

Practitioner's Section

Our March 2011 Symposium, “Hidden Injustice: LGBTQ Youth and the Juvenile Justice System,” brought together a number of prominent practitioners to discuss the ways in which our current juvenile justice system attempts to address the needs of LGBTQ youth and ways in which reform is needed. This portion of the *UC Davis Journal of Juvenile Law & Policy* focuses on the experiences of practitioners who work with LGBTQ youth in the juvenile justice system.

Our first piece, entitled *In Defense of LGBT Youth: Strategies to Help Juvenile Defenders Zealously Advocate for their LGBT Clients*, was written by Mr. Jody Marksamer. Marksamer is a staff attorney and Youth Project Director at the National Center for Lesbian Rights (NCLR) who oversees policy and advocacy work on behalf of LGBT youth in child welfare and juvenile justice settings. Marksamer is co-author of the 2009 Equity Project report, *Hidden Injustice: LGBT Youth in Juvenile Courts*; this report inspired our Journal staff to host our spring symposium. Marksamer sets out a framework for addressing the needs of LGBT children in the juvenile justice system by both vigorously representing these clients in court and also protecting them from abuse and mistreatment at all stages of court involvement.

Our second practitioner's piece is penned by Judge Donna Quigley Groman of the Los Angeles County Superior Court. Judge Groman highlights the important role played by families in juvenile justice proceedings, and notes that for LGBT youth, these family ties are often broken or absent due to hostility toward the child's sexual orientation. She argues that strengthening family ties is key to successful outcomes for LGBT youth in the juvenile justice system.

Last, Gena Castro Rodriguez, MFT, writes about the experiences of LGBTQ girls in the juvenile justice system. Rodriguez is the Co-Executive Director of the Youth Justice Institute, a policy and advocacy group in San Francisco. In her article, *LGBTQ Girls in the Juvenile Justice System – Discrimination, Alienation and Marginalization*, Rodriguez argues for more culturally attuned policies that are appropriate for adolescent girls in the justice system, emphasizing the importance of relationship in young girls' lives.

The Practitioner's Section is followed by summaries of recently passed federal and state legislation and court decisions affecting juveniles and families. Topics include but are not limited to competency of minors, child custody preferences, child support after termination of parental rights, and bullying.

In Defense of LGBT Youth: Strategies to Help Juvenile Defenders Zealously Advocate for their LGBT Clients

By: JODY MARKSAMER*

Many lesbian, gay, bisexual, and transgender (LGBT) youth face abuse, rejection, and discrimination in their homes, schools, and communities. These experiences can place LGBT youth at risk of juvenile court involvement. Without a firm understanding of how sexual orientation and gender identity impact the experiences and needs of each LGBT youth they serve, juvenile justice professionals will struggle to effectively serve these youth and risk treating them unfairly. Since 2005, the Equity Project has been working to address these issues in an effort to bring much-needed attention to the needs and concerns of LGBT youth.¹

* As a staff attorney and Youth Project Director at the National Center for Lesbian Rights (NCLR), Jody Marksamer oversees NCLR's policy and advocacy work on behalf of LGBT youth in child welfare and juvenile justice settings. NCLR is a national legal resource center with a commitment to advancing the rights and safety of LGBT people and their families through litigation, public policy advocacy and public education. Since 2005, Mr. Marksamer has also coordinated the Equity Project and is co-author of the Equity Project's 2009 publication, *Hidden Injustice: LGBT Youth in Juvenile Courts*. In 2006, Mr. Marksamer co-authored the *Child Welfare League of America (CWLA) Best Practice Guidelines for Serving LGBT Out-of-Home Youth*, the first comprehensive policy and practice guide for child welfare and juvenile justice professionals concerning LGBT youth. Mr. Marksamer joined NCLR's staff in 2003 as an Equal Justice Works fellow. He received his J.D. from Northeastern University School of Law and B.A. from Wesleyan University. Mr. Marksamer is grateful to all of the Equity Project staff members and to *Hidden Injustice* co-authors, Katayoon Majd and Carolyn Reyes, for the integral role they played in the development of the foundation of this article, and to Sarah Bergen, Melanie Rowan, and Amy Whalen for their assistance with finalizing this article.

¹ The Equity Project is a multiyear initiative aimed at ensuring that LGBT youth in the juvenile justice system are treated with dignity, respect, and fairness. To promote leadership and provide guidance regarding LGBT youth in the juvenile justice system, Legal Services for Children, the National Center for Lesbian Rights, and the National

In 2009, the Equity Project produced a report documenting the experiences of LGBT youth. *Hidden Injustice: LGBT Youth in Juvenile Courts* represents the first national effort to examine the treatment of LGBT youth in juvenile courts and provides guidance to professionals working in the juvenile justice system on the development of LGBT-sensitive practices and policies.² The report's findings, based primarily on information gathered from LGBT youth and the professionals who work with them, reveal that bias and lack of understanding about LGBT youth often leads to denials of due process, disrespectful treatment by juvenile justice professionals, unnecessary detention, unduly harsh dispositions, and ineffective and harmful programs and services. While all juvenile justice professionals have legal and ethical duties to ensure fair and unbiased treatment of youth in juvenile courts, defense attorneys play a critical role in protecting the rights and safety of court-involved youth.³ This article highlights the

Juvenile Defender Center joined in 2005 to launch this project. In addition to the lead organizations, the Equity Project receives critical guidance from the Equity Project Advisory Committee, which is comprised of individuals from across the country with expertise in this area, including professionals with experience working with LGBT youth in juvenile courts and LGBT youth who have been in the juvenile justice system. For more information about the equity Project and to download other Equity Project resources, visit www.equityproject.org

² See Katayoon Majd, Jody Marksamer, & Carolyn Reyes, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts* (2009) [hereinafter *Hidden Injustice*]. To download an electronic copy of *Hidden Injustice*, visit: http://www.equityproject.org/pdfs/hidden_injustice.pdf. To order hard copies of *Hidden Injustice*, visit: http://www.nclrights.org/site/PageServer?pagename=issue_youth_hidden_injustice_orderform

³ 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*]; *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"); National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases*, 123 (2005) [hereinafter

recommendations from *Hidden Injustice* for juvenile defenders and presents strategies to help defense attorneys advocate for their LGBT clients as effectively as possible.

I. Defense Attorneys Must Zealously Defend their Clients and Respond to their Individual Needs

All youth accused of committing a crime have a constitutional right to counsel who will zealously defend them and protect their due-process rights.⁴ 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.”⁵ Specifically, juvenile defense attorneys have a duty to:

- Advocate for their clients’ stated interests—not what the attorney believes is in their “best interests;”⁶
- Provide competent, diligent, and vigorous representation at all stages of juvenile court involvement;⁷

Juvenile Delinquency Guidelines]; James P. Manak, Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, *Juvenile Justice Standards Relating to Adjudication*, 263 (1996); National Center for Juvenile Justice, *Desktop Guide to Good Juvenile Probation Practice, Revised*, 115 (Griffin & Torbet, eds., 2002); National Juvenile Detention Association, *Code of Ethics*, 3 (2009), available at http://www.npjs.org/docs/NJDA/NJDA_Code_of_Ethics.pdf.

⁴ See generally *In re Gault*, 387 U.S. 1, 36-37 (1967); 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-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*, 119 (1996) [hereinafter *Juvenile Justice Interim Status Standards*]; *Juvenile Delinquency Guidelines*, *supra* note 4, at 122.

⁵ *Juvenile Justice Standards Relating to Counsel*, *supra* note 4, at 69.

⁶ American Bar Association Center for Professional Responsibility, *Model Rules of Professional Conduct*, Rules 1.1- 1.3 (2009); *Juvenile Delinquency Guidelines*, *supra* note 4, at 30, 122.

- Hold the juvenile justice system accountable to their clients and advocate for their fair and respectful treatment;⁸ and
- Ensure that their legal advocacy is tailored to their clients' individual needs.⁹

Unfortunately, not all defenders are meeting their legal and ethical responsibilities when representing LGBT youth. Juvenile defenders often fail their LGBT clients by advocating positions contrary to their client's expressed interests based on their own biases about sexual orientation and gender identity.¹⁰ Other defenders avoid talking with youth about sexual orientation and gender identity because they are uncomfortable doing so and miss crucial information about their clients that is necessary for effective defense.¹¹ Many LGBT youth do not receive zealous advocacy at detention and disposition hearings, and many more do not have adequate post-disposition representation.¹² Without zealous defense, LGBT youth often get pulled deeper into the system and spend significant portions of their adolescence in secure facilities where they are physically and emotionally unsafe.¹³ By implementing the following recommendations, juvenile defense attorneys will be better prepared to meet the legal and ethical duties owed to their LGBT clients and protect their clients' rights.

⁷ *Ten Core Principles*, *supra* note 5, at 1, 3; *Juvenile Delinquency Guidelines*, *supra* note 4, at 30-31.

⁸ *Ten Core Principles*, *supra* note 5, at 3; *Juvenile Delinquency Guidelines*, *supra* note 4, at 25.

⁹ *Ten Core Principles*, *supra* note 5, at 1.

¹⁰ *See Hidden Injustice*, *supra* note 3, at 121-22.

¹¹ *See Hidden Injustice*, *supra* note 3, at 129.

¹² *See Hidden Injustice*, *supra* note 3, at 123, 125, 126.

¹³ *See Hidden Injustice*, *supra* note 3, at 117; 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).

A. *Approach all Clients in a Manner that Recognizes that Any Youth May Be LGBT.*

Most of the defenders surveyed in *Hidden Injustice* were aware of representing only a handful of LGBT youth.¹⁴ In many of these cases, the defender perceived the youth to be LGBT but never directly addressed the topic with their client.¹⁵ Recent studies have found that close to 13% of youth in detention are LGBT or questioning.¹⁶ While many young people are openly LGBT in some areas of their lives, it is not likely that LGBT youth will immediately offer this information to their attorney. The role of juvenile defenders is not to determine whether or not each youth they represent is LGBT, but rather to approach all clients in a manner that recognizes that any youth *might be* LGBT, thus creating an atmosphere where LGBT youth will be comfortable sharing this information.

In order to develop meaningful attorney-client relationships with LGBT youth, defenders must be able to

¹⁴ See *Hidden Injustice*, *supra* note 3, at 44. See also *Hidden Injustice* juvenile defender survey data, on file with author.

¹⁵ See *Hidden Injustice* juvenile defender interview notes, on file with author.

¹⁶ See 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 author) Results of the 2009 Ceres Policy Research study will appear in *19 Columbia Journal of Gender & Law* (forthcoming 2011). 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.)” See also, A. Beck, P. Harrison, and P. Guerino, Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09 11 (Bureau of Justice Statistics (Jan., 2010) [hereinafter *Sexual Victimization in Juvenile Facilities*], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf> (finding twelve percent of youth in the study reported a sexual orientation other than heterosexual).

talk with youth about sexual orientation and gender identity.¹⁷ When defenders are unfamiliar with or uncomfortable talking about LGBT issues, youth can sense this and will likely shy away from sharing relevant information with their attorney, making it more difficult for the attorney to fully advocate on their behalf.¹⁸

Defenders can create a safe and open atmosphere for their clients by using the following techniques:

- Conduct initial interviews with clients in a setting that provides the greatest amount of privacy possible and without the clients' parents present, as many LGBT youth are not out to their parents.
- Avoid using language that assumes anything about a youth's sexual orientation or gender identity. For example, rather than asking a youth "Do you have a girlfriend?" ask "Do you have a boyfriend or girlfriend?" or "Are you dating or in a relationship with anyone?"
- Convey a nonjudgmental attitude and demonstrate an open mind when a client shares personal things about his or her life.
- Make sure clients understand what attorney-client confidentiality means.
- Ask open-ended questions and follow up with questions exploring the why behind the response.

¹⁷ See Jody Marksamer & Shannan Wilber, *The Model Standards Project: Defending LGBTQ Youth*, 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.

¹⁸ See *Hidden Injustice*, *supra* note 3, at 129.

- Signal openness and acceptance of LGBT people by placing LGBT-supportive posters, stickers, or pins on briefcases and in defender offices.

If defenders think that a youth is LGBT, they should raise the topic directly with their client rather than proceed based on an assumption. It is always appropriate to ask a youth if he or she is LGBT, but defenders need to be aware that if they have not yet developed a trusting relationship with their client, it is unlikely that the youth will share this information with them.¹⁹ Regardless of when it happens, if a youth does disclose that he or she is LGBT, defenders should respond in a way that indicates they will fully advocate for their client and will not reveal the information in court or elsewhere without their client's knowledge and permission. In addition, defenders should talk with the youth about his or her experiences with family and at school and find out who else knows that the youth is LGBT.

When representing transgender and gender nonconforming youth, defenders should always ask what pronoun and name the youth prefers, and unless directed by the client to do otherwise, they should consistently use that name and pronoun, even if it differs from the youth's legal name.²⁰ In addition, if the youth requests this, defenders should ask all other system professionals to refer to their client by the name and pronoun the youth prefers. And defenders should never refer to a transgender youth as "he-she" or "it" or allow other system professionals to do so. When representing a transgender youth, defenders should find out more about the client's gender history as early as possible, including whether the youth lives full time in their gender, whether the youth has a medical diagnosis of gender identity disorder (GID) and is undergoing treatment, and whether the youth is taking hormones – either prescribed or from the

¹⁹ See *Hidden Injustice*, *supra* note 3, at 44, 131 FN 50.

²⁰ See *Hidden Injustice*, *supra* note 3, at 48.

underground market – or if the youth wants to start taking hormones soon.²¹

B. *Talk with LGBT Clients about Any Experiences of Abuse, Discrimination, and Rejection and the Effect these Experiences Have Had on their Lives.*

Lack of understanding about LGBT youths' life experiences undermines a defender's ability to build an effective attorney-client relationship and to present the strongest possible defenses on their clients' behalves.²² To provide effective representation, defenders must understand the ways in which sexual orientation and gender identity impact the experiences of a particular LGBT client, both within and outside the system.²³ While a youth's sexual orientation and gender identity are not necessarily relevant in every case, defenders should keep in mind the numerous ways in which their client's LGBT identity could be relevant and be prepared to proceed appropriately.²⁴

Unfortunately, many LGBT youth experience harassment, discrimination, violence, and rejection at home, school, and in the community due to their identity.²⁵ These experiences can negatively impact adolescent development and lead to family rejection and school victimization, which increases the likelihood of entering the juvenile justice system.²⁶ When defending an

²¹ See *Hidden Injustice*, *supra* note 3, at 49-51.

²² See *Hidden Injustice*, *supra* note 3, at 129.

²³ See *Hidden Injustice*, *supra* note 3, at 69.

²⁴ See *Hidden Injustice*, *supra* note 3, at 118-9.

²⁵ See *Hidden Injustice*, *supra* note 3, at 69, 70, 75-6. See also A.R. D'Augelli, *Parents' Awareness of Lesbian, Gay, and Bisexual Youths' Sexual Orientation*, 67 *Journal of Marriage & Family* 474-482 (2005); Gay, Lesbian and Straight Education Network, *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* XVI (2010), available at <http://www.glsen.org/cgi-bin/iowa/all/news/record/2624.html> [hereinafter *GLSEN 2009 National School Climate Survey*].

²⁶ See *Hidden Injustice*, *supra* note 3, at 69; Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in*

LGBT youth, attorneys need to identify what, if any, effect societal bias has had on their client and how this has impacted his or her entrance to the system and experiences in the system. Defenders need to be aware that LGBT youth who experience conflicts at home because of their sexual orientation or gender identity are at risk of being charged with specific categories of offenses, such as status offenses, domestic disturbances with parents, and survival crimes if they have been kicked out of their homes.²⁷ Similarly, harassment at school can place LGBT youth at risk of entering the system for such things as fighting, truancy, and altercations with school resource officers.²⁸ Understanding these contextual factors assists defenders in explaining to the court underlying concerns in their client's life, which can help create a different picture of this youth for the judge and serve to mitigate the charges.

C. Provide Zealous Advocacy at All Stages of Representation.

While building relationships with LGBT clients and understanding how their identity may be relevant in their case is essential to competent representation, LGBT youth also need their defense attorneys to zealously advocate for them at every stage of their case. When LGBT youth do not receive zealous advocacy, they are vulnerable to unnecessary detention and incarceration, inappropriate services at disposition, and unchallenged abuse in out-of-home placements.²⁹

White and Latino Lesbian, Gay, and Bisexual Adults, 123 *Pediatrics* 346, 349-51 (2009).

²⁷ See *Hidden Injustice*, *supra* note 3, at 71-4.

²⁸ See *Hidden Injustice*, *supra* note 3, at 75-7. A recent article, based on a national longitudinal study of over 15,000 adolescents from the late 90's and early 2000's, found that lesbian, gay and bisexual (LGB) teens are about 40 percent more likely to receive punishment at the hands of school authorities, police and the courts compared to non-LGB teens who engage in similar behaviors. See Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 *Pediatrics* 49-57 (2011).

²⁹ See *Hidden Injustice*, *supra* note 3, at 117.

In order for defenders to provide their LGBT clients with vigorous advocacy in the courtroom, defenders should:

- Be familiar with current research on LGBT youth, including transgender healthcare.
- Be knowledgeable about state and local nondiscrimination laws and policies that protect LGBT youth in different settings.
- Be prepared to advocate for clients' expressed interests whenever LGBT issues come up, including at detention and disposition hearings, during plea bargaining, and in post-disposition representation.
- Keep informed about the conditions in the secure facilities in the jurisdiction, including whether these facilities have policies prohibiting discrimination based on sexual orientation and gender identity, provide LGBT training for staff, and engage in practices that protect the safety of LGBT youth. Also know how these facilities determine where to house transgender youth and whether the facility will call transgender youth by their chosen names and pronouns and provide them with access to necessary transgender-related medical care.
- Review risk-screening instruments for any potentially disparate impact on LGBT youth.
- Be familiar with alternatives to detention, community-based programs, non-secure placements, and other resources that provide competent and

nondiscriminatory services to LGBT youth and their families.

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

1. Representing LGBT youth at detention hearings³⁰

In most jurisdictions, after a youth is arrested the court holds a detention hearing to determine whether the youth can be released to the community (and under what conditions) or if he or she must be detained pending the completion of the case. Most states have statutes limiting the circumstances under which a court officer can order pretrial detention to cases where it is necessary to ensure that the youth appears in court or when there is high risk that the youth will seriously reoffend while the current charges are pending.³¹ In these states, courts must release youth who do not meet these standards to their parent, guardian, caregiver, or other appropriate non-secure placement.³²

Unfortunately, many LGBT youth are inappropriately and unnecessarily detained because their family refuses to allow them back home.³³ In other instances, courts have detained LGBT youth based on a misconception that it is in the youth's best interests to

³⁰ In some jurisdictions, a detention hearing is called a "first appearance" hearing or a probable cause hearing. See Elizabeth Calvin, *Advocacy and Training Guide: Legal Strategies to Reduce the Unnecessary Detention of Children* 4 (2004).

³¹ 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.

³² See *Juvenile Delinquency Guidelines*, *supra* note 4, at 30.

³³ See *Hidden Injustice*, *supra* note 3, at 95.

remove him or her from a less than ideal family situation or in order to prevent the youth from engaging in a same-sex relationship.³⁴ Defenders have a duty to represent their clients at detention hearings, including discussing options with their clients before the hearing, determining the least restrictive release possibilities, and advocating in court for appropriate alternatives to detention.³⁵ Without effective detention advocacy, LGBT youth are likely to end up in pre-trial detention where they are at high risk of abuse.

In order to prevent unnecessary detention for their LGBT clients, defenders should do the following:

- If your client was detained after arrest, ask if he or she was harassed or mistreated while in detention and ask about the circumstances. If your client was not detained, find out if he or she is afraid of abuse if detained and why.
- Ask about the youth's home life. If the youth does not get along with his or her family, ask why.
- If an LGBT youth's family is not accepting of his or her sexual orientation or gender identity and returning home is not an option, explore alternatives, such as a relative or mentor's home or other appropriate placement. Investigate possible options before the hearing. If you need additional time to find such a placement, ask for it.
- Ask about attendance and performance at school. If the youth is not attending school or is having problems at school, find out why.
- If your client is transgender, ask the youth about any hormones or other transition-related medications he or she is

³⁴ *See id.*

³⁵ *See Juvenile Justice Interim Status Standards, supra* note 5, at 139.

currently taking. Be sure that the youth will have access to these medications if placed out-of-home.

- If you have your client's consent, educate the judge 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.
- Inform your client of his or her rights in detention and explain that he or she should contact you if there are problems.
- If a judge detains a client who is transgender, advocate for placement in a facility or unit appropriate to the client's gender identity, and in accordance with your client's preference for placement. If there are concerns that a particular facility will not respect your client's gender identity, ask the court for an order requiring the facility to refer to your client by the appropriate name and pronoun, allow your client to dress in clothing in line with his or her gender identity, and continue providing your client with transgender-related medical care.³⁶

2. *Advocating for appropriate programs and services for LGBT youth at disposition.*

The purpose of a disposition hearing is to develop the least restrictive treatment and rehabilitation plans for youth that meet their individual educational, emotional,

³⁶ For an example of such an order, see *Hidden Injustice*, *supra* note 3, at 157-8.

and physical needs while also protecting the community.³⁷ Disposition interventions must also be developmentally and culturally appropriate.³⁸ Similar to their detention hearings duties, defenders must consult with their clients to develop the most appropriate disposition recommendations consistent with their clients' expressed interests and individualized needs.³⁹ In addition, defenders have an obligation to actively seek out and then advocate for these recommendations and other alternatives to incarceration.⁴⁰ Without this type of disposition advocacy, LGBT youth are likely to receive harsh dispositions that are highly restrictive, do not meet their needs, fail to keep them safe, and include long periods of incarceration.⁴¹

To provide effective representation to LGBT clients during the disposition phase of their case, defenders should:

- Review lists of LGBT-competent services in the jurisdiction, as well as programs or placements that have been unsupportive of LGBT youth.
- Explain all possible disposition options to LGBT clients and solicit input from them about the services with which they feel most comfortable.
- Inform the court of your clients' individual needs and expressed interests regarding treatment and placement alternatives.

³⁷ 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 32, at 228-29.

³⁸ *Juvenile Delinquency Guidelines*, *supra* note 4, at 135.

³⁹ *Id.* at 137; *Ten Core Principles*, *supra* note 5, at principle 8.

⁴⁰ *See id.*

⁴¹ *See Hidden Injustice*, *supra* note 3, at 125; Calvin et al., *supra* note 32, at 148-49.

- Recommend services and placements outside of the jurisdiction if there are no appropriate services available locally, and if consistent with your client's expressed interests.
- Zealously advocate against any placements that are not sensitive to LGBT youth or cannot keep LGBT youth safe. Ensure that any placements for transgender youth treat these youth respectfully and use the appropriate name and pronoun.
- 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, such as counseling that attempts to change a youth's LGBT identity.⁴²

3. Protecting the rights and safety of LGBT youth post-disposition

During the time period after a disposition hearing but while a youth is still under the jurisdiction of the court, continued access to counsel is critical to ensure that the state complies with all orders to provide services, that services provided are appropriate and effective, and that the youth is not experiencing unsafe conditions of

⁴² Attempting to change a youth's sexual orientation is harmful, futile and unethical. 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/lgbc/publications/therapeutic-response.pdf>; American Psychological Association, *APA Help Center: Sexual Orientation and Homosexuality* 1 (2009) <http://www.apahelpcenter.org/articles/pdf.php?id=31>; 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).

confinement.⁴³ When LGBT youth do not have zealous post-disposition representation, they are vulnerable to abuse and have no way to challenge violations of their constitutional rights.

LGBT youth experience disproportionate rates of physical, sexual, and emotional abuse in juvenile justice facilities.⁴⁴ Pervasive disrespect and unfair treatment by facilities is also common practice.⁴⁵ And facility staff regularly punish, ridicule, and prevent transgender youth from expressing their gender identity.⁴⁶ In addition, LGBT youth often report feeling isolated and many have little, if any, support in the facility or from people on the outside. For all of these reasons, LGBT youth need zealous post-disposition representation.

Defense attorneys should have regular contact with their LGBT clients in order to stay informed about conditions of confinement and to be able to advocate for these youth when necessary. Specifically, defenders should verify that their LGBT clients are not abused by staff or peers, are not given harmful or inappropriate treatment or services, and are not labeled as sex offenders, unless required by the court. In addition, when representing transgender youth, defenders should confirm that these youth are not disciplined for their gender

⁴³ See *Hidden Injustice*, *supra* note 3, at 126.

⁴⁴ Research released by the Bureau of Justice Statistics (BJS) regarding sexual victimization in juvenile facilities found that more than one in five non-heterosexual youth reported sexual victimization involving another youth or facility staff – almost twice the rate of heterosexual youth. And non-heterosexual youth were almost ten times as likely as heterosexual youth to have reported they had been sexually abused by other youth while in custody (12.5 percent vs. 1.3 percent). *Sexual Victimization in Juvenile Facilities*, *supra* note 17, at 11. See also *Hidden Injustice*, *supra* note 3, at 102-3.

⁴⁵ See *Hidden Injustice*, *supra* note 3, at 104-5. For a more in depth discussion of conditions of confinement for LGBT youth, see Chapter 8 of *Hidden Injustice*.

⁴⁶ See *Hidden Injustice*, *supra* note 3, at 105-6; 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, 80-2 (2008).

expression, are not isolated or segregated from other youth, are treated respectfully by facility staff and peers, are able to use the shower safely, and are provided with necessary transgender-related medical care.

If defenders become aware that an LGBT client is experiencing these or any other rights violations, or is not receiving the services ordered by the court, they should talk with the youth about options for moving forward and then advocate for their client using all available and appropriate vehicles. Depending upon the jurisdiction, possible ways to improve a client's situation, in addition to any identified by the youth, include requesting a review hearing, seeking a writ, or connecting the youth with attorneys who can talk with them about available civil remedies.⁴⁷

4. Respond to LGBT Bias and Misconceptions in the Courtroom

Bias and disrespect in the courtroom are all-too-common experiences for LGBT youth. Defense attorneys have legal and ethical responsibilities to advocate for their clients' fair and respectful treatment throughout the court process, which includes addressing bias by other juvenile court professionals toward their clients. To meet this responsibility, juvenile defenders should:

- Immediately respond to jokes or other disrespectful comments about a client's actual or perceived sexual orientation or gender identity. If this happens during a court hearing, object for the record.
- Oppose introduction of evidence of sexual orientation or sexual conduct when not relevant to the case or when introduced in an attempt to embarrass a client or attack his or her character.
- Review all written reports and evaluations for language that pathologizes an LGBT client's identity and appropriately address any such statements with the court.

⁴⁷ See Calvin et al., *supra* note 32, at 244-7.

- Oppose sexual offending assessments for LGBT clients when unwarranted.

Conclusion

While all juvenile justice professionals have legal and ethical responsibilities to court-involved youth, defenders of LGBT youth must vigorously represent their clients in court while also protecting them from abuse and mistreatment at all stages of system involvement. Studies have shown that LGBT youth are frequently unnecessarily detained, denied due process, disrespected by court and facility personnel, subjected to unduly harsh dispositions, and forced to endure ineffective and harmful services, including egregious conditions of confinement. It is essential that juvenile defenders are committed to zealously defending their clients from the very first court hearing through the time juvenile court jurisdiction is terminated. By using the strategies and recommendations that are highlighted in this article, defense attorneys will be better prepared to build effective attorney-client relationships with LGBT youth, protect their clients' rights and safety, advocate for fair and respectful treatment, and effectively respond to instances of mistreatment or abuse.

Missed Opportunities for Lesbian, Gay, Bisexual, Transgender (LGBT) Youth and their Families in the Juvenile Justice System

By: JUDGE DONNA QUIGLEY GROMAN*

“The purpose of the juvenile court law is “to provide for the protection and safety of the public . . . and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public.”⁴⁸”

The juvenile justice system is undergoing a cultural shift as research has demonstrated that community-based programs are more effective than traditional correctional programs.⁴⁹ “The formal juvenile justice system can’t substitute for strong families, schools, and communities, and was never meant to. For the vast majority of young people who get into trouble, the best responses are informal and close to home, guided by the community’s traditions and restrained by its common sense. It’s not just cheaper than arrests, petitions, court hearings, detention stays, and everything else that comes with formal processing. It’s more effective in the long run.”⁵⁰

Important reforms protecting LGBT youth have taken hold in various parts of the country. Much-needed anti-discrimination policies and best practice guidelines

* Judge Donna Quigley Groman is a Superior Court Judge in Los Angeles County.

⁴⁸ Cal. Welf. and Inst. Code § 202, subd. (a).

⁴⁹ James Austin, Kelly Dedel Johnson, and Ronald Weitzer *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, OJJDP Juvenile Justice Bulletin, p. 3 (2005) <http://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>

⁵⁰ Patrick Griffin, *Models for Change: Innovations in Practice*, National Center for Juvenile Justice, p. 4 (2010) <http://modelsforchange.net/publications/287>

dealing with LGBT youth in residential care have been adopted in New York, Hawaii, Washington, D.C., California and Washington.⁵¹

However, despite the current trend in juvenile justice to develop programs to prevent removal of youth from their homes, little attention has been focused on the special needs of LGBT youth and their families. This may be due to the fact that historically the “near-universal underlying assumption has been that family hostility and rejection [of LGBT children] are intractable. In essence, we have assumed this will continue to be true.”⁵² While this passive approach may have been endured by LGBT children who came out to parents while adults, the failure to foster reconciliation and acceptance between parents and their openly LGBT minor children can be disastrous.

Youth today are self-identifying as gay, lesbian, and gender variant at an earlier age, in high school or even middle school.⁵³ Unlike the young adults in past years who were more likely to be on their own, LGBT youth are “coming out” to parents at a time where they are wholly dependent on their parents for financial and emotional support.

⁵¹ New York State Office of Children and Family Services LGBTQ Youth Guidelines (2008) <http://www.wcl.american.edu/nic/documents/NewYorkDepartmentofChildrenandFamilyServices.pdf?rd=1> ; City of New York Department of Juvenile Justice, *Anti-Discrimination of LGBTQ Youth*, Policies and Procedures Directive #: 02/07 (2007) ; Hawaii Youth Correctional Facility, *Chapter 43 Youth Rights and Remedies: Non-Discriminatory, Developmentally-Sound Treatment of Lesbian, Gay, Bi-Sexual and Transgender (LGBT) Youth* (2007); King County, Department of Adult and Juvenile Detention General Policy Manual, Chapter 6: Inmate Classification and Discipline, 6.03.007 *Transgender Inmates* (2006); District of Columbia Department of Corrections, *Gender Classification and Housing* (2009); SB 518, CA Juvenile Justice Safety and Protection Act (2007) CA. Welf. & Inst. § 224.71

⁵² Shannon Minter and Jeff Krehely, *Families Matter. New Research Calls for a Revolution in Public Policy for LGBT Children and Youth*, Center for American Progress (February 7, 2011), available at http://www.americanprogress.org/issues/2011/02/pdf/families_matter.pdf/

⁵³ *Id.*

The psychological injury experienced by emerging LGBT youth can be significant.⁵⁴ High rates of family rejection account for elevated risk for depression, illegal drug use, and being suicidal.⁵⁵ Many teenagers end up on the streets because they are either kicked out or have experienced abuse at the hands of their parents.⁵⁶ Homelessness leads to the commission of survival crimes, including theft and prostitution. These paths lead to involvement in the juvenile justice system at rates almost three times greater than for non-LGBT youth.⁵⁷

Non-LGBT youth benefit from family relationships that support them in the community, allowing them to take advantage of programs that will keep them at home. In order for LGBT youth to participate in community-based programs, there is a need to reduce the incidence of family rejection and to allocate culturally appropriate resources to rebuild and strengthen family relationships. To do otherwise is to deprive LGBT youth the opportunity to avail themselves of the many

⁵⁴ Shannon Wilber, Caitlin Ryan, Jody Marksamer, *CWLA Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care*, p. 17 (2006), available at <http://www.nclrights.org/site/DocServer/bestpracticeslgbyouth.pdf?docID=1322>

⁵⁵ Russell, S. and Joyner, K. (2001) *Adolescent Sexual Orientation and Suicide Risk: Evidence From a National Study* American Journal of Public Health, Vol 91, No. 8, p. 1276 (August 2001), available at <http://ajph.aphapublications.org/cgi/content/full/91/8/1276>; Caitlin Ryan, David Huebner, Rafael M. Diaz, Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults*, Pediatrics, Official Journal of the American Academy of Pediatrics, p.346 (2009), available at <http://pediatrics.aappublications.org/cgi/content/abstract/123/1/346>

⁵⁶ Nicholas Ray, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness*. New York: National Gay and Lesbian Task Force Policy Institute and the National Coalition for the Homeless, p. 17 (2006), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>

⁵⁷ Kathryn Himmelstein and Hannah Bruckner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, Pediatrics, Official Journal of the American Academy of Pediatrics, p. 49-50, 53 (2010), available at <http://pediatrics.aappublications.org/cgi/reprint/peds.2009-2306v1>

opportunities leading to an informal resolution of their case, such as diversion or informal probation. A great inequity exists where an LGBT youth ends up in an out-of-home placement simply because s/he has no family with whom to live, while a non-LGBT youth committing a similar crime is able to remain in his or her family home.

A multitude of opportunities exist to divert youth from the juvenile justice system. "The Legislature intended to address juvenile delinquency at its inception and at the earliest signs of delinquency with a less structured program. To meet this objective it gave the courts more authority to deal with minors before they become habitual criminals."⁵⁸

Law enforcement officers and probation officers have the option to "counsel and release" youth in lieu of referring the matter to the district attorney for formal prosecution. A probation officer can place a youth on informal supervision under certain terms and conditions, and with successful completion of the program, charges will not be filed. Even when the case is referred to the district attorney and charges are filed, the juvenile court can choose any number of diversion alternatives, including informal supervision where no admission is required, a 6-month probation without wardship, or deferred entry of judgment for felony charges.⁵⁹ Each of these alternatives allows the youth to remain home and undergo rehabilitation with the opportunity for dismissal of all charges.

For youth who do not qualify for informal diversion or deferred entry of judgment, the juvenile justice system routinely employs graduated sanctions. First time offenders, if not diverted, are typically placed home on probation to complete terms and conditions. Various interventions can be utilized to prevent the removal of a youth from his or her home, including

⁵⁸ *In re Armondo A.* (1992) 3 Cal. App. 4th 1185, 1189.

⁵⁹ See Cal. Welf. and Inst. Code §§ 653.5, 654, 654.2, 725, 790.

Wraparound Services, Multi-Systemic Therapy and Functional Family Therapy.⁶⁰

LGBT youth from rejecting homes are deprived of these ground level opportunities. A petty theft charge which ordinarily may result in diversion, now results in out-of-home placement for a youth who has nowhere else to turn. Moreover, even when a youth does remain in his or her family home, professionals in the juvenile justice system may mistakenly conclude that the youth's behavior is a display of anti-social conduct as opposed to a manifestation of the turmoil in the youth's relationship with his or her parents. The reality is that many probation officers, judges and lawyers do not recognize or do not have the experience or training to appreciate the youth's life experience and the emotional burdens weighing upon them. Even where the professionals are aware of the youth's self-identification of LGBT status, they may fail to respond in an adequate manner, choosing to correct what they perceive as rebellious behavior. There may be attempts to change, control or punish the youth for his or her professed identity.⁶¹

Looking at the factors that a probation officer or judge is required to weigh,⁶² one can understand why a

⁶⁰ Richard Mendel, *Less Hype, More Help: Reducing Juvenile Crim, What Works—and What Doesn't.*, Washington, DC: American Youth Policy Forum, pp 17-19 (2000), available at <http://www.aypf.org/publications/mendel/MendelRep.pdf>

⁶¹ Katayoon Majd, Jody Marksamer, Carolyn Reyes, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*, pp. 2-4 (2009)

⁶² As an example, Cal. Rules of Ct, Rule 5.516 (b) lists a set of factors to be considered by the probation officer in determining whether informal supervision should be granted:

- (1) If the condition or conduct is not considered serious, whether the child has had a problem in the home, school, or community that indicates that some supervision would be desirable;
- (2) Whether the child and the parent or guardian seem able to resolve the matter with the assistance of the social worker or probation officer and without formal court action;
- (3) Whether further observation or evaluation by the social worker or probation officer is needed before a decision can be reached;
- (4) The attitudes of the child and the parent or guardian;
- (5) The age, maturity, and capabilities of the child;

LGBT youth may end up in the court system on formal probation or even in out-of-home placement. The extent of problems at home, school and in the community, coupled with substance abuse and mental health issues, may lead a probation officer or judge to conclude that the youth's behavior is too severe to handle in the home.

Indeed, research has demonstrated that “non-heterosexual adolescents, particularly girls, suffer punishments by school and criminal-justice authorities that are disproportionate to their rates of transgressive behavior.”⁶³ Moreover, LGBT youth may become more despondent while they are in the system, for example, when placed in a group home. Whereas their peers are going on home visits on weekends and looking forward to returning home to their families, it becomes more evident to the LGBT youth that s/he has been abandoned by his/her parents. Consider the dejection these youth must feel, knowing that their situation does not improve for them even when they run a good program. It does not matter how they behave or how well they do in school, or how long they maintain their sobriety; they have no home to go to and nothing to look forward to other than the stark reality of life on their own.

In interviews I conducted of LGBT youth in the juvenile justice system or graduates of the system, each echoed a similar sentiment. It was not the treatment by others in the system that caused the greatest despair. It was the absolute sadness of not having the support of their families. Not having a home to return to or alternatively, returning home at the expense of losing their identity are both hollow options.

The outcomes for LGBT youth do not have to be so ominous. With proper services, family rejection may

(6) The dependency or delinquency history, if any, of the child;
(7) The recommendation, if any, of the referring party or agency;
(8) The attitudes of affected persons; and
(9) Any other circumstances that indicate that a program of informal supervision would be consistent with the welfare of the child and the protection of the public.

⁶³ Himmelstein and Bruckner, *supra* at fn. 10, p. 50.

be substantially decreased. Dr. Caitlin Ryan, the director and senior quantitative researcher at the Family Acceptance Project in San Francisco, along with her colleagues, conclude: “while it is known that initial parental reactions to the disclosure of LGB identity may be negative—sometimes including ejection from the home—research has also shown that after parents become sensitized to the needs and well-being of their LGB children, many family relationships improve.”⁶⁴ Even where families are “a little less rejecting and a little more accepting,” outcomes for LGBT youth greatly improve.⁶⁵

In conclusion, LGBT youth must be afforded the same opportunities that non-LGBT youth receive to be diverted from the juvenile justice system, or to receive the services necessary to prevent the need for removal from their family homes. Practitioners, probation officers, social workers, judges and lawyers should become familiar with the experiences of LGBT youth and their families, and receive training to sensitively intervene to ensure the physical and emotional safety of the youth within the family setting.⁶⁶ Well-trained professionals can provide support, counseling⁶⁷ and guidance to help the family cope with the discovery of their child's LGBT identity. They can provide information to the family as to the negative effects of family rejection and can identify local services and resources to provide ongoing support to the family and youth.

Strengthening family ties is a key to successful outcomes for LGBT youth in the juvenile justice system.

⁶⁴ Caitlin Ryan *et al.*, *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, *Journal of Child and Adolescent Psychiatric Nursing*, Vol. 23, Number 4, p. 206 (2010), available at http://familyproject.sfsu.edu/files/FAP_Family%20Acceptance_JCA_PN.pdf

⁶⁵ Caitlin Ryan, *Supportive Families, Healthy Children*, Family Acceptance Project, San Francisco State University, p. 6 (2009), available at http://familyproject.sfsu.edu/files/English_Final_Print_Version_Last.pdf

⁶⁶ Wilber *et al.*, *supra* at fn. 7, pp. 53-61

⁶⁷ *Id.*

While protecting youth from abuses in out-of-home placement remains an important goal, the overall well-being of LGBT youth demands a focus on supporting youth in the embrace of their own families. The observation that “processing a juvenile through the system appears to have a negative or backfire effect”⁶⁸ applies to all youth. The success of our juvenile justice system depends on its ability to prevent the need to remove our children from the community. There should be no missed opportunities for LGBT youth as long as society makes the effort to support and enhance familial attachments for all, regardless of the challenge.

⁶⁸ Anthony Petrosino, Carolyn Turpin-Petrosino, Sarah Guckenburg, *Formal System Processing of Juveniles: Effects on Delinquency*, Campbell Systematic Reviews, p. 38 (2010) <http://www.campbellcollaboration.org/library.php>

LGBTQ Girls in the Juvenile Justice System- Discrimination, Alienation and Marginalization

By: GENA CASTRO RODRIGUEZ, MFT*

I. Introduction⁶⁹

Over the last two decades, there has been an increase in the number of girls referred to the juvenile justice system in California, and the system has failed to understand and respond to their unique needs. In 2008, nearly 60,000 girls were arrested throughout the state, and 41% of those arrests ended in an order of wardship.⁷⁰ The Urban Justice Center estimates that lesbian, gay, bisexual and transgender (LGBTQ) youth comprise 4-10 % of the juvenile justice population and research by Dr. Laurie Schaffner, a sociologist, found approximately one-third to one-fifth of the girls in a sample of 150 girls in the juvenile justices system identified as LGBTQ.⁷¹ LGBTQ girls experience discrimination, threats to physical and emotional safety, punishment and harassment as a result of their sexual identity. The system is ill-equipped to deal with their needs, and inconsistent or nonexistent policies, the lack of services and trained staff, and homophobia/heterosexism create a hostile and abusive environment for many LGBTQ girls.⁷² These girls

* Gena Castro Rodriguez is the Co-Executive Director of the Youth Justice Institute, which strives to address the needs of young people involved in California's juvenile justice system and provide support so that they may exist the system and transition into healthy adults.

⁶⁹ We regret that for the scope of this paper, we were not able to focus on transgender youth, but we include the T in the acronym as a reminder of their presence in the juvenile justice system, and hope to address the needs of this population at a later date.

⁷⁰ Berkeley Center for Criminal Justice (BCCJ), *Gender Responsiveness and Equity in California's Juvenile Justice System* (2010). Juvenile Justice Policy Brief Series, available at <http://www.law.berkeley.edu/bccj.htm>.

⁷¹ Schaffner, L., *Violence and Female Delinquency: Gender Transgressions and Gender Invisibility* (1999). Berkeley Women's Law Journal, pp. 1-41.

⁷² National Center for Crime and Delinquency (NCCD) Center for Girls and Young Women, *Getting the Facts Straight About Girls in*

represent a population that is even more marginalized and at risk in a system that at best does not see them and, at worst, causes them harm.

For the last seven years, the Youth Justice Institute (YJI) has worked with girls and young women from the greater Bay Area who have been sentenced to serve time at the Department of Juvenile Justice (DJJ) Ventura Youth Correctional Facility, the only state facility for girls in California. During that time, the organization has witnessed and learned about the complex realities and treatment of LGBTQ girls in the juvenile justice system. This article will capture some of the learning from our experience working with more than 50 young women who were incarcerated during their adolescence and young adulthood and who identified as LGBTQ. Additionally, the article will incorporate statements from five former detainees who are currently working with YJI in reentry services. These young women are part of an ongoing group receiving support, services and resources to support their successful completion of conditions of probation or parole. Their input and comments included in this article were gathered from their bi-monthly support group.

Girls are often left out of the conversations in juvenile justice. Although they represent a small portion, between 20-30% in most California jurisdictions, the state and counties have a responsibility to ensure that the juvenile justice system offers appropriate services to young women under their supervision.⁷³ Adolescence is a particularly important time for appropriate attention and resources as girls are developing their sense of identity and autonomy. In three stages of development between the ages of approximately 11 to 20, girls are developing a new self-image (early adolescence), individuating from family (mid-adolescence) and establishing a sense of identity including gender and sexual identity (late adolescence). In the best-case scenario, this is a challenging, emotional and important time for adolescent

the Juvenile Justice System (2009), available at <http://www.justiceforallgirls.org/>.

⁷³ BCCJ, *supra* at fn. 2.

girls. For girls in the juvenile justice system, this happens under the “parenting” of a punitive, judgmental, and too-often abusive system.

Some girls in the juvenile justice system identify as lesbian, gay, bi-sexual or queer, while others identify as heterosexual, and have relationships with girls. Girls, or others, sometimes refer to this last scenario as “gay for the stay.” Even if this is the reality of their current sexual identity, the term minimizes the role of the relationship in the life of a girl as important and relevant. Girls in general are relationship focused, meaning they seek intimacy, closeness, family, and love in close relationships. Research on women and prison has shown that sexuality and intimacy are complicated in prison and that consensual sexual relationships, the creation of a pseudo-family, and emotional dyads among inmates are common phenomena.⁷⁴ However, whether the girls in the juvenile justice choose to identify, their relationships are watched, judged, and even punished if the young women are system-involved.

II. Risks and Challenges

Before entering the juvenile justice system, many LGBTQ girls were subject to risks, abuse and violence. Some had already left home due to abuse or neglect because of their sexual orientation. Being on the streets makes LGBTQ girls more susceptible to police and social services involvement, and many have been placed in out-of-home placements or group homes where they too often experience further homophobia, abuse and shaming from staff and other youth. Girls who run away from these placements must participate in survival crimes like drug sales, prostitution or theft, and this is often how they cross over into the juvenile delinquency system. Once in the system, they are again exposed to abuse and

⁷⁴ Pasko, L., *Damaged Daughters: The History of Girls' Sexuality and the Juvenile Justice System*. The Journal of Criminal Law & Criminology. Northwestern University School of Law. Vol. 100, No. 3. (2010).

discrimination, and are marginalized based on ignorance, prejudice and intolerance. This puts them at even greater risk for poor self-image, self-harm, and suicide.

III. In the System

The juvenile justice system often pathologizes LGBTQ girls treating them as sexual predators or misattributes their sexual identity to trauma or sexual abuse. LGBTQ girls are sometime denied roommates, made to shower alone and not allowed to spend time in close proximity to other girls.

“We get targeted and profiled - they think if you [have] been with a girl they assume you are trying to get with everyone.” –YJI Client

In addition, staff members attributed their sexuality, inside or outside the penal institution, to being abnormal and the result of some previous trauma.⁷⁵ Staff also seem to hold stereotypical beliefs about LGBTQ girls, including that they are hypersexual, predatory, going through a phase, or trying to “recruit” others to be lesbian and bisexual.⁷⁶

LGBTQ girls experience homophobia and heterosexism from probation officers, institutional staff, and even mental health workers. They endure name-calling, “outing”, hostility, shame and discrimination because of their identity.

“You know they don’t like the gay girls, you can tell, they talk to each other, gossip, say stuff. You can just tell and then they treat you bad because they don’t like how you are.” –YJI Client

⁷⁵ *Id.*

⁷⁶ Curtain, M., *Lesbian and Bisexual Girls in the Juvenile Justice System*. *Child and Adolescent Social Work Journal*, Vol. 19, No. 4, August (2002).

Although there are no official policies condoning these homophobic practices, there are also no policies upheld to prevent this type of harassment and discrimination. Staff pass judgment on LGBTQ girls based on their own biases, religious beliefs, values or cultural norms. Additionally, they often dismiss and minimize a girl's sexual identity based on their own ignorance.

"They said, 'That's just not right, I would rather you talked to [dated] a guy in here, that would be better for you.'" –YJI Client

One young woman even reported that a chaplain pulled her aside and confronted her after church services.

"He's supposed to be a Christian; he said my sexuality was a sin, an ungodly sin, and that it was even worse because I had a man and baby at home. I stopped going [to services] after that because you know, I didn't want to hear that - what he thought about me." –YJI Client

In recent research by Lisa Pasko, correctional professionals insisted that girls were heterosexual and that their same-sex attraction was temporary and a method of manipulation and power over other girls and staff. Rarely did staff conceptualize or acknowledge girls' LGBTQ behavior identities.⁷⁷

"They always give you their opinion, like you need to focus on you – 'You ain't even going to be with girls when you get out of here, this is no good for you. I don't like that gay shit - you know when you get out you are going to be with a man.'" –YJI Client

Even more disturbing is that some girls are punished for being LGBTQ and get time adds, room time, dropped phases (behavioral phases used in detention to dictate privileges and limits, with A phase as the highest

⁷⁷ Pasko, *supra*, at fn. 6.

level) or written up for inappropriate sexual behaviors. These “behaviors” include telling “secrets”, holding hands, hugs, or kissing - behaviors sometimes allowed at co-ed facilities. These “behaviors” can even affect their parole consideration.

“If you are an “A” phase you can hold hands, hug, have a relationship, you can even kiss at visiting, if the staff is cool, but only with a guy, not a girl. Then it is sexual misconduct.” –YJI Client

“They try to break you up - messing up your program, lose your phase, if you get caught kissing, holding hands you get writing [sic] up. Then you go to boards and they say, ‘You know this relationship ain’t no good for you. It affects you at boards - why even bring it in[to] parole?’” –YJI Client

Policies in the system are not codified and are therefore subject to individual staff members’ comfort and knowledge about sexual orientation.⁷⁸ These “unofficial” policies leave girls with little or no recourse when they are discriminated against.

“You are treated differently, targeted, they are always watching you. They look at you different, but the relationship in her treatment effects as negative. They see it as negative. You can’t grieve anything having to do with a relationship; they won’t even look at it. They say it’s not grievable, they tell you you just need to handle [it] within your staff (in the facility), just work it out.” –YJI Client

Finally, there is a general lack of tolerance and understanding about sexual orientation and the importance of relationships in girls’ lives. As discussed above, girls need relationships and intimacy in their lives,

⁷⁸ Curtain, *supra*, at fn. 8.

and these relationships can provide the support and even guidance they need while enduring time spent in detention and the juvenile justice system.

“They don’t even consider that it could be a good thing for you. Even if you are being cool, not having any drama, doing your program - they don’t care. Some girls even help their girlfriends keep it together, stay out of trouble, they need that, but they [staff] don’t care.” –YJI Client

IV. What Can Be Done?

The juvenile justice system needs to evaluate and implement policies, practices and procedures for LGBTQ girls. Conditions of confinement, punishment structures, grievance procedures, and programming should be reviewed to ensure that they have practices that do not target LGBTQ girls, disproportionately affect them or further marginalize and alienate them. It is important that these policies and practices are not only sensitive and reflective of the needs of LGBTQ youth, but also that they are culturally attuned and appropriate for adolescents and young adults. Additionally, there should be training and supervision for staff to combat ignorance, bias and discriminating practices.

As allies and community support and service providers, we also need to ensure that we are incorporating practices and standards in our work that reflect the best practices of working with LGBTQ girls. Some suggestions follow.

- Ask about romantic relationships, not boyfriends; you can miss important information about relationships in her life and alienate her if you don’t consider that she might be in a same-gender relationship.
- Don’t assume you know a girl’s sexual or gender identity - ask her. She may or may not want to tell you, but her identity is hers to define.

- Don't forget that domestic violence or abuse may have happened to her. Don't make misassumptions about single-gender relationships and violence; it exists and is often unnoticed.
- Ask if she wants/needs/has support. In addition to abuse in the system, LGBTQ girls can be alienated by family, friends and their community.
- Incorporate non-heterosexual family, relationships, and parenting models into your curriculum, program and service models. Most materials are geared toward heteronormative models and can be alienating and irrelevant to LGBTQ girls.
- Identify and become familiar with LGBTQ resources in your community so you can help them access needed services.
- Have LGBTQ youth lead trainings on working with LGBTQ youth. It is not only a valuable way to understand the needs and experiences of these girls, but also an empowering experience for them to advocate for and make change in the system.
- And finally, see them. LGBTQ girls can feel and be invisible, especially in the juvenile justice system.