Stop Sweeping Abuse of LGBT Teens Under the Rug

By Tamara Lange

Unprotected. Homeless. Incarcerated. Invisible. For too many lesbian, gay, bisexual and transgender young people, those four words describe the only legal system they know. A system that calls them delinquent when they run away from home or from foster care placements to escape family abuse based on their sexual orientation or gender identity. A system that calls them truant when they skip school because they are afraid for their safety. A system that sends them to detention and correctional facilities because there are no other placements for them. A system that turns a blind eye when they are harassed, beaten or sexually assaulted in group homes or juvenile justice facilities.

For many lesbian, gay, bisexual and transgender teenagers, there is no safe haven. A study published in the journal Pediatrics revealed that more than 25 percent of gay teens said they had recently missed school out of fear for their safety, compared with only 5 percent of heterosexual teens. Nearly a third of lesbian and gay youth report physical violence by a family member after coming out, and a quarter of lesbian, gay, bisexual and transgender youth say they were forced to leave home because of family conflict over sexual orientation or gender identity.

A 2002 study found 70 percent of lesbian, gay, bisexual and transgender youth in group homes reported physical violence based on sexual orientation or gender identity. And city-funded research in Seattle and Los Angeles found 20 percent to 40 percent of runaway and homeless young people were lesbian, gay, bisexual or transgender.

So it should come as no surprise that such youth are overrepresented in child welfare and juvenile justice systems. What's shocking is not that there are so many lesbian, gay, bisexual and transgender young people in state care, but that our legal system is only just beginning to think about how to help such youth survive — let alone thrive — in the very systems designed to foster, rehabilitate and nurture them.

By making schools liable, the courts have begun to correct abusive conditions in schools. In 2000, the American Civil Liberties Union of Northern California sued on behalf of lesbian, gay, bisexual and transgender teenagers who were being harassed and assaulted by their peers but getting no protection from the school. The 9th U.S. Circuit Court of Appeals ruled in *Flores v. Morgan Hill* that schools violate equal protection when they fail to investigate complaints and to train staff to make school safe for lesbian, gay, bisexual and transgender youth; the case settled with an agreement that included a three-year training program focused on anti-lesbian, gay, bisexual and transgender bias and $1.1 million in damages and fees.

California also has statutory protection for youth who are harassed at school based on sexual orientation or gender identity. And two pending bills — AB 606, The Safe Place to Learn Act; and SB 1437, and The Bias-Free Curriculum Act — would require schools to create safer learning environments for lesbian, gay, bisexual and transgender teenagers, including prohibiting sexual orientation discrimination in text books, classroom instruction and school-sponsored activities.

But for the many lesbian, gay, bisexual and transgender teens who end up as wards of the state, there has been little good news until very recently.

In *R.G. v. Koller*, a case brought by the ACLU of Hawaii, the ACLU LGBT Project and Morrison & Foerster on behalf of three teenagers confined at the Hawaii Youth Correctional Facility, the U.S.District Court in Hawaii issued the first published decision in the nation addressing the safety of lesbian, gay, bisexual and transgender youth in juvenile justice facilities. The opinion provides a gruesome look at the abuse often suffered by wards who are or are perceived to be lesbian, gay, bisexual and transgender.

The court found substantial evidence of verbal abuse by staff, administrators and other wards. During a meeting of staff and female wards, the facility's chief administrator "expressed her own views that being gay was 'wrong' and 'disgusting' and required the other wards to develop rules and punishments for R.G. and [another girl]." "Staff at [Hawaii Youth Correctional Facility] ... routinely referred to R.G., a girl who identifies as gay, as 'butchie' or used other slurs based on sexual orientation or failure to conform to gender stereotypes. ... [One youth correctional officer] 'on an almost daily basis' used phrases such as 'fucking little bitches,' 'butchies' and 'fucking cunts'" to refer to female wards.

When a ward asked another officer about J.D., a boy perceived to be gay, the officer said, "Yes, [he] is a legal known fag." Other officers regularly called plaintiff C.P., a male-to-female transgender girl, "cupcake" or "fruitcake." The court found based on expert testimony that when such name-calling is directed at teenagers, it is far more damaging than when directed at adults.

The court also found inexplicable the decision to endanger C.P. by placing her with the boys despite the opinions of their own experts that male-to-female transgender girls were "better off . . . with the girls than anywhere else at [Hawaii Youth Correctional Facility."

On the boys' side, there was a culture of abuse in which officers looked the other way while C.P. and J.D. faced repeated sexual and physical threats and assaults. C.P. was threatened with rape, told repeatedly by male wards to "suck my dick," or "give me head," asked to show her breasts, and had other wards expose themselves and masturbate in front of her. Wards threatened to rape J.D., grabbed him in the shower, jumped on him and pantomimed having anal sex with him, exposed themselves to him, rubbed semen on his face and assaulted him in his bed.

Rather than punishing the perpetrators, the Hawaii Youth Correctional Facility put the victims in isolation cells or socially segregated them from other wards. Expert evidence established that such "long-term segregation or isolation of youth is inherently punitive, and that imposing such isolation as a form of protection is 'not an acceptable correctional practice for juveniles.'"

Ultimately, the District Court found "a relentless campaign of harassment ... that included threats of violence, physical and sexual assault, imposed social isolation and near constant use of homophobic slurs." The court concluded that the supervisory defendants — including the director of the Office of Youth Services — were aware of the systemic problems at the Hawaii Youth Correctional Facility and failed to address them adequately. As a result, the court found the teenagers are likely to succeed in demonstrating deliberate indifference to their safety — the minimum baseline of protection under the Due Process Clause of the 14th Amendment.

The *R.G.* court issued a preliminary injunction that requires the facility to retain a court-appointed consultant to help the Hawaii Youth Correctional Facility craft new policies and procedures that will protect lesbian, gay, bisexual and transgender youth from physical and psychological harm, train staff, ensure adequate staffing and supervision of wards and create a functioning grievance system.

Administrators and child welfare professionals in other states should take note. Similar litigation may be coming soon to a facility near you.

Lest anyone think such abuse is an issue only outside of California, consider the conditions at the California Youth Authority revealed by a recent decision upholding an award for anti-gay harassment of a CYA employee. In *Hope v. California Youth Authority*, the 2nd District Court of Appeal upheld a $1.9 million dollar damages award, finding "substantial evidence" of severe and pervasive anti-gay harassment. Like the decision in *R.G.*, the *Hope* court's exhaustive review of the facts, including verbal abuse and threats, fabrications concerning plaintiff's attraction to wards and complete inaction by supervisors, provide a "dirty" laundry list of what not to do when employees or wards of the state report harassment based on sexual orientation or gender identity.

California does have the Foster Care Non-Discrimination Act, the first law in the nation to provide explicit statutory protection for lesbian, gay. Bisexual and transgender youth in foster care. But like laws requiring schools to protect LGBT youth, the act has to be enforced before it will have any meaningful effect for those in the child welfare system.

The same enforcement problem applies to the Unruh Act, which protects youth in juvenile facilities by prohibiting government agencies from discriminating based on sexual orientation or gender identity. So far, there are no published decisions enforcing that requirement.

Next month, the Child Welfare League of America will publish "Best Practices Guidelines for Working with LGBT Youth in State Custody," the result of a national collaboration led by Legal Services for Children and the National Center for Lesbian Rights. And those organizations have now joined forces with the National Juvenile Defender Center to design a program that will educate probation officers, attorneys and judges about the needs of lesbian, gay, bisexual and transgender youth in the juvenile justice system.

Unfortunately, these advances reveal only the tip of the iceberg. The conditions at the Hawaii facility came to light only because the ACLU had access to the youth there and courageous staff stepped forward as whistle-blowers.

But that glimpse into one facility reveals a stark reality: the vast majority of juvenile justice programs have not even begun to think about how to provide for the lesbian, gay, bisexual and transgender youth in their care. As attorneys, advocates and legislators, we are uniquely situated to do something about it. It is time to stop sweeping abuse of these teen-agers under the carpet and to support the pro-active legislation, advocacy and litigation that can make us all part of the solution. For more information or to get involved, please write to getequal@aclu.org.

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