

The 2017 Annual Child Welfare Law Update – Friday, August 25, 2017

**LGBTQ UPDATE: OVERVIEW OF CURRENT LGBTQ ISSUES AND LEGAL DEVELOPMENTS IN HAWAII AND THE NATION – By Jo Chang**

Good morning, everybody! LGBTQ stands for Lesbian, Gay, Bisexual, Transgender and Q for Questioning OR Queer. LGBTQ is also used to represent all sexual minorities, collectively.

WHY is an LGBTQ focus important to family and youth services?

- LGBTQ youth have long been identified as an at-risk and disproportionately represented youth population -in bullying and harassment in our schools, and in child welfare, foster care, homelessness, sex trafficking, and other youth services, despite some progress in our legal system. And more over, as you will see today, support for LGBTQ people from our legal system nationwide is tenuous.

-In Hawaii, our LGBTQ youth also struggle daily from discrimination – suffering rejection, isolation, anxiety, fear, and even harm just for being LGBTQ and many here, do not feel safe in child services.

But in Hawaii, we have the opportunity to continue to improve our services for LGBTQ youth. We have the support of our legal system, and many in our communities. Each one of you is needed to help make our “safety-net services” also safe for LGBTQ children and youth. Because that is their last stop before they end up on the streets.

**\*NOW, LET’S REVIEW some BASIC LGBTQ TERMINOLOGY.**

**“Sex” or “sex assigned at birth”:** Our “sex” assigned at birth, is based upon our body, and is recorded on our birth certificates, as either male or female.

**“Gender”:** Is the expected masculine or feminine labeled behaviors by male and female designated persons, in a given culture.

**“Gender identity”:** Is a person’s own internally felt sense of being male, female, or other – that may or may not align with the sex and gender assigned at birth.

-HERE ARE SOME COMMON GENDER IDENTITIES:

-A “cisgender” identity -- is when a person feels that their gender identity matches their assigned sex and gender—most people identify as cisgender.

A “transgender” identity – is when a person feels that their gender identity does not match their assigned sex and gender. A transgender person might identify with the opposite sex and gender, often referred to as a “male to female” or as a “female to male” transgender identity.

A “bi-gender” identity – is when a person feels that their gender identity is part masculine and part feminine.

A “non-binary” identity: Is a non-specific identity indicating a difference from simply being male or female.

“Gender expression”- are aspects of a person’s appearance typically associated with males and females in a given culture - such as dress, grooming, mannerisms, speech, walk, and other behaviors.

“Sexual orientation” --- refers to a person’s emotional, romantic, and/or sexual attraction to others. Some common sexual orientations are:

“Heterosexual or straight” --- Is an attraction to persons of the opposite sex. A majority say they are straight.

“Gay or lesbian” --- Is an attraction to persons of the same sex – “gay” is used by males and females; “lesbian” is used by females.

“Bisexual” – describes an attraction to both male and female persons.

“Queer” is a non-specific term that may refer to one’s gender identity and/or sexual orientation.

AND “Questioning” is when a person is experiencing uncertainty about their own gender identity and/or sexual orientation.

**\*NOW LET'S LOOK AT LGBTQ LAW RELATED CHANGES ACROSS THE NATION.**

The most important LGBTQ legal events this year are related to the federal government's shift, under the Trump administration, to withdrawing support for LGBTQ rights under federal law, and removing administrative supports put in place by the Obama administration.

Some brief background: Federal civil rights laws specifically and explicitly prohibit "sex" discrimination, but do not explicitly prohibit discrimination based on "sexual orientation" or "gender identity."

Under the Obama Administration, federal agencies interpreted "sex discrimination" to also include discrimination based on "sexual orientation" and "gender identity," and thereby, extended protections to gay and transgender persons through administrative regulations and other administrative actions.

-The Obama Department of Justice (or DOJ) also asserted this interpretation of "sex discrimination" in court cases.

*\*I will be commenting briefly on 5 areas: Education, Health, Religious protections, Employment protections, and Transgender persons in the military. And then will review Hawaii's status with respect to these areas.*

1) EDUCATION: Title IX of the Federal Education Act prohibits federally funded educational institutions from discriminating against students or employees based on sex.

-In May, 2016, the Obama DOJ and Department of Education issued a joint guidance informing federally funded schools that Title IX protections based on "sex" also protected transgender students on the basis of gender identity.

-Schools were told that transgender students should be allowed to use school facilities and participate in school activities according to their gender identity.

-Then, in February, 2017, the Trump administration's DOE rescinded the Obama Title IX guidance on gender identity protections. And then in June, the DOE issued a new guidance that basically leaves it to the discretion of each school jurisdiction regarding transgender students, giving no clear guidance on gender identity protections, if any, under Title IX.

-The Trump administration's withdrawal of the Guidance on Title IX protections for transgender students, had an immediate impact in the courts: In March, the U.S. Supreme Court remanded Grimm v. Gloucester back to the 4<sup>th</sup> Circuit Court of Appeals --- because the Appeals Court had relied on the Obama guidance in its decision in favor of Grimm. Grimm was the first "transgender student rights" case to reach the Supreme Court.

-However, inspite of the federal government's shift away from protections for gender identity under Title IX, two subsequent federal court decisions favored "transgender student rights" under federal law and the Constitution.

-In February, 2017, a Pennsylvania U.S. District Court ruled in Evancho v. Pine-Richland, that two transgender students' claim of a violation of their Equal Protection rights under the U.S. Constitution would likely prevail. And the Court issued an injunction to stop the school district from barring transgender students from using restrooms according to their gender identity.

-Most significant, in May, 2017, the 7<sup>th</sup> Circuit Court of Appeals found that transgender students have protections under both Title IX and the Equal Protection Clause of the 14<sup>th</sup> amendment of the Constitution. In Whitaker v. Kenosha, the Appeals Court affirmed the lower court's preliminary injunction stopping the school board from prohibiting transgender students from using bathrooms consistent with their gender identity. ---Whitaker instead of Grimm, is now considered likely to be the first transgender student rights case to be taken up by the Supreme Court.

2) HEALTH: Section 1557 of the Affordable Care Act prohibits discrimination in federally funded health care on the basis of race, color, national origin, sex, age, or disability. Regulations promulgated by the Obama administration included protections for gender identity under "sex" discrimination protections, and would have required health care providers to cover and/or provide gender transition services.

-Section 1557 was challenged in court in Franciscan Alliance v US Dept. of Health and Human Services. In 2016, a Texas federal District Court issued a nationwide injunction prohibiting the implementation of the ACA regulations that prohibited discrimination by gender identity.

-Then, in May, 2017, the Trump administration's DOJ decided not to appeal the injunction, and filed a Motion for Voluntary Remand and Stay, stating that the DHHS would be rewriting the contested parts of the regulation.

3) RELIGIOUS PROTECTIONS: In February, 2017, a widely circulated draft Executive Order by the Trump administration signaled its promotion of religious liberty over the interests of LGBTQ persons – by including language explicitly discriminatory against LGBTQ people.

-Following widespread protests against the February draft, the final “Presidential Executive Order Promoting Free Speech and Religious Liberty” issued in May, 2017, did not contain explicit discriminatory language against LGBTQ people. However, many feared that the earlier Draft had already encouraged discrimination against LGBTQ persons in the name of religion.

-And we can see that such discrimination in law has come to pass at the state level, where there has been a proliferation of anti-LGBTQ legislation. Here are 3 examples:

-Passed in March, 2017, a new South Dakota law now allows taxpayer funded agencies to refuse to provide any service, including adoption and foster care services, on the basis of the agency's religious or moral convictions.

-Passed in April, 2017, a new Mississippi law legalizes discrimination against LGBTQ persons, now protecting persons and organizations, including government employees, from discrimination complaints IF they have these three beliefs: 1) that marriage is only for different sex couples, 2) sexual relations are reserved to such marriage, and 3) the terms “male and female refer to an individual's unchangeable sex as determined by genetics and anatomy at the time of birth.”

-AND, passed in June, 2017, a new Texas law now prohibits a government agency from taking any adverse action against a child welfare provider for any action it took or did not take where such action conflicts with the provider's sincerely held religious beliefs. For example, this new law would allow child placement agencies to refuse to place a child with LGBT families OR families with religious beliefs that differ from the provider.

4) EMPLOYMENT PROTECTIONS: In July, 2017, the Trump DOJ also sent a major signal when it filed an Amicus Brief in Zarda v. Altitude Express, taking a position that Title VII of the federal Civil Rights Act does not prohibit discrimination based on sexual orientation – that it is not illegal to fire an employee based on sexual orientation. The DOJ’s position directly clashed with the Equal Opportunity Employment Commission’s position in that very same case, that Title VII protects workers from bias based on sexual orientation.

5) TRANSGENDER PERSONS IN THE MILITARY. In June 2016, after much study, and finding that there would be little cost difference and no significant impact on unit readiness, the U.S. Department of Defense under the Obama administration, announced that transgender persons would be allowed to serve openly in the U.S. Armed Forces.

-Then, unexpectedly on July 26, of this year, President Trump announced by Tweets that “the United States Government will not accept or allow transgender individuals to serve in ANY capacity in the U.S. Military.”

-In response, on August 8th, five active duty service members who are serving openly as transgender persons, filed suit against the President and the Military, seeking an injunction to stop the ban against transgender persons. They cited harm to their military careers, loss of benefits associated with military service, and their exposure to this ban due to their reliance on the 2016 policy. (Jane Doe 1-5 v Donald J. Trump)

### **NOW LET’S LOOK AT HAWAII’S SITUATION -- GIVEN the rest of the nation:**

1) EDUCATION: Transgender students in Hawaii’s public schools have been protected since the beginning of the 2016-2017 school year, when the Hawaii DOE issued its “Guidance on Supports for Transgender Students.” The Hawaii DOE’s Guidance applies best practices in the field, making school support available to transgender students in: the use of preferred names and pronouns, clothing, access to sex-segregated facilities, including restrooms and locker rooms, and in student activities. (This guidance is in your packet and can be found on the Hawaii DOE “civil rights compliance office’s” webpage – see Resource List in your packet)

2. HEALTH INSURANCE PROTECTIONS FOR TRANSGENDER PERSONS: Regardless of the withdrawal of ACA regulations that prohibited discrimination by gender identity, Hawaii insurance providers are prohibited from discriminating by gender identity under new Hawaii law. Act 135, SLH 2016, became effective on January 1, 2017. It amends the Insurance Code and chapter 87A on the EUTF.

-Act 135 provides that, “no individual and group accident and health or sickness policy, contract, plan, or agreement that provides health care coverage shall discriminate with respect to participation and coverage under the policy, contract, plan, or agreement against any person on the basis of actual gender identity or perceived gender identity.” This ends a long-standing categorical exclusion of gender transition services for transgender persons.

-However, there is still a gap in Hawaii’s coverage. The Hawaii Medicaid/Quest program does not yet fully cover gender transition services for transgender persons.

3) HAWAII CIVIL RIGHTS LAWS: Unlike in many states that are still without explicit protections, Hawaii civil rights laws explicitly prohibit discrimination based on sexual orientation, gender identity or gender expression in Employment, Housing, and Public Accommodations.

4) TRANSGENDER PERSONS IN MILITARY SERVICE: Hawaii’s leaders have strongly opposed the President’s ban on transgender persons in military service. Hawaii’s Congressional delegation announced their opposition to the ban, the Honolulu Star Advertiser published an editorial, titled “Don’t deny troops chance to serve,” and Hawaii Attorney General Doug Chinn sent a letter to Congress on July 27, that was signed by 18 other states’ attorneys general, asking Congress, “to include language in the National Defense Authorization Act, 1) prohibiting discrimination against transgender service members currently serving in the United States Armed Forces, AND 2) reaffirming that transgender individuals may not be banned from serving in the United States Armed Forces.”

-At this point, transgender service members, including those from Hawaii, are left in limbo not knowing when the announced ban will end their military careers.

**\*\*FINALLY, I'D LIKE TO CALL YOUR ATTENTION TO TWO much needed HAWAII REPORTS:**

-1st: In April, 2017, Hawaii Dept of Health released its first issue of the "Hawai'i Sexual & Gender Minority Health Report". This report confirms that the health of Hawaii's sexual minorities are adversely impacted due to the constant stresses of discrimination as are LGBTQ people in the rest of the nation. A copy is included in your packet and can be downloaded from the DOH website.

2<sup>nd</sup> report: The UH Center on the Family is expected to release a report before the end of the year on data collected in a supplemental survey of unaccompanied homeless youth on Oahu this year. The survey was conducted by Youth Outreach or YO, in collaboration with the Center on the Family. YO is a homeless youth drop-in program in Waikiki, administered jointly by Hale Kipa and Waikiki Health.

-The survey produced the first such documentation that LGBTQ youth are a significant part of Oahu's homeless youth population – finding approximately 20% were LGBTQ, and that a notable amount overall had had prior contact with foster care and juvenile detention. Contact Sarah Yuen at Center on the Family or Carla Houser at YO for more information.

AND LAST, I'd like to call your attention to the Resource List in your packet on "SUPPORTING LGBTQ CHILDREN, YOUTH AND FAMILIES." Please be sure to look at the highly recommended SAMHSA report on the list, titled, "Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth." Also see the resource section on HOMELESSNESS AND SEX TRAFFICKING, and the Hawaii resources sections listed towards the back of the list.

If you have any questions or comments, please feel free to talk with me at lunch or contact me by email at [ocsjosie@hotmail.com](mailto:ocsjosie@hotmail.com). THANK YOU!!