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Implications of AB 458 for California LGBTQ Youth in Foster Care

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I. INTRODUCTION

At least five to ten percent of the adolescents in the foster care system are lesbian, gay, bisexual, transgender, or questioning (LGBTQ).¹ In spite of these significant numbers, the foster care system has done little to protect these young people, often the victims of homophobia or transphobia in their families of origin, from further homophobic or

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1. See Nat’l Ctr. for Lesbian Rights, *LGBTQ Youth in the Foster Care System*, available at <http://www.nclrights.org/publications/lgbtqfostercare> (last visited Sept. 23, 2004) [hereinafter *LGBTQ Youth*].

transphobic abuse in the foster care system.² LGBTQ youth are harmed by this victimization within the system that is supposed to ensure their safety;³ the damage sometimes rises to such an intolerable level that young people choose life on the street as a safer alternative to their group or foster home.⁴

California took a significant step towards the protection of LGBTQ youth in foster care with the passage of AB 458, the Foster Care Nondiscrimination Act, which went into effect on January 1, 2004.⁵ This Paper will explore the implications of AB 458 for LGBTQ youth who are facing homophobic or transphobic discrimination in foster care settings. The first Part will outline the background and content of AB 458. The second will explore existing law that may bear on the emerging definition of sexual orientation and gender identity discrimination as experienced by foster care youth. The third Part will outline some legal and extralegal strategies that youth and their advocates can employ to address some of the most common complaints of LGBTQ youth in the foster care system.

II. BACKGROUND AND CONTENT OF AB 458

AB 458 was enacted in California as the first law of its kind in the United States to offer explicit protection for LGBTQ youth and adults in the foster care system.⁶ Ironically, LGBTQ youth in foster care often face harassment, discrimination, inadequate care, and even violence within a system that is supposed to be protecting them from abusive or neglectful parental care.⁷ Inadequately trained staff often responds to incidents of harassment or discrimination by focusing on the victim rather than on changing the behavior of the perpetrator.⁸ For example, a caseworker might move a gay youth who is being harassed in a group home into a more restrictive placement “for his own safety” rather than enforce house rules against the harassers; or a foster parent who is uncomfortable with a foster child’s lesbian identity might request that the

2. See Lambda Legal Def. & Educ. Fund, *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual and Transgendered Adolescents in the Foster Care System* 11-12 (Oct. 5, 2001), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record899> [hereinafter *Youth in the Margins*].

3. See GERALD P. MALLON, LET’S GET THIS STRAIGHT: A GAY-AND LESBIAN-AFFIRMING APPROACH TO CHILD WELFARE 116-19 (John Michel ed. 1999).

4. See *LGBTQ Youth*, *supra* note 1.

5. See Nat’l Ctr. for Lesbian Rights, *AB 458 Fact Sheet: Foster Care Nondiscrimination Act*, available at <http://www.nclrights.org/publications/ab458.html> (last visited Sept. 23, 2004).

6. See *id.*

7. See *Youth in the Margins*, *supra* note 2, at 9-10.

8. See *id.* at 15.

child be placed elsewhere rather than requesting training for herself.⁹ Indeed, is not uncommon for the harassment to come directly from the caregivers themselves—LGBTQ youth in the foster care system have reported systematic patterns of abuse, including taunting from staff, inappropriate “conversion” therapies, and tolerance for slurs, violence, and sexual harassment in the foster care setting.¹⁰

Transgender youth are at particular risk for discrimination, harassment and violence.¹¹ Lack of awareness of the existence of transgender youth means that the foster care system is even less prepared to provide for their needs than for the needs of lesbian, gay, and bisexual youth. In addition to facing a heightened risk of all the forms of discrimination endured by LGB youth, transgender youth in foster care may not be allowed to dress or live as their identified gender, may be forced to use bathrooms and sleeping quarters inappropriate to their identified gender, and may be unable to access appropriate health and mental health care.¹²

The Foster Care Nondiscrimination Act was an important step in addressing the challenges faced by LGBTQ foster youth. The Act provides that LGBTQ foster children, foster parents, and service providers have a right to equal access to all services, placement, care, treatment and benefits of the foster care system, without discrimination or harassment on the basis of (among other things) sexual orientation, gender identity, or HIV status.¹³ It also specifically adds these rights to the California Foster Child List of Rights.¹⁴ Additionally, the Act requires training for group home administrators, foster parents, and department licensing personnel on the right of LGBTQ foster children to have fair

9. See *LGBTQ Youth*, *supra* note 1.

10. See *Youth in the Margins*, *supra* note 2, at 9; MALLON, *supra* note 3, at 118-19.

11. See TERESA DECRESCENZO & GERALD P. MALLON, CHILD WELFARE LEAGUE OF AMERICA, *SERVING TRANSGENDER YOUTH: THE ROLE OF CHILD WELFARE SYSTEMS* 10-11 (2002).

12. See Interview with Jody Marksamer, National Center for Lesbian Rights, and Shannan Wilbur, Executive Director, Legal Services for Children, in San Francisco, Cal. (Apr. 16, 2004). Some transgender youth may benefit from access to hormones, which can facilitate an optimal transition to a successful adulthood. Stephanie Swann & Sarah E. Herbert, *Ethical Issues in the Mental Health Treatment of Gender Dysphoric Adolescents*, in *SOCIAL SERVICES WITH TRANSGENDERED YOUTH* 30-33 (Gerald P. Mallon ed., 2000). Additionally, while a transgender identity does not in itself signal a need for mental health care, transgender youth in the foster care system may need support in negotiating a world that is not supportive of their gender identity, or they may require mental health care for other reasons. Providers who are not trained in supporting transgender youth may inappropriately focus on the transgender identity as the problem. See Christian Burgess, *Internal and External Stress Factors Associated with the Identity Development of Transgendered Youth*, in *SOCIAL SERVICES WITH TRANSGENDERED YOUTH* 36-37 (Gerald P. Mallon ed., 2000).

13. See CAL. WELF. & INST. CODE §§ 16001.9(a)(22), 16013(a) (West 2004).

14. See *id.* § 16001.9(a)(22).

and equal access to all available services without harassment or discrimination on the basis of actual or perceived sexual orientation or gender identity.¹⁵ These provisions offer a basis for asserting the rights of individual LGBTQ foster youth, and the required training that will help to prevent future incidents of discrimination.

However, AB 458 does have some limitations. There is no requirement for relative caregivers to participate in available training programs and no provision for funding the trainings that are required.¹⁶ The Act offers no mechanism for enforcement.¹⁷ There is also no definition of what constitutes discrimination on the basis of sexual orientation or gender identity in the bill.¹⁸ Therefore, it falls onto LGBTQ foster youth and their advocates to define and defend the youth rights addressed in AB 458.

III. RELATED CASE AND STATUTORY LAW

Because the Act went into effect so recently, there is currently no case law to guide interpretation. In fact, there is a lack of California case law generally addressing discrimination against LGBTQ foster youth. However, decisions about the rights of LGBTQ youth and adults in other settings and about racial discrimination in the foster care system may provide some guidance.

A. *Racial Discrimination in Foster Care*

Foster care youth are also protected from racial discrimination by AB 458.¹⁹ Unlike sexual orientation discrimination, racial discrimination in foster care has been tentatively explored in federal and state statutes and in case law.²⁰ For the most part, this exploration has been confined to discrimination that takes the form of delay or denial of foster or adoption placements.

The Federal Multiethnic Placement Act (MEPA) addresses racial discrimination in foster care, specifying that states which receive federal foster care funds cannot delay or deny placement of a child for adoption

15. See CAL. HEALTH & SAFETY CODE §§ 1522.41(c)(1)(H), 1529.2(b)(4)(E), 1563(c)(5) (West 2004).

16. See A.B. 458, 2003 Gen. Assem., Reg. Sess. (Cal. 2003) (addressing trainings available to relative caregivers).

17. See *id.*

18. See *id.*

19. See CAL. WELF. & INST. CODE § 16001.9(a)(22).

20. See 42 U.S.C.A. § 1996(b) (West 2004); CAL. FAM. CODE §§ 7950(a)(2)(B), 8708(a)(2) (West 2004); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 493-96 (D.N.J. 2000).

on the basis of the race of the child or the prospective parent.²¹ California statutes similarly provide that agencies receiving state funds may not delay or deny foster or adoptive placements on the basis of the race of the child or parent.²² In at least one instance, the Office for Civil Rights found both state and county child welfare departments to be in violation of MEPA due to policies that resulted in additional barriers to the adoption of African American children.²³ The OCR report specifically labeled such policies as discriminatory.²⁴ Analogy to racial discrimination prohibited by MEPA may be useful to LGBTQ youth facing delay or denial of placement based on sexual orientation or gender identity.

B. Sexual Orientation Discrimination in Schools

It is clear that public schools in California may not discriminate against students on the basis of sexual orientation.²⁵ In *Massey v. Banning Unified School District*, the court denied defendants' motion to dismiss in a case where an eighth grade student was removed from physical education class and made to sit in the principal's office during that class period for a week after coming out to her classmates and teachers as a lesbian.²⁶ In spite of the fact that there was no binding precedent at the time finding school officials liable for sexual orientation discrimination against a student, the District Court pointed out that "[i]t is [c]learly [e]stablished in the [United States Court of Appeals for the] Ninth Circuit that [d]iscrimination on the [b]asis of [s]exual [o]rientation

21. This aspect of racial discrimination in foster care has received attention because of the particular dynamics of race and the foster care system. Children of color are overrepresented in foster care, while foster and especially adoptive parents of color are underrepresented. When racial-matching preferences are enforced, this disparity means that children of color have to wait much longer for foster or adoptive placement than white children, even when supportive white families are available. See Joan Heifetz Hollinger & The ABA Center on Children and the Law, *A Guide to the Multiethnic Placement Act of 1994 as Amended by the Interethnic Adoption Provisions of 1996*, available at <http://www.acf.hhs.gov/programs/cb/publications/mepa94/> (last visited Sept. 23, 2004) [hereinafter *Guide to MEPA*]. The dynamics of sexual orientation and gender identity discrimination in foster care are different, in part because LGBT youth are a numerical minority in the system. The primary issue of discrimination for LGBT youth is one of a scarcity of placements that are prepared to be supportive. See MALLON, *supra* note 3, at 116-17.

22. See CAL. FAM. CODE §§ 7950(a)(2)(B), 8708(a)(2).

23. See Priv. Ltr. Rul. Docket No. 05997026 (Office of Civil Rights, U.S. Dep't of Health & Human Servs., Oct. 20, 2003) 1-3, available at http://www.hhs.gov/ocr/mepa/Hamilton_co2.pdf.

24. See *id.*

25. See *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1095 (C.D. Cal. 2003).

26. See *id.* at 1090-91.

violates the Equal Protection Clause.”²⁷ Calling the school district’s claim that removal from class was necessary to protect her from harassment “disingenuous,” the court held that defendants were not entitled to immunity from suit.²⁸ A major factor in this holding was that earlier decisions prohibiting sexual orientation discrimination in other settings put defendants on notice that such discrimination in a school setting was a violation of students’ equal protection rights.²⁹ *Massey* makes it clear that sexual orientation discrimination by public officials in any setting is a violation of equal protection rights, and its extension to the foster care setting is logical, especially in light of AB 458.³⁰

Schools also have a duty to protect LGBTQ students from harassment or violence based on sexual orientation.³¹ In *Flores v. Morgan Hill Unified School District*, plaintiffs were a group of students who alleged that school officials had failed to respond or responded inadequately to their repeated reports of student-to-student homophobic harassment and physical abuse.³² Plaintiffs brought suit under 42 U.S.C. § 1983, claiming that defendants denied their “right to equal protection on the basis of their actual or perceived sexual orientation.”³³ In order to establish this claim, the students had to show that school officials, acting under color of state law, discriminated against them intentionally or with deliberate indifference.³⁴ In upholding the district court’s denial of defendants’ motion for summary judgment, the court found that the law was sufficiently clear to put defendants on notice of their obligation to protect LGBTQ students.³⁵ Further, officials’ failure to discipline harassing students, provide appropriate antidiscrimination training, or take any further steps once they knew their remedial measures were inadequate supported a finding of deliberate indifference.³⁶ *Flores* may have application in cases where foster care workers fail to respond effectively to LGBTQ foster youths’ complaints of harassment or violence.

LGBTQ students in the Ninth Circuit also have the right to form school clubs.³⁷ In *Colin v. Orange Unified School District*, students were

27. *Id.* at 1095.

28. *See id.* at 1096 n.8.

29. *See id.*

30. *See id.* at 1095-97.

31. *See Flores v. Morgan Hill Unified Sch. Dist.*, 234 F.3d 1130 (9th Cir. 2003).

32. *See id.* at 1132-33.

33. *Id.* at 1133.

34. *See id.* at 1134.

35. *See id.* at 1137.

36. *See id.* at 1135-37.

37. *See Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000).

granted a preliminary injunction requiring their school to allow their Gay-Straight Alliance Club the same access to school facilities that was accorded other school groups.³⁸ This injunction was based primarily on the Equal Access Act, a federal statute specifically addressing the rights of students to hold meetings.³⁹ However, the court, citing the California Student Safety and Violence Prevention Act of 2000, which added sexual orientation to the list of prohibited forms of discrimination in public schools, also pointed out that granting the preliminary injunction supports state policy.⁴⁰ While the holding in *Colin* did have a specific basis in federal law addressing student free speech, it still provides support for the premise that AB 458 demonstrates a state policy of nondiscrimination and violence prevention for LGBTQ foster youth, and that providing access to LGBTQ youth groups will further this policy.⁴¹ Therefore, it may have some application in cases where LGBTQ foster youth are denied access to LGBTQ-supportive services.

C. Sexual Orientation Discrimination in Employment

Discrimination in employment is defined by a set of standards applied to adult contractual relationships, which are very different from the legal relationships between a foster child and a foster parent.⁴² However, because there is no real definition yet of what constitutes sexual orientation discrimination or harassment in the foster care setting, it may be instructive to consider what courts have found to constitute a hostile or abusive workplace environment.⁴³ *Erdmann* examines an employment discrimination situation that mirrors some common experiences of LGBTQ foster youth.⁴⁴ In *Erdmann*, the court denied defendants' motion for summary judgment on Title VII and California Fair Employment and Housing Act (FEHA) claims where the plaintiff, a gay man, alleged that his employer told him he would go to hell if he did not become a heterosexual and a Mormon, expressed her view publicly that homosexuals are promiscuous, pressured him to engage in prayer

38. See *id.* at 1151.

39. See *id.* at 1142 (citing 20 U.S.C. § 4071(a)-(b) (2000)).

40. See 83 F. Supp. 2d at 1150 (citing 1999 Cal. A.B. 537, Stats. 1999, ch. 587, § 3).

41. See *id.*

42. See *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d 1152, 1159 (N.D. Cal. 2001); *Broadus v. State Farm Ins. Co.*, No. 98-4254CVCSOWECF, 2000 WL 1585257, at *5 (W.D. Mo. Oct. 11, 2000).

43. See *County of Los Angeles Super. Ct. v. Super. Ct.*, 125 Cal. Rptr. 2d 637, 642 (Cal. App. Dist. 2002); *Weatherford ex rel. Michael L. v. State*, 81 P.3d 320, 322 (Ariz. 2003) (regarding sexual abuse in the system not sexual orientation or gender identity discrimination).

44. See *Erdmann*, 155 F. Supp. 2d at 1154.

meetings, and forced him to reassure other employees that he did not want to go to bed with them.⁴⁵ LGBTQ foster youth have complained of similar situations with foster parents who humiliate them in front of others for their sexuality, or pressure them to “convert,” often on religious grounds.⁴⁶ The court in *Erdmann* held that plaintiff’s claims, if sustained, constituted sufficient grounds to find that the work environment was hostile or abusive, and to find that the environment was so intolerable that a reasonable person would feel compelled to quit.⁴⁷ Defendant’s claims that her actions were motivated by love and concern for the plaintiff were not relevant to this holding.⁴⁸ Cases like *Erdmann*, where courts determine that employers’ homophobic actions or speech create a hostile, abusive, or intolerable work environment, may be persuasive in defining what constitutes discrimination under AB 458.⁴⁹

D. Gender Identity Discrimination

Gender identity discrimination is even less well-defined than sexual orientation discrimination. Most of the cases that exist concern the rights of transgender people not to lose their employment or be sexually harassed on the basis of gender identity.⁵⁰ The State of California has not issued any guidelines for determining what constitutes prohibited gender identity discrimination. However, the City of San Francisco has issued comprehensive guidelines, specifying that discrimination on the basis of gender identity includes denying people access to bathrooms, locker rooms, and housing appropriate to their gender identity; deliberate misuse of pronouns; and, where there are gender-specific dress codes, forcing transgender people to conform to dress codes that are inappropriate to their gender identity.⁵¹ These guidelines almost certainly apply to transgender foster youth within San Francisco and may be useful

45. See *id.* at 1164-65.

46. See *Youth in the Margins*, *supra* note 2, at 9.

47. See *Erdmann*, 155 F. Supp. 2d at 1164.

48. See *id.*

49. This line of reasoning seems especially compelling in light of the fact that, unlike employees, foster care youth live full-time with their harassers, cannot choose to leave, and did not contract to be there in the first place.

50. See, e.g., *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (holding that Title IX prohibits sexual harassment of a transsexual woman); *Broadus v. State Farm Ins. Co.*, No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4-*5 (W.D. Mo. Oct. 11, 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding, in a case involving a transsexual plaintiff, that “[s]exual stereotyping which plays a role in an employment decision is actionable under Title VII”)).

51. See S.F. Human Rights Comm’n, *Compliance Guidelines to Prohibit Gender Identity Discrimination* § 4 (Dec. 10, 2003), available at http://www.ci.sf.ca.us/site/sfhumanrights_page.asp?id=6274 [hereinafter *Compliance Guidelines*].

in defining the meaning of statewide gender identity discrimination in foster care.

IV. APPLICATION OF AB 458 FOR LGBTQ FOSTER CARE YOUTH

Sexual orientation or gender identity discrimination can take many forms. However, there are some recurring themes in LGBTQ foster youth's reports of discrimination. Common problems include harassment and violence in foster homes and group homes,⁵² isolation or overly restrictive placement, excessive changes in placement, and inappropriate placement.⁵³ LGBTQ youth often have religious conflicts with foster parents or group home providers who believe homosexuality is "sinful" and with foster parents sometimes attempting to force LGBTQ youth into "reparative therapy."⁵⁴ Foster care providers may also prevent LGBTQ youth from engaging in age-appropriate activities, such as dating or attending LGBTQ youth groups, or may deny transgender youth the right to dress in clothing appropriate to their gender or to access appropriate medical or mental health care.⁵⁵

There are many possible avenues for LGBTQ foster youth and their advocates to address these problems. The first step is for the young person to talk to her caseworker and her attorney any time there are problems.⁵⁶ If the problems are still not resolved, there is a statewide ombudsman for foster care youth who can intervene to help reach a workable solution.⁵⁷ Lawsuits may also be necessary in order to define the scope of protection for LGBTQ foster youth; these may be brought by individual youths or groups of youths.⁵⁸ Prevention is also important,

52. This harassment may come from group home staff, foster parents, or other youth in the home. See AL DESETTA, *IN THE SYSTEM AND IN THE LIFE: A GUIDE FOR TEENS AND STAFF TO THE GAY EXPERIENCE IN FOSTER CARE* 46-47 (2003).

53. See MALLON, *supra* note 3, at 112-19.

54. See Interview with Jody Marksamer & Shannan Wilbur, *supra* note 12.

55. See *id.*

56. See Interview with Karen Grace-Kaho, California Ombudsman for Foster Care (Apr. 30, 2004). Even if the caseworker and attorney are not supportive, this is an important first step, as it can lay the groundwork for showing deliberate indifference if there is a lawsuit in the future. It can be helpful in future investigations or at trial if young people or their advocates document these incidents.

57. See Cal. Foster Care Ombudsman Program, at <http://www.fosteryouthhelp.ca.gov/OMBprog.html> (last visited Sept. 23, 2004).

58. See *Gay-Straight Alliance Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1112 (E.D. Cal. 2001) (holding that a statewide organization comprised of LGBT students and supportive adults had standing to sue a school district on a sexual orientation discrimination claim where students in the school district were members of the organization). The opinion suggests that it might even be possible for a properly structured group representing LGBT foster care youth to bring suit. See *id.*

so it is crucial that LGBTQ youth and their advocates be involved in the development of curricula for the trainings mandated by AB 458, and that they remain involved in policy-making at the state and county level.⁵⁹ The remainder of this Paper will outline possible strategies for utilizing these tools to rectify some of the most common forms of discrimination against LGBTQ youth in foster care.

A. *Harassment and Violence in the Foster Care Setting*

It seems clear that courts in the Ninth Circuit will hold blatant homophobic speech or violence in the foster care setting to be a violation of Equal Protection rights.⁶⁰ The court's strong statement in *Flores* that school officials were deemed to have fair warning of LGBTQ students' right to equal protection gives a good indication that the court would consider foster care officials to have notice as well.⁶¹ The court in *Flores* also held that school officials could be held liable, once they had notice, for failing to take reasonable measures to stop harassment by other students, pointing out that "we are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation."⁶² It seems likely that the court would hold similarly in a case of foster care officials' tolerance of harassment or violence against an LGBTQ youth in their charge if the young person could show that the officials knew of the harassment.⁶³ In *Massey*, the court found that the plaintiff had grounds for declaratory and injunctive relief against school officials for discriminatory actions which violated her right to equal protection, as well as for punitive damages against individual officials in their personal capacities.⁶⁴ Similar remedies might be available to LGBTQ foster youth, especially in cases where, as in *Massey*, discrimination comes directly from officials, or where, as in *Flores*, officials fail to act after numerous reports of extreme harassment.⁶⁵ In

59. See *Youth in the Margins*, *supra* note 2, at 1-16.

60. See *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1138 (9th Cir. 2003).

61. See *id.* at 1136-37.

62. *Id.* at 1138 (quoting *Nabozny v. Podlesny*, 92 F.3d 446,458 (7th Cir. 1996)).

63. See *id.* at 1137-38. *Flores* underscores not only the importance of reporting the harassment and keeping a record of reports, but also of showing differential treatment in cases of violence, harassment, or sexual harassment of heterosexual youth. See *id.* There are rulings which find foster care workers immune under § 1983 for failing to protect foster children from abuse, however, in such cases, the caseworkers did not have actual knowledge of the abuse. See *Weatherford ex rel. Michael L. v. State*, 81 P.3d 320, 328 (Ariz. 2003); *County of Los Angeles v. Super. Ct.*, 125 Cal. Rptr. 2d 637, 649 (Cal. Ct. App. 2002).

64. See *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1093 (C.D. Cal. 2003).

65. See *id.* at 1091; *Flores*, 324 F.3d at 1132-33.

less extreme cases, negotiation with the local agency through the foster youth's lawyer or the state ombudsman might be sufficient to resolve problems.

B. Issues of Inappropriate Placement and Instability of Placement

LGBTQ youth can experience negative effects from inappropriate placement or instability of placement in several different contexts. A foster parent may ask to have a young person removed from the home because he is uncomfortable with the youth's sexual orientation or gender identity.⁶⁶ A young person may run away from a placement or request a new placement if she is the target of negative judgments from foster parents or other youth.⁶⁷ An LGBTQ youth who is placed in a group home that does not have a strong antidiscrimination policy for residents can be the target of devastating harassment or even violence.⁶⁸ For transgender youth, placement in a gender-specific facility can mean being forced to share sleeping quarters, bathrooms, or showers with members of their birth sex, which can have consequences ranging from humiliation to sexual assault.⁶⁹

Frequently, when foster care workers receive complaints of discrimination from LGBTQ youth, their response is to move the young person to a new placement that is better prepared to provide support for the young person's sexual orientation or gender identity.⁷⁰ While this may seem like the best response in an individual case, this strategy can have a detrimental effect on LGBTQ youth.⁷¹ A policy of changing the placements of victims of sexual orientation discrimination, instead of changing the behavior of perpetrators, has the effect of increasing overall instability of placement for LGBTQ youth.⁷² While being in a judgmental environment can be harmful to an LGBTQ youth's emerging sense of self, changing placements can have other negative consequences, including attachment problems, interruption of schooling, and a sense of failure due to being rejected by the foster family.⁷³

66. See DESETTA, *supra* note 52, at 50.

67. See *id.*

68. See *LGBTQ Youth*, *supra* note 1.

69. See Interview with Jody Marksamer & Shannan Wilbur, *supra* note 12. For example, a young male-to-female transsexual who is forced to sleep on the boys' side of a group home may be at a greatly increased risk of sexual assault. See *id.*

70. See Interview with Karen Grace-Kaho, *supra* note 56.

71. See MALLON, *supra* note 3, at 117-18.

72. See *id.* at 116-18.

73. See *id.* at 116-19 (demonstrating that this can be particularly devastating to a young person who has already been rejected by his family of origin due to their discomfort with his sexual orientation or gender identity).

A policy of routinely shifting placements for LGBTQ youth when their caregivers are unsupportive of their sexual orientation or gender identity may have the effect of increasing the level of instability of placement for LGBTQ youth above the level experienced by the general population of foster care youth. Because instability of placement has a harmful effect on youth in foster care, such an effect would be discriminatory. While AB 458 does not specifically define such activity as discrimination in the provision of service, we can look to MEPA's treatment of racial discrimination for some parallels. MEPA recognizes racial discrimination when a policy causes children of one race to experience more instability of placement than children of another race.⁷⁴ In fact, the abolishment of racial preferences in foster care placement under MEPA was a specific response to the problem of increased instability of placement experienced by foster care children of color who were forced to wait for same-race foster or adoptive parents.⁷⁵ For LGBTQ foster youth, the increased instability is not caused by a "matching" policy, but rather by a policy of removal when there are tensions around sexual orientation or gender identity.⁷⁶ Nonetheless, the discriminatory effect is similar. The analogy to racial discrimination as defined under MEPA may be useful to LGBTQ youth and their advocates as they work to define sexual orientation discrimination under AB 458.

Another common problem of LGBTQ foster youth is that agency staff may isolate them or move them into more restrictive settings, ostensibly for their own safety.⁷⁷ While it may be preferable for an individual LGBTQ youth to have a separate room for a variety of reasons, and even a more restrictive setting may be better than experiencing violence in a group home with inadequate supervision, this is still a victim-blaming policy that can have harmful repercussions for the young people who are singled out.⁷⁸ It is also likely to be an illegally discriminatory practice. The court in *Massey* held that isolating a young lesbian by removing her from class once a day, ostensibly in order to protect her from potential harassment, was a violation of her right to

74. See *Guide to MEPA*, *supra* note 21.

75. See *id.*

76. See MALLON, *supra* note 3, at 117-18.

77. See *LGBTQ Youth*, *supra* note 1.

78. For example, once a young person is placed in a more restrictive setting, even if she is not at fault she will face much stronger sanctions for minor infractions of the rules. See Interview with Jody Marksamer & Shannan Wilbur, *supra* note 12.

equal protection.⁷⁹ Because moving a foster care youth to a more restrictive placement is far more disruptive to her life than asking a student to sit out of gym class, it is likely that the court would apply a similar logic in such a case.

If foster care workers and agencies are responsible for protecting LGBTQ foster youth from harassment and violence, but they are not permitted to shuffle them from one placement to another in search of one that is safe, how are they to meet their responsibilities? AB 458 provides part of the answer. In addition to protecting LGBTQ youth from discrimination, the bill requires training for department licensing personnel, group home staff, and foster parents on the rights of LGBTQ foster care children.⁸⁰ The content of the training is not specified, although it seems clear that the only certain way to avoid illegal discrimination is for all foster care workers, group home staff, and foster parents to be prepared to provide adequate support for LGBTQ youth *before* placement. Therefore, caregiver training that emphasizes skills for support, acceptance, and prevention of harassment for LGBTQ youth will be an important step in providing safe environments for LGBTQ foster youth while still protecting their civil rights.⁸¹

Specific training on the needs of transgender youth is especially important to ensure appropriate initial placement.⁸² Transgender youth express a wide range of gender identities, and foster care providers will need to make sensitive and individualized judgments in determining appropriate placement, especially when gender segregation is an issue.⁸³ Sometimes a young transgender person will be best served with private sleeping and bathing facilities.⁸⁴ Other times, transgender youth will need access to facilities consistent with their identified gender.⁸⁵ Advocates may point to San Francisco's example to demonstrate that it is possible to maintain public accommodations without discriminating against transgender people.⁸⁶ In any case, AB 458 makes it clear that foster caregivers cannot deny services to transgender youth simply

79. See *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1095-96 (C.D. Cal. 2003).

80. See CAL. HEALTH & SAFETY CODE §§ 1522.41(c)(1)(H), 1529.2(b)(4)(E), 1563(c)(5) (West 2004).

81. See *Youth in the Margins*, *supra* note 2, at 24-25; MALLON, *supra* note 3, at 149; DECRESSENZO & MALLON, *supra* note 11, at 17-19.

82. See DECRESSENZO & MALLON, *supra* note 11, at 10-11.

83. See Swann & Hebert, *supra* note 12, at 33-34.

84. See *id.*

85. See DECRESSENZO & MALLON, *supra* note 11, at 18.

86. See *Compliance Guidelines*, *supra* note 51, § 5.

because of their gender identity.⁸⁷ It will be to everyone's advantage if child welfare agencies consider their policies on accommodating transgender youth in advance, rather than waiting until there is an issue.

Ultimately, a foster parent does have the right to ask to have a child removed without giving a reason, if the foster parent is uncomfortable with the placement.⁸⁸ AB 458 does not change that. However, the bill does point out that foster parents have the legal responsibility to provide care to the child without discriminating on the basis of sexual orientation or gender identity.⁸⁹ If foster parents cannot fulfill this responsibility, they are expected to seek additional training, requesting removal only as a last resort.⁹⁰

C. *Religious Conflicts*

Conflicts centering around religion are not uncommon for LGBTQ youth in foster care.⁹¹ A foster caregiver may believe that providing supportive care to an LGBTQ youth violates his religious beliefs.⁹² A foster caregiver may also offer a religious basis for urging an LGBTQ youth to change her sexual orientation or gender identity.⁹³ There are also reports of foster caregivers trying to force LGBTQ youth to attend religious services that are not in line with the youth's beliefs.⁹⁴ AB 458 recognizes the rights of both foster youth and caregivers to freedom from discrimination on the basis of religion, as well as sexual orientation and gender identity.⁹⁵

Religion is a sensitive area, and negotiating solutions that respect the rights of both LGBTQ foster youth and caregivers (especially foster parents who take youth into their homes) will require some care. However, a few principles are clear. First, foster parents and foster care staff, as well as foster youth, have the right to freedom of speech and religion.⁹⁶ This basic freedom may be abridged in certain settings, however, when it conflicts with the civil rights of another.⁹⁷ In *Erdmann*, the court did not find that pressuring an employee to change his sexual

87. See A.B. 458, 2003 Gen. Assem., Reg. Sess. (Cal. 2003).

88. See *id.*

89. See *id.*

90. See *id.*

91. See Interview with Jody Marksamer & Shannan Wilbur, *supra* note 12.

92. See *id.*

93. See *id.*

94. See *id.*

95. See CAL. WELF. & INST. CODE §§ 16001.9(a)(22), 16013(a) (West 2004).

96. See U.S. CONST. amend. I.

97. See *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d 1152, 1163 (N.D. Cal. 2001).

orientation on religious grounds or telling him he will go to hell for his sexual orientation was protected religious speech; rather it held that such speech could constitute a hostile or abusive work environment.⁹⁸ Certainly then, such speech in a group home would at least constitute inappropriate sexual orientation harassment. Additionally, while the employee/employer relationship is very different from the foster child/caregiver relationship, it does seem logical that speech which is considered harassing or abusive in a work environment could also be considered abusive of a youth in the group home environment. Of course, one could certainly imagine speech that could be appropriate coming from a foster caregiver that would be inappropriate from an employer (such as a lecture on hygiene or inquiry into personal relationships). However, it is widely recognized that pressuring LGBTQ youth to change their sexual orientation or gender identity is a harmful practice.⁹⁹ Therefore, the important question is whether the foster caregiver's interest in free speech outweighs the foster youth's interest in an environment free of harassment and religious discrimination. Because the foster youth is even more vulnerable than an employee, and because free speech rights are often constrained on the job site, it seems reasonable to extend protection to the youth in such a case.

When the religious conflict happens in a private foster care home the situation is more challenging. Foster parents are not employees,¹⁰⁰ and the religious speech of a person in her home would receive stronger protection, even in the situation of foster care, than that of group home employees. However, there are a few strategies available to LGBTQ youth and their advocates. The first might be to avoid placement in a home where the religious practices might be harmful to the LGBTQ youth. Agencies are required to consider religious preference insofar as possible in placing youth in foster homes.¹⁰¹ Therefore, it may be in the interest of an LGBTQ youth to make it known in advance if she has a preference to be in a home free from religious objections to her LGBTQ identity. Once placed in a home, the foster youth is still assured of her right to attend religious services of her choice.¹⁰² It is not clear if this right would extend to avoiding religious services that offend the youth,

98. *See id.*

99. *See Youth in the Margins, supra* note 2, at 13; DECRESCENZO & MALLON, *supra* note 11, at 19.

100. *See* A.B. 458, 2003 Gen. Assem., Reg. Sess. (Cal. 2003).

101. *See* CAL. CODE REGS. tit. 22, § 89173(a) (West 2004).

102. *See* CAL. WELF. & INST. CODE § 16001.9(a)(10) (regarding the rights of all children in foster care); CAL. CODE REGS. tit. 22, § 89372(c)(17) (regarding children's rights in foster family homes).

but this is certainly an avenue for LGBTQ youth and their advocates to explore.

At the least, if religious conflicts between a foster parent and an LGBTQ youth cannot be resolved, it is clear that state officials have the right to remove the youth from the home if they determine that is the best course to follow.¹⁰³ In *Backlund v. Barnhart*, the court upheld the state's right to remove a foster child from the home of foster parents whose religious principles required them to punish her by spanking.¹⁰⁴ Pointing out that foster parents do not have the same constitutional protections as biological parents, the court held that it was the right of state officials to use their best judgment in determining what is best for the child.¹⁰⁵ As mentioned above, a policy favoring removal is not ideal. However, in an individual instance where a foster parent's exercise of religious belief is harming the youth, it may be the best solution.

LGBTQ youth and their advocates can help prevent such situations by working to ensure that child welfare policies include clear statements emphasizing that attempts to change a foster child's sexual orientation or gender identity are considered harmful. Such a policy would then provide a basis for regulating speech of employees, excusing LGBTQ youth from offensive religious services, and removing LGBTQ foster youth from homes where religious conflicts are causing them harm. As a long-term strategy, the best way to protect the rights of foster parents as well as youth is for agencies to screen and train carefully so that foster parents are prepared to provide support to LGBTQ youth.¹⁰⁶

D. "Reparative" Therapy and Supportive Therapy

There are numerous reports of LGBTQ foster youth being forced into "reparative" therapy intended to change their sexual orientation or gender identity.¹⁰⁷ This kind of treatment is now widely recognized as inappropriate and harmful, but unfortunately it has not yet entirely vanished.¹⁰⁸ There are no cases specifically on point in California recognizing such treatment as discriminatory in or out of the foster care setting. However, the fact that there is no recognized therapeutic value from such an approach, combined with the fact that nontransgender

103. See *Backlund v. Barnhart*, 778 F.2d 1386, 1387 (9th Cir. 1985).

104. See *id.*

105. See *id.* at 1389-90.

106. Screening of all prospective foster parents is particularly important, as it is not always possible to determine at the time of placement which children or youth will turn out to be LGBTQ.

107. See *Youth in the Margins*, *supra* note 2, at 9.

108. See *id.* at 13.

heterosexual youth in foster care are not forced to try to change their sexual orientation or gender identity, might be enough to demonstrate inappropriately differential treatment. Another more certain approach would be to work towards developing regulations specifically recognizing that “reparative” therapy is inappropriate and ensuring that the required training for professionals in the foster care system includes up-to-date information on strategies for providing support to LGBTQ youth.

It is especially important that transgender youth have access to social workers and mental health providers who have training in their particular needs and experiences.¹⁰⁹ Besides facing many of the same issues as LGB youth, transgender youth must also navigate challenges of puberty that may not be in line with their gender identity and meet the expectations of a world that is only organized to accommodate two genders.¹¹⁰ Training and experience with LGB youth does not prepare a mental health professional for these issues.¹¹¹ It is vital, then, that advocates for LGBTQ foster youth work towards establishing trainings that specifically address the needs of transgender youth and towards identifying professionals within the system who have expertise in supporting transgender youth.¹¹²

E. Age-Appropriate Social and After-School Activities

A common complaint from LGBTQ foster youth is that they are treated differently from their heterosexual or nontransgendered peers in terms of the restrictions that are placed on their social activities.¹¹³ For example, a group home that permits heterosexual, nontransgendered boys to visit with girls and make age-appropriate gestures of affection (such as hand-holding) might prohibit a gay youth from engaging in the same activity with another boy.¹¹⁴ A foster care provider might allow foster youth to attend extracurricular school activities such as clubs or the prom, but forbid a lesbian foster child from attending Gay/Straight Alliance (GSA) meetings or the gay prom.¹¹⁵ Where advocates can demonstrate a double standard for LGBTQ and straight youth, it should

109. See Gerald P. Mallon, *Knowledge for Practice with Transgendered Persons*, in *SOCIAL SERVICES WITH TRANSGENDERED YOUTH* 1-19 (Gerald P. Mallon ed., 2000).

110. See Burgess, *supra* note 12, at 40-41.

111. See DECRESSENZO & MALLON, *supra* note 11, at 10.

112. See *id.* at 17-19.

113. See *LGBTQ Youth*, *supra* note 1.

114. See *id.*

115. See Nat'l Ctr. for Lesbian Rights, *LGBTQ Youth in the California Foster Care System: A Question and Answer Guide*, available at <http://www.nclrights.org/publications/QAab458.htm> (last visited Sept. 23, 2004).

be clear that this kind of treatment is discriminatory on its face. Therefore, it is important for LGBTQ youth and their allies to track and report any such instances of differential treatment.

In foster homes where there is only one foster youth, it may be impossible to show differential treatment *per se*. However, California statutes recognize the right of foster children to have social contact with people outside the foster care system¹¹⁶ and to participate in extra-curricular, cultural, and personal enrichment activities consistent with age and developmental level.¹¹⁷ Foster caregivers can put reasonable restrictions on a foster child's activities, but the state's policy of nondiscrimination, as discussed in *Colin*, weighs in favor of allowing LGBTQ youth access to appropriate supportive groups.¹¹⁸

Discussions with the foster youth's attorney or social worker may be enough to rectify such a situation. The state ombudsman's office for foster youth can also be helpful in clarifying the state's policy with foster parents or social workers.¹¹⁹ LGBTQ youth and their advocates can also work for a more explicit policy statement from the state foster care system that LGBTQ youth should be allowed to attend clubs and events aimed at providing them with age-appropriate support and socialization.

Transgender foster youth may also need support in asserting their right to dress in a manner appropriate to their gender identity and to be referred to by pronouns that reflect their internal sense of gender.¹²⁰ California recognizes the right of foster children to wear their own clothing,¹²¹ as well as specifically recognizing foster children's right to be free from discrimination on the basis of gender identity.¹²² San Francisco's guidelines for avoiding gender identity discrimination specifically state that transgender people should be allowed to meet dress codes for their identified gender and that inappropriate pronoun usage is discriminatory.¹²³ These guidelines are only mandatory in San Francisco, however, transgender youth and their advocates may be able to use them persuasively in defining the rights of transgender foster youth around the

116. See CAL. CODE REGS. tit. 22, § 89372(c)(10) (West 2004); CAL. WELF. & INST. CODE § 16001.9(a)(15).

117. See CAL. CODE REGS. tit. 22, § 89372(c)(18)(E); CAL. WELF. & INST. CODE § 16001.9(a)(13).

118. See *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1150 (C.D. Cal. 2000).

119. See Interview with Karen Grace-Kaho, *supra* note 56.

120. See Swann & Herbert, *supra* note 12, at 30-33.

121. See CAL. CODE REGS. tit. 22, § 89372(c)(6)(A).

122. See CAL. WELF. & INST. CODE § 16001.9(a)(22).

123. See *Compliance Guidelines*, *supra* note 51, § 4(a).

state.¹²⁴ Additionally, there now exists a range of resources outlining strategies for providing transgender youth with supportive care.¹²⁵ Transgender youth and their advocates can work to ensure that the foster care system incorporates this expertise in setting their policies for transgender foster youth, rather than relying on outdated information or stereotypes or ignoring the particular needs of transgender youth.

V. CONCLUSION

AB 458 represents an enormous step forward for LGBTQ foster youth. While existing case law may have already protected the rights established under the Act, AB 458 provides an explicit statutory basis for rights that previously could have been established only implicitly and by extension. LGBTQ foster youth are now clearly protected against discrimination in the foster care environment on the basis of sexual orientation or gender identity, and the Act establishes a new requirement of receiving training on the rights of LGBTQ foster youth for most care providers in the system.

Now LGBTQ foster youth and their advocates must work to define the prohibited discrimination in a way that accounts for the particular needs of LGBTQ youth and the specific mechanisms of homophobia and transphobia in the foster care system. Opponents of racial discrimination in foster care and advocates for LGBT civil rights have provided a structure on which to build this definition. It is also imperative for LGBTQ youth and their advocates to help in shaping the trainings made mandatory under the Act and the policies of state and county child welfare agencies. Ultimately, LGBTQ youth in foster care will win, not with individual triumphs in the courtroom, but with the transformation of the foster care system into one that is prepared to offer safe harbor and consistent response to their needs throughout.

124. Transgender foster youth in San Francisco may gain additional support from the SF Human Rights Commission, which issued the Compliance Guidelines, at http://www.ci.sf.ca.us/site/sfhumanrights_index.asp?id=4579.

125. See DECRESCENZO & MALLON, *supra* note 11, at 17-19; Swann & Herbert, *supra* note 12, at 23-26.