as a result of their sexual orientation were common. Some of the youth reported that they left home due to physical threats or violence from their family members. See GERALD P. MALLON, *WE DON'T EXACTLY GET THE WELCOME WAGON: THE EXPERIENCES OF GAY AND LESBIAN ADOLESCENTS IN CHILD WELFARE SYSTEMS* (1998). One New York child welfare advocate reported, "[w]e just keep seeing kids getting beaten up and thrown out of their houses, kids getting beaten up by their fathers for being gay, or young lesbians getting sexually abused by male relatives trying to change them so they won't be gay." *Id.* at 98. A San Diego study conducted in 2003 found that over sixty-six percent of local homeless LGBTQ youth reported at least one previous child welfare placement. The youth interviewed found the system so unsafe that they preferred to live on the streets. ROB WORONOF, RUDY ESTRADA, & SUSAN SOMMER, *OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH IN CARE 98* (2006), <http://www.cwla.org/programs/culture/outofthemargins.pdf>.

⁶⁷ FIENSTEIN ET AL., *supra* note 27, at 15.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.*

⁷⁰ CALIFORNIA SAFE SCHOOLS COALITION, *SAFE PLACE TO LEARN: CONSEQUENCES OF HARASSMENT BASED ON ACTUAL OR PERCEIVED SEXUAL ORIENTATION AND GENDER NON-CONFORMITY AND STEPS FOR MAKING SCHOOLS SAFER* 5 (2004), <http://www.casafeschools.org/SafePlaceToLearnLow.pdf>.

Depression and feelings of isolation are often associated with drug and alcohol abuse. LGBT youth are statistically more likely to abuse drugs and alcohol as a result of social and family problems stemming from their sexual orientation and gender identity.⁷¹ While there is no definitive count of the number of homeless LGBT youth, it is estimated that almost half of all homeless youth are LGBT.⁷²

Homeless LGBT youth are at greater risk for involvement in the juvenile justice system. These youth often commit “survival crimes” such as prostitution, pandering and theft to support themselves on the streets.⁷³ Homeless youth are at higher risk of being charged with “false personation”—knowingly lying about their pedigree information to a police officer.⁷⁴ Survival crimes and false personation are non-violent offenses and the youth who commit them are often a greater threat to themselves than to others.⁷⁵ An LGBT youth that provides false pedigree information or is charged with theft or prostitution commits such offenses in order to survive.⁷⁶ It is not possible to separate a youth’s sexual orientation or gender identity from the delinquent behavior that exposes such youth to the juvenile justice system. Social stigmatization, harassment in school, homophobia at home, homelessness, and subsequent delinquent behavior all put LGBT youth at greater risk of exposure to the juvenile justice system.

F. Conditions of Confinement and the Legal Rights of LGBT Youth

Most LGBT youth in delinquency facilities are subject to verbal harassment by their peers. These youth report verbal abuse, taunting with regard to their gender presentation, and anti-LGBT slurs.⁷⁷ Physical harassment, while less widely reported, does occur. When LGBT youth report verbal and physical abuse staff often ignore them or assume they were provoking the abuse.⁷⁸ Often staff and other adults charged with protecting the safety of youth in delinquency facilities believe that LGBT youth are promiscuous and are asking for the abuse.⁷⁹ Staff often isolate LGBT youth on the assumption that they are sexual predators that endanger the safety of same-sex wards.⁸⁰ This isolation, even in the absence of any underlying prejudice, results in placing the youth in a more restrictive setting than

⁷¹ FIENSTEIN ET AL., *supra* note 27, at 15.

⁷² *Id.*

⁷³ *Id.* at 18.

⁷⁴ N.Y. PENAL LAW §190.23 (2008). “A person is guilty of false personation when after being informed of the consequences of such act, he or she knowingly misrepresents his or her actual name, date or birth or address to a police officer or peace officer with intent to prevent such police officer or peace officer from ascertaining such information.”

⁷⁵ FIENSTEIN ET AL., *supra* note 27, at 20.

⁷⁶ *Id.*

⁷⁷ *Id.* at 33.

⁷⁸ WILBER ET AL., *supra* note 56, at 7.

⁷⁹ *Id.*

⁸⁰ *Id.*

their disposition demands.

All youth in detention facilities have a right to be placed in the least restrictive setting possible.⁸¹ Conditions of confinement that are unreasonably restrictive for purposes not legitimately related to the security of the facility are unconstitutional.⁸² Discriminatory restrictions violate the youth's liberty interest and are considered a Due Process Clause violation.⁸³ If an LGBT youth is harassed in a facility, the harasser should be segregated because they pose a known threat to the safety of the other wards. Segregation of the harasser is not considered a constitutional violation.⁸⁴

LGBT youth in detention cannot be placed in conditions of confinement that punish, stigmatize or humiliate them. Some restrictions on a ward's liberty may be constitutional if the restriction is "reasonably related" to a legitimate governmental interest. If the restriction is not reasonably related to a legitimate governmental interest then the court may find that the purpose of the restriction is punishment.⁸⁵ In this case, there is no legitimate governmental interest in proactively segregating LGBT youth.

Administrative segregation punishes LGBT youth for their sexual orientation and gender identity. The punishment far outweighs any benefit the youth might gain in safety. Adequately trained staff and LGBT specific programs are far better ways to ensure the safety of LGBT youth.⁸⁶

Gay and lesbian wards report not being permitted to have roommates or to spend time with other wards.⁸⁷ Delinquency facility staff that isolate LGBT youth for safety reasons do so in violation of the youth's constitutional rights.⁸⁸ Even

⁸¹ NATIONAL CENTER FOR LESBIAN RIGHTS, THE LEGAL RIGHTS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM 1 (2006), http://nclrights.org/site/docserver/LGBTQ_Youth_Juvenile_Justice_Legal_Rights.pdf?docID=1721.

⁸² See, e.g. Alexander S., 876 F.Supp.at 798.

Rudy Estrada & Jody Marksamer, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to When Working with LGBT Youth*, CHILD WELFARE (2006), available at http://www.nclrights.org/site/DocServer/LegalRights_LGBT_State_Custody.pdf?docID=1741.

⁸⁴ *Id.* at 7.

⁸⁵ Bell v. Wolfish, 441 U.S. 520, 539 (1974). 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.").

⁸⁶ SHANNAN WILBER, CAROLINE REYES, & JODY MARKSAMER, MODEL STANDARDS PROJECT: CREATING INCLUSIVE SYSTEMS FOR LGBT YOUTH IN OUT-OF-HOME CARE 8 (2006), http://nclrights.org/site/docserver/Model_Standards_Project_article.pdf?docID=1561.

⁸⁷ WILBER ET AL., *supra* note 56, at 7.

⁸⁸ R.G. v. Koller, 415 F.Supp.2d 1129, 1156 ("Even if the defendants, including the supervisory defendants, did not intend to punish the plaintiffs, the court finds that the effects of isolation are not 'but an incident of a legitimate non-punitive governmental objective.' [Citations omitted] Defendants' practices are, at best, an excessive, and therefore unconstitutional, response to legitimate safety needs of the institution. [Citations omitted] Consistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to separate LGBT wards from their abusers, cannot be viewed in any reasonable light as advancing a legitimate nonpunitive governmental objective. HYCF has attempted to remedy one harm with an indefensible and unconstitutional solution.").

when youth are not isolated on the basis of their sexual orientation or gender identity, they are often not exposed to LGBT youth groups or social supports.⁸⁹ Staff who are not properly trained in LGBT sensitivity often believe that it is immoral to foster a youth's sexual orientation or gender identity.⁹⁰

Youth in state custody are not convicted criminals, they are considered wards of the State. Like people involuntarily committed to mental institutions, youth in the juvenile justice system are completely dependent upon the State for their care. The United States Supreme Court has historically recognized a liberty interest in the right to personal security that is protected by the Due Process Clause of the Fourteenth Amendment.⁹¹ The Court found that where it was cruel and unusual punishment to hold convicted criminals in unsafe conditions, it is likewise unconstitutional to confine the involuntarily committed to such conditions.⁹²

In *R.G. v. Koller*, plaintiffs sought a preliminary injunction requiring the Hawaii Youth Correction Facility ("HYCF") to refrain from "harassing, abusing, discriminating against, or isolating plaintiffs based on their actual or perceived sexual orientation, gender identity or sex; to refrain from failing to protect plaintiffs from anti-lesbian, gay, bisexual, and transgender ("LGBT") peer harassment and abuse"⁹³ The plaintiffs in *R.G.*—an eighteen year old lesbian girl, an eighteen year old boy who was perceived to be gay, and a seventeen year old transgender girl—alleged that verbal abuse by staff and other wards was based on sexual orientation and gender identity was pervasive, that the verbal abuse was harmful, that the staff isolated wards in response to anti-LGBT harassment, and that the HYCF lacked adequate procedures, training, staffing, and supervision to adequately ensure safe conditions of confinement for LGBT youth.⁹⁴ The court held that the plaintiffs had a liberty interest in personal safety and "well-being" that was protected by the Due Process Clause of the Fourteenth Amendment.⁹⁵ The plaintiffs' offered substantial evidence of a "relentless campaign of harassment based on their sexual orientation that included threats of violence, physical and sexual assault, imposed social isolation and near constant use of homophobic slurs."⁹⁶ The court found that, in light of the abuse and harassment suffered by the LGBT wards, the HYCF did not meet the minimum standard of care required by

⁸⁹ WILBER ET AL., *supra* note 56, at 7.

⁹⁰ *Id.*

⁹¹ *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) ("the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause. . . . And that right is not extinguished by lawful confinement, even for penal purposes If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." (Citations omitted).

⁹² *Id.*

⁹³ *Koller*, 415 F. Supp.2d at 1133.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1156.

⁹⁶ *Id.*

the Due Process Clause because HYCF did not adequately provide for the plaintiff's personal safety and well being.⁹⁷ The court granted the preliminary injunction on Due Process grounds.

When LGBT youth in juvenile justice settings are denied access to services or are harassed or abused based on their sexual orientation or gender identity, their constitutional right to equal protection is violated. The plaintiffs in *R.G.* also sought injunctive relief on Equal Protection Clause grounds. However, since the court granted injunctive relief based on Due Process grounds, it did not reach the equal protection issue in *R.G.*⁹⁸ Nevertheless, the equal protection issue has been reached within the context of public schooling and the case law can be applied by analogy.

In *Flores v. Morgan High School District*, the court held that the Equal Protection Clause supported a claim brought by students who alleged discrimination where the school district failed to protect gay and lesbian students from harassment, discrimination, and physical abuse to the same degree as straight youth. The court held that LGBT students had a clearly established right to be free from harassment based on their sexual orientation, which the school violated by failing to enforce their regulations.⁹⁹

In *Nabozny v. Podlesny*, a student brought an equal protection suit against a school administrator who told the student that he should expect abuse because he was openly gay.¹⁰⁰ An equal protection claim requires the plaintiff to show that the defendant acted with a "nefarious discriminatory purpose" and that the discrimination was based on the plaintiff's inclusion in a definable class.¹⁰¹ The discriminatory purpose "implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group."¹⁰² The court found that homosexuals are an identifiable class that is subject to discrimination in American society.¹⁰³ This means that discrimination on the basis of sexual orientation is subject to rational basis review.¹⁰⁴ In essence, this standard of review means that if there is a rational basis for the government's discrimination, there is no constitutional violation.¹⁰⁵ The *Nabozny* court found that there was "no rational basis for permitting one student to assault another based on the victim's

⁹⁷ *Id.*

⁹⁸ *Id.* at 1159.

⁹⁹ *Flores v. Morgan High School District*, 324 F.3d 1130, 1138 (9th Cir. 2003). ("Plaintiffs' claim that the defendants' response or lack of response to complaints of student-to-student anti-homosexual harassment denied them equal protection.")

¹⁰⁰ *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir.1996).

¹⁰¹ *Id.* at 453.

¹⁰² *Id.* at 454.

¹⁰³ *Id.* at 457.

¹⁰⁴ *Id.* at 458.

¹⁰⁵ *Id.* at 458.

sexual orientation.”¹⁰⁶

The reasoning in these public school cases can be applied to LGBT youth in the juvenile justice system. The abuse suffered by Jamie Nabozny is similar in character to that experienced by LGBT youth in delinquency facilities. Given that youth in state custody are not convicted criminals, the staff and administrators must meet the same rational basis requirement for discriminating against LGBT wards. A staff member in a delinquency facility has the same responsibility to the wards as a teacher has to a pupil, the delinquency setting does not excuse the violation of a constitutional right.

Jamie Nabozny was continually abused and harassed by his fellow students because he was gay. He repeatedly reported his abuse to his teachers and guidance counselors who failed to protect him.¹⁰⁷ The school had a policy in place to investigate peer physical abuse and sexual harassment.¹⁰⁸ Similarly, juvenile justice facilities have rules and guidelines dealing with abuse harassment. It is unconstitutional to apply these rules more vigorously for the protection of straight youth and more laxly or not all when LGBT youth are concerned. For example, if the facility has a code of conduct that forbids physical or verbal harassment, this code must be enforced when another youth harasses a LGBT youth.

G. Legislation and Model Best Practice Guidelines

While there has been some success with litigation, it has not secured the systemic concern necessary to protect LGBT youth in delinquency facilities. It is harder to litigate mistreatment of youth in delinquency due to the isolation of the youth and the limited oversight of juvenile justice departments.¹⁰⁹

The Child Welfare League of America and the National Center for Lesbian Rights have co-authored a best practices guide that addresses the needs of LGBT youth in the juvenile justice system. The intention of the guidelines is to “support the development of policies and practices governing the care of LGBT youth in out-of-home care; to create training materials for agency personnel, facility staff, caregivers, and providers; and to provide guidance to professionals and caregivers

¹⁰⁶ *Nabozny*, 92 F 3d at 458.

¹⁰⁷ *Id.* at 449. Nabozny alleged that he experienced harassment and abuse by other students because he was gay. He reported the harassment to school administrators who failed to protect him despite a policy of investigating and punishing sexual harassment. Nabozny claimed that the school administrators violated his 14th Amendment right to equal protection by discriminating against him on the basis of his sexual orientation. *Id.* “We are unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation, and the defendants do not offer us one. Like Nabozny’s gender claim, the defendants argue that they did not discriminate against Nabozny.” *Id.* at 458.

¹⁰⁸ *Id.* at 449.

¹⁰⁹ Kamelia Angelova, *Safe and Sound: Legislation Would Protect Incarcerated LGBT Youth*, CITY LIMITS WEEKLY, May 8, 2005, http://www.urbanjustice.org/pdf/press/city_limits_08may06.pdf.

serving individual LGBT youth in out-of-home care.”¹¹⁰

The Safe and Fair Equal Treatment of Youth Act, co-sponsored by Assemblyman Roger L. Green (NY) calls for the end of discrimination in OCFS facilities based on sexual orientation and gender identity.¹¹¹ Youth sent to OCFS facilities “report being slapped, hit, punched, kicked, threatened, and called names by other residents and staff members.”¹¹² The bill asks OCFS to set up “various rules meant to curb and better define discrimination, create supplementary training for guards to help them address issues of sexual orientation within the prison system, outline the responsibilities of the commissioner of OCFS and develop protection systems to ensure the safety of guards and prisoners who reveal abuses.”¹¹³

The purpose of the juvenile justice system is to foster at risk youth towards becoming fully realized adults. While the tools discussed above are important in the fight for the safety and dignity of LGBT youth in delinquency facilities, the very purpose of the juvenile justice system itself requires that the sexual orientation and gender identity of LGBT youth not be merely tolerated or accommodated, but fostered and encouraged as a fundamental part of the rehabilitation process. Sexual orientation and gender identity is a necessary part of any adult’s conception of self. This requires that the juvenile justice system support at risk youth in the exploration and expression of their sexual orientation and gender identity.

III. WHAT THE JUVENILE JUSTICE SYSTEM CAN DO TO SUPPORT LGBT YOUTH

Adolescence is a confusing time during which youth learn the skills required to become healthy adults. Youth experience significant intellectual, emotional, and physical developments during this bridge to adulthood. This is equally true of LGBT youth, but they have the added disadvantage of coming of age in a society in which their identities are stigmatized and their families and schools often harass and victimize them. LGBT youth need a safe place that supports the exploration and integration of their sexual orientation and gender identity, while providing

¹¹⁰ SHANNAN WILBER, RYAN CAITLIN & JODY MARKSAMER, *SERVING LGBT YOUTH IN OUT-OF-HOME CARE: CWLA BEST PRACTICE GUIDELINES* xv (2006), <http://nclrights.org/publications/pubs/bestpracticeslgbtyouth.pdf>.

¹¹¹ OCFS Juvenile Rehabilitative Services website, <http://www.ocfs.state.ny.us/main/faqs/#juvenile> (last visited Jan. 27, 2007). “OCFS operates thirty-four accredited juvenile residential facilities statewide for more than 2,000 youth remanded to the agency’s custody and care from the family and criminal courts. The extensive rehabilitative services provided to youth in residential care includes counseling, health, education and employment services as well as programs for youth with special needs. Through its Aftercare Program, the agency provides post-residential counseling and supervision for youth returning to the community. During their period of residential placement, the Family Advocacy Bureau works with the family and youth to provide services and transition assistance.” *Id.*

¹¹² Angelova, *supra* note 110, at 1.

¹¹³ Joseph M. Gerace, *Bill Would Protect Gay and Lesbian Children in the State Correction System*, LEGISLATIVE GAZETTE (May 1, 2006), <http://www.legislativegazette.com/printable.php?id=1294>.

positive social and mentoring programming. Encouraging LGBT youth to explore and express their identities benefits all youth by extinguishing discrimination and bias. In its *Best Practice Guidelines for Serving LGBT Youth in Out-of-Home Care* the Child Welfare League of America (CWLA) calls for juvenile justice systems to adopt programming that encourages LGBT youth to express their identities in a manner that is inclusive and avoids shame.¹¹⁴ These practices include: creating an environment where LGBT youth feel safe to disclose their sexual orientation to their care givers, encouraging LGBT youth to discuss their feelings of attraction in an age appropriate way without stigma or shame, participation in LGBT geared social activities similar to those straight youth are encouraged to participate in (i.e. “proms,” dances and mixers), expressing their sexual orientation through their grooming, and displaying LGBT themes in their rooms.

The juvenile justice system should adopt practices that allow LGBT youth to express their identities in the same way that other youth are encouraged to express themselves. Agency staff and caregivers should allow LGBT youth the same expressions of attraction that they allow heterosexual youth to express. LGBT youth should not be subject to “reparative therapy”¹¹⁵ or “transformational ministries.”¹¹⁶ In accordance with the CWLA’s *Best Practices Guidelines*, policies

¹¹⁴ WILBER ET AL., *supra* note 111, at 28.

Child welfare and juvenile justice agencies should adopt policies and practices that permit youth to: (1) disclose their sexual orientation to other youth, caregivers, and agency personnel; (2) discuss their feelings of attraction to youth of the same sex, consistent with discussion of romantic attachments among heterosexual youth, without being penalized or shamed; (3) participate in social activities that are geared toward or inclusive of lesbian, gay and bisexual youth; (4) express their sexual orientation through their choice of clothing, jewelry, or hairstyle; have access to LGBT-inclusive, supportive books and materials; and (5) post LGBT-friendly posters or stickers in their rooms. *Id.*

¹¹⁵ John Alan Cohan, *Parental Duties and the Right of Homosexual Minors to Refuse “Reparative” Therapy*, 11 BUFF. WOMEN’S L.J. 67, 76 (2004). Reparative therapy is therapy aimed at “curing” sexual desires that its practitioners deem aberrant. It is sometimes referred to as “conversion therapy” and is based on a conception of sexual orientation that is rejected by major mental health practitioners. See JUST THE FACTS COALITION, JUST THE FACTS ABOUT SEXUAL ORIENTATION AND YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS AND SCHOOL PERSONNEL 5-9 (2008), <http://www.apa.org/pi/lgbcc/publications/justthefacts.pdf> [hereinafter JUST THE FACTS] Reparative therapy often uses a range a medically dubious techniques such as:

behavioral therapy, electrical shock therapy, chemical aversive therapy, drug and hormone therapy, subliminal therapies designed to inculcate ‘feminine’ or ‘masculine’ behavior, and ‘covert desensitization’ therapies that teach a young person to associate homosexual feelings with disgusting images. Juveniles who have undergone ‘reparative’ therapy against their will have had nervous breakdowns, experienced excessive feelings of guilt, and have committed acts of genital mutilation, and suicide. *Id.*

¹¹⁶ JUST THE FACTS, *supra* note 116, at 10. Transformational ministries use religion to eliminate sexual desires that its practitioners deem aberrant. The transformation ministry “takes the approach that ‘freedom from homosexuality is possible through repentance and faith in Jesus Christ as Savior and Lord.’” *Id.* The use of transformational ministries in state run agencies also presents a Constitutional violation of the separation of church and state and of equal protection. The First Amendment of the Constitution protects youth in the juvenile justice system from religious indoctrination. The Ninth Circuit held that allowing or failing to prevent religious indoctrination in the adult prison system is a violation of the Establishment Clause of the Constitution. See *Canell v. Lightner*, 143 F.3d 1210, 1214

should be adopted that prohibit facility staff from isolating LGBT youth to protect them from harassment and abuse.¹¹⁷ Staff should also be prohibited from blaming harassment and abuse on the victim's sexual orientation or gender identity.¹¹⁸

The CWLA Guidelines also call for agencies to provide LGBT youth with access to "age-appropriate social, spiritual, and recreational opportunities that encourage and support these youth in developing into self-assured, healthy adults."¹¹⁹ Accepting the proposition that the juvenile justice system exists to rehabilitate delinquent youth means that agencies must teach youth how to become responsible, functioning adults. LGBT mentoring and socialization that encourages youth to love themselves can curb many of the self-destructive and anti-social behaviors that plague them. Agencies should provide these youth with settings that not only tolerate who they are, but embrace them. These mentoring relationships and positive programming experiences will help develop the life skills that are a normal part of adolescence—the exploration of interpersonal relationships, learning to form and maintain friendships, and learning to see issues from another person's point of view. This type of programming is in the best interest of all adolescents in juvenile justice facilities and where such programming exists for heterosexual youth, it must also be made available to LGBT youth.

Juvenile justice agencies should train their staff and employ mentoring programs. Each agency should implement a diversity policy and discuss it with staff members. The policy should be written and should discuss all aspects of inclusiveness, including LGBT Youth.¹²⁰ Staff should be trained regarding the

(9th Cir. 1998) (holding that failing to prevent or condoning religious indoctrination by prison staff would violate the Establishment Clause if the requisite factual showing is made). This holding can be applied by analogy to LGBT youth in the juvenile justice system. The practice of "curing" a young person's sexual orientation through a transformational ministry could be shown to violate that youth's rights under the Establishment Clause.

¹¹⁷ WILBER ET AL., *supra* note 111, at 31.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ MODEL ANTI-HARASSMENT AND NON-DISCRIMINATION POLICY FOR CHILD WELFARE OR JUVENILE JUSTICE AGENCIES, http://www.nclrights.org/publications/pubs/model_policy_for_juvenile_justice-agencies.pdf (last visited January 19, 2007).

It is the policy of [name of your agency or organization], in accord with state and federal laws, that each youth under the jurisdiction of the [agency or organization] has the right to an environment free of harassment and discrimination. It is also the policy of the [agency or organization] in accord with state and federal laws, that each employee, contractor, and volunteer has the right to work in an environment free of harassment and discrimination. Harassment and discrimination are strictly prohibited and will not be tolerated at the [agency or organization]. The [agency or organization] will take all reasonable steps within its control to provide an environment in which all individuals are treated with respect and dignity.

It is the policy of the [agency or organization] to prohibit all forms of harassment and discrimination of or by youth, employees, contractors, and volunteers, including harassment and discrimination based on actual or perceived race, color, religion, sex, national origin, ethnicity, ancestry, age, disability, sexual orientation, gender identity and

resources available to LGBT youth in their area.¹²¹ Training materials for staff should use inclusive language that does not assume that all youth are heterosexual. Staff should be trained to be aware of their own attitudes and stereotypes with regard to sexual orientation and gender identity. They should know that anything other than acceptance of an adolescent's personal choice with regard to his or her sexuality will not be tolerated. They should also be educated with respect to the particular challenges facing LGBT youth and the ways in which they can support them.¹²²

IV. GUIDELINES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM

Facilities should not condone "administrative isolation," the practice of isolating LGBT youth either for their own protection or because of an unfounded fear that they will "prey" on other youth. There should be parity in accommodations. If straight youth have roommates, LGBT youth should not be prohibited from having roommates. Staff should rely on the individual needs of each youth, rather than on classifications to determine what is appropriate. LGBT youth should never be placed in a housing situation with an abusive or hostile roommate.

Juvenile justice facilities should be aware of the risk of abuse, harassment, and violence that LGBT youth face in their facilities. Many homophobic practices, such as name calling and ridicule, are an accepted part of many juvenile justice facilities. Staff should take the following measures to protect youth:

- (1) Develop and implement a non-discriminatory policy to protect all youth.
- (2) Provide staff training for implementing and maintaining a supportive, safe and sensitive environment for LGBT youth.
- (3) Provide a variety of housing options based on the individualized needs of the youth in custody.

expression, or based on an individual's association with a person or group with one or more of these actual or perceived characteristics.

Retaliation against an individual who files a complaint of harassment or participates in an investigation of such a complaint is strictly prohibited. The [agency or organization] shall ensure that all youth, employees, contractors, and volunteers receive notice of this policy. *Id.*

Harassment is defined as:

unwelcome, offensive or intimidating behavior on account of an individual's (or group of individuals') membership in a protected category. Protected categories include race, color, religion, sex, national origin, ethnicity, ancestry, age, disability, sexual orientation, gender identity and expression, or any other category protected now or in the future by state or federal laws. *Id.*

¹²¹ The National Center for Lesbian Rights Youth Project is a prolific advocate for LGBT youth in juvenile justice settings. It advocates for policies that protect the rights of LGBT youth in custody settings and publishes several useful resources. See National Center for Lesbian Rights website, <http://www.nclrights.org>.

¹²² The National Mentoring Center offers specific guidance for training staff to work with LGBT youth. See National Mentoring Center website, <http://website at www.nwrel.org>.

(4) Youth should be housed in the least restrictive setting. LGBT youth should not be prohibited from having a roommate due to fears that they will engage in sexual activity or prey upon that roommate. A policy that prohibits LGBT youth from sharing a room is punitive and serves to stigmatize youth. Considerations in housing arrangements should be based on the individual needs of the ward and not homophobia.

(5) Provide health services (including mental health and sexual health) and employ medical and mental health staff that is knowledgeable and sensitive to the needs of LGBT youth.

(6) Provide staff with a review of the coming-out process and offer training on how staff can support LGBT youth in the process of coming-out.

(7) Discuss with staff how sexual orientation or gender identity may put LGBT youth at risk for involvement with the juvenile justice system.

(8) Discuss with staff how acceptance or rejection of LGBT youth has an impact on health and well-being.

(9) Take affirmative action to recruit providers and staff who are committed to providing all youth with the necessary tools to become fully functioning, contributing members of their communities – including LGBT youth.¹²³

V. CONCLUSION

In the past, LGBT youth in the juvenile justice system have been the victims of abuse and harassment. At best they were ignored and at worst mistreated. While the current climate is more sensitive to the needs of LGBT populations in the system, the time has come to move beyond mere tolerance and begin to implement LGBT-specific programming that incorporates sexual orientation and/or gender identity into the rehabilitative process. In addition to Model Standards, anti-discrimination, and anti-harassment policies, there is a need for LGBT-specific programming that incorporates sexual orientation and gender identity.

Sexual orientation and gender identity cannot be compartmentalized from other issues. In many cases, these issues are the very reason why LGBT youth are in the delinquency system to begin with. The rehabilitative goals of the juvenile justice system cannot be met when staff and administrators separate sexual orientation and gender identity from mental health concerns, substance abuse issues or family problems.¹²⁴

¹²³ See WILBER, *supra* note 111, at 31.

¹²⁴ FIENSTEIN ET AL., *supra* note 27, at 41.

We never get to this point [of discussing sexual orientation] with kids because there is so much going on and there is such a quick turn-around. There was a young man at Spofford [now named Bridges] who admitted he was gay-was in for drugs and prostitution. His sexuality was far down on the list of issues to be addressed. My first line of attack was to deal with other priorities; prostitution and the use and sale of drugs.
Id.

Given that sexual orientation and gender identity are intricately intertwined with issues of truancy, the commission of survival crimes, substance abuse, and suicide, it is not possible to treat and rehabilitate youth without providing counseling and programming that includes LGBT identities. The interconnectedness of sexual orientation and gender identity must be acknowledged and the failure to do so can ultimately serve to undermine any rehabilitative effect that the delinquency facility providers are attempting to achieve.

This proposition relies heavily on the creation of placement options for LGBT youth. If the rehabilitative goal of the juvenile justice system is to be met, juvenile justice departments must develop placement options that are supportive of LGBT youth. The scarcity of placement options cannot be supported by the relatively low percentage of youth in delinquency facilities. The State is charged with providing guidance and rehabilitation for the children in its care. LGBT youth have a right to adequate rehabilitation regardless of how many youth are in the system. This right to rehabilitation requires that juvenile justice officials provide specific programs that adequately address the very complicated needs of LGBT youth.

In addition to LGBT specific placement options, mandatory training that educates delinquency facility staff and administrators with respect to the needs of LGBT youth must be implemented. Facility staff that work with LGBT youth must be trained with respect to the integral roles that sexual orientation and gender identity play, both in putting youth at risk for involvement with the juvenile justice system and as part of their sense of self. Staff must not presume heterosexuality and must support and respect individual differences in a climate that is accepting of those differences. The expression of LGBT youth's sexual orientation and gender identity must be supported in much the same way as youth's religious expression is supported. It is an integral part of their "selfness" that must be fostered. Ideally, juvenile justice facilities need to recruit staff that either identify as LGBT or are at least familiar with LGBT experiences and can provide effective treatment and mentoring.

The juvenile justice system must also facilitate access to programming that provides positive social outlets to LGBT youth. Facilities and staff should work with organizations within the LGBT community to provide positive role models and mentoring. The isolation and stigmatization that LGBT youth experience can be diffused by positive interaction with other LGBT youth as well as adults that identify as LGBT. Mentoring and social programs are important in fostering the mental health of LGBT youth. State institutions are required to protect youth in their care from psychological deterioration.¹²⁵ This necessitates that LGBT youth

¹²⁵ See *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990). (The Court found that responsible state officials have a Constitutional obligation to prevent the physical or psychological deterioration of children in their care. The state cannot avoid its responsibility to the children in its care by delegating its

have the opportunity to participate in programming that helps them deal with the societal stresses they experience as a result of their sexual orientation and/or gender identity. The opportunity to participate in age-appropriate social and recreational activities that are LGBT-specific will help further the rehabilitative goal of helping youth develop into self possessed, healthy adults. Programming that provides emotional support and acceptance of sexual orientation and/or gender identity is important in developing the necessary skills to become productive and well-adjusted members of society. When LGBT youth are encouraged to participate in normative, adolescent social activities, their sexual orientation and gender identity are incorporated into their sense of self rather than being marginalized. This can have the positive effect of avoiding isolation, depression and high-risk behavior that is the product of stigmatization.

Agencies should also provide parity in programming for LGBT youth. If facilities provide social opportunities for straight youth, LGBT youth should have the opportunity to participate in LGBT specific programming. This is particularly important within the context of programming with respect to sexuality. Adolescence is a time of development and any programming with respect to sexuality and development should be LGBT inclusive. Under no circumstances should same-sex relationships be considered inappropriate or immoral by facility staff or administration.

