

A ROOM OF ONE’S OWN: SAFE PLACEMENT FOR TRANSGENDER YOUTH IN FOSTER CARE

ARIEL LOVE*

Transgender youth in foster care are not safe. While these youth face the daily danger of physical violence at the hands of others in their foster care group homes, administrators of child welfare services have shown deliberate indifference to these risks, and staff in foster care group homes do not effectively protect the physical safety of transgender youth in their care. Because resource constraints make it impossible to place all transgender youth in LGBTQ-only group homes, we need a solution that will make transgender youth safe in the group homes that already exist. This Note argues that the current New York City foster care system violates the substantive due process safety rights of the transgender youth under its care, and proposes legislation that would presumptively mandate transgender-only bedrooms and bathrooms. Such legislation would provide safe spaces within existing group homes in order to fix current constitutional violations.

INTRODUCTION	2266
I. TRANSGENDER YOUTH IN FOSTER CARE	2271
A. <i>Introduction to the Foster Care System</i>	2271
B. <i>Discrimination and Violence Faced by Transgender Youth in Foster Care</i>	2275
C. <i>Transgender Youth in LGBTQ-Only Group Homes are Safe</i>	2280
II. CURRENT SITUATION: WHAT IS ALREADY BEING DONE TO AFFECT THE SAFETY OF TRANSGENDER YOUTH	2282
A. <i>New York State General Rules</i>	2282
B. <i>NYC ACS Policy</i>	2283
C. <i>Why the ACS Policy is Insufficient</i>	2285
III. PROPOSED SOLUTIONS: TWO WAYS TO MAKE TRANSGENDER YOUTH SAFER	2288

* Copyright © 2014 by Ariel Love. J.D., 2014, New York University School of Law; B.A., 2011, University of Southern California. Many thanks to Deborah Ellis for her early advice on this Note, and to Michele A. Yankson and Samuel J. Zeitlin for their aid and encouragement in its progression. Thanks also to the many editors of the New York University Law Review who worked to prepare this piece for publication, in particular Rebecca A. Hufstader, Samuel F. Steinbock, Bradley E. Markano, and Caroline E. Odorski. Thank you to Nicole Sanchez for your vital advice and inspiration, and to Professor Chris Freeman for instilling a love of queer theory. This Note would not have been possible without the guidance and support of the AnBryce Scholarship, the incredibly generous individuals who make it possible, and my fellow AnBryce Scholars. Above all, thank you to Steve, Sandra, and Hanna Love, and Wyatt Banks for your encouragement, input, and love.

- A. *Making Transgender Youth Safer Through Legislation* 2288
- B. *Making Transgender Youth Safer Through Litigation* 2292
 - 1. *The Fourteenth Amendment Right to Safety in the Child Welfare System* 2292
 - a. *The State’s Constitutional Duty to Protect Youth in Foster Care* 2293
 - b. *The State’s Standard of Care* 2295
 - 2. *Remedies*..... 2300
- CONCLUSION 2300

INTRODUCTION

Transgender¹ youth in foster care are not safe. Administrators of child welfare services have shown deliberate indifference to the risks

¹ A brief explanation of transgender and other terms relevant to this Note: Transgender persons’ “self-image of their gender differs from gender norms traditionally associated with the sex assigned to them at birth.” ROB WORONOFF ET AL., *OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE* 80 (2006), available at <http://www.lambdalegal.org/sites/default/files/publications/downloads/out-of-the-margins.pdf>. For example, an individual whose birth certificate says female, but who identifies as a man is a transgender man. Transgender individuals can also identify as genderqueer, meaning that although their birth certificate says (for example) female, they identify as neither a man nor a woman. See JODY MARKSAMER, *NAT’L CTR. FOR LESBIAN RIGHTS, A PLACE OF RESPECT: A GUIDE FOR GROUP CARE FACILITIES SERVING TRANSGENDER AND GENDER NON-CONFORMING YOUTH* 57 (2011), available at http://www.nclrights.org/wp-content/uploads/2013/07/A_Place_Of_Respect.pdf (defining the term “genderqueer”). This Note also uses the term transgender to refer to gender-nonconforming youth more generally, i.e., anyone who may be perceived by others as transgender and thus face discrimination because their actions fail to conform to expectations about the way someone with their sex should act. See, e.g., *id.* at 58 (defining transgender to include gender-nonconforming individuals). Sex refers to the designation as either male or female, usually made by a doctor at birth based on a “person’s physiological characteristics, including genitalia, chromosomes, and hormones.” WORONOFF ET AL., *supra* at 80; see also MARKSAMER, *supra* at 56 (defining assigned birth sex similarly). Gender refers to gender identity—a person’s internal sense of being a man or a woman, or something in between—and gender expression—a person’s “outward expression of self as a man or woman or combination thereof.” WORONOFF ET AL., *supra* at 81; accord MARKSAMER, *supra* at 56. Gender and sex are both conventionally believed to be a binary: man or woman, and male or female. WORONOFF ET AL., *supra* at 81; Joy L. Johnson & Robin Repta, *Sex and Gender: Beyond the Binaries*, in *DESIGNING AND CONDUCTING GENDER, SEX, & HEALTH RESEARCH* 19 (John L. Oliffe & Lorraine Greaves, eds., 2012). However, thanks to the evolution of medical and social science, there is a developing understanding that both gender and sex occur on a more fluid continuum that encompasses a greater range of gender identities, expressions, and bodies. WORONOFF ET AL., *supra* at 81. When a transgender person shares the fact that they are transgender with another person, they have “come out” to that person. When someone reveals that an individual is transgender to a third party without the consent of the transgender person, the transgender

they face.² In one instance, “[a] transgender youth . . . was repeatedly beaten by boys in her group home. The youth reported the abuse to her social worker, but rather than helping her, the social worker said, ‘It’s your fault. Stop acting like a girl.’”³ Youth-on-youth violence is rampant nationwide: Transgender youth in foster care face the daily danger of physical violence at the hands of other youth living in the same group homes.⁴ Staff who work in these homes do not effectively protect the physical safety of transgender youth in their care. So far, the only solution that has kept transgender youth safe in foster care has been to place them in separate group homes specifically designated as LGBTQ-only.⁵ Ideally, cities and states should house every transgender youth in foster care in a safe LGBTQ-only group home,

person has been “outed.” A cisgender person identifies as the gender stereotypically associated with the sex they were assigned at birth. *Cisgender* (*adj.*), QUEERDICTIONARY (Aug. 20, 2011, 10:22 PM), <http://queerdictionary.tumblr.com/post/9264228131/cisgender-adj>. For example, an individual whose birth certificate says female and who identifies as a woman is cisgender. *Id.* Gender identity disorder (GID) is a medical condition in which someone strongly and persistently identifies with the gender not stereotypically associated with their sex. MARKSAMER, *supra* at 56. This diagnosis requires that the person show significant impairment or distress in important areas of their life due to this gender identification. *Id.* People diagnosed with GID sometimes choose or desire to have sex-reassignment surgery. *Id.* at 71. Sex-reassignment surgery is a series of various medical procedures that change the physical appearance and function of one’s body to conform to one’s gender identity. *Id.* at 58. LGBTQ stands for lesbian, gay, bisexual, transgender, queer, and questioning individuals. *Id.* at 57. Sexual orientation is not the same as gender identity, and the two are completely unrelated. *Id.* at 11. Sexual orientation refers to a person’s emotional, sexual, and/or romantic attraction to individuals, whether of the same or different gender. *Id.* For example, a man attracted exclusively to women has the sexual orientation heterosexual. Being transgender, i.e., having a gender identity that does not conform to the gender stereotypically associated with one’s sex, has no bearing on one’s sexual orientation. *Id.* When referring to transgender individuals as a group and to people whose pronoun of choice is unknown I will use gender-neutral plural pronouns in order to avoid assigning a gender. See *Transgender FAQ*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/transgender-faq> (last visited Aug. 24, 2014) (“Some transgender people do not believe in a gender binary and prefer not to use pronouns typically associated with men (e.g., him) and women (e.g., her). Instead, they would prefer if people simply used their names or used a non-gendered pronoun such as ‘hir’ or ‘they.’”).

² See *infra* notes 73–74 and accompanying text (describing abuse suffered by transgender youth in foster care and the indifferent and discriminatory responses of staff assigned to care for them).

³ SHANNAN WILBER, CAITLIN RYAN & JODY MARKSAMER, CWLA BEST PRACTICE GUIDELINES: SERVING LGBT YOUTH IN OUT-OF-HOME CARE 7 (2006), available at <http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf>.

⁴ See *infra* Parts I.A and I.B (describing conditions in general group homes for transgender individuals, focusing on the harassment and violence faced in this setting).

⁵ See *infra* Part I.C (describing the improved circumstances in LGBTQ-only group homes compared to general group homes). “Specialized programs are able to offer the types of safety and security that all LGBTQ youth should be offered in each of their placements, whether or not they have been specially designed for them.” WORONOFF ET AL., *supra* note 1, at 25 (quoting from an interview with an adult participant in Sacramento).

but the resources currently available are insufficient to do so. It would also be ideal if every foster care group home were a friendly and welcoming place where transgender youth did not face any discrimination, harassment, or danger due to their gender identity. The current reality is quite the opposite, however, and transgender youth should not be forced to wait for society to overcome its prejudice and hate. Transgender foster youth need safe placements now. Therefore, cities and states need solutions that will make transgender youth safe in the group homes that already exist, despite the reality of discrimination.

Although similar problems exist throughout the country,⁶ this Note focuses on New York City to provide a specific example and to demonstrate how even a program with relatively transgender-friendly policies has room for improvement. New York state law requires the division of girls and boys in foster care over the age of 5 into separate bedrooms.⁷ This poses a problem for transgender youth, who are often placed according to their biological sex rather than their gender identity.⁸ The problem is that the law separates every cisgender woman in foster care from people likely to commit gender-based violence against her (e.g., men who rape), but it fails to separate transgender women in foster care from people likely to commit gender-based violence against them (e.g., anyone of any gender who is transphobic).

New York City Administration of Children's Services (NYC ACS) has attempted to solve this problem by instituting a policy that allows transgender youth to be placed according to their gender identity and counsels administrators to take each child's individual circumstances into account when making placements.⁹ This policy is commendable for its recognition and validation of the gender identity of transgender youth, but the policy fails to go far enough. It does not address the fact that transgender youth are at high risk of transphobic violence from cisgender youth regardless of the cisgender youth's sex. For example, transgender men are not safe from violence just because they sleep in a bedroom designated for men only. Transgender individuals are at their most vulnerable when in their bedrooms and bathrooms (i.e., when naked or sleeping) because these are situations in

⁶ See generally WORONOFF ET AL., *supra* note 1 (describing the problems LGBTQ youth throughout the country face in foster care).

⁷ N.Y. COMP. CODES R. & REGS. tit. 18, § 448.3(d)(4)(iv) (2014).

⁸ WORONOFF, ET AL., *supra* note 1, at 86.

⁹ N.Y.C. ADMIN. FOR CHILDREN'S SERVS., PROMOTING A SAFE AND RESPECTFUL ENVIRONMENT FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING (LGBTQ) YOUTH AND THEIR FAMILIES INVOLVED IN THE CHILD WELFARE, DETENTION AND JUVENILE JUSTICE SYSTEM 6, 25 (2012), available at http://www.nyc.gov/html/acs/downloads/pdf/lgbtq/LGBTQ_Policy.pdf.

which others are most likely to discover that they are transgender and attack them for that reason. Therefore, additional measures are necessary to protect them in these sensitive parts of daily life.

Transgender people should always be treated in a way consistent with their gender identity and equal to cisgender individuals. However, this is an instance in which formal equality falls short of the mark and substantive equality is needed to adequately protect transgender individuals. In order to be safe in foster care, transgender youth need their own bedrooms and privacy in bathrooms so that they are not outed to cisgender youth.¹⁰

This Note argues that the New York state law¹¹ requiring separation of girls and boys over the age of five into separate bedrooms,

¹⁰ Transgender individuals should not normally be separated or treated differently from cisgender individuals; in fact, this should almost never happen. See WILBER, RYAN & MARKSAMER, *supra* note 3, at 48 (explaining that treating LGBTQ youth differently from other youth (e.g., by isolating or segregating them) can stigmatize them, increase their loneliness, and effectively act as a punishment). The placement of transgender youth in foster care is an unusual case in which separation is needed to protect the personal safety of those individuals. Targeted discrimination needs a targeted cure—in this instance formal equality means practical inequality, and substantive equality is needed. It would be vastly preferable to protect transgender youth in foster care without giving them separate bedrooms and bathrooms. See WORONOFF ET AL., *supra* note 1, at 81–83 (explaining that care for transgender youth must “acknowledge and support their gender identity” by treating a female-identifying transgender individual like any cisgender female). However, all available evidence shows that it is not currently practicable to protect transgender youth in foster care without putting them in a separate LGBTQ-only group home or a separate bedroom within a normal group home. See, e.g., WILBER, RYAN & MARKSAMER, *supra* note 3, at 49–50 (explaining that putting transgender youth in situations where they must change, shower, or use the restroom in front of others “poses serious risks to their safety and well-being”). This Note assumes that most transgender youth in foster care would rather be safe than housed with their cisgender counterparts, but if this is not true for some individuals then the preference of those individuals should be respected when the risks to their safety are not too great. See *id.* at 49–50 (explaining that appropriately placing transgender youth involves balancing the safety of the youth and the importance of placing the youth in a way that corresponds to and respects their gender identity).

¹¹ This Note focuses on New York; both because of the ways it is typical and the ways it is different. New York’s law mandating sex-segregated bedrooms in foster care is typical of American foster systems, and its effects and the ways in which it can be challenged as unconstitutional are also typical throughout the United States. See, e.g., FLA. ADMIN. CODE ANN. r. 65C-14.008(9)(e) (2014) (providing that, in group care of foster youth, “[s]eparate sleeping rooms for boys and girls over the age of 3 shall be provided”); 40 TEX. ADMIN. CODE § 748.3363(a) (2014) (mandating that in residential care centers for foster youth “[a] child six years old or older must not share a bedroom with a child of the opposite gender”); UTAH ADMIN. CODE r. R501-12-7(4)(a) (2014) (requiring, in foster homes, that “rooms are not shared by children of the opposite sex, except infants under the age of two years”). However, NYC ACS’s policy expressing a preference for housing transgender individuals according to their gender identity is atypical in that it provides far more acknowledgement and protection of transgender foster youth than can be found in most American foster care systems. See Sara Sugar, *Struggle Amid Progress: To Be LGBTQ in Foster Care*, CITY LIMITS (July 16, 2014), <http://www.citylimits.org/news/articles/5146/struggle-amid-progress-to-be-lgbtq-in-foster-care#.U-Au61BdW0w>

without a provision requiring separate bedrooms for transgender youth, is unconstitutional under the Fourteenth Amendment because it violates transgender youth's right to personal safety. To obtain the substantive equality needed to protect transgender youth in foster care, and address the unconstitutional status quo, this Note proposes both litigation strategies and legislation.

This Note's recommended legislative solution would mandate separate bedrooms for cisgender boys and girls over the age of five and presumptively mandate transgender-only bedrooms for transgender youth at all ages. At the same time, this legislation would allow transgender youth, after counseling and a determination that they are mature enough to make the decision, to choose to be placed in the cisgender boys' bedroom or the cisgender girls' bedroom if they prefer one of those to the transgender bedroom. The law would require utmost confidentiality—nobody would be permitted to out transgender youth to cisgender youth (other than the youth themselves) in any way, especially not by disclosing the existence or location of a transgender-only bedroom. This legislation would also mandate privacy (e.g., in the form of individual locking stall doors) in bathrooms and showers—at a minimum for all transgender youth, but ideally for everyone in foster care—that would be subject to the same confidentiality provision.

Requiring that transgender youth have their own separate bedrooms and bathroom privacy will not be a complete solution. Transgender youth will still face a substantial risk of harm at the hands of other youth in the common areas of their foster care facilities, and a marginal risk of violence at the hands of their transgender roommates. However, the solutions this Note proposes will help protect transgender youth in foster care when they are most vulnerable.¹²

Part I explains aspects of the structure of the New York City and State foster care systems relevant to this Note and chronicles the history and current experiences of transgender youth in these systems. It shows that transgender youth are not currently safe in foster group homes unless these group homes are LGBTQ-only. Part II explores the law and policies that govern bedroom and bathroom availability in foster group homes. In particular, Part II looks at NYC ACS's policy

(comparing NYC ACS under their new policy to other states and finding that “[t]he progress that New York City has made places it decades ahead of other areas of the country”). Thus NYC ACS's policy provides a useful starting point in creating policies and/or legislation to protect transgender youth in foster care.

¹² “The most important issue is safety, especially in ‘straight’ group homes where the staff can be unfriendly and rape and other forms of abuse are often tolerated.” WORONOFF ET AL., *supra* note 1, at 85 (quoting from an interview with a youth participant).

designed to increase the safety of transgender youth in its care and explains why that policy is inadequate. Part III begins by proposing a legislative framework that would fix the problems with New York state law and New York City policy by mandating safe and substantively equal accommodations for transgender youth in foster care. Part III then lays out the framework of the Fourteenth Amendment right to personal safety of transgender youth in the NYC foster system and explores two litigation strategies that can be used to challenge unsafe placements under the current New York City legal and regulatory regime.

I

TRANSGENDER YOUTH IN FOSTER CARE

A. *Introduction to the Foster Care System*

Relatively little has been written about the physical setup of congregate care facilities within New York City's foster care system,¹³ due at least in part to the variation among the facilities and the freedom of organization they have.¹⁴ However, a broad overview is possible. New York state law requires that facilities house no more than three children in any bedroom,¹⁵ and that individuals over age five share a bedroom only with other individuals of the same sex.¹⁶ Both of the rules apply specifically, and uniquely, to foster care group homes.¹⁷ New York state law also requires that a group home with seven to eight foster youths have at least two lavatories and at least one tub or shower, and that a group home with nine to twelve foster youths have at least three lavatories and at least two tubs or showers.¹⁸ The law also requires separate bedrooms and lavatories for staff.¹⁹

¹³ Cf. Mark E. Courtney & Darcy Hughes-Heuring, *Residential Care in the United States of America: Past, Present, and Future*, in RESIDENTIAL CARE OF CHILDREN: COMPARATIVE PERSPECTIVES 173, 184 (Mark E. Courtney & Dorota Iwaniec eds., 2009) (“[L]ittle knowledge exists about residential care in the United States The lack of interest in residential care among scholars and policy makers during the last three decades has resulted in a sparse knowledge base on the nature of residential care”); IRA M. SCHWARTZ & GIDEON FISHMAN, *KIDS RAISED BY THE GOVERNMENT* 103 (1999) (stating that “relatively little is known about” congregate care foster facilities).

¹⁴ See SUSAN WHITELAW DOWNS, ERNESTINE MOORE & JEAN MCFADDEN, *CHILD WELFARE AND FAMILY SERVICES: POLICIES AND PRACTICE* 302 (8th ed., 2009) (describing variation among group homes).

¹⁵ N.Y. COMP. CODES R. & REGS. tit. 18, § 448.3(d)(4)(vi)(a) (2014).

¹⁶ *Id.* § 448.3(d)(4)(iv); see also Part II.A (exploring the requirement of sex-segregated bedrooms in more detail).

¹⁷ N.Y. COMP. CODES R. & REGS. tit. 18, § 448.3 (2014) (entitled “Requirements for each group home”).

¹⁸ *Id.* § 448.3(d)(5)(i)-(ii).

¹⁹ *Id.* § 448.3(d)(4)(vii), (5)(iv).

A child can enter many different types of placement in foster care. Most basically, placements can be either family foster homes or congregate care facilities.²⁰ Family foster homes are the private family homes of foster parents.²¹ Foster parents are individuals who have been certified or licensed by the state or municipality in which they live to serve as guardians and caretakers for children in foster care.²² Foster parents may be relatives of the child placed in their care or complete strangers selected for the child by a social worker.²³ Placement in a family foster home is meant to be the least restrictive, most family-like foster care placement, and thus it is the preferred placement.²⁴

Congregate care (also known as residential care)²⁵ refers to a variety of group placements that are not in private homes, that are often staffed by employees on a 24-hour basis, and that range in size from four-bed facilities to institutions with 250 or more beds.²⁶ There are seven types of commonly recognized congregate care facilities: “(1) Supervised/staff apartments (also known as Supervised Independent Living Programs or SILPs),” which are placements for older youth allowing for minimum oversight and are most similar to independent living; “(2) Community-based group homes; (3) Residential treatment centers (RTCs); (4) Intensive residential treatment facilities (RTFs); (5) Emergency shelter care; (6) Short-term/diagnostic reception centers (DRCs); and (7) Detention and secure treat-

²⁰ See DOWNS, MOORE & MCFADDEN, *supra* note 14, at 295, 298, 300 (describing types of foster care placements).

²¹ *Id.* at 295, 298.

²² *Id.* An exception to the typical certification or licensing of foster parents exists where the foster parent is a relative with whom the child, a court ward, is placed under abuse/neglect provisions. *Id.* at 295.

²³ *Id.* at 295, 298.

²⁴ See Kathy Barbell & Madelyn Freundlich, *Foster Care Today*, in CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 504, 510 (Gerald P. Mallon & Peg McCartt Hess eds., 2005) (discussing state and federal preferences for family-like placement options, and particularly for kinship care); see also CYNTHIA CROSSON-TOWER, *EXPLORING CHILD WELFARE: A PRACTICE PERSPECTIVE* 352 (6th ed. 2013) (identifying congregate care as the last alternative for children, and noting that it can be more structured and restrictive than a family foster home); DOWNS, MOORE & MCFADDEN, *supra* note 14, at 295 (stating that foster homes in which the foster parent is a relative of the child are the preferred foster placement).

²⁵ DOWNS, MOORE & MCFADDEN, *supra* note 14, at 300 (“Residential care, broadly defined, includes any congregate care facility . . .”).

²⁶ Lloyd B. Bullard & Katherine Johnson, *Residential Services for Children and Youth in Out-of-Home Care*, in CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 558, 558 (Gerald P. Mallon & Peg McCartt Hess eds., 2005); DOWNS, MOORE & MCFADDEN, *supra* note 14, at 300.

ment (secure and nonsecure detention).”²⁷ Community-based group homes²⁸ are facilities with seven to twelve beds.²⁹ The physical facility is typically a large single dwelling or apartment that is owned or rented by an agency or other organization licensed by the state or local municipality to operate foster care group homes.³⁰ Adults hired as staff for the group home care for the foster youth in the home.³¹ Group home staff usually take on a role more akin to counselors than surrogate parents, but some group homes have a married couple living with the children as group home parents in order to give the children under their care some form of family-like contact.³² Group homes are meant to be one of the least restrictive forms of congregate care, and are often “unlocked,” rather than high-security, facilities.³³ Unlike residents of RTCs, foster youth in group homes attend neighborhood schools and can participate in community activities outside the home such as recreation programs, social events, and religious services.³⁴

Aside from the above characteristics, group homes vary widely in their physical layout and structure. They can be single-sex or mixed.³⁵ Group homes that house both boys and girls can differ a great deal in the level of contact that youth can have with individuals of the “other sex”³⁶—ranging from relatively permissive facilities that separate the

²⁷ Bullard & Johnson, *supra* note 26, at 558–59 (referring to these categories as recognized by the Child Welfare League of America in its 2004 *Standards of Excellence for Residential Services*).

²⁸ These are referred to as “group homes” throughout this Note. This Note will focus on group homes because “[t]hey are the most common form of congregate care, and the majority are located in New York City,” and are thus under the jurisdiction of ACS. TIMOTHY ROSS, VERA INST. OF JUSTICE, *A SYSTEM IN TRANSITION: AN ANALYSIS OF NEW YORK CITY’S FOSTER CARE SYSTEM AT THE YEAR 2000*, at 36 (2001), available at http://www.vera.org/sites/default/files/resources/downloads/153_223.pdf.

²⁹ *Id.*

³⁰ DOWNS, MOORE & McFADDEN, *supra* note 14, at 302.

³¹ See *id.* (describing the structure of group homes).

³² *Id.*

³³ WILBER, RYAN & MARKSAMER, *supra* note 3, at 47; see also Amy J. L. Baker & Patricio Calderon, *The Role of Group Homes in the Child Welfare Continuum of Care*, 21 RESIDENTIAL TREATMENT FOR CHILD. & YOUTH 39, 41 (2004) (describing the less restrictive nature of group homes).

³⁴ Baker & Calderon, *supra* note 33, at 41. Access to these community resources is why group homes are often referred to as “community-based group homes.” See, e.g., *supra* note 27 and accompanying text (describing different types of group homes).

³⁵ See, e.g., WILBER, RYAN & MARKSAMER, *supra* note 3, at 49 (mentioning the existence of “mixed-gender units or programs”).

³⁶ In this instance, “other sex” is used to refer to the sex assigned to foster youth by the facility that houses them. To my knowledge, all ACS group homes that are not LGBTQ-specific are organized around a gender binary of female/girl vs. male/boy—the use of “other sex” refers to that gender binary. See WILBER, RYAN & MARKSAMER, *supra* note 3, at 49 (“Most facilities classify youth according to their anatomical sex, which is generally consistent with their gender identity.”).

sexes only for the purpose of assigning bedrooms and allocating bathrooms, to extremely strict facilities that forbid all contact between individuals of different sexes.³⁷ Bathrooms within group homes also vary widely: some facilities have “[c]ommunal bathrooms that have no stall doors [or] shower partitions”³⁸ or other setups that “require the youth housed in a particular unit to shower and use the toilet in each others’ presence, under the supervision of a staff member of the same sex as the youth,”³⁹ while some other facilities presumably provide more privacy.⁴⁰

Despite the federal preference for placing foster youth in the least restrictive, most family-like setting,⁴¹ transgender youth are more likely to be placed in group homes than foster family homes.⁴² Social workers are trained to place youth in congregate care facilities like group homes when the individual has “behavioral and emotional problems” or when the individual experiences “repeated placement failures in family settings.”⁴³ However, transgender youth are often placed in congregate care facilities because of transphobia, both on

³⁷ Compare Part II.A (describing the only New York state law requirement of sex-segregation: sex-segregated bedrooms), with Alan Keith-Lucas, *Children in Group Care*, 18 RESIDENTIAL TREATMENT FOR CHILD. & YOUTH 75, 77 (2000) (quoting a girl in a mixed-gender foster care facility with strict sex-segregation stating “I don’t want to have sex with a boy, but at least I’d like to be able to talk to one. I just don’t know what boys are like or how they think about things” and describing a facility that historically had a line down the middle of the campus which, although removed, was still used by staff to forbid contact between boys and girls).

³⁸ Keith A. Bailey, *The Role of the Physical Environment for Children in Residential Care*, 20 RESIDENTIAL TREATMENT FOR CHILD. & YOUTH 15, 23 (2002) (mentioning these types of bathrooms and implying that such bathrooms exist in some group homes).

³⁹ WILBER, RYAN & MARKSAMER, *supra* note 3, at 49.

⁴⁰ This presumption arises from the fact that the previous sources (describing a lack of privacy in bathroom and shower facilities) are condemning and raising awareness of unacceptable conditions. This Note therefore assumes that they describe some of the worst conditions, and that better conditions exist in some group homes.

⁴¹ “In order for States to receive Federal payments for foster care and adoption assistance, Federal law under title IV-E of the Social Security Act requires that they ‘consider giving preference to an adult relative over a nonrelated caregiver when determining placement for a child’” CHILDREN’S BUREAU, CHILD WELFARE INFO. GATEWAY, PLACEMENT OF CHILDREN WITH RELATIVES (2013), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/placement.pdf (citing 42 U.S.C. § 671(a)(19) (2012)); see also *supra* note 24 and accompanying text (discussing this preference).

⁴² See WILBER, RYAN & MARKSAMER, *supra* note 3, at 24 (stating that “agencies disproportionately place LGBT youth in congregate care settings,” although “[m]any of the LGBT youth placed in group care do not require the additional structure and institutional supports provided by group care”).

⁴³ Barbell & Freundlich, *supra* note 24, at 513; see also CROSSON-TOWER, *supra* note 24, at 352 (counseling that “[c]hildren who are extremely self-abusive or suicidal, cannot conform to family rules, are dangerous to others, or are exceptionally destructive of property may be candidates for residential care”).

the part of people within the foster care system, such as social workers and foster parents, and in society at large.⁴⁴ Placement of transgender youth within the foster system is complicated by problems with foster placement overall: Social workers often lack the training and skills they need to serve even cisgender youth, let alone transgender youth;⁴⁵ ACS currently lacks a placement system that is able to identify transgender- (or even LGB-) friendly placements;⁴⁶ and social workers are so overburdened that even highly qualified individuals would find it difficult to do an adequate job.⁴⁷ Although transgender youth would be able to avoid many of the harms they face in foster care if they were in family placements, ACS's aforementioned shortcomings unfortunately result in transgender youth being placed in congregate care more often than in family placements.⁴⁸

B. Discrimination and Violence Faced by Transgender Youth in Foster Care

Discrimination against transgender individuals is prevalent in society at large: Transgender individuals face discrimination in nearly every aspect of their lives. A 2011 study found that of the 6,450 transgender individuals surveyed, 41% reported attempting suicide, 78% reported experiencing harassment in K-12 education,⁴⁹ 90% reported

⁴⁴ See DOWNS, MOORE & MCFADDEN, *supra* note 14, at 365 (“Unfortunately, agency staff may hold homophobic attitudes based on myth and stereotype, and may lack training on how to help gay and lesbian teens.”); WORONOFF ET AL., *supra* note 1, at 20 (“Unfortunately, LGBTQ youth often find the same rejection, harassment, and abuse from members of their foster families that they experienced within their families of origin.”); see also *infra* note 63 and accompanying text (describing transphobia that results in social workers ignoring the needs of transgender foster youth).

⁴⁵ See Barbell & Freundlich, *supra* note 24, at 514 (“Caseworkers who provide foster care services often lack the education and experience they need to provide quality services.”); Rita Kramer, *In Foster Care, Children Come Last*, CITY J. (1994), <http://www.city-journal.org/article01.php?aid=32> (explaining that New York City’s Child Welfare Administration’s “social workers, in particular, are undertrained, underpaid, and overworked. . . . And city regulations make it next to impossible to discipline, remove, transfer, or suspend a worker”).

⁴⁶ See Kendra Hurley, *Gay Teens in Foster Care*, CHILD WELFARE WATCH (Mar. 16, 2011), <http://blogs.newschool.edu/child-welfare-nyc/2011/03/gay-teens-in-foster-care/> (ACS “has no systematic way to identify [placements] that are LGBTQ-affirming or to connect them to gay youth”). These failures of ACS’s placement system result in “LGBTQ youth spend[ing] more time than other teens in temporary, isolated situations.” *Id.*

⁴⁷ See Barbell & Freundlich, *supra* note 24, at 514 (“Rising demands for out-of-home care services have caused caseloads to expand, resulting in unmanageable workloads and, in many instances, low morale.”).

⁴⁸ The experiences of transgender youth in foster care group homes will be explored in more detail in Part I.B.

⁴⁹ To clarify, this particular figure is not a percentage of all individuals surveyed but rather is 78% of only those individuals who outwardly expressed their transgender identity or gender non-conformity during their K-12 education.

experiencing harassment or discrimination at work or taking actions to avoid such treatment, and 53% reported experiencing harassment in public.⁵⁰ Additionally, 19% experienced homelessness, 55% of those who tried to access a homeless shelter were harassed by staff, and 57% reported significant family rejection.⁵¹

In addition to the discrimination of society at large, transgender youth face particular discrimination in the foster care system. This Note focuses on discrimination against transgender youth in New York City ACS, and references other foster care systems in New York State when relevant. ACS has a history of discriminating against transgender youth and turning a blind eye to discrimination faced by transgender youth at the hands of others while in ACS's care, as documented by the multiple lawsuits brought on behalf of transgender youth against ACS. Despite these lawsuits, this discrimination continues in many forms today.

Transgender youth have challenged ACS's allegedly discriminatory practices in three lawsuits with publicly available opinions. The first alleged that systemic failures of ACS subjected LGBTQ youth in foster care to "bias-related violence, harassment and discrimination at the hands of their heterosexual peers in the foster care system and by the City and State officials responsible for overseeing the child welfare system."⁵² The original parties to the case included non-LGBTQ youth who reached a settlement with ACS and the New York State Office of Children and Family Services (OCFS) to which LGBTQ youth unsuccessfully objected, claiming the settlement did not address their complaints because it was negotiated by and tailored to a class of youth that included the very persons who victimized LGBTQ youth.⁵³ As a result, the approved settlement failed to contain measures specif-

⁵⁰ JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2–3, 5 (2011), available at http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf.

⁵¹ *Id.* at 4, 7.

⁵² *Joel A. v. Giuliani*, 218 F.3d 132, 137 (2d Cir. 2000). The case was filed on behalf of foster care youth generally as *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996), *aff'd* 126 F.3d 372 (2d Cir. 1997), *aff'd sub nom Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000), but in *Joel A.*, LGBT youth intervened with additional claims and to challenge the settlement approved in *Marisol A. Joel A.*, 218 F.3d at 138. In *Marisol A.*, the court found "a child welfare program in crisis," under the care of which the plaintiffs had "endured a wide range of abuses" that "reflect[ed] the dire situation facing children in the system." *Marisol A.*, 929 F. Supp. at 669–70.

⁵³ *Joel A.*, 218 F.3d at 138. Under the settlement, ACS agreed to allow welfare experts to review their operations and to make good faith efforts to adopt the experts' recommendations for change. *Marisol A. v. Giuliani*, 185 F.R.D. 152, 157–58 (S.D.N.Y. 1999). Plaintiffs in the LGBT subclass objected to the settlement, asserting that for them the settlement constituted "illusory relief of practically no value" and that they could not be adequately represented in the class action. *Joel A.*, 218 F.3d at 138.

ically designed to curtail the bias-related discrimination and harassment faced by transgender youth in ACS.⁵⁴ In the second case a transgender girl living in an all-male, ACS-operated group home successfully challenged a group home policy that forced her to wear boys' clothing because she had been identified as male at birth.⁵⁵ The court held that ACS had failed to reasonably accommodate her gender identity disorder (GID) in violation of the New York State Human Rights Law.⁵⁶ In the third case a transgender girl under ACS's care unsuccessfully attempted to compel ACS to pay for her gender reassignment surgery, which her doctor had deemed medically necessary.⁵⁷ Transgender rights advocates then attempted to convince ACS to reverse the decision by adopting a new internal policy, but the policy the agency ultimately issued essentially maintains the status quo.⁵⁸

These cases show how difficult it is to compel ACS to end its discriminatory practices, how often the fight for the rights of transgender youth in foster care is a losing battle, and how the few victories are often small and riddled with more problems. Moreover, these cases likely do not capture the full extent of ACS's past discrimination against transgender individuals. Before the start of the LGBTQ rights movement, society believed it was completely acceptable and even desirable to discriminate against transgender individuals.⁵⁹ The absence of earlier litigation about transgender rights in foster care, as

⁵⁴ *Joel A.*, 218 F.3d at 144.

⁵⁵ *Doe v. Bell*, 754 N.Y.S.2d 846, 847–48, 856 (N.Y. Sup. Ct. 2003).

⁵⁶ *Id.* at 856. The court granted the plaintiff relief in the form of an exemption from the dress policy, and declined to reach her alternative claim for relief on the grounds of sex discrimination. *Id.* at 848, 856.

⁵⁷ *Brian (a/k/a Mariah) L. v. Admin. for Children's Servs.*, 859 N.Y.S.2d 8, 11, 20 (N.Y. App. Div. 2008). The plaintiff is listed as Brian L., but she is a transgender girl who prefers to be referred to as Mariah L. Julie Anne Howe, *Transgender Youth, the Non-Medicaid Reimbursable Policy, and Why the New York City Foster Care System Needs to Change*, 11 *DUKEMINIER AWARDS* 1, 3 & n.10 (2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Howe-Dukeminier-Student-Note-2012.pdf>. ACS refused to pay for the treatment in spite of a social services law mandating that ACS pay for medically necessary treatment for those under its care. *Id.* at 13–14. The Appellate Division ruled that ACS has ultimate discretion over the provision of medical care, so that the only available remedy is an appeal to ACS itself. *See id.* at 14 (discussing the court's holding that the family court did not have the power to compel ACS to provide medical services).

⁵⁸ *See Howe, supra* note 57, at 14–16 (describing the new Non-Medicaid Reimbursable Policy and arguing that it “ratifies ACS's ability to discriminate against transgender youth”).

⁵⁹ *See, e.g., SUSAN STRYKER, TRANSGENDER HISTORY* 31, 50, 60–61 (2008) (describing U.S. laws that criminalized cross-dressing starting in the 1850s and continuing well into the 20th century, as well as persecution and harassment of transgender people by authorities ranging from the postal service to local police for engaging in conduct such as sending love letters or loitering).

much as the existence of recent litigation on the issue, evidences the deeply rooted discrimination against this community.

One of the biggest problems that transgender youth in foster care currently face is the lack of safety in group homes.⁶⁰ The problems complained of by the transgender plaintiffs in *Marisol A.*—bias-related harassment, discrimination, and violence—still persist in foster group homes.⁶¹ At least some adults working in the foster care system harbor transphobia and disapproval that leads them to treat transgender youth in ways “that range[] from less than compassionate, to practices and protocols that are outright discriminatory and abusive.”⁶² The reality is “that too many child welfare professionals believe that LGBTQ youth are, or should be, invisible, and that their needs are less important than those of youth who are heterosexual and gender nonvariant.”⁶³

Obtaining data about the numbers and experiences of transgender (and LGBTQ) youth in foster care is difficult because many youth hide their gender identities out of fear of discrimination.⁶⁴ The few available studies were conducted some time ago, yet likely still offer a useful and fairly accurate picture of the current situation for transgender youth, though the studies may no longer offer an accurate picture of LGB youth. A 1994 survey of youth under ACS’s care found that every single LGBT youth surveyed experienced verbal harassment based on their sexual orientation and/or gender identity while

⁶⁰ See MARKSAMER, *supra* note 1, at 6 (“[T]ransgender and gender non-conforming youth in group care facilities are regularly denied fair and respectful treatment and often face serious emotional, physical, and sexual abuse.”); WILBER, RYAN & MARKSAMER, *supra* note 3, at 50 (“LGBT youth placed in congregate settings are substantially more likely to be subjected to hostility, harassment, violence, and sexual assault than their non-LGBT counterparts.”).

⁶¹ See MARKSAMER, *supra* note 1, at 37 (“For transgender and gender non-conforming youth, group care facilities are often scary, unsafe, and in some instances, completely unlivable situations.”).

⁶² WORONOFF ET AL., *supra* note 1, at 4.

⁶³ *Id.* at 4–5.

⁶⁴ See, e.g., WILBER, RYAN & MARKSAMER, *supra* note 3, at 1 (“Quantifying the number of LGBT youth in out-of-home care is difficult because many of these youth hide their sexual orientation and gender identity from adults and peers whom they perceive as rejecting or unsupportive.”); cf. Angela Irvine, “We’ve Had Three of Them”: Addressing the Invisibility of Lesbian, Gay, Bisexual, and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675, 677 (2010) (describing the factors that make gathering information about the sexual orientation, gender identity, and gender expression of youth challenging in the juvenile justice system). The same factors that make collecting this data difficult in the juvenile justice context likely impede data collection in the foster care context; indeed, the systems are often compared and discussed together. See generally MARKSAMER, *supra* note 1; WORONOFF ET AL., *supra* note 1.

in a group home.⁶⁵ In the same survey, 70% of LGBT youth reported that while in a group home they experienced physical violence because of their sexual orientation and/or gender identity.⁶⁶ Another survey found that 78% of LGBT youth ran away or were removed from their foster care placement (either a group home or an in-home placement) due to bias and/or hostility they faced at their placement because of their sexual orientation and/or gender identity.⁶⁷ Because the statistics in these surveys do not distinguish the experiences of transgender youth from LGB youth, the percentage of transgender youth who have faced violence is likely higher than the percentage of all LGBT individuals who have faced violence.⁶⁸ Because being transgender is more visible than being LGB (gender expression is usually visible but sexual orientation can be hidden more easily), transgender individuals are more likely to be outed to their peers and thus more likely to face bias-related harassment and violence.⁶⁹

Statistics cannot fully communicate the unsafe conditions in group homes, so this section describes those conditions by quoting liberally from interviews with transgender youth and adults who advocate on their behalf. Although each of these quotes only represents the words of one individual, these anecdotes describe types of harassment, discrimination, and violence against transgender youth that are “disturbingly common.”⁷⁰

- The first group home I was in, and where I stayed for three years, was terrible, and so were a lot of other group homes I’ve been in. . . . I had at least two fights a day, and the boys used to do stupid things like throw rocks at me or put bleach in my food because I was gay. Once I was thrown down a flight of stairs, and I’ve had my nose broken twice. They even ripped up the only picture of my mother that I had. Often the staff were bad, too. If I had had a fight with one of the staff earlier in the day, they would start conversations with the other boys in the group home about the argument just to get them riled up, and then the boys would come up to me, challenging me and calling me names like f-ggot.

⁶⁵ RANDI FEINSTEIN ET AL., JUSTICE FOR ALL?: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 16 (2001), available at http://njjn.org/uploads/digital-library/resource_239.pdf.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See WORONOFF ET AL., *supra* note 1, at 85 (quoting an adult participant who said that “[t]ransgender young people may be even more vulnerable to abuse in their placements than lesbian, gay, and bisexual young people, since gender expression is more visible and not as easily hidden as sexual orientation”).

⁶⁹ *Id.*

⁷⁰ WILBER, RYAN & MARKSAMER, *supra* note 3, at ix.

Sometimes the staff would even stand there while the kids jumped me. One time one of the staff jumped me with the kids.⁷¹

- I was placed in a co-ed group home. When I was shown to my room, I asked why I was being put on the boys' floor. They said, "You're not a boy? Well, we can't put you on the girls' floor looking like that." So they made me sleep on a couch on a landing in between the two floors.⁷²
- "Line staff in a group home fail to intervene when residents harass and abuse a transgender youth because they believe he 'asked for it' by being open about his gender identity."⁷³
- "I refused to use the group shower with the 13 boys in my unit because I was afraid they would assault me. [The facility] wouldn't let me use it by myself so I just didn't shower until the judge ordered them to let me shower alone."⁷⁴
- Fourteen-year-old Stephan was placed into foster care by his mother when he informed her that he identified as a transgender female. Stephan, now known as Shardee, was placed in a group home, where she was treated disrespectfully and punitively by the foster care staff—often denied food and prevented from contacting her attorney. Shardee begged for a transfer to a trans-friendly placement. ACS refused, arguing that there was no appropriate placement for Shardee.⁷⁵

C. *Transgender Youth in LGBTQ-Only Group Homes are Safe*

LGBTQ-only group homes differ sharply from the rest of the foster care system. Staff, activists, and transgender foster youth agree that LGBTQ-only group homes offer a safe, positive environment that benefits the development of transgender youth in foster care. Green Chimneys was one of the first LGBTQ-only group homes in the country, and was a prime example of a safe and welcoming LGBTQ environment while it was open.⁷⁶ Once again, the positive impact of LGBTQ-only homes is best shown through the words of transgender youth and their adult advocates:

- But at most of the group homes I was in, people were constantly harassing me. After about a year, I finally got a phone call from

⁷¹ Mariah Lopez, *Trapped!*, YOUTHSUCCESSNYC, <http://www.youthsuccessnyc.org/lgbtq/stories/Trapped-Lopez.html> (last visited Aug. 31, 2014).

⁷² WORONOFF ET AL., *supra* note 1, at 23 (quoting from an interview with a youth participant).

⁷³ WILBER, RYAN & MARKSAMER, *supra* note 3, at ix.

⁷⁴ MARKSAMER, *supra* note 1, at 43 (quoting from an interview with a transgender girl who was housed in a boys-only facility).

⁷⁵ *Success Stories*, LAWYERS FOR CHILD., <http://www.lawyersforchildren.org/success-stories#shardee> (last visited Aug. 17, 2014).

⁷⁶ See, e.g., WORONOFF ET AL., *supra* note 1, at 25 (describing Green Chimneys and the "excellent job" it did to help LGBTQ youth).

my law guardian telling me that I had a bed at Green Chimneys, so I packed my bags and hit it to this home. When I got here, I still couldn't believe it. For the last three years of my life all I had wanted was to be here. I used to dream about how it would be—the smells, the sounds, the tastes—and when I got here, I finally felt content, and that I could be myself and unique at the same time.⁷⁷

- Once I got to [the LGBTQ group home], I started to get better. I was really nervous when I first arrived, but I saw that everyone was just like me. I felt safe to be in a place where I could be myself without getting harassed. I've been there for about six or seven months, and I've made so many improvements.⁷⁸
- When I came to [the LGBTQ group home], I had just gotten out of rehab. I made a lot of progress in rehab, but I could have made even more if it had been a more supportive environment. I didn't know that there were programs like this specifically for LGBTQ people. It's a very satisfying feeling to wake up every day and look around knowing that I'm in a supportive environment and staying clean.⁷⁹
- Since her transfer to the new placement, Shardee has consistently reported that she is very happy in her new home, where she lives as a female. Shardee reports that staff and residents are respectful of her transgender identity; she is once again excelling in school and will be graduating from high school next year. In addition, Shardee now goes on regular visits to her mother, with whom she has mended her relationship.⁸⁰

Unfortunately, there is an acute lack of LGBTQ-only group homes.⁸¹ Such homes were never numerous,⁸² and multiple recent closures (due at least in part to budget cuts) have only exacerbated the shortage.⁸³ The remaining homes cannot house all of the transgender

⁷⁷ Lopez, *supra* note 71. Green Chimneys has since closed. See *WARN Details*, N.Y. ST. DEPARTMENT LAB., <http://www.labor.ny.gov/app/warn/details.asp?id=4106> (last visited Oct. 15, 2014) (referring to the closure of Green Chimneys' LGBTQ foster home, the Gramercy Group Residence).

⁷⁸ WORONOFF ET AL., *supra* note 1, at 24 (quoting from an interview with a youth participant).

⁷⁹ *Id.* (same).

⁸⁰ *Success Stores*, *supra* note 75.

⁸¹ See WORONOFF ET AL., *supra* note 1, at 25 (arguing that specialized LGBT-only homes cannot solve the problem of ensuring the safety of all LGBT children in care).

⁸² See *id.* (referring to "a handful" of LGBTQ-only homes among the "approximately 10,000 licensed congregate care programs in this country").

⁸³ See Ginia Bellafante, *A Cost Cut, On the Backs of Children*, N.Y. TIMES, Jan. 27, 2013, at MB1 (describing a recent budget cut that eliminated important services for foster youth in New York City); Kendra Hurley, *Dozens of Young People Turned Away from Shelters*, THE NEW SCHOOL (July 30, 2009), http://www.newschool.edu/milano/nycaffairs/childwelfarewatch_newsbriefarchive.aspx (describing the partial closure of Green Chimneys' LGBTQ foster home due to budget cuts); *WARN Details*, N.Y. ST.

foster youth who need them, and funding to build more of these homes is not available.⁸⁴ Therefore, it is critical that general foster care group homes be safe for transgender youth.⁸⁵

II

CURRENT SITUATION: WHAT IS ALREADY BEING DONE TO AFFECT THE SAFETY OF TRANSGENDER YOUTH

A. *New York State General Rules*

Placement of youth in ACS-governed foster group homes is governed by New York state social services law. In particular, New York State law dictates the rules for sharing bedrooms in foster group homes. The law requires that no more than three children be placed in a bedroom together, and that each child have their own bed.⁸⁶ Once children are over the age of five, the law prohibits them from sharing a bedroom with someone of a different sex.⁸⁷ The application of this law to transgender youth has been problematic. The law has, in almost all instances, resulted in transgender individuals being placed in bedrooms and group homes according to the sex they were assigned at birth rather than the gender they identify with.⁸⁸ New York law also contains requirements for bathrooms in group homes, but these requirements merely dictate the number of lavatories and tubs or showers that are required depending on the number of children

DEPARTMENT LAB., <http://www.labor.ny.gov/app/warn/details.asp?id=4106> (last visited Oct. 15, 2014) (referring to the closure of Green Chimneys' LGBTQ foster home, the Gramercy Group Residence); Stevie St. John, *Landmark \$13.3 Million Grant to Fund L.A. Gay & Lesbian Center's Development of Model Program to Serve LGBTQ Foster Youth*, L.A. GAY & LESBIAN CENTER (Sept. 30, 2010), <http://laglc.convio.net/site/News2?page=NewsArticle&id=13263> ("Gay and Lesbian Adolescent Social Services (GLASS), the only group home for LGBTQ foster youth in Los Angeles, closed its doors in 2008").

⁸⁴ See, e.g., CROSSON-TOWER, *supra* note 24, at 379 ("States have drastically cut the budgets of child welfare agencies, so these agencies seek the least expensive means to treat their clients."); Bellafante, *supra* note 83, at MB1 (describing a recent budget cut that eliminated important services for foster youth in New York City).

⁸⁵ See WORONOFF ET AL., *supra* note 1, at 24–25 (quoting from an interview with an adult participant in New York City who said that "[t]he child welfare system needs to overcome the companion assumptions that LGBTQ youth belong in specialized programs and placements, and that because specialized placements and services exist, no more is needed to make the rest of the system safer and more supportive").

⁸⁶ N.Y. COMP. CODES R. & REGS. tit. 18, § 448.3(d)(4)(vi) (2014).

⁸⁷ *Id.* § 448.3(d)(4)(iv). An exception is made for mothers and their children. *Id.*

⁸⁸ Indeed, ACS's policy regarding placement of transgender individuals in bedrooms would be pointless if there were a widespread practice of placing transgender individuals in bedrooms according to their gender identity. See *infra* Part II.B (describing the ACS Policy).

housed in the facility.⁸⁹ Notably, there is no requirement that children of different sexes use different bathrooms or tubs/showers.⁹⁰ Aside from the specific regulations just listed, New York State requires that staff and foster children use separate bedrooms and bathrooms and sets forth certain requirements for the size and physical condition of the facilities that are not relevant here.⁹¹

B. NYC ACS Policy

On November 21, 2012 ACS issued a policy (the ACS Placement Policy or the Policy) in response to pressure from LGBTQ advocates that departs from the historical interpretation of New York's requirements for bedrooms and bathrooms in foster care group homes.⁹² The ACS Placement Policy thus implicitly recognizes the flaws in the state's requirements, though unfortunately it does not fully solve them.

The general statement of the Policy provides that “[i]t is ACS policy that all LGBTQ youth shall be in LGBTQ-affirming homes and LGBTQ-affirming congregate facilities.”⁹³ The Policy sets forth specific provisions regarding nearly every aspect of institutional control over LGBTQ youth in care.⁹⁴ However, this Note will only discuss the provisions relevant to placement and conditions in bedrooms and bathrooms, and the enforcement of those provisions.

The portion of the ACS Placement Policy dealing with bedrooms states that ACS “shall make every effort” to place LGBTQ youth in a facility that can house them in individual sleeping quarters.⁹⁵ The Policy cites privacy as its reason for recommending individual bedrooms as the ideal bedroom placement for LGBTQ youth.⁹⁶

The Policy specifically addresses transgender youth placed in foster group homes.⁹⁷ The Policy's preference for one-person bed-

⁸⁹ N.Y. COMP. CODES R. & REGS. tit. 18, § 448.3(d)(5)(i)–(ii) (2014). The minimum number of required lavatories and tubs or showers is two and one, respectively. *Id.*

⁹⁰ *See id.*

⁹¹ *See id.* § 448.3(d)(1)–(10) (setting forth requirements for the physical conditions of facilities); *id.* § 448.3(d)(4)(vii), (5)(iv) (requiring separation of staff and child accommodations).

⁹² N.Y.C. ADMIN. FOR CHILDREN'S SERVS., *supra* note 9.

⁹³ *Id.* at 6.

⁹⁴ *See generally id.* (the policy touches on everything from prohibitions on discrimination by staff and youth, staff training, and addressing incidents of discrimination to provisions about clothing, healthcare, and permanency).

⁹⁵ *See id.* at 25 (clarifying that individual sleeping quarters house only one person per bedroom).

⁹⁶ *Id.*

⁹⁷ *Id.* The Policy includes a definition for its use of the word “transgender,” stating that: “Transgender . . . include[s] all persons whose gender identity or gender expression does

rooms for LGBTQ youth is strengthened in the case of transgender individuals—the Policy states that when placing “a known transgender youth, individual sleeping quarters must be considered if available.”⁹⁸ Several subsequent provisions deal with the difficult issues involved in placing transgender youth in gendered placements. For instance, the Policy provides that transgender individuals “must not automatically be housed according to their gender assigned at birth.”⁹⁹ Instead, the Policy counsels that it is “most appropriate” to place transgender youth according to their gender identity.¹⁰⁰ However, the Policy modifies those provisions with a mandate that placement decisions be based on each individual youth’s needs.¹⁰¹ According to the Policy, not all needs are created equal—it counsels ACS staff to prioritize the “emotional and physical safety” of the youth.¹⁰² In assessing the potential safety of each transgender youth, the Policy directs ACS staff to consider each individual’s opinion about where they will be safest, in addition to any recommendations from the individual’s doctor and/or mental health provider.¹⁰³

The ACS Placement Policy also contains specific provisions governing bathrooms used by transgender youth in group homes.¹⁰⁴ The provisions dealing with bathrooms echo the concerns that underlie the provisions concerning bedrooms and gendered placements: privacy, physical and emotional safety, and each transgender youth’s individual preferences and feelings of security.¹⁰⁵ The Policy states that bathrooms “shall” be accessed in a way that accounts for the safety and privacy of transgender youth.¹⁰⁶ The Policy mandates that transgender youth be allowed the use of individual stalls and privacy in showering “within commonly accepted time limits” (although the Policy does not give any indication as to what constitutes a commonly accepted time limit).¹⁰⁷ The Policy also provides that transgender

not correspond with their sex assigned at birth. For purposes of protection from discrimination and harassment, transgender refers to both self-identified transgender individuals and individuals perceived as transgender . . .” *Id.* at 5.

⁹⁸ *Id.* at 24.

⁹⁹ *Id.* at 25.

¹⁰⁰ *Id.* at 24.

¹⁰¹ *Id.* at 25.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* (detailing the policy’s specific guidelines for bedrooms and bathrooms used by transgender youth).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

youth “shall not be required to shower or undress in front of other youth.”¹⁰⁸

C. *Why the ACS Policy is Insufficient*

The ACS Placement Policy represents an earnest and valiant effort on the part of ACS to improve conditions for LGBTQ youth in care. For example, the definitions section includes a progressive and well informed definition of transgender and an explanation of the differences between sexual orientation and gender identity,¹⁰⁹ suggesting that ACS likely consulted experts (or sources created by experts) and applied the knowledge gained from their expertise with care and goodwill. The Policy in its entirety is to be commended. Moreover, it bears considering that protection for LGBTQ foster youth is rare in this country, and that ACS has shown itself to be one of the most LGBTQ-friendly foster care systems in the country by issuing this policy.¹¹⁰

Nonetheless, the Policy does not solve all of the problems it set out to fix. It is important to critique even a very progressive Policy like this, in order to keep allies like ACS from growing complacent and failing to continue to enact positive change. This assessment will also help other foster care systems that may be considering whether to enact LGBTQ-affirming policies to learn which aspects of the ACS Placement Policy they should adopt and which they should change.

The primary issue with the ACS Placement Policy is that it does not provide mandatory protections for transgender youth in foster care. A close reading of the language of the Policy reveals that it is effectively a collection of strong suggestions rather than a set of rules. Indeed, the Policy refers to itself as a set of “guidelines.”¹¹¹ The portions of the Policy dealing with bedrooms and bathrooms are riddled with words like “must” and “shall,” which give the impression that the Policy’s provisions are obligatory.¹¹² However, these imperatives are consistently modified by words that rob them of their compulsory meaning: “must be considered if available,” “shall make every effort,” “must not automatically,” “shall make housing decisions . . . that prioritize,” “shall take into account,” “shall be allowed . . . within commonly accepted . . . limits.”¹¹³ While staff must consider, take into

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 5–6.

¹¹⁰ See *infra* note 119 and accompanying text (describing other laws that protect transgender individuals in foster care).

¹¹¹ N.Y.C. ADMIN. FOR CHILDREN’S SERVS., *supra* note 9, at 2.

¹¹² *Id.* at 24–25.

¹¹³ *Id.*

account, prioritize, and attempt actions in the best interests of transgender youth, they do not actually have to *act* in the best interests of transgender youth in order to comply with the Policy.

Relatedly, the Policy will be extraordinarily difficult to enforce.¹¹⁴ Part of this is due to its ambiguity; the Policy is a set of suggestions, not rules, and suggestions by their very nature cannot be enforced. ACS staff can justify their actions *ex post* by claiming that another interest overrode the Policy's suggestion. In addition, the Policy relies on complaints for enforcement; youth will often be the only people in a position to lodge complaints for wrongs done to them, and youth must know about and understand their rights under the Policy in order to realize that these rights have been violated. Furthermore, shame and fear of retaliation might discourage youth from filing complaints. Additionally, the prompt investigations of any complaints that the Policy's enforcement provision requires may often be deemed baseless due to institutional biases in favor of protecting one's colleagues and coworkers as well as society's lack of respect for youth and animus towards transgender individuals.¹¹⁵ Moreover, the only evidence likely to be available in most situations is the testimony of the staff member making placement decisions and any reports they may have written about the placement, suggesting that staff could escape discipline merely by lying.

Even if ACS construes the Policy to provide strong protections for transgender youth and overcomes the barriers to enforcement, there are still flaws in substantive provisions of the Policy. The Policy contains a bare mandate to consider transgender individuals' assessments of their own safety in a potential placement.¹¹⁶ More guidance should be given to help staff weigh the opinions of youth when making placements. For example, a youth's background should likely inform an assessment of their opinion; a seventeen-year-old who has been in foster care since the age of ten likely has a far better idea of their safety in a potential placement than any staff member would, while an eleven-year-old who is entering foster care for the first time

¹¹⁴ The section on enforcement within the ACS Placement Policy states that "alleged violations" of the Policy are to be "investigated promptly," and confirmed violations will lead to "the enforcement of corrective and/or disciplinary action." *Id.* at 7. The ACS Placement Policy offers nothing more specific concerning the enforcement of violations, but directs generally that they will be dealt with "[i]n accordance with Children's Services' policy and procedures." *Id.*

¹¹⁵ See *supra* note 44 and accompanying text (describing the transphobia of people within the foster care system, such as social workers and foster parents, and in society at large); *supra* note 63 and accompanying text (describing transphobia that results in social workers ignoring the needs of transgender foster youth).

¹¹⁶ *Supra* notes 102–03.

might require counseling and guidance in order to form an opinion about which placement would in fact provide them the most safety. In order to properly prioritize safety in the current system, transgender youth may have to make a nearly impossible choice between a placement in consonance with their gender and a placement that will provide the least likelihood of physical threats to their safety.¹¹⁷ Not every child has the resources to make such a decision. ACS and society at large do not usually place such a burdensome choice on the shoulders of youth, and ACS should exercise care when doing so here. As this Note has repeatedly emphasized, an ideal system would not force transgender children to make such a difficult choice because every group home of every makeup would be a friendly and welcoming place where they would not face any discrimination, harassment, or danger due to their gender identity. While we work toward that ideal, we must deal with the world we have—one in which many group homes pose grave dangers to the safety of transgender youth. In this world a transgender youth is not always safe in their preferred placement, and that makes the bare mandate to consider a youth's preference dangerous.

As a result, there is tension between the Policy's presumption in favor of placing transgender youth consistently with their gender identity and its commitment to prioritizing safety above all else when placing youth. For example, a transgender boy is likely to be physically safest when placed with girls because transgender boys under the age of eighteen are unlikely to have begun hormone treatments or have had sex reassignment surgery, and thus they will have a vagina and the physical strength of a female. Such physical differences between transgender boys and cisgender boys place transgender boys at a physical disadvantage in fighting off attacks by cisgender boys, and at heightened risk of being raped by cisgender boys.¹¹⁸ This increased risk to physical safety must be weighed against the possible mental distress that placing a transgender boy in a situation that conflicts with his gender identity could cause. While this is a choice that should not have to be made, the current Policy should reconcile, or at least provide guidance to staff who must reconcile, these competing concerns.

¹¹⁷ See MARKSAMER, *supra* note 1, at 36 (noting that “[i]n some cases, a transgender youth may be emotionally and physically safer in a unit with youth of their assigned birth sex” and arguing that in those situations staff should place the youth with peers that share their birth sex but continue to respect their “core gender”).

¹¹⁸ See *id.* (describing the effect of high levels of violence in some boys' facilities on transgender boys' safety).

The ACS Placement Policy attempts to cure systematic discrimination against and mistreatment of transgender youth in the placement process and the physical layout of group homes, but it fails to cure the fundamental problems with ACS group homes created by a state social services law that mandates a gendered and cis-biased system that is unsafe and inhospitable for transgender youth.

III

PROPOSED SOLUTIONS: TWO WAYS TO MAKE TRANSGENDER YOUTH SAFER

A. Making Transgender Youth Safer Through Legislation

The best solution to the problems discussed in this Note is comprehensive, carefully drafted legislation. Litigation is time-consuming, expensive, and yields uncertain results, while legislation has the ability to create an elegant targeted solution in a relatively short period of time. Unfortunately, litigation is sometimes necessary to force legislation, which is why this Note explores both avenues for change. This section offers suggestions for how legislation can, under current conditions, provide the safest placements possible in ACS group homes for all youth. Currently no jurisdiction, U.S. or international, has enacted comprehensive legislation governing the placement of transgender youth in foster care, though a few have enacted much-needed anti-discrimination legislation that protects gender identity.¹¹⁹ While non-discrimination laws that explicitly protect transgender individuals, legally protected access to gender-identity affirming healthcare, and many other provisions would likely increase the safety of transgender youth in their placements and should be adopted into New York law, they are beyond the scope of this Note. This legislation proposal focuses only on the placement of transgender individuals in group homes and bedrooms, as well as their access to appropriate bathroom and showering facilities.

This legislation proposal touches on six major issues in ACS placement of transgender individuals: (1) placement in gendered

¹¹⁹ See, e.g., CAL. WELF. & INST. CODE § 16003(a)(1) (2011) (affirming that foster children have the right to fair and equal access to all services and benefits and to be free from discrimination on the basis of sexual orientation or gender identity); OR. REV. STAT. § 179.750(2) (2013) (prohibiting discrimination based on sexual orientation and gender identity in state institutions, including juvenile justice facilities); R.I. GEN. LAWS § 28-5.1-7(a) (2003) (requiring that all state agencies and facilities render their services without discriminating on the basis of sex, sexual orientation, gender identity, or gender expression); *Montreuil v. Nat'l Bank of Canada*, [2004] C.H.R.T. 7, para. 2 (Can.) (holding that discrimination claims by transgender persons are cognizable under sections 3 and 7 of the Canadian Human Rights Act, which states “that it is a discriminatory practice to refuse to employ an individual on the prohibited ground of sex”).

group homes, (2) appropriate bedroom assignments within any group home, (3) access to appropriate bathroom facilities, (4) confidentiality of gender identity, (5) deference to individual choice, and (6) ongoing management of placements.

Given the current climate of anti-transgender animus in many group homes and assuming that space in an LGBTQ-only facility is not available, the safest placement option for transgender youth in group homes is a mixed-gender facility.¹²⁰ This placement would make it less likely that transgender individuals would be outed because a group that includes both boys and girls usually includes more gender variation than a group that contains only boys or only girls. Legislation should therefore require that transgender individuals be placed in mixed-gender group homes, subject only to the limited carve-out for individual choice discussed below.

The safest bedroom option is a transgender-only bedroom. Legislation should mandate that all transgender youth be placed in a transgender-only bedroom.¹²¹ In practice this would be a one-person bedroom in many instances, but the goal should be to place transgender individuals in the same bedroom so that they will not face the isolation of a single bedroom. This is a feasible change because it would not be costly (it may, in fact, cost nothing)—it merely involves a reallocation of bedrooms that already exist and demands the care and attention in placement that social workers are already supposed

¹²⁰ See WILBER, RYAN & MARKSAMER, *supra* note 3, at 49 (“Some facilities place transgender youth in mixed-gender units or programs, which reduces their vulnerability to violence and harassment and eliminates the difficulties associated with finding a gender-appropriate unit.”).

¹²¹ There is an inherent complication in creating a transgender-only bedroom—a bedroom with both transgender boys and transgender girls will stick out and raise suspicions (because other foster care bedrooms are gender-segregated). This could partially be solved by having separate transgender girl-only and transgender boy-only bedrooms. However, that solution is imperfect because it leaves androgynous-looking gender nonconforming individuals and transgender individuals who identify as gender queer (i.e., neither boy nor girl) without a place. Moreover, some transgender individuals present as androgynous before coming out fully as a transgender man or woman. Placing individuals who present as androgynous together in a bedroom will likely call more attention to their gender nonconformity and leave them vulnerable; however, having a support network of one or two other transgender individuals might provide a social network that helps protect these individuals from the violence and harassment of their peers. These competing considerations must all be weighed in deciding what a transgender-only bedroom should look like. This Note takes the position that a non-gendered transgender-only bedroom (i.e., a single bedroom that can house transgender boys, transgender girls, gender queer individuals, and individuals who present as androgynous) is the best solution, based on the judgment that the social network provided by this bedroom will likely outweigh the increased attention that would accompany a bedroom that is not gender-segregated.

to provide.¹²² Single bedrooms already exist in ACS group homes,¹²³ and bedrooms housing individuals in foster care in New York are not permitted to house more than three people.¹²⁴ Thus, placing a transgender individual in a single-occupancy bedroom would cost the same as other placements, and even placing only two transgender individuals together in a bedroom meant for three¹²⁵ would not be a large resource expense. Moreover, the benefits far outweigh the costs, because a transgender-only bedroom combines the safety of a private place for transgender individuals to change clothes and sleep with the camaraderie and support of sharing a room with someone who has some similar life experiences. Hopefully this bedroom placement would reduce both the physical and social vulnerability of transgender youth in foster care.

Transgender individuals are generally not safe if they have to use the bathroom, change, or shower in front of other individuals. Those are all circumstances in which it is likely that others will see their genitalia and they will be outed as transgender. Thus, legislation should require that transgender individuals be allowed to use the bathroom, change, and shower privately. This could be as simple as adding latches that will lock stall doors, or installing locking stall doors to replace curtains. Indeed, this change would benefit all foster youth in group homes—many adolescents feel awkward about their changing body and would feel more psychologically secure in a private bathroom and/or shower stall.¹²⁶ Ideally these legislative changes would be used as an opportunity to provide bathroom privacy to all foster youth, in order to increase the quality of life for everyone in foster care while making the legislation more acceptable to the general public because its benefits are distributed more broadly. However, as a last resort, the legislation could be satisfied by the designation of a separate time for transgender individuals to shower, because there may be insufficient resources to add additional facilities, doors, or

¹²² See DOWNS, MOORE & MCFADDEN, *supra* note 14, at 294–95 (stating that placements should be chosen based on what will be in the “best interests of the child,” but acknowledging that in practice social workers often fail to fulfill this duty).

¹²³ See N.Y.C. ADMIN. FOR CHILDREN’S SERVS., *supra* note 9, at 25 (expressing a preference for housing LGBTQ foster youth in facilities that can provide them with “individual sleeping quarters (one-person bedroom) to allow for privacy”).

¹²⁴ See N.Y. COMP. CODES R. & REGS. tit. 18, § 448.3(d)(4)(vi)(a) (2014) (“No more than three children shall occupy any bedroom.”).

¹²⁵ The third bed would, of course, remain empty only until filled by another transgender foster youth.

¹²⁶ See Bailey, *supra* note 38, at 23 (describing the importance for all youth of bathrooms that are “a place of safety and privacy for the child to come to terms with his or her body, find acceptance for its care and functions, and learn to live more comfortably in it”).

locks. This would be less ideal because it would not protect the privacy of cisgender foster youth and because it poses the real possibility that transgender youth would be outed when other youth notice that transgender youth get special shower time. In such cases, the utmost care must be taken to preserve the confidentiality of the individual's gender identity.

Strict confidentiality of the identity of transgender individuals, their status as transgender, and all associated details that could reveal them to be transgender must be mandated by the legislation. As mentioned previously, it is possible that the bedroom and bathroom accommodations discussed above would out some transgender individuals. That is a risk worth taking, but it must be stressed that taking that calculated risk does not lift the mandate of confidentiality or relieve social workers and staff from taking care to minimize the attention drawn to transgender individuals as a result of their bedroom and/or bathroom accommodations. If a transgender individual elects to come out to their cisgender peers while in foster care, that is entirely their choice and should be expressly allowed by the legislation. However, it is usually unsafe for transgender individuals to be out to their peers in foster care,¹²⁷ and thus all foster staff must take the utmost care not to out a transgender individual without their consent.

Although youth (particularly youth in the foster care system) are usually not given the power to make such important decisions about their safety, the legislation should provide a limited exception for transgender youth in foster care to choose their own placement. There are two main variables that must be accounted for in this portion of the legislation: the age of the individual, and the individual's knowledge of foster care group homes. The legislation should provide knowledge to the individuals by mandating that any transgender youth who wants to select their own placement be counseled by a caseworker experienced in placing LGBTQ individuals and a mental health professional with a robust understanding of gender identity disorder before being permitted to choose their placement. While the counseling should be required, the only person permitted to make the final decision must be the transgender individual. The legislation should also mandate a minimum age that youth must attain before choosing their own placement—allowing five-year-olds to decide placement will likely not increase their safety.

Finally, and perhaps most importantly, the legislation needs to underscore that transgender individuals need the same care, compas-

¹²⁷ See *supra* Part I.B (describing the experiences of transgender youth in foster care).

sion, and attention given to other foster youth. The legislation should reinforce the pre-existing (but too often ignored) requirement that transgender youth be protected from harassment and violence by social workers and staff. It should also emphasize that this harassment and violence is not the fault of the transgender individuals at whom it is directed, and it must never be ignored. The legislation should enforce these provisions with specific penalties for social workers and staff who harass or commit violence against transgender youth—penalties that are scaled and proportionate to the offenses but which remove the worst offenders from their jobs so they cannot do further harm. Legislation is the best way to force a change in the deliberate inattention paid to the needs of transgender individuals in the foster care system. However, if it is not possible to pass legislation, the following litigation strategy could be a more circuitous route to the same end.

B. Making Transgender Youth Safer Through Litigation

This section provides claims and arguments designed to challenge New York social services law through litigation. Although the litigation strategy presented in this section focuses on a New York law and how it can be challenged in New York State and Second Circuit courts, similar laws exist in most states and the arguments in this section could be adapted for courts nationwide.¹²⁸

1. The Fourteenth Amendment Right to Safety in the Child Welfare System

As this section discusses, the Due Process Clause of the Fourteenth Amendment includes a right to personal safety for individuals in government custody.¹²⁹ In practice, this right requires that transgender youth in group homes be placed in a transgender-only bedroom and have access to a transgender-only bathroom (or at least private shower time). Separating boys and girls into different rooms in all instances (as New York law mandates) is unconstitutional because it results in placements that violate the right to personal safety of transgender youth in foster care. By forcing transgender youth to

¹²⁸ Circuits differ in their interpretations of the constitutional right to safety. *See, e.g., infra* notes 169–73 and accompanying text (noting that the Second Circuit follows the *Estelle* standard dictating that individuals in foster care are owed less protection from the state, while other circuits follow the *Romeo* standard providing more protection). Thus, a thorough examination of a circuit's case law should always be conducted and is advised before using any of the arguments made here.

¹²⁹ *See infra* notes 130–34 and accompanying text (describing the due process right to safety).

share bedrooms and bathrooms with cisgender youth, the law creates an unacceptable risk that transphobic violence will occur in these shared spaces.

a. The State's Constitutional Duty to Protect Youth in Foster Care

New York state has a duty to keep transgender youth in foster care safe under the substantive component of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This substantive due process right to personal safety is grounded in the Fourteenth Amendment's guarantee that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."¹³⁰ The Supreme Court has held that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."¹³¹ Rather, the Due Process Clause is a limitation on a state's power to act, which is designed "to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'"¹³² However, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."¹³³ The Constitution imposes this duty because the "[s]tate's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty" leaves the individual unable to care for their own safety and well-being.¹³⁴

The Supreme Court has not decided whether states owe youth in foster care a duty of protection from harm. The Court came close in *DeShaney v. Winnebago County Department of Social Services*, in which it ruled that states do not owe such a duty to children who are not currently in state custody.¹³⁵ However, a footnote in *DeShaney* explicitly left unresolved a situation in which child protective services

¹³⁰ U.S. CONST. amend. XIV, § 1.

¹³¹ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

¹³² *Id.* (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)).

¹³³ *DeShaney*, 489 U.S. at 199–200 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)).

¹³⁴ *DeShaney*, 489 U.S. at 200.

¹³⁵ *See id.* at 197 (ruling that child protective services could not be held liable for injuries incurred by a child in the custody of the child's parent, even though child protective services had received complaints regarding the child's safety and had visited the child's home before declining to take the child into custody).

has taken custody of the child.¹³⁶ The Court stated that such a situation might be “sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect,” and noted that several courts had made this finding, but ultimately clarified that “[w]e express no view on the validity of this analogy.”¹³⁷

The Second Circuit, on the other hand, has firmly ruled that states must protect youth in foster care from harm.¹³⁸ Indeed, the Second Circuit has gone so far as to assert in *Southerland v. Giuliani* that “[i]t is well-established that a child in foster care has a liberty interest to be free from harm, and correspondingly, that the state has a duty to protect such children from harm.”¹³⁹ *Southerland* involved a father who filed suit pro se claiming that the caseworker in charge of his children wrongfully removed his children from his custody without full compliance with his substantive and procedural due process rights.¹⁴⁰ The plaintiff also alleged that his children were abused while in foster care.¹⁴¹ The Second Circuit suggested that this second claim could give rise to an additional due process claim: that the plaintiff’s children’s right to safety was violated.¹⁴²

In spite of the sweeping assertion in *Southerland*, there is some disagreement among scholars and practitioners over whether the state duty to protect foster children from harm applies when a parent has voluntarily placed their child in the custody of child protective services.¹⁴³ *Youngberg v. Romeo*, the Supreme Court case that held that a due process right to safety is owed to individuals in institutional care, focused on involuntary commitment, but did not explicitly state

¹³⁶ *Id.* at 201 n.9.

¹³⁷ *Id.*

¹³⁸ See *Doe v. N.Y. City Dep’t of Soc. Servs.*, 649 F.2d 134, 141–42 (2d Cir. 1981) (applying a deliberate indifference standard to determine whether the defendant violated the Constitution by failing to meet its affirmative duties toward foster children in its care).

¹³⁹ *Southerland v. Giuliani*, 4 Fed. App’x 33, 37 (2d Cir. 2001) (citing *Doe*, 649 F.2d at 141–42 and Third, Sixth, Eighth, Tenth, Seventh, and Eleventh Circuit opinions establishing the same principle); see also Marisol A. *ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996) (finding, with regard to children in foster care, that “[c]learly, the state is required to protect children in its custody from physical injury. This Court further finds that custodial plaintiffs have a substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being”).

¹⁴⁰ *Southerland*, 4 Fed. App’x at 35–36.

¹⁴¹ *Id.* at 36.

¹⁴² See *id.* at 37 (identifying the liberty interest in being free from harm as a potential source for an additional due process claim stemming from the children’s abuse in foster care).

¹⁴³ See, e.g., Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25, 43 (2009) (noting that the question of whether states owe an affirmative duty to children who are voluntarily placed in foster care remains open, and arguing that governments should require the same standard of care to preserve equality).

that involuntary commitment is a requirement for a duty to exist.¹⁴⁴ Furthermore, there is a strong argument that the state duty to protect foster children from harm applies to all children in foster care, as it is the parent, not the child, who decides whether to voluntarily commit a child to state custody.¹⁴⁵ Thus, all children are in a sense involuntarily committed to foster care. There is even more ambiguity over whether the duty should apply to individuals over the age of eighteen who have elected to remain in foster care, but concerns over uniformity and equality of treatment in foster care counsel in favor of extending the duty to protect to those individuals as well.¹⁴⁶ Therefore, this Note applies the same state duty of protection to all youth in foster care.¹⁴⁷

b. The State's Standard of Care

New York state and ACS officials have violated their duty to protect transgender youth under their care from harm if they have failed to exercise the requisite standard of care in placing said youth in group homes.¹⁴⁸ There are two standards of care that could apply, each stemming from (and named after) a different Supreme Court decision:¹⁴⁹ (1) the *Estelle* “deliberate indifference” standard and,¹⁵⁰ (2) the *Romeo* “professional judgment” standard.¹⁵¹ The *Estelle* standard developed in an Eighth Amendment cruel and unusual punishment case filed by a prison inmate, in which the Court made the Eighth Amendment applicable to the states through the Fourteenth Amendment.¹⁵² However, the case is relevant here because the

¹⁴⁴ See *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (arguing that “persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish”).

¹⁴⁵ See *Olson*, *supra* note 143, at 43 (“It would seem absurd to allow a state to permit a young person to live in a group foster home but then fail to provide that child with reasonable care.”).

¹⁴⁶ *Id.*

¹⁴⁷ It is outside the scope of this Note to fully discuss the issue of when and to whom the state duty to protect foster wards under its care is owed.

¹⁴⁸ See Beth A. Diebel, Note, *Mark G. v. Sabol: Substantive Due Process Rights, a Possibility for Foster Care Children in New York*, 64 ALB. L. REV. 823, 844 (2000) (explaining how courts adjudicate substantive due process claims).

¹⁴⁹ See *Mark G. v. Sabol*, 717 N.E.2d 1067, 1073–74 (N.Y. 1999) (describing the two standards).

¹⁵⁰ *Id.* at 1073 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

¹⁵¹ *Mark G.*, 717 N.E.2d at 1074 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

¹⁵² *Estelle*, 429 U.S. at 101–02.

Supreme Court has treated it as key precedent in substantive due process cases,¹⁵³ as have Second Circuit cases.¹⁵⁴

The *Estelle* “deliberate indifference” standard of care refers to the state’s attitude towards the welfare of the individual(s) owed the duty (in this case, those individuals are transgender youth in foster care). The state has failed to exercise the requisite standard of care if it has shown deliberate indifference to the welfare of the transgender youth under its care.¹⁵⁵ The *Estelle* standard of deliberate indifference also requires the state to have “some knowledge triggering an affirmative duty to act on plaintiff’s behalf.”¹⁵⁶ However, actual knowledge of a specific harm is not required—the state’s “deliberate indifference to a known injury, a known risk, or a specific duty” has been held to satisfy the requirement.¹⁵⁷ Indeed, the state can be “charged with knowledge” of conditions which violate their constitutional duty if it “persistently violated a statutory duty to inquire about such conditions and to be responsible for them.”¹⁵⁸ In such cases, deliberate indifference is in essence inferred from the state’s persistent failures to do its duty, failures that rise to such a level as to reveal a conscious lack of attention to protections put in place for the safety of those under the care of the state.¹⁵⁹

Estelle involved a prison inmate named Gamble who claimed that the prison doctor and staff’s failure to adequately diagnose and treat an injury he sustained while on prison work assignment amounted to a violation of his Eighth Amendment right to be free from cruel and unusual punishment.¹⁶⁰ Gamble received an inadequate diagnosis and insufficient treatment, despite experiencing excruciating pain.¹⁶¹ Gamble’s condition and pain remained untreated for months; during this time he was moved to solitary confinement because he refused to

¹⁵³ See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 198 & n.5 (1989) (quoting *Estelle* as relevant precedent); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (same).

¹⁵⁴ See *infra* notes 171–73 and accompanying text (describing the Second Circuit’s treatment of the *Estelle* standard).

¹⁵⁵ See *Doe v. N.Y. City Dep’t of Soc. Servs.*, 649 F.2d 134, 144–45 (2d Cir. 1981) (citing *Holmes v. Goldin*, 615 F.2d 83, 85 (2d Cir. 1980)) (stating that a defendant must be deliberately indifferent to the plaintiff’s welfare in order to give rise to a finding of liability).

¹⁵⁶ *Doe*, 649 F.2d at 145.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (citing *Duchesne v. Sugarman*, 566 F.2d 817, 832 n.31 (2d Cir. 1977); *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972); *United States ex rel Larkins v. Oswald*, 510 F.2d 583 (2d Cir. 1975)).

¹⁵⁹ *Doe*, 649 F.2d at 145.

¹⁶⁰ *Estelle v. Gamble*, 429 U.S. 97, 98–102 (1976).

¹⁶¹ *Id.*

work.¹⁶² Gamble's condition worsened while there, yet he still was not correctly diagnosed or sufficiently treated.¹⁶³ The Supreme Court noted that the state has a duty to provide medical care to the people it incarcerates, and concluded that "deliberate indifference to serious medical needs of prisoners" violated this duty.¹⁶⁴ The Court emphasized that the indifference cannot be inadvertent; thus, while the prison doctors' failures to employ better diagnostic tools (such as an X-ray) might constitute malpractice, they did not amount to deliberate indifference.¹⁶⁵ However, the Court remanded for an assessment of whether the actions of prison officials in denying and delaying access to medical treatment did rise to the level of deliberate indifference.¹⁶⁶

The *Romeo* "professional judgment" standard of care, on the other hand, holds that the state has failed to exercise the requisite standard of care if its action "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."¹⁶⁷ The Court designed this standard to require a higher level of care from the state because this standard arose in the context of involuntary confinement in a mental institution, while the *Estelle* standard arose in response to mistreatment of prisoners.¹⁶⁸

While the Supreme Court has held that *Estelle* is the standard of care owed to incarcerated individuals and *Romeo* is the standard owed to institutionalized individuals, it has not ruled on the standard owed to those in foster care.¹⁶⁹ Each Circuit is thus left to decide which standard to apply when dealing with the substantive due process claims of foster youth.¹⁷⁰ The Second Circuit applies the *Estelle* standard, although it has stated once in dicta that "in our view the

¹⁶² *Id.* at 100–01.

¹⁶³ *Id.* While in the hospital after his condition worsened Gamble swore out his complaint. *Id.* at 101.

¹⁶⁴ *Id.* at 103–04.

¹⁶⁵ *Id.* at 105, 107–08.

¹⁶⁶ *See id.* at 108 (remanding to allow the lower court to determine whether the plaintiff stated a cause of action against the non-doctor defendants in the prison).

¹⁶⁷ *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

¹⁶⁸ *See id.* at 321–22 (asserting that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish"). *Romeo* was filed on behalf of the eponymous man who was involuntarily committed to a state mental institution and claimed that the conditions of his confinement violated his constitutional right to safety. *Id.* at 309–310 (describing the allegations in the complaint).

¹⁶⁹ *See Diebel*, *supra* note 148 (describing the two standards of care and the situations in which the Supreme Court developed them).

¹⁷⁰ *See id.* at 847–50 (describing two different circuits' choice of standard and reasoning, and arguing that the Second Circuit should shift to applying the *Romeo* standard).

Romeo standard is a better fit.”¹⁷¹ Since that statement there has been no definitive Second Circuit ruling on which standard should apply. However, Second Circuit courts continue to apply only the more rigorous¹⁷² *Estelle* standard,¹⁷³ so that is the standard this Note will apply.

Deliberate indifference is very difficult to prove, but there is strong potential for a transgender plaintiff in ACS to meet the burden. As *Estelle* shows, actions that impair a state ward’s safety and well-being but are done out of mere inadvertence will not meet the deliberate indifference standard.¹⁷⁴ Thus, a social worker without proper training and without knowledge about the dangers a transgender youth would face in current foster group homes could not be held liable for harm arising from such a placement.

On the other hand, the Supreme Court provided a graphic example of a situation likely evidencing deliberate indifference: a “doctor’s choosing the easier and less efficacious treatment of throwing away the prisoner’s ear and stitching the stump”¹⁷⁵ Such knowing disregard for the welfare of an individual under one’s care is exhibited by group home staff and social workers who know of and fail to intervene (e.g., by changing the placement of the individual) in the repeated physical abuse suffered by transgender individuals under their care.¹⁷⁶ The social worker who responds to reports of abuse by saying “It’s your fault. Stop acting like a girl,”¹⁷⁷ exhibits deliberate indifference because that response acknowledges that the abuse occurred and expresses that the speaker will do nothing to protect the

¹⁷¹ Mark G. v. Sabol, 717 N.E.2d 1067, 1074 (N.Y. 1999); see also Sharon Balmer, Comment, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 953 (2005) (citing *Doe v. N.Y. City Dep’t of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981)) (“The Second . . . Circuit [] generally use[s] the harsher deliberate indifference standard set out in *Estelle v. Gamble*.”).

¹⁷² The standard is more rigorous from the perspective of the plaintiff, because it is more difficult for plaintiffs to prove their case under *Estelle*. See Diebel, *supra* note 148, at 847 (describing the different burdens on the plaintiff under the two different standards).

¹⁷³ See, e.g., *Daniel H. v. City of New York*, 115 F. Supp. 2d 423, 430 (S.D.N.Y. 2000) (applying the *Estelle* standard and noting that *Doe*, the landmark Second Circuit case ruling that *Estelle* is the standard of care owed to foster youth in substantive due process cases, is still good law).

¹⁷⁴ See *Estelle*, 429 U.S. at 105, 107–08 (holding that a finding of inadvertent misconduct cannot sustain a claim of deliberate indifference).

¹⁷⁵ *Id.* at 104 n.10 (quoting *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974)) (internal quotation marks omitted).

¹⁷⁶ See *supra* notes 73–74 and accompanying text (describing abuse suffered by transgender youth in foster care and the indifferent and discriminatory responses of staff assigned to care for them).

¹⁷⁷ WILBER, RYAN & MARKSAMER, *supra* note 3, at 7. This is an edited version of the quote without context. For additional context, see *supra* note 3 and accompanying text.

abused transgender individual from further harm. If the social worker indeed fails to do anything to increase the safety of the transgender individual's placement, and the transgender individual is abused again, the social worker's deliberate indifference to the known risk of abuse means that the social worker has violated the transgender individual's substantive due process right to safety and is liable for that violation.

Cases involving individual plaintiffs and actual knowledge by state officials of potential harm are easiest to prove, but some precedent offers grounds for a system-wide argument. ACS officials can be charged with knowledge of harm to transgender foster youth if the plaintiff proves that officials persistently violated a statutory duty to inquire about the conditions that caused the harm.¹⁷⁸ In dicta the Second Circuit stated that defendants could be charged with knowledge of abuse suffered by a foster child because defendants violated a statutory duty to report the child's abuse.¹⁷⁹ The child in that case was in in-home foster care, which the state had a duty to periodically re-examine and re-certify and/or report any harm suffered by the foster children there.¹⁸⁰ The child remained in the home and faced severe abuse there for six years before her foster mother reported the abuse.¹⁸¹ ACS officials overseeing group homes have the same statutory duty to report maltreatment,¹⁸² and thus they could be found liable for harm done to transgender youth placed in bedrooms with cisgender youth if plaintiffs can prove that officials persistently violated this statutory duty to report harm.¹⁸³

¹⁷⁸ See *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981) (explaining that the state can be "charged with knowledge" of conditions which violate their constitutional duty if it "persistently violated a statutory duty to inquire about such conditions and to be responsible for them").

¹⁷⁹ See *id.* at 145–46 (discussing New York Social Services Law § 413, which requires reporting of suspected abuse).

¹⁸⁰ *Id.* at 137.

¹⁸¹ *Id.* at 137–38. Officials responsible for the placement occasionally visited and re-certified the home without reporting the child's abuse; plaintiff claimed that this failure to report violated the child's substantive due process right to safety. *Id.* at 136–38.

¹⁸² The statute creating the duty to report harm in *Doe*, New York Social Services Law § 413, is still in effect and requires ACS officials to report maltreatment suffered by transgender youth in foster group homes. N.Y. SOC. SERVS. LAW § 413 (McKinney 2010) (requiring foster care workers to report suspected abuse or maltreatment).

¹⁸³ Although this Note highlights the duty to report under New York Social Services Law § 413, any violation of a statutory duty that causes harm to transgender youth and is committed with deliberate indifference would arguably violate the right of transgender youth to safety. See *Doe*, 649 F.2d at 146 (describing the relevance of statutory duties to the deliberate indifference standard).

2. Remedies

If any of the above claims prevailed, the remedy would likely be an injunction ordering ACS to comply with its duty to keep the individuals under its care safe. Such an injunction would probably not detail how ACS should accomplish this goal, but Part III.A on proposed legislation provides that guidance. An ideal victory would also result in a repeal of the New York state law mandating placement based on sex, as it results in unsafe placements for transgender youth.

CONCLUSION

This Note, the legislation proposal in particular, is not aspirational—it is reactionary. Rather than advocating for changes that create an ideal foster care system for transgender individuals, this Note offers temporary solutions to help manage the current system. We should work towards a future in which transgender individuals are fully accepted by society and thus do not need protection when living with cisgender strangers. In the meantime, however, this Note's proposal seeks to maximize the physical and emotional well-being of transgender youth living under the state's care.