IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

R.G., an individual; C.P., an individual by and through her next friend, A.W.; and J.D., an individual, Plaintiffs, v. LILLIAN KOLLER, Director of the State Department of Human Services, in her individual and official capacities; SHARON AGNEW, Director of the Office of Youth Services, in her individual and official capacities; KALEVE TUFONO-ISOSEFA, Hawaii Youth correctional Facility Administrator, in her individual and official capacities; *et al*., Defendants.	CIVIL NO. 05-566 JMS/LEK [CIVIL RIGHTS ACTION] MEMORANDUM IN SUPPORT OF MOTION

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INTRODUCTION

The Hawaii Youth Correctional Facility (HYCF) is a dangerous place for any child and is particularly unsafe for teenagers who are, or are perceived to be, lesbian, gay, bisexual or transgender (LGBT). Plaintiffs are teenagers who have been confined at HYCF and subjected to unrestrained anti-LGBT discrimination and abuse and sex stereotyping by staff and other wards, including frequent physical and sexual assaults and pervasive verbal abuse and threats. Although C.P. and J.D. threatened suicide and R.G. engaged in self-mutilation and attempted suicide, defendants' only response to repeated requests for help from plaintiffs and their medical providers has been to isolate plaintiffs, sometimes in solitary confinement, resulting in further psychological distress from lack of social contact.

Despite years of advocacy and intervention efforts, including most recently by the U.S. Department of Justice (DOJ) (Declaration of Lois Perrin (Perrin Decl.) ¶ 3, Ex. 1-2.), defendants continue to operate HYCF without adequate policies, procedures and training to ensure ward safety. For example, two weeks ago HYCF readopted virtually the same policies that DOJ found resulted in "major constitutional deficiencies in the harm protection measures in place at the facility." (Perrin Decl. Ex. B (hereinafter DOJ Report) 3-4 n.4.) Of specific concern here, defendants continue to provide grossly inadequate responses to complaints of anti-

LGBT harassment and sex stereotyping. R.G., C.P. and J.D. all have been in and out of HYCF in recent months, and live in fear knowing that staff and ward abuse will continue unabated the next time they are sent to HYCF, and may even intensify because of their lawsuit.

Plaintiffs seek preliminary injunctive relief on their due process, equal protection and establishment clause claims to require defendants to take basic measures necessary to redress the severe climate of anti-LGBT and sex-stereotyping harassment at HYCF, including by promptly retaining a mutually-agreeable corrections expert to guide development and implementation of policies, procedures and training regarding protection of wards, and to ensure that HYCF staff does not preach to wards or otherwise promote religion. Plaintiffs also seek injunctive relief requiring defendants to facilitate plaintiffs' legal visits and calls at HYCF.

Plaintiffs' equal protection and due process claims leave defendants between a rock and a hard place. If defendants contend they had general policies and procedures designed to protect youth from harassment and abuse by staff and other wards, then defendants' failure to address pervasive anti-LGBT harassment and sex-stereotyping establishes that defendants are discriminatorily enforcing and failing to train staff and wards regarding HYCF policies and procedures. Because continued physical, sexual, and verbal abuse furthers no legitimate state interest,

plaintiffs are likely to succeed on the merits and, therefore, are entitled to preliminary relief on their equal protection claim. On the other hand, if defendants concede, as the DOJ Report found, that HYCF lacks policies, procedures and training necessary to protect youth from abuse, they necessarily concede defeat on plaintiffs' due process claim.

The same injunctive relief is sought on the equal protection and due process claims. Consequently, the Court may grant relief on either claim without recourse to the other or may rely on both provisions to support the relief necessary to prevent further constitutional violations. Defendants also should be enjoined from continuing their customs of endorsing religion and restricting plaintiffs' access to counsel.

FACTUAL BACKGROUND

Despite a two-year effort by the ACLU of Hawaii to persuade defendants to correct serious constitutional deficiencies at HYCF (Perrin Decl. ¶ 4, Ex. B, ¶ 3) and a year-long investigation by DOJ culminating two months ago in a scathing report detailing conditions at HYCF that violate wards' constitutional rights (*id*), defendants continue to bury their heads in the sand, ignoring unsafe and abusive conditions caused by nonexistent or entirely inadequate policies, procedures and training. (¶ 2, Ex. A; Bidwell Decl. ¶¶ 13, 14, 16.) The pervasive climate of abuse at HYCF, and the use of extended periods of isolation to "protect" vulnerable

youth by minimizing their social interaction, are of particular concern to plaintiffs, because they have been the targets of severe anti-LGBT harassment and sex-stereotyping by Defendant Tufono-Iosefa, the Youth Facility Administrator (YFA), staff and other youth.

Plaintiff R.G. is 18 years old and has been confined at HYCF on three occasions, including once *after* this action was filed. (R.G. Decl. ¶¶ 3, 7, 9.) R.G. is under HYCF's jurisdiction until her 19th birthday. (*Id.* ¶¶ 3, 7, 9.) Defendants have subjected R.G. to a relentless crusade of harassment because she is gay. (*Id.* ¶¶ 4, 5, 8, 9, 10,12, 13, 14, 15, 16, 19, 20, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 42, 43.) During R.G.'s confinement at HYCF, Defendants Rosete and Josiah began preaching their religious views to R.G., stating that she should make the "right" choice to be heterosexual because God made women to have children, that being gay is "not of God" and that "God made Adam and Eve, not Adam and Steve." (*Id.* ¶ 9.) Defendant Rosete highlighted anti-gay passages in her Bible and showed them to R.G. (*Id.* ¶ 10.)

Staff threatened to send R.G. to "the boys side" of the facility or to isolation if R.G. talked with or about her girlfriend, although staff and other wards talked far more graphically about their heterosexual relationships. (*Id.* ¶ 10, 11, 13,33, 36.) Defendant Holloway told R.G., "this 'I love you' shit has got to stop. Who do you think you are? If we wanted you to have relationships we'd bring the boys over.

It's not fair to the other girls to see you two together. It's disgusting." (*Id.* ¶ 16.) Defendant Hubbell actively encouraged a dating relationship between R.G.'s girlfriend and a male ward, passing notes between the two of them while both were housed at HYCF. (*Id.* ¶¶ 17, 18, 19, 20, 23.)

Frustrated with the prohibitions against speaking to or sitting by her girlfriend, and devastated by defendants' attempts to break up their relationship while encouraging her girlfriend to date a male ward, R.G. engaged in self-mutilation – her only available form of communication – in order to express her feelings for her girlfriend. (*Id.* ¶¶ 21, 22.) Staff ignored R.G.'s suicide watch, (Perrin (Decl. Ex. 2 at 3, 6, R.G. Decl. ¶¶ 22-25), and Defendant Hubbell tormented R.G. by waiving in R.G.'s face a note from her girlfriend to the male ward. (R.G. Decl. ¶ 23.) Defendant Hubbell's incessant torture drove both girls to attempt suicide on September 10, 2004. (*Id.* ¶¶ 24-25; Perrin Decl. ¶ 2, Ex. A.) Having failed to break up R.G. and T.R.'s relationship, the YFA held a group meeting where she expressed her views that being gay was "wrong" and "disgusting" and required other wards to develop rules and punishments for them. (*Id.* ¶¶ 27-35.) Despite R.G.'s grievances and letters from medical staff, defendants have ignored the anti-gay discrimination and harassment. (*Id.* ¶¶ 38, 39, 40; Bidwell Decl. ¶ 57.)

Plaintiff C.P. is a 17-year-old transgender girl who has been confined at HYCF on three occasions. (C.P. Decl. ¶¶ 2, 10-25, 51-52.) C.P. is subject to the continuing jurisdiction of HYCF until her 18th birthday. (*Id.* ¶ 10.) During her first stay at HYCF, C.P. was housed with the other girls, but her requests for a bra were denied (even though she physically needed one) and she was forced to wear boys' clothing. (*Id.* ¶¶ 12, 13.) Shortly after arriving at HYCF, defendant Tavako dubbed her "twinkle toes" and "fairy;" defendant Simao called her "cupcake" and "fruitcake" and told her she was not allowed to play with her hair "like the girls;" and male staff routinely referred to her as "him" or a "boy." (*Id.* ¶¶ 15, 17, 18, 20, 21.) Defendants' disregard for her gender identity quickly led to C.P. being placed on suicide watch. (*Id.* ¶ 21; Bidwell Decl. ¶ 40, Ex. 2.) Pleas from the medical staff to address the harassment went unanswered. (Bidwell Decl. ¶¶ 40-41, Ex. 6.) Additionally, during C.P.'s initial months at HYCF, the wards were precluded from having any personal effects in their cells. (C.P. Decl. ¶ 23.) Defendants later changed the policy to allow wards to have only Bibles in their cells (*id.*) despite being on notice since July of 2003 that such a practice was unconstitutional (Perrin Decl. ¶ 7, Ex. E.).

The YFA transferred C.P. to be housed with the boys in September 2004, when the rest of the girls were transferred temporarily to Utah. (C.P. Decl. ¶ 28; Bidwell Decl. ¶ 42). The entire medical staff notified the YFA and Defendant

Agnew of their grave concerns that C.P. would be unsafe on the boy's side. (Bidwell Decl. ¶ 44, Ex. C.) Defendants Agnew and Tufono-Iosefa ignored the advice of the medical staff, thus subjecting C.P. to relentless abuse, including name calling such as "faggot" and "mahu," physical and sexual assaults, masturbation directed at her, and threatening commands such as "suck my dick", "put this in your mouth and suck on it", or "give me head," and threats of rape and assault. (C.P. Decl. ¶¶ 32, 33; Bidwell Decl. ¶ 27.) HYCF staff did nothing to address the abuse and harassment, sometimes encouraging or participating in it. (*Id.*)

Defendants' response to the harassment was effectively to isolate C.P., depriving her of social interaction. (C.P. Decl. ¶ 21; Exs. A, B.) C.P. was released from HYCF in December 2004 but returned on August 10, 2005. (C.P. Decl. ¶ 51.) Upon her return, defendants held her in solitary confinement for 6 days, allowing her one hour a day to leave the cell for recreation and showering. (*Id.* ¶ 55.) But staff and wards continued to torment her based on her gender identity. (*Id.* ¶¶ 57, 59.)

Plaintiff J.D. is an 18-year old boy who has been in HYCF on two occasions and is subject to HYCF's jurisdiction until his 19th birthday. (J.D. Decl. ¶ 2.) Defendants ignored J.D.'s repeated pleas for help, and allowed severe anti-gay abuse (J.D. Decl. ¶¶ 5, 7, 10, 11, 12, 14, 18, 37, 41, Bidwell Decl. ¶¶ 20, 22, 23), including having semen rubbed onto his face (J.D. Decl. ¶ 19, Ex. B), being

jumped on and subjected to pantomimed anal rape, including in the shower, (*id.*), being told by other wards "give me head," and being called names like "fucking faggot" and "homo." (*Id.* ¶¶ 3, 13, 21, 23, 46, Ex. B.) One ward hung his testicles in J.D.'s face and on another occasion placed his testicles in J.D.'s hands. (*Id.* ¶ 17, Ex. B.) This abuse occurred in the presence of staff, who again largely ignored the issue. When Defendant Haina was asked by another ward if J.D. was gay, Defendant Haina replied, in the presence of other wards, "Yes, [he] is a legal known fag.**"** **(**Bidwell Decl. ¶ 31.) Plaintiff wrote several grievances to the YFA, who responded by placing J.D. in isolation. (J.D. Decl. ¶¶ 32-35, Ex. A.)

In early 2005, a Hawaii family court judge issued a decision informing the supervisory defendants of the urgent need for "policies and operation procedures that are appropriate to the treatment of [LGBT] youth, that set standards for the conduct of youth correctional officers and other staff, and that provide on-going staff training and oversight" in order to address the "systemic" problem of anti-LGBT harassment at HYCF. (Bidwell Decl. ¶ 32.) Appended to the order was "The Model Standards Project: Creating Inclusive Systems for LGBTQ Youth in Out-of-Home Care," which sets forth recommendations for creating child welfare settings that are safe, respectful and nurturing for lesbian, gay, and transgender youth. (Perrin Decl., ¶ 17, Ex. K.) Even though the decision recommended the

adoption of LGBT protective standards without delay, defendants admittedly have taken no steps to address the harassment of LGBT youth at HYCF. (*Id.* ¶ 10.)

ARGUMENT

I. STANDARD FOR GRANTING INJUNCTIVE RELIEF

On a preliminary injunction, "[t]he district court is not required to make any binding findings of fact; it need only find probabilities that the necessary facts can be proved." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984). A preliminary injunction is warranted when plaintiffs show either

> (1) a likelihood of success on the merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [their] favor. These two alternatives represent extremes of a single continuum, rather than two separate tests. Thus, the greater the relative hardship to [plaintiffs], the less probability of success must be shown.

Warsoldier v. Woodford, 418 F.3d 989, 993-94 (9th Cir. 2005) (internal citations omitted). In addition, "advancement of the public interest" is one of the "traditional equitable criteria for granting a preliminary injunction." *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (citation omitted).

II. PLAINTIFFS HAVE STANDING TO SEEK INJUNCTIVE RELIEF

Injunctive relief is appropriate because all three plaintiffs reasonably expect that they will be returned to HYCF and are "realistically threatened by a repetition of [the violation]" of their constitutional rights. *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001) (citation omitted); *see also Demery v. Arpaio*, 378 F.3d

1020, 1027 (9th Cir. 2004); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999) (*en banc*).

In *Demery*, the Ninth Circuit held that pretrial detainees had standing to seek injunctive relief even though they had been released from the facility because the record showed that plaintiffs had been incarcerated repeatedly, and were likely to be reincarcerated and subjected to the same unconstitutional conditions. 378 F.3d at 1027. Similarly here, plaintiffs have been incarcerated repeatedly and are likely to be reincarcerated. R.G. and C.P. each have been detained three times at HYCF. C.P. was harassed and held in isolation at HYCF for a week just before the complaint was filed, and R.G. was sent back to HYCF and released again since filing. (C.P. Decl. ¶¶ 20, 25, 51-52; R.G. Decl. ¶¶ 7, 47.) J.D. has been sent to HYCF twice in the past fourteen months. (J.D. Decl. ¶¶ 2, 48.) Both R.G. and C.P. have run away from home and from other placements, and it is likely that they will run away and be returned to HYCF again. (Bidwell Decl. ¶ 59.) Most importantly, all three plaintiffs *currently* are committed to the legal custody of the executive director of the Office of Youth Services, defendant Agnew, to be incarcerated at HYCF subject to defendants' discretion to place them elsewhere in the community. Consequently, even if plaintiffs do nothing to violate the terms of their release from HYCF, defendants have discretion to decide at any time that they should be returned to HYCF.

In *Armstrong*, the Ninth Circuit reviewed an analogous case brought by parolees challenging disability discrimination in parole revocation hearings. 275 F.3d at 866. The Court found plaintiffs had standing to seek injunctive relief because they could not necessarily avoid future injury by refraining from illegal conduct, as revocation hearings could be instituted without probable cause, and without a law enforcement officer witnessing an alleged violation, based on mere suspicion of misconduct. *Id.* Like the parolees in *Armstrong*, plaintiffs may be returned to HYCF for mere suspicion of misconduct that falls well short of unlawful activity – or even for conduct of a third party over which plaintiffs have no control. For example, since the filing of this action, R.G. was sent back to HYCF because she received an unsolicited, sexually-explicit letter from a much older woman in her treatment program. Similarly, if C.P. has a problem at home, she will be sent back to HYCF because defendants believe alternative placements are unavailable. (C.P. Decl. ¶ 65.) Thus, plaintiffs have a reasonable expectation that they will again be returned to HYCF, where defendants' challenged conduct will continue unabated unless it is enjoined.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR DUE PROCESS CLAIM

A. Plaintiffs Have a Due Process Right to Reasonably Safe Conditions and Freedom from Unreasonable Restraint

1. The Fourteenth Amendment Governs the Constitutionality of Conditions in Juvenile Correctional Facilities

Wards at HYCF have been adjudicated "delinquent," not convicted of crimes. H.R.S. § 571-1. Because they have not been afforded the right to jury trial and the other "constitutional guarantees traditionally associated with criminal prosecutions," the *more protective* Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, governs their conditions of confinement. *See Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987); *see also Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). Courts applying the Due Process Clause to assess conditions of confinement for incarcerated children have applied the standards set forth in two Supreme Court cases addressing similar populations: *Bell v. Wolfish*, 441 U.S. 520 (1979), which addressed the rights of adult pretrial detainees, and *Youngberg v. Romeo*, 457 U.S. 307 (1982), which concerned the rights of mentally disabled individuals involuntarily committed by the state.

In *Bell*, the Supreme Court considered the due process rights of pretrial detainees, who, like juveniles, are incarcerated but have not been convicted of crimes, and held that conditions are unconstitutional if they "amount to

punishment." *Bell*, 441 U.S. at 535. Thus, where defendants create unsafe conditions or impose isolation on detainees with an express intent to punish, they violate due process. *Id.* at 538. Moreover, even without a showing of intent to punish, if no legitimate purpose for the challenged condition appears, or if the condition appears excessive in relation to a non-punitive purpose, "a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted" on unconvicted detainees. *Id*., 441 U.S. at 539.

In *Youngberg*, the Supreme Court held that a mentally disabled individual who was involuntarily committed to a state institution had a protected liberty interest in reasonably safe conditions of confinement and freedom from unreasonable bodily restraint. 457 U.S. at 315-16. Applying *Bell* and other earlier cases, the Court again held that to determine whether conditions violate due process, a court must "balanc[e] [the individual's] liberty interest against the relevant state interests." *Id.* at 321. As in *Bell*, the key is whether the state's action serves a legitimate interest, and whether the challenged condition is excessive in light of that interest. *Id.* Whether an unsafe or restrictive condition is excessive depends on whether it reflects the judgment of qualified professionals, *Youngberg*, 457 U.S. at 321-22, or is "such a substantial departure from accepted professional

judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323.

Several courts, including the Ninth Circuit, have relied on *Youngberg* in assessing the constitutionality of juvenile conditions of confinement. *See Gary H.*, 831 F.2d at 1432; *A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d 572, 585, n.3 (3d Cir. 2004) (holding juvenile-detention center has duty to protect wards from harm "whether self-inflicted or inflicted by others"); *Alexander S. v. Boyd*, 876 F. Supp. 773, 797-98 (D.S.C. 1995) (same).

B. Defendants Customarily Violate Plaintiffs' Due Process Rights

Applying *Youngberg*, *Bell* and their progeny to HYCF's conditions and practices, plaintiffs are likely to succeed on the merits of their due process claim because defendants routinely, as a matter of policy and practice, subject plaintiffs to unsafe conditions, including a pervasive climate of sexual, physical and verbal anti-LGBT harassment, and unnecessarily restrictive conditions of confinement, including long periods of isolation. (R.G. Decl. ¶¶ 20, 45; J.D. Decl. ¶¶ 32-35; C.P. Decl. ¶¶ 38, 29, 55.) In so doing, defendants substantially depart from accepted professional judgment and impose conditions that impermissibly punish plaintiffs, for whom reintegration into their families and communities is the ultimate goal.

1. Defendants Maintain Unreasonably Unsafe Conditions

Defendants have subjected and threaten to continue to subject plaintiffs to unreasonably unsafe conditions at HYCF by failing adequately to promulgate constitutionally-sufficient policies, train staff regarding protection of wards; adopt and implement a classification system; supervise juveniles; establish a sufficient grievance procedure; and take remedial measures in response to plaintiffs' complaints of harassment by staff and other wards. Plaintiffs' claims are supported by the DOJ Report, which found that:

> The State fails to protect youth from: (1) self-harm; (2) staff violence; (3) youth-on-youth violence; (4) excessive use of disciplinary isolation; (5) lack of supervision; and (6) an inadequate grievance system.

(DOJ Report 5-6.) Indeed, DOJ found that these conditions not only violated wards' due process rights, but "are so egregious as to violate even the more stringent Eighth Amendment standard." (*Id.* at 5.)

a. Lack of Adequate Policies and Failure to Train

The DOJ Report found that the "most fundamental problem that plagues HYCF is the absence of policies or procedures to govern the facility." (DOJ Report at 3.) This problem is compounded by defendants' failure to train staff. (*Id.* at 4) ("*Security staff . . . have received no training in over five years and have*

no rules to guide their decisions.") (emphasis added). The result of defendants' lack of policies and training is not surprising:

> Security staff have stepped into the vacuum of order and taken control of every aspect of the operation of the facility. . . . [Staff] routinely use excessive force against youth, confine youth to their cells for days on end, discipline youth without justification or oversight, deny youth access to medical and mental health services, and prevent youth from receiving education. . . . it is our impression that this situation has existed for years.

(*Id*).

The absence of adequate policies and procedures is compounded by defendants' failure to train the individuals expected to enforce them. DOJ found that "staff and administrators were either unaware of the existence of any policies or procedures or were cognizant of their existence yet ignorant of their content." DOJ Report at 4 n.4. Moreover, defendants concede that, as of August 12, 2005, HYCF still has not trained its staff regarding the proper use of force, investigation techniques, or the identification and protection of vulnerable youth. (Perrin Decl. ¶ 5.)

In light of the pervasive harassment of LGBT youth by staff and other wards, the supervisory defendants' failure to promulgate policies and procedures for ensuring ward safety and failure to train staff to protect wards, including the plaintiffs and other "invisible" LGBT wards (Bidwell Decl. ¶ 18), substantially departs from accepted professional judgment, subjects plaintiffs to a punitive environment and indicates, at best, deliberate indifference to plaintiffs' safety.

The Third Circuit recently considered a similar situation in *Luzerne County*, 372 F.3d 572. The plaintiff, a juvenile who was assaulted repeatedly by fellow wards in a detention facility, charged that the center's lack of policies to ensure youth safety and failure to train its staff on methods of identifying and protecting vulnerable youth violated his due process rights. *See id.* at 575. The court reversed summary judgment for the defendants, holding that a reasonable jury could find the plaintiff's injuries were a foreseeable consequence of the center's lack of policies and procedures and failure to train, which deviated substantially from accepted professional judgment. *Id.* at 581-86.

Similarly, here, HYCF's lack of minimally adequate policies, procedures and training to ensure ward safety resulted in and threatens to cause additional abuse of plaintiffs by staff and other wards so severe that it has caused each of the plaintiffs to contemplate suicide and one of the plaintiffs to engage in self-mutilation and attempt suicide. (R.G. Decl. ¶¶ 21, 25; C.P. Decl. ¶ 21; J.D. Decl. ¶ 30; Bidwell Decl. ¶ 40; Ex. B.) HYCF's lack of policies and procedures necessary to ensure a safe environment, such as identification and protection of vulnerable youth, supervision of youth, appropriate reporting and response to staff-on-youth and youth-on-youth abuse, and handling of grievances, is a substantial departure from accepted professional judgment advances no legitimate

governmental interest, and subjects plaintiffs to punitive living conditions (Perrin Decl. Ex. L (LGBTQ model standards); Ryan Decl. Ex. B.)

Since the filing of the Complaint in this action, *defendants have readopted the same 1984 policies that DOJ condemned as "outdated and intended for an adult institution."* (Perrin Decl. Ex. B; DOJ Report 4, Ex.D) This backward step makes it abundantly clear that conditions at HYCF will not improve without a court order.

b. Inadequate Staffing And Supervision

Anti-LGBT abuse is rampant at HYCF. (C.P. Decl. ¶¶ 12-20; R.G. Decl ¶¶ 10, 15, 36.; J.D. Decl. ¶¶ 3-6, 17-19.) Such mistreatment is the predictable result of defendants' inadequate staffing and supervision. (DOJ Report at 16 ("T]he lack of supervision of youth is [a] contributing factor" to unconstitutionally hazardous conditions at HYCF)); Perrin Decl. Ex. I at 10 (Ohio Report); *see also Luzerne*, 372 F.3d at 581. Defendants have "employed an insufficient number of staff at HYCF to monitor youth, and the staff that are employed there have no training in adequate monitoring procedures. As a result, youth are frequently able to exploit the gaps in supervision and harm other juveniles." (DOJ Report 16.) Indeed, given the obvious relationship between staffing levels and safety in a custodial setting, inadequate staffing even supports a finding of deliberate indifference. *Luzerne*, 372 F.3d at 581.

c. Failure to Adopt an Appropriate Classification System

DOJ found that HYCF's frequent failure to protect youth from assaults by other wards can be attributed in part "to the absence of a classification criteria for housing youth. . . . [S]taff place aggressive youth with vulnerable youth regardless of the risk of harm." (DOJ Report at 16). A sound classification system is necessary to provide incarcerated juveniles with reasonably safe conditions, including the right "to reasonable protection from the aggression of others, whether 'others' be juveniles or staff." *Alexander S.*, 876 F. Supp. at 797-98; *see also Redman v. County of San Diego*, 942 F.2d 1435, 1440 n.7 (9th Cir. 1991); Perrin Decl. Ex. K (AI Report). Defendants' failure to classify wards and practice of placing aggressive youth with vulnerable youth, including vulnerable transgender girls with aggressive boys, has resulted in and continues to threaten repeated physical and sexual assaults on J.D. and C.P., and pervasive verbal harassment of all plaintiffs. (Perrin Decl. Ex. J at 6 (report of court-appointed expert regarding conditions at California Youth Authority) (noting the "growing professional consensus that effective classification systems are essential to the safe and efficient operation of correctional systems").)

d. Ineffective Grievance Procedure

DOJ found that HYCF's grievance procedures are fatally flawed in both design and execution. "The most significant legal deficiencies with the grievance system at HYCF are the difficulty in filing claims and the common presence of intimidation and retaliation against those youth who are able and dare to do so." (DOJ Report at 20-21 (former administrator conceded "that he simply could not complete investigations" due to resistance and sick outs by YCOs).)

In *Luzerne*, the Court found that evidence of an inadequate policy for reviewing and acting on incident reports could support a finding that "the Center disregarded an obvious consequence of its action, namely, that residents of the Center could be at risk if information gleaned from the incident reports was not reviewed and acted upon." 372 F.3d at 583. Likewise, here, defendants' failure to establish an adequate policy for reviewing and acting upon grievances and incident reports contributes directly to the unsafe environment at HYCF.

2. Defendants Use of Isolation Is Inconsistent with Professional Standards and Constitutes Punishment

Due process guarantees juveniles freedom from unreasonable bodily restraint. *Youngberg*, 457 U.S. at 315-16. It is well established that the use of isolation for juveniles is punitive except where necessary to restrain a violent juvenile for a short period of time. *See, e.g., Milonas v. Williams*, 691 F.2d 942-43 (9th Cir. 1982) (affirming injunction against placing children in

isolation for any reason other than to contain violent behavior); *see also Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983) (experts' testimony on lack of therapeutic and disciplinary benefits from isolation sufficient to warrant remand for further factual findings). Even the threat of isolation has been held to constitute punishment in certain circumstances. *See Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (5th Cir. 1974) (characterizing the threat of solitary confinement as "mental punishment"). Defendants have not promulgated a policy limiting the use of isolation to situations where it is necessary to control a violent individual, so YCOs impose isolation at will.

Juveniles are particularly vulnerable to the damaging psychological effects of isolation, including extreme loneliness, anxiety, rage, and depression, among other potentially debilitating emotional and psychological problems. *See, e.g.*, *Hegstrom*, 831 F.2d at 1434 (Ferguson, J., concurring); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986) ("Juveniles are even more susceptible to mental anguish than adult convicts"); (Bidwell Decl. ¶ 26; Ryan Decl., Ex. B.)

Nevertheless, defendants' practice is to use isolation as a form of punishment and to isolate vulnerable youth in lieu of providing adequate supervision and protection. Isolating wards when they complain about harassment is not reasonably related to the legitimate needs of the institution, constitutes punishment and is out of step with professional standards. (Perrin Decl. Ex. I

(Ohio Expert Report) 18-19, Ex. J (CYA Report)) The conditions of plaintiffs' isolation highlight its punitive nature.

In October 2004, in response to C.P.'s complaints of abuse, defendants socially isolated C.P. for months. When C.P. was not in her single cell, she was instructed not to have anything to do with the male wards – not to sit, speak, look at, or interact with them in any way. (C.P. Decl. ¶ 38.) When C.P. was returned to HYCF in August of 2005, Defendants placed C.P. in solitary confinement for six consecutive days. She was under surveillance 23 hours a day, and was not permitted letters, writing instruments, radio, or television, or to interact or socialize with any other wards. (*Id.* ¶¶ 38-46.) She was let out of the cell for only one hour each day to wash, to eat, and to engage in recreation. (*Id.* ¶¶ 54-55.)

In August 2004, J.D. informed defendants that he was being subjected to near-constant harassment because of his perceived sexual orientation. (J.D. Decl ¶ 9.) Defendants responded, not by addressing the harassment, but by placing J.D. in an isolation cell for a week until, starved for human interaction, J.D. asked to be returned to his module. While J.D. was in the isolation cell, he was prevented from making any phone calls or writing any letters, allowed one hour of solo recreational time and one shower per day, and was given only a Bible and one additional book to read. (J.D. Decl. at ¶¶ 34-36.) Additionally, R.G. was

repeatedly threatened with isolation based on YCOs' disapproval of her sexual orientation. (R.G. Decl. ¶ 13.)

In light of the well-known adverse psychological and physical effects of isolation on children, neither administrative convenience nor protecting children from harassment and abuse is sufficient to warrant extended isolation. *See Milonas*, 691 F.2d at 942-43; *Bell*, 441 U.S. at 539. Defendants' use of isolation, and threats of isolation, were clearly punitive in nature as there is no safety, rehabilitative, or other legitimate institutional purpose for defendants' use of prolonged periods of confinement in isolation cells. *Bell*, 441 U.S. at 539. Defendants may not constitutionally punish the victims of harassment with isolation simply because doing so is cheaper or more convenient than providing adequate staffing, supervision or training.

Finally, even if isolation of innocent victims of harassment were reasonably related to some legitimate institutional purpose, defendants' practices are, at best, an excessive response to legitimate safety needs of the institution. Such isolation is completely inconsistent with professional standards and plainly "amounts to punishment," in violation of the Due Process Clause. *Bell*, 441 U.S. at 535. It may have been more convenient for defendants to isolate J.D. and C.P. than to address the underlying harassment, but convenience cannot justify such departure from professional standards and imposition of punishment.

Defendants' failure to correct the foregoing deficiencies and to intervene, in the face of repeated complaints about anti-LGBT abuse and improper use of isolation, directly contributed to plaintiffs' injuries and threatens continuing injury. *See Redman*, 942 F.2d at 1446 (supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation). Defendants' failure to take even minimal steps necessary to ensure a reasonably safe environment and to refrain from punitive isolation cannot be explained by any legitimate governmental interest, departs substantially from professional standards, and threatens to again subject plaintiffs to unconstitutional conditions at HYCF.

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR EQUAL PROTECTION CLAIM

To establish an equal protection violation under § 1983, "plaintiffs must show that defendants, acting under color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional" or that defendants "acted with deliberate indifference." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134-35 (2003). Deliberate indifference is established when officials "respond[] to known peer harassment in a manner that is clearly unreasonable." *Id.* at 1135. While *Flores* concerned the failure to protect students from harassment at school, the same equal protection principles apply to

the failure of other state actors to protect youth from harassment, including those in a juvenile correctional facility.[1]

To survive rational basis review, defendants' discrimination must at least "bear a rational relationship to an independent and legitimate [governmental purpose]." *Romer v. Evans*, 517 U.S. 620, 631 (1996).[2] In *Flores*, the Ninth Circuit held that a school district's discriminatory failure to investigate complaints of anti-LGBT harassment and to train staff and students to improve the hostile climate did not rationally advance any legitimate governmental interest. The court concluded, "we are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not

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[1] Although many constitutional challenges to correctional facility policies are subject to the test articulated in *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), the Supreme Court recently explained in *Johnson v. California*, __ U.S. __, 125 S. Ct. 1141 (2005), that it applies "*Turner*'s reasonable-relationship test *only* to rights that are "inconsistent with proper incarceration." . . . *The right not to be discriminated against based on one's race* . . . is not a right that need necessarily be compromised for the sake of proper prison administration." *Id.* at 1149 (emphasis added). The same principle applies here. Moreover, if *Turner* does not apply to pretrial detainees, *see Demery*, 378 F.3d 1028-29, it should not apply to incarcerated juveniles.

In any event, the outcome is the same under *Turner*, for it is not meaningful to ask "whether there are alternative means of exercising the right" to equal protection from harassment. 482 U.S. at 90. The impact on staff, other wards and HYCF resources of accommodating the right to equal protection from harassment can only be salutary. *See id*. And obvious, easy alternatives are available. *See id*.

[2] Plaintiffs will provide supplemental briefing on the appropriate level of scrutiny should the Court consider it necessary to resolve that open question.

offer us one." 324 F.3d at 1138 (quoting *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996)).

As in *Flores*, the plaintiffs here are "members of an identifiable class for equal protection purposes" because they allege discrimination based on their actual or perceived sexual orientation, gender identity and sex. 324 F.3d at 1134-35. Plaintiffs are likely to succeed on the merits of their equal protection claim because (1) defendants intentionally discriminated against them and acted with deliberate indifference in failing to address anti-LGBT harassment and sex-stereotyping by staff and other wards, and (2) the discrimination was not rationally related to a legitimate governmental interest. *Id.* at 1137.

A. Defendants' Differential Treatment of LGBT Plaintiffs and Failure to Take Adequate Remedial Measures to Address Anti-LGBT Harassment Support Preliminary Findings of Intentional Discrimination and Deliberate Indifference

In *Flores*, student plaintiffs who were harassed at school based on their actual or perceived sexual orientation defeated summary judgment by presenting evidence that school officials had failed to enforce anti-harassment policies when presented with complaints of anti-gay harassment. 334 F.3d at 1136. In that case, plaintiffs' evidence showed that teachers and administrators "failed to stop name-calling and anti-gay remarks" and "responded with inadequate disciplinary action to physical abuse." *Id.* at 1132. The Ninth Circuit concluded that evidence of

administrators' failure to investigate complaints of harassment, to discipline harassing students, and to take further action when students continued to complain of a hostile environment could support a finding of deliberate indifference. *Id.* at 1135-36; *see also Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 871, 875 (N.D. Ohio 2003).

In addition, plaintiffs presented evidence in *Flores* that the school district had failed to train teachers, students and campus monitors about harassment based on sexual orientation. 324 F.3d at 1136. Although the school district had conducted training about sexual harassment, the staff training "was limited and did not specifically deal with sexual orientation discrimination." *Id.* Moreover, despite defendants' awareness of anti-gay hostility in their schools, they inadequately conveyed their anti-harassment policies to students. *Id.* The Ninth Circuit held a jury could find "that there was an obvious need for training and that the discrimination the plaintiffs faced was a highly predictable consequence of the defendants not providing that training." *Id.*

Plaintiffs' showing here goes well beyond that presented in *Flores*. Here, defendants intentionally and overtly discriminated against plaintiffs, including by:

(1) Subjecting plaintiffs to anti-LGBT harassment by staff and supervisory personnel. Defendants called all three plaintiffs anti-LGBT names, told R.G. she is "disgusting," "bad" and a "sinner" because she is gay, made humiliating sexual references to R.G., told C.P. not to act like a girl and threatened to cut her hair, told

C.P. that she could stop the harassment by not being transgender, threatened to send R.G. and C.P. to the boys' side of the facility, and eventually did place C.P. with the boys. (R.G. Decl. ¶¶ 9, 10, 13, 15; C.P. Decl. ¶¶ 19-21, 28, 31; J.D. Decl. ¶ 2, 6; Bidwell Decl. ¶¶ 23, 31, 43, 46.)

(2) Encouraging and facilitating a dating relationship between R.G.'s girlfriend, T.R., and a male ward, including by passing notes between them, while telling R.G. that her relationship with T.R. is "disgusting," that she should let T.R. go to have a "normal" life, and that "this 'I love you' shit [between R.G. and T.R.] has got to stop. . . . If we wanted you to have relationships we'd bring the boys over," and attempting to break up their relationship by showing R.G. a note from T.R. to the male ward, resulting in R.G. and T.R.'s suicide attempts.

(3) Investigating other complaints made in the course of Mr. Haina's investigation but failing to investigate or respond to R.G.'s complaints to Mr. Haina of anti-gay harassment or to any of the many complaints filed by plaintiffs or on their behalf by medical staff.

(4) Punishing J.D. and C.P. by putting them in isolation rather than disciplining harassing staff and wards.

(5) Disciplining R.G. and T.R. for saying "I love you" to one another and prohibiting them from talking, writing or signaling to one another while permitting heterosexual wards and staff to talk graphically about their sexual relationships.

Overwhelming evidence demonstrates that this discriminatory treatment was motivated by defendants' disapproval of plaintiffs' actual or perceived LGBT status. *See Nabozny*, 92 F.3d at 457.

In addition, plaintiffs are likely to succeed based on their showing that defendants were "clearly unreasonable," *Flores*, 324 F.3d at 1135, when they

turned a blind-eye to pervasive and egregious sexual, physical and verbal peer and staff harassment, failed to respond to complaints from plaintiffs and medical staff, failed to discipline the perpetrators, failed to institute universal policies and procedures for protecting wards or specific policies and procedures for protecting LGBT wards, failed to train staff and ward regarding such policies, told plaintiffs that the harassment was their fault, and punished the victims by subjecting them to isolation. *See Nabozny*, 92 F.3d at 460 (citing failure to take action against perpetrators and rearrangement of victim's schedule to minimize exposure to offending students as evidence of deliberate indifference).

B. Defendants' Discrimination and Failure to Address Harassment Based on Sex Stereotypes Establish Deliberate Indifference

Sex stereotyping is a form of sex discrimination, whether the claim is for disadvantage based on sex stereotypes, *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40, 251 (1989), or harassment based on sex stereotypes, *see Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enters., Inc*., 256 F.3d 864, 874 (9th Cir. 2001) (calling plaintiff "she" and mocking him for "walking and carrying his tray 'like a woman'" constituted sex discrimination under Title VII because it reflected defendants' belief that plaintiff "did not act as a man should act").

Transgender people have an equal right to protection from discrimination based on sex stereotyping. *See Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (citation omitted) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination"); *Kastl v. Maricopa Cty. Cmty Coll. Dist.*, No. Civ. 02-1531-PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("The presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision"). Although the preceding cases involved statutory provisions, their reasoning is equally applicable to plaintiffs' constitutional challenge because the point they establish – that harassment based on sex stereotyping discriminates based on sex – stems from the concept of sex discrimination itself.

R.G., J.D. and C.P. all present evidence of staff and ward harassment based on sex stereotyping, including calling J.D. a "bitch" and a "wahine," [woman] repeatedly referring to R.G.'s feelings and non-sexual conduct as "butchie" "and mistreating C.P. in innumerable ways based on stereotypes about how boys and girls should act, dress, speak and identify. C.P. has been required to wear boys' clothing and denied a bra despite her need for one, humiliated and told not to put up her hair or play with the other girls, told that she is "really a boy," and forced to

live with the boys or in isolation. These actions caused plaintiffs severe physical and emotional harm.

Moreover, in light of defendants' facilitation and encouragement of a different-sex dating relationship between R.G.'s girlfriend and a male ward, R.G. is likely to succeed in challenging the discriminatory restrictions prohibiting her from talking or writing to her girlfriend and penalizing her for expression of her feelings for her girlfriend. *See Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Whitmire v. Arizona*, 298 F.3d 1134 (9th Cir. 2002), the Ninth Circuit found no "common-sense connection" between a regulation that applied more restrictive rules for displays of affection between gay inmates and their same-sex visitors than for others. *See* 298 F.3d 1146, 1136. Similarly, permitting wards to engage in different-sex relationships with other wards at HYCF and to talk graphically about sexual activity while attempting to break up R.G.'s same-sex relationship and penalizing her for saying "I love you," violates equal protection.

C. Defendants' Discrimination Is Not Rationally Related to Any Legitimate Governmental Interest

As in *Flores*, it is hard to imagine any government interest furthered by permitting rampant anti-LGBT harassment and sex stereotyping at HYCF. Defendants both abused plaintiffs themselves and failed to take remedial measures to address severe harassment by other wards. Without an injunction requiring prompt remedial action, plaintiffs will continue to live in fear because they

reasonably expect, based on past experience, that sooner or later they will be sent back to HYCF.

V. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR ESTABLISHMENT CLAUSE CLAIM

State officials preaching to wards from the Bible and making negative religious pronouncements about homosexuality violate the First Amendment's Establishment Clause, as does defendants' practice of allowing only Bibles in wards' cells, because such practices have the impermissible purpose and effect of endorsing religion. YCOs and other staff proselytized to R.G. regarding their religious beliefs, condemned R.G.'s sexual orientation based on a particular religious denomination's doctrine, and allowed no reading material or personal items other than a Bible in wards' cells. (R.G. Decl. ¶ 9, 10 ; C.P. Decl. ¶ 25; Perrin Decl. ¶¶8-9.) The religious views asserted by YCOs and other HYCF staff represent both a preference for religion and a denominational preference, as there are many religious denominations that do not condemn homosexuality and that welcome LGBT members and officiants.

Modern Establishment Clause jurisprudence centers on three tests: (1) the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); (2) the endorsement test from *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989); and (3) the coercion test from *Lee v. Weisman*, 505 U.S. 577, 580 (1992). The

Court may grant relief upon a finding that defendants' actions violate any of the three tests, *see, e.g.*, *Newdow v. United States Cong.*, 328 F.3d 466, 487 (9th Cir. 2002), *rev'd on other grounds*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), because defendants frankly endorse anti-gay religious views and attempt to coerce wards to conform to those views, and their challenged actions have no secular purpose.

"The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief," or "conveying . . . a message that a particular religion or belief is favored or preferred." (emphasis omitted). *County of Allegheny*, 492 U.S. at 593-94.

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 625 In the juvenile corrections context, where government power is at its apex, and youth are in the process of forming their identities (Ryan Decl. Ex. B.), endorsement of anti-gay religious views also sends the message to LGBT wards that they are outsiders who can be subjected to discrimination without repercussions, not only by other members of the community but by the government itself. (R.G. Decl. ¶ 5 ("I believe God says come as you are, so I am who I am. When Aunty Lani kept preaching to me about her anti-gay beliefs, which conflict

with mine, I . . . kept asking myself why I couldn't be normal like Aunty Lani said."); Bidwell Decl., ¶ 16, 17.)

In *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998), the Ninth Circuit considered an adult prisoner's Establishment Clause claim and held that a practice of condoning or failing to prevent known proselytizing or religious indoctrination by prison staff would violate the Establishment Clause, but that plaintiff in that case failed to make the requisite factual showing. *Id.*. ("state policy need not be formal, written, or approved by an official body to qualify as state *sponsorship* of religion"). Plaintiffs have presented evidence of just such a practice here, easily satisfying *Canell*. In *Canell*, officer training taught that preaching would unlawfully infringe rights of inmates, there was only one preaching employee, who was on duty for only 18 days and who was transferred after plaintiff complained, and there was no evidence that preaching was the custom of the facility or that supervisors endorsed preaching. *Id.* In contrast, HYCF's lack of appropriate operating policies, procedures and training permits YCOs to enforce informal policies and practices based on their individual religious views (DOJ Report 3-4.), several preaching YCOs singled R.G. out for conversion, and, most importantly, supervisory defendants knew about these policies and practices (Bidwell Decl. Ex. F, 5/12/05 letter; Perrin Decl. Exs. E-G), and ratified and endorsed them by ignoring complaints or taking inadequate steps to prevent further violation. (R.G.

Decl. ¶ 28; C.P. Decl. ¶ 39-41.) Moreover, Establishment Clause jurisprudence is especially protective of youth, recognizing that they are particularly susceptible to religious indoctrination. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992). .

VI. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR ACCESS TO COUNSEL CLAIM

The right of access to the courts is protected by due process and equal protection, *see ex parte Hull*, 312 U.S. 546, 551 (1941), *Murray v. Giarratano*, 492 U.S. 1, 6 (1989), and requires that prisoners be afforded "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds v. Smith*, 430 U.S. 817, 825 (1977), *overruled in part on other grounds*, 518 U.S. 343, 354 (1996). Prison officials must both eliminate undue barriers to inmate access and "shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Id.*. at 824 (holding provision of adequate libraries or adequate assistance from persons trained in the law would satisfy constitution and suggesting facilities should explore involvement of volunteer or legal services attorneys, law students, inmate paralegals, or public defenders).[3] For juveniles, courts have held that meaningful access to the courts requires access to counsel to allow children to assert violation of their civil rights related to their incarceration. *See John L. v. Adams*, 969 F.2d 228, 237 (6th Cir.

1992); *Cornett v. Donovan*, 51 F.3d 894, 898 (9th Cir. 1995); *Nami v. Fauver*, 82 F.3d 63 (3rd Cir. 1996).

HYCF violates the basic principle that states may not erect barriers to or intentionally interfere with access to the courts without a legitimate penological purpose. *See Lewis v. Casey*, 518 U.S. 343, 361 (1995). In light of the scathing reports concerning the unconstitutional and unduly punitive living conditions endured by the wards at HYCF for years, *Id.*, Exs. 1, 2, HYCF's efforts to block wards' access to counsel to assist them in challenging the conditions of their confinement patently violates their right of access to the courts.

Despite being on notice for years that HCYF is hindering access to the courts, defendants have failed to adopt a policy that ensures that wards have meaningful access. (FAC, Ex. A, 23.) Moreover, defendants have obstructed attempts by the ACLU of Hawaii and other counsel to talk with wards concerning their conditions of confinement. For example, since the ACLU of Hawaii issued its Report in 2003, HYCF began requiring written consent of parents and guardians to allow the wards to speak with the ACLU concerning the conditions, policies and practices at HYCF. (Perrin Decl. ¶ 12.) Additionally, following the release of the DOJ Findings Letter in August of 2005, Defendants further limited access to the

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[3] HYCF does not have law library at all, nor does it provide wards with any other form of legal assistance from volunteer or legal services attorneys, law students, or paralegals. (Perrin Decl. ¶ 11.)

wards. During the week of August 15, 2005, the ACLU received a message from plaintiff C.P., but Defendant Tufono-Iosefa refused to consent to an ACLU visit stating, "I have been directed that all requests for consent to see the kids must now go directly to the Attorney General's office." (Perrin Decl. ¶ 13.) During the week of August 15, 2005, two other wards, including plaintiff R.G., requested permission to call the ACLU. R.G's social worker denied this request stating, "No, I can't. There is a lot of shit going down right now," (R.G. Decl. ¶ 43) an apparent reference to the recent ACLU and DOJ investigations.

Defendants' denial of access to counsel frustrates the right to meaningful access to the courts. Because the wards are juveniles, they have little experience with the legal system and for many, their sentences are relatively short in nature. Plaintiffs seek to protect visits and access to counsel while they are confined at HYCF or in placements dictated by HYCF.

VII. PLAINTIFFS ARE THREATENED WITH IRREPARABLE HARM, THE BALANCE OF HARDSHIPS TIPS SHARPLY IN PLAINTIFFS' FAVOR AND A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

An "alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Absent injunctive relief, plaintiffs are threatened with irreparable harm in the form of unconstitutionally unsafe conditions, punitive isolation, discriminatory treatment and religious indoctrination.

The balance of hardships tips sharply in plaintiffs' favor, for defendants cannot seriously claim they will be harmed by an injunction that requires them to take appropriate measures to ensure ward safety and to refrain from punitive isolation, whereas plaintiffs have been driven to the brink of suicide by the abusive environment at HYCF.

Finally, protection of constitutional rights is a compelling public interest, *see United States v. Raines*, 362 U.S. 17, 27 (1960), and "weighs heavily in the balancing of harms, for the protection of those rights is not merely a benefit to plaintiff but to all citizens." *Int'l Society for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116, 125 (E.D. Cal. 1978).

VIII. NO SECURITY SHOULD BE REQUIRED.

Waiver or imposition of a minimal bond is appropriate under Fed. R. Civ. P. 65(c) where, as here, a public interest organization is enforcing public rights on behalf of plaintiffs with limited resources. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). If defendants ultimately are found to have been wrongly enjoined, any award of costs will be minimal. Plaintiffs request that the Court set the bond amount at zero, or, in the alternative, set a minimal bond of no more than $100.00.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be granted.

DATED: Honolulu, Hawaii, October 3, 2005.

Respectfully submitted,

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