

LGBT YOUTH IN JUVENILE COURT

PRACTICE TIPS FOR JUVENILE DEFENDERS

Hidden Injustice:
Representing LGBT Youth in Juvenile Court

THE
EQUITY
PROJECT



THE EQUITY PROJECT a unique collaboration initiative of organizations and individuals, was founded to ensure that lesbian, gay, bisexual and transgender (LGBT) youth in juvenile delinquency courts are treated with dignity, respect, and fairness. In 2009, The Equity Project released the groundbreaking report, *Hidden Injustice*, which examined issues impacting LGBT youth throughout the delinquency process, ranging from arrest through post-disposition, and put forth corresponding recommendations for juvenile justice professionals.

The information below, largely extracted from *Hidden Injustice*, provides tips for juvenile defenders to ensure the equitable treatment of their LGBT clients.

For more information, contact the Equity Project at info@equityproject.org

Advocate with a Client-Centered Approach

- Treat - and ensure others treat – all LGBT youth with fairness, dignity, and respect, including prohibiting any attempts to ridicule or change a youth's sexual orientation or gender identity.
- Effectively counsel clients about all legal options, potential advantages and disadvantages of each option, and to advocate in a manner that respects all clients, regardless of sexual orientation or gender identity.
- Zealously represent a client's expressed interests, which includes respecting the client's decisions about whether, how and to whom he/she chooses to disclose his/her sexual orientation and gender identity.
- Maintain up-to- date lists of LGBT-competent services, programs and placements, as well as those that have been unsupportive of LGBT youth in the past. Defenders should share this information with courts, probation officers, and prosecutors and advocate for those services and placements that are LGBT-competent and challenge those which are not.

Develop Meaningful Attorney-Client Relationships

- Inform youth of the attorney-client privilege and confidentiality and ensure that you will maintain client confidentiality accordingly. Specifically, explain that defenders are ethically bound to allow the client to decide whether to disclose his or her sexual orientation or gender identity in the course of the case.
- Explain that defenders need to know as much as possible about their clients to be able to advocate for their interests and convey a nonjudgmental attitude.
- Do not make assumptions about a youth's sexual orientation or gender identity. Avoid language that assumes anything about a youth's sexual orientation or gender identity. For example, rather than asking a youth "Do you have a boyfriend?" ask "Are you dating anyone?" or "Are you in a romantic relationship?"
- Signal affirmation of all sexual orientations or gender identities through posters, stickers, or other office displays that include LGBT youth.
- If a youth raises issues related to sexual orientation or gender identity, remain open and supportive.
- Ask youth what name they would like to be called and what pronoun they prefer. Defenders should call a young client by the name and pronoun preferred by that youth, even if it differs from the client's legal name.
- Remember that the youth is the gatekeeper of information pertaining to his or her sexual orientation and gender identity. Always ask his or her permission before revealing this information to others.¹

Interview Youth Prior to the Initial Hearing

- Defenders won't necessarily know that a youth is LGBT. Talk to youth without parents present in a setting that provides the greatest amount of privacy possible. Clearly explain and maintain attorney-client confidentiality.
- Find out if your client is afraid for her or his safety if detained and why.
- If your client was detained after arrest, ask if he or she was harassed or mistreated while in detention and investigate the circumstances.
- Ask about attendance and performance at school and obtain school records. If the youth is not attending school, ask why.
- Ask about the youth's home life. If the youth does not get along with her or his family, ask why.
- If your client tells you that he or she is LGBT, respond in a way that indicates that you will fully advocate for him or her. Ask your client who else knows his or her sexual orientation or gender identity and tell your client you will not reveal this information in court or elsewhere without his or her permission.
- If your client is transgender, ask what name and pronoun the youth uses and if the youth requests, ask the judge to use the youth's preferred name and pronoun. Discuss with the youth the advantages and disadvantages of wearing gender-nonconforming clothing during court hearings or while in placement in order to assist the youth in making an informed decision. Ask the youth about any hormones or other transition-related medications he or she is currently taking and ensure the youth receives them if detained or in any other placement.
- Inform the youth of his or her rights in detention and explain that he or she should contact you if he or she has problems

Prepare for the Initial Hearing

- If the youth's family is not accepting of her or his sexual orientation or gender identity and returning home is not an option, explore alternatives, such as the home of a relative or mentor or other appropriate placement. Investigate possible options before the hearing and support youths' connections to their extended families.
- Be familiar with risk-screening instruments, their potentially disparate impact on LGBT youth, and be ready to challenge the validity of such instruments.
- Keep informed about the conditions in the facilities in your jurisdiction, particularly as to whether facilities have policies of nondiscrimination based on sexual orientation and gender identity, treat all youth fairly, and engage in practices that ensure the safety of all youth.

Advocate During the Initial Hearing

- If you have your client's consent, educate the judge, if appropriate, about the high risk of abuse for LGBT youth in detention facilities and explain that transgender youth are particularly vulnerable to abuse.
- If your client does not want his or her parents or others to hear in court that he or she is LGBT but you think it is important for the judge to know, ask the judge to have a discussion in chambers.
- Challenge the application of risk criteria used to make detention decisions if they have a disparate impact on LGBT youth.
- Zealously argue for the least restrictive placement possible.
- Keep informed of alternatives to detention for LGBT youth and present these alternatives to the court at detention hearings.

Prepare for the Disposition Hearing

- Be familiar with community-based programs and resources that provide competent and nondiscriminatory services to LGBT youth.
- Explain all possible disposition options to your clients after adjudication and solicit input from the youth about the services with which he or she feels most comfortable.
- Request additional evaluations or expert witnesses if necessary to prepare for the disposition hearing.

Advocate During Disposition Hearing

- Inform the court of a clients' individual needs and expressed interests regarding treatment and placement alternatives.
- Zealously advocate against any placements that are not sensitive to LGBT youth or cannot keep LGBT youth safe.
- Present expert testimony and reports to challenge any recommendations for incarceration or other harmful treatment services that are not consistent with professionally accepted medical and mental health practices for LGBT youth.
- Recommend services and placements outside of the jurisdiction if there are no LGBT appropriate services available locally and if consistent with clients' expressed interests.

Respond to Bias in the Courtroom

- Immediately respond to jokes or other disrespectful comments about your client's actual or perceived sexual orientation or gender identity. Note your objection for the record.
- Challenge disproportionate and punitive juvenile court responses to consensual sexual conduct, particularly when based on gender, sexual orientation, or race.
- Advocate for youths' right to express their sexual orientation and gender identity in court, including requesting that court professionals address the client with their preferred name and pronoun, if so directed by client.
- Oppose assumptions made about the sexual activity of clients based on gender, sexual orientation, or race.
- Oppose introduction of evidence of sexual orientation or sexual conduct when not relevant or when used to punish or embarrass youth.
- Challenge assumptions that youth should be placed in secure facilities "for their protection."
- Cite research, expert testimony, and accepted professional standards that support fair treatment of LGBT youth.

Identify LGBT Competent Programs as those that:

- Do not make assumptions about the sexual orientation and gender identity of individual youth;
- Are designed with the understanding that at least some of the youth served will be LGBT;
- Do not rely on gender, race, or other stereotypes but make individualized assessments of the strengths and needs of each client;
- Unequivocally prohibit any attempts to change a youth's sexual orientation and gender identity;
- Adopt and enforce non-discrimination policies;
- Implement protocols that maintain confidentiality of information regarding youths' sexual orientation and gender identity;
- Require training of all service providers on issues related to sexual orientation and gender identity;
- Address developmental, physical, social and emotional concerns of LGBT youth;
- Understand and address the impact of societal bias on LGBT youth development;
- Provide LGBT youth with help in addressing issues of family rejection, school harassment, and societal stigma.; and
- Provide support to families of LGBT youth or refer families to appropriate programs.

Protect the Rights of LGBT Youth in Out of Home Placement

- LGBT youth should not be isolated, even if meant for their safety, as this practice violates the constitutional right to be free from unreasonably restrictive confinement. The law requires that facilities employ less stigmatizing responses to address the risk of violence rather than just isolating LGBT youth.²
- Confined youth have a constitutional right to be free from physical, emotional and sexual abuse.³
- Confined youth have a right to receive adequate medical and mental healthcare and nondiscriminatory treatment.⁴ For instance, transgender youth diagnosed with Gender Identity Disorder (“GID”) must receive appropriate health care, including continued hormone therapy, to address their needs while detained. (See forthcoming Equity Project issue brief on transgender healthcare for youth in the juvenile justice system).⁵
- All juveniles have a right to equal protection under the law while they are confined. Juvenile justice professionals must provide services and fair and equal treatment to all youth, including LGBT youth. LGBT youth may not be refused services or programs because of their sexual orientation or gender identity, nor should they be treated differently from other youth engaged in the program or residing at the facility. For instance, facility staff should not isolate LGBT youth for their protection, should not ignore LGBT-related violence or victimization, and should not move LGBT youth from one placement to another because of harassment without first addressing the problematic behavior.⁶
- All juveniles have the right to freedom of speech and expression, which includes the right to be open about one’s sexual orientation and the right to express one’s gender identity through clothing, accessories, and grooming.⁷

NOTES

¹ Some defender offices regularly inquire about sexual orientation and gender identity on client intake forms. This can be an effective practice in offices that regularly train their staff on LGBT-related issues. It is important to understand, however, that many youth are not comfortable coming out to others with whom they have not yet developed a trusting relationship.

² See *R.G. v. Koller*, 415 F. Supp.2d 1129, 1157 (D. Haw. 2006) (finding the state facility's use of isolation to protect LGBT wards was not within the range of acceptable professional practices and constituted punishment in violation of their due process rights).

³ *Youngberg v. Romeo*, 457 U.S. 307 (1982); *R.G. v. Koller*, 415 F.Supp.2d at 1157 (D. Haw. 2006); *A.M. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 579 (3rd Cir. 2004).

⁴ *Burton v. Richmond*, 276 F.3d 973 (8th Cir. 2002); *Jackson v. Johnson*, 118 F. Supp. 2d 278, 289 (2000); *Alexander S. v. Boyd*, 876 F. Supp. 773, 788-789 (D.S.C. 1995), *aff'd in part and rev'd in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998).

⁵ LGBTQ youth who have unique health care needs also have a right to health care. *A.M. v. Luzerne County Juvenile Detention Center*, 372 F.3d at 584-85 (3rd Cir. 2004).

⁶ See *R.G. v. Koller*, 415 F.Supp.2d 1129 (D. Haw. 2006).

⁷ *Henkle v. Gregory*, 50 F. Supp.2d 1067 (D. Nev. 2001) (allowing claims under Title IX for discrimination and harassment by other students and under First Amendment based on demands by school officials that student keep his sexual orientation to himself).

EQUITY PROJECT PARTNERS

Legal Services for Children (LSC)

was founded in 1975 as one of the first non-profit law firms in the country to provide free legal representation and social work services to children and youth. LSC's mission is to ensure that all children and youth in San Francisco Bay Area have an opportunity to be raised in a safe environment with equal access to a meaningful education and the services and supports they need to become healthy and productive young adults. LSC represents children and youth in cases that include legal guardianship, dependency, school discipline, immigration, emancipation, and restraining order proceedings.

The National Center for Lesbian Rights (NCLR)

is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. NCLR litigates precedent-setting cases at the trial and appellate court levels; advocates for equitable public policies affecting the LGBT community; provides free legal assistance to LGBT people and their legal advocates; and conducts community education on LGBT legal issues

National Juvenile Defender Center (NJDC)

was created to respond to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. To ensure excellence in juvenile defense and promote justice for all children, NJDC provides support to public defenders, appointed counsel, law school clinical programs and non-profit law centers while offering a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

VISION

The Equity Project envisions a just and rehabilitative delinquency system that treats every young person with dignity, respect and fairness, regardless of sexual orientation or gender identity

MISSION

The Equity Project ensures that lesbian, gay, bisexual, and transgender youth in delinquency courts remain safe and receive fair and equitable treatment. Through collaboration, research, leadership development, training, technical assistance, and policy advocacy, the Equity Project provides delinquency court professionals with the knowledge to integrate developmentally appropriate and culturally competent approaches into training, policy, and practice.

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