

**Addressing the Harm of Silence and Assumptions of Mutability:
Implementing Effective Non-Discrimination Policies for Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Foster Care**

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Introduction

“Children walk the streets today because they were kicked out of a home that saw their struggle as a moral choice rather than a fact of their identity development.”¹

The recent media attention on suicides committed by youth identified as, or perceived to be, lesbian, gay, bisexual, transgender, or queer (“LGBTQ”)² brings much awareness to a serious problem.³ The increasing awareness of the problem of high suicide rates amongst LGBTQ youth has prompted high profile outreach efforts to address the issue. For example, hundreds of people, including President Barack Obama and U.S. Secretary of State Hillary Clinton, have contributed positive messages to LGBTQ youth through online videos as part of the “It Gets Better” campaign. “It Gets Better” addresses the pattern of isolation and despair among LGBTQ youth and is intended to lower suicide rates and inspire hope to keep living despite their many obstacles.⁴ However, the disparate suicide rate for LGBTQ youth is not a new trend.⁵

¹ Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 440 (1998).

² Sometimes “Q” is used to represent “questioning;” however, this article will use “Q” to represent “queer” youth unless otherwise noted. Additionally, some studies of youth cited here do not include queer- or bisexual-identified youth and the discrepancy is noted by omitting the “B” and/or “Q” from the LGBTQ acronym. Although queer has sometimes been used as a unifying “catch-all” for lesbian, gay, bisexual, and transgender communities, a potentially more useful understanding of the term is as an identity for some sexual minorities who are excluded from lesbian, gay, bisexual, heterosexual, and transgender categories. For example, some women-identified people who are primarily attracted to transgender men feel that they cannot consider themselves heterosexual nor lesbian but strongly identify as queer.

³ See Jesse McKinley, *Suicides Put Light on Pressures of Gay Teenagers*, N.Y. TIMES, Oct. 3, 2010, at A9, available at <http://www.nytimes.com/2010/10/04/us/04suicide.html?scp=1&sq=several%20recent%20suicides%20put%20light%20on%20pressures%20&st=cse>; Lucia Graves, *Gay Teen Suicides Pervasive, A ‘Hidden Problem’: Expert*, HUFFINGTON POST (Oct. 22, 2010, 9:06 PM), http://www.huffingtonpost.com/2010/10/22/gay-teen-suicides-a-hidden-problem_n_772707.html.

⁴ *What Is the It Gets Better Project?*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> (last visited Aug. 22, 2012).

⁵ Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES REPORT OF THE SECRETARY’S TASK FORCE ON YOUTH SUICIDE 110, 127 (1989) (reporting that 65% of homeless LGB youth compared to 19% of

LGBTQ youth also have higher rates of depression, sexually transmitted diseases, survival crimes, substance abuse, prostitution, and mental health issues.⁶ Researchers and advocates have been voicing concerns for years. So why does the problem persist?⁷

The statistically poor outcomes associated with LGBTQ youth persist largely as a result of systemic discrimination against LGBTQ communities. Both the covert and the overt forms of this discrimination must be addressed in order to make significant changes in these statistics.⁸ While it is especially difficult to reach LGBTQ youth living in the private

heterosexual youth reported ever being suicidal and that gay youth had a rate of suicidality nearly three and a half times greater than other youth); Gary Remafedi, Simone French, Mary Story, Michael D. Resnick & Robert Blum, *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 AM. J. PUB. HEALTH 57 (1998) (finding 28% of gay- and bisexual-identified male youth had attempted suicide compared to 4% of heterosexual-identified male youth and 20% of lesbian- and bisexual-identified female youth had attempted suicide compared to 14% of heterosexual-identified female youth); Chris Bull, *Suicidal Tendencies: Is Anguish over Sexual Orientation Causing Gay and Lesbian Teens to Kill Themselves?*, THE ADVOCATE, Apr. 5, 1994, at 35 (finding that 30% of five hundred gay and lesbian youths in San Francisco had attempted suicide).

⁶ See discussion *infra* Part I.A.

⁷ See, e.g., Stephen T. Russell & Kara Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence From a National Study*, 91 AM. J. PUB. HEALTH 1276, 1278 (2001) (finding that youth who had romantic attractions to or romantic relationships with the same sex are twice as likely to attempt suicide); BELINDA HANLON, MASSACHUSETTS DEPARTMENT OF EDUCATION: 2003 YOUTH RISK BEHAVIOR SURVEY RESULTS (2004) (finding that 32% of sexual minority youth have attempted suicide compared to 7% of heterosexual youth); Barbara L. Frankowski, *American Academy of Pediatrics: Clinical Report: Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827, 1829 (2004) (surveying the research and finding that LGB youth are two to seven times more likely to attempt suicide); Caitlyn 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*, 123 PEDIATRICS 346, 349 (2009) (reporting 40% of 224 lesbian, gay, and bisexual youth who were out to at least one parent had attempted suicide).

⁸ Shannon B. Dermer, Shannon D. Smith & Korenna K. Barto, *Identifying and Correctly Labeling Sexual Prejudice, Discrimination, and Oppression*, 88 J. COUNSELING & DEV. 325, 328 (2010) (“The idea that same-sex expressions of sexuality are deviant and unacceptable is integrated into the micro-, meso-, and macrolevels of society. The insidious nature of heterosexism in cultural institutions means that it is all around, while simultaneously rendered invisible. The group that holds a privileged status in a particular society goes unquestioned and unnoticed and is the assumed group membership for all individuals unless there is evidence to the contrary.”).

sphere of their families, LGBTQ youth in state custody may be easier to support because they frequently come into contact with adults such as social workers, attorneys, judges, biological parents, and foster parents. This article specifically addresses the unique problems of sexual orientation and gender identity discrimination that impact LGBTQ youth in the foster care system.

When addressing sexual orientation and gender identity issues in the context of the foster care system, it is important to look at a youth's circumstances holistically. As an initial matter, an adult must consider that these youth come into the system with a number of other risk factors, such as severe family conflict, abuse, neglect, abandonment, poverty, and mental health and physical disabilities.⁹ Therefore, while child welfare professionals may have good intentions in attempting to address sexual orientation or gender identity issues directly, the youth may have priorities that are not focused on sexual orientation or gender identity issues.¹⁰ It should always be the youth's choice, often through his or her zealous legal advocate, to set priorities regarding their personal safety and emotional needs. However, creating an atmosphere in which a youth does not have to worry about covert and overt forms of discrimination due to their sexual orientation or gender identity is crucial to alleviating the disproportionate risks these youth face.

Part I describes disproportionate risk factors facing LGBTQ youth in order to provide a concrete picture of the harmful effects that sexual orientation and gender identity discrimination have on youth. This section elaborates on the ways in which the combination of a culture of silence surrounding LGBTQ issues and an underlying attitude that sexual

⁹ See generally ADMINISTRATION FOR CHILDREN & FAMILIES, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING: WHO ARE THE CHILDREN IN FOSTER CARE? (1997-2010).

¹⁰ For example, in one care and protection case, a youth's father attacked her after he found out that she was "questioning." While foster care professionals sought to address his homophobia, the youth was most concerned that her father had attacked her during a period of sobriety because it undermined her hope that his violence would go away when he was no longer drinking. It is important not to overlook the youth's main concern in an attempt to address the sexual orientation issues. Nancy Hathaway, Committee for Public Counsel Services Staff Attorney, Roundtable at Northeastern University School of Law: Transforming Challenges Into Strength and Resilience - Defending the Rights of LGBT Youth in Out-of-Home Care (Feb. 9, 2011).

orientation is mutable creates a heterocentric atmosphere that can be dangerous for all youth, particularly those who do or may come to identify as LGBTQ. Part II discusses the necessity and potential indeterminacy of non-discrimination clauses, as well as the value of higher cultural competency standards for foster parents and for professionals working in state agencies that interact with youth. This section also describes ways for a legal advocate to assert an LGBTQ youth's rights when he or she has been harmed by conversion or religious therapy in the foster care system. Part III examines the current best practices regarding LGBTQ youth in out-of-home care and the potential effectiveness of sexual orientation and gender identity non-discrimination clauses. This section highlights that a statute or policy is not alone sufficient to effect the cultural changes necessary to improve conditions for LGBTQ youth and discusses a wide range of policy proposals necessary for successful implementation of the regulation or policy.

I. Consequences of Silence and A Belief in a Cure

LGBTQ youth are overtly victimized through violence and harassment and are enveloped in a culture of silence and subtle discrimination regarding their sexual orientation and gender identity. This environment results in a disproportionate number of risk factors as well as adult ignorance of the prevalence of discrimination. Foster care, juvenile justice systems, and public schools are major social institutions that can intentionally work toward providing protections and supportive environments for at-risk youth. Scarce resources and a high number of at-risk populations make it difficult to prioritize which best practices and competency trainings will be developed and implemented in child welfare settings. However, over the last few decades, social science researchers have conducted studies that clearly demonstrate the widespread harm in leaving LGBTQ issues unaddressed and that strongly support prioritizing these issues.

The term homophobia captures overt behaviors such as harassment and violence that exhibit explicit anti-LGBTQ messages.¹¹ In contrast, *heterocentrism* consists of covert attitudes and assumptions that all

¹¹ Dermer et al., *supra* note 8, at 325 (“Whereas homophobia refers to individual beliefs and behaviors emanating from personal ideology, heterosexism refers to the cultural ideology that maintains societal prejudice against sexual minorities.”).

persons are heterosexual or that people should not choose to be homosexual.¹² Heterocentrism operates as a social control mechanism to discourage sexual minorities from increasing their visibility.¹³ This article addresses two commonly held heterocentric assumptions that are detrimental to sexual minority youth in any environment, and particularly to those in foster care. The first is an attitude that if LGBTQ youth cannot be seen, they do not exist.¹⁴ Maintaining a culture of silence around issues affecting LGBTQ youth does not leave room for improving overt attitudes or for providing support to the youth. The second is an assumption that sexual orientation and gender identity in youth can be changed. This attitude leaves open opportunities for an adult to turn to conversion or religious therapy to address a youth's sexual orientation or gender identity.¹⁵ Regardless of any potential mutability of sexual orientation in youth and adolescents, this attitude creates a hostile atmosphere for those coming into a minority sexual orientation or gender identity, as well as those who are sure that they identify as LGBTQ. An understanding of the way in which these assumptions interact with the disparate health and safety concerns for LGBTQ youth and the struggles of the larger LGBTQ community is key to driving forward effective legislative and policy changes.

A. *Harmful Consequences of Discrimination and Silence on LGBTQ Youth Represent a Major Public Policy Concern*

LGBTQ youth face a higher number of physical, emotional, and social health risks primarily because of societal stigma, which often results

¹² *Id.* at 325; GERALD P. MALLON, LET'S GET THIS STRAIGHT: A GAY- AND LESBIAN-AFFIRMING APPROACH TO CHILD WELFARE 1-2 (1999) [hereinafter LET'S GET THIS STRAIGHT].

¹³ LET'S GET THIS STRAIGHT, *supra* note 12, at 2.

¹⁴ ROB WORONOFF, RUDY ESTRADA & SUSAN SOMMER, CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL DEF. AND EDUC. FUND, OUT OF THE MARGINS: A REPORT ON THE REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE 4-5 (2006), [hereinafter OUT OF THE MARGINS], available at <http://www.cwla.org/programs/culture/outofthemargins.pdf> ("The result of societal, institutional, and individual homophobia, transphobia, and heterosexism is that too many child welfare professionals believe that LGBTQ youth are, or should be, invisible . . .").

¹⁵ JASON CIANCOTTO & SEAN CAHILL, NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST., YOUTH IN THE CROSSHAIRS: THE THIRD WAVE OF EX-GAY 30 (2006), <http://thetaskforce.org/downloads/reports/reports/YouthInTheCrosshairs.pdf>.

in isolation.¹⁶ Frequently, youth who reveal their status as, or who are perceived to be, LGBTQ face discrimination and harassment from friends, family, and strangers.¹⁷ On the other hand, LGBTQ youth who stay silent about their sexual and gender identity development due to fear of backlash from family, friends, foster parents, social workers or their attorneys may suffer severe psychological distress.¹⁸ This distress often leads to severe feelings of loneliness and an inability to cope with the process of understanding their sexual orientation.¹⁹ These social circumstances culminate in a disproportionate number of LGBTQ youth who are displaced from their homes.²⁰ An abundance of studies also indicate much higher rates of suicide, substance abuse, mental health issues, survival crimes, and homelessness for LGBTQ youth.²¹ For example, one survey

¹⁶ Frankowski, *supra* note 7, at 1827; *see also*, Arriola, *supra* note 1, at 445-46.

¹⁷ Gerald P. Mallon, *Sticks and Stones Can Break Your Bones: Verbal Harassment and Physical Violence in the Lives of Gay and Lesbian Youths in Child Welfare Settings*, 13 J. GAY & LESBIAN SOC. SERVS. 63, 65 (2001) (“Many of these young people reported that relatives and others in their community helped to increase the momentum of this violence by joining in the harassment.”) [hereinafter *Sticks and Stones*].

¹⁸ MIMI LAVER & ANDREA KHOURY, *OPENING DOORS FOR LGBTQ YOUTH IN FOSTER CARE: A GUIDE FOR LAWYERS AND JUDGES* 18 (2008) (“I have heard social workers say out loud, without fear of reproach, that they wouldn’t place a kid because he was gay. I know that I felt outing myself in foster care would be suicide. The bottom line is no one wants to project differences in an inhospitable space.”).

¹⁹ KATHLEEN Y. RITTER & ANTHONY I. TERNDRUP, *HANDBOOK OF AFFIRMATIVE PSYCHOTHERAPY WITH LESBIANS AND GAY MEN* 115 (2002) (“Their secrecy leads to invisibility and isolates them to suffer in silence without adequate social support for their developmental needs. This cognitive, social, and emotional isolation often extends into adulthood and manifests itself in mental health problems, such as anxiety, depression, self-hatred, demoralization, and loneliness.”).

²⁰ 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, 418 n.14 (2006); Ryan, et al., *supra* note 7, at 346.

²¹ *See, e.g.*, NICO SIFRA QUINTANA, JOSH ROSENTHAL AND JEFF KREHELY, CENTER FOR AMERICAN PROGRESS, *ON THE STREETS: THE FEDERAL RESPONSE TO GAY AND TRANSGENDER HOMELESS YOUTH* (2010), *available at* http://www.americanprogress.org/issues/2010/06/on_the_streets.html; OUT OF THE MARGINS, *supra* note 14, at xii, 35; LYNNE CARROLL, *COUNSELING SEXUAL AND GENDER MINORITIES* 160, 311 (2010); Ritch Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay male, and Bisexual youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide*, 62 J. CONSULTING & CLINICAL PSYCHOL. 261 (1994).

found that 39% of homeless LGBT youth between the ages of twelve and twenty-four had been forced to leave home due to their sexual orientation or gender identity.²² Another recent study demonstrates an explicit correlation between displacement from home and higher risk factors for LGB youth.²³ Additionally, LGBTQ youth in minority racial groups often face challenges in concurrently developing and identifying with a strong gay identity and a strong ethnic identity, avoiding conflicts in allegiance between their sexual or gender identities and racial identities, and experiencing homophobia and racism simultaneously.²⁴

The serious consequences of these risk factors should drive the widespread enactment of sexual orientation and gender identity non-discrimination policies in public institutions that house or regularly interact with youth. It should also create the impetus to enforce laws against those who mistreat LGBTQ youth because of biases against or fear of sexual and gender minorities. Regardless of one's beliefs regarding homosexuality and LGBTQ communities, it is hard to imagine that anyone would support bringing an end to the lives of sexual minority youth altogether. But, in reality, this is the consequence of ignoring current iterations of discrimination, homophobia, and heterocentrism. Even in the form of silence, cultural messages are powerful and youth are the most vulnerable to internalizing them.²⁵ Furthermore, leaving LGBTQ youth on their own to struggle through silence and hardship affects entire communities and society as a whole. A major advocacy organization for LGBTQ homeless and foster youth, Lambda Legal, describes,

“If LGBTQ young people are not seen as having worth and value by their government, their society, their communities,

²² Heather Berberet, *Putting the Pieces Together for Queer Youth: A Model of Integrated Assessment of Need and Program Planning*, 85 CHILD WELFARE 361, 373 (2006).

²³ Ryan et al., *supra* note 7, at 346.

²⁴ See Ritch Savin-Williams, *Lesbian, Gay Male, and Bisexual Adolescents*, in LESBIAN, GAY, AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES 173 (Anthony R. D'Augelli & Charlotte Patterson, eds., 1995).

²⁵ See MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION 27-30 (discussing the discursive effect of silence), 30 (“It may well be true that adults and children themselves were deprived of a certain way of speaking about sex, a mode that was disallowed as being too direct, crude, or coarse. But this was only the counterpart of the other discourses, and perhaps the condition necessary in order for them to function, discourses that were interlocking, hierarchized, and all highly articulated around a cluster of power relations.”).

and the adults who are charged with their care, they will not be afforded an opportunity to develop the self-esteem necessary to support their healthy growth and development and to achieve the positive outcomes sought by those working in the child welfare system.”²⁶

B. Foster Care Systems in All Fifty States Should Directly Address Overt and Covert Discrimination Against LGBTQ Youth

Foster care systems take custody of and interact with LGBTQ youth on a regular basis. In fact, statistics show that foster care systems actually interact with a higher number of LGBTQ youth than most institutions, with more than 4-10% of youth in state care identifying as lesbian, gay, bisexual, or transgender.²⁷ It is important for foster care institutions to eliminate homophobic messaging and intentional silence regarding sexual orientation and gender identity in order to avoid the devastating impacts of such messaging.²⁸ As Elvia Arriola, a law professor at Northern Illinois University, highlights, “Under such emotional and moral pressures, the teenager internalizes the belief that she is wrong and sinful. A potentially healthy, creative and happy child thus turns into a depressed, lonely, isolated and suicidal child.”²⁹ Unfortunately, many LGBTQ youth face particularly unbearable treatment in the child welfare system. For example, a study conducted in New York City, found that once placed in a foster care setting, as many as 78% of sexual minority youth are removed or run away due to anti-LGBT violence and harassment.³⁰ Another study found that 78% of youth and 88% of child welfare professionals interviewed reported that it was not safe for gay and lesbian adolescents in group homes or congregate care settings to self-identify as gay or lesbian.³¹

All youth in foster care deserve a safe environment to develop their personal identities and capabilities. The foster care system must directly combat the prevalence of homophobia and heterocentrism through policy and procedural changes in order to provide these youth with an

²⁶ OUT OF THE MARGINS, *supra* note 14, at 4-5.

²⁷ LAVER & KHOURY, *supra* note 18, at 1.

²⁸ Arriola, *supra* note 1, at 441, 463-465.

²⁹ *Id.* at 441.

³⁰ OUT OF THE MARGINS, *supra* note 14, at 19.

³¹ *Sticks and Stones*, *supra* note 17, at 65.

appropriate standard of care and to address the disparate rates of suicide and homelessness.³² Youth in foster care already face hardships and vulnerabilities as a result of the initial displacement from their homes.³³ LGBTQ youth are often additionally struggling directly with their sexual orientation or gender identity. With increasing information on the harm of silence on this issue, it is unreasonable and arguably negligent to avoid taking additional steps to provide LGBTQ youth with better care. Poor treatment or neglect is increasingly more likely to shock the conscience of the general population. As an initial matter, it is essential to understand and address attitudes that seek to change a youth's sexual orientation or prevent them from living openly as LGBTQ-identified persons.

1. *Converting LGBTQ and Questioning Youth in Foster Care*

*I live at an independent living program, and the staff will say things like, "Do you like boys now?" And I'll say, "No, what are you talking about?" That's the kind of thing that really bothers me.*³⁴

*If we know, that we know, that we know, that we know, that we know, that we know, that we know, that we are gay, they still tell us we're not, it's just a phase. I think that they don't want to believe that young people can be gay.*³⁵

The belief that sexual orientation is mutable permeates social and cultural messaging, and the sentiment rings strongest when speaking about youth. This message is often thought of as "preventing" youth from becoming homosexual because it is assumed that all young people are, or can be, heterosexual.³⁶ Additionally, many people who accept that

³² See discussion *infra* Pt.III.

³³ Lisette Austin, *Mental Health Needs of Youth in Foster Care: Challenges and Strategies*, 20 THE CONNECTION 6 (2004) (quoting research finding that anywhere from 40 to 85% of kids in foster care have mental health disorders).

³⁴ OUT OF THE MARGINS, *supra* note 14, at 9.

³⁵ GERALD P. MALLON, WE DON'T EXACTLY GET THE WELCOME WAGON: THE EXPERIENCES OF GAY AND LESBIAN ADOLESCENTS IN CHILD WELFARE SYSTEMS 1 (1998) [hereinafter WELCOME WAGON].

³⁶ LET'S GET THIS STRAIGHT, *supra* note 12, at 8 ("While most professionals are convinced that it was 'too soon' for an adolescent or a child to identify as lesbian, gay, or bisexual, the same professionals were equally convinced that every young person was heterosexual.").

offering protections to sexual minority adults is beneficial simultaneously believe that youth should not be “encouraged” or “supported” in the development of a non-heterosexual orientation.³⁷ It is these attitudes that proliferate the current forms of religious and conversion therapy for youth.³⁸ Some youth are subjected to extreme forms of conversion therapy where the stated goal is to make them heterosexual. Other youth are subjected to subtle forms of conversion therapy where a therapist holds the assumption that sexual orientation can or should be changed. Finally, youth may be subjected to conversion therapy in the guise of treatment for Gender Identity Disorder.

Although statistics regarding the prevalence of conversion therapy are not available, a number of listening forums and qualitative interviews with LGBTQ youth in foster care and juvenile justice settings reveal examples of conversion therapy.³⁹ Some youth indicate that they have been subjected to conversion or religious therapy by foster parents, stating that “[a]fter coming out to one of my foster families, I was told I was going to hell and forced to go to church with them. I became very closeted after that and didn’t tell any other foster families I was a lesbian. I was in 22 different homes; many of them were very religious.”⁴⁰ Behavior modification tactics might also take place within group homes. For example, one youth describes: “[t]hey had a behavior modification kind of program. Like, I could get a day pass or a weekend pass if I spent the afternoon playing football. They knew I was gay and that was the lifestyle

³⁷ Ritch Savin-Williams, *Dating Those You Can’t Love and Loving Those You Can’t Date*, in *PERSONAL RELATIONSHIPS DURING ADOLESCENCE: ADVANCES IN ADOLESCENT DEVELOPMENT* 198 (Raymond Montemayor, Gerald Adams & Thomas Gulotta, eds., 1994).

³⁸ CIANCIOTTO, ET AL., *supra* note 15, at 2 (“Exodus International, which claims to include over 170 ex-gay programs in seventeen countries, called the launch of its Exodus Youth teen program one of its most significant accomplishments of 2002.”).

³⁹ OUT OF THE MARGINS, *supra* note 14; LAVER & KHOURY, *supra* note 18; Rob Woronoff & Rudy Estrada, *Regional Listening Forums: An Examination of the Methodologies Used by the Child Welfare League of America and Lambda Legal to Highlight the Experiences of LGBTQ Youth in Care*, 83 *CHILD WELFARE* 341, 360 (2006); *see also*, KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, *LEGAL SERVS. FOR CHILD., NAT’L JUVENILE DEFENDER CTR. & NAT’L CTR. FOR LESBIAN RIGHTS, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS* 64-65 (2009) (discussing the incidence of reparative therapy in juvenile justice settings).

⁴⁰ OUT OF THE MARGINS, *supra* note 14, at 114.

I wanted, but they thought maybe they could change me.”⁴¹ Another youth describes, “[i]n my first group home, the staff sat me down with a big family Bible and described to me why it was wrong to be gay.”⁴² Conversion therapy also takes place in the context of trying to address other mental health issues. One youth said, “I mean when I was on a psychiatric ward they were trying to give me aversion therapy and I mean they were supposed to help me with my depression, not by telling me that I’m wrong.”⁴³ Violating a youth’s sense of well-being by attempting to change his or her sexual orientation, or even suggesting that change is a possibility, creates an extremely hostile environment. An understanding of the history and development of conversion therapy is necessary to counter these types of harmful assumptions.

i. Conversion and Religious Therapies

*There was follow-up after I after I came out as queer within the court system. The follow-up was the judge sentencing me to “gender therapy,” which sends a really negative message. And without even consulting with me at all! Even the word “therapy” makes me shiver, when it comes to LGBT issues. It’s really important that the court system is supportive both in language and in action.*⁴⁴

Conversion, or reparative, therapy is a process through which reparative therapists assert they can and should convert homosexuals into heterosexuals or that a person’s sexual identity can be repaired.⁴⁵ The history of reparative therapy includes appalling treatments such as electroshock therapy and even castration and hysterectomies.⁴⁶ Prior to 1973, homosexuality was listed as a pathological disorder in the Diagnostic and

⁴¹ WENDELL RICKETTS, LESBIANS AND GAY MEN AS FOSTER PARENTS 77 (1991).

⁴² OUT OF THE MARGINS, *supra* note 14, at 113.

⁴³ LET’S GET THIS STRAIGHT, *supra* note 12, at 118.

⁴⁴ OUT OF THE MARGINS, *supra* note 14, at 95.

⁴⁵ Chuck Bright, *Deconstructing Reparative Therapy: An Examination of the Processes Involved When Trying to Change Sexual Orientation*, 32 CLINICAL SOCIAL WORK J. 471, 472 (2004); Tyler Talbot, *Reparative Therapy for Homosexual Teens: The Choice of the Teen Should Be the Only Choice Discussed*, 27 J. JUV. L. 33, 34 (2006).

⁴⁶ Sean Young, *Does “Reparative” Therapy Really Constitute Child Abuse?: A Closer Look*, 6 YALE J. HEALTH POL’Y L. & ETHICS 163, 167-68 (2006); CIANCOTTO, *supra* note 15, at 71-72.

Statistical Manual of Mental Health Disorders (“DSM”).⁴⁷ Kenji Yoshino, a Professor at New York University School of Law, highlights that even though homosexuality has been removed as a diagnosis, the contagion metaphor still serves as an implicit basis for subtler forms of conversion.⁴⁸ For example, the DSM published in 1980 included ego-dystonic homosexuality, which was later replaced with “sexual disorder not otherwise specified.”⁴⁹ This diagnosis encompasses “persistent and marked distress about one's sexual orientation.”⁵⁰ This diagnosis remains in the current version of the DSM.⁵¹ Yoshino also highlights that it is not uncommon for individuals to express the view that adult homosexuals should not be permitted to spread their condition to others, especially youth.⁵² Several states even have laws that forbid teachers from giving students positive information about homosexuality during sex education classes and sometimes require them to emphasize that homosexuality is not an acceptable “lifestyle.”⁵³

Conversion therapy models that are based on religion and psychotherapy have increasingly replaced the “scientific” models of conversion therapy.⁵⁴ In 1991, Joseph Nicolosi, a clinical psychologist, produced the first overtly religious-based analysis, which was defined by conformity to traditional values and gender roles.⁵⁵ The most well-known advocates of conversion therapy include fundamentalist Christian groups such as Homosexuals Anonymous, Metanoia Ministries, Love in Action, Exodus International, and EXIT of Melodyland.⁵⁶ Psychotherapy models

⁴⁷ CARROLL, *supra* note 21 at 31.

⁴⁸ Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 786, 801-09 (2002).

⁴⁹ Sana Loue, *Redefining the Emotional and Psychological Abuse and Maltreatment of Children: Legal Implications*, 26 J. LEGAL MED. 311, 324 (2005).

⁵⁰ *Id.*

⁵¹ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL-IV-TEXT 582 (4th ed., text revision 2000).

⁵² Yoshino, *supra* note 48, at 811 (quoting E.L. Pattullo, *Straight Talk About Gays*, COMMENTARY, Dec. 1992, at 21, 22) (“Surely decency demands that those who find themselves homosexual be treated with dignity and respect. But surely, too, reason suggests that one guard against doing anything which might mislead wavering children into perceiving society as indifferent to the sexual orientation they develop.”).

⁵³ *Id.* at 811 (citing “no promo homo” laws in ten states plus the District of Columbia).

⁵⁴ CIANCIOTTO, *supra* note 15, at 62.

⁵⁵ *Id.*

⁵⁶ Arriola, *supra* note 1, at 466 (quoting Richard Green, an avid GID treatment supporter, as saying “[P]arents have the legal right to seek treatment to modify their child's cross-

include attempts to solve unconscious childhood conflicts believed to be the etiology of one's homosexuality, group social demand treatments, heterosexual responsiveness instruction, aversion conditioning, social learning training, covert sensitization, fantasy modification, capacity for heterosexual intercourse, training for abstinence and celibacy, and drug treatment.⁵⁷ These types of therapy frequently indicate that homosexuality is the result of troubled family dynamics or faulty psychological development; these are assumptions that the American Psychiatric Association considers to be based on misinformation and prejudicial bias.⁵⁸

Conversion therapy has a high potential for harming the patient. This article focuses on psychotherapeutic and religious models used to address sexual orientation and/or gender identity of youth in foster care.⁵⁹ Psychotherapy can be as influential and invasive as physical or medical treatments, and psychological abuse can have the most enduring negative effects.⁶⁰ Studies have documented potential harms of depression, suicidal ideation and attempts, lowered self esteem and internalized homophobia, distorted perception of homosexual orientation, intrusive imagery and sexual dysfunction, paranoia about being able to pass as heterosexual,

gender behavior to standard boy and girl behavior even if their own motivation is to prevent homosexuality.”).

⁵⁷ Christopher W. Blackwell, *Nursing Implications in the Application of Conversion Therapies on Gay, Lesbian, Bisexual and Transgender Clients*, 29 ISSUES MENTAL HEALTH NURSING 651, 655 (2008).

⁵⁸ *Id.*; see also Am. Psychiatric Ass'n, *Commission on Psychotherapy by Psychiatrists (COPP): Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, ASS'N., GAY & LESBIAN PSYCHIATRISTS, <http://www.aglp.org/pages/position.html#Anchor-55000> (last visited Oct. 24, 2012).

⁵⁹ Similar to Sean Young's approach, the analysis here will focus on psychotherapy even though physically invasive therapy could be subject to a similar analysis because this article aims to draw connections that encourage recognition of the harm that flows from psychologically abusive conditions and treatment of LGBTQ youth. See Young, *supra* note 46, at 171.

⁶⁰ See Young, *supra* note 46, at 172 (“Judge Stephen Hjelt notes: ‘Psychotherapy is the principle product, good, or service of the mental health profession. It is a treatment that can do great good or great harm. It is a functional analog to a drug or medical device. It can relieve symptoms and resolve conditions. It can cure. It can kill. It can also cause adverse reactions. Like any drug or medical device, psychotherapy has contraindications as well as dose-specific impacts.’”)

isolation, impaired social relationships, and loss of spiritual beliefs.⁶¹ It is important to note that no form of conversion therapy is currently, nor has ever been, accepted by most therapists.⁶² Many organizations prohibit or strongly discourage the use of conversion therapy.⁶³ For example, the American Psychiatric Association recommends that ethical practitioners “refrain from attempts to change individuals’ sexual orientation, keeping in mind the medical dictum to first, do no harm.”⁶⁴ Furthermore, the American Psychological Association “opposes portrayals of sexual minority youth and adults as mentally ill due to their sexual orientation” and “supports the dissemination of accurate scientific and professional information about sexual orientation in order to counteract bias that is based in lack of knowledge about sexual orientation.”⁶⁵ Additionally, several of these groups have proposed guidelines for affirmative therapy practices with sexual minorities.⁶⁶

While current psychiatric clinical thought supports that homosexuals do not have pathology in need of treatment, a number of psychologists and clinicians have heterosexist assumptions that may negatively impact counseling with LGBTQ-identified clients.⁶⁷ Additionally, there are contemporary reparative therapists who maintain that homosexuality is a disease in need of curing and who use mental health interventions and counseling techniques to attempt to cure sexual orientation.⁶⁸ It is

⁶¹ CIANCOTTO, *supra* note 15, at 69-71; *see also*, Blackwell, *supra* note 57 at 657 (“Strong evidence indicates the effects of these therapies on GLBT clients can be harmful and damaging and in fact, result in serious psychological trauma to clients.”); CARROLL, *supra* note 21, at 40 (“Many [opponents of conversion therapy] are concerned as a result of studies that show persons who fail to change their sexual orientation are harmed because the therapy reinforces their self-hatred.”).

⁶² Blackwell, *supra* note 57, at 656.

⁶³ *Id.* at 657 (“These organizations include but are not limited to the American Psychiatric Association, American Academy of Pediatrics, American Medical Association, American Counseling Association, National Association of School Psychologists, National Association of Social Workers, and the Royal College of Nursing.”).

⁶⁴ Am. Psychiatric Ass’n, *supra* note 58.

⁶⁵ Am. Psychiatric Ass’n, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, <http://www.apa.org/about/policy/sexual-orientation.aspx> (last visited Oct. 24, 2012).

⁶⁶ CARROLL, *supra* note 21, at 34 (citing the Nat’l Ass’n of Social Workers and Am. Ass’n of Family and Marriage Therapy).

⁶⁷ RITTER, *supra* note 19, at 149-50; *see also* CARROLL, *supra* note 21, at 87-90, 95-96.

⁶⁸ Blackwell, *supra* note 57, at 654-55.

important to assess and address the severity of this problem within the foster care population to prevent one of the most vulnerable sectors of our society from the documented damaging effects of this approach.

ii. Gender Identity Disorder

*Eventually, after a series of tests as part of my foster care therapy, I was diagnosed with gender identity disorder. They knew I was gay, but no one ever brought up the word gay [. . .] It was obviously an ‘off’ diagnosis, because it is usually reserved for transsexuals, but most foster care psychotherapists paint with a broad brush.*⁶⁹

Gender Identity Disorder (“GID”) was added to the DSM seven years after homosexuality was removed as a disorder in 1973.⁷⁰ GID can be a useful diagnosis for those who are transgender and would like to access medical care and hormone treatments to ease the discomfort of their situation.⁷¹ However, there is much controversy over whether GID should be a mental health diagnosis. A pathological diagnosis may stigmatize otherwise well-adjusted individuals whose mental health issues stem from social stigma and isolation rather than the gender identity tension itself.⁷² Treatment for those with cross-gender identities should be limited to helping people recover from the trauma suffered in an intolerant culture instead of targeting the individual as pathological.⁷³

Furthermore, GID is sometimes used as a pretext to address homosexuality, particularly in youth. Because GID is an acceptable mental health diagnosis, many clinicians wrongly label youth with GID

⁶⁹ LAVER & KHOURY, *supra* note 18, at 17.

⁷⁰ CARROLL, *supra* note 21, at 160; Arriola, *supra* note 1, at 458-59.

⁷¹ See generally THE WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (7th ed. 2012), available at <http://www.wpath.org/documents/SOC%20V7%2003-17-12.pdf> [hereinafter STANDARDS OF CARE].

⁷² See, e.g., Nancy Bartlett, Paul Vasey & William Bukowski, *Is Gender Identity Disorder in Children a Mental Disorder?*, 43 SEX ROLES 753, 758 (2000) (“Thus, there is some inconsistency regarding whether a child’s distress needs to derive directly from the ‘disturbance’ per se, or can be associated in an indirect manner, through sources such as possible ostracism. In these, ways, the diagnostic criteria for GID cannot be treated as problem free.”).

⁷³ CARROLL, *supra* note 21, at 163.

when they are in fact lesbian, gay, or bisexual.⁷⁴ In fact, even children who do not want to be the opposite sex but are gender non-conforming can meet the criteria for GID under the current diagnostic guidelines.⁷⁵ This is a dangerous loophole for use of conversion or reparative therapy for homosexuality. Many therapists employ behavioral treatments for GID in an attempt to put the child “on track” in terms of his or her gender role behaviors.⁷⁶ This should not be seen as an acceptable way to treat youth who are questioning their sexual orientation. Misdiagnoses should be considered a violation of any sexual orientation non-discrimination clause applicable to child welfare agencies. Putting youth through behavioral therapy with plans to help them “reverse” GID, especially when it is not a correct diagnosis, should be seen as conversion therapy and should be strictly prohibited in foster care settings.

Finally, if a youth is more accurately diagnosed with GID, it is important to make sure that he or she has access to appropriate treatment. Child welfare practitioners should also call transgender youth by their preferred names and pronouns and ensure that they are provided access to clothing that is appropriate to their internal gender identity.⁷⁷ If appropriate, a youth should also have access to hormone blockers and other medically necessary transition-related medical care.⁷⁸ Other concerns that should be appropriately and respectfully addressed include grooming policies, bathroom policies, and sleeping arrangements.⁷⁹ Child welfare practitioners should be familiar with best practice guidelines regarding treatment of gender non-conforming youth.⁸⁰

⁷⁴ LET’S GET THIS STRAIGHT, *supra* note 12, at 8.

⁷⁵ CARROLL, *supra* note 21, at 160.

⁷⁶ *Id.* at 161.

⁷⁷ NAT’L CTR. FOR LESBIAN RIGHTS, MODEL POLICY & PRACTICE GUIDELINES FOR PROVIDING NON-DISCRIMINATORY SERVICES TO LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) YOUTH IN JUVENILE JUSTICE FACILITIES 4 (Aug. 2008), http://www.nclrights.org/site/DocServer/LGBT_POLICY_final_9_18_8.pdf?docID=4201 [hereinafter *NCLR Model Policy*].

⁷⁸ STANDARDS OF CARE, *supra* note 71, at 8-11.

⁷⁹ *NCLR Model Policy*, *supra* note 77.

⁸⁰ See discussion *infra* Part III.A.

2. Creating and Reinforcing a Culture of Silence Regarding Sexual Identity Issues

Gay and lesbian youth live in a different place. That place lies beyond our popular, medical, and legal understandings of homosexuality, which are premised on a central cultural fantasy that gay and lesbian youth do not exist.⁸¹

Overall, I'd say, it's the one issue that most child welfare professionals avoid at all costs.⁸²

While modern day iterations of conversion therapy are a significant concern to those subjected to it, the persistence of silence regarding sexual identity development in foster care has widespread consequences that are harmful to many foster youth.⁸³ Forcing “invisibility” on sexual identity issues stigmatizes LGBTQ-identified youth by pretending they do not exist and that their problems are not important.⁸⁴ Even valid concerns about engaging with youth on the topic of sex do not justify complete silence regarding LGBTQ issues because sexual orientation is not merely about sexual behavior. Sexual orientation development includes the emotional and physical attraction to another person, including falling in love, caring for, and making a commitment to the other person.⁸⁵ At the least, LGBTQ foster youth should be able to discuss their relationships in ways similar to heterosexual foster youth.

Gerald Mallon, an Assistant Professor of Social Work, has extensively researched the culture of silence in the foster care system around gender identity issues. In one study, Mallon interviewed fifty-four gay and lesbian youth in out-of-home care in New York, Los Angeles, and Toronto.⁸⁶ The youth he interviewed repeatedly discussed the ways in

⁸¹ Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 269-70 (1996).

⁸² LET'S GET THIS STRAIGHT, *supra* note 12, at 14.

⁸³ LAVER & KHOURY, *supra* note 18, at 17 (“The nonexistence of something is powerful: homosexuality doesn't exist in foster care. There was never a box to check; I was never asked; I was never given support; I was never spoken of as a gay youth and my homosexuality was never discussed even though I knew I was gay.”).

⁸⁴ Ruskola, *supra* note 81, at 269.

⁸⁵ WELCOME WAGON, *supra* note 35, at 19-20.

⁸⁶ *Id.* at 8.

which they were silenced and the harmful impacts silence had on their well-being. One youth described the pain of invisibility, stating “[t]hey were very cruel, cruel in the sense that I just became that invisible boy again, just like I was in my family.”⁸⁷ Another youth demonstrates the importance of sexual identity development, describing, “[the child welfare professionals] were ignorant to me and to who I was about and it affected me. When I think back about those days, I get so mad because it hurts that no one paid attention to me being gay and it was a big part of my life.”⁸⁸ And another youth describes the impact silence had on his life:

“I was literally making myself sick. I wasn’t eating, I didn’t talk to my family, I cut school, I got high. I was a mess when I was first coming to terms with who I was. I was very depressed and I often wondered if it was even worth living, but one day I met this guy at school. He was open about who he was. . . . He told me I wasn’t crazy, I wasn’t sick, I wasn’t evil – he said I was just fine the way I was. He literally saved my life.”⁸⁹

The harmful effects of an environment where a youth is unable to talk about their sexual orientation may force a youth to leave child welfare settings for the streets.

In another book examining practices of child welfare agencies regarding LGBTQ youth, Mallon discusses the widespread assumption by practitioners that children and adolescents are heterosexual and that it is not possible for a child to identify as lesbian or gay.⁹⁰ A common attitude assumes that it is “too soon” for youth to identify as lesbian, gay or bisexual.⁹¹ In environments that are hostile to or silent about sexual orientation, many youth may choose to hide or try to change their identity.⁹² These impulses may resurface later in life and can lead to dysfunctional and distorted relationships that contribute to a sense of isolation.⁹³

⁸⁷ *Id.* at 63.

⁸⁸ *Id.* at 72.

⁸⁹ *Id.* at 30.

⁹⁰ LET’S GET THIS STRAIGHT, *supra* note 12, at 8.

⁹¹ *Id.*

⁹² WELCOME WAGON, *supra* note 35, at 26.

⁹³ *Id.* at 26-27.

Despite assumptions that youth cannot identify as LGBTQ, stories consistently and persistently emerge of people who knew they had non-normative sexual identities at very young ages. Additionally, when a social environment becomes accepting enough for LGBTQ youth to come out, many youth do. Once youth are able to authentically express their sexual orientation, they begin the journey to healthy relationships and acceptance of self. One youth describes, “I can’t conceive of the hidden life anymore, I don’t think of it as a life. When you finally come out, there’s a pain that stops, and you know it will never hurt like that again, no matter how much you lose or how bad you die.”⁹⁴ Taking an affirmative approach to the psychological and emotional development of LGBTQ youth does not mean merely refraining from practices harmful to LGBTQ youth but includes actively valuing and supporting sexual and gender diversity.⁹⁵ This type of approach would include, among other things, unconditional positive regard for and acceptance of all sexual and gender minorities as well as acknowledging the harmful effects of social discrimination on the youth.⁹⁶

II. Legal Mechanisms for and Potential Barriers to Addressing and Preventing Harm that Results From Conversion or Religious Therapy in Foster Care Settings

LGBTQ youth are entitled to protection of their civil rights under the United States Constitution, state constitutions, state and federal statutes and regulations, and agency policies.⁹⁷ When LGBTQ youth are subjected to extreme acts, such as conversion therapy, by foster care agencies or foster parents, it is crucial that the justice system provides a forum for youth to advance legal claims. Providing access to these legal mechanisms will contribute to reducing suicide rates and risk factors for this vulnerable population.

⁹⁴ *Id.* at 31.

⁹⁵ CARROLL, *supra* note 21, at 90.

⁹⁶ *Id.* at 90.

⁹⁷ For a detailed discussion on the rights of LGBTQ youth in the child welfare system, see NAT’L CTR. FOR LESBIAN RIGHTS, THE LEGAL RIGHTS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN THE CHILD WELFARE SYSTEM (2006), available at http://www.nclrights.org/site/DocServer/LGBTQ_Youth_In_Child_Welfare_System.pdf?docID=1581.

Child welfare agencies and the courts are required to act according to the youths' best interests.⁹⁸ The *best interests* standard is vague and determined by the attitudes and beliefs of the adults making the decision given the information that they have available to them.⁹⁹ A loose standard increases the potential for bias and reduces predictability in its application. However, this flexibility has the advantages of incorporating new information gained through social science research and evolving attitudes regarding issues like race and sexual orientation. In this way, advocates can change the standard slowly by accommodating individual needs rather than having to wait for a major ideological shift to change a rule. As discussed in Part I, there is a wealth of social science research that informs an understanding that supportive therapy and affirming attitudes towards sexual orientation and gender identity development is in the best interests of LGBTQ youth.

⁹⁸ See, e.g., 42 U.S.C. § 675(5) (“The term ‘case review system’ means a procedure for assuring that each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents’ home, consistent with the best interest and special needs of the child [. . .]”); MASS. GEN. LAWS ch. 119, § 1 (“In all matters and decisions by the department of children and families, the policy of the department, as applied to children in its care and protection or children who receive its services, shall be to define best interests of the child as that which shall include, but not be limited to, considerations of precipitating factors and previous conditions leading to any decisions made in proceedings related to the past, current and future status of the child, the current state of the factors and conditions together with an assessment of the likelihood of their amelioration or elimination; the child's fitness, readiness, abilities and developmental levels; the particulars of the service plan designed to meet the needs of the child within the child's current placement whether with the child's family or in a substitute care placement and whether such service plan is used by the department or presented to the courts with written documentation; and the effectiveness, suitability and adequacy of the services provided and of placement decisions, including the progress of the child or children therein.”).

⁹⁹ LESLIE J. HARRIS, JUNE CARBONE & LEE TEITELBAUM, FAMILY LAW 585 (4th ed. 2010) (explaining, for example, that the best interests standard has evolved from a preference granting custody to the father to a preference for the mother and, more recently, a greater acceptance of joint custody); see also Sarah Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1056 (2008) (“Worsening this problem is the concept of ‘best interest’ lawyering, in which attorneys appointed for children are given broad leeway to represent not their child clients, but their own beliefs as to what is in the best interest of those children. These notions as to what might be in a particular child’s ‘best interest’ are shaped by an attorney’s own biases and belief systems.”).

Part A briefly discusses the threshold issue of the effectiveness of the relationship between the legal advocate and the LGBTQ youth. This section urges child welfare systems to increase the LGBTQ cultural competency of legal advocates so that they can initiate appropriate legal advocacy on behalf of LGBTQ youth. Part B provides child welfare advocates and professionals an introduction to the types of sexual orientation and gender identity non-discrimination mechanisms that currently exist in a number of states and argues that there should be enforceable non-discrimination provisions in all state foster care systems. This part also discusses the forums in which violations of non-discrimination clauses could be brought, particularly in Massachusetts. Part C addresses the constitutional duties states owe to youth generally, as well as the specific rights of foster youth in Massachusetts. These legal rights are important because class actions against child welfare systems alleging violations of constitutional duties have been successful, and legal advocates for LGBTQ youth should be familiar with these successes. Part D describes possible causes of action in tort when a youth has been subject to harm as a result of conversion, religious, or reparative therapy. Although this article focuses on the harmful effects of conversion therapy, these principles also apply to other types of emotional and physical violence that LGBTQ youth may face while in state custody.

A. *Comparing the Best Interests of the Child Standard to the Zealous Advocacy Standard*

A threshold issue for child welfare agencies to consider is whether there is an adult who can effectively act as an LGBTQ youth's legal advocate. Especially when a youth openly identifies as LGBTQ and at least some adults in his or her life are unsupportive, he or she may have a more difficult time than most voicing personal needs and concerns. Some courts have held that youth in child welfare proceedings have a fundamental liberty interest in representation of counsel under the Due Process Clause of the Fourteenth Amendment.¹⁰⁰ Every state differs on the quality and type of legal representation available to a foster youth. If a youth is afforded a legal advocate, the state might require the attorney to

¹⁰⁰ See, e.g., Valentine, *supra* note 99, at 1060 (citing *In re Gault*, 387 U.S. 1 (1967); *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005); *In re Jamie T.T.*, 599 N.Y.S.2d 892 (N.Y. App. Div. 1993)).

act as a zealous advocate and represent the youth's desires.¹⁰¹ However, many states allow legal advocates to act in the youth's best interests.¹⁰²

Sarah Valentine, an Associate Professor at The City University of New York School of Law, argues that zealous traditional advocacy for LGBTQ youth is especially important because heterosexist biases can taint an attorney's ability to represent their clients.¹⁰³ She further argues that best interest lawyering with LGBTQ youth is almost always harmful and, in many circumstances, disastrous.¹⁰⁴ Under either standard, the youth must be able to trust the legal advocate before he or she will ever discuss issues of sexual orientation or gender identity. This could be dangerous if he or she is facing extreme harassment and violence on account of sexual orientation or gender identity but cannot disclose it to his or her attorney. Valentine also describes options for youth who are not receiving adequate representation. For example, LGBTQ youth may want to look into bringing legal malpractice claims or a claim that their right to effective assistance of counsel has been violated.¹⁰⁵ While quality of lawyering issues will not be explored in further depth here, they are important to consider while developing effective laws, policies, and legal claims.

B. Sexual Orientation and Gender Identity Non-Discrimination Policies

Every state should incorporate a statute, regulation, and department policy that effectively prohibits discrimination based on sexual orientation and gender identity in the provision of child welfare programs. It is important to have a policy at every level in order to increase its enforceability and effectiveness. In drafting legislation or policies, it is preferable to recognize gender identity as a separate category of

¹⁰¹ Valentine, *supra* note 99, at 1111–12 nn.354–55 (2008) (citing N.M., Wash., and Mich. statutes).

¹⁰² *Id.* at 1062.

¹⁰³ *Id.* at 1054.

¹⁰⁴ *Id.* at 1056.

¹⁰⁵ Sarah Valentine, *When Your Attorney is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, 19 COLUM. J. GENDER & L. 773, 776 (2010).

discrimination because transgender and gender non-conforming youth face a unique set of challenges.¹⁰⁶

There are several examples of non-discrimination policies that are currently in place. Some non-discrimination statutes explicitly apply to the state child welfare department. For example, California's Foster Care Non-Discrimination Act protects youth and adults involved in the foster care system from discriminatory or unequal treatment based on their sexual orientation or gender identity.¹⁰⁷ Additionally, Massachusetts added sexual orientation to the non-discrimination provision that applies to all recipients of services from the Massachusetts Department of Children and Families ("Massachusetts DCF").¹⁰⁸

Some states have departmental policies and procedures that prohibit discrimination based on sexual orientation and/or gender identity in lieu of or in addition to a non-discrimination statute. For example, in New York, the Office of Children and Family Services ("New York OCFS") implemented the "Lesbian, Gay, Bisexual, Transgender and Questioning Youth and Guidelines for Good Childcare Practices with Lesbian, Gay, Bisexual, Transgender and Questioning Youth" as part of its Policy & Procedure Manual.¹⁰⁹ The manual explicitly states that "[a]ll

¹⁰⁶ See, e.g., NAT'L GAY & LESBIAN TASK FORCE ACTION FUND, PASSING THE EMPLOYMENT NON-DISCRIMINATION ACT: A TOOLKIT 4 (2008), available at http://www.thetaskforce.org/enda07/ENDAtoolkit_c4.pdf ("The inclusion of gender identity is vital for two reasons. First, it is necessary to cover transgender people, who are among the most discriminated-against Americans. Second, it is essential to fully protect lesbian, gay, bisexual and even heterosexual people who may not fit traditional gender norms.").

¹⁰⁷ CAL. WELF. & INST. CODE § 16001.9(a)(23) (stating that all foster youth have the right "[t]o have fair and equal access to all available [child welfare] services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.").

¹⁰⁸ 110 MASS. CODE REGS. 1.09(1) (1994) ("No applicant for or recipient of Department services shall, on the ground of race, creed, color, religion, age, ancestry, marital status, sex, sexual orientation, language, disability, veteran status, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in connection with, any service, program, or activity administered or provided by the Department.").

¹⁰⁹ N.Y. DEP'T OF CHILDREN AND FAMILY SERVICES, POLICY & PROCEDURE MANUAL 3442.00 (Mar. 17, 2008), available at http://archive.srlp.org/files/LGBTQ_Youth_

[New York] OCFS staff, volunteers and contract providers are prohibited from engaging in any form of discrimination against or harassment of youth on the basis of actual or perceived sexual orientation, gender identity, and gender expression.” In 2009, the Illinois Department of Children and Family Services (“Illinois DCF”) promulgated a policy titled “Support and Well-Being of Lesbian, Gay, Bisexual, and Questioning Youth,” which provides clear direction to child welfare staff on issues affecting LGBT and questioning youth.¹¹⁰ The Illinois policy states, among other things, that all child welfare workers must receive regular trainings to fully understand the needs and issues confronting LGBT and questioning youth as they come to terms with their sexual orientation and/or gender identity.¹¹¹ It also provides a clear list of “do’s” and “don’ts” when working with LGBT youth.¹¹²

Some states have non-discrimination provisions in statutes that apply to state agencies and could be enforceable against child welfare agencies. For example, in Rhode Island, the law states that “[e]very state agency shall render service to the citizens of the state without discrimination based on sexual orientation, gender identity or expression [nor shall] become a party to any agreement, arrangement, or plan which has the effect of sanctioning those patterns or practices.”¹¹³ In Minnesota, sexual orientation discrimination in “public services” is prohibited and should be applied to the child welfare system.¹¹⁴ Additionally, New

Policy_PPM_3442_00.pdf.

¹¹⁰ ILL. DEP’T OF CHILDREN AND FAMILY SERVICES, POLICY MANUAL, Procedure 302, App. K (Mar. 13, 2009) (on file with author).

¹¹¹ See discussion *supra* Pt. III.B. for more information on the Illinois policy.

¹¹² ILL. DEP’T OF CHILDREN AND FAMILY SERVICES, POLICY MANUAL, Procedure 302, App. K (Mar. 13, 2009) (on file with author).

¹¹³ R.I. GEN. LAWS § 28-5.1-7(a) (2001) (“Every state agency shall render service to the citizens of this state without discrimination based on race, color, religion, sex, sexual orientation, gender identity or expression, age, national origin, or disability. No state facility shall be used in furtherance of any discriminatory practice nor shall any state agency become a party to any agreement, arrangement, or plan which has the effect of sanctioning those patterns or practices.”).

¹¹⁴ MINN. STAT. § 363A.02(4) (2002) (prohibiting discrimination “in public services based on race, color, creed, religion, national origin, sex, marital status, disability, sexual orientation, and status with regard to public assistance. . . .”); MINN. STAT. § 363A.03(44) (2002) (“‘Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or

York's non-discrimination law prohibits discrimination in the procurement of publicly-assisted housing.¹¹⁵ A legal advocate in a state without explicit protection should research whether a broader non-discrimination clause could be applied to child welfare and foster home settings.

If a policy, regulation, or statute is already in place, a youth's legal advocate should be aware of how to bring an effective claim based on a violation of the youth's rights under the non-discrimination law. An advocate on behalf of a transgender or gender non-conforming youth should also note whether the statute includes gender identity explicitly in the statute or within the definition of "sexual orientation." If sexual orientation is not defined, it could be argued that gender identity is included in the definition of sexual orientation.¹¹⁶ Each state will have a different forum in which a youth may be able to pursue a claim that their rights to non-discrimination have been violated. For example, in Massachusetts, 110 Mass. Code Regs. 1.09(1) (1994) provides that:

[n]o applicant for or recipient of Department services shall, on the ground of race, creed, color, religion, age, ancestry, marital status, sex, sexual orientation, language, disability, veteran status, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in connection with, any service, program, or activity administered or provided by the Department.

If there is a violation of the Massachusetts regulation, it is important to know whether there is an open Care and Protections case in which a juvenile court judge is examining custody issues and the best

being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.").

¹¹⁵ N.Y. EXEC. LAW § 296(2-a)(b) (2010) ("It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations . . . to discriminate against any person because of his or her . . . sexual orientation . . . in the terms, conditions or privileges of any publicly-assisted housing accommodations or in the furnishing of facilities or services in connection therewith.").

¹¹⁶ See, e.g., OR. REV. STAT. § 174.100(6) (2008) ("'Sexual orientation' means an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.").

interest of the youth.¹¹⁷ If a case is open, the child's attorney could try to file an *Abuse of Discretion* motion notifying the court that there has been a violation and asking for an appropriate remedy.¹¹⁸ On the other hand, if the Massachusetts DCF is only providing services to the family, the attorney must file an internal grievance.¹¹⁹ Unfortunately, at this time, filing an internal grievance is unlikely to lead to any remedies because it is so ineffective and backlogged with complaints.¹²⁰ A legal advocate in Massachusetts should research whether a fair hearing could be requested by the youth, which could lead to judicial review in the Massachusetts Superior Court. Legal advocates should thoroughly research enforcement possibilities in their jurisdiction.

C. Deprivation of Constitutional Rights

Foster children have a right to safety under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.¹²¹ The

¹¹⁷ Interview with Nancy Hathaway, Children and Family Law Attorney, Committee for Public Counsel Services, in Brookline, Mass. (Feb. 10, 2011).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*; see also, Complaint at 4, Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142 (D. Mass. 2011) (No. 10-CV-30073-MAP), available at http://www.childrensrights.org/wp-content/uploads/2010/04/2010-04-15_ma_complaint_as_filed.pdf (“Over the last 18 months, Defendants have exacerbated longstanding systemic problems, and aggravated the resulting harm to children, by cutting the child welfare workforce; by failing to provide promised increases in foster care maintenance payment rates; by reducing essential services for children and families; and by decreasing the resources and administrative support necessary to support a full continuum of foster care placements and services.”).

¹²¹ See *Omar v. Lindsey*, 334 F.3d 1246, 1248 (11th Cir. 2003) (per curiam) (“[t]here is no question that foster children have a fourteenth amendment liberty interest in physical safety. . . .”); *Hernandez ex rel. Hernandez v. Texas Department of Protective and Regulatory Services*, 380 F.3d 872, 880 (5th Cir. 2004) (stating that children have clearly established right to personal security and safe living arrangements); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (“[A] child who is in the state’s custody has a substantive due process right to be free from unreasonable and unnecessary intrusion on both [his or her] physical and emotional well-being.”); *B.H. by Pierce v. Murphy*, 984 F.2d 196, 198 (7th Cir. 1993) (recognizing that children have a right to be free from arbitrary intrusions upon their physical and emotional well-being while directly or indirectly in state custody); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (“ . . . [i]f foster parents with whom the state places a child injure the child, and that injury results from state action or inaction, a balancing of interests may show a deprivation of

special relationship between the state and foster children in its custody confers an affirmative right to governmental aid.¹²² A deprivation of affirmative aid to foster children violates their Due Process rights.¹²³ Persons in state facilities, such as foster children, have the right to “conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.”¹²⁴ Additionally, all youth in child welfare systems have a right to receive adequate physical and mental health care.¹²⁵ Some LGBTQ-identified youth may face conditions in foster care that are so unreasonable that the youth may be able to bring a successful legal claim that his or her constitutional rights have been violated, specifically his or her First, Ninth, and Fourteenth Amendment rights. When the government violates constitutional rights, the Civil Rights Act provides a

liberty.”); *Howard v. Malac*, 270 F.Supp.2d 132, 138 (D. Mass. 2003) (establishing that foster youth have a liberty interest to be free from harm).

¹²² See *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 160 (D. Mass. 2011); *Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 892-94 (10th Cir. 1992); *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 291-292 (8th Cir. 1993); *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990); *Ledbetter*, 818 F.2d at 795; *Doe v. New York City Dep’t of Social Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1981); *J.R. v. Gloria*, 599 F.Supp.2d 182, 194-95 (D.R.I. 2009); *Eric L. ex rel. Schierberl v. Bird*, 848 F.Supp. 303, 307 (D.N.H. 1994).

¹²³ *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 161 (D. Mass. 2011) (citing to *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 200 (1989) (“ . . .when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - e.g., food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”)).

¹²⁴ *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

¹²⁵ *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 161 (D. Mass. 2011) (stating that foster children have the right to services such as safe and secure foster care placements, appropriate monitoring and supervision, placement in a permanent family, and adequate medical, dental, psychiatric, psychological, and educational services); see also *Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289, 293 (8th Cir. 1993) (finding that the state has an obligation to provide appropriate medical care for children in foster care); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (requiring state officials to take steps to prevent children in state institutions from deteriorating physically or psychologically).

remedy.¹²⁶ Three lawsuits claiming violations of LGBTQ youths' constitutional rights demonstrate how these claims might be pursued.¹²⁷

In 1995, eleven foster children brought claims of constitutional violations against several defendants, including the Commissioners of the New York City Department of Social Services and the Administration for Children's Services.¹²⁸ The constitutional violations alleged were based on the First, Ninth and Fourteenth Amendments to the United States Constitution.¹²⁹ After two years of discovery, the parties reached a settlement; however, a subgroup of gay-identified foster youth objected to the settlement and filed a separate class action suit (the "Joel A. objectors").¹³⁰ The Joel A. objectors claimed that their peers could not adequately represent them in the lawsuit because their peers were also perpetrators of the homophobic harassment alleged and the district court had not ensured that their interests were adequately represented in the settlement negotiations.¹³¹ The Joel A. objectors brought claims against the state under a variety of federal and state constitutional and statutory provisions for bias-related victimization by their peers and systemic discrimination based on sexual orientation.¹³² The Second Circuit affirmed the district court's findings that the Marisol I settlements were reasonable and that the Joel A. objectors had been adequately represented.¹³³ Although the Court supported the settlement, this case illuminates the unique difficulties of LGBTQ youth in the foster care system. It is unlikely that the general population of youth will be able to adequately represent LGBTQ youths' concerns regarding systemic failures of the child welfare system. Advocates for LGBTQ youth must consider

¹²⁶ 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .").

¹²⁷ See also *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003).

¹²⁸ *Marisol A. ex rel. Forbes v. Giuliani*, 929 F.Supp. 662, 669-72 (S.D.N.Y. 1996).

¹²⁹ *Id.* at 669-72.

¹³⁰ *Joel A. v. Giuliani*, 218 F.3d 132, 136 (2d Cir. 2000).

¹³¹ *Id.* at 138.

¹³² *Id.* at 136-38 (failing to discuss on which constitutional provisions plaintiffs' claims rested).

¹³³ *Id.* at 138.

how to preserve claims that are specific to LGBTQ youth early in litigation process and should ensure they are adequately represented in policy revisions and settlement agreements.

R.G. v. Koller, brought in 2006, represents a successful attempt to induce policy change specific to LGBTQ youth that may lead to improved conditions in the Hawai'i Youth Correctional Facility ("HYCF").¹³⁴ The plaintiffs were a male-to-female transgender girl, a lesbian, and a boy perceived as gay.¹³⁵ These youth alleged due process, equal protection, establishment clause, and access to counsel violations.¹³⁶ Reports from the A.C.L.U. of Hawai'i and the U.S. Department of Justice supported these youths' claims, exposing pervasive abuse of LGBTQ youth and systematic violations of youths' civil rights.¹³⁷ The plaintiffs alleged that HYCF lacked the policies and procedures necessary to prevent the pervasive harassment, discrimination, and abuses that take place at the facility.¹³⁸ The court acknowledged that although the defendants adopted a policy prohibiting discrimination against youth based on their sexual orientation, other institutional policies remained silent on the issue and there was no proof that treatment of the youth had improved.¹³⁹ The district court issued a preliminary injunction based on the plaintiffs' Fourteenth Amendment Due Process claim, requiring HYCF to stop harassing, abusing, or isolating plaintiffs based on their actual or perceived sexual orientation, gender identity, or sex; to refrain from failing to protect plaintiffs from anti-LGBT peer harassment and abuse; to refrain from endorsing religion and engaging in religious indoctrination; and to refrain from obstructing plaintiffs' access to counsel.¹⁴⁰ HYCF subsequently agreed to several new training procedures, an anti-harassment policy, and other substantive reforms.¹⁴¹

Connor B. v. Patrick discusses foster children's rights in depth, describing what the Due Process clause requires of the state. In April 2010, six named plaintiffs representing all children who are now or will be

¹³⁴ *R.G. v. Koller*, 415 F.Supp.2d 1129, 1133 (2006) (D. Haw. 2006).

¹³⁵ *Id.* at 1133-34.

¹³⁶ *Id.* at 1133.

¹³⁷ *Id.* at 1132-1133.

¹³⁸ *Id.* at 1138.

¹³⁹ *Id.* at 1140.

¹⁴⁰ *Id.* at 1133.

¹⁴¹ LAVER & KHOURY, *supra* note 18, at 75.

in the foster care custody of Massachusetts DCF brought constitutional claims against the state. The complaint alleges a number of harms as a result of improper placements and treatment that violate the plaintiffs' substantive due process rights under the Fourteenth Amendment, their liberty interests, privacy interests, and associational rights under the First, Ninth, and Fourteenth Amendments, and their procedural due process rights under the Fourteenth Amendment.¹⁴² The fact that the complaint specifically alleges harm as a result of Massachusetts DCF placing a gay teen in a home intolerant of differences in sexual orientation demonstrates the potential severity and prevalence of harm to LGBTQ youth, even in a state that has a non-discrimination provision.¹⁴³

In denying Massachusetts DCF's motion to dismiss as to the plaintiffs' substantive due process claim, the court explicitly found and Massachusetts DCF conceded that foster children are entitled to (a) the right to "protection from unnecessary harm" while in state custody; (b) the right to a living environment that protects foster children's physical, mental and emotional safety and well being; (c) the right to services such as safe and secure foster care placements, appropriate monitoring and supervision, placement in a permanent family, and adequate medical, dental, psychiatric, psychological, and educational services; and (d) the right to treatment and care "consistent with the purpose of the assumption of custody" by Massachusetts DCF.¹⁴⁴ Additionally, the court found that it is possible that the Due Process clause protects a foster child's right to remain in state custody no longer than necessary under the circumstances, right to receive care and treatment in accordance with accepted standards of professional judgment, and right to be placed in the least restrictive environment.¹⁴⁵ The court clarified that the defendants' conduct must be a substantial departure from accepted professional judgment that "shock[s] the conscience" and deprives the foster youth of reasonable care and

¹⁴² Complaint at 38, Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142 (D. Mass. 2011) (No. 10-CV-30073-MAP), available at http://www.childrensrights.org/wp-content/uploads/2010/04/2010-04-15_ma_complaint_as_filed.pdf; Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 150 (D. Mass. 2011).

¹⁴³ See discussion *supra* Part II.B.

¹⁴⁴ Connor B. *ex rel.* Vigurs v. Patrick, 771 F. Supp. 2d 142, 161 (D. Mass. 2011).

¹⁴⁵ *Id.*

safety.¹⁴⁶ The court found that the alleged conduct could easily meet this standard. Legal advocates for LGBTQ youth should consider LGBTQ youths' needs within this framework in order to successfully argue Due Process violations when youth are harmed by homophobic treatment.

Legal advocates for LGBTQ youth should also consider case law that may provide other protections for LGBTQ youth. For example, the First Amendment guarantees young people in state custody a right to religious freedom and a right to be free from religious indoctrination.¹⁴⁷ The overlap of sexual orientation discrimination and religious beliefs makes this area of the law ripe for consideration.¹⁴⁸ State constitutions or human rights provisions may also provide protections for LGBTQ youth. For example, Massachusetts and New York courts have held that a youth has a right to dress in gender non-conforming clothes.¹⁴⁹ Other courts have recognized that proper mental health treatment for GID is a serious medical need and that denying access to treatment could amount to cruel and unusual punishment under the Eighth Amendment.¹⁵⁰ Considering

¹⁴⁶ *Id.* at 162 (synthesizing *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998) and *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

¹⁴⁷ *See, e.g., Wilder v. Bernstein*, 848 F.2d 1338, 1347 (2d Cir. 1988), *rev'd on other grounds*, 944 F.2d 1028 (1991) (stating that the state must make reasonable efforts in placing foster children to accommodate the religious interests of both legal parents and foster children).

¹⁴⁸ For an in-depth discussion on the religious freedom rights of children in foster care, biological parents, and foster parents, *see* Kelsi Brown Corkran, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325 (2005).

¹⁴⁹ *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Dist. Ct. Oct. 11, 2000) (allowing a transgender girl to wear girl's clothing in high school based on the plaintiff's likelihood of success on her claims under MASS. GEN. LAWS ch. 76, § 5 and Article I and XIV of the Massachusetts Declaration of Rights, reasoning that "since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear.") *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000); *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (allowing gender non-conforming dress in foster care facilities because refusing to reasonably accommodate the plaintiff's Gender Identity Disorder was a violation of the New York State Human Rights Law).

¹⁵⁰ *See, e.g., Allard v. Gomez*, No. 00-16947, 9 F. App'x. 793, 794, 2001 U.S. App. Lexis 13321 (Unpub. 9th Cir. 2001) ("It is now undisputed that the appellant suffered from such a disorder, that appellant repeatedly sought hormone therapy treatment for it between 1995 and 1998, and that the disorder constituted a serious medical need.");

creative ways to protect LGBTQ youth from both overt and covert discrimination they may be facing while in the foster care system may save lives and will certainly improve the quality of life for LGBTQ youth.

D. Causes of Action in Tort

Foster children may have a tort remedy in state court for negligent foster care placements or negligent failures to protect them from abuse. Potential plaintiffs in a cause of action in tort are the injured child or the child's natural parents, guardian, and/or executor. Potential defendants are the foster parents, the foster care facility, and/or the child welfare department. However, qualified and absolute immunity may limit the liability of certain parties. For example, immunity is bestowed on foster parents as public employees under the Tort Claims Act in Massachusetts. Instead, likely defendants in Massachusetts include state employees in their official capacities, including the commissioner of the Massachusetts Department of Children and Family Services ("DCF"), the secretary of the Massachusetts Executive Office of Health and Human Services ("EOHHS"), and even the governor. However, the Commonwealth may be entitled to discretionary function immunity from negligence claims under Mass. Gen. Laws c. 258, § 10(b). The court determines discretionary immunity by looking at whether the governmental actor had any discretion as to the course of conduct followed and whether the discretionary action impacts public policy. A legal advocate must explore jurisdiction-specific questions of immunity for foster parents and child welfare agencies before pursuing a state tort remedy, such as the negligent failure to protect a foster youth from child abuse or the negligent placement of LGBTQ youth in a harmful environment.

1. Negligent Failure to Protect a Foster Youth from Child Abuse

If an LGBTQ youth has experienced harm as a result of conversion therapy or other homophobic treatment in foster care, a legal advocate should consider the possibility of bringing a claim for negligent failure to

Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (holding that transsexualism should not be treated differently from other disorders and is a serious medical need); *Kosilek v. Malone*, 221 F.Supp. 2d 156, 184-85 (Mass. Dist. Ct. 2001) (finding that severe forms of Gender Identity Disorder are a serious medical need and implicate the Eighth Amendment).

protect the youth from child abuse. In 1999, Karolyn Ann Hicks, J.D., examined incidences of reparative therapy imposed on children by their parents in the context of New York child abuse and neglect statutes.¹⁵¹ Hicks argues that reparative therapy should be considered abuse and neglect because of its harmful effects on youth, including isolation, withdrawal, and attempted suicide.¹⁵² Hicks supports her argument with the opposition statements made by the American Psychoanalytic Association and the American Psychiatric Association.¹⁵³ Hicks' analysis of New York law demonstrates that a reasonably prudent parent with access to information about the potential harmful effects of reparative therapy would not subject his or her child to it.¹⁵⁴ She also highlights that a reasonably prudent parent is legally required to act sensitively in response to the "unique disposition" of their child and argues that sexual orientation should be considered a unique disposition requiring sensitivity.¹⁵⁵ For example, parents of LGBTQ kids should be sensitive to the social homophobia that they face and the impact that conversion attempts will have on their emotional well-being.¹⁵⁶

Once the state has been given sole custody of the child in a foster care setting, the duty of the state to care for the child is arguably higher than that of a natural parent.¹⁵⁷ The foster care system should be held accountable for attempts to change a child's sexual orientation because the wealth of information available makes any attempt to subject a youth to

¹⁵¹ Karolyn Ann Hicks, "Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U. L. REV. 505, 513 (1999).

¹⁵² *Id.*; see also, Tyler Talbot, *Reparative Therapy for Homosexual Teens: The Choice of the Teen Should Be the Only Choice Discussed*, Comment, 27 J. JUV. L. 33, 43 (2006) (examining California's child abuse statute and concluding that giving a child a choice between homelessness and reparative therapy can be considered nothing other than child abuse because both decisions lead to "mental suffering.").

¹⁵³ Hicks, *supra* note 151, at 513.

¹⁵⁴ *Id.* at 524-25.

¹⁵⁵ *Id.* at 526 ("If this line of reasoning is applied to lesbian, gay, bisexual, and transgender youths who are forced to go through "reparative" therapy, parents should be held responsible for not recognizing the delicate mental and emotional states of gay children.").

¹⁵⁶ *Id.* at 524-25.

¹⁵⁷ HARVEY SCHWEITZER & JUDITH LARSEN, FOSTER CARE PRIMER 64 (2005) (stating that the agency-foster child relationship allows the child to enforce those statutes, regulations, policies and court orders that impose obligations on the agency).

reparative therapy unreasonably dangerous.¹⁵⁸ Additionally, our society is moving closer to conceptualizing attempts to change, or even completely ignore, a child's sexual orientation as child abuse. There is an increasing understanding that homosexuality is not a "moral issue" to choose, but a real experience and state of being for many. For example, since Hicks wrote her article, the U.S. Supreme Court removed a major legal barrier for sexual minorities by holding that "concern for homosexual immorality" could not serve as a rational basis for an anti-sodomy law.¹⁵⁹ Although the law excludes minors from legally engaging in the act of sodomy, it does not logically follow that LGBTQ-identified youth should be denied the same care and protection given to other youth in the system. For example, if a heterosexual youth were forced to attempt to become homosexual or transgender, the court would almost certainly consider this a form of emotional or psychological abuse. Since Hicks' article, a greater amount of information regarding LGBTQ cultural competency and the positive effects of affirming care is available to state officials, which further supports a heightened duty to protect youth from reparative therapy.¹⁶⁰

Hicks also discusses a number of challenges to judicial recognition of reparative therapy as child abuse, many of which are not as much of a concern in the foster care context.¹⁶¹ Hicks first discusses that very few reparative therapists openly admit that they are attempting to change a child's sexual orientation.¹⁶² However, foster care agencies could make significant improvements in preventing the practice if all mental health providers were required to sign a declaration stating that they understand what constitutes reparative therapy and will refrain from practicing it with foster youth in their care. Hicks articulates that a second concern is a parental defense such as a claim to free exercise of religion and parental

¹⁵⁸ See discussion *supra* Part I.A.

¹⁵⁹ *Lawrence v. Texas*, 539 U.S. 558, 582 (2003).

¹⁶⁰ See, e.g., *Fostering Transitions: CWLA/Lambda Joint Initiative to Support LGBTQ Youth and Adults Involved with the Child Welfare System*, CHILD WELFARE LEAGUE AM., <http://www.cwla.org/programs/culture/glbqt/about.htm> (last visited Aug. 22, 2012); *Youth in Foster Care and Juvenile Justice Systems*, NATIONAL CENTER FOR LESBIAN RIGHTS, http://www.nclrights.org/site/PageServer?pagename=issue_youth_docsDownloads#fcjj (last visited Aug. 22, 2012).

¹⁶¹ Hicks, *supra* note 151, at 529; see also Young, *supra* note 46 (discussing evidentiary weaknesses in Hicks' proposal).

¹⁶² Hicks, *supra* note 151, at 530.

autonomy.¹⁶³ A foster parent might also try to assert a religious freedom claim but such a claim would not be nearly as strong as a biological parent with legal and physical custody of a child.¹⁶⁴ A foster parent might argue that accommodating the religious interests of the foster child limits his or her own religious activity, but it is difficult to see a situation where refraining from preaching homophobic religious views to a youth would inhibit the foster parent's religious freedom.¹⁶⁵ This is especially true in states like Massachusetts, where a foster parent is legally required to be supportive of a child's sexual orientation and gender identity.¹⁶⁶ Third, Hicks discusses the difficulty of establishing causation in a child abuse claim because depression, aggression, and other behaviors could be the result of other causes.¹⁶⁷ This is especially pertinent in a foster care setting where the child is highly likely to be suffering trauma from being displaced from his or her home of origin. However, there are some cases where it is clear that a youth has run away from a foster home or cannot stand life anymore as a result of homophobic treatment. Such treatment should constitute child abuse and the youth should be entitled to compensation from the actor who was negligent in carrying out obligations to the youth.

2. *Negligent Placement of LGBTQ Youth in a Harmful Environment*

Negligent placement of a youth in an unsupportive household is another possible cause of action in tort on behalf of an LGBTQ-identified youth who has suffered harm from homophobic treatment in a foster care

¹⁶³ *Id.* at 530-533.

¹⁶⁴ Kelsi Brown Corkran, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325, 348 (2005) (“... from a statutory perspective, foster parents have no authority regarding the religious upbringing of children in their care.”).

¹⁶⁵ *Id.* at 349.

¹⁶⁶ 110 MASS. CODE REGS. 7.104 (“Standards for Licensure as a Foster/Pre-adoptive Parent . . . In order to be licensed as a foster/adoptive parent, a foster/pre-adoptive parent applicant must meet the following requirements: (1) A foster/pre-adoptive parent applicant must demonstrate, to the satisfaction of the Department the ability: (d) to promote the physical, mental, and emotional well-being of a child placed in his or her care, including supporting and respecting a child's sexual orientation or gender identity.”).

¹⁶⁷ Judith G. McMullen, *The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children*, 41 DRAKE L. REV. 483, 486 (1992).

facility or group home. A plaintiff could bring this claim against the state agency directly. In Massachusetts, a cause of action for negligent placement is highly unlikely to succeed because Massachusetts DCF will always be able to meet the first prong of immunity for discretionary functions.¹⁶⁸ Furthermore, in Massachusetts, the courts have virtually no role in determining the child's placement, leaving complete discretion to Massachusetts DCF.¹⁶⁹ However, in other states, placements may not be considered discretionary. A legal advocate should look into immunity issues in the youth's jurisdiction to determine jurisdiction-specific immunity issues.

If a plaintiff is able to get past immunity issues, she or he must then make out a prima facie case for negligent placement in or supervision of a foster home. This typically requires a showing that the defendant owed the foster child a duty to adhere to a standard of care, that the defendant breached its duty to the child, that the foster child suffered damages such as physical or emotional injury or death, and that the defendant's breach of duty was the proximate cause of harm to child.¹⁷⁰ Once an agency obtains or accepts legal custody of a child, it assumes an affirmative duty to make all reasonable efforts to provide for that child's well-being, both physical and emotional.¹⁷¹ A legal advocate should research the jurisdiction-specific question of whether this duty is delegable.¹⁷² If the youth were subjected to conversion therapy that led to severe mental health issues or homelessness, an advocate may be able to prove harm. Additionally, the agency's standard of care is a question of

¹⁶⁸ Archer *ex rel.* Goodwin v. Dare Family Services, No. 98-04354, 2002 WL 243649, at *4 (Mass. Super. Ct. Feb. 4, 2002) (stating that choosing which household to place the child inherently requires discretion).

¹⁶⁹ Care & Protection of Three Minors, 392 Mass. 704, 467 N.E.2d 851, 861 (1984) ("When [DCF] is granted permanent custody of a child, it has *virtually free rein* to place that child in a foster home of its choosing, to decree whether, how much, and what sort of family visitation there should be, and to decide whether to have the child adopted. This discretion is subject only to a petition for review which cannot be filed more than once every six months.").

¹⁷⁰ Eric M. Larsson & Jean A. Talbot, *Cause of Action for Negligent Placement in or Supervision of Foster Home*, 43 CAUSES OF ACTION 2d 1 (2010).

¹⁷¹ See, e.g., Barnes v. County of Nassau, 108 A.D.2d 50, 487 N.Y.S.2d 827 (N.Y. App. Div. 2d Dep't 1985); Weatherford *ex rel.* Michael L. v. State, 206 Ariz. 529, 81 P.3d 320 (2003); Hunte v. Blumenthal, 238 Conn. 146, 680 A.2d 1231 (1996); Miller v. Martin, 838 So. 2d 761 (La. 2003).

¹⁷² Larsson et al., *supra* note 170.

fact to be submitted to a jury and may be based on categories of information such as the contents of state and local statutes and regulations applying to the licensing and supervision of foster homes.¹⁷³

III. Adding Substance to Policy: Implementation and Enforcement of Sexual Orientation and Gender Identity Non-discrimination Policies

Once a non-discrimination provision is enacted, child welfare professionals have a duty to ensure that it is enforced and that other laws and policies reflect an understanding of this non-discrimination provision. Discrimination, particularly covert discrimination, does not disappear by adding non-discrimination language to a statute. Massachusetts added substance to its sexual orientation non-discrimination clause by including in its licensure requirements a provision that foster parents must agree to support a foster youth regardless of his or her sexual orientation.¹⁷⁴ However, once such a requirement is in place, it must also materialize in social interactions between social workers and foster parents. For example, it must show up on social work forms and social workers must be trained in strategies for engaging in these discussions.

Requiring supportive foster parents should not apply only to cases of children who are vocal about their sexual orientation or gender identity. Sexual orientation and gender identity issues must be discussed with all prospective foster parents in order to make a non-discrimination policy truly effective. Making the transition to discussing these matters routinely, especially in the course of a bureaucracy, may be challenging and will require intentional efforts until it becomes increasingly culturally comfortable. This section discusses a number of areas that policymakers can address when determining how to effectively implement a non-discrimination clause. These recommendations are based on years of work by a number of dedicated advocates for LGBTQ foster youth and on

¹⁷³ *Id.*

¹⁷⁴ 110 CODE MASS. REGS. 7.104 (“Standards for Licensure as a Foster/Pre-adoptive Parent . . . In order to be licensed as a foster/adoptive parent, a foster/pre-adoptive parent applicant must meet the following requirements: (1) A foster/pre-adoptive parent applicant must demonstrate, to the satisfaction of the Department the ability: (d) to promote the physical, mental, and emotional well-being of a child placed in his or her care, including supporting and respecting a child’s sexual orientation or gender identity. . .”).

a number of policies currently being implemented in foster agencies as a result of excellent advocacy.

A. *Best Practices*

National efforts have advanced best practices with LGBTQ youth in out-of-home care, creating an integrated model that supports a wide range of inclusive, safe, and nondiscriminatory services to LGBT youth.¹⁷⁵ In 2002, Legal Services for Children and the National Center for Lesbian Rights (“NCLR”) launched the Model Standards Project, which developed model standards governing professional services to LGBT youth in out-of-home care.¹⁷⁶ These model standards were published as *CWLA Best Practice Guidelines for Serving LGBT Youth in Out-of-Home Care* (“Best Practices”). In 2002, the Child Welfare League of America (“CWLA”) also joined the Lambda Legal Education and Defense Fund (“Lambda”) to create the Fostering Transitions Project, which sponsored a series of regional listening forums in thirteen jurisdictions with an accompanying report.¹⁷⁷ Any child welfare professional interested in developing a policy or best practice guidelines for working with LGBTQ youth in out-of home care should consult the Best Practices and the listening forum report.

Highlighting a few of the Best Practices recommendations provides a framework for adding substance to a sexual orientation and gender identity non-discrimination provision. The first consideration for implementing an effective non-discrimination policy is its applicability. A drafter should be sure to clarify that the policy applies to all agency personnel from managers to caseworkers, providers who contract to serve youth in the agency’s custody, and all direct care staff, including foster parents, relative caregivers, and facility staff.¹⁷⁸ In the mental health context, it is important to ensure that therapists working with the youth are aware of how to appropriately handle sexual orientation and gender identity issues. Another consideration is the visibility of the policy. The Best Practices recommend several tactics such as including a copy of the policy in the staff training or orientation for every new employee,

¹⁷⁵ SHANNON WILBUR, CAITLIN RYAN, & JODY MARKSAMER, CHILD WELFARE LEAGUE OF AMERICA, *CWLA BEST PRACTICES GUIDELINES: SERVING LGBT YOUTH IN OUT OF HOME CARE* x (2006) [Hereinafter *CWLA BEST PRACTICES*].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*; see also *OUT OF THE MARGINS*, *supra* note 14.

¹⁷⁸ *CWLA BEST PRACTICES*, *supra* note 175, at 10

contractor, and caregiver.¹⁷⁹ Another essential component of visibility is making ongoing trainings on LGBTQ cultural competency available for agency employees.¹⁸⁰ It also recommends that child welfare agencies ensure that health care providers are trained in competent, sensitive health assessments and treatment to LGBT youth.¹⁸¹ Only quality cultural competency trainings will be effective in changing the atmosphere of silence that is detrimental to LGBTQ youth.¹⁸²

A non-discrimination policy must also consider effective enforcement mechanisms. The Best Practices recommends including a formal grievance procedure that allows for confidential complaints and neutral third-party investigations.¹⁸³ This procedure should include a written component for filing and resolving complaints of discrimination and an overseeing body or individual to review grievance records to “identify potential problems, patterns, or need for additional training.”¹⁸⁴ It highlights that agency policies should explicitly prohibit the use of isolation or segregation as a means to protect “LGBT youth” from violence and harassment. Additionally, reliance on punishment alone is ineffective and child welfare agencies can use incidents of harassment or discrimination as opportunities to educate and promote awareness for all the children and adults involved.

Once LGBTQ issues are fully acknowledged and begin to routinely surface, child welfare agencies must also consider confidentiality of the youth as well as affirming services and access to resources. The Best Practices recommends having written policies regarding the management of confidential information and counsels against disclosure unless legally required or with the youth’s consent in a context where the professional can identify a direct benefit to the youth.¹⁸⁵ Child welfare and juvenile justice agencies are also encouraged to adopt explicit policies and practices that prohibit the caregivers or providers from forcing youth to undergo conversion therapy in an attempt to cure them of their same-sex attraction or gender non-conformity. These policies should

¹⁷⁹ *Id.* at 11.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 54.

¹⁸² *Id.*

¹⁸³ *Id.* at 10.

¹⁸⁴ *Id.* at 11.

¹⁸⁵ *Id.* at 39.

affirmatively permit youth to disclose their sexual orientation, discuss their feelings of attraction to the same extent as heterosexual youth without being penalized or shamed, and to express their sexual orientation through their choice of clothing, jewelry, or hairstyle.¹⁸⁶

B. Policies in Practice

A number of states have developed policies that reflect the CWLA guidelines, some of which are a result of successful litigation on behalf of LGBTQ youth. A survey of important features of these policies illuminates the ways in which the Best Practices guidelines have been implemented.

Some policies function to raise awareness among child welfare professionals and foster families. For example, in addition to prohibiting discrimination, the Office of Families and Children in Santa Clara, California (“Santa Clara OCFS”) has made its policy available online, where any youth or foster family can access it. Santa Clara OCFS’ online policy explicitly acknowledges that LGBTQ youth face a higher number of risk factors and that child welfare professionals must be aware of issues regarding special placement, disclosure/privacy, court, and licensing/approval.¹⁸⁷ The policy addresses placement procedures of LGBTQ-identified youth by requiring a youth’s social worker to inform any “prospective caregiver that the youth has a right to openly identify as a LGBTQ individual.”¹⁸⁸ This clause operates to raise awareness about giving youth space to openly express his or her sexual orientation or gender identity.¹⁸⁹ Additionally, New York’s Administration for Children’s Services’ (New York ACS) policy on assessing safety explicitly prohibits “. . . any staff member of Children’s Services to attempt to convince an LGBTQ child or young person to reject or modify

¹⁸⁶ *Id.* at 28.

¹⁸⁷ Santa Clara Dep’t of Children and Family Services, *DCFS Online Policies and Procedures, Cross-Program Protocols: Lesbian, Gay, Bi-sexual, Transgender and Questioning Youth: Guidelines for Services*, http://www.sccgov.org/ssa/opp2/13_xp/13-18.html. (last visited Nov. 9, 2012)

¹⁸⁸ *Id.*

¹⁸⁹ A notable feature of the policy, however, is that the requirements seem to apply only where a youth is openly LGBTQ.

his/her sexual orientation or gender identity” under any circumstances.¹⁹⁰ Illinois DCF’s policy explicitly prohibits contracts with any service provider for the purpose of changing a youth’s sexual orientation, gender identity, or gender expression,” explaining that it would be “ineffective and extremely damaging to the youth’s sense of self and well-being.”¹⁹¹ This functions to bring awareness to situations where an automatic or unconscious response of a child-welfare professional may be to attempt to discourage an LGBTQ youth from identifying as LGBTQ. It also clarifies that this type of response is unacceptable because of the negative impact it has on the youth.

A number of policies explicitly state the types of LGBTQ cultural competency trainings and resources that should be available. Connecticut’s Department of Children and Families (“Connecticut DCF”) issued a non-discrimination policy “to ensure that [lesbian, gay, bisexual, transgender, questioning, and intersex]¹⁹² children, youth and adolescents under the guardianship of [Connecticut] DCF receive non-discriminatory, safe, affirming and non-detrimental services.”¹⁹³ The policy unequivocally covers mental health, substance abuse, foster care and adoption, and mentoring services, and makes reference to having sexual orientation and gender identity sensitivity training available for all staff.¹⁹⁴ Connecticut DCF’s policy also includes a reference to making appropriate referrals and resources available to LGBTQ youth but does not provide guidance on where and how to find these resources. On the other hand, Santa Clara OCFS includes a resource list specific to LGBTQ youth on its

¹⁹⁰ N.Y. ADMINISTRATION FOR CHILDREN’S SERVICES, ASSESSING SAFETY OF LGBTQ CHILDREN AND YOUTH 2 (May 22, 2009) (on file with author).

¹⁹¹ ILL. DEP’T OF CHILDREN AND FAMILY SERVICES., POLICY MANUAL, *supra* note 110.

¹⁹² If a policy adds intersex to the category being protected, drafters must also consider the unique needs of such children, how they might differ from sexual orientation and gender identity issues, and how the agency is going to address those needs.

¹⁹³ CONN. DEP’T OF CHILDREN AND FAMILIES, POLICY MANUAL § 30-9 NON-DISCRIMINATION OF LGBTQI INDIVIDUALS (May 14, 2004), *available at* http://www.dir.ct.gov/dcf/policy/IntroVol2_30/30-9.htm.

¹⁹³ Santa Clara Dep’t of Children and Family Services, *DCFS Online Policies and Procedures, Cross-Program Protocols: Lesbian, Gay, Bi-sexual, Transgender and Questioning Youth: Guidelines for Services*, http://www.sccgov.org/ssa/opp2/13_xp/13-18.html (last visited Nov. 9, 2012).

¹⁹⁴ *Id.*

website.¹⁹⁵ Making information about resources widely available and easily accessible will greatly benefit youth and child welfare professionals.

Confidentiality is addressed differently in a few of the policies. Santa Clara addresses an LGBTQ youth's right to confidentiality, although it provides social workers with discretion to disclose the information to the child's therapist, counselor, or advocate when in the child's "best interests."¹⁹⁶ The policy further elaborates on instances when it might be appropriate to disclose a youth's sexual orientation to a judge hearing a youth's case, including instances where the youth's sexual orientation affects the family's willingness to reunify or when it affects the availability of a suitable placement.¹⁹⁷ Illinois DCF also protects a youth's choice to keep his or her sexual orientation or gender private, but has a stricter disclosure exception that allows admission without permission "only if there is reason to believe that the youth presents an immediate danger to his- or herself or is at risk of being harmed by others because of his or her LGBTQ identity."¹⁹⁸ A drafter would want to heavily consider whether a strict or loose standard is most beneficial to the youths' well-being.

In writing legislation and policies, drafters should also consider effective ways to enforce the non-discrimination provision. For example, in California, a violation of the non-discrimination clause applicable to the juvenile justice system clearly requires the Department of Juvenile Justice ombudsperson to investigate complaints and to maintain a toll-free helpline that youth can call to report rights violations and unlawful conditions in facilities.¹⁹⁹ The ombudsperson is required to document the number, source, nature, and resolution of all helpline complaints and make this information available to the legislature and to the public.²⁰⁰ However, if a report to an ombudsperson is the only enforcement mechanism, a system that is backlogged or unable to effectively address the complaints may completely deny a youth access to effective enforcement. Additional enforcement mechanisms should be considered, such as the ability to bring

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ ILL. DEP'T OF CHILDREN AND FAMILY SERVICES, POLICY MANUAL, *supra* note 110.

¹⁹⁹ CAL. WELF. & INST. CODE § 224.74 (2007).

²⁰⁰ *Id.*

a claim in the state's division of human rights or commission on discrimination.

Finally, a few policies allude to providing support above and beyond simply refraining from discrimination. For example, Santa Clara OCFS states on its website that it is the policy of the agency to respect, support, and nurture each individual foster child's total development, including issues of sexual identity.²⁰¹ New York's ACS created a policy in addition to its non-discrimination policy titled "Assessing the Safety of LGBTQ Children and Youth," which provides further substance to its non-discrimination provision.²⁰² It requires ACS staff to consider whether actual or perceived sexual orientation and/or gender identity is contributing to a parent's abusive behavior toward the child.²⁰³ It specifically recommends that ACS staff use "inclusive language that signals to all young people that they will be treated with respect and dignity, regardless of how they identify."²⁰⁴ For example, professionals can ask open-ended questions such as, "have you ever had a romantic relationship with a boy or a girl?" which leaves the door open to additional communications and breaks down stereotypes and stigmatization.²⁰⁵

There are further recommendations to consider in reference to mental health concerns of LGBTQ youth. For example, an agency could consider how its Medicaid policies could be revised to be more inclusive of LGBTQ youth. New York revised its policy on the "Provision of Non-Medicaid Reimbursable Treatment of Services for Youth in Foster Care" to explicitly include "gender affirming healthcare associated with Gender Identity Disorder" as a non-Medicaid reimbursable treatment for which the agency is required to seek outside funding.²⁰⁶ It is also possible to create policies requiring mental health care providers to sign a statement agreeing they will not use any form of conversion therapy, will make appropriate referrals of gender non-conforming youth to GID specialists, and will not require LGBT youth to participate in sex-offender treatment or counseling based solely on the youths' sexual orientation or gender

²⁰¹ Santa Clara Department Dep't of Children and Family Services, *supra* note 187.

²⁰² N.Y. ADMINISTRATION FOR CHILDREN'S SERVICES, *supra* note 190.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Frankowski, *supra* note 7 at 1829.

²⁰⁶ N.Y. ADMINISTRATION FOR CHILDREN'S SERVICES, *supra* note 190.

identity.²⁰⁷ Illuminating LGBTQ issues in every aspect of agency functioning will take time and the child welfare agencies described here have demonstrated excellent initial steps.

Conclusion

Social awareness of the importance of healthy attitudes toward sexual orientation and gender identity development in youth has gained momentum over the last two decades, particularly in light of the attention on high suicide rates amongst LGBTQ youth. However, this awareness has come with its own set of unique problems. As youth come to terms with their sexual orientation and/or gender identity at earlier ages, they may face increasing harassment and opposition to their identities. While the “coming out” process can positively impact a youth’s psychological development, the social stigma may disproportionately put them in dangerous situations and lead to increased risks of homelessness, street crimes, suicide, and other risk factors. The adults in charge of care for these youth have the responsibility to provide environments that are not only free of harassment but that also have affirming attitudes. Because society is able to acknowledge that homosexuality is not a disease or mental illness and social service agencies seem prepared to recognize that discrimination against LGBTQ youth is a serious problem, we should all find the time and energy to instill effective policies that will create change and break the harmful silence. The resources are available and the legal advocates are prepared to do the work. It should not take a greater number of lawsuits, youth on the streets, or suicides to propel the momentum to ameliorate this problem. It is time to use available resources to show LGBTQ foster youth that “It Is Better.”

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²⁰⁷ CWLA BEST PRACTICES, *supra* note 175, at 56.