

2013

Fostering Care for All: Towards Meaningful Legislation to Protect LGBTQ Youth in Foster Care

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FOSTERING CARE FOR ALL: TOWARDS MEANINGFUL LEGISLATION TO PROTECT LGBTQ YOUTH IN FOSTER CARE

By: Larisa Maxwell

ABSTRACT

Lesbian, gay, bisexual, transgender, and questioning (“LGBTQ”) youth in the foster care system often face a multitude of discrimination, harassment, and abuse because of their actual or perceived homosexuality or gender identity. Mistreatment ranges from taunting to physical and sexual assaults by both other youth and staff. Certainly, this mistreatment is quite the antithesis of the safe haven that foster care placements are designed to be.

There is very little legislation in place to specifically address these issues. In 2004, California’s Foster Care Nondiscrimination Act became the first act to provide explicit statutory protections from grievances based on sexual orientation or gender identity, among other protected classes.

Recently, the Every Child Deserves a Family Act was proposed for the third time in the United States House of Representatives. The Act was designed to bar inequity in adoption and foster care placements due to either the prospective parent’s or child’s sexual orientation or gender identity, or the prospective parent’s marital status. Unfortunately, the bill died in committee, meeting the same fate as its predecessors.

This Comment describes the strengths and shortcomings of both Acts and illustrates the immediate need to enact comprehensive statutory protections for youth in the foster care system who face discrimination and harassment based on their actual or perceived sexual orientation or gender identity. Legislation should be enacted to help insulate these already marginalized youth from continuing harm.

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I. INTRODUCTION

James wasn't blind to his foster son's sexuality. The young man was decidedly out—preaching tolerance at school assemblies, appearing on teen panels, and advocating gay pride in rainbow pamphlets. He even showed up to court hearings wearing lipstick. Privately, though, James dismissed all of it as a phase. . . . When James . . . saw Kenneth with his date, he grew livid. . . . “I’ll kick your asses,” he threatened. Taking him at his word, the couple fled, with James chasing them down the stairs and out the door. . . . James evicted him then and there.

After several days, Kenneth returned to James, who apologized. . . . Two months later, . . . [a] bit of gossip led to another blowout, more threats, and a second police visit. Kenneth refused to stay any longer. . . . You’d think placing Kenneth would be relatively easy. He had decent grades and no criminal record. He spent his weekend nights doing chores, and loved to show off his spotless stove or the 17th redesign of his tiny bedroom. Although he struggled with a mood disorder, he’d learned to keep it in check. But, what people saw first were his lipstick, his painted nails—his sexual orientation. “I’m just really worried about where we place you,” the judge said at one hearing.¹

Lesbian, gay, bisexual, transgender,² and questioning³ (“LGBTQ”) youth in the foster care system face a myriad of discrimination, harass-

1. Jason Cherkis, *Queer and Loathing: Does the Foster Care System Bully Gay Kids?*, MOTHER JONES (Nov.–Dec. 2010), available at www.motherjones.com/politics/2010/11/gay-kids-foster-homes-bullying.

2. E.g., Mimi Laver & Andrea K. Khoury, *Protecting LGBTQ Youth in Foster Care*, GPsolo EREPORT (Jan. 2012), http://www.americanbar.org/publications/gp-solo_ereport/2012/january_2012/lgbtq_foster_youth.html (“people who identify more strongly with the other gender than the one to which they were assigned (e.g., females who feel like males, or males who feel like females)”).

3. *Id.* (“Refers to a person for whom a fixed sexual orientation and/or gender identity is not clear. Some questioning individuals may ultimately ‘come out’ as LGBT, whereas others may be seeking additional resources to help address their internal questions. It is not developmentally uncommon for adolescents to question their sexual orientation or gender identity.”).

ment, and abuse because of their actual or perceived homosexuality⁴ or gender identity.⁵ Some of these youth entered the foster care system when they were abandoned or when they ran away in fear of harm from their families of origin after their sexual orientation or gender identity was revealed.⁶ Tragically, the situations they face in the foster care system, a supposed safe haven, are not always better. Some circumstances are so egregious, many LGBTQ youth run away from their foster care placements, reporting they feel safer on the streets than in those homes.⁷ Others stay and risk harm and discrimination in placement, services, and care.

Individuals self-identify as non-heterosexual at varying ages. One study reported that, on average, children self-identify as LGBTQ as young as ten years old.⁸ Among the youth in foster care, one estimate indicated that 5% to 10% are lesbian, gay, bisexual, or transgender.⁹ Based on that approximation, with a conservative estimate of over 400,000 United States youth in foster care each year,¹⁰ there is a potential for over 20,000 to 40,000 of those youth facing discrimination, harassment, and abuse due to their sexual orientation or gender identity each year.

In 2004, California enacted the Foster Care Nondiscrimination Act, which offers foster youth explicit statutory protections from discrimination and harassment based on their actual or perceived sexual orientation or gender identity, among other protected classes.¹¹ Hailed

4. *Id.* (“Sexual orientation refers to one’s sexual and romantic attraction. Those whose sexual orientation is to people of the opposite sex are called ‘heterosexual,’ those whose sexual orientation is to people of the same sex are called ‘homosexual’ (or lesbian or gay), and those whose sexual orientation is to people of both sexes are called ‘bisexual.’”).

5. *Id.* (“At birth, we are assigned one of two genders, usually based on our visible genitals. For many people this gender assignment fits and feels comfortable and they never think about it further. Others do not feel as comfortable with their assigned gender, either because they find the two-gender system too limiting or because they feel more identification with the gender opposite that to which they were assigned at birth.”).

6. ROB WORONOFF ET AL., CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL, *OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE* 35 (2006).

7. *Id.* at 34.

8. Cynthia J. Telingator & Kelly T. Woyewodzic, *Sexual Minority Identity Development: A Review of the Process & Effects*, *PSYCHIATRIC TIMES*, Dec. 16, 2011, available at <http://www.psychiatristimes.com/child-adolescent-psychiatry/sexual-minority-identity-development>.

9. COLLEEN SULLIVAN ET AL., LAMBDA LEGAL DEFENSE & EDUC. FUND, *YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE* 11 (2001).

10. *Foster Care*, *CHILD TRENDS* (Aug. 2012), http://childtrends.org/wp-content/uploads/2012/08/12_Foster_Care.pdf.

11. *AB 458 Fact Sheet: The California Foster Care Non-Discrimination Act*, NAT’L CTR. FOR LESBIAN RTS. (Jun. 2006), http://www.nclrights.org/site/DocServer/ab458_fact_sheet.pdf?docID=1321.

as the first legislation of its kind, the Act seeks to ensure “fair and equal access to all available services, placement, care, treatment, and benefits”¹²

There is, however, no comparable federal statute. The Every Child Deserves a Family Act, introduced within the United States House of Representatives on May 3, 2011, had the stated purpose “to prohibit discrimination in adoption or foster care placements based on the sexual orientation, gender identity, or marital status of any prospective adoptive or foster parent, or the sexual orientation or gender identity of the child involved.”¹³ Unfortunately, the bill died in committee.¹⁴

This Comment will explore the dire need for comprehensive statutory protections for youth in the foster care system who face discrimination and harassment based on their actual or perceived sexual orientation or gender identity. Part II will provide further evidence illustrating the need for these protections. Part III will discuss California’s Foster Care Nondiscrimination Act, which currently provides these protections. Part IV will detail the proposed federal Every Child Deserves a Family Act, which was designed to address some of these issues. Part V will propose changes to future acts to ensure adequate comprehensive protections for LGBTQ youth in the foster care system.

II. A LITANY OF GRIEVANCES

The child welfare system is designed to ensure the safety of children as well as provide for their basic living needs.¹⁵ Youth enter the system through various ways, including following allegations of abuse, neglect, or abandonment by their families of origin.¹⁶ Once the child enters the child welfare system, the goal is to find a permanent home, either by reuniting the child with his or her family of origin, other family members, or with adoptive parents.¹⁷

In the meantime, the youth are most often placed in foster care homes or group homes. Group homes are community living spaces with some staff supervision as opposed to a living situation more analogous to a family setting in a foster care home placement.¹⁸ Teenagers are most frequently placed in group homes¹⁹ and are infrequently

12. Ch. 331, 2003 Cal. Stat. 2686.

13. Every Child Deserves a Family Act, H.R. 1681, 112th Cong. (2011).

14. *H.R. 1681 (112th): Every Child Deserves a Family Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr1681#overview> (last visited Feb. 20, 2013).

15. Miriam Aviva Friedland, *Too Close to the Edge: Lesbian, Gay, Bisexual and Transgender Youth in the Child Welfare System*, 3 GEO. J. GENDER & L. 777, 781 (2002).

16. *Id.* at 791.

17. *Id.* at 781.

18. *Id.* at 802.

19. *Id.*

adopted.²⁰ Youth who do not find permanent homes remain in the child welfare system until they reach adulthood.²¹ Unfortunately, in the very system reportedly in place to protect them, these youth often face discrimination, harassment, and abuse that lead to life-altering consequences.

A. *Discriminatory Placement*

When I said I was gay, she freaked, she tried to put me in a separate room, she didn't want me near any of the other girls. When some of the girls tried to talk to me she told them to get away from me . . . I mean they were supposed to be helping me with my depression, not telling me I was wrong by being who I was.²²

LGBTQ youth in the child welfare system are considered less likely to find permanent living situations than heterosexual children.²³ Social workers may not expect to find a family who wants LGBTQ youth and cease to try.²⁴ LGBTQ youths' placement is often unstable due, at least in part, to some caretaker's disagreement with the youth's sexual orientation or gender identity, leading to many different placements in the youth's time in the foster care system.²⁵

B. *Harassment and Abuse*

When I arrived at St. Mary's the people there really freaked out and accused me of being a rapist and some other shit and the people at Youth's Haven didn't like it either. I mean in one placement, as soon as I walked in the door, I mean I wasn't even shown to my room, I was brought into the staff office and told by staff "You know we don't go for any of that mess around here—so you better watch yourself and don't be bringing none of that lesbian shit around here."²⁶

LGBTQ youth in foster care may face harassment, intimidation, and abuse by fellow youth.²⁷ Other times, the very people who are supposed to protect and care for the youth are the very people they fear. LGBTQ youth frequently face staff or foster parent hostility

20. *Id.* at 781.

21. *Id.*

22. GERALD P. MALLON, *WE DON'T EXACTLY GET THE WELCOME WAGON: THE EXPERIENCES OF GAY AND LESBIAN ADOLESCENTS IN THE CHILD WELFARE SYSTEMS* 114 (1998).

23. *Addressing the Needs of LGBTQ Youth in Foster Care*, *THE CONNECTION* 6, 7 (Fall 2009), http://nc.casaforchildren.org/files/public/site/publications/TheConnection/Fall2009/Cover_Story.pdf.

24. *Id.*

25. MALLON, *supra* note 22, at 54.

26. *Id.* at 65.

27. Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 *TEMP. L. REV.* 415, 419 (2006).

ranging from being forbidden to talk about their sexual orientation or gender identity²⁸ to violence,²⁹ including rape.³⁰ Staff may refuse to punish harassers or only punish the LGBTQ youth.³¹ For example, one youth reported, “I got jumped by a bunch of guys in my group home, and when I told the Director, he said, ‘Well, if you weren’t a faggot they wouldn’t beat you up.’”³² These types of incidents and fear of further harm often forces LGBTQ youth to conceal their sexual orientation or gender identity in order to stay safe.³³

C. *Religious and Moral Opposition*

After coming out to one of my foster families, I was told I was going to hell and forced to go to church with them. I became very closeted after that and didn’t tell my other foster families I was a lesbian. I was in 22 different homes; many of them were very religious.³⁴

Often, the conflict between religious beliefs and LGBTQ acceptance creates situations for LGBTQ youth in foster care that range from contentious to abusive, which is quite to the contrary of the care and support that is supposed to be provided.³⁵ The youth are then faced with choosing between either condemnation or the isolation that accompanies keeping their sexual orientation or gender identity secret.³⁶ Those who do reveal themselves as homosexual, bisexual, or transgender, often face harassment, abuse, attempted religious conversion, and placement changes.³⁷

Moral, often religious, opposition to homosexuality may lead foster parents to put LGBTQ youth through reparative therapy, also known as conversion therapy.³⁸ Reparative therapy involves procedures thought to cure homosexuality.³⁹ This is based, in part, on the historical view of homosexuality as a mental illness, as well as the religious belief that homosexuality is a sin.⁴⁰ Across time, procedures have involved electroshock therapy, aversion therapy, hormone treatments, testicular transplants, visits to prostitutes, and other conditioning pro-

28. MALLON, *supra* note 22, at 70.

29. *Id.* at 98.

30. *Id.* at 108.

31. Friedland, *supra* note 15, at 803.

32. CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL, *supra* note 6, at 18.

33. Friedland, *supra* note 15, at 802.

34. CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL, *supra* note 6, at 114.

35. *Id.* at 113.

36. *Id.* at 112.

37. *Id.* at 113.

38. *Id.*

39. Jonathan Sacks, *Pray Away the Gay? An Analysis of the Legality of Conversion Therapy by Homophobic Religious Organizations*, 13 *RUTGERS J. L. & RELIGION* 67 (2011).

40. *Id.* at 72–73.

cedures.⁴¹ Aversion therapy, psychoanalytic procedures, and religious-based treatments are often used today.⁴²

Not only does reparative therapy lack empirical evidence of its efficacy, it can also result in dangerous side effects ranging from depression to drug and alcohol abuse to difficulties forming close relationships.⁴³ The use of these procedures on LGBTQ youths in the child welfare system could be particularly harmful given the LGBTQ youths' already tenuous psychological state. Among many professional organizations, the American Psychological Association and American Medical Association denounce the use of such procedures.⁴⁴

D. *Concerns Unique to Transgender Youth*

In addition to negative experiences shared by LGBTQ youth, transgender youth (those who identify more readily with the gender opposite of theirs from birth)⁴⁵ can face additional unique disparate and abusive treatment. Often, transgender youth are forced into placements with youths with matching biological gender,⁴⁶ which can increase safety concerns.⁴⁷ Additionally, they may be forbidden from dressing in clothing corresponding to the gender with which they identify and are called by the pronoun associated with their biological gender.⁴⁸ Access to appropriate medical care may be limited.⁴⁹ Some transgender youth may be subject to corrective therapy, a behavior-based therapy designed to shape behavior to gender role stereotypes corresponding with the child's biological sex.⁵⁰ Quashing a transgender youth's gender identity expression can damage the youth's self-esteem and self-image,⁵¹ adversely affecting positive development⁵² and the youth's psychological and emotional well-being.

41. David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1305–07 (1999).

42. Sarah E. Valentine, *Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 19 YALE J.L. & FEMINISM 449, 468 (2008).

43. Lila Shapiro, *Conversion Therapy Survey Reveals Real Harm in Gay "Cure,"* HUFFINGTON POST (May 30, 2013, 9:16 A.M.), http://www.huffingtonpost.com/2013/05/30/conversion-therapy-survey_n_3354253.html.

44. *Id.*

45. *E.g.*, Laver & Khoury, *supra* note 2.

46. Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 794 (2006).

47. CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL, *supra* note 6, at 86.

48. *Id.* at 84–85.

49. *Id.* at 88.

50. Erika Skougard, Note, *The Best Interests of Transgender Children*, 2011 UTAH L. REV. 1161, 1177 (2011).

51. Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25, 29 (2009).

52. SHANNAN WILBER ET AL., CHILD WELFARE LEAGUE OF AM., CWLA BEST PRACTICE GUIDELINES: SERVING LGBT YOUTH IN OUT-OF-HOME CARE 27–28

E. *Absence of Adequate Staff Procedures and Sensitivity*

I was placed in a co-ed group home. When I was shown to my room, I asked why I was being put on the boys' floor. They said, "You're not a boy? Well, we can't put you on the girls' floor looking like that." So they made me sleep on a couch on a landing in between the two floors.⁵³

Despite the overwhelming evidence of LGBTQ youth in the foster care system and the issues they face, some people, including those working in the system, continue to believe that there are no LGBTQ youth in the system.⁵⁴ In part as a result of such a belief, few policies and procedures are developed, and LGBTQ youth remain with little help and protection.⁵⁵ As noted by one New York child welfare professional, one reason others believe there are no LGBTQ foster youth is because the youth keep that hidden for their own safety.⁵⁶ Failure to acknowledge and remedy these issues sends a negative message to LGBTQ youth and fails to keep them out of harm's way.⁵⁷

F. *Misunderstanding and Ill-Willed Legal and Social Services Professionals*

It became real clear to me that my caseworker wouldn't be able to handle it if I came out to her and told her I was gay. A couple of times I tried to hint around about it, but she just wasn't hearing any of it. And she was always asking me about my "girlfriends." So when she found me a foster home, I knew I couldn't count on her to make sure they'd be cool with my being gay. I was afraid to tell my foster family too. So, more time in the closet for me.⁵⁸

Expressing one's negative attitude towards LGBTQ youth or otherwise behaving in a way that leads them to become uncomfortable confiding in other people can inhibit the ability to provide appropriate services to LGBTQ youth.⁵⁹ Judges, attorneys, and social workers are in a critical position to ensure LGBTQ youth are receiving proper care and nondiscriminatory treatment. Unfortunately, at times these individuals charged with this duty are the very ones discriminating against LGBTQ youth.⁶⁰ Though some professionals are willing but

(2006), available at <http://www.lsc-sf.org/wp-content/uploads/bestpracticeslgbyouth.pdf>.

53. CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL, *supra* note 6, at 23.

54. LAMBDA LEGAL DEFENSE & EDUC. FUND, *supra* note 9, at 11–12.

55. *Id.*

56. MALLON, *supra* note 22, at 86.

57. Talia Yasmeeen Stoessel, *Addressing the Harm of Silence and Assumptions of Mutability: Implementing Effective Non-Discrimination Policies for Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Foster Care*, 17 U.C. DAVIS J. JUV. L. & POL'Y 79, 84–85 (2013).

58. CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL, *supra* note 6, at 2.

59. Mimi Laver, *Exploring Attitudes about LGBTQ Youth in Foster Care*, 26 CHILD L. PRAC. 97, 102 (2007).

60. *Id.*

lack knowledge regarding LGBTQ youths' needs, others fail or refuse to treat LGBTQ youth fairly.⁶¹

For example, in one listening forum regarding youth experiences with judges while in the foster care system, youths reported incidents such as a judge dismissing one boy's homosexuality as a whim and another judge belittling one youth based on his sexuality.⁶² Other youths have noted they never saw their lawyers, the very people who were supposed to be advocating for their rights based on their needs.⁶³ The quote that opened this section illustrates just one instance of a caseworker who could not meet the needs of an LGBTQ youth. Unavailable, misunderstanding, disrespectful, and discriminating legal and child welfare professionals may preclude youth from remedying the disparate and abusive treatment they may face. This can all lead LGBTQ youths to develop a dislike and distrust of the child welfare and justice systems just when they need them most.

G. *Negative Consequences*

As a result of this treatment, LGBTQ youth in foster care struggle with many internal and external difficulties.⁶⁴ These can significantly impact their educational success, mental and physical health, and stable living arrangements.

1. Educational Detriment

It was my sophomore year. . . . I had just finished my last mid-term exam and was heading for the bus when I heard yelling. I turned around and saw a crowd of people running after me. . . . I started running, but it wasn't long before they got me. . . . That wasn't the first time I was harassed because of my sexuality. . . . I had no friends at that school, no one to turn to.⁶⁵

LGBTQ youth, both in and out of foster care, often encounter difficulties in school beyond that of heterosexual youth.⁶⁶ Foster care can compound those issues. For example, multiple foster care placements can result in frequent school changes.⁶⁷ This disrupts not only the learning process but also the ability of LGBTQ youth to identify allies and build and maintain friendships, which can increase feelings of isolation. The difficulties associated with a lack of support in their foster care placements may be enhanced by similar difficulties faced in

61. *Id.*

62. *Id.*

63. Andrea Khoury, *Opening Doors for LGBTQ Youth in Foster Care*, 26 *CHILD L. PRAC.* 65, 71 (2007).

64. Fedders, *supra* note 46, at 787–93.

65. *YOUTH COMM'N, IN THE SYSTEM AND IN THE LIFE: A GUIDE OF TEENS AND STAFF TO THE GAY EXPERIENCE IN FOSTER CARE* 25 (Al Desetta ed., 2003).

66. Friedland, *supra* note 15, at 788–91.

67. *CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL, supra* note 6, at 58.

schools, and vice versa.⁶⁸ Additionally, if the students do not feel safe at school, they may not attend.⁶⁹ Academic achievement is negatively affected, and truancy to avoid harassment and threats of violence can result in legal problems.⁷⁰ Future success is attenuated, further disadvantaging this already marginalized group.⁷¹

2. Emotional and Psychological Damage

I slept with older men so I had a place to stay the night. Some were nice to me, some were shits. I was high everyday, my life was a mess, I hated myself. I had nothing. I tried to kill myself several times, finally I was hospitalized and then I started to get better.⁷²

This quote illustrates part of one boy's struggle after leaving home and entering the child welfare system after his family could not accept that he was homosexual.⁷³ Though mental health issues can adversely affect all youth, LGBTQ youth are generally more susceptible to mental health problems than their heterosexual counterparts. Mistreatment due specifically to LGBTQ status has been shown to be associated with negative psychological well-being.⁷⁴

According to a Human Rights Campaign report, "highly rejected" LGBT youth are "more than 8 times as likely to have attempted suicide [and] [n]early 6 times as likely to report high levels of depression" than LGBT youth who felt minimally or not rejected.⁷⁵ Another study showed that participants who reported low levels of family acceptance regarding their LGBTQ status reported lower self-esteem and almost double the number of suicide attempts compared to LGBTQ participants who reported high levels of family acceptance.⁷⁶ Certainly, entering a foster care system plagued by low levels of support and acceptance of LGBTQ youth is likely to affect the youth's overall emotional and psychological well-being.

3. Homelessness

I even lived in an abandoned trailer truck with ten other people, slept in railroad tunnels, and anywhere that was warm. As bad as

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. MALLON, *supra* note 22, at 115.

73. *Id.* at 171.

74. Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 DEVELOPMENTAL PSYCHOL. 1580, 1585 (2010).

75. *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy> (last visited Feb. 20, 2013).

76. Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. OF CHILD & ADOLESCENT PSYCHIATRIC NURSING 205, 208 (2010).

things got on the streets, it was better than the group homes that I had lived in—at least people cared for me on the streets.⁷⁷

A disproportionate number of LGBTQ youth are among the homeless youth population.⁷⁸ Estimates indicate between 320,000 and 400,000 LGBTQ youth will experience homelessness each year.⁷⁹ These youth find places to stay on the streets, in homeless shelters, or in the homes of friends and acquaintances.⁸⁰

LGBTQ youths' homelessness can both precede the entry into and be a result of experiences in the foster care system.⁸¹ Many LGBTQ youth enter the foster care system after their families of origin reject them, harm them, or both when they find out about their sexual orientation or gender identity.⁸² One study estimated 42% of LGBTQ youth in the foster care system or other state system (e.g., juvenile), experienced this treatment.⁸³

Well over half of LGBTQ foster youths have reported discrimination, abuse, violence, and removal or running away from a foster care placement due to their sexual orientation or gender identity.⁸⁴ Unfortunately, instead of the reprieve they seek, they often find more discrimination and violence due to their actual or perceived sexual orientation or gender identity on the streets and in homeless shelters, if they are even allowed in.⁸⁵ To survive, some homeless teens turn to prostitution, putting them at severe risk of contracting sexually transmitted diseases, including HIV.⁸⁶

H. *Summary*

As illustrated, LGBTQ youth can face an abundance of hardships in the foster care system, resulting in damaging and lasting consequences. Despite the gravity of this issue, there has been little progress in enacting legislation to help protect these children. California's Foster Care Nondiscrimination Act⁸⁷ and the proposed federal Every Child Deserves a Family Act⁸⁸ stand out and will be the focus of the remainder of this Comment.

77. MALLON, *supra* note 22, at 111.

78. NICO SIFRA QUINTANA ET AL., CTR. FOR AM. PROGRESS, ON THE STREETS: THE FEDERAL RESPONSE TO GAY AND TRANSGENDER HOMELESS YOUTH 6 (2010), available at <http://www.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/lgbtyouthhomelessness.pdf>.

79. *Id.*

80. *Id.* at 4.

81. *Id.* at 13–14.

82. *Id.* at 13.

83. *Id.*

84. *Id.* at 14.

85. *Id.* at 16.

86. MALLON, *supra* note 22, at 115.

87. Ch. 331, 2003 Cal. Stat. 2686.

88. Every Child Deserves a Family Act, H.R. 1681, 112th Cong. (2011).

III. CALIFORNIA'S FOSTER CARE NONDISCRIMINATION ACT

On January 1, 2004, California's Foster Care Nondiscrimination Act went into effect.⁸⁹ This Act was intended to protect:

the rights of a foster child to have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.⁹⁰

The California Act was the first to offer foster youth explicit legal protections from discrimination and harassment based on their actual or perceived sexual orientation or gender identity.⁹¹ By explicitly prohibiting discrimination and harassment based on these characteristics, proponents of the Act hoped to further the general goal that foster care provide a safe haven for youth.⁹² In addition to these prohibitions, the Act mandated that this topic be added to the initial and ongoing training curriculum already required of foster parents.⁹³

The Act has a number of strengths. First, the Act includes broad coverage, beyond a child's sexual orientation or gender identity to foster youth generally.⁹⁴ In addition, the text specifically notes youth's right to have "fair and equal access" across the spectrum of "available services, placement, care, treatment, and benefits"⁹⁵ Since the California Act is specifically designed to address the needs of foster care youth, service providers are likely put on notice of expectations. Additionally, the explicit mention of "actual or perceived"⁹⁶ sexual orientation or gender identity protects beyond those individuals who readily self-identify as lesbian, gay, bisexual, or transgender. Lastly, the Act directly addresses both discrimination and harassment.⁹⁷

Though the Foster Care Nondiscrimination Act offers expansive protections, it does have a number of shortcomings. Notably, the Act does not specify an enforcement mechanism.⁹⁸ Without clarity, motivation to comply with the Act to avoid liability may be reduced. Parties may also have difficulty determining the most appropriate way to seek remedies.

89. NAT'L CTR. FOR LESBIAN RTS., *supra* note 11.

90. *Id.*

91. *Id.*

92. *Foster Care Anti-Discrimination Act: Hearing on A.B. 458 Before the Assembly Committee on Human Services*, 2003 Leg., 2003–2004 Sess. 5 (Cal. 2003).

93. Ch. 331, 2003 Cal. Stat. 2686.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Anne Tamar-Mattis, Note, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 TUL. J.L. & SEXUALITY 149, 152 (2005).

Second, the Act lacks a definition for discrimination, a deficiency that could lead to confusion regarding the prohibited actions.⁹⁹ The ambiguity could also lead to less protection than was intended. For example, the courts will need to determine whether actions with discriminatory effects are prohibited or only actions with a discriminatory purpose. Lastly, there is no funding for relative caretakers to take part in trainings, though they are not required to do so.¹⁰⁰ It would be optimal to provide a means for relative caretakers to participate to help facilitate the youths' permanent placement and supportive living situation.

IV. PROPOSED FEDERAL EVERY CHILD DESERVES A FAMILY ACT

On October 15, 2009, United States House Representative Pete Stark from California introduced H.R. 3827, the "Every Child Deserves a Family Act."¹⁰¹ This Act sought to "prohibit discrimination in adoption or foster care placements based on the sexual orientation, gender identification, or marital status of any prospective adoptive or foster parent."¹⁰² The Act was referred to, and died in, the House Committee on Ways and Means.¹⁰³ On March 10, 2010, Representative Stark introduced H.R. 4806, an updated version of the Act.¹⁰⁴ One key change was the addition of discrimination based on the *child's* sexual orientation or gender identity.¹⁰⁵ This bill met the same fate.¹⁰⁶

On May 3, 2011, Representative Pete Stark reintroduced the Act, H.R. 1681, which was once more referred to the House Committee on Ways and Means, where it died once again.¹⁰⁷ The Act's text almost exactly mirrored that of H.R. 4806. The same bill, with the exception of some different findings data sources, was introduced by New York Senator Kirsten Gillibrand as S. 1770 on November 1, 2011.¹⁰⁸ At that time, it was referred to then subsequently died in the Senate Committee on Finance.¹⁰⁹

The purposes of both Acts were:

to decrease the length of time that youth wait for permanency with a loving family and to promote the best interests of youth in the

99. *Id.*

100. *Id.*

101. Every Child Deserves a Family Act, H.R. 3827, 111th Cong. (2009).

102. *Id.*

103. *Id.*

104. Every Child Deserves a Family Act, H.R. 4806, 111th Cong. (2010).

105. *Id.* at § 3(a)(1)(A).

106. *H.R. 4806 (111th): Every Child Deserves a Family Act*, GovTRACK, <http://www.govtrack.us/congress/bills/111/hr4806> (last visited Feb. 20, 2013).

107. Every Child Deserves a Family Act, H.R. 1681, 112th Cong. (2011).

108. Every Child Deserves a Family Act, S. 1770, 112th Cong. (2011).

109. *S. 1770 (112th): Every Child Deserves a Family Act*, GovTRACK, <http://www.govtrack.us/congress/bills/112/s1770> (last visited Feb. 20, 2013).

child welfare system by preventing discrimination in adoption and foster care placements based on sexual orientation, gender identity, or marital status.¹¹⁰

Both bills' findings acknowledged that LGBT youth face discrimination, harassment, and violence in the child welfare system.¹¹¹ Additionally, the findings noted "approximately 60 percent of homeless lesbian, gay, bisexual, and transgender youth were previously in foster care. According to the Urban Justice Center, many . . . felt 'safer' than living in their group or foster home."¹¹²

Both bills stated:

An entity that receives Federal assistance or contracts with an entity that receives Federal assistance, and is involved in adoption or foster care placements may not

(A) deny to any person the opportunity to become an adoptive or a foster parent on the basis of the sexual orientation, gender identity, or marital status of the person, or the sexual orientation or gender identity of the child involved;

(B) delay or deny the placement of a child for adoption or into foster care on the basis of the sexual orientation, gender identity, or marital status of any prospective adoptive or foster parent, or the sexual orientation or gender identity of the child; or

(C) require different or additional screenings, processes, or procedures for adoptive or foster placement decisions on the basis of the sexual orientation, gender identity, or marital status of the prospective adoptive or foster parent, or the sexual orientation or gender identity of the child involved.¹¹³

In the event of a violation, the Acts accorded an individual a right to relief in a United States district court.¹¹⁴ The Secretary, in the event a state violated the Act, reserved the right to withhold payment under parts "B or E of title IV of the Social Security Act (42 U.S.C. 621 et seq., 670 et seq.)"¹¹⁵ in order to induce compliance.

If the Every Child Deserves a Family Act had been enacted, it would have been the first federal statute providing explicit protections for LGBT youth in the foster care system. The proposed Act had several strengths. First, unlike the California Statute, there was a clear enforcement mechanism of the authority to withhold funds¹¹⁶ as well as an individual right to remedy,¹¹⁷ which would likely increase

110. H.R. 1681 § 2; S. 1770 § 2.

111. H.R. 1681 § 2; S. 1770 § 2.

112. H.R. 1681 § 2(a)(5); S. 1770 § 2(a)(5).

113. H.R. 1681 § 3(a)(1)(A)–(C); S. 1770 § 3(a)(1)(A)–(C).

114. H.R. 1681 § 3(b); S. 1770 § 3(b).

115. H.R. 1681 § 3(e)(3); S. 1770 § 3(e)(3).

116. H.R. 1681 § 3(e)(3); S. 1770 § 3(e)(3).

117. H.R. 1681 § 3(b); S. 1770 § 3(b).

the probability of compliance. Second, the availability of technical assistance¹¹⁸ would help agencies and individuals who lack the knowledge and understanding of the issues learn the impact of placement discrimination on LGBT youth in the foster care system. The trainings and assistance available specifically for judges and attorneys¹¹⁹ would aid in the appropriate enforcement and growth of understanding so that those in the legal profession are more readily able to support and represent the youth.

Though the Every Child Deserves a Family Act proposed a nice step towards federal protections for LGBT youth in foster care, it too had a number of shortcomings. First, despite mention of broader concerns in the findings,¹²⁰ the statute specifically addressed placement decisions only. Placement was defined as:

the decision to place, or to delay or deny the placement of, a child in a foster care or an adoptive home, and includes the decision of the agency or entity involved to seek the termination of birth parent rights or otherwise make a child legally available for adoptive placement.¹²¹

The proposed Act's limitation to prohibiting discrimination in placement addressed only one area of concern for these youth.

Second, based on the text of the Every Child Deserves a Family Act, it appeared to only protect youth based on their *actual* sexual orientation or gender identity. The lack of a more encompassing statement such as "actual or perceived" would have likely resulted in the statute not providing protections for those youth who would not define themselves as such, whether they are still determining their sexual orientation or gender identity or they are just perceived by others to fall under one of the LGBTQ classes. This would have greatly narrowed the number of youth who would, and should, have been covered by such protections.

Third, the only definition was that of "placement decision."¹²² This left it to the courts to define other terms such as discrimination. Like with the California statute, this could have resulted in confusion and fewer protections than intended or necessary.

V. TOWARDS MORE MEANINGFUL LEGISLATION TO PROTECT LGBTQ YOUTH IN FOSTER CARE

According to the Child Welfare Information Gateway, "The child welfare system is a group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and

118. H.R. 1681 § 3(d); S. 1770 § 3(d).

119. H.R. 1681 § 3(d); S. 1770 § 3(d).

120. H.R. 1681 § 2; S. 1770 § 2.

121. H.R. 1681 § 3(a)(2); S. 1770 § 3(a)(2).

122. H.R. 1681 § 3(a)(2); S. 1770 § 3(a)(2).

strengthening families to care for their children successfully.”¹²³ As has been emphasized, this is not always achieved for LGBTQ youth in the system. Though some states have instituted policies protecting LGBTQ youth,¹²⁴ others have failed to do so.

LGBTQ foster youth have some existing remedies for unjust treatment. If there is an existing agency policy, there may be internal grievance procedures to follow.¹²⁵ When a government actor violates a constitutional right, the youth may be able to bring a claim under 42 U.S.C. § 1983.¹²⁶ First Amendment rights, such as free speech or freedom of religion, may be implicated.¹²⁷ Importantly, youth in foster care have a constitutional right to safety based on the Fourteenth Amendment’s due process clause.¹²⁸ Depending on the jurisdiction, additional remedies, such as state tort remedies, may be available.¹²⁹ Lastly, perpetrators of abuse and other grievances may face criminal charges, such as child abuse, if and when their conduct comes to light.

However, remedies are difficult to obtain. Child welfare agencies may be able to assert a governmental immunity defense¹³⁰ or may shift fault to foster parents to preclude recovery from the agency.¹³¹ Foster parents and caseworkers may avoid liability as well.¹³² With a low chance of liability, it is not surprising that child welfare agency reform appears minimal.

As evidenced by the continuing mistreatment of LGBTQ youth in foster care, the few existing protections are proving insufficient. It is time to put statutory protections in place to help ensure the best interests of these youth. The statutory enactment process, though by no means quick, is not as slow as the evolution of case law.¹³³ Additionally, a statute can be enacted without the constraints of stare decisis.¹³⁴ Moreover, a statute would likely put agencies and individuals on notice of expectations and consequences for failing to comply. A statute’s prescriptive nature should also promote uniformity and consistency among service providers. Lastly, a statute with clear conse-

123. CHILD WELFARE INFO. GATEWAY, HOW THE CHILD WELFARE SYSTEM WORKS 1 (2013), <http://www.childwelfare.gov/pubs/factsheets/cpswork.pdf>.

124. Stoessel, *supra* note 57, at 101–02.

125. *Id.* at 103.

126. *Id.* at 105.

127. Estrada & Marksamer, *supra* note 27, 432–33.

128. *Id.* at 422.

129. Stoessel, *supra* note 57, at 109.

130. Sharon Balmer, Comment, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 941 (2005).

131. Michael B. Mushlin, *Unsafe Havens: The Case of Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 246–47 (1988).

132. *Id.* at 247–49.

133. Giacomo A. M. Ponzetto & Patricio A. Fernandez, *CaseLaw Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 289–90.

134. *Id.* at 405.

quences may prompt states to take proactive measures to prevent harm, rather than solely reactive responses when the damage is already done. For all these reasons, enacting a statute designed to promote the best interests of LGBTQ youth in the foster care system is imperative.

Though family law matters are generally reserved for the states,¹³⁵ federal legislation offers several advantages. First, even though experimentation on the local level may allow for more individualization,¹³⁶ it could be burdensome and time-consuming for each state's legislators to develop their own legislation. Federal legislation could facilitate quicker intervention and allow states to focus on more local issues. Second, federal legislation would help ensure consistent treatment of LGBTQ youth across the United States. Ultimately, regardless of whether the statute is enacted at the state or federal level, immediate action is crucial. The following sections describe pertinent inclusions to ensure comprehensive statutory protections for LGBTQ foster youth.

A. *Protected Parties*

As previously mentioned, the absence of "actual or perceived" preceding sexual orientation and gender identity could greatly limit the number of protected youths. Particularly given the age of the youth, they may not yet readily self-identify as one of those classes. Additionally, any youth who are discriminated against or harassed due to their perceived, but not actual, sexual orientation or gender identity may not be protected under the proposed federal statute. The inclusion, like in California's statute,¹³⁷ of "actual or perceived" is imperative to prevent an unfortunate and unnecessarily narrow reading of a statute's protected classes.

A statute similar to California's, which includes protected classes beyond sexual orientation and gender identity from discrimination and harassment, would certainly be sufficient, and potentially advisable. All children deserve to be free from these grievances and to be ensured of a remedy should they occur. Additionally, including LGBTQ youth among all youth may increase the probability of the statute's enactment if those legislators who may hesitate to enact an LGBTQ-specific statute would vote for a more inclusive one.

Though a combined statute protecting both LGBTQ individuals who want to foster with a statute protecting LGBTQ youth from simi-

135. Nancy G. Maxwell, *Unification and Harmonization of Family Law Principles: The United States Experience*, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 249 (Katharina Boele-Woelki ed., 2003).

136. David A. King, Note, *Formalizing Local Constitutional Standards of Review and the Implications for Federalism*, 97 VA. L. REV. 1685, 1695 (2011).

137. Ch. 331, 2003 Cal. Stat. 2686.

lar conduct may serve the necessary purpose, a statute more like California's in which foster care youth are the sole focus would be more clear. Doing so may be more likely to put others on notice of the statute's requirements. This is not to argue that allowing LGBTQ adults to adopt is not imperative, just that separating the issues into different statutes may be better for clarity's sake. Additionally, legislators who may be hesitant to enact LGBTQ parent adoption rights legislation may be more willing to enact legislation to protect children.

B. *Prohibited Mistreatment*

Though the California Act explicitly prohibits discrimination and harassment,¹³⁸ the proposed federal act explicitly prohibits only discrimination in placement decisions.¹³⁹ Discriminatory treatment of LGBTQ youth may arguably be a primary concern, but harassment is, as illustrated, pervasive and damaging and also requires prohibition. Including both discrimination and harassment based on sexual orientation or gender identity would broaden the range of damaging conduct prohibited by the statute.

Additionally, explicitly limiting the prohibited conduct to discrimination in placement decisions addresses only one area of disparate treatment. Like in the California Act, explicitly extending protections to services, placement, care, treatment, and benefits¹⁴⁰ will encompass a broader scope of areas in which discrimination occurs.

C. *Definitions*

As has been noted as a weakness in the California statute,¹⁴¹ failure to define key terms in the statute, such as discrimination or gender identity, may result in confusion and inconsistent application. Without definitions it may be unclear who the protected parties are and courts may define the term in an inconsistent, unfavorable, or inaccurate way.

However, difficulties arise in defining and including or not including some terms without being unnecessarily and unfortunately narrow. The American Psychological Association's definition of transgender will help illustrate this concept:

Transgender is an umbrella term for persons whose *gender identity*, *gender expression*, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. *Gender identity* refers to a person's internal sense of being male, female, or something else; *gender expression* refers to the way a person communicates gender identity to others through behavior, clothing,

138. *Id.*

139. Every Child Deserves a Family Act, H.R. 1681, 112th Cong. § 3(a)(1) (2011).

140. 2003 Cal. Legis. Serv. Ch. 331 (A.B. 458) (West).

141. Tamar-Mattis, *supra* note 98, at 152.

hairstyles, voice, or body characteristics While transgender is generally a good term to use, not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person. The ways that transgender people are talked about in popular culture, academia, and science are constantly changing, particularly as individuals' awareness, knowledge, and openness about transgender people and their experiences grow.¹⁴²

Using just one of these terms or definitions or using them interchangeably in a statute may result in confusion and coverage exclusion for some youth who should be included. So, when proposing an act, the author should carefully consider whether and how to define and include these terms. If the author chooses to include a definition, the author should consider defining only with non-exclusionary examples or including a more fluid definition that provides coverage for a broader class of youth. A statute like California's with coverage of youth across all identities, backgrounds, and statuses, as well as including "actual or perceived" descriptors as previously discussed, would reduce the need to focus intently on this element.

D. *A Clear Enforcement Mechanism*

An explicit enforcement mechanism should be included in future statutes. With ambiguous consequences, states, agencies, and foster parents may not be as likely to comply with the statute, and courts may apply inconsistent consequences. Particularly with religious or moral conflicts, some people may prefer to run the risk of a minor consequence for violation than adapt to the needs of LGBTQ youth. The proposed Federal Act's provision allowing for withholding of funds payable under the Social Security Act¹⁴³ and the noted ability for an individual to bring suit in a United States district court¹⁴⁴ are ways to provide some incentive for states to come into compliance.

E. *Technical Assistance*

An important element in both the California and proposed federal act is training. Training will be imperative to support the possibly ill-prepared agencies, foster parents, and legal professionals who are to provide appropriate care, support, and services to LGBTQ youth.¹⁴⁵ As noted, the failure to systematically acknowledge and actively seek to remedy these egregious circumstances has left LGBTQ youth in foster care in harm's way.¹⁴⁶ Though many of LGBTQ youths' needs

142. *Answers to your Questions About Transgender People, Gender Identity, and Gender Expression*, AM. PSYCHOL. ASS'N (2011), available at <http://www.apa.org/topics/sexuality/transgender.pdf>.

143. H.R. 1681 § 3(e)(3).

144. *Id.* § 3(b).

145. QUINTANA ET AL., *supra* note 78, at 8–10.

146. Stoessel, *supra* note 57, at 84.

mirror those of their heterosexual counterparts, the frequency or intensity of negative treatment can be much greater.¹⁴⁷ Without awareness of these unique challenges, the possibility of a successful placement or adequate support is reduced. All parties should be informed of the concerns mentioned throughout this Comment as well as trained in affirming and effective support for the LGBTQ youth.¹⁴⁸ The proposed Every Child Deserves a Family Act¹⁴⁹ and California Act¹⁵⁰ both supported this thesis and it should be included in all future acts.

VI. CONCLUSION

Rather than continuing to fail to protect LGBTQ youth in foster care, we need to enact comprehensive statutes explicitly prohibiting discrimination and harassment of foster youth based on their actual or perceived sexual orientation or gender identity. This is not to argue this statutory solution is going to magically repair the child welfare system for LGBTQ youth. This is certainly a societal and systemic problem that will take some time and concerted effort in many areas to remedy. For instance, agency policy reform and ongoing education of all caregivers and social workers of the issues faced by LGBTQ youth and how to remediate those issues is crucial and will need to remain fluid and tuned in to the youths' needs. Ensuring LGBTQ adults who work with the youth do not face discrimination themselves is also important so youth have those role models. The availability of LGBTQ foster and group homes as well as allowing LGBTQ adults to foster and adopt without prejudice and other barriers is imperative. Importantly, all foster youth should be educated about their rights and available remedies and be allowed open access to the courts as it is necessary.

However, as noted, comprehensive statutory protections will provide a strong foundation to ensure the safety, care, support, and success of these vulnerable and marginalized youth. A statute of this sort would send a message to LGBTQ youth in foster care that they are worthy of protection under the law. We must work towards the day that no LGBTQ child in the foster care system describes their experience by saying, "To survive you have to hide, you have to act straight."¹⁵¹

147. Friedland, *supra* note 15, at 782–85.

148. *See, e.g.,* Khoury, *supra* note 63.

149. H.R. 1681.

150. Ch. 331, 2003 Cal. Stat. 2686.

151. MALLON, *supra* note 22, at 155.