



And by the Way, Do You Know He Thinks He's a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Juvenile Delinquency Courts

Jody Marksamer

Abstract: Because of the persistence of bias and discrimination against transgender people generally, the societal lack of understanding of gender and sexuality, and a distrust of difference, transgender youth are at high risk for involvement in the juvenile justice system. For many of these youth, their gender identity is relevant both to why they were arrested and to their needs once they are brought into the courtroom. This article discusses how law, policy, and legal representation are regularly failing transgender youth in juvenile delinquency systems throughout the United States. The author concludes by posing policy and system recommendations that will address these failures.

Key words: equality; discrimination; homophobia; juvenile defense; gender identity; transsexual

The persistence of bias and discrimination against transgender¹ people generally, the societal lack of understanding of gender and sexuality, and a distrust of difference put transgender youth at high risk for involvement

in the juvenile justice system. Although exact numbers are not available, initial research (Feinstein, Greenblatt, Hass, Kohn, & Rana, 2001; Wilber, Ryan, & Marksamer, 2006; Woronoff, Estrada, & Sommer, 2006) has documented that transgender youth are overrepresented in juvenile justice settings. For many of these youth, their gender identity² is relevant both to why they were arrested and to their needs once they are in the courtroom. Unfortunately, however, the current reality is that lawyers, judges, and other juvenile justice personnel are typically unprepared to ask the right questions, provide supportive services, or meet the needs of transgender youth and, too often, the juvenile justice system is outwardly hostile and unapologetically punitive toward these youth. In addition to

¹ *Transgender* is an umbrella term used to describe a wide range of identities and experiences, including transsexual people and others whose appearance or characteristics are perceived to be gender atypical. This term includes both those who undergo medical treatment to alter their physical appearance to match their internal gender identity and those who live as the other gender without any medical treatment. It can include people who are not transsexual but who do not fit gender stereotypes, such as women who are seen as masculine, men who are seen as feminine, and people whose gender expression is not clearly definable as masculine or feminine.

Transgender people may begin to understand or express their gender at different points during their lives—as children or youth, or when they are middle-aged or even elderly. As medical science has learned more about gender identity and gender expression, it has become clear that individuals cannot, or should not be asked to, change these deep-seated characteristics.

² The term *gender identity* refers to a person's internal, deeply felt sense of being male or female—a person's psychological identification as masculine or feminine. Most people's gender identity corresponds to their physical body, a correspondence that does not necessarily hold true for transgender individuals.

Address correspondence concerning this article to Jody Marksamer, National Center for Lesbian Rights, 870 Market Street, Suite 370, San Francisco, CA 94102. E-mail: jmarksamer@nclrights.org

individual bias and lack of understanding of gender and sexuality, other factors, such as a shortage of programs and services that can competently serve transgender youth, cause transgender youth to be placed in high-security correctional facilities rather than back with their families or in community-based treatment settings that are more appropriate for their needs. In these high-security facilities, staff members subject transgender youth to intensive gender and sexuality policing, literally forcing gender conformity on them in the guise of a treatment plan. Because of the juvenile delinquency system's conflation of gender difference with inappropriate sexual behaviors, transgender youth often are criminalized and punished simply for being themselves. As these problems have become more visible over the past few years, advocates and attorneys have begun to provide guidance about how the juvenile justice system needs to change.

In the first section of this brief policy report, I examine specific societal and personal factors that affect how and why transgender youth end up in front of a juvenile court judge. In the second section, I provide an overview of the juvenile delinquency system. In the third section, I demonstrate how law, policy, and legal representation regularly fail transgender youth in juvenile delinquency systems throughout the United States by highlighting the experiences of one *transgender girl*³ over the course of 4 years. In the final section, I pose recommendations that will assist lawyers, judges, and other court personnel in protecting the rights of transgender youth and preventing their placement in facilities that treat them as sexual deviants and put them at risk for emotional and physical harm. I conclude by stressing that transgender youth advocates must address the overarching failures of the juvenile delinquency system in order to respond to the reality of the lived experiences of transgender youth, who not only experience bias and mistreatment because of their gender identity but also are navigating a system that is wrought with inequities and rights violations based on race, class, and other differences.

Transgender Youth Are at Risk for Juvenile Court Intervention

Many transgender young people find themselves facing rejection, harassment, and physical abuse at the hands of their families, communities, and schools because of their gender. This abuse is often so intense that they run

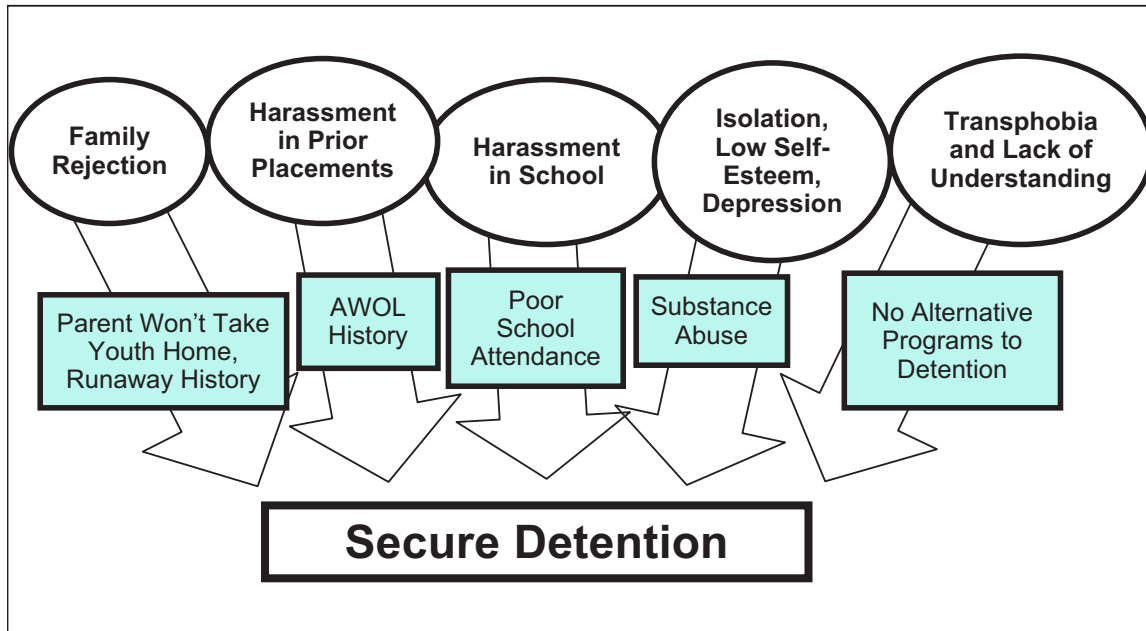
³ A transgender girl is someone who was born male but has a female gender identity and presentation. Transgender girls use female pronouns and otherwise express their gender in a feminine manner.

away from home, drop out of school, or enter the child welfare system (Ryan & Diaz, 2005; Wilber et al., 2006). Without the support of their families, transgender youth are at risk for depression, suicide, substance abuse, HIV infection, and prostitution (Mallon & DeCrescenzo, 2006; Ryan & Diaz; Wilber et al.). All of these risk factors increase the likelihood that a young person will become involved with the juvenile delinquency system.

Most parents expect their children to have so-called typical boy or girl behavior and interests from a very early age. If a child strays too far from what is considered socially acceptable for a boy or a girl, some parents become upset, embarrassed, and concerned. These parents may try to prevent their child from expressing characteristics outside of traditional gender roles, either through verbal means (e.g., "Only girls play with dolls") or through more aggressive means such as beatings or kicking their child out of the home (DeCrescenzo & Mallon, 2000). In some cases, parents of gender-nonconforming children have even sought out therapy to try to cure their child's gender nonconformity (Gelder & Marks, 1969; Mallon & DeCrescenzo, 2006; Scholinski, 1997). These efforts are not only unsuccessful but also can cause severe psychological harm and can alienate a child from his or her family (Israel & Tarver, 1997; Mallon, 1999).

As a result of family rejection or abuse, a disproportionate number of transgender and gender-nonconforming youth are homeless. The National Network of Runaway and Youth Services has estimated that between 20% and 40% of homeless youth are lesbian, gay, bisexual, or transgender (LGBT) individuals (Feinstein et al., 2001; Sullivan, Sommer, & Moff, 2001; Woronoff et al., 2006). Unfortunately, many homeless shelters and other programs that are geared to assist street-involved youth are segregated by gender and have little understanding of transgender youth and their needs (National Gay and Lesbian Task Force [NGLTF], 2007). Because these facilities are not welcoming or safe for transgender youth, homeless transgender youth often sleep on the streets without access to shelter programming that could provide them with support, medical care, and food.

Transgender youth who are homeless, like all homeless youth, are at high risk for arrest. Without income, these youth are forced to engage in criminalized activities such as theft, petty drug dealing, or sex work, activities that increase their likelihood of both assault and arrest (Berberet, 2006). Living on the streets also puts transgender youth at high risk for exploitation by adults who may manipulate vulnerable youth to participate in criminalized activities (Klein, 1998). Finally, police often target and arrest transgender homeless youth for

Figure 1. Experiences leading to the overrepresentation of transgender youth in secure detention.

prostitution and other quality of life crimes (e.g., loitering, trespassing) even when they are not engaging in these activities (Amnesty International, 2005).

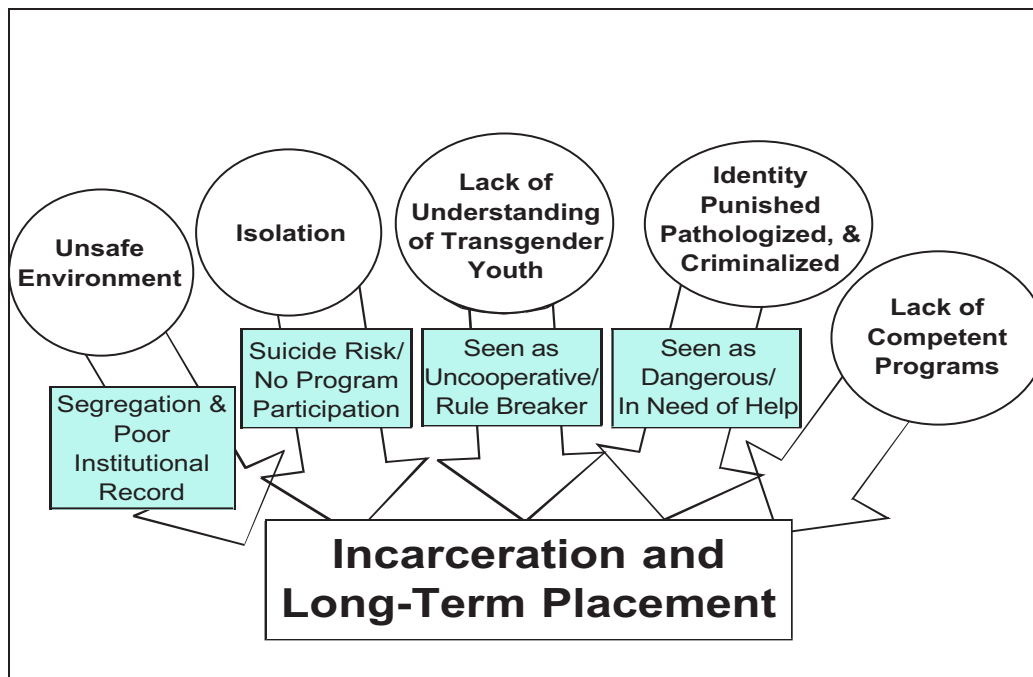
Transgender youth also have a hard time in school (Human Rights Watch, 2001). According to recent studies (Kosciw, 2004, 2006), 90% of transgender students nationwide reported feeling unsafe at school and 55% reported that they had experienced physical harassment because of their gender expression. Violence and harassment of this kind not only have a negative effect on young people's self-esteem and mental health but also drastically decrease their likelihood of success at school. One recent study (O'Shaughnessy, Russell, Heck, Calhoun, & Laub, 2004) found that, compared with students who are not harassed, students who face harassment due to their sexual orientation or gender identity are more than three times as likely to carry a weapon to school, more than twice as likely to use methamphetamine and inhalants, and have higher rates of alcohol and marijuana abuse.

In addition to gender-based harassment, transgender youth often encounter teachers and school administrators who refuse to recognize their chosen name and pronoun, prohibit them from wearing clothing that fits their gender identity, and fail to provide them with access to a safe bathroom and locker room (Feinstein et al., 2001). Because of these policies or practices, transgender students who express their gender identity are disciplined or even kicked out of school for such things as violating

school dress codes or using the wrong bathroom. Unsafe, disrespected, and basically unwelcome, some transgender youth simply stop going to school, further increasing the likelihood of juvenile court intervention (Feinstein et al.).

As shown in Figure 1, family rejection, harassment in their community and schools, and low self-esteem and depression not only can increase the risk of arrest for transgender youth but also make it more likely that, once arrested, transgender youth will be held in a locked detention facility during the course of delinquency proceedings. The general purpose of detention is to protect public safety and ensure a youth's appearance at future hearings (Calvin, 2004). In deciding whether detention is necessary, judges often will consider whether a youth has a history of running away from home, a poor school record, or a substance abuse problem (Calvin). The more problems a youth has had with his or her family and community, the more likely it is that the judge will order the youth to be held in detention—even if the youth was arrested for a nonviolent offense. In addition, simply not having a parent who will take a youth home could result in a youth being held in detention (Calvin).

Once in a detention facility, transgender youth regularly face abuse from their peers and detention facility staff. In response to this abuse, facilities often isolate the transgender youth or otherwise remove the youth from the general population, which prevents the youth from participating in school or other facility programming (Wilber et al., 2006).

Figure 2. Factors leading to incarceration and long-term placement for transgender youth.

Such abuse also adds to a transgender youth's distress, increasing suicide risk. As shown in Figure 2, for cases in which the court has adjudicated a transgender youth delinquent, a judge may look at a youth's poor record in detention and determine that it is necessary to incarcerate the youth in a locked correctional facility rather than allow the youth to return home and participate in community-based treatment programs, a decision based on the fact that the youth has proven to be uncooperative and not amenable to less restrictive treatment options.

Overview of the Juvenile Delinquency System

Whereas the purpose of the adult criminal justice system is almost exclusively punitive, the juvenile justice system was established based on the idea that children differ from adults and should be treated differently. As the U.S. Supreme Court explained in *Kent v. United States* (1966), the theory of the juvenile court "is rooted in social welfare philosophy....The objectives [of the court] are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment" (p. 554). In line with this holding, most states have statutes explicitly stating that the purpose of juvenile delinquency court intervention includes the provision of treatment and rehabilitation (National Center for Juvenile Justice, 2006). The juvenile court's focus on

specialized treatment for youth also has resulted in the development of a different set of terms than those used in criminal courts (Calvin, Marcus, Oleyer, & Scali, 2006). Juvenile delinquency proceedings are not considered criminal cases: Young people are most often called respondents rather than defendants. Juvenile courts adjudicate young people delinquent or find them delinquent, rather than convict them of crimes; once a young person is adjudicated, courts develop disposition orders rather than order sentences.

Despite the rehabilitative ideals espoused by the Supreme Court and state statutes, many states over the last decade have shifted the focus of their juvenile courts to a more punitive model of client accountability and public safety, minimizing or even eliminating treatment and rehabilitation programming (American Council of Chief Defenders [ACCD] & National Juvenile Defender Center [NJDC], 2005). Rather than providing individualized treatment programs, juvenile courts are incarcerating more young people in prison-like facilities that provide little if any treatment and that are overcrowded and unsafe (Calvin et al., 2006; Conward, 2001; Snyder & Sickmund, 2006). In addition, the collateral consequences of a juvenile adjudication have increased. Depending on the jurisdiction and the particular facts of a case, these negative consequences can include sex offender registration, preclusion from public housing,

ineligibility for student loans or military service, and limited educational and employment opportunities (Pinard, 2006; Puritz & Majd, 2007). Courts also may use a juvenile adjudication as a basis for an automatic transfer to adult court in the event of a future juvenile offense, or they may use it to enhance a later adult sentence (Calvin et al.; Puritz & Majd).

At the same time that the juvenile court has become more punitive, numerous studies (ACCD & NJDC, 2005; Hsia, Bridges, & McHale, 2004; Poe-Yamagata & Jones, 2000; Pope, Lovell, & Hsia, 2002) have documented that youth of color are vastly overrepresented at every stage of juvenile delinquency proceedings and that they are confined in juvenile justice facilities at highly disproportionate rates. According to a 2007 National Council on Crime and Delinquency report, from 2002 to 2004, African Americans comprised 16% of the overall youth population in the United States but represented 28% of juvenile arrests, 30% of referrals to juvenile court, 37% of the detained population, 34% of youth formally processed by the juvenile court, 30% of adjudicated youth, 35% of youth judicially waived to criminal court, 38% of youth in residential placement, and 58% of youth admitted to state adult prison.

Theoretically, all youth brought into the juvenile court have an attorney to zealously defend them, challenge the differential policing practices and racial basis that contribute to disproportionate minority contact, and ensure their due-process rights. In *In re Gault* (1967), the U.S. Supreme Court held that children accused of juvenile delinquency offenses have a due-process right to counsel. Standards and guidelines for juvenile defense services explain that to meet this right to counsel, children should have continuous legal representation during every stage of delinquency court proceedings including detention, disposition, postdisposition, and probation (ACCD & NJDC, 2005; Institute of Judicial Administration [IJA] & American Bar Association [ABA], 1980b; National Council of Juvenile and Family Court Judges [NCJFCJ], 2005). To ensure that this representation is effective, juvenile defense attorneys must represent their clients' stated interests, not what the attorney feels is in their clients' best interest (IJA & ABA, 1980a; NCJFCJ). Juvenile justice commentators (Henning, 2005; Puritz & Majd, 2007; University of Nevada, Las Vegas [UNLV], 2006), due-process precedents that establish obligations to enforce and advance clients' rights (*Shioutakon v. District of Columbia*, 1956), and model codes of professional conduct and responsibility (ABA, 2000–2007) also call for expressed-interests representation.

Despite the widespread acknowledgment of the crucial role of counsel in ensuring due-process rights for youth and the high stakes of a delinquency adjudication,

many youth do not receive effective assistance of counsel and, in some jurisdictions, up to 90% of youth waive their right to counsel without ever speaking with an attorney (Calvin et al., 2006, NJDC, 2007; Puritz & Majd, 2007). Even for youth who have appointed counsel, numerous systemic barriers prevent them from actually receiving quality representation: Defenders often carry overwhelmingly high caseloads, receive little training on adolescent development, and often have no access to support staff or other resources to assist with investigations and case preparation (Calvin et al.; Puritz, Burrell, Schwartz, Soler, & Worboys, 1995). In some jurisdictions, fee caps and payment structures discourage zealous advocacy (Puritz & Majd). The National Juvenile Defender Center has documented these and other problems in its statewide assessments of juvenile indigent defense systems in numerous states across the country (Puritz et al.).⁴

Many thoughtful and conscientious advocates throughout the United States are diligently working to address these and other juvenile justice system failures (Calvin et al., 2006; NJDC, 2007). Unfortunately, few of these advocates have information about the specific problems transgender youth encounter in the juvenile courts (Fedders, 2006). Without this knowledge, juvenile justice reform efforts will fail to address the specific problems that transgender youth encounter in the juvenile delinquency system. In the next section, using the experiences of one transgender youth to guide my discussion, I illustrate some of these specific failures in order to lay the groundwork for guiding advocates to respond.

The Failures of Juvenile Court Intervention for Transgender Youth

Destiny,⁵ a 16-year-old African American transgender girl, has been living as a girl since she was 13. She uses

4 The National Juvenile Defender Center has conducted state-based assessments of access to and quality of juvenile defense counsel in 16 states. These assessments provide comprehensive examinations of the systemic and institutional barriers that prevent defenders from providing adequate legal services to youth in delinquency courts within a particular state. These reports are available at <http://www.njdc.info/assessments.php>.

5 From January 2006 until May 2006, I—along with a clinical professor working at a juvenile law clinic in the county where Destiny lived—represented Destiny. To protect Destiny, as well as the lawyers and counselors who were also concerned about her safety, all names and identifying information related to Destiny's case have been changed. All facts about this case, as well as quotations, come from documents in Destiny's court files, actual court hearing transcripts, or documented personal conversations I had with Destiny, Destiny's family, and other individuals connected to her case. I have these sources on file.

a female name, prefers to use female pronouns, and generally dresses and presents herself in a feminine manner at school, with her family, and in her community. Destiny first became involved with the juvenile court when she was 12. Over the next 4 years, Destiny was in and out of court for various property offenses. Not unlike many other court-involved transgender youth, many of the offenses for which she was arrested had some connection to her transgender identity, including shoplifting women's clothing and shoes, breaking into a neighbor's house to steal women's jewelry, and fighting back at school. She was also arrested for stealing a car. She had no record of violent offenses or sexually assaultive behavior. At different points, the court placed Destiny under house arrest, in an intensive probation program, and in juvenile hall. Throughout her involvement with the juvenile court, she had an appointed juvenile defense attorney to represent her and, although her mother was mostly absent, Destiny had the support of her grandmother, who attended court hearings and visited her in the facilities.

When Destiny was 15, the court decided to send her to T-Max, the state's highest-security juvenile facility for boys, because no other program would accept a transgender girl. T-Max originally had planned to place her in the sex offender unit but, after an evaluation by the facility psychiatrist, decided to place her in the general population. I became involved in Destiny's case after her therapist contacted me because he was very concerned about Destiny's risk of assault at T-Max. As her therapist had anticipated, Destiny was assaulted shortly after she arrived at T-Max. Over the next 6 months, youth regularly sexually assaulted and physically threatened Destiny, staff members harassed and mistreated her, and counselors punished Destiny for expressing her gender in any way. Despite Destiny's pleas for help, neither Destiny's defense attorney nor the court did anything to protect her. Instead, the court continued her placement at T-Max indefinitely and ignored her request for a new defense attorney.

After more than 1 year in the facility, Destiny was finally released from T-Max in December 2006. Shortly after her release, Destiny violated probation and was arrested. Although the juvenile court could have retained jurisdiction over her case until she turned 20, because Destiny was now 17, the court chose to dismiss her case rather than retaining jurisdiction and providing her with further rehabilitative services as a juvenile. Although the good news was that Destiny would not have to face abuse at T-Max again and would no longer have to deal with her defense attorney, the bad news was that if she were arrested again she would automatically be sent to the adult criminal system which, unlike the juvenile court (in

theory), has almost no ability to respond to individualized needs.

The Failures of Legal Representation

Over the 4 years that Destiny was involved with the juvenile delinquency system, she was mistreated, disrespected, and had her due-process and other constitutional rights violated. Destiny's defense attorney, as her appointed counsel, had the legal and ethical responsibility to zealously defend her, protect her due-process rights, and ensure that she had a meaningful opportunity to express her interests to the court. Unfortunately, her defense attorney failed to meet these responsibilities and instead contributed to her mistreatment.

Destiny's attorney failed her in many respects—he did not advocate for programs and treatments that would have met Destiny's specific needs, he did not talk or visit with her once she was placed at T-Max, and he failed to advocate on her behalf when he became aware of the assaults and mistreatment she was experiencing. Coloring all aspects of this attorney's representation was his failure to represent Destiny's stated interests coupled with his bias toward Destiny because of her transgender identity. An example of how this interaction caused Destiny harm is a statement Destiny's attorney made to the court during a review hearing in which our local co-counsel and I filed a report on Destiny's behalf that documented the abuse she was experiencing at T-Max. Immediately after Destiny swore that the information in the report we submitted was true and she testified that she was being sexually assaulted at T-Max and wanted to be moved to another facility because she was scared that the abuse would continue, Destiny's attorney told the judge

I think [the report Marksamer and co-counsel filed with the court on Destiny's behalf] overblows a lot of the incidents. I went through it with [Destiny] and while conceding there had been several incidences [*sic*], I think there has been a lot of good progress work done at [T-Max]....I think this young man has a lot of things—and I use the word *man*—to think about so I would just ask the court to be cautious in any decision that it makes.⁶

In failing to represent Destiny's stated wishes, as well as exhibiting disrespect and hostility toward Destiny's gender identity, her attorney encouraged complacency to her abuse at T-Max and fostered an overarching atmosphere of disrespect for Destiny's gender.

⁶ This quote is from the transcript of a placement review hearing in Destiny's case in March 2006 and is on file with the author.

This incident was not the only time Destiny's attorney exhibited hostility toward Destiny because of her gender. When I first contacted him to inquire about what he was doing to address the assaults at T-Max, knowing that I was calling from an LGBT organization, he said to me with a chuckle and a hint of disgust, "And by the way, do you know he thinks he's a girl?"

Putting aside the hostility of Destiny's attorney, it is also clear that he had little understanding of transgender identity. Without this understanding, Destiny's attorney was not equipped to ask her the questions that would have helped him develop a more complete picture of who Destiny was so he could effectively defend her. He also was unable to educate the judge about the circumstances surrounding Destiny's alleged offenses, her risk of abuse if placed in confinement, or her treatment needs. This lack of understanding directly informed what Destiny's attorney believed was in Destiny's best interest—that Destiny should stop acting like a girl because she was not a girl, that she needed to get treatment for her so-called sexual problem, and that she needed protection from herself because she was too immature to comprehend the consequences and safety risks of telling people she was a girl. These beliefs, rather than Destiny's stated interests, formed the backbone of the arguments Destiny's attorney presented in court and influenced how he handled Destiny's case overall.

Transgender youth often do not receive effective representation because many attorneys lack an understanding of gender and sexuality or hold a bias against gender difference. As was the case for Destiny, her attorney not only was unprepared to ask her the right questions and zealously advocate for her stated interests but also was outwardly hostile toward her. Without effective representation, transgender youth are pulled deeper into the juvenile justice system. Only when defense attorneys understand the varied backgrounds of their clients, insist on the court system's respect of these backgrounds, and expose the biases within the system can transgender youth have the opportunity to be heard in court (Puritz & Majd, 2007).

Failure to Provide Appropriate Treatment and Rehabilitation Plans

The dispositional phase of juvenile proceedings is one of the primary features that distinguish it from the adult criminal system. The purpose of disposition is to develop treatment and rehabilitation plans for juveniles that meet their educational, emotional, and physical needs while protecting the public from future offenses (Puritz et al., 1995). Because of the rehabilitative nature of juvenile

courts and the breadth of treatment and programming options available for a judge to choose from at disposition, *IJA-ABA Standards Relating to Disposition* provide that judges should order the least restrictive dispositions that satisfy the needs of both the youth and society (IJA & ABA, 1980b). In line with these standards, at least 20 states explicitly provide by statute or case law that juvenile dispositions should be the least restrictive possible consistent with rehabilitation and other state goals (*U.S. v. Juvenile*, 2003). The standards further provide that disposition decisions are individualized and that all court-ordered services are appropriate to the needs of the youth and have been determined to be effective to meet those needs (IJA & ABA, 1980a). These standards are very important because—unlike the adult system, which often relies on sentencing guidelines or mandatory minimums—almost all of the disposition decisions made in the juvenile system are at the discretion of the judge (Calvin et al., 2006; Puritz et al.). In addition, rather than sentencing a youth to a set number of years in a juvenile facility, most juvenile courts retain jurisdiction over a case until the youth reaches a certain age (18, 21, or even 25 depending on the state and the offense) and can continue a youth's placement until this time if the judge or facility believe that the youth has not yet been rehabilitated.

The juvenile court has many different types of programming options available to construct an individualized disposition for a youth whom it has adjudicated delinquent—including ordering the payment of fines, the completion of community service or supervised probation, or placement in group homes, structured residential programs, staff secure programs, or locked and secured institutions that function much like adult jails (Calvin et al., 2006; Puritz et al., 1995). Without a strong defense attorney to locate treatment programs and make disposition recommendations to the court, youth found to be delinquent are in danger of being sent to programs that do not meet their needs, are highly restrictive, and are far from home (IJA & ABA, 1980b), merely because there may be an opening in the program or because it would be most convenient for the probation officer.

Destiny did not have a zealous advocate to push the court to make appropriate disposition orders, nor did she have an advocate to challenge the overt discrimination that she encountered when the court was trying to find her a placement. Destiny should never have been sent to T-Max. The court's probation staff and mental health evaluator recommended that the court place Destiny in an unlocked facility because she was low risk, and the evaluator even made some specific group home

recommendations that he thought would be sensitive to her needs. Destiny interviewed with three different group home programs, but all of them refused to accept her because she was transgender. So, after spending 4 months in the county detention facility waiting for a placement, instead of getting treatment in one of these smaller, less restrictive programs, Destiny was sent to T-Max, a large, high-security facility that resembles an adult prison and is usually reserved for youth with a long history of violent offenses. The court sent Destiny to T-Max not because T-Max met her individualized needs at the lowest level of security deemed necessary to protect society—the legal standard—but only because less restrictive, smaller, and more appropriate facilities were unwilling to take her because she was transgender.

Although Destiny's attorney was responsible for zealously advocating for the best possible disposition plan for Destiny and to protect Destiny's interests after the judge issued the disposition order (Calvin et al., 2006), he failed to meet these obligations. He did not ensure that the court's disposition was in line with Destiny's low-risk designation; did not make specific recommendations to the court for programs or services that would support Destiny's gender identity, either at the disposition hearing or after the group homes refused to accept her; and failed to challenge the court order that sent Destiny to T-Max, even though he could have argued that she was unlawfully placed in a secure facility.

When a court places a transgender youth in a secure facility because other, nonsecure programs have refused to accept the youth due to the youth's gender identity, the young person faces many consequences: vulnerability to assault, lack of socialization and programming, loss of community and connection with family, and an increased likelihood that he or she will be pulled even deeper into the system. Juvenile dispositions must meet the treatment needs of individual youth in the least restrictive environment possible (Calvin et al., 2006; IJA & ABA, 1980b; *In re Molina*, 1999). Transgender youth should not be treated more harshly because of the ignorance and bias of the court, their defense attorney, or juvenile justice programs.

Lack of Access to Counsel and the Courts

Along with the right to an attorney to represent them in their delinquency case, youth in juvenile detention and correctional facilities have a federal due-process right to meaningful access to attorneys and the courts while confined (*John L. v. Adams*, 1992; *Procunier v. Martinez*, 1974; *Younger v. Gilmore*, 1971). Correctional facilities must not interfere with communication between wards,

attorneys, and the courts and they must allow wards to have unmonitored visits with attorneys in matters related to their delinquency case, as well as matters related to their conditions of confinement (*Adams v. Carlson*, 1973; *Keker v. Procunier*, 1975; *U.S. v. Janis*, 1992). Defense attorneys, as well as judges, have responsibility for ensuring that juvenile detention and correctional facilities do not violate a youth's due-process right to have access to the courts (NCJFCJ, 2005).

Many barriers prevent young people confined in detention and correctional facilities from gaining access to attorneys or the courts. These facilities are often far from a youth's home and provide little opportunity for youth to interact with people outside of the facility. Few facilities provide youth with information about their constitutional rights and many fail to tell youth that they have a right to contact an attorney and how they can do so (Calvin et al., 2006).

In many jurisdictions, one of the biggest barriers to access is that youth in correctional facilities no longer have a defense attorney to contact (Puritz et al., 1992). Juvenile defense standards call for attorneys to represent their clients through the end of the juvenile court's jurisdiction; however, in many jurisdictions, a defense attorney's appointment officially ends when the judge issues a disposition order (IJA & ABA, 1980b; NCJFCJ, 2005). Consequently, thousands of young people who are confined in juvenile facilities do not have an attorney they can contact if they are abused in their placements. Even in jurisdictions where a defense attorney's appointment technically continues after disposition, attorneys often do not have time to contact their confined clients and many attorneys assume that their clients will contact them if they have a problem (NJDC, 2007; Puritz & Majd, 2007). Unfortunately, it is not uncommon for a juvenile facility to take young people's personal belongings when they arrive, including the business card of their attorney, making it very difficult for confined youth to contact their attorney if they are in trouble.

Destiny's defense attorney, a private practitioner who took juvenile defense appointments from the court, was technically still representing Destiny while she was at T-Max. In Destiny's jurisdiction, private defense attorneys are paid a set amount per case, regardless of the amount of time they work on a youth's case or whether the attorney continues to work on a case after disposition. So although Destiny theoretically had access to the courts through her defense attorney, she did not contact him to request that he inform the court of the abuse she was experiencing at T-Max. She explained to me that she did not know that she was allowed to call her attorney and she

thought he would not do anything to help her even if she did. Destiny was right to believe that her attorney would not help her: When I spoke to Destiny's attorney, he told me that he was no longer representing her and did not want to be involved. It was not until much later, when the judge contacted the attorney and asked him to visit Destiny, that he got reinvolved.

Destiny was also unable to gain access to the courts to address her conditions of confinement through any other attorneys. Although Destiny had asked that I come and meet with her in person, when I contacted facility administrators to determine the procedures for scheduling an attorney visit, they refused my request. T-Max administrators told me that I was not allowed to speak with Destiny or visit her and that they would not allow her to contact me because I was not the attorney of record in her delinquency case. Eventually, unbeknownst to facility administrators, I was able to meet with Destiny as a guest of an organization that was permitted regular visits with youth at T-Max. But even after Destiny, as well as Destiny's mother and grandmother, signed a retainer with me and our local co-counsel, T-Max still prevented Destiny from talking to us.

T-Max administrators were not the only ones interfering with Destiny's right to have access to counsel and the courts. During a review hearing, Destiny told the judge that she wanted the local attorney I was working with to represent her instead of her current defense attorney, and Destiny's defense attorney agreed to this substitution of counsel, saying he was happy to be off her case. Unfortunately, the judge did not. She explained, "I think [Destiny] is being torn by people and I am concerned that it's disrupting his treatment....Frankly, I have no belief that the mother...retained [our local co-counsel], so I don't know what your motivations are."⁷ Instead of ordering a substitution of counsel as Destiny requested, the judge told Destiny's defense attorney he was still on her case and she appointed a guardian ad litem (GAL) to complete a 30-day investigation and submit a report to the court that detailed what the GAL thought was in Destiny's best interests regarding continued confinement at T-Max.

Access to counsel and the courts is a fundamental right (*John L. v. Adams*, 1992). Without true access to counsel, transgender youth like Destiny are unable to contact attorneys who will listen to them, treat them with respect, and take their complaints of violence and abuse seriously. Instead, they are left alone in the hands of

juvenile facilities that violate their rights with no way to bring these violations to the attention of the court.

Lack of Competence to Work With Transgender Youth

In order to competently work with youth in the juvenile system, defense attorneys and other delinquency professionals need to have a wide range of social competencies and should be aware of the effects of bias and discrimination on the lives of young people (UNLV, 2006). Unfortunately, many of those working in the juvenile justice system lack basic cultural competence when it comes to issues of race, class, gender, and sexuality. The likelihood is very high that transgender youth will encounter delinquency professionals, like Destiny's attorney, who do not have an informed and bias-free understanding about transgender people. Without this understanding, delinquency professionals are unable to develop a complete picture of transgender young people, their needs, and the circumstances that brought them into court. Instead, courts and attorneys fall back on stereotypes about gender expression and inaccurate assumptions that transgender young people have sexual issues and are likely to be sexual predators.

For Destiny, almost every person she interacted with did not understand her and was very uncomfortable with her gender expression, a situation that affected her experiences both in and out of the courtroom. Rather than receiving appropriate medical and mental health services and the support she needed for expressing her gender identity while at T-Max, the court, her attorney, and T-Max staff all sexualized Destiny and intensively policed her gender and sexuality with the goal of forcing her to conform.

Lack of appropriate medical and mental health care. Although medical and mental health care for youth who are confined in juvenile institutions throughout the United States is notoriously poor (*A.M. v. Luzerne County Juvenile Detention Ctr.*, 2004; Calvin et al., 2006) and many youth fail to receive any form of mental health treatment while incarcerated, all youth in detention and correctional facilities have a constitutional right to receive adequate and appropriate physical and mental health care (*Alexander S. v. Boyd*, 1995; *Jackson v. Johnson*, 2000; *Youngberg v. Romeo*, 1982). This right to diagnosis and treatment also applies to the health care needs of transgender youth. Unfortunately, if the medical professionals who work within the juvenile justice system lack sufficient training and understanding of gender-identity concerns, transgender youth are in danger of either having their treatment needs ignored completely or receiving treatment

⁷ From court transcript of March 2006 review hearing, on file with the author.

that is harmful to them, in conflict with internationally accepted standards of care, and in violation of their constitutional rights.

In Destiny's case, the court appointed medical providers to evaluate Destiny to determine whether she was at risk to sexually offend even though she was not in court for a sexual offense. These evaluators had some basic understanding of transgender identity. All three wrote in their reports to the court that Destiny's gender expression was related to a diagnosable condition called gender identity disorder (GID; also known as gender dysphoria) and was not a sign that she was sexually deviant or a sexual predator. Each of these evaluators diagnosed Destiny with GID using the criteria in the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev.; American Psychiatric Association, 2000),⁸ but none of their reports outlined appropriate care for a young person with GID.

The World Professional Association for Transgender Health (formerly the Harry Benjamin International Gender Dysphoria Association) has developed internationally accepted guidelines titled *Standards of Care for Gender Identity Disorders* (Meyer et al., 2001). The *Standards of Care* call for professionals to support young people's exploration of their gender identity and focus therapeutic interventions on reducing the distress these youth experience due to the discordance between their gender identity and their bodies.⁹ The overarching treatment goal of the *Standards of Care* is to help a transgender person achieve "lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment" (Meyer et al., p. 1). When transgender youth do not receive appropriate treatment for GID or are forced to conform to traditional gender

stereotypes, they are at risk for serious negative health and social consequences, including clinical depression, and suicide attempts, as well as problems with relationships, school, and work (*DSM-IV-TR*, 2000; Israel & Tarver, 1997).

Neither the juvenile court judge nor Destiny's attorney addressed Destiny's GID diagnosis or questioned whether forcing Destiny to act like a boy was appropriate and in line with accepted medical standards. In addition, no one at T-Max had experience working with transgender youth or knew how to provide medical or mental health care to youth with GID. For example, the T-Max psychiatrist explained that Destiny "can be expected to flaunt his gender issues as a way of expressing his anger and disdain over being rejected as a female." But rather than recommending that T-Max staff take actions that would decrease Destiny's distress, the psychiatrist encouraged T-Max staff to "help [Destiny] understand that this environment is not suitable at this time for overt expressions of female gender identity" and encouraged them to explain to Destiny that "he will need to learn to contain his gender issues until he is released." Staff members followed this recommendation and regularly told Destiny, "Stop acting like a female," and "You are not a female and never will be one."¹⁰

During the 4 years that Destiny was involved with the juvenile court, she never saw a health care provider with expertise in GID. In addition, when she arrived at T-Max, staff did not do an evaluation to determine whether she had any medical needs related to her GID diagnosis, such as hormone therapy or supportive counseling. Rather than giving her the care and treatment she needed to improve her health, T-Max staff—at the urging of ignorant medical providers and with the support of the court—increased Destiny's emotional distress, putting her at greater risk for the negative outcomes described in the *DSM-IV-TR*.

Lack of respect for gender identity. Unfortunately, as is the case for so many other transgender youth navigating the juvenile delinquency system, Destiny was denied appropriate care for GID and T-Max staff refused to respect her transgender identity and made no accommodation in their policies or practices for her GID diagnosis. Although Destiny had been living as a female for 2 years, the court and her attorney refused to acknowledge this fact. For example, no one called Destiny by her chosen

8 According to the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev.), the diagnosis of gender identity disorder is to be given to children and adolescents who experience "a strong and persistent cross-gender identification...persistent discomfort with [their] sex or sense of inappropriateness in the gender role of that sex...[and] clinically significant distress or impairment in social, occupational, or other important areas of function" (American Psychiatric Association, 2000, p. 576).

9 For more than 27 years, transgender health care providers have followed a set of internationally recognized clinical protocols for the treatment of gender identity disorder. In 1979, the World Professional Association for Transgender Health (as the Harry Benjamin International Gender Dysphoria Association) published the first edition of *The Standards of Care for Gender Identity Disorders*. Today, the *Standards of Care* is in its sixth edition (Meyer et al., 2001).

10 From a personal interview with Destiny, transcript on file with the author.

name or used female pronouns when referring to her. When the court looked into placements and programming for Destiny, they only considered sending her to facilities for boys. For Destiny, one of the most distressing consequences was that as soon as she arrived at T-Max, staff cut off her long, styled hair and left her with a short, marine-style buzz cut.

In addition to cutting Destiny's hair so she would look more like a boy, T-Max staff members also tried to force her to act more like a boy. As part of her T-Max treatment plan, as detailed in a letter from the T-Max youth residential director, Destiny was prohibited from crossing her legs in a feminine manner, clicking her tongue, or otherwise expressing herself in any way the staff considered to be feminine.¹¹ Destiny's T-Max file contained numerous gender-related behavior write-ups, including one that cited her for dancing like a female,¹² another that stated she violated the dress code by wearing her pants too tight and padding her buttocks, and another that simply stated that her gender was disruptive.¹³

In addition, the treatment progress reports that T-Max filed with the court were full of comments that sexualized Destiny's gender expression. T-Max staff explained to the court that they were not treating Destiny's gender; according to them, they were simply addressing Destiny's "inappropriate sexual behaviors."¹⁴ The problem was that T-Max staff characterized all of the ways that Destiny expressed her gender as inherently sexual, admonishing her for such things as "dressing in a solicitous/seductive manner," "flaunting a female cover," and "advertising"¹⁵ just because she walked, sat, spoke, or dressed in a feminine manner.

A juvenile justice facility should not require a youth to hide his or her gender identity or force a youth to conform to gender stereotypes in the guise of treatment. Treating transgender youth as sexual deviants is inexcusable behavior. As the T-Max psychologist explained in his intake report, transgender youth can be expected to feel distress and anger if they are prevented from expressing

their gender. In addition to violating his or her rights, a treatment plan like the one at T-Max increases a transgender youth's distress and creates an atmosphere that is not conducive to his or her treatment and rehabilitation.

Lack of Safety in Juvenile Correctional Facilities

Young people in juvenile justice facilities have a constitutional right to be free from physical, emotional, and sexual abuse at the hands of other youth or facility staff (*Alexander S. v. Boyd*, 1997; *A.M. v. Luzerne County Juvenile Detention Ctr.*, 2004; *R.G. v. Koller*, 2006). Juvenile justice facilities have a corresponding legal responsibility to protect all of the youth in their care from physical, sexual, and emotional harm. Facility administrators must ensure that staff respond in a timely and appropriate manner to all harassment and abuse in order to alleviate conditions that could cause harm (*A.M. v. Luzerne County Juvenile Detention Ctr.*; *R.G. v. Koller*). Despite having a constitutional right to safety, many youth in juvenile justice facilities report being terrorized, assaulted, raped, and beaten by other wards and inmates, as well as by correctional staff and guards (*Alexander S. v. Boyd*; *A.M. v. Luzerne County Juvenile Detention Ctr.*; Parent et al., 2004; *R.G. v. Koller*). Many facilities are overcrowded, provide little training to staff members, and offer little if any supervision or programming to wards (NJDC 2004; Parent et al.).

Although juvenile justice facilities are generally unsafe for all youth, transgender youth must also deal with the ignorance and bias of staff members who lack a basic understanding of the particular safety risks that exist for transgender girls in an all-boys facility. Destiny, like many other transgender youth, was not emotionally or physically safe while in confinement. T-Max staff members did not protect her from physical and emotional harm: She was regularly harassed, sexually assaulted, and threatened with violence. Boys in Destiny's unit fondled her buttocks, some repeatedly exposed their genitals to her, and two boys masturbated in front of her while threatening to assault her. On one occasion, one of these boys came into Destiny's room, grabbed her from behind, and pushed her onto the bed. The boy then got on top of her and, while holding her down, proceeded to sexually assault her by rubbing his erect penis against her buttocks while making sexual remarks.

Staff members were aware that the boys were sexually assaulting Destiny, but they did nothing to stop it. One staff member told Destiny that if she made a complaint or filed a grievance regarding a sexual incident, Destiny would be sent to isolation because she should not be sexually propositioning the boys in her unit by telling

11 Letter from youth residential director in response to report that Destiny had been a victim of sexual assault, on file with the author.

12 Updated residential treatment plan, on file with the author

13 Education Report, on file with the author.

14 From progress reports submitted to the court, on file with the author.

15 From progress reports submitted to the court, on file with the author.

them that she was a girl and acting feminine.¹⁶ In addition, the staff member said he would deduct good-behavior points from Destiny because acting feminine was a violation of her treatment plan at T-Max.

Rather than creating an environment conducive to treatment and rehabilitation, T-Max staff members contributed to or disregarded Destiny's abuse, in violation of her 14th Amendment rights to safety and the equal protection. If a staff member becomes aware that a transgender youth is being subjected to harassment or violence, the facility must respond with appropriate actions designed to stop the harassment and violence (*R.G. v. Koller*, 2006). Facility staff should never ignore sexual or gender-related abuse or tell youth that they should expect to be harassed because they are openly transgender.

Juvenile Courts Fail to Uphold Their Responsibilities to Protect the Rights of Transgender Youth

Juvenile justice facilities are not left to their own devices once a youth is placed in their custody. In most jurisdictions, the judge has statutory oversight responsibility to monitor the treatment a facility provides to a youth, as well as the general conditions in the facility. According to the *Juvenile Delinquency Guidelines* of the National Council of Juvenile and Family Court Judges (2005), juvenile delinquency court judges have a legal and ethical responsibility to monitor the provision of all court-ordered services until all court requirements have been met. In addition, juvenile court judges are also responsible for ensuring that youth "who appear before the juvenile delinquency court receive the legal and constitutional rights to which they are entitled" (NCJFCJ, p. 32). As part of these responsibilities, judges have the power to order specific services, remove a youth from a particular placement, or otherwise change a youth's disposition to ensure that a youth's treatment needs are met (IJA & ABA, 1980b; NCJFCJ). Defense attorneys have a similar responsibility to their clients: If a confined client is not safe or has had his or her constitutional rights violated in some manner, defense attorneys should bring this to the court's attention and argue for appropriate treatment or removal from the facility (IJA & ABA, 1980a).

In Destiny's case, the court professionals who had the power and responsibility to stop Destiny's abuse did nothing even though there was sufficient reason for them to believe that she was at risk. At her case review hearing, Destiny told the court,

¹⁶ From a personal interview with Destiny, transcript on file with the author.

It has been cases and stuff where I have been touched and been threatened by peers and stuff like that. The program manager, I told him about it and he's not followed up on it and I'm very concerned about my safety at [T-Max]. I know when I first got there I had caused a lot of attention to myself in a negative way and I done changed and I just want it to stop but it won't stop because you can't change nobody else, you can only change yourself. I really would like to be removed from [T-Max].¹⁷

Rather than expressing any concern, the judge responded by saying, "All right. Anything else you wanted to say, [Destiny]?"¹⁸ She did not ask Destiny any additional questions about these alleged incidents of abuse and she did not ask Destiny why she was concerned for her safety.

The judge did ask a T-Max staff member whether Destiny had ever brought these concerns to her attention. The T-Max staff member told the judge that incidents had occurred in the first quarter of Destiny's stay but that this was no longer a problem.¹⁹ Again, the judge did not ask the staff member about these incidents or question how she was sure that Destiny was no longer being abused. Rather than upholding her responsibility to ensure that T-Max was not violating Destiny's constitutional right to safety and exercising her power to change Destiny's placement, the judge sent Destiny back to T-Max and appointed a GAL to investigate. She did not make any statements to the T-Max administrators that she was concerned about the corroborated allegation of abuse, nor did she remind them that they had a legal responsibility to keep Destiny safe.

The GAL also corroborated these allegations of abuse in the report he submitted to the court 1 month later, at the next review hearing. The GAL explained that despite "incidents of abuse," he thought Destiny should stay at T-Max because it was in Destiny's best interests to hold out and finish the T-Max program. He explained he was not concerned about these incidents because he thought that "[Destiny] was not offended by the actions of this boy, but rather encouraged them."²⁰ He also explained to the court that he did not think Destiny would be assaulted in the future because Destiny "has learned how to arrest this

¹⁷ From March 2006 review hearing transcript, on file with the author.

¹⁸ From March 2006 review hearing transcript, on file with the author.

¹⁹ From March 2006 review hearing transcript, on file with the author.

²⁰ From court report filed by guardian ad litem, on file with the author.

behavior or to cope with it. He does not feel intimidated by it, nor does he feel his identity is threatened, and he says he has adjusted his behaviors to avoid the problems.”²¹ Without further investigation, the judge followed the GAL’s recommendation and continued Destiny’s T-Max placement so she could finish the T-Max program. For the next 6 months, Destiny faced further abuse; her defense attorney and the court continued to fail to meet their legal and ethical responsibilities to ensure Destiny’s safety while she was under the jurisdiction of the juvenile court.

Broken Promises, Emotional Trauma

Destiny’s story is just one example of how the juvenile delinquency system mistreats transgender youth. Every day in cities throughout the United States, transgender youth face similar fates in the hands of the juvenile court. The juvenile court did not fulfill its legal responsibility to provide Destiny with rehabilitative services that would have met her individual needs, effective representation, adequate health care, appropriate placements and treatment, and protection from physical and mental abuse. Instead, Destiny was locked up far from her family and community in a facility that the court did not hold accountable for allowing Destiny to be abused and for causing her emotional harm. Without a zealous advocate, a culturally competent judiciary, and the availability of appropriate programming, juvenile justice professionals’ unaddressed bias and general lack of understanding regarding transgender youth will cause these youth to spiral deeper and deeper into a broken juvenile justice system.

Fairness, Dignity, and Respect for Transgender Youth in Juvenile Courts

Much work needs to be done to reaffirm the fundamental principles of the juvenile court—to provide appropriate support, resources, opportunities, and treatment to ensure the rehabilitation and development of competencies for all children found delinquent (ACCD & NJDC, 2005). Although transgender youth are often treated differently from other youth in these systems because of bias and discrimination, for Destiny, this bias only accounted for a portion of the problems she encountered in the juvenile court. Many of the problems that Destiny experienced in the juvenile justice system (e.g., poor representation, lack of access to courts) were not a consequence of her transgender identity but resulted from the poor general conditions for all youth in the system or were due to racism or the criminalization of youth.

²¹ From court report filed by guardian ad litem, on file with the author.

Many transgender youth that come into the juvenile delinquency system, like Destiny, are youth of color from impoverished communities. Adequately addressing the challenges that transgender youth in delinquency courts face requires not only understanding and responding to this intersection of identities and experiences but also joining forces with efforts to challenge the general inequities and failures in the juvenile justice system for any youth who comes in contact with it. In this section, I propose recommendations that use this framework to respond to the failures of law, policy, and representation that Destiny and other transgender youth in the juvenile delinquency system encounter.

Keeping Transgender Youth Out of Juvenile Courts

Prevention. As community and youth organizers have long recognized, the best way to protect youth from mistreatment in juvenile courts and correctional facilities is to prevent young people from entering the system in the first place. Advocates for transgender youth need to confront factors that make youth vulnerable to court involvement and partner with communities and organizations that are fighting police profiling, challenging racist policies and practices that increase poverty, addressing the failures of the public school system, and fighting to reduce the overrepresentation of youth of color in the juvenile justice system.²²

In addition, transgender youth advocates need to address the specific problems that make transgender youth vulnerable to juvenile court involvement so these young people can continue to live with their families, go to school, and be a part of their community. Advocates should develop, support, and expand projects that are promoting family acceptance and support for transgender youth, thus improving their relationships with their families, increasing their safety in schools, and building competency in social services programs that transgender youth might use.²³

²² A few examples of organizations that are working on these issues include the W. Haywood Burns Institute (<http://www.burnsinstitute.org>), the Ella Baker Center for Human Rights (<http://www.ellabakercenter.org>), FIERCE! (<http://www.fierceny.org>), and the Community Justice Network for Youth (<http://www.cjny.org>).

²³ A few examples of organizations and projects that are working on these issues include the Family Acceptance Project (<http://familyproject.sfsu.edu>); Parents, Families and Friends of Lesbians and Gays (<http://www.pflag.org>); GSA Network (<http://www.gsanetwork.org>); and Child Welfare League of America/Lambda Legal—Fostering Transitions Project (<http://www.cwla.org/programs/culture/glbtcabout.htm>).

Diversion programs. Just because a young person gets arrested does not mean the juvenile court must intervene. Juvenile courts should be used to address only those problems that cannot be successfully addressed at home, at school, or in the community using social services and other nonlegal interventions (Puritz & Majd, 2007). According to the NCJFCJ, judges have a responsibility to ensure that cases are diverted from juvenile court proceedings whenever possible (NCJFCJ, 2005). The last 10 years have seen increased attention on developing programs that divert young people from the juvenile court system and get them the services they need in their own communities, without a juvenile court record. Transgender youth who are arrested should also have the opportunity to participate in diversion programs. The following recommendations will increase access to these services for transgender youth:

1. Juvenile courts should support the creation of a continuum of community-based, culturally sensitive diversion programs, such as mental health assessment and educational services, peer court, youth development services, and family support.
2. Diversion programs need to have an understanding of transphobia and how it affects transgender youth and must be able to competently work with transgender youth.
3. Juvenile courts should support the development of specific diversion programs for transgender youth who are arrested for such things as loitering, trespassing, and sex work, as well as truancy and other school-related issues.

Alternatives to detention. When young people are not diverted out of the juvenile court system, judges should send them back to their families or communities during the pendency of their delinquency case rather than putting them into secure detention facilities. NCJFCJ (2005) guidelines explain that “detention should only be considered when a youth is believed to be a danger to self or others, or at risk to reoffend or abscond” (p. 30). Numerous research findings (Poe-Yamagata & Jones, 2000) have shown that detention can have many negative ramifications for a young person, including risk of abuse, injury, and suicide. In addition, research (Calvin, 2004) has consistently shown that juveniles who have been in detention are more likely to be formally processed and receive more punitive sanctions at disposition than those not placed in detention. Research (Calvin) has also shown that detention actually increases the likelihood that a youth will be arrested again. Detention is particularly difficult for

transgender youth because detention facilities are most often segregated by gender and are not equipped to support or protect young people who are gender nonconforming (Wilber et al., 2006).

Since 1992, the Annie E. Casey Foundation’s (2007) Juvenile Detention Alternatives Initiative (JDAI) has been supporting jurisdictions throughout the United States to (a) eliminate the inappropriate or unnecessary use of secure detention, (b) minimize failures to appear and the incidence of delinquent behavior, (c) redirect public finances from building new facility capacity to responsible alternative strategies, and (d) improve conditions in secure detention facilities (Mendel, 2007). JDAI has been very successful in decreasing the use of detention, developing new alternatives to detention programs, and improving conditions in detention facilities in many of these jurisdictions. Over the last few years, JDAI has also been successful at helping jurisdictions decrease disproportionate minority contact and respond to the specific needs of girls in the system (Mendel). Currently, 80 JDAI sites employ JDAI’s eight core strategies to meet these objectives.²⁴ Beginning in 2008, JDAI will start to incorporate LGBT youth into their site-based work and will conduct a statistically valid quantitative study to document their numbers in detention facilities and the experiences they have there.

In addition to the steps that JDAI recommends to reduce the number of youth in detention, in order to ensure that transgender youth are not inappropriately held in detention during the pendency of their delinquency cases, juvenile courts should also:

1. Use creative plans to keep transgender youth in their communities with the lowest level of supervision necessary. These plans may include informal daily reporting, curfews, placement in a foster home, or counseling.
2. Ensure that the alternatives to detention programs in the jurisdiction are competent to work with transgender youth and can provide the specific types of support and supervision that transgender youth need.
3. Develop detention facility risk assessment tools that are based on neutral and objective factors rather than on the screener’s subjective opinion of the youth to avoid bias against transgender youth.

²⁴ Visit <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/CoreStrategies.aspx> for more information about what Juvenile Detention Alternatives Initiative jurisdictions do to decrease the use of detention.

Furthermore, courts should not place transgender youth who cannot be released to their families in secure detention facilities after an arrest simply because they lack sufficient family support. As the NCJFCJ (2005) guidelines explain, in situations where the court cannot reach a young person's family or the family refuses to take the child back home after he or she is arrested, if the youth is not a safety or flight risk, the court should place the young person in kinship care, foster care, or another nonsecure environment—not in secure detention.

Protecting the Due-Process Rights of Transgender Youth in the Courtroom

Respect in the courtroom. To ensure fair and consistent decision making that minimizes the impact of bias, juvenile court professionals must treat all young people with respect, dignity, courtesy, and cultural understanding (NCJFCJ, 2005). Juvenile court judges have a responsibility to “explain and maintain strict courtroom decorum and behavioral expectations for all participants...[and] ensure that the juvenile delinquency court is a place where all...participants are treated with respect, dignity, and courtesy” (NCJFCJ, p. 123). What this guideline means for transgender youth is:

1. All juvenile delinquency professionals should refer to transgender youth using the name and pronoun that the youth prefers, both inside and outside of the courtroom, if so directed by the youth or his or her attorney. If a transgender youth's preferred name is not her or his legal name, the court should indicate on court documents that the youth is also known as his or her preferred name.
2. Courts should not require youth who appear in the courtroom to dress or otherwise present themselves in conformity with gender stereotypes. During court appearances, transgender girls should be permitted to dress in a feminine manner and transgender boys should be permitted to dress in a masculine manner.
3. Judges should ensure that transgender youth are treated with respect in the courtroom and should quickly respond if a juvenile justice professional treats a youth disrespectfully.

To ensure that court professionals can competently work with youth, the NCJFCJ (2005) guidelines explain that “all participants in the juvenile delinquency court system should be trained in child and adolescent development principles, cultural differences, mental health, substance abuse, and learning issues, and community systems and services” (p. 28). Moreover:

1. All jurisdictions should develop training on sexual orientation and gender identity for judges, prosecutors, probation staff, and all other court professionals. This training should focus on developing competencies to work with transgender youth, should be mandatory, and should be incorporated into the general training programs for these various stakeholders.
2. Judges should not appoint attorneys who cannot provide transgender youth with professional and competent representation or who exhibit bias toward transgender people.
3. Courts should identify community-based programs and resources that are trained to work with transgender youth and are providing effective nondiscriminatory services so the court can make competent referrals. Judges should support these programs and encourage the creation of new programs to fill any gaps in services for transgender youth.
4. Judges should ensure that all court-based services, such as behavioral health programs, drug or alcohol abuse services, and status offender programs, are also providing effective and nondiscriminatory services to transgender youth.

Zealous advocacy and effective representation. Young people charged with delinquency offenses have a due-process right to counsel (*In re Gault*, 1967). In order to satisfy this right, a defense attorney's paramount responsibility to young people charged with delinquency is to zealously defend them and protect their due-process and other important legal rights during every stage of juvenile delinquency proceedings (ACCD & NJDC, 2005). Unfortunately, many young people do not receive effective representation because defenders lack necessary resources, have enormous caseloads, lack specialized training, and face other systemic barriers that prevent even the most dedicated lawyers from meeting their clients' needs (Puritz et al., 1995). Since 1999, the National Juvenile Defender Center (NJDC; <http://www.njdc.info>) has been the leading national organization working to ensure that all children in delinquency courts receive high-quality representation. In 2004, the NJDC joined forces with Legal Services for Children (<http://www.lsc-sf.org/web/index.html>) and the National Center for Lesbian Rights (<http://www.nclrights.org>) to introduce the Equity Project, a multiyear collaboration addressing the failures of the juvenile delinquency court to treat transgender (as well as lesbian, gay, and bisexual) youth with fairness and respect. The Equity Project is studying attitudes and

practices at each of the juvenile court decision-making locations and is formulating recommendations to ensure that LGBT young people have well-trained juvenile defenders who zealously represent them at each stage of their case and are prepared to uphold their due-process and other constitutional rights.

To ensure that all young people have zealous advocates defending them and protecting their rights, NJDC (2007) recommends that juvenile defense programs adopt the following principles:

1. Juveniles have a right to zealous representation at every stage of the delinquency process, not just for adjudication.
2. Juvenile defenders need real access to support staff, research tools, and other resources to assist with investigations and case preparation.
3. Juvenile defense is a specialized area of law and defenders must be adequately trained in all aspects of this field, including in adolescent development.
4. Managers should keep defenders' caseloads at a level that ensures high-quality representation.
5. Juvenile defense programs should ensure that juveniles do not waive the appointment of counsel before consulting with an attorney. Young people should be appointed attorneys at the earliest possible stage of delinquency proceedings.
6. Juvenile defenders have an obligation to actively seek out and advocate for treatment and disposition programs that best serve the unique needs and dispositional requests of each individual client.
7. Juvenile defenders must promote fairness and equity for young people in the juvenile delinquency system.

Effective representation also requires an acknowledgment of and explicit engagement with the realities of the lives of the young people the attorney represents, including those who identify as transgender. "Specifically, lawyers should acquire basic information about [transgender] young people, understand the ways in which they are uniquely vulnerable to abuse, violence, and discrimination and support them through sensitive advocacy strategies" (Fedders, 2006, p. 775). To do this, defense attorneys need to develop meaningful attorney-client relationships with their clients. To foster such relationships:

1. Defense attorneys should be aware of their personal biases regarding race, ethnicity, class, sexual orientation, and gender identity (UNLV, 2006).

2. All jurisdictions should develop training on sexual orientation and gender identity for defense attorneys to provide them with the competencies they need to meet their ethical duties of providing zealous advocacy to their transgender clients. These competencies include the ability to communicate with clients in an appropriate manner about sexual orientation, gender identity, and sexual behaviors.
3. Defense attorneys should respect the rights of their clients to express their gender identity (Fedders, 2006). Attorneys should call transgender youth by their chosen names and use the appropriate pronoun. If so directed by clients, attorneys should request that juvenile justice professionals respect their clients' gender identity in a similar manner.
4. Defense attorneys should treat all information relating to a youth's transgender identity as confidential and should not share this information, even with the youth's parent or guardian, without first obtaining client consent. The attorney should protect confidentiality even if she or he believes that sharing this information would benefit the client.

Standards and guidelines developed specifically to ensure effective juvenile delinquency representation require juvenile defense attorneys to represent their clients' stated interests, not what an attorney feels is in a client's best interest (IJA & ABA, 1980a; NCJFCJ, 2005). For transgender youth, defenders are ethically bound to advocate at every stage of the case for young people's legitimate interests and goals, including interests related to their gender identity. Defenders may not substitute their own judgment, or the judgment of their transgender clients' families, for the expressed interests of their clients. Even attorneys who are well practiced in client-directed representation may find it difficult to apply these skills when representing a transgender youth, especially if they have had little experience with transgender youth. For effective representation:

1. Defense attorneys need to be cognizant of not allowing what they believe are appropriate gender expressions or behaviors to influence their representation of transgender clients.
2. Defense attorneys should assist a transgender youth in making informed decisions regarding how the youth wishes to express his or her gender in the courtroom or in a juvenile justice facility by discussing possible negative consequences with the youth. Defense attorneys should not tell a

youth that the youth should not express his or her gender at a particular time or in a particular setting based on the attorney's opinion that it would be inappropriate for the youth to do so or that it is not a good idea.

Individualized and appropriate dispositions. Attorneys have a responsibility to ensure that the court has been informed of their clients' individual needs during the dispositional phase of the case (NCJFCJ, 2005). Defense attorneys have an obligation to actively seek out and advocate for treatment and placement alternatives that best serve the specific needs and requests of each individual client (ACCD & NJDC, 2005). To meet this obligation, attorneys should be familiar with community-based programs and resources that provide competent and nondiscriminatory services to transgender youth, and they should work with the courts to support the creation of a continuum of nonsecure services and programs that can serve transgender young people.

Once the court issues disposition orders, defense attorneys have an obligation to make sure their clients receive the programming and services that the judge ordered in the disposition plan and are responsible for bringing any failure to the court's attention using whatever local remedies are available (IJA & ABA, 1980b). Defense attorneys also need to make sure that program staff members are treating transgender youth with respect and are not attempting to change a youth's gender identity.

Effective postdispositional representation. A defense attorney's responsibilities to a client continue after the judge issues a disposition order (Calvin et al., 2006; IJA & ABA, 1980b; NCJFCJ, 2005). According to the IJA & ABA *Juvenile Justice Standards* (1980a, 1980b), attorneys should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan. (Volume 6, Standard 10.1 [a][i])

Postdisposition representation includes (a) addressing the conditions and duration of confinement, including the consequences of confinement and available alternatives to confinement; (b) challenging ineffective programs and services and proposing alternatives; and (c) exhausting possible appeals of the underlying adjudication (UNLV, 2006). Furthermore:

1. Postdisposition representation should not end until the jurisdiction of the court ends, unless the client terminates representation (UNLV, 2006).

2. All jurisdictions should provide the necessary training and financial support to ensure that defense attorneys have sufficient time and ability to provide effective postdisposition representation.
3. Defense attorneys should receive training that addresses the common problems that transgender youth experience in placements, including inappropriate placements, classification as sex offenders, lack of access to medical care, lack of safety, isolation, and lack of respect for gender identity.

Responding to Unconstitutional Conditions of Confinement for Transgender Youth

When a court places a transgender youth in a detention or correctional facility, the youth should be safe and be able to participate in facility programs. Juvenile justice facilities have a legal obligation to protect the safety of transgender youth and to ensure that their constitutional rights are upheld (*Alexander S. v. Boyd*, 1998; *R.G. v. Koller*, 2006). To fulfill this obligation, juvenile justice facilities need to develop concrete policies and practices that address providing competent and constitutional treatment and rehabilitation to the transgender youth in their care.

Improve general conditions of confinement. Some of the most basic and fundamental steps necessary to protect all juveniles in correctional institutions from abuse and rights violations will also improve conditions for transgender youth. The following recommendations address general conditions of confinement for juveniles and will also make transgender youth less vulnerable:

1. Ensure that correctional institutions are not beyond capacity.
2. Require higher staff-to-youth ratios, better-trained staff, better supervision, and more programming for youth.
3. Develop and implement adequate evidence-based screening processes that protect vulnerable youth from assault.
4. Develop adequate grievance and complaint procedures.
5. Establish independent ombudsman programs or other similar oversight programs that are not administered by the same agency that runs the institutions. These programs should have the ability to receive and investigate physical and sexual abuse complaints and to engage in follow-up advocacy.

6. Remove barriers that make access to attorneys difficult and establish affirmative policies that assist confined youth in gaining access to courts and attorneys.

Ensure safety for transgender youth. Even with these overarching changes, transgender youth will continue to be vulnerable to abuse until the transphobic culture of correctional facilities is challenged. Juvenile detention and correctional facilities must require that all individuals who are involved in the provision of care to youth treat transgender youth with dignity and respect and adhere to contemporary professional standards for the treatment of transgender youth.

In 2003, Legal Services for Children and the National Center for Lesbian Rights started a collaborative project to develop model standards of care for LGBT young people in out-of-home care. The culmination of this project was the 2006 publication of *CWLA Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care* (Wilber et al., 2006). This publication offers contemporary professional standards regarding the care of LGBT youth in the child welfare and juvenile justice system and provides guidance for implementing systemic changes to respond to the specific safety and treatment needs of transgender youth in detention and correctional facilities. According to Wilber et al., by implementing the following recommendations, facilities will be better prepared to address transphobia and replace the myth that transgender youth are sexual predators with the understanding that transgender youth are at high risk for sexual victimization and are in need of protection:

1. All staff, counselors, and juvenile justice facility administrators should undergo training on the needs and care of transgender youth. This training should be mandatory and ongoing, as well as incorporated into general training curriculum. In addition to formal training, supervisors should use supervision and regular performance evaluations as opportunities to discuss safety issues that come up for transgender youth and to assess the competency of direct-care staff.
2. Juvenile justice facilities should adopt written policies prohibiting harassment and discrimination on the basis of actual or perceived sexual orientation and gender identity.
3. All juvenile facility staff members must show respect for a youth's gender identity by (a) calling transgender youth by their preferred name and pronouns, (b) allowing transgender youth to dress in the clothing of their preferred gender and not

requiring a transgender girl to cut or style her hair in a masculine style, (c) encouraging other youth to respect the gender identity and chosen names of transgender youth and telling them that harassment and violence against these youth will not be tolerated, (d) keeping personal information about a youth's gender identity private, and (e) not ridiculing or chastising youth for expressing their gender identity.

4. Facilities should not arbitrarily place transgender youth in sex-offender units or with violent or sexually aggressive youth. Transgender youth should never be required to participate in sex-offender programs simply because of their gender identity.
5. Juvenile justice facilities should not make attempts to change a youth's gender identity as part of the youth's treatment plan or punish the youth for expressing his or her gender.
6. Facility administrators should reprimand staff who verbally harass transgender youth or make transphobic remarks in general.
7. To prevent escalation to violence and sexual abuse, facility staff should promptly and appropriately intervene when youth behave disrespectfully toward their peers based on sexual orientation, gender identity, or other differences.
8. Juvenile justice facilities must develop policies that address safe placements for transgender youth. Transgender youth should not automatically be placed according to their birth sex. Instead, staff should make individualized classification decisions based on each transgender youth's emotional and physical well-being, prioritizing the youth's evaluation of his or her safety. In most cases, it will be appropriate for facilities to house transgender youth according to their gender identity, not their birth gender, although it may be necessary to provide them with additional privacy for showering or a single room for sleeping.
9. Juvenile facilities must provide transgender youth with access to medical providers who are knowledgeable about their health needs and can provide the care that is medically necessary for them. Facilities should permit transgender youth to continue to receive all transition-related medical treatment they started prior to placement in the juvenile justice facility and provide any necessary authorization for transition-related treatments when they are medically necessary

according to accepted professional standards.
(pp. 9–13, 29–31, 47–50, 56–59)

Conclusion

Much work needs to be done to achieve the systemic changes that are needed to address the juvenile delinquency system's failure of law, policy, and representation for transgender youth. Advocates for transgender youth need to work across communities to address the specific bias and misunderstanding that harms transgender youth brought into juvenile delinquency courts while also addressing the system-wide failures that harm all young people in this system. Advocates also need to contribute to efforts that challenge the overarching social, institutional, and political powers that are unnecessarily funneling thousands of young people from impoverished communities, including transgender young people, into the juvenile delinquency system. Only through collaborative efforts that understand and respond to the complex identities and experiences of transgender youth who are at risk for juvenile delinquency system intervention will these youth no longer be destined to face the same fate that Destiny did.

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