

## **Chapter 10**

# **Recommendations for Guaranteeing Due Process and Improving Outcomes for Court-Involved Youth**

Despite the outstanding work of many dedicated juvenile justice system professionals who have tirelessly advocated on behalf of LGBT youth, many LGBT youth across the country continue to face bias, harassment, and unfair treatment throughout the course of their delinquency cases. In addition, many well-meaning juvenile justice professionals lack an understanding of the unique challenges confronting LGBT youth, which limits their ability to fulfill their professional and ethical responsibilities.

Collaborative action is needed to address the systemic deficiencies that undermine fairness and equity for LGBT youth in the nation's juvenile courts. By implementing practice and policy reforms, individuals and jurisdictions can protect the due process rights of LGBT youth in juvenile courts, divert as many youth as possible out of the juvenile justice system, and meet the individualized treatment and rehabilitative needs of adjudicated youth. The recommendations set forth in this chapter are intended to guarantee due process protections and improve outcomes for all court-involved youth generally, and for LGBT youth, in particular.

### **Core Recommendations**

The following core recommendations are designed to enhance the capacity of juvenile justice professionals to work effectively with LGBT youth. To help ensure the rights of LGBT youth and meet their rehabilitative needs in delinquency and status offense cases, the Equity Project recommends the following:

1. Juvenile justice professionals (including judges, defense attorneys, prosecutors, probation officers, and detention staff) must 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.
2. Juvenile justice professionals must promote the well being of transgender youth by allowing them to express their gender identity through choice of clothing, name, hairstyle, and other means of expression and by ensuring that they have access to appropriate medical care if necessary.
3. Juvenile justice professionals must receive training and resources regarding the unique societal, familial, and developmental challenges confronting LGBT youth and the relevance of these issues to court proceedings. Trainings must be designed to address the specific professional responsibilities of the audience (i.e., judges, defense attorneys, prosecutors, probation officers, and detention staff).

4. Juvenile justice professionals must develop individualized, developmentally appropriate responses to the behavior of each LGBT youth, tailored to address the specific circumstances of his or her life.
5. All agencies and offices involved in the juvenile justice system (including courts, as well as prosecutor, defender, and probation offices, and detention facilities) must develop, adopt, and enforce policies that explicitly prohibit discrimination and mistreatment of youth on the basis of actual or perceived sexual orientation and gender identity at all stages of the juvenile justice process, from initial arrest through case closure.
6. Juvenile courts must commit to using the least restrictive alternative necessary when intervening in the lives of youth and their families and avoid unnecessary detention and incarceration.
7. Juvenile courts must collaborate with other system partners and decision makers to develop and maintain a continuum of programs, services, and placements competent to serve LGBT youth, ranging from prevention programs to alternatives to detention to nonsecure and secure out-of-home placements and facilities. Programs should be available to address the conflict that some families face over the sexual orientation and gender identity of their LGBT child.
8. Juvenile justice professionals and related stakeholders must ensure adequate development, oversight and monitoring of programs, services, and placements competent to serve LGBT youth.
9. Juvenile courts must ensure the timely appointment of qualified and well-resourced counsel to provide zealous defense advocacy at all stages of delinquency proceedings.
10. Juvenile justice professionals must take responsibility for protecting the civil rights, and ensuring the physical and emotional well being and safety, of LGBT youth placed in out-of-home placements.
11. Juvenile justice professionals must adhere to all confidentiality and privacy protections afforded LGBT youth. These protections must prohibit disclosure of information about a youth's sexual orientation and gender identity to third parties, including the youth's parent or guardian, without first obtaining the youth's consent.

## **Strategies for Reform**

Each stakeholder within the juvenile justice system has responsibility for implementing practice and policy reforms to ensure that all youth, including LGBT youth, are treated with dignity, fairness, and respect. Depending on the particular role of the professionals within the system, however, the specific strategies for reform will vary. The strategies below are directed toward particular categories of professionals within the juvenile justice system, based on their specific duties.

### **Juvenile Courts, Judges and Bench Officers**

### **Support the creation of a continuum of community-based, LGBT-competent resources**

- Ensure that all court-based services such as mental health programs, drug or alcohol abuse services, and status offender programs, provide effective and nondiscriminatory services to LGBT youth.
- Keep informed of community-based programs and resources (including diversion program, out-of-home placements, and aftercare services) that are equipped to work with LGBT youth and provide effective nondiscriminatory services. Ensure that defense attorneys, prosecutors, and probation officers are familiar with these resources as well.
- Require mental health professionals with whom the court contracts to obtain training in competently providing services to LGBT youth.

### **Insist on decorum and respect in the courtroom**

- Ensure that all professionals, regardless of their personal views, treat LGBT youth with dignity and respect in court. Immediately respond to instances of discrimination, including comments made in court that belittle, ridicule, or otherwise demonstrate bias towards LGBT youth.
- Where applicable, indicate on court documents a transgender youth's preferred name along with the legal name.

### **Adhere to constitutional and statutory due process provisions**

- Ensure the timely appointment of well-resourced, qualified counsel to represent LGBT youth at all stages of a delinquency cases.
- Conduct all judicial colloquies using developmentally appropriate language and insist that any waivers of rights by youth meet the knowing, voluntary, and intelligent standard.

### **Reduce the over-reliance on detention and incarceration**

- Make detention decisions based on appropriate legal standards (i.e., risk of dangerousness or flight). In cases in which these standards are not met but returning home is not an option, explore viable alternatives to detention.
- Support the creation of alternatives to detention that will keep LGBT youth in their communities with the lowest level of supervision necessary, such as informal daily reporting centers, curfews, placement in foster homes, or counseling.
- Where applicable, participate with other stakeholders on committees that develop or adopt screening tools used to make detention decisions. Any such tools must be based on objective, evidence-based factors and should not have a disparate impact on LGBT youth.

## **Juvenile Defense Attorneys**

### **Provide client-centered defense advocacy throughout the duration of each case**

- Zealously represent the child's expressed legal interests, after counseling the client to understand the benefits and drawbacks that could accompany any particular course of action.

This includes respecting the clients' decisions about whether, how, and to whom they choose to disclose their sexual orientation and gender identity.

- Provide comprehensive representation throughout the duration of the case, including but not limited to representation at the initial and detention hearings, pre-adjudicatory motions hearings, adjudication, disposition, and post-disposition. To provide effective representation, defenders must carry reasonable caseloads, and have access to support staff, investigators, experts, and social workers to assist with case investigation and preparation. Moreover, the court must appoint counsel at the earliest stage of cases, and representation must continue through the post-disposition phase.
- Maintain up-to-date lists of LGBT-competent services in the jurisdiction, as well as programs or placements that have been unsupportive of LGBT youth. Share this information with courts, probation officers, and prosecutors. Advocate for those services and placements that are LGBT-competent and against those which are not.

#### **Develop meaningful lawyer-client relationships**

- Establish a meaningful, trusting relationship with clients and assure the youth of the confidential nature of the attorney-client relationship. Successful attorney-client relationships can only be built if defenders spend—and are afforded—sufficient time with clients.
- Be aware of personal biases regarding race, ethnicity, class, immigration status, sexual orientation, and gender identity. Defenders should not allow these biases to negatively influence the representation of clients.

#### **Juvenile Prosecutors**

##### **Ensure fair prosecution**

- In addition to training on LGBT issues for all staff in the prosecutor's office, such as investigators, paralegals, social workers, disposition specialists, police liaisons, and anyone who may interview complainants, receive training on how to identify hate-based offenses against LGBT youth, including those perpetrated by family members.
- Consider the risk factors associated with adolescent LGBT identities when deciding whether to divert, dismiss, or petition a case, assessing culpability, and making disposition recommendations.
- Develop LGBT-competent diversion programs and resolve cases outside the formal court process to the extent possible.

#### **Juvenile Probation Agencies and Officers**

##### **Ensure fair case processing**

- Consider sexual orientation and gender identity when making disposition recommendations to ensure that youth are not placed in programs that are damaging to them, and instead are placed in programs and provided services that appropriately address their individual concerns.

- Explore possible alternatives to detention and incarceration and recommend the least restrictive disposition necessary in each case.
- For youth alleged to have violated probation conditions, thoroughly explore the reasons for the behavior and consider whether harassment or abuse associated with sexual orientation or gender identity have contributed to the behaviors before asking the court to revoke probation.

#### **Ensure services and programs provided to youth are LGBT-competent**

- Support the creation of a continuum of community-based, LGBT-competent programs, including diversion programs.
- Require that all contracts with community-based providers and other governmental agencies specifically include LGBT-competent services and prohibit discrimination against LGBT youth.
- Address family conflicts by providing services to families struggling to accept the sexual orientation or gender identity of youth. Secure funding for community-based, LGBT-sensitive conflict resolution programs and counseling services to resolve family conflicts.

#### **Detention and Other Secure Facilities**

##### **Ensure the safety and respect of youth**

- Prohibit, and swiftly respond to, the verbal, physical, and sexual abuse of LGBT youth by staff and other youth. Create a culture of respect for all youth within the facility. (*See also “Practice Tips: Preventing Harassment in Secure Facilities” in Chapter 8.*)
- Provide a written explanation of the facility’s nondiscrimination policies (once adopted) to youth when they enter facility.
- Gather data on the number of LGBT youth in detention and their experiences to assess youth needs through anonymous surveys or other measures that will protect privacy and confidentiality.
- Provide LGBT-competent programming and services within facilities. Do not attempt to change a youth’s sexual orientation or gender identity, punish youth for expressing sexual orientation or gender, or require youth to undergo sex offender counseling based solely on the youth’s sexual orientation or gender identity.

##### **Make appropriate and individualized housing decisions**

- Develop policies and protocols regarding the appropriate housing and classification of LGBT youth in facilities. Develop and implement evidence-based intake processes to identify youth who are vulnerable to physical and sexual assault for purposes of classification. Utilize LGBT-competent health and mental health screening tools.
- Insist on individualized classification and housing decisions. Prohibit blanket policies regarding the housing of LGBT youth, or those perceived to be LGBT, including policies that allow for the automatic housing of transgender youth according to their birth sex. Prohibit placement of LGBT youth, based solely on their sexual orientation or gender identity, in sex-offender units or with violent or sexually aggressive youth.

- Develop responses to abuse or harassment (or threat of abuse or harassment) of LGBT youth that do not rely on the isolation or segregation of LGBT youth. Place vulnerable youth in the least restrictive environment necessary to ensure safety and provide the youth with equal access to facility services.

#### **Provide adequate oversight and advocacy**

- Remove any barriers that impede access to counsel for youth in the facility.
- Develop grievance procedures regarding complaints related to discrimination, harassment, and physical or sexual abuse. Investigate and provide meaningful follow-up on all complaints. Track complaints in a manner that identifies the sexual orientation and gender identity of the alleged victim and abuser while ensuring confidentiality of this information.

#### **Provide appropriate medical care**

- Provide all youth with access to quality medical care. Ensure access to medical personnel who are knowledgeable about the particular health needs of transgender youth. Continue to provide all transition-related medical treatments that transgender youth started prior to entering the facility. Provide any necessary authorization for the initiation of transition-related treatments when they are medically necessary according to accepted professional standards.
- Engage health and mental health professionals in monitoring the well being of LGBT youth, advocating on their behalf, and taking steps to ensure their safety in facilities. Medical staff should ask all youth about safety, both in the facility and the youth's homes. Medical staff should routinely ask about sexual activity, sexual orientation, and gender identity of all youth.
- Provide counseling services that address self-acceptance and validation, concerns about disclosure of sexual orientation or gender identity, family relationships, healthy intimate relationships, and sexual decision making.

#### **Bar Associations**

State and local bar associations should:

- Pass resolutions supporting legislative and policy changes that will improve the system's response to LGBT youth (such as the adoption of nondiscrimination policies by justice system agencies, enactment of legislation that rolls back punitive responses to minor misbehavior, and the creation of a continuum of care for all youth, including LGBT youth).
- Host continuing legal education events, and develop subcommittees to address issues related to LGBT youth in the juvenile justice system.

#### **LGBT Advocates and Juvenile Justice Advocates**

LGBT and juvenile justice advocates should work together to:

- Ensure that local juvenile justice systems implement the recommendations provided in this report. Pursue litigation and policy advocacy when necessary to ensure the fair and respectful treatment of LGBT youth in the juvenile justice system.
- Advocate for the enactment of legislation that would address the criminalization of adolescent sexual behavior. This includes advancing policies that (1) respond to juveniles engaged in prostitution with social services rather than criminal sanctions; (2) address out-dated age of consent laws that expose adolescents to sanctions for engaging in consensual sexual behavior with other adolescents; and (3) exempt juveniles from harmful sex offender registration and community notification laws.
- Educate law enforcement personnel about the particular issues facing LGBT youth to ensure respectful treatment and prevent police profiling of LGBT youth as prostitutes and unnecessary arrests.
- Encourage professional organizations, such as the American Academy of Pediatrics, the National Commission on Correctional Health Care, the National Council of Juvenile and Family Court Judges, and the American Bar Association, to take supportive positions on LGBT issues.

### **Policy Makers**

- Ensure the passage of nondiscrimination laws that specifically address actual or perceived sexual orientation and gender identity.
- Establish an independent ombudsperson or similar oversight program for secure facilities that is not administered by the same agency that oversees the institutions.
- Ensure that a continuum of community-based, LGBT-competent programs is available and properly funded.
- Develop status offender systems that treat at-risk youth outside the court system and provide them and their families with culturally-competent community-based services.
- Eliminate zero tolerance laws and require that schools provide interventions to improve student behavior before referring to juvenile court except for most serious criminal offenses. Pass legislation giving schools incentives and resources to develop such interventions.