



ADVOCATING FOR OUR COMMUNITIES



Transgender Family Law 101

A. Introduction

This workshop seeks to provide basic and accessible California specific information about transgender people's ability to: enter into or remain in legally recognized marriages or domestic partnerships; maintain custody and/or visitation with a child or children; and, participate in the adoption or foster care systems. Because this is an area of the law that is rapidly developing, the workshop is intended to provide only general information. If you have a specific legal question, you should contact an attorney for information tailored to your legal need. Both NCLR and TLC provide free legal information and can be contacted via the attorneys listed at the bottom of this handout.

B. Workshop Agenda

1. Transgender Marriage and Child Custody
2. Adoption
3. Foster Parenting

C. Attachments

1. Model Memorandum of Understanding
2. Durable Power of Attorney for Finances
3. California Advanced Health Care Directive
4. Adoption Agency Resource List
5. Information on

D. Presenters

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1. Transgender Marriage and Child Custody Law

E. State of the law for marriage rights

- “Pre-Transition” Marriages – while the term “pre-transition” is an oversimplification for someone’s identity, it is used here to represent those marriages that are begun prior to a person transitioning. These marriages are strongly believed to remain valid. No case law or statute exists directly on point, however, California law is well settled that the only way to dissolve a marriage are divorce or death. Transition does not, by itself, dissolve a marriage.
- “Post-Transition” Marriages -- while the term “post-transition” is an oversimplification for someone’s identity, it is used here to represent those marriages that are begun after a person has transitioned. No explicit prohibitions exist in California or federal law to prevent a transgender person from entering into a heterosexual marriage. However, challenges – with mixed results -- have been made to the validity of marriages involving a transgender person in a number of cases across the U.S. The one case that has been fully litigated in California found that the underlying marriage was valid.
- While we have every reason to believe that the validity of marriages involving transgender people will be upheld in California, it is important that couples preserve as many rights as possible in the event that their marriage is ruled invalid upon challenge. Key steps to doing so include: a memorandum of understanding between the spouses, financial power of attorney, health care directive, and a will or trust. You can find models of the mou, power of attorney, and directive documents attached. You can use an attorney to prepare your will or trust or do it your self by utilizing one of the many “how to guides” now available.

F. State of the law for Domestic Partnerships

- Some open questions remain for transgender people entering into a domestic partnership. On the state level (where domestic partnerships will convey a wide array of rights and responsibilities beginning on January 1, 2005), the couple must be same-sex or at least one partner must be over the age of 62. For those city and counties that created domestic partnership registries prior to the passage of the state registry, it is sometimes the case that the couple can be any two people regardless of gender (however, all of these registries offer fewer protections and obligations than the state process).

G. State of the law for custody rights that flow from Marriages and Domestic Partnerships

- Biological children -- No explicit prohibition exists in California regarding the rights of a transgender person to retain custody or visitation rights to their biological child. However, a parent's transgender identity is often an issue used in a custody hearing to the detriment of the transgender parent. Luckily, we have good case law in the state law judges from relying on this information in the absence of proof that the health and well-being of the child will be compromised.
- Children of a Post-Transition Marriage – many times, the transgender spouse in a post-transition marriage will adopt children of the marriage via spousal rights (a step-parent adoption). Occasionally, one partner will challenge the transgender parents rights or responsibilities to that child by attacking the underlying marriage. In addition to the above arguments made in Section A, additional arguments exist in California law for finding parental rights and responsibilities.
- Step Parent Adoption through a Domestic Partnership – If you and your partner are registered California Domestic Partners, either of you is able to adopt the other's child or children through a step-parent adoption procedure (so long as all other step-parent adoption criteria are met). If you entered into your domestic partnership prior to your transition (and you and your partner are now an opposite-sex couple), some questions may be raised about your ability to utilize the step-parent adoption procedure (because, as noted above, only same-sex couples can be registered domestic partners). While the lack of any case law on the subject makes it impossible to predict how this issue would be handled by a court, anecdotal evidence suggests that, like a pre-transition marriage, transitioning does not, in and of itself, dissolve or void a domestic partnership.

This document is intended to convey basic information about laws and regulations affecting our ability to express our gender identity. It is not intended to serve as legal advice. While every effort has been made to provide readers with accurate information, the law is often changing, especially in this area. Anyone with a specific legal question is strongly encouraged to contact the Transgender Law Center or another source of legal information to discuss the facts surrounding your particular circumstances.



Adoption and Foster Parenting for Transgender Folks Living in California

2. Adoption

A. National Overview

- No states have a law that specifically bars transgender people from adopting, either as an individual or in a couple.
- There are three states that prohibit gay and lesbian adoption in some manner. Currently, **Florida** is the only state that categorically prohibits lesbians and gay individuals from becoming adoptive parents by statute. In addition, although not specifically directed at lesbian, gay and bisexual people, **Utah** prohibits adoptions by "a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state," and **Mississippi** prohibits "adoption by couples of the same gender."
- Whether a married couple where one member is transgender would be allowed to adopt in Utah and Mississippi is unclear. In Mississippi, the couple may be considered to be "of the same gender" if the person's transgender status is known to those investigating the adoption and in Utah, the couple may be considered to be in a cohabiting relationship that is not a "legally valid and binding marriage."
- Whether a transgender person may be allowed to adopt at all in Florida is also unclear. At least one transgender person has adopted a child in Florida, but the validity of this adoption may be challenged following the *Kantaras v. Kantaras* marriage dissolution case. It is likely that many other transgender people in Florida have adopted, though it is not clear whether their status as a transgender person has been known.
- While transgender people are not explicitly prohibited from adopting under the law in the above states or any others, adoption agencies, child welfare workers and judges may discriminate against transgender people during the adoption process; making the process more lengthy, difficult, or intrusive or by denying access to adoption outright.

B. Adoption in California

- California allows adoptions by lesbian, gay, bisexual, and transgender people, both as individuals or as couples, either through individual adoptions, joint adoptions, or step parent adoptions for domestic partners or married couples.

- If you are currently in a California domestic partnership and a child is born into the partnership after Jan 1, 2005 the adoption procedure is not necessary for the non-biological parent to be considered the legal parent, though other procedures may be necessary to safeguard your relationship.
- Depending on the county, a transgender person in California may still encounter difficulties adopting.

C. Hints

- Contact adoption agencies that are known to welcome lesbian and gay parents and which may, therefore, also be open to working with families that include a transgender parent.
- Have a supportive therapist or doctor with expertise in transgender issues available to help you address any questions or concerns raised by social workers, adoption officials or courts.
- Seek the counsel of an attorney with experience in transgender issues. His or her familiarity with transgender law can make or break a case.

3. Foster Parenting

A. National overview

- Arkansas is the only state that prohibits lesbians and gay men from being foster parents. It is likely that if a person's transgender status is known, they would also prohibit a transgender person from foster parenting.
- Procedure to become a foster parent varies state by state.
- In all other states, a transgender person should be able to become a foster parent.

B. Foster Parenting in California

- Counties and foster family agencies may not discriminate against foster parents on the basis of their gender identity. It is unlawful to deny a person the ability to foster parent because they are transgender.
- A license is required to operate a foster home. The process requires a licensing worker to visit your home and meet with you and other family members. Minimum personal, safety and space requirements are required by law.

Memorandum of Understanding

This memorandum is entered into on the date shown below between _____ (“Husband”) and _____ (“Wife”).

I. Recitals

- A. The parties, upon entering into marriage, desire to establish that both have knowledge that XXXXXX is transgender.
- B. By entering into this memorandum, XXXX and YYYY wish to make clear that they both understand that XXXXX was identified as [male/female] at birth.
- C. By entering into this memorandum, XXXX and YYYY wish to make clear that they both understand that XXXX is actually [female/male].
- D. By entering into this memorandum, both parties make clear that they each fully accept the rights and responsibilities typically associated with marriage in California, despite the fact that XXXX is transgender.
- E. Both parties agree that in the event that this marriage is dissolved, neither party will make arguments -- based on XXXX being transgender -- denying the other’s rights or their own responsibilities typically associated with marriage in California.
- F. By entering into this memorandum, both parties have full knowledge that because XXXX is transgender they will be unable to conceive a child together.

Representations and Waivers

- A. Each party has in good faith fully disclosed all relevant information concerning XXXX’s status as transgender.
- B. Each party has in good faith fully answered all questions presented by the other about XXXXX’s status as transgender and the possible effects of said status on their marriage.
- C. Neither party has any remaining questions about XXXXX’s status as transgender and the possible effects of said status on their marriage.
- D. Each party recognizes that this Memorandum may alter rights each would otherwise have under California law.
- E. By entering into this memorandum, each party expressly waives such rights.
- F. This memorandum takes effect at the time when a marriage license is issued.
- G. The later invalidation of such a marriage license does not invalidate this agreement.
- H. In the event that any provision of this Memorandum is deemed invalid or unenforceable, the remaining provisions are severable and remain effective.

In witness thereof, the parties have entered into this agreement on [date].

 (“Husband”)

 (“Wife”)

DURABLE POWER OF ATTORNEY FOR FINANCES

Recording requested by and when recorded mail to:

Warning to Person Executing This Document

This is an important document. It creates a durable power of attorney. Before executing this document, you should know these facts:

- 1. This document may provide the person you designate as your attorney in fact with broad powers to dispose, sell, convey and encumber your real and personal property.**
- 2. These powers will exist for an indefinite period of time unless you limit their duration in this document. These powers will continue to exist notwithstanding your subsequent disability or incapacity.**
- 3. You have the right to revoke or terminate this durable power of attorney at any time.**

DURABLE POWER OF ATTORNEY

1. Creation of Durable Power of Attorney

By signing this document, I, _____, intend to create a durable power of attorney. This durable power of attorney shall not be affected by my subsequent disability or incapacity, and shall remain effective until my death, or until revoked by me in writing.

2. Effective Date

This durable power of attorney shall become effective only in the event that I become incapacitated or disabled so that I am not able to handle my own financial affairs and decisions.

That determination shall be made in writing by a licensed physician and the writing shall be attached to this durable power of attorney.

3. Designation of Attorney in Fact

I, _____, hereby appoint
_____, as my attorney in fact, to act for me in
my name and for my use and benefit. Should _____
for any reason fail to serve or cease to serve as my attorney in fact, I appoint
_____ of _____ to be
my attorney in fact.

4. Authority of Attorney in Fact

I grant my attorney in fact full power and authority over all my property real and
personal, and authorize _____ to do and perform all and every act
which I as owner of that property could do or perform and hereby ratify and confirm that
all that my attorney in fact shall do or cause to be done under the Durable Power of
Attorney.

[Special Provisions or Limitations. Add to this section any specific limitation(s),
restriction(s), direction(s), etc. you want.]

5. Reliance by Third Parties

The powers conferred on my attorney in fact by this durable power of attorney may be
exercisable by my attorney in fact alone, and my attorney in fact’s signature or act under
the authority granted in this durable power of attorney may be accepted by any third
person or organization as fully authorized by me and with the same force and effect as if I
were personally present, competent and acting on my own behalf. No person or
organization who relies on this durable power of attorney or any representation my
attorney in fact makes regarding [his/her] authority, including but not limited to:

- (i) the fact that this durable power of attorney has not been revoked;
- (ii) that I, _____, was competent to execute this power
of attorney;
- (iii) the authority of my attorney in fact under this durable power of attorney,

Durable Power of Attorney for Finances
Page 2 of 3

shall incur any liability to me, my estate, heirs, successors or assigns because of such reliance on this durable power of attorney or on any such representation by my attorney in fact.

Signed on _____ at _____, _____.

Signature of Principal

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California)
County of _____)

On this date _____ before me, _____ ,
personally appeared _____

____ Personally known to me - OR - ____ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Notary's Signature

IMPORTANT NOTE: This sample legal document is provided for informational purposes only and may or may not be valid in your state. This sample legal document also may not include the particular provisions you need. We strongly recommend you consult a competent family or estate planning attorney who is familiar with these issues. This sample document in no way constitutes, and should not be relied upon, as legal advice.

CALIFORNIA

ADVANCE HEALTH CARE DIRECTIVE

Explanation

You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or an employee of the health care institution where you are receiving care, unless your agent is related to you, is your registered domestic partner, or is a co-worker. Your supervising health care provider can never act as your agent.)

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- (a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition;
- (b) Select or discharge health care providers and institutions;
- (c) Approve or disapprove diagnostic tests, surgical procedures and programs of medication; and
- (d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation;
- (e) Make anatomical gifts, authorize an autopsy, and direct the disposition of your remains.

Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. Space is provided for you to add to the choices you have made or for you to write out any additional wishes. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out part 2 of this form.

Part 3 of this form lets you express an intention to donate your bodily organs and tissues following your death.

Part 4 of this form lets you designate a physician to have primary responsibility for your health care.

After completing this form, sign and date the form at the end. The form must be signed by two qualified witnesses or acknowledged before a notary public. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health-care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this form at any time.

INSTRUCTIONS

PART 1
POWER OF ATTORNEY FOR HEALTH CARE

**PRINT THE
 NAME, HOME
 ADDRESS AND
 HOME AND
 WORK
 TELEPHONE
 NUMBERS OF
 YOUR PRIMARY
 AGENT**

(1) **DESIGNATION OF AGENT:** I designate the following individual as my agent to make health care decisions for me:

_____ (Name of individual you choose as agent)

_____ (address) (city) (state) (zip code)

_____ (home phone) (work phone)

**PRINT THE
 NAME, HOME
 ADDRESS AND
 HOME AND
 WORK
 TELEPHONE
 NUMBERS OF
 YOUR FIRST
 ALTERNATE
 AGENT**

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health-care decision for me, I designate as my first alternate agent:

_____ (Name of individual you choose as first alternate agent)

_____ (address) (city) (state) (zip code)

_____ (home phone) (work phone)

**PRINT THE
 NAME, HOME
 ADDRESS AND
 HOME AND
 WORK
 TELEPHONE
 NUMBERS OF
 YOUR SECOND
 ALTERNATE
 AGENT**

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

_____ (Name of individual you choose as second alternate agent)

_____ (address) (city) (state) (zip code)

_____ (home phone) (work phone)

ADD PERSONAL INSTRUCTIONS ONLY IF YOU WANT TO LIMIT THE POWER OF YOUR AGENT

(2) **AGENT’S AUTHORITY:** My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration, and all other forms of health care to keep me alive, **except** as I state here:

(Add additional sheets if needed.)

INITIAL THE BOX IF YOU WISH YOUR AGENT’S AUTHORITY TO BECOME EFFECTIVE IMMEDIATELY

(3) **WHEN AGENT’S AUTHORITY BECOMES EFFECTIVE:** My agent’s authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. If I mark this box [], my agent’s authority to make health care decisions for me takes effect immediately.

(4) **AGENT’S OBLIGATION:** My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

CROSS OUT AND INITIAL ANY STATEMENTS IN PARAGRAPHS 4 5, OR 6 THAT DO NOT REFLECT YOUR WISHES

(5) **AGENT’S POSTDEATH AUTHORITY:** My agent is authorized to make anatomical gifts, authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this form:

(6) **NOMINATION OF CONSERVATOR:** If a conservator of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as conservator, I nominate the alternate agents whom I have named, in the order designated.

PART 2

INSTRUCTIONS FOR HEALTH CARE

If you fill out this part of the form, you may strike any wording you do not want.

**INITIAL THE
PARAGRAPH
THAT BEST
REFLECTS
YOUR WISHES
REGARDING
LIFE-SUPPORT
MEASURES**

(7) **END-OF-LIFE DECISIONS:** I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below: **(Initial only one box)**

(a) **Choice NOT To Prolong Life**

I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits, **OR**

(b) **Choice To Prolong Life**

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

(8) **RELIEF FROM PAIN:** Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort should be provided at all times even if it hastens my death:

(9) **OTHER WISHES:** (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

(Add additional sheets if needed.)

**ADDITIONAL
INSTRUCTIONS
(IF ANY)**

**ORGAN
DONATION**

**PART 3
DONATION OF ORGANS AT DEATH
(OPTIONAL)**

(10) Upon my death: (mark applicable box)

(a) I give any needed organs, tissues, or parts,

OR

(b) I give the following organs, tissues, or parts only

(c) My gift is for the following purposes:
(strike any of the following you do not want)

- (1) Transplant
- (2) Therapy
- (3) Research
- (4) Education

**PART 4
PRIMARY PHYSICIAN
(OPTIONAL)**

(11) I designate the following physician as my primary physician:

(name of physician)

(address) (city) (state) (zip code)

(phone)

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

(name of physician)

(address) (city) (state) (zip code)

(phone)

**PRINT THE
NAME, ADDRESS
AND TELEPHONE
NUMBER OF
YOUR PRIMARY
PHYSICIAN**

**PRINT THE
NAME, ADDRESS
AND TELEPHONE
NUMBER OF
YOUR
ALTERNATE
PRIMARY
PHYSICIAN**

(12) **EFFECT OF COPY:** A copy of this form has the same effect as the original.

(13) **SIGNATURE:** Sign and date the form here:

_____	_____
(date)	(sign your name)
_____	_____
(address)	(print your name)
_____	_____
(city)	(state)

(14) **WITNESSES:** This advance health care directive will not be valid for making health care decisions unless it is either:

- (1) signed by two (2) qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature; or
- (2) acknowledged before a notary public.

ALTERNATIVE No. 1
STATEMENT OF WITNESSES

I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual's identity was proven to me by convincing evidence, (2) that the individual signed or acknowledged this advance directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud or undue influence, (4) that I am not a person appointed as an agent by this advance directive, and (5) that I am not the individual's health care provider, an employee of the individuals' health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

First Witness:

_____	_____
(date)	(signature of witness)
_____	_____
(address)	(printed name of witness)
_____	_____
(city)	(state)

SIGN AND DATE THE DOCUMENT

PRINT YOUR NAME AND ADDRESS

WITNESSING PROCEDURE

BOTH OF YOUR WITNESSES MUST AGREE WITH THIS STATEMENT

HAVE YOUR WITNESSES SIGN AND DATE THE DOCUMENT AND THEN PRINT THEIR NAME AND ADDRESS

Second Witness:

_____	_____
(date)	(signature of witness)
_____	_____
(address)	(printed name of witness)
_____	_____
(city)	(state)

ADDITIONAL WITNESS STATEMENT

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

_____	_____
(date)	(signature of witness)
_____	_____
(address)	(printed name of witness)
_____	_____
(city)	(state)

**ALTERNATIVE No. 2
NOTARY PUBLIC**

State of California)
) SS.
County of _____)

On _____ before me, _____
(insert name of notary public)

personally appeared _____,
(insert the name of principal)

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity and that by his/her signature on the instrument the person upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

NOTARY SEAL _____
(signature of notary)

ONE OF YOUR WITNESSES MUST ALSO AGREE WITH THIS STATEMENT

HAVE YOUR WITNESS ALSO SIGN AND DATE THIS SECTION AND PRINT THEIR NAME AND ADDRESS

OR

A NOTARY PUBLIC SHOULD FILL OUT THIS SECTION OF YOUR DOCUMENT

**THIS SECTION
IS TO BE
COMPLETED
ONLY IF YOU
ARE A
RESIDENT IN A
SKILLED
NURSING
FACILITY**

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as witness as required by section 4675 of the Probate Code.

(date)

(signature)

(address)

(printed name)

(city)

(state)



AB 458 FACT SHEET

Foster Care Non-Discrimination Act

AB 458, the Foster Care Non-Discrimination Act, was signed into law on September 6, 2003 and goes into effect on January 1, 2004. AB 458 prohibits discrimination in the foster care system on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status. Because training is crucial to enable service providers to fulfill their responsibilities to provide safe and nondiscriminatory care, placement, and services to foster children, AB 458 also mandates initial and ongoing training for all group home administrators, foster parents, and department licensing personnel.

This law is the first of its kind in the United States to explicitly include protections for lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth and adults involved with the foster care system.

Specifically, the law provides:

- Ø All foster children¹ and all adults engaged in the provision of care and services to foster children² have a right to fair and equal access to all available services, placement, care, treatment and benefits.
- Ø All foster children³ and all adults engaged in the provision of care and services to foster children⁴ have a right not to be subjected to discrimination or harassment on the basis of actual or perceived sexual orientation or gender identity.
- Ø Adds these rights and protections to the California Foster Child List of Rights.
- Ø All group home administrators,⁵ foster parents,⁶ and department licensing personnel⁷ must receive initial and ongoing training on the right of a foster child to have fair and equal access to all available services and to not be subjected to harassment or discrimination based on their actual or perceived sexual orientation or gender identity.
- Ø All community college districts that provide orientation and training to relative caregivers must make available to relative and extended family caregivers orientation and training courses that cover the right of a foster child to have fair and equal access to all available services, placement, care, treatment, and benefits and the right of foster youth not to be subjected to discrimination or harassment on the basis of actual or perceived sexual orientation or gender identity.⁸

(OVER)

ENDNOTES

¹ Cal. Welfare & Inst. Code § 16001.9(a)(22).

² Cal. Welfare & Inst. Code § 16013(a).

³ Cal. Welfare & Inst. Code § 16001.9(a)(22).

⁴ Cal. Welfare & Inst. Code § 16013(a).

⁵ Cal. Health & Safety Code § 1522.41(c)(1)(H). Failure to comply with this section shall constitute cause for revocation of the license of the facility. Cal. Health & Safety Code § 1522.41(b)(3)

⁶ Cal. Health & Safety Code § 1529.2(b)(3)(F); § 1529.2(b)(4)(F).

⁷ Cal. Health & Safety Code § 1563(c)(5).

⁸ Cal. Welfare & Inst. Code § 16003(a)(1).

NCLR's Youth Project has been advocating for LGBTQ youth in schools, foster care, juvenile justice settings, and the mental health system since 1993. The Project provides direct, free legal information to youth, legal advocates, and activists through a toll-free line; advocates for policies that protect and support LGBTQ youth in these different arenas; and litigates cases that are creating new legal protections for youth in schools, foster care, juvenile justice and other settings.

FOR MORE INFORMATION, CONTACT:

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National Center for Lesbian Rights

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LGBTQ Youth in the California Foster Care System A Question and Answer Guide

This question and answer guide is designed to address many of the frequently asked questions about protecting lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth in the California foster care system from harassment and discrimination.

Are there LGBTQ youth in foster care?

Yes. At any one time there are approximately 260,000 youth in the foster care system in the United States¹ and approximately 42,500 youth in the California foster care system.² While it is impossible to determine precisely the number of LGBTQ youth in the foster care system, recent studies suggest that LGBTQ youth make up between 5 and 10 percent of the total foster youth population.³ The actual percentage may be even higher since LGBTQ youth are over-represented in the foster care pool due to discrimination and abuse many of these youth face in their families of origin and in their schools.⁴

Are LGBTQ youth in the foster care system at risk of being harassed or discriminated against?

Yes. LGBTQ youth are disproportionately targeted for harassment and discrimination in the foster care system. In one of the only studies of its kind, a New York Task Force found:

- Ø 100% of LGBTQ youth in New York City group homes reported that they were verbally harassed on the basis of their sexual orientation or gender identity while at their group home.⁵
- Ø 70% reported physical violence due to their sexual orientation or gender identity.⁶
- Ø 78% were removed or ran away from their foster placements as a result of hostility toward their sexual orientation or gender identity.⁷
- Ø 56% spent time living on the streets because they felt “safer” there than they did living in their group or foster home.⁸

This abuse is perpetrated not only by youth peers, but also by facility staff and other service providers. When the abuse is between peers, often it is condoned by facility staff or goes unaddressed.

What are some examples of discrimination that LGBTQ youth might encounter in the foster care system?

Examples of unlawful discrimination include:

- Ø Failing or refusing to take steps to protect an LGBTQ youth from harassment based on their actual or perceived sexual orientation or gender identity;

- Ø Failing to use the requested name and pronoun that is in accordance with a transgender youth's gender identity;
- Ø Treating displays of affection by same-sex couples differently than displays of affection by different-sex couples;
- Ø Refusing to allow a youth to wear clothing that is consistent with their gender identity;
- Ø Not allowing an LGBTQ youth to attend a gay prom;
- Ø Confiscating LGBTQ supportive materials.

Do foster care providers have a legal responsibility to protect LGBTQ youth from harassment and discrimination?

Yes. California law specifically protects foster children from harassment and discrimination based on actual or perceived sexual orientation or gender identity. All LGBTQ youth in foster care must be provided with equal access to all available services, placement, care, treatment and benefits. The law covers all aspects of foster care, including all available services, placement, care, treatment, and benefits, and the right to not be subjected to discrimination or harassment.⁹

In addition, all foster youth have a constitutional right to equal protection under the law. This means that all group home facilities must protect LGBTQ youth, and those perceived to be LGBTQ, from harassment, just as they must protect all foster youth from harassment on the basis of race, religion, and sex. If group home providers ignore incidents of harassment because they believe LGBTQ youth should expect to be harassed or that they have brought the harassment upon themselves by being open about their sexual orientation or gender identity, they have violated the youth's right to equal protection..

In addition, all youth have constitutional rights to freedom of expression, which may include the right to be open about their sexual orientation or gender identity. The First Amendment and the Federal Due Process and Equal Protection Clauses may also protect the right of a transgender youth to dress in accordance with his or her gender identity in a group home.¹⁰

Does the law require foster care providers to receive training about this nondiscrimination requirement?

Yes. Under the California Foster Care Nondiscrimination Act all group home administrators, foster parents, and department licensing personnel must receive initial and ongoing training on the rights of a foster child to have fair and equal access to all available services and the right to not be subjected to harassment or discrimination based on their actual or perceived sexual orientation or gender identity.¹¹

In addition, all community college districts that provide orientation and training to relative caregivers must make available to these caregivers, orientation and training courses that cover the rights of a foster child to have fair and equal access to all available services and to not be subjected to harassment or discrimination on the basis of actual or perceived sexual orientation or gender identity.¹²

In addition to the required trainings, what other steps can service providers take to ensure they comply with the nondiscrimination requirements?

Foster care programs should adopt and enforce written anti-harassment/anti-discrimination policies that explicitly prohibit harassment and discrimination on the basis of actual or perceived sexual orientation or gender identity. Both the policy and the forms for filing complaints under the policy should be readily available to foster youth.

Programs should also provide anti-bias training for youth and any other persons involved in the foster care system who are not mandated to receive training under the law, including child welfare workers and other group home staff. All facilities should have information and materials about LGBTQ issues available for staff and youth.

Are foster parents required to take in a foster child who is LGBTQ even if they feel that homosexuality is morally wrong?

Foster parents are free to hold any beliefs they choose about homosexuality. Foster parents and relative caregivers are not paid employees of the state. Instead they care for foster children in their own homes and are permitted under current practice to decide on an individual basis whether to accept and retain an individual child in their care. But once a foster parent or relative caregiver accepts a child into their home, they have a legal responsibility to provide care to the child without discrimination on the basis of actual or perceived sexual orientation, gender identity, HIV status, and other protected categories.

Because a change in living environment is traumatic for any child, if a foster parent or relative caregiver cannot fulfill their responsibility of caring for a particular child, then they should notify the child's social worker and seek additional training, counseling, or other assistance with the goal of keeping the child in the home. Only as a last resort should a foster parent or relative caregiver request that a child be removed from their home.

How do we protect LGBTQ youth in foster care from harassment and discrimination and still respect the religious and cultural diversity of foster parents and youth?

It does not violate any person's religious beliefs or disrespect any person's cultural background to teach young people or adults that violence, name calling and other harassment are wrong and to ensure that all youth are treated equally. Everyone is free to hold any beliefs they choose regarding homosexuality and gender, so long as they do not harass, threaten, or discriminate against foster youth because of their sexual orientation or gender identity. Developing an atmosphere of respect for diversity in all foster care placements provides the necessary space for all foster youth to feel comfortable and safe.

In addition, it does not violate the religious freedom of staff or administrators to require that staff appropriately respond to violence, discrimination and harassment.

Adopting and enforcing inclusive anti-harassment and discrimination policies and training all staff on these non-discrimination requirements will help service providers ensure that all of their youth are provided with the safe and affirming placements to which they are entitled.

¹ According to the U.S Department of Health and Human Services, Administration on Children, Youth, and Families, and the Children's Bureau on September 30, 2001 there were 542,000 kids in foster care in the United States. The median age for these kids was 10.6 years old. Approximately 49% or 260,475 were over the age of 11. Statistics available at: <http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.htm> (last visited December 2, 2003).

² According to the Child Welfare Research Center Child Welfare Services report, there were 90,049 children in foster care in California on July 1, 2003. Of these youth, 42,612 were over the age of 11. Statistics available at: http://cssr.berkeley.edu/CWSCMSreports/Pointintime/fostercare/childwel/data/CWf_PA0_jul2003_0.html (last visited December 19, 2003).

³ See Lambda Legal Defense and Education Fund, *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care* 11 (2001) (hereinafter *Youth in the Margins*).

⁴ See *id.*

⁵ See Urban Justice Center, *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System* 16 (2001) (citing Joint Task Force of New York City's Child Welfare Administration and the Council of Family and Child Caring Agencies, *Improving Services for Gay and Lesbian Youth in NYC's Child Welfare System: A Task Force Report*, (1994)).

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ Cal. Welfare & Inst. Code § 16001.9(a)(22).

¹⁰ See, e.g., *Doe v. Yunits*, 2000 WL 33162199, at * 3-4 (Mass. Super.), *aff'd sub nom, Doe v. Brockton Sch. Comm.*, No. 2000-J-638 (Mass.App.2000).

¹¹ Cal. Health & Safety Code § 1522.41(c)(1)(H); Cal. Health & Safety Code § 1529.2(b)(3)(F); § 1529.2(b)(4)(F); Cal. Health & Safety Code § 1563(c)(5).

¹² Cal. Welfare & Inst. Code § 16003(a)(1).

NCLR's Youth Project has been advocating for LGBTQ youth in schools, foster care, juvenile justice settings, and the mental health system since 1993. The Youth Project provides direct, free legal information to youth, legal advocates, and activists through a toll-free line; advocates for policies that protect and support LGBTQ youth; and litigates cases that establish legal protections for youth in schools, foster care, juvenile justice, and other settings.

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