



# SAFE HAVENS

Closing the Gap Between Recommended Practice and Reality  
for Transgender and Gender-Expansive Youth in Out-of-Home Care



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# I. EXECUTIVE SUMMARY

Child advocates and experts from a host of disciplines have documented for over a decade the overrepresentation of lesbian, gay, bisexual, transgender and queer or questioning (LGBTQ+) youth in child welfare, juvenile justice and runaway and homeless youth systems<sup>2</sup> (“out-of-home care systems”) compared to the general population.<sup>3</sup> Further, **transgender**,<sup>4</sup> **gender-expansive**<sup>5</sup> and **gender-nonconforming** (TGNC)<sup>7</sup> youth, who may identify across the sexual orientation spectrum,<sup>8</sup> are overrepresented in these systems at even higher rates than youth who identify as LGBQ.<sup>9</sup>

Data are scarce regarding the particular experiences of TGNC youth in out-of-home care.<sup>10</sup> However, extraordinarily high rates of family rejection, societal discrimination and victimization of TGNC people<sup>11</sup>—including staggering rates of violence against transgender women of color<sup>12</sup>—and anecdotal evidence suggest that TGNC youth in out-of-home care are exposed to even harsher and more abusive treatment than LGBQ youth in these systems. Most out-of-home care placements and facilities are sex-specific and many aspects of youths’ supervision and care are governed by regulations that reference a youth’s sex (or gender). This makes it particularly important to insure that out-of-home care practices are accepting and affirming for TGNC young people.<sup>13</sup> For example, placing a young woman who is transgender on the boys’ floor in a child welfare group home, juvenile justice facility or shelter for youth experiencing homelessness can be

dangerous, exposing her to bullying, physical assaults and even sexual abuse. At its core, such a placement constitutes a refusal to fully affirm the youth’s identity and may contribute to suicidal ideation and depression and exacerbate gender dysphoria,<sup>14</sup> among other undesirable health outcomes.<sup>15</sup> Lack of affirmation for TGNC youth in care is, too frequently, accompanied by discrimination and mistreatment in school, at work and within their communities. Stigma, conflicts around gender nonconformity and racial identity also

IN A LOS ANGELES COUNTY FOSTER CARE SURVEY,  
5.6% OF YOUTH IDENTIFIED AS **TRANSGENDER** COMPARED TO 1-2% IN THE GENERAL POPULATION  
AND 11.1% IDENTIFIED AS **GENDER-NONCONFORMITY**.

contribute to the criminalization of TGNC young people, particularly TGNC youth of color, at higher rates than their cisgender<sup>16</sup> and gender-conforming peers.<sup>17</sup> Without assistance and support from out-of-home care providers, these issues may remain unaddressed, leading to disparately poor life outcomes for these young people.

This report, based on the authors’ research, identifies barriers to affirming treatment for TGNC

## GLOSSARY

The authors use the term **transgender**—a person whose *gender identity* (i.e., their innate sense of being male, female or something else) differs from the sex they were assigned or presumed to be at birth—to include youth who identify at all points along the gender spectrum, including youth who identify as *non-binary* or *gender fluid*. As an example, the authors use the description *transgender girl* to describe a girl who identifies as female, but was assigned the sex of male at birth.

**Gender-expansive** is a broad term referring to aspects of gender expression, identity, and interests that go beyond cultural binary prescriptions of behaviors and interests associated primarily with boys or girls. Gender-expansive includes young people who do not identify with the sex they were assigned at birth as well as those who do, but may nonetheless find themselves barraged with questions based on their dress, appearance, or interests, such as, “Are you a boy or a girl?” or “Why do you play with that? It’s a boy/girl toy!” Other words with similar meanings include *gender diverse* and *gender creative*. Nat’l Ass’n of School Psychologists & Gender Spectrum, *Gender Inclusive Schools: Overview, Gender Basics, and Terminology* (2016), <https://www.nasponline.org/resources-and-publications/resources/diversity/lgbtq-youth/gender-inclusive-schools-faqs/gender-inclusive-schools-overview-gender-basics-and-terminology>.

**Gender Non-conforming** or Gender Variant—a person whose gender expression differs from how their family, culture, or society expects them to behave, dress, and act.” Substance Abuse & Mental Health Servs. Admin., *A Practitioner’s Resource Guide: Helping Families to Support Their LGBT Children* (2014), at 3, <https://store.samhsa.gov/shin/content/PEP14-LGBTKIDS/PEP14-LGBTKIDS.pdf>.

The authors use the abbreviation **TGNC** in this report because it appears most frequently in the literature and research. The authors emphasize that every individual is unique and there is no “correct” way to identify or express oneself. Here, the authors use *gender-nonconforming* to convey that cultural norms around gender still negatively impact youth who express themselves outside of those norms.

"WHILE I WAS IN THE FACILITIES, I WASN'T ABLE TO FOCUS ON MY CLASSES AND WHAT I NEEDED TO LEARN. I WAS ALWAYS MORE FOCUSED ON WHO WAS OUT TO FIGHT ME AND WHO WAS GOING TO JUMP ME TODAY. I WAS SO BUSY PAYING ATTENTION TO MY SURROUNDINGS THAT I COULDN'T PAY ATTENTION TO MY WORK. ONCE I KNEW MY PAROLE OFFICER WAS GOING TO RESPECT ME AND TREAT ME FAIRLY, I WAS ABLE TO FOCUS ON WHAT I NEEDED TO DO AND WORKING ON POSITIVE THINGS."

—LYDIA,  
transgender youth in care

youth in out-of-home care and suggests steps to eliminate these barriers. The report provides first-of-their-kind live national maps<sup>18</sup> of specific out-of-home care statutes, policies and licensing regulations related to sexual orientation, gender identity and

gender expression, providing a resource to help users understand the explicit protections that exist (or do not exist) in all 50 states and the District of Columbia. Also provided are concrete law and policy reform recommendations and practical tips to better protect and serve TGNC youth involved in intervening public systems. The recommendations were developed with significant input from both TGNC youth who reported affirming experiences during their placement in out-of-home care and providers who have made recommended practices a reality for the youth they serve.

ONLY **5-7%** OF YOUTH ARE LGBTQ+ BUT LGBTQ+ YOUTH ARE ALMOST **25%** OF THOSE IN FOSTER CARE, **20%** OF YOUTH IN THE JUVENILE JUSTICE SYSTEM AND ALMOST **50%** OF YOUTH EXPERIENCING HOMELESSNESS.



*All photographs are stock images for illustrative purposes only.*

## THE PROBLEM

Comprehensive data on the number of LGBTQ+ youth in out-of-home care are difficult to find and data specific to transgender and gender-nonconforming youth even more so.<sup>19</sup> Available research using representative samples has shown that while young people who identify as LGBTQ+ comprise about 5-7% of the overall youth population,<sup>20</sup> they make up almost one-fourth of those in the foster care system,<sup>21</sup> one-sixth of those in the juvenile justice system<sup>22</sup> and almost half of young people experiencing homelessness.<sup>23</sup> Moreover, sexual orientation and gender identity are important, but not singular, aspects of a young person's identity. Data disaggregated by race and ethnicity show that LGBTQ and TGNC young people in out-of-home care are disproportionately young people of color,<sup>24</sup> therefore exposed to overlapping inequalities associated with that intersectionality.<sup>25</sup>

For TGNC youth in out-of-home care systems, the combination of societal stigma and discrimination and sex-specific regulations presents a veritable minefield of challenges. While a young person is in out-of-home care, nearly all aspects of the youth's life—from the doctor they see to the place they sleep, the clothes they wear and who searches their bodies—are controlled by out-of-home care professionals who in most cases lack training and guidance on how to properly serve this population. The report highlights gaps in law and

**IN NEW YORK CITY, 78% OF HOMELESS LGBTQ+ YOUTH WERE REMOVED OR RAN AWAY FROM FOSTER HOMES BECAUSE OF ABUSE OR DISCRIMINATION.**

policy that must be filled in order to protect youth from discrimination and seeks to improve practice by sharing insights from the experiences of TGNC youth and from affirming and supportive providers. The authors hope that this information will enable policymakers and practitioners to drive change in the systems where they work, in line with professional commitments and legal obligations that require them to provide for the safety and well-being of all youth.

Out-of-home care systems are often ill-equipped to serve LGBTQ+ youth adequately. Research has shown that once in out-of-home care, LGBTQ+ youth face higher rates of victimization and discrimination and worse life outcomes than their non-LGBTQ+ peers. In New York City, studies show that 78% of LGBTQ+ youth experiencing homelessness were removed or

**LGBTQ+ YOUTH IN THE JUVENILE JUSTICE SYSTEM ARE TWICE AS LIKELY AS THEIR NON-LGBTQ+ PEERS TO HAVE EXPERIENCED CHILD ABUSE, OUT-OF-HOME PLACEMENT OR HOMELESSNESS.**

ran away from foster homes because of abuse or discrimination, and 56% chose to live on the street—rather than in a foster care placement—because they felt safer there.<sup>26</sup> Findings show that, when compared to their heterosexual and cisgender peers, LGBTQ+ youth in the juvenile justice system are twice as likely to have experienced child abuse, out-of-home placement or homelessness.<sup>27</sup> The U.S. National Alliance to End Homelessness reports that LGBTQ+ youth experiencing homelessness are roughly 7.4 times more likely to suffer acts of sexual violence than their non-LGBTQ+ peers, and are more than twice as likely to attempt suicide (62%) than their peers (29%).<sup>28</sup> Research specific to TGNC youth has shown that transgender youth in New York City have been found eight times as likely as non-transgender youth to trade sex for a place to stay.<sup>29</sup> This bleak picture is, of course, not inherent to being TGNC, but certainly indicative of intense misunderstanding, stigma and prejudice in general society. These factors fuel horrifyingly high rates of suicide, self-harm and physical and sexual victimization among TGNC youth.<sup>30</sup>

In light of the challenges that TGNC youth face and the weighty obligations of out-of-home care providers, experts have produced a body of professional standards that identify how to serve LGBTQ+ youth appropriately and reduce disparities in outcomes.<sup>31</sup> Some federal and state laws and policies specific to child welfare, juvenile justice and runaway and homeless youth systems of care have likewise evolved and, consistent with youth's constitutional rights, provide explicit protection from discrimination and harassment on account of sexual orientation, gender identity or gender expression (SOGIE). Flowing from professional standards and law and policy protections, a handful of jurisdictions have provided training for staff working with young people on affirming and supporting LGBTQ+ youth and have developed pilot programs or “best practice” models. At the same time, policies and practices that affirmatively hurt LGBTQ+ children and youth also persist.

## OUR FINDINGS:

Our first-of-its-kind 50-state analysis of state statute, regulations and policy found that:

- Despite the fundamental need for protection against discrimination, only 27 states and the District of Columbia explicitly include *sexual orientation* and *gender identity* in non-discrimination protections specific to the child welfare system; only 21 states and the District of Columbia do so in their juvenile justice systems; and only 12 states and the District of Columbia do so in their facilities serving runaway and homeless youth.
- Despite the near-ubiquitous use of the term *sex* (or *gender*) in regulations governing placement, clothing, searches and other critical aspects of systems of care, only three states in the nation define *sex* (or *gender*) to include gender identity, and only one of those does so in a regulation specific to out-of-home care.
- Despite the critical need for placement decisions that respect identity and keep TGNC youth safe, only four states have statutory or regulatory guidance regarding placement of transgender youth in out-of-home care in accordance with their gender identities.
- Even though professional standards dictate that the well-being of TGNC youth requires they be allowed to dress and express themselves in accordance with who they are, 24 states provide no such explicit allowance in statute or regulation in their child welfare systems, 40 states provide no such allowance in their juvenile justice systems and 34 states provide no such allowance in their homeless and runaway youth facilities.



New York and California are the only states to have comprehensive protections in place to protect these young people across all of their out-of-home care systems. Both enacted SOGIE-inclusive anti-discrimination statutes and regulations specific to out-of-home care systems as well as definitions of *sex* (or *gender*) that include gender identity. On the other end of the spectrum, the states of Alaska and North Carolina provide no explicit protections for LGBTQ or TGNC youth in any of their out-of-home care systems. Most states fall somewhere in between these extremes.

Law and policy protections are essential for ensuring the health and well-being of TGNC youth, but they are not sufficient. Of utmost importance is the responsibility of caregivers to turn recommended practice into reality. Based on concrete tips from providers featured in this report who are bridging that gap, the authors call for solid legal and policy protections that are connected to staff hiring, training and ongoing coaching and development; better support for families of origin and foster and

**LGBTQ+ YOUTH EXPERIENCING HOMELESSNESS ARE MORE THAN TWICE AS LIKELY AS THEIR NON-LGBTQ+ PEERS TO ATTEMPT SUICIDE.**

adoptive parents; increased community collaboration; intentional engagement with LGBTQ+ young people to ensure that they are affirmed in care; and a commitment to agency-wide culture change.

Youth with lived experience in out-of-home care systems who contributed to the report had the following recommendations for providers: Provide affirming health care and use qualified and trusted providers; screen existing placements and develop affirming ones; don't replicate the harm youth experienced at home; respect youth to build trust with them; give non-TGNC youth and adults time to learn about and understand TGNC youth; affirm identity in all aspects and promote well-being; don't blame youth for being victimized; use resources to help youth and avoid unnecessary grievances; provide safe environments to allow youth to focus on positive development; don't gender things; if you see bullying, stop it and connect youth to LGBT supports. As this important work progresses, TGNC youth must be engaged<sup>32</sup> to ensure that their voices are part of policy development and that their positive experiences can serve as examples to guide life-changing system improvements.

**"EVEN THOUGH YOUR CLIENTS ARE CHILDREN, THEY STILL NEED TO BE TREATED WITH RESPECT. ESPECIALLY IN THIS SETTING, THE TRANS KIDS YOU WORK WITH ARE THERE FOR A REASON AND IT'S OFTEN BECAUSE THEIR IDENTITIES WERE REJECTED BY THEIR PARENTS. WHEN THE SYSTEM IS SUPPOSED TO BE THERE TO HELP, IT'S CRITICAL THAT IT DOESN'T REPLICATE THE SITUATION THAT [A YOUTH] IS TRYING TO GET AWAY FROM."**

**– SAVANNAH,**  
transgender youth in care

Explicit protection from discrimination and training for providers on how best to work with LGBTQ+ youth are critical precursors to safe and supportive participation by youth in system reform efforts. These precursors also allow for safe collection of much-needed SOGIE demographic data on system-involved youth and families in order to inform and improve practice.<sup>33</sup> Unfortunately, the vast majority of states have no statutory or regulatory requirements for LGBTQ+-specific ongoing training and coaching in any of their out-of-home care systems.

The authors hope this report will constitute a call to action for states, agencies, advocates and stakeholders across the country to require their out-of-home care systems to provide affirming treatment for TGNC youth.

## II. INTRODUCTION

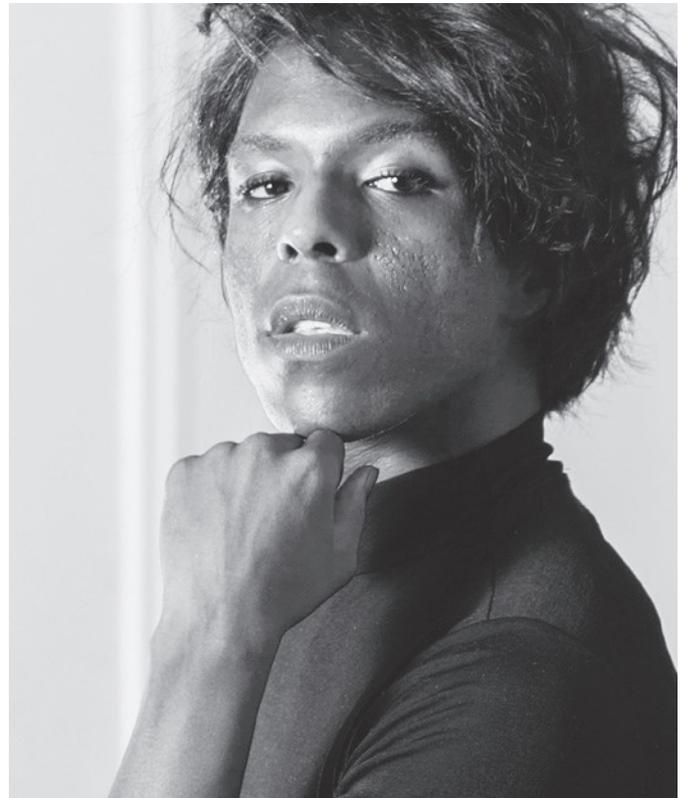
Could there be any need more fundamental than the need to sleep safely at night? Could anything be more critical to a young person's development than being accepted where they live? When physical and psychological safety is protected, young people have the freedom to think creatively and optimistically about their futures.

At a minimum, all youth need to be safe, have food and appropriate shelter and be supported and affirmed by others, including their families and communities. For youth in out-of-home care these needs are especially critical and states must ensure that they are met. Many LGBTQ+ youth in out-of-home care systems have been rejected by their families of origin and kicked out of their homes, only to be rejected again based on who they are when placed in other settings. These issues are particularly acute for TGNC youth, because so much of their treatment in out-of-home care systems is governed by the way those systems define and segregate youth on the basis of sex (or gender).<sup>34</sup>

This report provides concrete recommendations to state policymakers, administrators and providers about comprehensive and affirming policies and practices that can support TGNC youth in their care. The report examines the federal and state laws and policies that enshrine youth's right to be safe from physical and psychological harm and to be treated equally and fairly while in state custody, and it identifies law and policy gaps and their impacts in the field. Most critically, the report highlights practical tips from providers serving these youth and insights from youth themselves about the positive impact of having their needs met. The authors hope that in response to this call to action, states will adopt comprehensive law and policy for TGNC youth, and that agencies and providers will follow models of appropriate TGNC youth treatment and incorporate constant and meaningful feedback from TGNC youth themselves.

### About the Authors

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# III. EXISTING LAW AND POLICY AND RECOMMENDATIONS FOR REFORM

The U.S. Constitution requires that youth in state custody be protected from unreasonable risk of harm and provides all youth with freedom of speech and expression as well as protection from unequal treatment under the law.<sup>35</sup> In addition to these fundamental rights, recent advancements in federal law and policy for youth in out-of-home care offer with explicit protection from SOGIE-based discrimination.<sup>36</sup> Moreover, courts around the country continue to clarify that discrimination based on sex, a protected class in some federal laws, includes both sex stereotyping and gender identity-based discrimination.<sup>37</sup>

As detailed in Section III (B) below, a growing number of jurisdictions at the state and local level provide explicit protections for youth in their child welfare, juvenile justice or runaway and homeless youth systems of care. Some states offer complete SOGIE-inclusive protection in all three systems, others in only one system and still others only for discrimination on account of sexual orientation. In a few states and localities, protection may be offered under general nondiscrimination laws that are not specific to out-of-home care systems, such as public accommodation or human rights laws. In others, there are no explicit law or policy protections whatsoever against SOGIE-based discrimination.

Advocates and administrators should utilize existing protections to ensure that children and youth are treated fairly while proactively working to develop laws and policies so that protection is explicit and complete. Explicit protection from discrimination is an essential component of appropriate care for system-involved youth and provides clarity for professionals regarding their obligations.<sup>38</sup>

In addition to nondiscrimination laws (whether statutory or regulatory) and policies, a complex array of state-based licensing regulations governs services for children in out-of-home care, covering such areas as placement, clothing and staff training. In some jurisdictions, regulations regarding placement for youth in single-sex homes or facilities, or access to clothing or programming that is sex- or gender-specific, has been perceived as a barrier to affirming gender identity. In the absence of clear definition or guidance, administrators and staff may have assumed that the term *sex* (or *gender*) references a youth's sex assigned at birth and consequently barred them

from sex-specific facilities, programming or other practices consistent with that youth's gender identity. This report offers a compilation of those regulations for out-of-home care systems in all 50 states and the District of Columbia, along with recommendations for regulatory reform. Affirming models are also highlighted.

## A. FEDERAL LAW AND POLICY



### 1. CHILD WELFARE

#### A. CONSTITUTIONAL LAW

**The U.S. Constitution.** Youth in child welfare custody have substantive due process rights under the Fourteenth Amendment, including rights to:

- Personal security and reasonably safe living conditions;<sup>39</sup>
- Freedom from psychological harm<sup>40</sup> and from physical and psychological deterioration;<sup>41</sup>
- Adequate care, including the provision of certain services;<sup>42</sup> and
- A reasonably suitable placement.<sup>43</sup>

Additionally, all LGBTQ+ youth, including those in child welfare custody, have the right to be treated equally under the law as compared to their non-LGBTQ+ peers.<sup>44</sup> An Equal Protection claim for a transgender or gender-nonconforming child may be brought where the child has been subjected to discrimination on the basis of their transgender or gender-nonconforming identity because “[t]ransgender people as a class have historically been subject to discrimination or differentiation; ...they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; ...as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and...as a class, they are a minority with relatively little political power.”<sup>45</sup> State discrimination against TGNC and LGBQ youth may be subjected to a more rigorous review by the court in an Equal Protection case (enjoying “heightened scrutiny,” making it easier for the plaintiffs to prevail), given the growing number of federal courts recognizing that discrimination on the basis of sexual orientation or gender identity triggers heightened scrutiny.<sup>46</sup> “As to these Plaintiffs, gender identity is entirely akin to ‘sex’ as that term has been customarily used in Equal Protection analysis. It is deeply ingrained and inherent in their very beings.”<sup>47</sup> Furthermore, youth have the right to freedom of religion (or freedom not to practice religion) because the Establishment Clause forbids imposition of a

state-sanctioned religion.<sup>48</sup> TGNC youth may have Establishment Clause claims if they are subjected to the imposition of religion in their out-of-home care placement settings.<sup>49</sup>

Youth have the right to freedom of expression, including the right to express one's identity, which has been interpreted to be "speech" protected by the First Amendment.<sup>50</sup> Many cases affirm constitutional protections of LGBTQ+ speech in schools.<sup>51</sup> Of note, the Fifth Circuit Court of Appeals has also signaled that wearing clothing, even clothing not tied to a particular political message, may constitute protected speech.<sup>52</sup>

Discrimination and mistreatment against LGBTQ+ youth in out-of-home care may violate some or all of these rights.

## B. STATUTORY AND REGULATORY LAW

**Titles IV-E and IV-B of the Social Security Act.** The Federal Foster Care Program, authorized by Titles IV-E and IV-B of the Social Security Act, aims to support states in providing safe and stable out-of-home care for children until they are safely returned to their families of origin, placed permanently with adoptive families or guardians or placed in other planned arrangements for permanency. Agencies receiving federal child welfare dollars are required to place children in a "safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child[.]"<sup>53</sup> In order for an agency to receive IV-E dollars, its State plan must document how it establishes and maintains standards for foster family homes and child care institutions that are "reasonably in accord with recommended standards of national organizations concerned with [such] standards."<sup>54</sup> These standards include those related to admission policies, safety and protection of civil rights, among others.<sup>55</sup> In addition, agencies must develop a case that assures the child receives safe and proper care and that services are provided to the parents and child. Thus, agencies are required to ensure safety, permanency and well-being for all children in their care.<sup>56</sup> These fundamental aims are applicable to all children in child welfare custody, including LGBTQ+ children.

**Foster Care Independence Act (John H. Chafee Foster Care Independence Program).**<sup>57</sup> The Chafee program provides services and support to children and youth aging out of foster care to make the transition to self-sufficiency.<sup>58</sup> Agencies receiving funding under this program must ensure that children and youth "have regular, ongoing opportunities to engage in age or developmentally-appropriate activities."<sup>59</sup> States and



tribes must "use objective criteria...for ensuring fair and equitable treatment of benefit recipients."<sup>60</sup> States and tribes are required to use federal training funds "to help foster parents, adoptive parents, workers in group homes and case managers understand and address the issues confronting adolescents preparing for independent living."<sup>61</sup> These fundamental aims are applicable to all children covered by the Act, including LGBTQ+ children.

**Health and Human Services Grants.** Regulation 45 CFR Part 75, the Department of Health and Human Services (HHS) Grants Rule, provides that "it is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation." This provision is binding on state child welfare agencies because they receive federal funds through awards from the Administration for Children and Families (ACF), a division of HHS.<sup>62</sup>

**The Affordable Care Act.** Section 1557 of the Affordable Care Act (ACA)<sup>63</sup> prohibits discrimination on the basis of race, color, national origin, sex, age or disability in health programs and activities that receive financial assistance from the federal government

or are administered by an executive agency or any entity established under Title I of the ACA.<sup>64</sup> Many child welfare programs, such as those involving therapeutic foster care or residential treatment, may qualify as health programs under the ACA.<sup>65</sup> In 2016, the HHS Office for Civil Rights issued the final rule implementing Section 1557 of the ACA, the Nondiscrimination in Health Programs and Activities Rule.<sup>66</sup> This rule prohibits discrimination on account of gender identity or sex stereotyping and requires all health programs and activities that receive federal dollars to treat individuals in a manner consistent with their gender identity.<sup>67</sup>

### ***Title IX of the Education Amendments of 1972.***

Title IX protects people from discrimination based on sex, among other protected classes, in education programs or activities that receive federal financial assistance.<sup>68</sup> Courts have interpreted Title IX's prohibition on discrimination based on sex to include sex stereotyping, gender identity-based discrimination and nonconformity to gender norms.<sup>69</sup> To the extent that programs serving youth in child welfare systems receive federal funds for educational programs or activities, they are required to follow Title IX requirements.<sup>70</sup>

## **C. POLICY MEMORANDA AND INFORMATION**

### ***Administration for Children and Families***

***Information Memorandum 11-03.*** On April 6, 2011, Administration on Children, Youth and Families (“ACYF”) Commissioner Bryan Samuels issued an information memorandum to state child welfare agencies regarding LGBTQ+ youth in foster care. Commissioner Samuels’ memorandum “confirms and reiterates [the] fundamental belief that every child and youth who is unable to live with his or her parents is entitled to a safe, loving and affirming foster care placement, irrespective of the young person’s sexual orientation, gender identity or gender expression.”<sup>71</sup> It addresses safety concerns specific to LGBTQ+ youth in foster care and describes steps that states receiving Title IV-E funding should take to protect these young people, including steps regarding workforce development, training, the support of families of origin and of relative legal guardians and recruitment and support for foster and adoptive parents, including LGBTQ+ parents and families.<sup>72</sup>

In addition to the 2011 Memorandum, numerous helpful resources related to recommended practices for appropriately protecting and serving LGBTQ+ youth can be found on ACF’s Children’s Bureau and the Child Welfare Information Gateway websites, including reports and webinars.<sup>73</sup> ACF also funded the RISE (Recognize, Intervene, Support, Empower)

Project in Los Angeles and established a Quality Improvement Center focused on developing affirming policies and practice for LGBTQ+ youth in the child welfare system.<sup>74</sup>



## **2. JUVENILE JUSTICE**

### **A. CONSTITUTIONAL LAW**

***The U.S. Constitution.*** In addition to the protections defined in the child welfare description above, LGBTQ+ youth in juvenile justice facilities, like all youth, have the right to a sound classification system that prevents the placement of vulnerable youth in cells or units with aggressive youth who may physically or sexually attack them.<sup>75</sup> All youth, including LGBTQ+ youth, have a right to be free from unreasonably restrictive conditions of confinement, including isolation and segregation, and isolation cannot be used as a punishment for expressing their identity, to protect them from harm or as a response to the unfounded and illogical myth that LGBTQ+ youth pose a danger to other youth.<sup>76</sup>

LGBTQ+ youth in detention and correctional facilities, like all youth, have a right to receive adequate physical and mental health care, including a right to health care that may be of special need to LGBTQ+ youth.<sup>77</sup> For example, even under the more restrictive standard applicable to adult prisoners, courts have held that “transsexualism” constitutes a “serious medical need” and deliberately denying access to transgender-related health care for prisoners amounts to cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution.<sup>78</sup>

Additionally, under the First Amendment, LGBTQ+ youth, like all youth, have the right to religious freedom; to be free from religious indoctrination; not to be forced to hide their identities because of religious objections; and to choose not to participate in religious activities that condemn homosexuality or gender-nonconformity.<sup>79</sup> Nor should facility staff be permitted to intimidate or coerce a young person into adopting any particular religious practices or beliefs.<sup>80</sup>

A Federal District Court has found that LGBTQ+ youth in juvenile detention have the right to be protected from long-term segregation or isolation because it amounts to punishment in violation of their due process rights.<sup>81</sup> The court agreed with an expert that it is “[t]he likely perception by teenagers that isolation if imposed as punishment for being LGBT only compounds the harm.”<sup>82</sup> Though such practices could be excused if they were “an incident of a legitimate non-punitive governmental objective,” the

court held that the practice was, at best, excessive and therefore unconstitutional.<sup>83</sup> The court also held that youth have a due process right to minimally adequate policy, training, staffing, supervision, grievance procedures and a classification system under the Due Process Clause of the Fourteenth Amendment.<sup>84</sup> The court held that the “relentless campaign” of harassment by other youth and staff, of which the juvenile justice detention center supervisors were aware, and the accompanying “failure to take any minimally adequate remedial measures constitute[d] deliberate indifference.”<sup>85</sup> Of note, the court relied on “the totality of the circumstances at [the facility]” in its holding, but specifically noted the failure of the facility to maintain: “(1) policies and training necessary to protect LGBT youth; (2) adequate staffing and supervision; (3) a functioning grievance system; and (4) a classification system to protect vulnerable youth.”<sup>86</sup> Because it found that the plaintiffs were entitled to injunctive relief under their due process claims, the court did not address the Equal Protection claims.<sup>87</sup>

Discrimination and mistreatment against LGBTQ+ youth placed in juvenile justice custody may violate some or all of these rights.

## B. STATUTORY AND REGULATORY LAW

### *Juvenile Justice and Delinquency Prevention Act.*

The Juvenile Justice and Delinquency Prevention Act<sup>88</sup> (JJDP) established the Office of Juvenile Justice and Delinquency Prevention (OJJDP)<sup>89</sup> and established funding for state juvenile justice systems via block and discretionary grants (administered by OJJDP) and other provisions to support local and state efforts to prevent delinquency and improve the juvenile justice system. JJDP’s nondiscrimination provision<sup>90</sup> incorporates by reference 42 U.S.C. § 3789d(c)(1), which states: “No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter.”<sup>91</sup> The JJDP should be interpreted in accordance with other federal court decisions finding that sex-based discrimination includes discrimination on account of gender identity and sex stereotyping.

### *Omnibus Crime Control and Safe Streets Act.*

The Omnibus Crime Control and Safe Streets Act of 1968 prohibits sex discrimination by federal grant recipients, including police and sheriff departments, prosecutors, courts, juvenile justice facilities and victim assistance programs.<sup>92</sup> As addressed above,



since a majority of courts have held discrimination based on transgender or gender-nonconforming identity to be sex discrimination,<sup>93</sup> this prohibition should be interpreted to include discrimination on account of gender identity or sex stereotyping.

*Prison Rape Elimination Act.* The Prison Rape Elimination Act of 2003 (PREA)<sup>94</sup> was passed to address the high rates of sexual victimization and sexual harassment of inmates. It applies to both adult and juvenile facilities. LGBTQ+ people are highlighted as being particularly at risk and entitled to specific protections.<sup>95</sup> In juvenile facilities, PREA standards require:

- an inquiry to ascertain any gender-nonconforming appearance or LGBTQ or intersex<sup>96</sup> (LGBTQI) identity to determine if the juvenile may be at risk of sexual abuse;<sup>97</sup>
- an affirmative opportunity for youth to self-identify as LGBTQI;<sup>98</sup>
- a case-by-case assessment for placement of transgender or intersex youth that seriously considers their gender identity and is not based solely on external anatomy;<sup>99</sup>
- ensuring youth are not segregated or placed in particular housing or bed assignments based solely on being LGBTQI;<sup>100</sup>

- a prohibition on using LGBTQI status as an indicator of likelihood of being sexually abusive;<sup>101</sup>
- ensuring transgender and intersex youth are given the opportunity to shower separately from other residents;<sup>102</sup> and
- ensuring searches of transgender or intersex youth are conducted professionally and never for the sole purpose of determining genital status.<sup>103</sup>

### C. POLICY MEMORANDA AND INFORMATION

**Federal Advisory Committee on Juvenile Justice Recommendations.** In 2016, the Department of Justice formed an LGBTQ Subcommittee of the Federal Advisory Committee on Juvenile Justice. In January 2017, the committee adopted the subcommittee recommendations that OJJDP work with state juvenile justice programs to help them establish SOGIE-inclusive nondiscrimination protections, implement training and encourage data collection, among other items.<sup>104</sup>

**Office of Juvenile Justice and Delinquency Prevention LGBTQ Listening Session.** In 2014, OJJDP held a listening session entitled “Creating and Sustaining Fair and Beneficial Environments for LGBTQ Youth.”<sup>105</sup> At the listening session, experts summarized information and resources about the experiences of LGBTQ+ youth and suggested recommendations for reform. In addition, youth with system involvement discussed their experiences and met with the OJJDP Administrator. A summary of the presentations and recommendations for reform made by the attendees can be found in the listening session report.<sup>106</sup>



## 3. SYSTEMS SERVING RUNAWAY AND HOMELESS

### A. CONSTITUTIONAL LAW

As described above, under the Constitution, LGBTQ+ youth experiencing homelessness have Equal Protection rights to be treated in the same way as their non-LGBTQ+ peers, First Amendment rights to freedom of speech and expression and the right to be free from religious indoctrination under the Establishment Clause.<sup>107</sup>

### B. STATUTORY AND REGULATORY LAW

**The Runaway and Homeless Youth Act.** The Runaway and Homeless Youth Act<sup>108</sup> authorizes community-based runaway and homeless youth

projects to provide temporary shelter and care to runaway or otherwise homeless youth in need of temporary shelter, counseling and aftercare services. The Act, as amended and reauthorized by the Reconnecting Homeless Youth Act of 2008, states that services should be provided “using a positive youth development approach” and should ensure young people have a sense of “safety and structure, belonging and membership, self-worth and social contribution, independence and control over their life, as well as closeness in interpersonal relationships.”<sup>109</sup> In 2016, pursuant to the Runaway and Homeless Youth Act, HHS promulgated the Runaway and Homeless Youth Rule, which explicitly prohibits discrimination on account of sexual orientation and gender identity by runaway and homeless youth programs receiving federal funds.<sup>110</sup> In addition, the rule requires that providers collect SOGIE demographic information and receive training.<sup>111</sup>

### **Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity.**

The Department of Housing and Urban Development (HUD) Equal Access Rule ensures that its core programs, including runaway and homeless youth shelters, are open to all eligible individuals and families regardless of sexual orientation, gender identity or marital status.<sup>112</sup> The rule prohibits discrimination on account of sexual orientation or gender identity in all programs receiving federal assistance through HUD, including all providers who operate shelters for runaway and homeless youth across the country.<sup>113</sup>

### **Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs.**

Subsequent to the Equal Access Rule referenced above, HUD issued the Gender Identity Rule to clarify that gender identity should be affirmed in all programs, including housing.<sup>114</sup> The Gender Identity Rule also applies to all programs receiving federal financial assistance from HUD.

### C. INFORMATION

Information and resources regarding affirming programs and services for LGBTQ+ youth experiencing homelessness may be found on ACF’s and HUD’s websites.<sup>115</sup> HUD funded two pilot initiatives to address homelessness among LGBTQ+ youth in Houston (Harris County) and Cincinnati (Hamilton County).<sup>116</sup>

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## Federal Law and Policy Reform Recommendations

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### CHILD WELFARE

- HHS should issue a nondiscrimination regulation, pursuant to federal child welfare law, clarifying that youth may not be discriminated against on account of SOGIE in federally funded child welfare programs.
- HHS should issue policy guidance interpreting existing federal law as requiring Title IV-E and IV-B agencies to implement SOGIE-inclusive nondiscrimination policies that ensure LGBTQ+ youth are physically and emotionally safe while in care; have equitable access to services and opportunities; and achieve safety, permanency and well-being outcomes. The guidance should also prohibit “conversion” therapy and any similar attempts to change, condemn, suppress or pathologize LGBTQ+ identity.

### JUVENILE JUSTICE

- Congress should include SOGIE as protected classes in a reauthorization of the JJDPA.
- OJJDP should fully implement the LGBTQ+ recommendations adopted by the Federal Advisory Committee on Juvenile Justice.

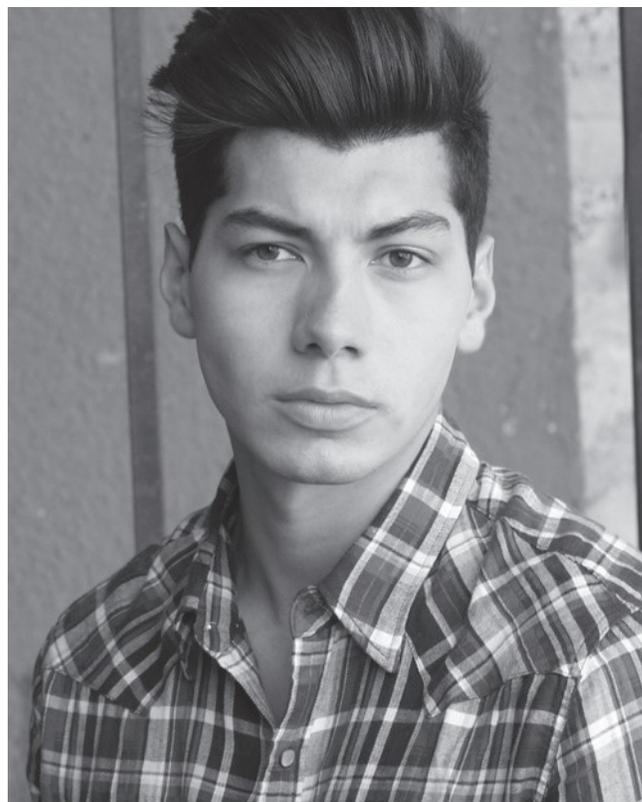
### RUNAWAY AND HOMELESS YOUTH

- Congress should include SOGIE as protected classes in the reauthorization of the Runaway and Homeless Youth and Trafficking Prevention Act.

A wealth of experts have published recommended practices to promote the safety and well-being of LGBTQ+ youth in out-of-home care systems. The authors recommend consulting these professional standards, many of which may be found in Appendix B, for more information.<sup>117</sup> In addition, experts from a wide variety of disciplines have unanimously endorsed explicit protection from discrimination inclusive of SOGIE.<sup>118</sup>

## B. STATE LAW AND POLICY

Child welfare, juvenile justice and runaway and homeless youth systems of care are administered through a complicated array of state, county and municipal government agencies and their contractors. In addition to the federal protections outlined above, explicit protection from SOGIE-based discrimination may be found in some state statutes and regulations as well as in agency policies specific to these three systems.<sup>119</sup> State and local public accommodation and human rights laws and ordinances offer additional



protections, to the extent that they apply to out-of-home care systems.<sup>120</sup>

This section offers a snapshot of SOGIE nondiscrimination protections found in statutes, regulations and policies specific to out-of-home care systems, in addition to a map of the United States with links to the sources of protection in each state’s child welfare and juvenile justice systems.<sup>121</sup> Due to the scarcity of explicit state-based protections specific to systems serving runaway and homeless youth, a map is not available, but this section does offer a narrative description.

Explicit SOGIE nondiscrimination protections in state law and policy provide youth and professionals with a clear set of expectations and enable systems to conduct training in order to broaden awareness of these obligations.<sup>122</sup> Explicit state-based SOGIE nondiscrimination provisions are essential to the fair and equitable treatment of TGNC youth.

Despite the fundamental importance of these protections, 22 states fail to include both sexual orientation and gender identity in law and policy protections specific to child welfare. In the juvenile justice system, 29 states fail to include both sexual orientation and gender identity as protected classes in law or policy. Only three states have state-based regulatory protections explicitly for runaway and homeless youth systems that are inclusive of sexual orientation and gender identity.



## 1. CHILD WELFARE

California, New Jersey and New York rank highest among the states in terms of legal protections for TGNC youth, as they provide explicit SOGIE-inclusive protection from discrimination in statute or regulation and additional legal and policy guidance. New Jersey and New York have statewide LGBTQ+-specific policies, and California, as discussed below, requires transgender youth in out-of-home care to be placed in accordance with their gender identity.<sup>123</sup> California law also requires providers to receive LGBTQ+ youth-focused training, an essential component of ensuring that protections are implemented. Nevada also ranks highly. In statute, it has sexual orientation and gender identity protections, requires training for system professionals on working with LGBTQ+ youth and mandates that transgender youth be treated in all respects, including placement, in accordance with their gender identity.<sup>124</sup> In addition to New Jersey and New York, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Tennessee and Utah have LGBTQ+-specific agency policy.

The lowest-ranking states—offering no express protection from discrimination on account of sexual orientation, gender identity or sex (or gender) in child welfare-specific law and policy—are Alabama, Alaska, Arizona, Georgia, Kansas, Kentucky, Nebraska, North Carolina and Virginia. Virginia law permits government-funded providers to refuse service to youth if doing so conflicts with “sincerely held religious beliefs.”<sup>125</sup>

The following summarizes protections from discrimination, to the extent that they exist, along with their sources:

### **Sexual Orientation and Gender Identity as Protected Classes**

#### ● **Statute or Regulation**

Ten states and the District of Columbia explicitly include sexual orientation and gender identity in statutes or regulations specific to their child welfare systems: California, Florida, Mississippi, Nevada, New Mexico, New Jersey, New York, Ohio (uses *sexual identity* versus *gender identity*), Rhode Island and Washington. Florida’s protections cover youth placed in congregate care facilities and are not system-wide.

#### ● **Agency Policy**

Additionally, 16 states contain explicit sexual orientation and gender identity protections in agency policy (either Department of Health/

Human or Social Services or the child welfare agency itself): Connecticut (child welfare), Hawai‘i (DHS), Idaho (child welfare), Illinois (child welfare), Indiana (child welfare), Iowa (DHS), Maine (child welfare), Maryland (child welfare), Massachusetts (child welfare), Michigan (DHHS),<sup>126</sup> Minnesota (child welfare), Oregon (DHS), South Dakota (DSS),<sup>127</sup> Tennessee (child welfare), Utah (child welfare) and Vermont (AHS).

#### ● **LGBTQ+-Specific State-Wide Policy**

Nine states not only include sexual orientation, gender identity and gender expression in their nondiscrimination protections but also have detailed LGBTQ+-specific policies: Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Tennessee and Utah. California has issued a statewide policy transmittal to county child welfare agencies summarizing their obligations under state nondiscrimination law but does not go into further detail.<sup>128</sup>

### **Sex and Sexual Orientation as Protected Classes**

As noted above, courts have held that discrimination based on sex, a protected class in some federal laws, includes both sex stereotyping and gender identity-based discrimination.<sup>129</sup> To the extent the term *sex* (or *gender*) appears in state or local anti-discrimination measures, it should be uniformly interpreted.

#### ● **Statute or Regulation**

Twelve states include either sex (or gender) and sexual orientation, but not gender identity, as protected classes in nondiscrimination protections in child welfare-specific statute or regulation: Colorado, Delaware, Louisiana, Massachusetts, Minnesota, New Hampshire, North Dakota,<sup>130</sup> Pennsylvania, Utah, West Virginia, Wisconsin and Wyoming. Of these states, Colorado, Massachusetts, Minnesota and Utah include gender identity (and some gender expression) in agency policy.

### **Sex as a Protected Class**

#### ● **Statute or Regulation**

Four states include sex (or gender) as a protected class in statute or regulation but do not explicitly include sexual orientation or gender identity: Arkansas, Maine, Oklahoma and South Carolina.

## Neither Sexual Orientation, Gender Identity nor Sex as Protected Classes

Ten states have no explicit protection against discrimination on account of sexual orientation, gender identity or sex (or gender) in child welfare-specific statute, regulation or policy: Alabama, Alaska, Arizona,<sup>131</sup> Georgia, Kansas, Kentucky, Nebraska, North Carolina, Texas and Virginia. Virginia has a so-called conscience clause law, which allows providers receiving government funds to refuse to serve persons if doing so conflicts with their “sincerely held religious beliefs.”<sup>132</sup>

## Recommended Regulatory Language

Examples of recommended regulatory language may be found in New Mexico’s regulations governing child-placing agencies and Rhode Island regulations governing residential child care:

### New Mexico Child-Placing Agencies:

**Discrimination:** Agencies who receive state or federal monies, shall not discriminate against applicants, clients, or employees based on race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity.<sup>133</sup>

### Rhode Island Residential Child Care: The

Department of Children, Youth, and Families does not discriminate against individuals based on race, color, national origin, sex, gender identity or expression, sexual orientation, religious belief, political belief or handicap. The prohibition against discriminatory practices extends to the agencies, organizations and institutions the Department licenses.<sup>134</sup>

## Recommended TGNC-Affirming Policies

Explicit SOGIE-inclusive nondiscrimination laws are an essential starting point for ensuring safety and well-being for TGNC youth. More detailed policy and training on policy obligations are needed to ensure that youth and system professionals are clear on exactly what it means not to discriminate on account of sexual orientation, gender identity or gender expression. As referenced above, nine states have developed more detailed LGBTQ+-policies and include more specific requirements for working with TGNC youth. A few of the recommended examples below include specifics such as referring to transgender youth by the name and pronouns they use and ensuring that they are allowed to express their gender freely and are provided trans-affirming health and behavioral health care,<sup>135</sup> among other necessities.

The following are examples of recommended policies that provide specific practice obligations

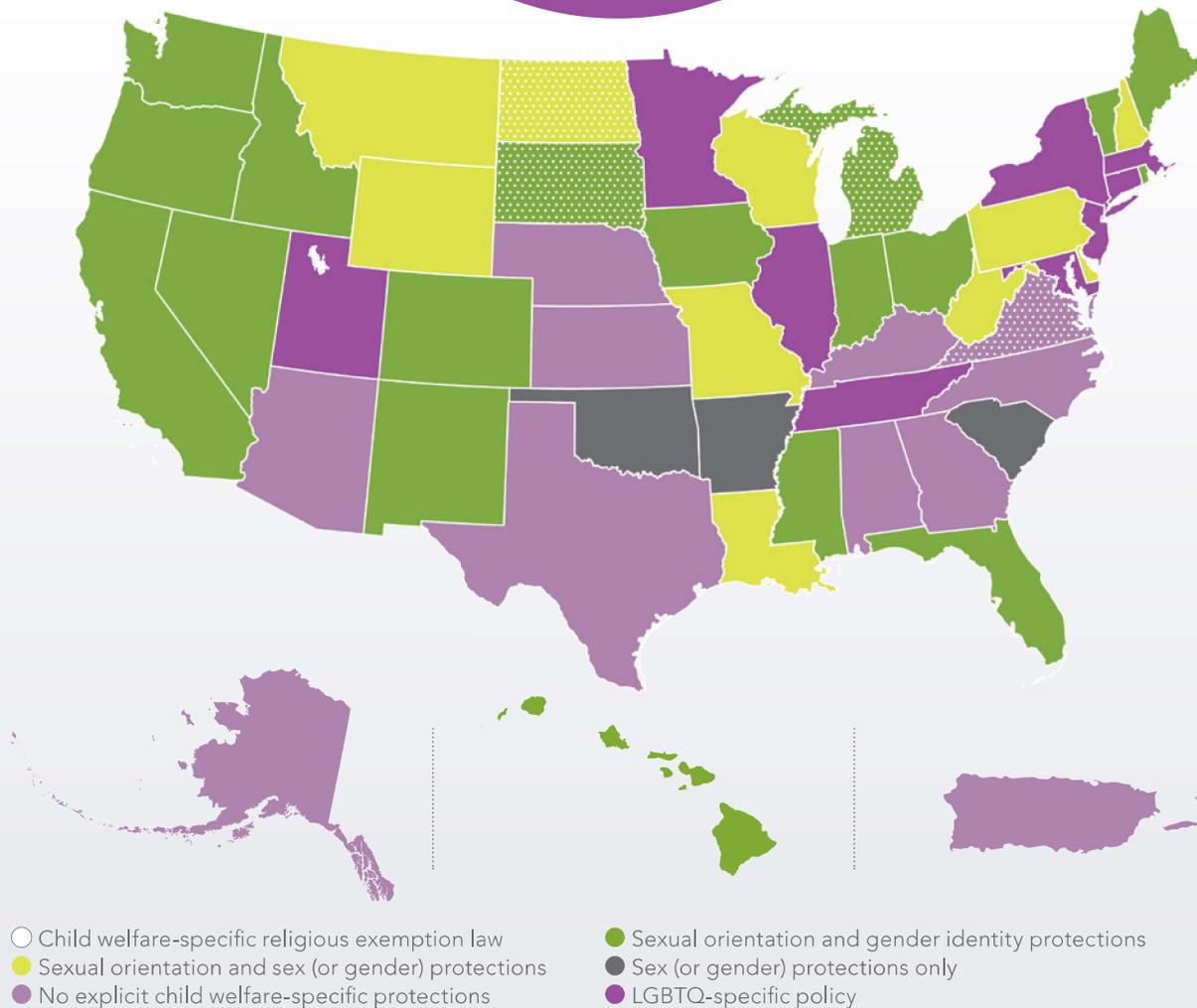


to meet the needs of TGNC youth in child welfare systems:

- Maryland Department of Human Resources, Social Services Administration’s *Working with Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Families* (2016).<sup>136</sup>
- Minnesota Department of Human Services’ *Working with lesbian, gay, bisexual, transgender and questioning/queer youth* (2013).<sup>137</sup>
- The most thorough set of guidelines regarding affirming practice for TGNC youth is provided by New York City’s Administration for Children’s Services in their *Safe and Respected: Policy, Best Practices, and Guidance for Serving Transgender and Gender Non-Conforming Children and Youth in the Child Welfare, Detention and Juvenile Justice Systems* (2014).<sup>138</sup>

## CHILD WELFARE

Nondiscrimination  
Law and Policy



Please consult the interactive map at the link provided for a comprehensive state-by-state overview of nondiscrimination statutes, regulations and policies specific to the child welfare system

[lambdalegal.org/map/child-welfare](https://lambdalegal.org/map/child-welfare)



## 2. JUVENILE JUSTICE

The District of Columbia, Louisiana and New York rank highest among state juvenile justice systems by providing not only SOGIE-inclusive non-discrimination protections, but LGBTQ+-specific policy as well. California offers statutory protection but has a county-based system and therefore no statewide LGBTQ+-specific policy. Rhode Island and Texas also provide SOGIE-inclusive regulatory protections. Colorado, Connecticut, Illinois, Massachusetts, New Jersey, Ohio and Tennessee rank high because they, like D.C., New York and Louisiana, have LGBTQ+-specific statewide policies.

The lowest-ranking states—offering no protection from discrimination on account of sexual orientation, gender identity or sex (or gender) in juvenile justice-specific law and policy—are Alaska, Maine, Mississippi, Nevada, North Carolina, North Dakota,

Oklahoma, South Dakota, Utah and Wisconsin.

The following summarizes express protections from discrimination, to the extent that they exist, along with their sources:

### **Sexual Orientation and Gender Identity as Protected Classes**

#### ● **Statute or Regulation**

Five states and the District of Columbia explicitly include sexual orientation and gender identity in statute or regulation specific to their juvenile justice systems: California, Louisiana, New York, Rhode Island and Texas. Texas's regulations contain sexual orientation and gender identity as protected classes for youth in the custody of the Texas Juvenile Justice

Department and for youth placed in non-secure facilities, but not for short-term detention. The District of Columbia's statutory protections are provided in the District of Columbia's Human Rights Law, which covers all government agencies.

- **Agency Policy**

Additionally, 16 states contain explicit sexual orientation and gender identity protections in agency policy (either through a Department of Health/Human Rights or Social Services<sup>139</sup> or through a juvenile justice agency or state detention/facility policy): Arizona, Colorado, Connecticut, Georgia, Hawai'i, Illinois, Iowa (Department of Human Services policy), Kentucky, Massachusetts, Michigan, New Jersey, Ohio, Oregon, Tennessee, Vermont (Administration for Human Services policy) and Washington (Department of Social and Health Services policy). Hawai'i's policy is specific to the state's one detention facility.

- **LGBTQ+-Specific Policy**

Nine states and D.C. have LGBTQ+-specific policies: Colorado, Connecticut, Illinois, Louisiana, Massachusetts, New Jersey, New York, Ohio and Tennessee. Additionally, the following localities have LGBTQ+-specific policies in part or all of their juvenile justice systems: San Francisco Juvenile Probation Department, Santa Clara County Probation Department, Cook County Juvenile Temporary Detention Center, New Orleans Juvenile Detention Center, New York City Administration for Children's Services, New York City Probation Department (Adult and Juvenile) and the Philadelphia Juvenile Justice Center.

## **Sex and Sexual Orientation as Protected Classes**

- **Statute or Regulation**

Nine states include either sex (or gender) and sexual orientation, but not gender identity expressly, as protected classes in nondiscrimination protections in juvenile justice-specific statute or regulation: Arizona, Colorado, Florida, Maryland, Minnesota, Montana, New Mexico (transition services only), Pennsylvania (non-secure residential treatment facilities only) and Rhode Island.

- **Agency Policy**

Five states include either sex (or gender) and

sexual orientation, but not gender identity expressly, as protected classes in juvenile justice or detention/facility policy: Delaware, Indiana, Kansas, Missouri (Department of Social Services) and New Hampshire (Department of Health and Human Services).

## **Sex as a Protected Class:**

- **Statute or Regulation**

Seven states include sex (or gender) as a protected class in juvenile justice-specific statute or regulation, but do not include sexual orientation or gender identity: Alabama, Arkansas, Idaho, Kentucky, Nebraska, New Mexico (all services) and Texas (short-term detention).

- **Agency Policy**

One state, South Carolina, has sex as a protected class in agency policy.

## **Neither Sexual Orientation, Gender Identity nor Sex as Protected Classes**

Eleven states have no explicit protections against discrimination on account of sexual orientation, gender identity or sex (or gender) in juvenile justice statute, regulation or agency policy: Alaska, Maine, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, South Dakota, Utah and Wisconsin.

## **Recommended Regulatory Language**

New York provides an example of recommended regulatory language inclusive of sexual orientation, gender identity and gender expression. Notably, it extends protections to preventative services in addition to protecting youth in detention facilities:

**Administration and operation of detention.** Staff and volunteers of detention providers shall not engage in discrimination or harassment of families receiving preventative services on the basis of race, creed, color, national origin, age, **sex**, religion, **sexual orientation**, **gender identity or expression**, marital status, or disability. Detention providers shall promote and maintain a safe environment, take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur.<sup>140</sup>

California's regulation directs each county to develop a nondiscrimination policy:

All facility administrators shall develop, publish, and implement a manual of written policies and procedures that address, at a minimum, all regulations that are applicable to the facility... The manual

shall include... (h) a non-discrimination provision that provides that all youth within the facility shall have fair and equal access to all available services, placement, care, treatment, and benefits, and provides that no person shall be subject to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, **gender, sexual orientation, gender identity, gender expression**, mental or physical disability, or HIV status, including restrictive housing or classification decisions based solely on any of the above mentioned categories[.]<sup>141</sup>

### Recommended TGNC-Affirming Policies

- Massachusetts Department of Youth Services, Policy 03.04.09, *Prohibition of Harassment and Discrimination Against Youth*,<sup>142</sup> is a recommended example of a juvenile justice policy that affirms and supports TGNC (and LGBTQ+) youth. Massachusetts' policy provides comprehensive SOGIE protection, including protection against those perceived to be LGBTQ+ and gender-nonconforming youth, and provides that transgender youth shall be housed consistently with their identity (after consultation with the youth and decision by a team of administrators), referred to by name and pronouns they use and provided with clothing consistent with their identity and expression.

Additionally, the policy provides that youth shall have access to qualified medical providers and be provided with recommended care, including hormone therapy.<sup>143</sup>

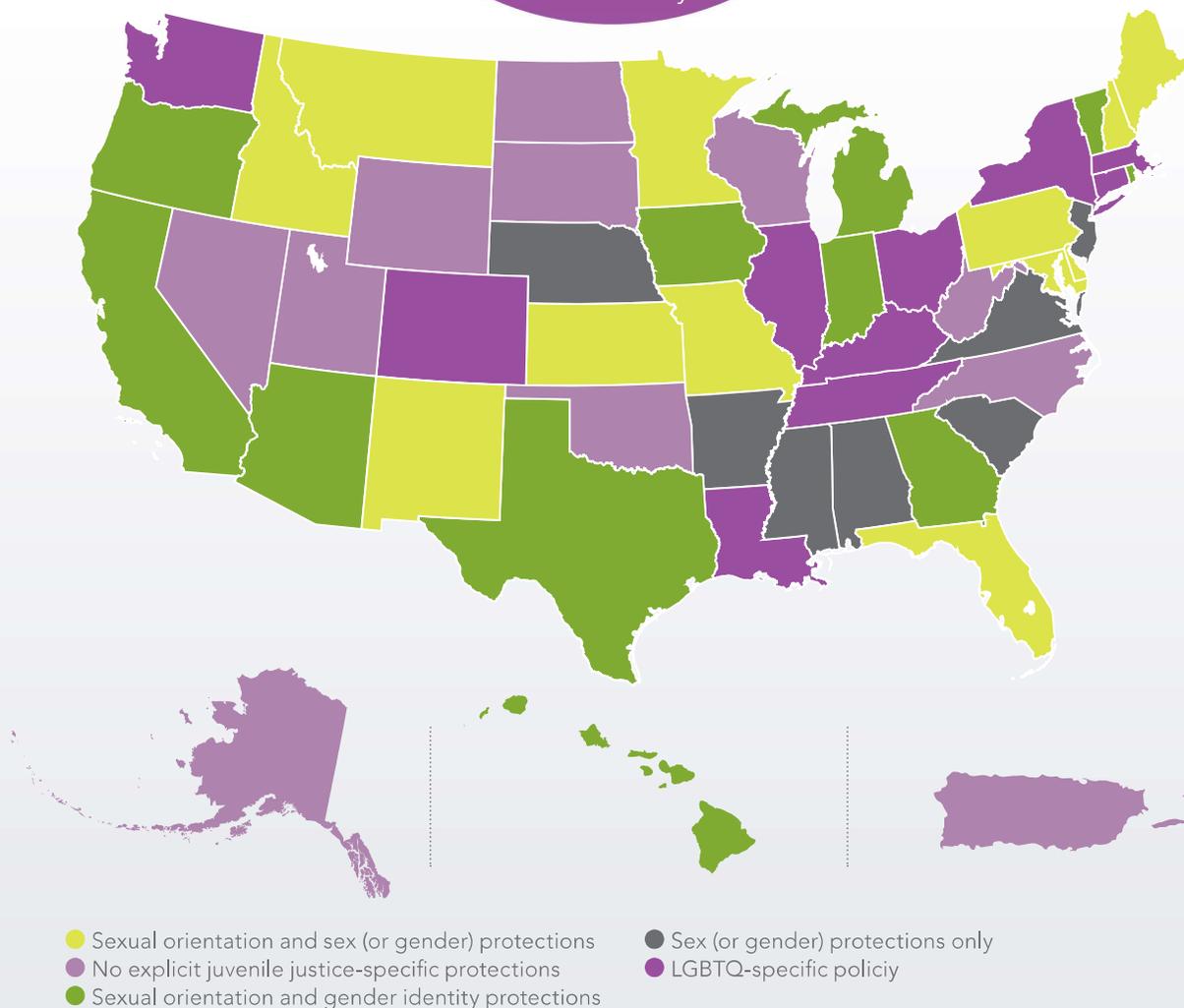
- Colorado's Department of Human Services, Division of Juvenile Corrections, *Non-Discriminatory Services to Lesbian, Gay, Bisexual, Transgender, Questioning, and Intersex (LGBTQI) Juvenile*,<sup>144</sup> is also a good example of both providing comprehensive policy protection against discrimination, harassment, violence and disparate treatment and specifically requiring affirmation of youth's gender identity and expression. It includes sexual orientation, gender identity and gender expression as protected classes, also covers those merely perceived to be LGBTQI and forbids any attempt to change a youth's identity or expression. In addition, it provides specific guidance regarding housing classifications and clothing provisions based on a youth's identity and requires that health care be provided by qualified professionals. The policy also dictates that a youth is allowed to choose the sex of a staff member who searches them.<sup>145</sup>

Both of these policies provided an example of how PREA requirements can be incorporated in agency policy.



## JUVENILE JUSTICE

Nondiscrimination  
Law and Policy



Please consult the interactive map at the link provided for a comprehensive state-by-state overview of nondiscrimination statutes, regulations and policies specific to the child welfare system

[lambdalegal.org/map/child-welfare](https://lambdalegal.org/map/child-welfare)



### 3. SYSTEMS SERVING RUNAWAY AND HOMELESS

State-based statutes and regulations and agency policy also offer protection against SOGIE-based discrimination for youth experiencing homelessness and living in government-funded care. These sources may be the same regulations that govern licensing of other types of congregate care facilities, including congregate care facilities that serve youth in child welfare or juvenile justice systems. To the extent these providers and programs receive funding or are otherwise administered through their state's Department of Health and Human Services or Social Services, they may be covered by nondiscrimination protections in state agency policy.<sup>146</sup> Given that state-based systems serving youth experiencing homelessness are, as in many states, not separate distinct government entities or agencies, explicit sources of protection

specific to those systems are often less clear.

Only California, the District of Columbia and New York have SOGIE-inclusive protection from discrimination in statute or regulation for youth served by runaway and homeless youth programs and shelters.<sup>147</sup>

The following summarizes protections from discrimination, to the extent they exist, and their sources:

#### *Sexual Orientation and Gender Identity as Protected Classes*

##### ● *Statute or Regulation*

California, D.C. and New York contain SOGIE-inclusive protection from discrimination