

**Representing Lesbian, Gay, Bisexual, Transgender, Queer, or Questioning
(LGBTQ) Youth in Juvenile Court**

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LGBTQ Youth in Juvenile Court: Introduction

Although there are few if any reliable statistics concerning lesbian, gay, bisexual, transgender, queer, or questioning (LGBTQ), child welfare and juvenile justice systems report that LGBTQ youth are disproportionately represented in child welfare and juvenile justice facilities.¹ Therefore, in an effort to help defense counsel better understand the experiences of LGBTQ youth involved in the juvenile justice system, this document provides a compilation of recent research regarding sexual orientation and gender identity, describes the obstacles faced by LGBTQ youth prior to entering and upon entering the juvenile justice system, and suggests best practices and strategies for defense counsel representing LGBTQ youth.

When representing youth in juvenile court, it is helpful to be aware of the following definitions and research regarding sexual orientation and gender identity:

- ❖ First, although “LGBT” is an acronym for “lesbian, gay, bisexual, and transgender, often used to refer to individuals whose sexual orientation is not heterosexual or whose gender identity is considered non-conforming, using the acronym “LGBTQ” includes those persons considering themselves “queer” and “questioning” as well.² While “queer” was traditionally used as a derogatory word, there has been an attempt to reclaim the word as an affirmative social and political identity, and at times as a more inclusive term for all LGBT persons.³ Furthermore, “questioning” refers to the process in which a person explores sexual orientation or gender identity and questions cultural assumptions that he or she is heterosexual and/or gender conforming.⁴
- ❖ Moreover, “sexual orientation” refers to a person’s emotional, romantic, and sexual attraction, to persons of the same sex or of a different sex.⁵ Many youth recognize that they are lesbian, gay, or bisexual long before they become sexually active.⁶ According to a recent study of LGBTQ youth,⁷ the common age of same-sex attraction is around 10, but lesbian and gay youth are identifying themselves, on average, at 13.4, and several self-identified between 5 and 7 years of age.⁸
- ❖ Similarly, “gender identity,” a person’s internal, deeply felt sense of being male or female, apart from the person’s sex at birth, is established at an early age, usually by age 3.⁹ Many youth at first identify as lesbian or gay before they identify as transgender, which in the same study occurred between 13 and 16 years of age.¹⁰ However, not all transgender

¹ SHANNAN WILBER ET AL., CWLA BEST PRACTICE GUIDELINES: SERVING LGBT YOUTH IN OUT-OF-HOME CARE, 16 (2006).

² KATAYOON MAJD ET AL., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS, 124 (2009).

³ *Id.*; Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L. J. 774, 779 (2006).

⁴ *Id.*

⁵ *Id.*

⁶ C. RYAN ET AL., FAMILY RESPONSES AS A SOURCE OF RISK & RESILIENCY FOR LGBT YOUTH, PAPER PRESENTED AT THE CHILD WELFARE LEAGUE OF AMERICA PRECONFERENCE INSTITUTE (2005).

⁷ *Id.*

⁸ SHANNAN WILBER ET AL., *supra* note 1, at 16.

⁹ KATAYOON MAJD ET AL., *supra* note 2, at 11. SHANNAN WILBER ET AL., *supra* note 1, at 2.

¹⁰ C. RYAN ET AL., *supra* note 6. SHANNAN WILBER ET AL., *supra* note 1, at 16.

youth are gay, lesbian, or bisexual.”¹¹ In some cases, transgender youth may be diagnosed with Gender Identity Disorder (GID), a medical condition wherein persons experience high levels of distress because they have a strong persistent desire to be a different sex and a persistent discomfort with the sex they were born.¹² For many of these youth, treatments, such as counseling, hormone therapy, and sex reassignment surgery are medically necessary.¹³

LGBTQ Youth in Juvenile Court: An Overview

Research indicates that LGBTQ juveniles, as well as young people who are perceived to be LGBTQ, face a number of obstacles, both before and after entering the juvenile justice system, due to stigma and discriminatory practices as indicated below.¹⁴

- ❖ LGBTQ youth commonly experience stress, depression, and anxiety due to threatened exposure before they are ready to reveal their sexual orientation or gender identity, harassment, discrimination, and abuse.¹⁵ This leads to a higher risk of suicide ideation and attempts among LGBTQ youth.¹⁶
- ❖ According to a study on family acceptance and rejection of LGBTQ youth, 42% of the LGBTQ youth in out-of-home settings were either removed or thrown out of their homes because of conflict concerning their LGBTQ identity.¹⁷ Agencies placed one-third of the youth in foster care or juvenile justice facilities due to behavior disorders, drugs, or violence within the family, while the others entered care because of family dysfunction, abuse, and neglect, and as status offenders following truancy because they were afraid to attend school due to bullying.¹⁸
- ❖ A number of LGBTQ youth enter state care after being arrested and charged with a sex offense for engaging in consensual sexual conduct or relationships with same-sex partners.¹⁹ Frequently, the motivation for filing criminal charges comes from a parent who finds same-sex encounters abhorrent and is adamant in characterizing his or her child as a victim instead of a participant in the sexual encounter.²⁰ At other times, school or juvenile justice facility staff who discover a youth in a same-sex relationship may feel obligated to identify a perpetrator, and then to file criminal charges. Therefore, in many cases, the same type of conduct would not necessarily result in arrest or prosecution if the youth involved were of the opposite sex.²¹ Adjudication for a sex offense is detrimental to youth because being labeled and treated as a sex offender can cause psychological

¹¹ JODY MARKSAMER, ET AL., A PLACE OF RESPECT: A GUIDE FOR GROUP FACILITIES SERVING TRANSGENDER AND GENDER NON-CONFORMING YOUTH, 11 (2011).

¹² KATAYOON MAJD ET AL., *supra* note 2, at 165.

¹³ *Id.*

¹⁴ *Id.* at 11.

¹⁵ SHANNAN WILBER ET AL., *supra* note 1, at 55.

¹⁶ *Id.*

¹⁷ See Ryan, C., & Diaz, R., *supra* note 6; SHANNAN WILBER ET AL., *supra* note 1, at 4.

¹⁸ See Ryan, C., & Diaz, R., *supra* note 6; SHANNAN WILBER ET AL., *supra* note 1, at 4.

¹⁹ SHANNAN WILBER ET AL., *supra* note 1, at 5.

²⁰ *Id.*

²¹ *Id.*

problems for LGBTQ youth who have not committed a sex offense.²² Additionally, labeling a youth as a sex offender can have severe collateral consequences, including sex offender registration, exclusion from employment or volunteer work involving children, and denial of legal residency or citizenship status.²³

- ❖ In many juvenile justice facilities, LGBTQ youth who were neither alleged to have committed nor adjudicated of a sex offense are housed in sex-offender units because identifying as LGBTQ is erroneously perceived as being the same as having a “sexual problem.” This practice places youth who are more susceptible to harassment and bullying with youth identified as predators, thereby creating a higher probability of harm.²⁴
- ❖ In some juvenile justice facilities, LGBTQ youth are wrongfully segregated “for their protection,” and deprived of educational, programming, and recreational opportunities in violation of their constitutional rights.²⁵ This practice punishes defenseless youth at their most vulnerable time.
- ❖ LGBTQ youth in juvenile justice facilities cope with harassment and physical assault, and even report sexual assault by staff and other youth in these facilities.²⁶ This notion is not surprising given a recent report by the Bureau of Justice Statistics, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008 – 2009*, which indicated that the victimization rate among all juveniles, including victimization by other youth and facility staff was 33.3% at one facility in North Carolina, making it one of six facilities nationally with a rate above 30%.²⁷

LGBTQ Youth in Juvenile Court: Best Practices & Strategies for Defense Counsel

To better address the obstacles LGBTQ youth are facing, recent research and case law provides the following best practices and strategies for defense counsel.

- ❖ **Client Interviews:** Before beginning client interviews, explain the purpose of the interview to the youth, and provide an overview of confidentiality laws.²⁸ Defense counsel should remember that identifying a youth as LGBTQ is not necessarily apparent from an interview. Avoid making assumptions about the youth based on his or her physical appearance or behavior.²⁹ Also, remember that the youth may never disclose his or her sexual orientation or gender identity because his or her family may not be aware, and therefore this may affect the information the youth provides to you.³⁰

²² *Id.* at 56.

²³ *Id.* at 5.

²⁴ *Id.* at 48.

²⁵ *Id.* at 48. In 2006, in *R.G. v. Koller* (415 F. Supp. 2d 1129), the federal district court found that isolating LGBTQ youth in Hawaii’s youth correction facilities for their protection and failing to protect them from abuse as well as harassment violated the due process rights of the youth. SHANNAN WILBER ET AL., *supra* note 1, at xiii.

²⁶ SHANNAN WILBER ET AL., *supra* note 1, at 6.

²⁷ ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008 – 2009*, 5 (2010).

²⁸ JODY MARKSAMER ET AL., *supra* note 11, at 34; SHANNAN WILBER ET AL., *supra* note 1, at 6.

²⁹ KATAYOON MAJD ET AL., *supra* note 2 at 124.

³⁰ Barbara Fedders, *supra* note 3, at 802.

- Generally, it is not appropriate to ask a direct question about sexual orientation or gender identity as part of an initial interview or assessment.³¹ However, consider having something visible in your office that signifies support of all sexual orientations or gender identities such as posters or stickers as this may encourage the youth to open up about his or her sexual orientation or gender identity if he or she wants to do so.³²
 - Help the youth feel safe enough to disclose information about himself or herself. Talk to the youth in a private setting without the parents present.³³ Begin with noncontroversial questions that help establish a rapport. Ask about the youth’s home and school environments, and whether the youth feels unsafe in any of his or her environments.³⁴ If the youth was detained, ask whether there was any harassment or mistreatment, including harassment aimed at him or her due to actual or perceived sexual orientation or gender identity.³⁵
 - During the interview, remember to use inclusive language. For example, rather than asking a youth “Do you have a boyfriend?” ask “Are you dating or in a relationship with anyone?”³⁶ Reiterate to the youth that the information regarding his or her sexual identity is confidential, and that you will not reveal it without his or her permission.³⁷
 - If the youth is transgender, determine which name and pronoun the youth prefers. Discuss the benefits and obstacles associated with wearing gender-nonconforming clothing during court proceedings and in placement, but allow the youth to express himself or herself through their chosen clothing, hairstyles, and mannerisms.³⁸ Become knowledgeable of any hormones or related medications the youth is taking so that you can help ensure that he or she receives them when placed or detained.³⁹
 - If the youth indicates that he or she is not able to return home during the interview, help the juvenile by recommending alternative placements or other safe alternatives.
- ❖ **Charging Decisions:** When it comes to charging decisions, defense counsel should realize the potential for discriminatory charges against LGBTQ youth. For instance, LGBTQ youth are more likely to be charged with sex offenses when engaging in consensual sexual conduct than youth with same-sex partners.⁴⁰
- If the youth is facing discriminatory or inappropriate charges, consider moving to dismiss the charges on constitutional and statutory grounds.⁴¹ One successful case in this area was *State v. Limon* (280 Kan. 275, 122 P.3d 22 (2005)), wherein the Kansas Supreme Court struck down a state statute that imposed a more severe

³¹ SHANNAN WILBER ET AL., *supra* note 1, at 36.

³² KATAYOON MAJD ET AL., *supra* note 2, at 131.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ SHANNAN WILBER ET AL., *supra* note 1, at 36-37.

³⁷ KATAYOON MAJD ET AL., *supra* note 2, at 124.

³⁸ Barbara Fedders, *supra* note 3, at 801; JODY MARKSAMER ET AL., *supra* note 11, at 32.

³⁹ KATAYOON MAJD ET AL., *supra* note 2, at 124; SHANNAN WILBER ET AL., *supra* note 1, at 57.

⁴⁰ KATAYOON MAJD ET AL., *supra* note 2, at 118.

⁴¹ SHANNAN WILBER ET AL., *supra* note 1, at xiii.

punishment for voluntary sexual conduct between youth of the same sex than the punishment imposed for voluntary sexual conduct between youth of the opposite sex.⁴² Under the state statute, the youth was sentenced to 206 months, and served 4 years before the Kansas Supreme Court struck down the statute.⁴³ If the sexual contact had involved a youth of the opposite sex, the imprisonment range would have been between 13 and 15 months.⁴⁴

- Make the court aware of the issues that lead youth into the juvenile justice system, such as probation violations for school discipline issues due to harassment at school or runaway behavior due to rejection at home, as this strategy may provide support for the argument that the case is better handled outside the court system.⁴⁵ Utilize recent research such as a study from 2001 that indicated that 30% of youth are physically abused at home upon coming out to parents.⁴⁶ Another study from 2003 revealed the difficulties LGBTQ youth experienced at school. According to the study of LGBTQ youth between 13 and 20 years of age, 90% of the youth heard homophobic remarks at school on a frequent basis; approximately 20% heard such remarks from faculty or staff; 75% reported feeling unsafe at school because of sexual orientation or gender identity; nearly 20% reported some experience of physical assault because of sexual orientation; over 10% indicated physical assault because of their expressed gender identity; and over 50% of the youth reported that their property had been intentionally vandalized or stolen within the past year.⁴⁷

❖ **Detention Hearings:** As part of advocating for LGBTQ youth, defense counsel should work to ensure that they are not placed in detention facilities with abusive or discriminatory practices.⁴⁸ When possible, determine the source of such institutional bias, and collaborate to find a solution that is not harmful to the youth.⁴⁹

- Familiarize yourself with risk-screening instruments and the potential for disparate impact on LGBTQ youth.⁵⁰
- Be knowledgeable about current research concerning the harmful effects of detention for LGBTQ youth.⁵¹ If the youth consents, consider educating the judge, where appropriate, about the risk of abuse for LGBTQ youth in detention facilities.⁵² If the youth does not want his or her parents or others in the courtroom to hear that he or she is LGBTQ, but you think it is important for the judge to know and the youth consents, request to discuss this information with the

⁴² *Id.*

⁴³ Barbara Fedders, *supra* note 3, at 798.

⁴⁴ *Id.*

⁴⁵ Barbara Fedders, *supra* note 3, at 791, 802; SHANNAN WILBER ET AL., *supra* note 1, at xiii.

⁴⁶ Barbara Fedders, *supra* note 3, at 785.

⁴⁷ Barbara Fedders, *supra* note 3, at 790.

⁴⁸ Majd, Katayoon (National Juvenile Defender Center), *supra* note 2, at 119.

⁴⁹ Barbara Fedders, *supra* note 3, at 802-803.

⁵⁰ KATAYOON MAJD ET AL., *supra* note 2, at 123.

⁵¹ *Id.*

⁵² *Id.*

judge in chambers.⁵³ Also, remember that in some cases, the youth may wish not to inform the judge of information regarding his or her sexual orientation or gender identity believing such disclosure will result in isolation or open him or her up to abuse by staff.⁵⁴

- If the youth is transgender, ask the judge to use the youth's preferred name and pronoun if the youth requests.⁵⁵ If the transgender youth is currently taking any hormones or related medications, ensure that he or she receives them while detained.⁵⁶
- If appropriate, inform the court that when placing transgender youth, research indicates that in most cases, the best practice is to accommodate the youth by placing or housing them according to their current gender identity, and not their anatomical sex while providing additional privacy for showering and sleeping to reduce the vulnerability to violence and harassment.⁵⁷ Research that transgender youth, specifically those diagnosed with gender identity disorder (GID), should also be allowed to wear the clothing and hairstyles associated with their gender identity while in placement has also been validated by a 2003 New York decision.⁵⁸ In the case, *Doe v. Bell*, (194 Misc. 2d 774, (Sup. Ct. N.Y. County 2003)), a young transgender woman diagnosed with GID, won a lawsuit against the New York City Administration for Children's Services requiring the agency to permit her to wear female attire in the boys' group home.⁵⁹ The court ruled that "because gender identity is a disability, allowing Doe to dress in 'girls' clothes was a reasonable accommodation mandated by the state's disability antidiscrimination statute."⁶⁰
- As a number of LGBTQ youth are being arrested and charged with a sex offense for engaging in consensual sexual conduct or relationships with same-sex partners, defense counsel should work to ensure that LGBTQ youth are not placed in sex offender treatment programs simply because of their sexual orientation or sexual identity. Emphasize to the court that this practice is psychologically damaging and may have other collateral consequences.⁶¹
- Remember to inform the youth of his or her rights in detention and explain that he or she should contact you if there are any problems.⁶² Specifically, inform the youth that he or she can not be isolated for his or her own protection based upon his or her actual or perceived sexual orientation or gender identity as the Hawaii

⁵³ *Id.*

⁵⁴ Barbara Fedders, *supra* note 3, at 802.

⁵⁵ *Id.*

⁵⁶ KATAYOON MAJD ET AL., *supra* note 2, at 124; SHANNAN WILBER ET AL., *supra* note 1, at 57.

⁵⁷ SHANNAN WILBER ET AL., *supra* note 1, at 49.

⁵⁸ *Id.* at xii, 5.

⁵⁹ *Id.* at xii. Barbara Fedders, *supra* note 3, at 774, 779.

⁶⁰ Barbara Fedders, *supra* note 3, at 774, 785.

⁶¹ JODY MARKSAMER ET AL., *supra* note 11, at 42.

⁶² *Id.*

federal district court found this practice unconstitutional in *R.G. v. Koller* (415 F. Supp. 2d 1129) (2006).⁶³

- Research less restrictive alternatives to detention and be prepared to recommend those alternatives to the court at the detention hearings.⁶⁴
 - Talk to the facility about safeguards against harassment and opportunities for services to ensure the safety and welfare of the youth.
- ❖ **Disposition:** To create the most appropriate recommendations, defense counsel should consult with LGBTQ youth, and advocate against any conditions of probation or placements that will be harmful to them.⁶⁵
- Request further evaluations or expert witnesses if necessary to prepare for the disposition hearing. Utilize expert evaluations and testimony to challenge any harmful recommendations.⁶⁶
 - Always oppose the introduction of evidence of sexual orientation or sexual conduct when it is not relevant or when it is being used to punish or embarrass the youth.⁶⁷ If you believe the judge has bias, request his or her recusal.
 - Ensure that the youth understands all of the possible disposition options and determine which services he or she feels would be most beneficial.⁶⁸
 - Argue for the least restrictive placement possible. Challenge beliefs that LGBTQ youth should be placed in secure facilities for their own protection or that transgender youth should be housed according to their anatomical sex as opposed to their current gender identity.⁶⁹ Ensure that LGBTQ youth are not placed in sex offender treatment programs as a result of their sexual orientation or sexual identity, and work to ensure that transgender youth receive any hormones or related medications that they may be taking prior to placement at disposition.⁷⁰
 - Be knowledgeable of support groups, services, and placements in your jurisdiction, as well as those outside of your jurisdiction if there are no suitable services available in the vicinity and if consistent with the youth's expressed interest.⁷¹ Some examples of LGBTQ support groups in North Carolina include the following:
 - iNSIDEoUT of the Triangle-area is a youth-founded and youth-led organization that provides leadership opportunities as well as a safe place for

⁶³ SHANNAN WILBER ET AL., *supra* note 1, at xiii.

⁶⁴ *Id.*

⁶⁵ KATAYOON MAJD ET AL., *supra* note 2, at 119.

⁶⁶ *Id.* at 126.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ KATAYOON MAJD ET AL., *supra* note 2, at 132; SHANNAN WILBER ET AL., *supra* note 1, at xii – xiii.

⁷⁰ KATAYOON MAJD ET AL., *supra* note 2, at 124; SHANNAN WILBER ET AL., *supra* note 1, at 57.

⁷¹ KATAYOON MAJD ET AL., *supra* note 2, *supra* note 2, at 124; SHANNAN WILBER ET AL., *supra* note 1, at 57. JODY MARKSAMER ET AL., *supra* note 11, at 47.

youth by helping to form and strengthen Gay and Straight Alliances (GSAs) while connecting and empowering youth.⁷²

- LGBTQ Center of Raleigh houses two programs for youth and family, and is currently working on the formation of at least three additional programs. The current programs include ASPYRE to Lead Camp, which provides youth with the tools necessary to make their own change and Wake County GSA Alliance Council, which works to support and strengthen GSAs in Wake County.⁷³
- Time Out Youth is a Charlotte-based grassroots LGBTQ youth service organization that provides support, education, and advocacy for LGBTQ youth between the ages of 13 through 23.⁷⁴
- YouthSAFE is a joint project of Gay Straight Advocates for Education (GSAFE) and Parents, Families, & Friends of Gays (PFLAG) Greensboro to provide safe, welcoming, confidential, regular social networking opportunities for LGBTQ youth in Guilford County.⁷⁵ Teens, age 14 -18, under the supervision of an adult facilitator, meet monthly at a local coffee shop to support each other and informally discuss topics of interest to LGBTQ youth.⁷⁶

Post-Disposition: Similar to many other jurisdictions, in North Carolina, defense counsel’s appointment ends at disposition, and therefore juveniles are not afforded a right to counsel post-disposition. This lack of post-disposition representation leaves LGBTQ youth vulnerable to harassment and abuse in out-of-home placements and in juvenile justice facilities.⁷⁷ National standards indicate that during the post-dispositional stage, access to defense counsel is essential for ensuring the state’s compliance with court orders to provide services, advocating for additional and more suitable services, as well as addressing unsafe conditions of confinement.⁷⁸

- ❖ Given that youth are not entitled to counsel for post-disposition representation at this time, it is even more critical that defense counsel appointed to represent a youth on a probation violation work thoroughly to investigate and defend against the allegations.⁷⁹ At the motion for review hearing defense counsel should consider preparing to the same degree they would prepare for an adjudicatory hearing, including investigating the allegations, determining if the violation was willful or if a lawful excuse exists, and preparing alternatives for disposition sensitive to the juvenile’s needs if the juvenile is found to be in violation.

LGBTQ Youth in Juvenile Court: Conclusion

LGBTQ youth face tremendous obstacles at home, school, and in the broader community, specifically the juvenile justice system. In an effort to reduce the obstacles in the juvenile justice

⁷² See <http://www.insideout180.org>.

⁷³ See <http://www.lgbtcenterofraleigh.com/site/programs/youthfamily>.

⁷⁴ See <http://www.timeoutyouth.org/>.

⁷⁵ See <http://www.gsafe.org/>.

⁷⁶ See *id.*

⁷⁷ KATAYOON MAJD ET AL., *supra* note 2, *supra* note 2, at 126.

⁷⁸ *Id.*

⁷⁹ *Id.* at 119.

system, defense counsel can incorporate the above research. In doing so, defense counsel can better understand their LGBTQ youth as well as provide more welcoming and comprehensive client interviews, more appropriate charging and detention decisions, as well as more effective dispositions and services.