

Access to Juvenile Justice Irrespective of Sexual Orientation, Gender Identity, and Gender Expression (SOGIE)

Supporting Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Gender Non-Conforming (LGBTQ-GNC) Youth

A judge, and all those subject to the judge's direction and control, shall perform their duties of office, both judicial and administrative, free from personal and extracurricular biases. Judges, members of their staff, and lawyers in proceedings before the court are ethically obligated to promote access to justice for all impartially, competently, and diligently regardless of race, ethnicity, religion, sexual orientation, gender identity, and gender expression.¹ Judges shall not "by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."²

LGBTQ-GNC Youth are Disproportionately Represented in the Juvenile Justice System

- LGBTQ-GNC youth represent 5-7% of the nation's youth population³ but 20% of those in juvenile detention facilities.⁴ Eighty-five percent of these youth are youth of color.⁵ Forty percent of girls in detention facilities identify as LGB-GNC.⁶
- From the time of an LGBTQ-GNC youth's first contact with the system, the youth may be marginalized based on conscious or unconscious perceptions and biases made about their sexual orientation, gender identity, and gender expression. This is compounded for LGBTQ-GNC youth of color who may experience discrimination at the intersection of these aspects of their identity. LGBTQ-GNC youth of color often face discrimination by judges and other justice system actors at all stages of their case.⁷
- LGBTQ-GNC youth are more frequently detained for status offenses, such as running away and truancy, for charges of prostitution, and for probation violations.⁸ State statutes and professional standards provide that pretrial detention should be imposed only when a child poses a risk of flight or is a palpable threat to public safety.⁹ LGBTQ-GNC youth, however, are often detained in situations in which these legal standards are not met.
- At disposition, LGBTQ-GNC youth are confined for nonviolent offenses at twice the rate of their gender-conforming peers.¹⁰ LGBTQ-GNC youth who crossover from the child welfare to the juvenile justice system or are dually involved in both systems, also face increased confinement.¹¹ In facilities, these youth are at greater risk of abuse, injury, and suicide.¹² Additionally, incarcerated youth are much more likely than incarcerated adults to be sexually abused.¹³ For LGBTQ-GNC youth, this is even more prevalent.

Unique Considerations at Every Stage of the Case

- Do not make assumptions regarding sexual orientation or gender identity.
- Examine any attitudes, beliefs, or biases that you may consciously or unconsciously hold.¹⁴
- Use developmentally appropriate language and ensure knowledge and use of current and appropriate terminology relevant to working with LGBTQ-GNC individuals.¹⁵
- Support an individual's expression of gender identity by using their preferred name and pronouns of choice.¹⁶
- Keep gender expression and identity confidential when it is not relevant to the court proceeding.
- Be mindful of the unintended consequences of "outing" a child.¹⁷
- Respect the privacy rights of all LGBTQ-GNC youth and never disclose a youth's sexual orientation or gender identity unless the youth has given you permission to do so, either through counsel or through direct communication.
- Allow transgender and gender non-conforming people to wear clothing that matches their gender identity or expression.
- Demand professionalism and prohibit use of derogatory pronouns, including "he-she" and "it" in reference to LGBTQ-GNC individuals. Instead, ensure that everyone in court uses an individual's chosen pronouns, such as he, she, they, or ze.
- Proactively address any homophobic or transphobic comments or actions made by anyone in the courtroom.
- Ensure that all juvenile justice professionals treat LGBTQ-GNC individuals with fairness, dignity, and respect, including prohibiting any attempts to ridicule or change a youth's sexual orientation or gender identity.
- When an LGBTQ-GNC youth is involved in both the juvenile justice and child welfare systems, determine whether the services identified for the youth are appropriate for the identified needs.¹⁸
- When the source of a delinquency charge against an LGBTQ-GNC youth originates from an existing child welfare placement, or where safety issues exist in the current child welfare placement, require alternative placements be evaluated and presented to the court.
- Become familiar with laws and policies that protect SOGIE and have resources available in the courtroom to share with LGBTQ-GNC youth and their families, as well as juvenile court actors and treatment providers.

Unique Considerations at Specific Stages of the Case

DETENTION AND PROBABLE CAUSE HEARINGS

- In making a probable cause determination, ensure bias related to the youth's sexual orientation, gender identity, or gender expression was not the underlying or direct basis for arrest and court referral.
- Pretrial detention should only be employed if it is the least restrictive option to ensure court appearance or if it is necessary to address substantial public safety concerns. These considerations are particularly important for LGBTQ-GNC youth due to increased and well-documented risk of harm to this population of youth in placement facilities.¹⁹
- If detention must be utilized, ensure that at a minimum the placement facility complies with PREA,²⁰ and other best practices related to housing of LGBTQ-GNC youth.

PRETRIAL MOTIONS

- Where issues relating to the youth's SOGIE are raised in pretrial motions, carefully consider any existing law, research, best practices, and standards of care before issuing a decision. Request information to supplement the motion if necessary.

DISPOSITION

- Where probation or the prosecution recommends services as part of the disposition, be cognizant of ordering services that are harmful or inappropriate for LGBTQ-GNC youth. Examples of harmful services include, but are not limited to, reparative therapy, unnecessary sex offender assessment or treatment, and requirements to conform with the sex the child was assigned at birth.
- When out-of-home placement is recommended, ensure it is competent to serve LGBTQ-GNC youth; review any available information and data about the placement to determine if appropriate services are available for LGBTQ-GNC youth; ensure youth will have access to the same programs as their straight and cisgender peers; make sure that LGBTQ-GNC youth are not placed into more restrictive placements than are necessary merely because other placements will not accept them on the basis of their SOGIE.
- Consider alternate LGBTQ-GNC friendly/appropriate resources or plans identified by the youth's defender when they are different than what probation or the prosecution is requesting.
- Be familiar with resources in the community that provide better and more competent alternative placements than a commitment facility.
- Given the high rates of family rejection that LGBTQ-GNC youth experience, support the youth's family of choice when out-of-home placement is unnecessary but the youth's family will not allow the child to return home.
- Where the youth's SOGIE is a barrier to family reunification, when possible order parents and family members to participate in counseling and parent support groups to assist in helping them become more accepting and supportive of their LGBTQ-GNC child.

Unique Considerations at Specific Stages of the Case (cont.)

POST-DISPOSITION REVIEW HEARINGS/PROBATION REVOCATION

- When a post-disposition review hearing is scheduled or requested, or when a motion for modification of disposition is filed, inquire as to conditions of confinement and address any concerns if there is possible discrimination based on SOGIE. Make specific inquiry about any reported instances of isolation, administrative segregation, disparate application of sanctions, allegations of abuse, prohibition or punishment of gender expression, health and safety issues, and fair and respectful treatment.
- Where necessary, issue orders to prevent institutions from treating LGBTQ-GNC youth differently than their straight and cisgender peers; require the use of qualified mental health practitioners who are knowledgeable about LGBTQ-GNC youth for court-ordered evaluations and treatments; ensure that transgender youth receive necessary medical services from qualified healthcare practitioners knowledgeable about Gender Dysphoria and medical care for transgender youth.
- Recognizing that isolation of LGBTQ-GNC youth is often a contributing factor to acting out in placements, make inquiry into available opportunities for LGBTQ-GNC youth to read appropriate magazines, books, and watch movies with LGBTQ-GNC themes, to socialize with other LGBTQ-GNC youth, and to engage in recreational activities together.

VIOLATIONS OF PROBATION/PROBATION REVOCATION

- Inquire whether the probation officer has instituted appropriate services and opportunities for support for the LGBTQ-GNC youth on probation.
- Determine whether the reason for revocation is related to bias or other factors specific to the youth's SOGIE.

Understanding LGBTQ-GNC Terminology

LGBTQ-GNC is an acronym that stands for Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Gender Non-Conforming. This bench card uses the acronym "LGBTQ-GNC" in the broadest sense possible. While there are many other acronyms that may reflect a more nuanced understanding of the breadth of identities that exist within the SOGIE (Sexual Orientation, Gender Identity, and Gender Expression) spectrum (e.g. LGBTQQIAA2-S: Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex, Asexual, Ally, and Two-Spirit), the judges involved in drafting this bench card chose LGBTQ-GNC for the sake of brevity and uniformity. Terminology is constantly evolving and because certain groups may gravitate to certain terms and abbreviations over others, it is therefore difficult to come to a commonly agreed upon acronym that reflects all perspectives. This model's use of LGBTQ-GNC is intended to be as inclusive of all identities as possible. For a comprehensive glossary of key LGBTQ-GNC terms, please visit the links provided under Additional Resources.

Training

This bench card provides judges with introductory principles and best practices to ensure that LGBTQ-GNC people in the courtroom are treated with respect by all justice system actors. Comprehensive, supplementary training by professionals with specific competence in SOGIE issues and expertise in the fields of juvenile justice and LGBTQ-GNC rights is strongly recommended in conjunction with use of this card. To be connected with leading experts, please contact The Equity Project by emailing info@equityproject.org.

Additional Resources

The Equity Project: An initiative to ensure that LGBTQ-GNC youth in juvenile delinquency courts are treated with dignity, respect, and fairness.

- See generally: <http://www.equityprojects.org/>
- Short definitions list: <http://www.equityprojects.org/wp-content/uploads/2015/03/ShortDefinitionListHandout.pdf>
- Hidden Injustice: Lesbian, Gay, and Transgender Youth in Juvenile Courts: http://www.equityprojects.org/wp-content/uploads/2014/08/hidden_injustice.pdf (includes a Glossary of Terms on page 145-Appendix A)
- Toward Equity: Understanding Sexual Orientation, Gender Identity, and Gender Expression and Developing Competency to Serve Lesbian, Gay, Bisexual, and Transgender Youth in the Juvenile Justice System <http://www.equityprojects.org/training/toward-equity-full-curriculum-download/>

Lambda Legal: An organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.

- See generally: www.lambdalegal.org

National Center for Lesbian Rights – Youth Project: Advancing the rights of LGBT youth through education, public policy, and precedent-setting casework to ensure that all LGBT young people are safe and can live openly with the support they need to reach their full potential.

- See generally: www.nclrights.org

Center for American Progress - Movement Advancement Project: An independent nonpartisan policy institution that is dedicated to improving the lives of LGBT Americans.

- See generally: <https://www.americanprogress.org/issues/lgbt/view/>

GLSEN: An organization dedicated to improving the education system for LGBTQ students.

- See generally: <https://www.glsen.org/>

Family Acceptance Project: An initiative that works to prevent health and mental health risks for lesbian, gay, bisexual and transgender (LGBT) children and youth, including suicide, homelessness and HIV – in the context of their families, cultures and faith communities.

- See generally: <https://familyproject.sfsu.edu/>

Parents, Families & Friends of Lesbians and Gays (PFLAG): Promoting the health and well-being of lesbian, gay, bisexual and transgender persons and their families and friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights.

- See generally: www.pflag.org

Improving Courtroom Culture

Encourage justice system actors, such as defense lawyers, court workers, probations staff, service providers, and others advocating for LGBTQ-GNC youth to follow the guidelines outlined in this bench card.

ENDNOTES

1. See generally MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS'N 2007); MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2016). See also CONN. PROB. CT. CODE JUD. CONDUCT r. 2.3; ME. CODE JUD. CONDUCT 2.3; MASS JUD. CODE OF CONDUCT r. 2.3(2) (2016); MO CODE OF JUD. CONDUCT r. 2.3 (2013); OR CODE OF JUD. CONDUCT. R. 3.3(B) (2013); 42 P.C.S.A. § 102 (2016).
2. MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR ASS'N 2007).
3. Angela Irvine, "We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675 (2010); DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, MODEL PROGRAMS GUIDE LITERATURE REVIEW: LGBTQ YOUTHS IN THE JUVENILE JUSTICE SYSTEM (2014), <https://www.ojjdp.gov/mpg/litreviews/LGBTQYouthsInTheJuvenileJusticeSystem.pdf>.
4. Angela Irvine & Aisha Canfield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population*, 24 J. GENDER SOC. POL'Y & L. 243, 248 (2016). See also Bianca D. M. Wilson et al., *Disproportionality and Disparities among Sexual Minority Youth in Custody*, 46 J. YOUTH ADOLESCENCE 1547 (2017) (LGBTQ and particularly LGBTQ youth of color are overrepresented in the juvenile justice system).
5. See Irvine & Canfield, *supra* note 4, at 248. See also CENTER FOR AMERICAN PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *Unjust: How the Broken Criminal Justice System Fails LGBTQ+ People of Color*, 2016 [hereinafter *Unjust*]; Wilson et al., *supra* note 4, at 1.
6. Irvine & Canfield, *supra* note 4, at 257-58; see also Wilson et al., *supra* note 4, at 2.
7. Irvine & Canfield, *supra* note 4, at 248; see *Unjust*, *supra* note 5; Wilson et al., *supra* note 4, at 2.
8. Irvine, *supra* note 3, at 675; Wilson et al., *supra* note 4, at 3.
9. Some state statutes allow for a juvenile to be detained if they are deemed to be a danger to themselves. Prior to the detention of an LGBTQ-GNC youth who is purportedly a danger to themselves, judges should ensure that there is an actual danger, rather than a perceived danger based on the youth's SOGIE. It is often this errant rationale that leads to the unnecessary detention of status offenders, runaways, and LGBTQ-GNC youth. See *Unjust*, *supra* note 5; Wilson et al., *supra* note 4, at 3.
10. FRANCINE H. JACOBS & FRANCINE T. SHERMAN, JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE 164 (2011).
11. REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 6 (Richard J. Bonnie et al., eds. 2013).
12. See Eileen Poe-Yamagata & Michael A. Jones, *Building Blocks for Youth, And Justice for Some: Differential Treatment of Minority Youth in the Justice System* (2000), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf. See also Wilson et al., *supra* note 4, at 4.
13. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH (2012), <https://www.bjs.gov/content/pub/pdf/svjfry12.pdf>.
14. Implicit biases are held by all people, even those with commitments to impartiality such as judges. Implicit associations do not necessarily align with consciously held or declared beliefs. See Video: Hidden Injustice: Bias on the Bench (Am. Bar Ass'n), <http://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission/implicit-bias.html> (last visited March 27, 2017). See also EQUITY PROJECT, TOWARD EQUITY: UNDERSTANDING SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION AND DEVELOPING COMPETENCY TO SERVE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM, http://www.equityprojects.org/wp-content/uploads/2015/01/Equity_Curriculum_Complete.pdf [Hereinafter *Toward Equity*].
15. For key terms and relevant terminology glossaries, see source cited *supra* Additional Resources.
16. Walter Meyer III et al., *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders* 9 (6th ed. 2001), <http://www.cpath.ca/wp-content/uploads/2009/12/WPATHsocv6.pdf>. See also TERESA DECRESCENZO & GERALD P. MALLON, SERVING TRANSGENDER YOUTH: THE ROLE OF THE CHILD WELFARE SYSTEM 19 (Child Welfare League of America 2000).
17. Common feelings associated with coming out include loss of relationships and friendships, rejection, being kicked out of the house, and not having financial support for food, clothing, or school. *Toward Equity*, *supra* note 14, at 16, 22-23.
18. See *Toward Equity*, *supra* note 14; *Unjust*, *supra* note 5.
19. LAMBDA LEGAL, KEEPING LGBTQ YOUTH SAFE IN JUVENILE JUSTICE & DELINQUENCY PLACEMENTS (2012), http://www.lambdalegal.org/sites/default/files/gdtb_2013_10_juvenile_justice.pdf.
20. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972. See also *Prison Rape Elimination Act*, NATIONAL PREA RESOURCE CENTER, <https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> (last visited Mar. 29, 2017).