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## California's Foster Youth Bill of Rights as a Roadmap for Expanding Rights of LGBTQ2S+ Foster Youth in America: A Fifty-State Survey

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# CALIFORNIA'S FOSTER YOUTH BILL OF RIGHTS AS A ROADMAP FOR EXPANDING RIGHTS OF LGBTQ2S+ FOSTER YOUTH IN AMERICA: A FIFTY-STATE SURVEY

*Thomas Barrymore Murtland\**

*LGBTQ2S+ youth are overrepresented in foster care systems across the United States and have unique needs that state governments tasked with caring for foster youth must address. In 2018 and 2019, the California legislature passed AB 2119 and AB 175, respectively, which each increased the number of rights in the California Foster Youth Bill of Rights aimed at addressing the needs of LGBTQ2S+ foster youth. These bills made California's Bill of Rights the most expansive bill across the country in addressing the needs of LGBTQ2S+ foster youth. This Note examines the underlying needs of LGBTQ2S+ foster youth, surveys the Foster Youth Bills of Rights across the country, and proposes that other states should adopt California's Foster Youth Bill of Rights as a model for the rights of LGTBQ2S+ foster youth.*

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\* J.D. Candidate, 2022, Loyola Law School, Los Angeles; B.A. General Studies, Trinity Western University, May 2013. Thank you to Professor Amy Levin for her support, feedback, and incredible edits that helped bring this Note to its current state. Thank you also to the staff and senior editors of Volume 54 and 55 of *Loyola of Los Angeles Law Review* for all their work, especially Samantha Pannier for her incredible supervision and edits. This Note would not be what it is today without the thoughtful feedback from Alexander Rafuse, Chloe Rome, Sarah Keegstra, and Michaela Yarnell. Thank you to my family and friends for all of their support. I could not be where I am or writing this Note without the many people who raised, supported, mentored, and encouraged me through my own childhood and young adulthood in the foster care system. Finally, thank you to my husband, Nathan Allen, for being my best friend and best editor throughout this process.

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## I. INTRODUCTION

LGBTQ2S+<sup>1</sup> youth<sup>2</sup> are overrepresented in the foster care system in California. While LGBTQ2S+ youth make up approximately 10.5 percent of the national youth population,<sup>3</sup> they represent 30.4 percent of youth living in foster care in California.<sup>4</sup> Studies consistently find that LGBTQ2S+ youth are overrepresented in the foster care system; however, these numbers vary depending on geographical area.<sup>5</sup>

When a child welfare department receives a complaint of maltreatment, the department investigates the allegations to ensure they are well-founded.<sup>6</sup> If the allegations are well-founded, the child welfare department will remove the child from the home and place them<sup>7</sup>

1. There are many versions of the acronym intended to include all people who are gender or sexuality minorities. For this Note, the acronym LGBTQ2S+ is adopted as the standard acronym (standing for Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Two-Spirit, and others) to ensure explicit inclusion of Indigenous peoples who are also disproportionately affected by the foster care system in the United States. Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 CAP. UNIV. L. REV. 239, 239–40 (2008). The ‘+’ is intended to indicate inclusion of people with identities that are not explicitly mentioned in the acronym, including intersex and asexual persons. When a different acronym is used, it is intended to reflect the specific source relied upon for the assertion (for example, “LGB persons” when statistics refer generally to sexual orientation but not gender identity or expression).

2. For this article, youth is used as an umbrella term for adolescents and young adults who could be in the child welfare system, generally ages 10–21. When a survey is cited, the specific ages the survey includes as youth will be noted.

3. THE TREVOR PROJECT, NATIONAL ESTIMATE OF LGBTQ YOUTH SERIOUSLY CONSIDERING SUICIDE 4–5 (2019), <https://www.thetrevorproject.org/wp-content/uploads/2019/06/Estimating-Number-of-LGBTQ-Youth-Who-Consider-Suicide-In-the-Past-Year-Final.pdf> [<https://perma.cc/EB6L-3Z8F>] (giving an estimated percentage of youth ages 13–18 who identify as LGBTQ).

4. See, e.g., Laura Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 143 PEDIATRICS 1, 4 (2019) (surveying youth ages 10–18 years old in foster care).

5. Compare Bianca D.M. Wilson et al., *Sexual & Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, WILLIAMS INST. 6 (Aug. 1, 2014), <https://escholarship.org/uc/item/6mg3n153> [<https://perma.cc/G9K3-T7W7>] (finding that 19 percent of foster youth in Los Angeles County identify as LGBTQ and overrepresent the general LGBTQ youth population by a factor of 1.5 to 2), with Theo G. M. Sandfort, *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City: Disproportionality and Disparities*, N.Y.C. ADMIN. FOR CHILD.’S SERVS. 7 (2020), <https://www1.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf> [<https://perma.cc/YT3R-8HKD>] (finding that LGBTQIA+ youth are overrepresented in New York City, with 34.1 percent of foster youth in the city classifiable as LGBTQIA+).

6. See Marc Winokur et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 83 FAMS. SOC’Y: J. CONTEMP. SOC. SERVS. 338, 338 (2008); Sarah Collins, Comment, *Unreasonable Seizure: Government Removal of Children from Homes with Drugs but No Evidence of Neglect*, 20 GEO. MASON L. REV. 631, 636–37 (2013).

7. This Note intentionally uses the singular pronoun “they/them” to refer to a person of unknown gender. While the use of the singular “they” has historically been discouraged in legal writing, the practice has been growing as the usefulness and necessity of the singular “they” have become clear. Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMM’N & RHETORIC: JALWD

in an out-of-home care setting.<sup>8</sup> There are many reasons why a child welfare department may remove a child from their home, but “[t]he main removal reasons are chronic neglect; physical, sexual, and psychological abuse; abandonment; threats of harm; and drug addiction.”<sup>9</sup> Many LGBTQ2S+ foster youth enter foster care because their birth parents disapprove of their LGBTQ2S+ identities or abuse or neglect them because of their identities.<sup>10</sup> This complication makes reunifying a foster youth with their birth family—a primary goal of the child welfare system—more difficult for LGBTQ2S+ youth than for non-LGBTQ2S+ youth.<sup>11</sup>

The purpose of the foster care system in California is to (1) protect foster youth, (2) seek reunification to preserve the family when possible “and safeguard the parents’ fundamental right to raise their child,” and (3) promptly provide a stable and permanent home for foster youth.<sup>12</sup> These goals are usually obtained through reunification, when possible, or a permanent and stable placement for the youth, which is referred to as “permanency.” Permanency and stability for a youth focus on reuniting a youth with their birth parents or, alternatively, adoption or a permanent non-adoption placement with a family member.<sup>13</sup> The majority of children in foster care are placed in foster homes,<sup>14</sup> which “is meant to be the least restrictive, most family-like foster care placement, and . . . [therefore] the preferred placement

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61, 61–62 (2020). Because this Note discusses the rights of LGBTQ2S+ foster youth who may identify as a gender other than male or female and use a gender-neutral pronoun, the singular “they” is adopted to respect the gender identity of youth who may not feel represented by the use of “he or she.” Please see *id.* for an in-depth discussion of the increased adoption of gender-neutral language within the legal community and how the use of a singular “they” pronoun may enhance clarity and respect. See also Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 895, 961–63 (2019) (discussing possible objections to requiring non-binary pronouns, including potential grammar-based objections).

8. Winokur et al., *supra* note 6.

9. *Id.*

10. See Anarida Delaj et al., *Adoption and Foster Care*, 19 GEO. J. GENDER & L. 157, 189 (2018).

11. See *id.* at 165–66, 189–90.

12. *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727 (Ct. App. 2001).

13. See 42 U.S.C. § 675(5)(C)(i) (2018); Robin Munro, *For Children in U.S. Foster Care, What Does Permanency Mean?*, HOLT INT’L BLOG (Jan. 7, 2020), <https://www.holtinternational.org/blog/2020/01/for-children-in-u-s-foster-care-what-does-permanency-mean/> [<https://perma.cc/WXD8-FMSW>].

14. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT NO. 27 1 (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [<https://perma.cc/59DS-JPVN>] [hereinafter AFCARS REPORT]. Nationally, 46 percent of placements are in Foster Family Home (Non-Relative) placement settings and 32 percent are in Foster Family Home (Relative) placements. *Id.*

type.”<sup>15</sup> Congregate care facilities, which include group homes, are the other primary placement type for children in care, with approximately 10 percent of youth in these facilities.<sup>16</sup>

The foster care system has traditionally been ill-equipped to effect these goals for LGBTQ2S+ foster youth due to the unique barriers LGBTQ2S+ youth face in finding a safe, stable, and permanent home.<sup>17</sup> For example, LGBTQ2S+ youth in foster care are often subject to physical or verbal abuse by foster parents and foster siblings due to their sexual orientation or gender identity.<sup>18</sup> They may also be forced into sexual orientation “conversion therapy” or face negative reactions by foster parents to their sexual orientation, gender identity, or gender expression that require them to move to a new home—the same type of reaction that brings many LGBTQ2S+ youth into foster care in the first place.<sup>19</sup>

Approximately 20,000 youth “age out”<sup>20</sup> of the foster care system in the United States each year.<sup>21</sup> Young people in America are

15. Ariel Love, Note, *A Room of One’s Own: Safe Placement for Transgender Youth in Foster Care*, 89 N.Y.U. L. REV. 2265, 2272 (2014).

16. *Id.* at 2275; AFCARS REPORT, *supra* note 14 (reporting four percent of placements in a group home and six percent in an institution). Other placement types include supervised independent living, trial home visit, and pre-adoptive placement.

17. See HUM. RTS. CAMPAIGN, LGBTQ YOUTH IN THE FOSTER CARE SYSTEM 2–3, <https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf> [<https://perma.cc/UMN2-GTXM>].

18. See Delaj et al, *supra* note 10, at 189–90.

19. James W. Gilliam, Jr., *Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual, and Transgender Youth Face in the Foster Care System*, 37 LOY. L.A. L. REV. 1037, 1038–39 (2004); Delaj et al, *supra* note 10, at 189–90; LAMBDA LEGAL DEF. & EDUC. FUND ET AL., YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDERED ADOLESCENTS IN FOSTER CARE 15 (2001), <https://www.lambdalegal.org/publications/youth-in-the-margins> [<https://perma.cc/7BV5-37YU>]. Conversion therapy is a practice aimed at changing a person’s sexual orientation, gender identity, or gender expression that has “been rejected by every mainstream medical and mental health organization for decades.” *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy> [<https://perma.cc/7UER-9QML>] (“In short, there is clear evidence that conversion therapy does not work, and some significant evidence that it is also harmful to LGBTQ people.”) A number of states, including California, ban conversion therapy on minors. See, e.g., CAL. BUS. & PROF. CODE §§ 865–865.2 (2021).

20. Aging out of the foster care system means to remain in the foster care system until court jurisdiction over the youth is terminated due to age, typically at age eighteen. Melinda Atkinson, Note, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 183 n.1, 187 (2008).

21. See Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822, 1823–24 (1999).

increasingly dependent on their parents after they reach the age of majority,<sup>22</sup> and a permanent placement ensures the same type of continued support for youth previously in foster care.<sup>23</sup> Youth who age out of foster care without finding a permanent placement are: more likely to experience homelessness, more likely to be in the criminal justice system, less likely to graduate from high school or attend postsecondary school, less likely to be employed, more likely to live in poverty, more likely to have worse physical and mental health, and often lacking basic independent living skills compared to their peers.<sup>24</sup> LGBTQ2S+ youth in foster care are more likely to age out of foster care without the support of a permanent placement and encounter these risks more than their non-LGBTQ2S+ peers, “with transgender youth having the most difficult time achieving permanency.”<sup>25</sup>

Common barriers to a permanent placement include whether a youth has: had a high total number of placements, been hospitalized overnight, been hospitalized for emotional reasons, ever experienced homelessness, and/or ever lived in a group home.<sup>26</sup> Youth in foster care who identify as LGBTQ2S+ experience every one of the listed barriers to permanency at higher rates than their non-LGBTQ2S+ peers.<sup>27</sup> For example, one 2002 study found that LGBTQ2S+ foster youth experience more than double the placements that non-LGBTQ2S+ youth experience.<sup>28</sup> Foster parents’ negative reactions to a youth’s sexual orientation, gender identity, or gender expression contribute to the repeated placement moves of LGBTQ2S+ youth.<sup>29</sup>

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22. The age of majority is “[t]he age, usu[ally] defined by statute as 18 years, at which a person attains full legal rights, esp[ecially] civil and political rights.” *Age of Majority*, BLACK’S LAW DICTIONARY (11th ed. 2019).

23. Joan R. Kahn et al., *Growing Parental Economic Power in Parent–Adult Child Households: Coresidence and Financial Dependency in the United States, 1960–2010*, 50 DEMOGRAPHY 1449, 1449 (2013) (“We find that younger adults have become more financially dependent on their parents.”); Hanna Martin, *Financial Dependence on Parents: A New Reality for Young People*, MEDIUM: THE STARTUP (Apr. 27, 2020), <https://medium.com/swlh/financial-dependence-on-parents-a-new-reality-for-young-people-e396e1b29d27> [<https://perma.cc/W96P-KB8S>] (“[O]nly a quarter of adults aged 22 or younger are financially independent.”).

24. Atkinson, *supra* note 20, at 188–95.

25. Wilson et al., *supra* note 5, at 12.

26. *Id.* at 7 tbl.1.

27. *Id.*

28. HUM. RTS. CAMPAIGN, *supra* note 17, at 2; Gerald P. Mallon et al., *There’s No Place Like Home: Achieving Safety, Permanency, and Well-Being for Lesbian and Gay Adolescents in Out-of-Home Care Settings*, 81 CHILD WELFARE, 407, 421 (2002) (finding that LGBTQ2S+ foster youth experience an average of 6.35 placements, compared to an average of only three for non-LGBTQ2S+ foster youth).

29. See Delaj et al., *supra* note 10, at 190; Wilson et al., *supra* note 5, at 11.

State governments must address the unique barriers LGBTQ2S+ foster youth face in finding a permanent placement because they are overrepresented in the system, less likely to find a permanent placement than their non-LGBTQ2S+ peers, and youth who do not find a permanent placement face myriad negative outcomes. While most states have a Foster Youth Bill of Rights,<sup>30</sup> the bills often provide no protections or additional rights for LGBTQ2S+ foster youth. State legislatures need to expand these rights to address the needs of LGBTQ2S+ youth and improve their permanency rates.

California recently enacted two bills that significantly expand the rights of LGBTQ2S+ foster youth in the state—Assembly Bill 2119 (“AB 2119”) and Assembly Bill 175 (“AB 175”).<sup>31</sup> Each bill expands the enumerated rights in California’s codified Foster Youth Bill of Rights.<sup>32</sup> A foster youth, foster parent, social worker, or attorney may seek enforcement of these rights for the youth by filing a complaint to the Office of the State Foster Care Ombudsperson.<sup>33</sup> Collectively, these bills spotlight the issues LGBTQ2S+ youth face in the foster care system, provide enforceable rights protecting LGBTQ2S+ youth, and mitigate some barriers affecting permanency through education and training.<sup>34</sup>

AB 2119’s purpose is “to ensure the health and well-being of all foster children . . . , including those who are transgender or gender nonconforming,” and adds new rights targeted explicitly at protecting transgender and gender nonconforming foster youth to the California Foster Youth Bill of Rights.<sup>35</sup> AB 175 is broadly focused on expanding the rights of foster youth in California but contains specific additions increasing the enumerated rights of LGBTQ2S+ youth, such as “the right to maintain the privacy of the child’s sexual orientation and gender identity and expression.”<sup>36</sup> AB 175 also provides all foster youth with the right to a caregiver, social worker, and lawyer who have received training on “competency and sensitivity relating to sexual orientation, gender identity and expression” and best practices for caring

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30. See *infra* Section IV.A.

31. Assemb. B. 2119, 2017–2018 Reg. Sess. (Cal. 2018); Assemb. B. 175, 2019–2020 Reg. Sess. (Cal. 2019).

32. See CAL. WELF. & INST. CODE § 16001.9 (West 2018).

33. See *id.* §§ 16001.9, 16164.

34. See *id.* §§ 16001.9, 16010.2, 16164.

35. Cal. Assemb. B. 2119.

36. Assemb. B. 175, 2019–2020 Reg. Sess. (Cal. 2019).



for LGBTQ2S+ foster youth.<sup>37</sup> AB 2119 and AB 175 protect LGBTQ2S+ foster youth from discrimination; grant youth rights that affirm their sexual orientation, gender identity, and gender expression; and thereby address significant areas of need and concern for LGBTQ2S+ youth in foster care.

Many states have a Foster Youth Bill of Rights, but the rights contained in the bills vary widely.<sup>38</sup> Some states have similar rights for LGBTQ2S+ youth in foster care to those provided in California, some contain only blanket anti-discrimination policies protecting LGBTQ2S+ youth, and others contain limited or no rights aimed at protecting LGBTQ2S+ youth in foster care.<sup>39</sup> Other states rely on state regulations or agency policy to safeguard the rights of LGBTQ2S+ youth in the foster care system.<sup>40</sup>

This Note argues that California's Foster Youth Bill of Rights, as contained in California Welfare and Institutions Code section 16001.9 and accompanying statutes, is the leading Bill of Rights in the country in addressing the key areas of need for LGBTQ2S+ youth in foster care and should be adopted as a model for other states. Part II discusses the psychological and sociological background for understanding the main areas of need that LGBTQ2S+ youth in foster care have because of their sexual orientation, gender identity, or expression. Part II also discusses how California addresses these needs by enacting the Foster Youth Bill of Rights and incorporating rights aimed at protecting LGBTQ2S+ youth, specifically AB 2119 and AB 175. Part III surveys the major arguments of those opposed to the inclusion of LGBTQ2S+ rights in the Foster Youth Bill of Rights, namely, disagreement with the research supporting the bills and the possibility of driving away potential foster parents with religious backgrounds. Part IV will survey the existence of Foster Youth Bills of Rights across the United

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37. CAL. WELF. & INST. CODE § 16001.9(a)(18) (West, 2018).

38. For a list of Foster Children's Bills of Rights and Foster Parents' Bills of Rights, see *Foster Care Bill of Rights*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 29, 2019), <https://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx> [<https://perma.cc/C4GR-3BNJ>]. See *infra* Table 1; *infra* Section IV.E.

39. Compare OR. DEP'T OF HUM. SERVS., OREGON FOSTER CHILDREN'S BILL OF RIGHTS 1, [https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting4\\_012216/Foster\\_youth\\_perspective/FC\\_Bill\\_of\\_Rights.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting4_012216/Foster_youth_perspective/FC_Bill_of_Rights.pdf) [<https://perma.cc/L6ZW-AJL9>] (enumerating only the right "[t]o determine and express [youth's] gender and sexual identity for [themselves]" while noting "that the adults in [the youth's] life make [the] rules and set limits"), with HAW. REV. STAT. § 587A-3.1(b)(1) (2020) (granting youth the right "[t]o be treated fairly and equally and receive care and services that are culturally responsive and free from discrimination based on . . . gender, gender identity, gender expression, sexual orientation").

40. See *infra* Table 1; *infra* Section IV.E.

States and the wide-ranging rights of LGBTQ2S+ youth in foster care in different states. Finally, Part V concludes that California's Foster Youth Bill of Rights is the leading Bill of Rights for LGBTQ2S+ foster youth in the country and should be adopted by other states moving forward.

## II. BACKGROUND: ADDRESSING THE KEY AREAS OF NEED FOR LGBTQ2S+ YOUTH IN FOSTER CARE IN CALIFORNIA

This Part provides a background on the psychological, sociological, and legal needs of LGBTQ2S+ youth in foster care in California. Section II.A discusses the high rates of violence and harassment, high rates of mental health challenges, and low rates of permanency and stability faced by LGBTQ2S+ youth in foster care. It will also highlight possible solutions to these key areas of need. Section II.B provides a history of Foster Youth Bills of Rights across the country and an overview of the development of California's Foster Youth Bill of Rights. It then describes the recent laws enacted in California that protect youth from discrimination and provide LGBTQ2S+ youth with rights that address their unique needs.

### A. *The Unique Needs of LGBTQ2S+ Youth in Foster Care*

Because LGBTQ2S+ youth make up nearly a third of the foster youth in California, compared to only about a tenth of the national youth population, their needs must be a priority for the child welfare system.<sup>41</sup> The child welfare system's goals include protecting foster youth from harm and providing them with a stable and permanent home, both of which require evaluating the specific needs of the youth the system is serving.<sup>42</sup> Placing LGBTQ2S+ youth in foster care exacerbates the disparities that LGBTQ2S+ youth generally encounter.<sup>43</sup> LGBTQ2S+ youth in foster care face higher rates of harassment and violence, have more mental health issues, and have less housing stability than their non-LGBTQ2S+ peers.<sup>44</sup> These increased risks demonstrate a clear need for specific protections that assist LGBTQ2S+ youth in foster care and provide a safe environment that affirms their sexual orientation, gender identity, and gender

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41. Baams et al., *supra* note 4; THE TREVOR PROJECT, *supra* note 3.

42. *See In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727 (Ct. App. 2001).

43. Baams et al., *supra* note 4, at 1.

44. *Id.* at 1, 8.

expression.<sup>45</sup> This Section addresses the (1) harassment and violence, (2) mental health challenges, and (3) barriers to permanency and stability that LGBTQ2S+ youth in foster care face.

### 1. Harassment and Violence

Many LGBTQ2S+ youth face bullying, harassment, and violence at school and at home because of their actual or perceived<sup>46</sup> sexual orientation, gender identity, or gender expression.<sup>47</sup> LGBTQ2S+ youth in foster care face harassment and violence at higher rates than their LGBTQ2S+ peers who are not in foster care.<sup>48</sup> For example, one New York City study found that of LGBTQ2S+ foster youth in group homes, 70 percent were victims of physical violence, and 100 percent had been verbally harassed due to their sexual orientation.<sup>49</sup> In addressing the harassment and violence that LGBTQ2S+ youth face, foster parents and group home workers sometimes isolate the LGBTQ2S+ youth or move the youth to a new home or group home instead of “addressing the underlying issues of homophobia or transphobia” in the home.<sup>50</sup> There is a clear need to reduce or eliminate

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45. See *id.*; cf. HUM. RTS. WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 45–46 (2001), <https://www.hrw.org/reports/pdfs/c/crd/usalbg01.pdf> [<https://perma.cc/ZAV2-EARW>] (describing the effect of a harmful climate created by verbal harassment on LGBTQ2S+ youth in schools).

46. For information on the importance of including a person’s “perceived” sexual orientation, gender identity, and gender expression in these discussions, please see Mary Ziegler, *Perceiving Orientation: Defining Sexuality After Obergefell*, 23 DUKE J. GENDER L. & POL’Y 223 (2016).

47. Mudasar Khan et al., *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 505 (2017); Deborah Lolai, “You’re Going to Be Straight or You’re Not Going to Live Here”: *Child Support for LGBT Homeless Youth*, 24 TUL. J.L. & SEXUALITY 35, 45 (2015).

48. Compare GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY xix (2019), <https://www.glsen.org/sites/default/files/2020-11/NSCS19-111820.pdf> [<https://perma.cc/TN4K-2DWF>] (finding that 68.7 percent of LGBTQ youth experienced verbal harassment and eleven percent experienced physical violence at school), with HUM. RTS. CAMPAIGN, *supra* note 17, at 3 (stating that in one survey of LGBTQ youth in foster care in New York City 100 percent of LGBTQ youth in group homes experienced verbal harassment and seventy percent of LGBTQ youth reported physical violence (citing 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), <https://www.hivlawandpolicy.org/sites/default/files/justiceforallreport.pdf> [<https://perma.cc/VZN3-HNA2>])).

49. FEINSTEIN ET AL., *supra* note 48, at 16.

50. NAT’L CTR. FOR LESBIAN RTS., LGBTQ YOUTH IN THE FOSTER CARE SYSTEM 2 (2006), [https://www.nclrights.org/wp-content/uploads/2013/07/LGBTQ\\_Youth\\_In\\_Foster\\_Care\\_System.pdf](https://www.nclrights.org/wp-content/uploads/2013/07/LGBTQ_Youth_In_Foster_Care_System.pdf) [<https://perma.cc/T9DD-2KQM>]. Homophobia “is an emotional reaction of fear, disgust, anger, discomfort, and aversion to homosexuals.” Linda M. Peterman & Charlotte G. Dixon, *Domestic Violence Between Same-Sex Partners: Implications for Counseling*, 81 J. COUNSELING & DEV. 40, 44 (2003). The term Transphobia similarly “expresses hatred and fear of transgender people.” ROB WORONOFF ET AL., OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS

the bullying, harassment, and violence that LGBTQ2S+ youth in foster care face to protect the youth from higher rates of myriad long-term mental health concerns resulting from such bullying.<sup>51</sup>

## 2. Mental Health

When faced with an unsafe environment where they are harassed by their peers or family members, such as the situations described above, many LGBTQ2S+ youth develop mental health problems.<sup>52</sup> LGBTQ2S+ youth, in general, are at an increased risk for suicidal ideation, intent, and attempts.<sup>53</sup> These increased rates of mental health problems are true for youth who disclose their LGBTQ2S+ identities and those who choose to keep their LGBTQ2S+ identity a secret.<sup>54</sup> Further, LGBTQ2S+ youth in foster care experience more mental health problems than both their non-LGBTQ2S+ peers in foster care and LGBTQ2S+ youth who are not in foster care.<sup>55</sup> For example, LGBTQ2S+ foster youth seriously consider suicide at nearly twice the rate of their non-LGBTQ2S+ peers in foster care.<sup>56</sup> Moreover, while 37.31 percent of non-LGBTQ2S+ foster youth experienced at least two weeks of depression in the previous year, 57.75 percent of LGBTQ2S+ foster youth did.<sup>57</sup> As a subset, transgender youth face discrimination at even higher rates and, thus, have even higher rates of mental health issues.<sup>58</sup> Mental health problems also lead to higher

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HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE 3 (2006).

51. See Michael S. Boroughs, *The Impact of LGBT-Related Bullying on Emerging Adults*, CLAY CTR. FOR YOUNG HEALTHY MINDS, <https://www.mghclaycenter.org/parenting-concerns/grade-school/impact-lgbt-related-bullying-emerging-adults/> [<https://perma.cc/7Y3Y-BJPY>] (stating that bullying of youth is associated with higher rates of myriad mental health concerns that continue into adulthood).

52. Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 418 n.15 (2006).

53. Gary Remafedi et al., *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 AM. J. PUB. HEALTH 57, 58–59 (1998).

54. See Talia Yasmee Stoesel, *Addressing the Harm of Silence and Assumptions of Mutability: Implementing Effective Non-Discrimination Policies for Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Foster Care*, 17 U.C. DAVIS J. JUV. L. & POL'Y 79, 85–86 (2013).

55. Baams et al., *supra* note 4, at 4–5, 5 tbl.2.

56. *Id.* LGBTQ2S+ youth in foster care also seriously considered suicide at statistically significantly higher rates than their LGBTQ2S+ peers in stable housing. *Id.* at 5, tbl.2 (reporting 39.75 percent of LGBTQ youth in stable housing seriously considering suicide over the past year and 48.55 percent of LGBTQ youth in foster care considering the same).

57. *Id.* (noting significant statistical difference from heterosexual youth in foster care ( $P < .05$ )).

58. See Love, *supra* note 15, at 2274–76.

hospitalization rates for emotional reasons for LGBTQ2S+ foster youth than for their non-LGBTQ2S+ peers.<sup>59</sup> Accordingly, mental health is a key area of need for LGBTQ2S+ foster youth.

### 3. Permanency and Stability

While permanency and stability for foster youth are primary goals of the foster care system, LGBTQ2S+ youth in foster care are less likely than their non-LGBTQ2S+ peers to find a permanent home before aging out of the system, with transgender youth being the least likely.<sup>60</sup> While in foster care, available studies show that LGBTQ2S+ youth have a higher average number of placements than their non-LGBTQ2S+ peers.<sup>61</sup> These changes in placements often occur because the youth were removed or ran away from their foster homes due to foster parents' negative reactions to the youth's LGBTQ2S+ identity.<sup>62</sup> The risk of being removed from a foster home because of a foster parent's negative reaction runs especially high when LGBTQ2S+ youth are placed in foster homes with religious foster parents.<sup>63</sup>

### 4. A Way Forward: Necessary Reforms

This Note asserts there are three key requirements for a solution to effectively address the variance in harassment and violence, mental health concerns, and permanency and stability issues that LGBTQ2S+ foster youth experience: (1) it must include enforceable rights aimed at addressing these needs for LGBTQ2S+ youth, (2) it must require training for the adults in the youth's lives, and (3) it must provide youth notice of the rights and require social workers to explain the rights to them.

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59. Wilson et al., *supra* note 5, at 7.

60. *Id.* at 12.

61. *See, e.g.*, HUM. RTS. CAMPAIGN, *supra* note 17, at 2 (“For example, a 2002 study of 45 LGBTQ foster youth found the average number of placements for those youth to be 6.35. Compare this to the . . . average number of placements for a youth in foster care [in 2015], which is around three.”); Wilson et al., *supra* note 5, at 7 tbl.1 (reporting 2.85 placements on average for LGBTQ youth and 2.43 for non-LGBTQ youth).

62. HUM. RTS. CAMPAIGN, *supra* note 17, at 3; Gilliam, *supra* note 19, at 1046.

63. *See* Gilliam, *supra* note 19, at 1043; MIMI LAVER & ANDREA KHOURY, OPENING DOORS FOR LGBTQ YOUTH IN FOSTER CARE: A GUIDE FOR LAWYERS AND JUDGES 9 (Claire Chiamulera ed., 2008), <https://www.glad.org/wp-content/uploads/2018/04/lgbtq-foster-care-aba-guide.pdf> [<https://perma.cc/N4WY-PS9F>] (“I had my own lock box with my stuff in it. They broke into it one day while I was at school. When I got home, they had me all packed up, because I was gay.”); WORONOFF ET AL., *supra* note 50, at 112–13.

The sociological and psychological research show best practices that provide a foundation for enforceable rights that would address the unique needs of LGBTQ2S+ youth in foster care. For instance, LGBTQ2S+ youth in foster care need the right to have their foster parents and social workers recognize and validate their gender.<sup>64</sup> This communicates to the youth that they are welcome and respected and ensures they feel welcome and safe in the home.<sup>65</sup> LGBTQ2S+ youth in foster care need the right to be called by their preferred name and pronouns<sup>66</sup> because of the negative effect on mental health that being misgendered—referred to by an incorrect name or pronouns—can create for transgender youth.<sup>67</sup> The profound need youth have to express their gender identity is widely recognized by professionals working with transgender and gender nonconforming youth, and accordingly, youth should have the right to own, wear, and use the clothing and hygiene products that align with their gender identity and expression.<sup>68</sup> Importantly, transgender and gender nonconforming youth in foster care also need the right to access gender-affirming health care and mental health care, which can help alleviate the intense distress that many transgender and gender nonconforming youth experience and prevent youth from unsafe alternatives, such as obtaining treatment illicitly and dangerously.<sup>69</sup>

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64. Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 840 (2015).

65. *See id.*

66. This article uses the term “preferred pronouns” because of the statutory language currently in place in California. For information on why the term “correct pronouns” is the growing preferred language for pronouns, please see Clarke, *supra* note 7, at 958 n.390.

67. *See* Erin E. Clawson, Comment, *I Now Pronoun-ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN ST. L. REV. 247, 249 & n.11 (2019); WORONOFF ET AL., *supra* note 50, at 84; Khan et al., *supra* note 47, at 493; *Deadname*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deadname> [<https://perma.cc/TAE3-DU9R>] (calling a transgender person by “the name that a transgender person was given at birth and no longer uses upon transitioning” is referred to as “deadnaming”); Veronica Zambon, *What to Know About Deadnaming*, MED. NEWS TODAY (Feb. 12, 2021), <https://www.medicalnewstoday.com/articles/deadnaming> [<https://perma.cc/5MLS-4KPJ>] (“Deadnaming is harmful because refusing to use a person’s chosen name or pronouns is a form of transphobia, or cissexism[, which] can contribute to mental health conditions, such as depression and suicidality[,] . . . physical and verbal assault[,] and abuse.”).

68. WORONOFF ET AL., *supra* note 50, at 81. *See generally* WORLD PRO. ASS’N TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 10–21 (7th ed. 2012), <https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf> [<https://perma.cc/78B4-DWGF>] (describing professional standards of care for those working with children and adolescents with gender dysphoria).

69. WORONOFF ET AL., *supra* note 50, at 88–89, 100 (“If not afforded the supportive care they seek, transgender young people will often turn to the streets and the black market for the hormones

LGBTQ2S+ youth in foster care should also have the right to be free from discrimination based on their sexual orientation, gender identity, or gender expression to protect them from any biases of their foster parents, social workers, and attorneys.<sup>70</sup> Further, youth in foster care should have the right to participate in extracurricular and social activities that align with their sexual orientation, gender identity, and gender expression, which may give LGBTQ2S+ youth needed support.<sup>71</sup> Participation in social activities welcoming, or aimed at supporting, LGBTQ2S+ youth may improve mental health and well-being in LGBTQ2S+ youth.<sup>72</sup> Youth who live in areas with community organizations that support LGBTQ2S+ youth have lower rates of mental health issues.<sup>73</sup> LGBTQ2S+ foster youth should have the right to attend such social activities that affirm their identities because of the improved health and well-being and decreased rates of mental health concerns.

Second, for the rights to be effective, foster parents, social workers, and attorneys must be trained in best practices for caring for LGBTQ2S+ youth. One of the main priorities of the child welfare system is to ensure the safety of children.<sup>74</sup> Foster parents need training in sexual orientation, gender identity, and gender expression to prevent potential abuse and improve the overall care of LGBTQ2S+ youth in foster care.<sup>75</sup> Proper education and training help foster parents understand “their responsibility to protect [LGBTQ2S+] youth from discrimination by others” and give them the “tools to advocate actively

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they need. In so doing, they run the risk of taking hormones in inappropriate doses or that are of poor or unknown quality, with potentially dangerous consequences. Since hormones are commonly taken through injection, they also run the risk of contracting diseases like HIV and hepatitis from needles shared on the street.”); see also WORLD PRO. ASS’N TRANSGENDER HEALTH, *supra* note 68, at 21 (“Refusing timely medical interventions for adolescents might prolong gender dysphoria and contribute to an appearance that could provoke abuse and stigmatization. As the level of gender-related abuse is strongly associated with the degree of psychiatric distress during adolescence, withholding puberty suppression and subsequent feminizing or masculinizing hormone therapy is not a neutral option for adolescents.” (citation omitted)).

70. HUM. RTS. CAMPAIGN, *supra* note 17, at 4; Anne Tamar-Mattis, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 LAW & SEXUALITY 149, 150 (2005).

71. See Estrada & Marksamer, *supra* note 52, at 420–21 n.29; Tamar-Mattis, *supra* note 70, at 165–66.

72. Marla E. Eisenberg et al., *LGBTQ Youth-Serving Organizations: What Do They Offer and Do They Protect Against Emotional Distress?*, 1 ANNALS LGBTQ PUBL’N & POPULATION HEALTH 63, 64 (2020).

73. *Id.* at 74.

74. *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727 (Ct. App. 2001).

75. Colleen Sullivan et al., *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care*, LAMBDA LEGAL 22, 24–25 (2001), <https://www.lambdalegal.org/publications/youth-in-the-margins> [<https://perma.cc/7BV5-37YU>].

to ensure that LGBT[Q2S+] foster children are safe in their foster families, group homes, schools, and communities.”<sup>76</sup> LGBTQ2S+ youth in foster care have often faced discrimination, harassment, or abuse, or come from families that did not affirm their sexual orientation, gender identity, or gender expression, and can hesitate to trust foster parents who are not adequately trained or prepared to address the needs these youth have.<sup>77</sup> To help find permanent families for LGBTQ2S+ youth, it is essential that all supporting adults in the youth’s life, including the foster parents, social worker, and attorney, receive adequate training to support the youth and ensure they are free from harassment and abuse, receive the necessary health services, and feel they are genuinely accepted in their foster homes.<sup>78</sup>

Finally, foster youth need to be informed of the rights they have, in an age-appropriate manner, for the protections to be effective.<sup>79</sup> Having a central document, such as a Foster Youth Bill of Rights, that enumerates a youth’s rights and informs them how to file a complaint will help empower foster youth to make complaints when they are discriminated against or are not receiving the treatment they are entitled to.<sup>80</sup> Because many foster parents, social workers, and attorneys lack a general knowledge of LGBTQ2S+ issues,<sup>81</sup> a Foster Youth Bill of Rights also helps provide notice to the foster parents, social workers, and attorneys, as well as the foster youth, of what a safe and supportive environment for the foster youth must include.<sup>82</sup>

### *B. Protecting LGBTQ2S+ Youth in Foster Care in California: The Enactment of AB 2119 and AB 175*

Over the past twenty years, California has instated and developed the most comprehensive Foster Youth Bill of Rights in the United States regarding protections for LGBTQ2S+ foster youth. First, this

76. *Id.* at 25.

77. Wilson et al., *supra* note 5, at 12.

78. See Jill Jacobs & Madelyn Freundlich, *Achieving Permanency for LGBTQ Youth*, 85 CHILD WELFARE 299, 314 (2006).

79. Lydia M.S. Fuatagavi, Comment, *An Analysis of the Rights of Children in Foster Care in Hawai‘i*, 20 ASIAN-PAC. L. & POL’Y 139, 156 (2019) (“A statute listing the rights of children in foster care fails to achieve its intended purpose unless the children understand their rights and are made aware of a process through which to file a grievance.”); Jennifer Pokempner et al., *Promoting Normalcy for Children and Youth in Foster Care*, JUV. L. CTR. 14 (2015), [https://jlc.org/sites/default/files/publication\\_pdfs/JLC-NormalcyGuide-2015FINAL.pdf](https://jlc.org/sites/default/files/publication_pdfs/JLC-NormalcyGuide-2015FINAL.pdf) [<https://perma.cc/RX7G-5322>].

80. See Pokempner et al., *supra* note 79, at 14; Fuatagavi, *supra* note 79, at 151, 156.

81. See Gilliam, *supra* note 19, at 1044.

82. See Fuatagavi, *supra* note 79, at 151.



section provides a brief overview of the Foster Youth Bills of Rights across the United States. Then this section outlines the development of the California Foster Youth Bill of Rights, from its first enactment through the most recent amendments, which protects LGBTQ2S+ youth from discrimination and provides affirmative rights targeted at proactively addressing the needs of LGBTQ2S+ youth in foster care.

### 1. Foster Youth Bills of Rights

Currently, the United States does not have a federal framework that provides for and outlines the specific rights of foster youth.<sup>83</sup> However, in 2014, Congress called for states to implement enumerated lists of rights for foster youth and provide foster youth ages fourteen and older with a document outlining their rights.<sup>84</sup> Twenty states have codified a Foster Youth Bill of Rights in a statute, seven states have promulgated a bill by regulation, and child welfare agencies in fifteen other states have enumerated the rights of foster youth in their official policies.<sup>85</sup> Unfortunately, these statutorily created or regulation-based “Bills of Rights typically do not create enforceable rights or specify any means for their enforcement.”<sup>86</sup> Often, policy-based Foster Youth Bills of Rights developed by child welfare agencies also fail due to their lack of standards or enforcement mechanisms.<sup>87</sup>

Expanding the rights of foster youth requires not only enumerating the rights of youth but also strengthening the enforcement mechanisms of the Bills of Rights and including an explanation in the statute or policy for why foster youth need these rights.<sup>88</sup> Some states have already made the rights in their Bills of Rights enforceable by youth, either through statute or through child welfare policies on submitting

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83. Rricha Mathur, *Children’s Bill of Rights*, FIRST FOCUS CAMPAIGN FOR CHILD. (2015), <https://campaignforchildren.org/wp-content/uploads/sites/2/2015/10/Childrens-Bill-of-Rights.pdf> [<https://perma.cc/KJW7-3B4Q>]. This Note focuses primarily on Bills of Rights for foster youth. For other federally protected rights of foster youth, such as constitutional rights, see CHRISTINA WILSON ET AL., SAFE HAVENS: CLOSING THE GAP BETWEEN RECOMMENDED PRACTICE AND REALITY FOR TRANSGENDER AND GENDER-EXPANSIVE YOUTH IN OUT-OF-HOME CARE (Apr. 2017), [https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report\\_2017\\_final-web\\_05-02-17.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report_2017_final-web_05-02-17.pdf) [<https://perma.cc/79HM-9CCQ>].

84. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113, 128 Stat. 1919, 1928–30 (2014) (codified as amended at 42 U.S.C. §§ 675–675A (2018)).

85. See *infra* notes 189–190 and accompanying text.

86. See Pokempner et al., *supra* note 79, at 10.

87. *Id.*

88. See *id.*; Fuatagavi, *supra* note 79, at 165–66.

grievances.<sup>89</sup> Other states specifically provide that the Bill of Rights, which may go by a different name, is intended only as a proclamation of what youth in foster care “should” enjoy, not what foster youth are entitled to enforce.<sup>90</sup> While the enforceability of these Bills of Rights has not been extensively litigated, courts have ruled on both sides of the enforceability of the Bills.<sup>91</sup> Thus, the existence of Foster Youth Bills of Rights, and further the enforceability of any such Bill of Rights, varies drastically state-by-state.

## 2. The California Foster Youth Bill of Rights

The California Foster Youth Bill of Rights was first introduced in 2001 in Assembly Bill 899 (“AB 899”).<sup>92</sup> AB 899 established the state policy that “children placed in foster care have certain rights” they are entitled to know about.<sup>93</sup> The bill consolidated all existing foster youth rights into one statute,<sup>94</sup> which unambiguously provides that “it is the policy of the state that all children in foster care shall have the following rights.”<sup>95</sup> Similar bills to codify foster children’s rights in California had passed two previous times but were vetoed by then-Governor Pete Wilson.<sup>96</sup> AB 899 introduced twenty-one enumerated rights for

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89. See, e.g., N.J. STAT. ANN. § 9:6B-4(l) (West 2021) (“To be represented in the planning and regular review of the child’s case . . . by a person . . . who will advocate for the best interests of the child and the enforcement of the rights established pursuant to this act . . .”); DEP’T OF SOC. SERVS., HEALTH & HUM. SERVS. AGENCY, STATE OF CAL., MANUAL OF POLICIES AND PROCEDURES: CHILD WELFARE SERVICES 22–24.1 (Apr. 1, 2019), <https://www.cdss.ca.gov/Portals/9/Regs/cws1.pdf?ver=2019-01-29-130847-963> [<https://perma.cc/EDR4-H7R8>].

90. Elizabeth Fordyce, *Too Young to Understand, but Old Enough to Know Better: Defining the Rights of Transition-Age Youth in the Child Welfare System*, 94 DENV. L. REV. 567, 598 (2017).

91. Compare *K.D. v. Hoffman*, 359 P.3d 1022, 1024 (Ariz. Ct. App. 2015) (finding that the plain language of the statute codifying the Bill of Rights “makes clear that . . . [the statute] does not grant [the youth] an absolute right”), with *K.J. ex rel. Lowry v. Div. of Youth & Fam. Servs.*, 363 F. Supp. 2d 728, 742 (D. N.J. 2005) (finding “that the intent of the legislature was to provide an effective remedy for the violation of the rights enumerated by the Child Placement Bill of Rights Act”).

92. Assemb. B. 899, 2001–2002 Leg., Reg. Sess. (Cal. 2001).

93. *Id.*

94. S. COMM. ON HUM. SERVS., ANALYSIS OF ASSEMBLY BILL No. 1067, 2015–2016 Sess., at 5 (Cal. 2015) [hereinafter A.B. 1067 BILL ANALYSIS] (“AB 899, in making the Foster Youth Bill of Rights law, consolidated and codified the rights of children into one place in statute.”).

95. Cal. Assemb. B. 899.

96. A.B. 1067 BILL ANALYSIS, *supra* note 94, at 2. The Governor stated that he vetoed the bills largely because they sought to put into statute rights that are already required by the Department of Social Services’ regulations. Veto Message of Assemb. B. 2923 from Pete Wilson, Governor, Cal., to the Members of the Cal. Assemb. (Sept. 30, 1994); Veto Message of S.B. 1974 from Pete Wilson, Governor, Cal., to the Members of the Cal. S. (Sept. 29, 1996).

youth in foster care; however, none of the provisions included any specific protections for LGBTQ2S+ youth.<sup>97</sup>

The first amendment to the Foster Youth Bill of Rights aimed at protecting LGBTQ2S+ foster youth in California was the Foster Care Nondiscrimination Act.<sup>98</sup> The Act added a twenty-second right to the Foster Youth Bill of Rights, namely, the “right of a foster child to have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived . . . sex, sexual orientation, [or] gender identity.”<sup>99</sup> The Bill of Rights received four other amendments between 2004 and 2010 before receiving its next amendment including LGBTQ2S+ specific rights.<sup>100</sup> In 2012, Assembly Bill 1856<sup>101</sup> added the right “[t]o have caregivers and child welfare personnel who have received instruction on cultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home care.”<sup>102</sup> Further amendments in 2013 and 2015 made stylistic changes and added rights to (1) age-appropriate information regarding reproductive health, unplanned pregnancy, and sexually transmitted infections, and to (2) be placed in an out-of-home placement that aligns with the foster youth’s gender identity, regardless of the gender or sex listed in records.<sup>103</sup>

Notably, courts have recognized the California Foster Youth Bill of Rights as creating enforceable rights.<sup>104</sup> In *Martinez v. County of Sonoma*,<sup>105</sup> five named plaintiffs filed a class action against: (1) the operator of a temporary housing facility for youth who had been

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97. See Cal. Assemb. B. 899. The Bill included the right to “live in a safe, healthy, and comfortable home where he or she is treated with respect”; the right to “attend school and participate in extracurricular, cultural, and personal enrichment activities”; and the right to “receive medical, dental, vision, and mental health services,” among others. *Id.*

98. Assemb. B. 458, 2003–2004 Reg. Sess. (Cal. 2003).

99. *Id.* (emphasis added).

100. See S.B. 1639, 2003–2004 Reg. Sess. (Cal. 2004); Assemb. B. 1412, 2005–2006 Reg. Sess. (Cal. 2005); Assemb. B. 3015, 2007–2008 Reg. Sess. (Cal. 2008); S.B. 1353, 2009–2010 Reg. Sess. (Cal. 2010).

101. Assemb. B. 1856, 2011–2012 Reg. Sess. (Cal. 2012).

102. *Id.*

103. S.B. 528, 2013–2014 Reg. Sess. (Cal. 2013); S.B. 731, 2015–2016 Reg. Sess. (Cal. 2015).

104. *Martinez v. Cnty. of Sonoma*, No. 15-cv-01953, 2015 WL 5355071, at \*10 (N.D. Cal. Sept. 12, 2015); see also *Von Bradley v. Dep’t of Child. & Fam. Servs.*, No. CV 17-6556, 2018 WL 7291450, at \*2 n.2 (C.D. Cal. Dec. 12, 2018) (“Plaintiff may also be able to state a claim for violation of CAL. WELF. & INST. CODE § 16001.9(a)(1)–(2), which lists the rights of minors and nonminors in foster care.”).

105. *Martinez*, 2015 WL 5355071.

removed from their homes; (2) the Sonoma County Family, Youth and Children’s Services; (3) the Sonoma County Human Services Department; (4) the County of Sonoma; and (5) two other individually named defendants.<sup>106</sup> The class made four claims against the defendants for violating the Foster Youth Bill of Rights, two of which survived a motion to dismiss and two that were dismissed with leave to amend on a demurrer for failure to plead specific facts.<sup>107</sup> Other state and federal courts have also implicitly found that the California Foster Youth Bill of Rights creates legally enforceable rights.<sup>108</sup>

#### a. AB 2119

At the time of AB 2119’s drafting, the California Foster Youth Bill of Rights had been expanded to twenty-seven enumerated rights for youth, with two rights directly aimed at improving the experience of LGBTQ2S+ youth.<sup>109</sup> AB 2119 was introduced by Assembly-member Todd Gloria and sponsored by a number of prominent organizations known for promoting LGBTQ2S+ rights.<sup>110</sup> The bill sought to expand the rights of foster youth to include the right to “covered”<sup>111</sup> gender-affirming health care and gender-affirming mental health care, which would include interventions to suppress the development of endogenous secondary sex characteristics<sup>112</sup> and to align the foster

106. *Id.* at \*1–4.

107. *Id.* at \*10–11. The court also ruled on possible governmental immunity for the County on the claims arising from the Foster Youth Bill of Rights, finding that “to dismiss the County as immune when its employees may be found liable would be in error.” *Id.* at \*11.

108. See *In re Charlotte C.*, 245 Cal. Rptr. 3d 98, 113 (Ct. App. 2019) (recognizing the right “to receive information about his or her out-of-home placement and case plan, including being told of changes to the plan” found in CAL. WELF. & INST. CODE § 16001.9 (West 2018)); *In re Y.M.*, 144 Cal. Rptr. 3d 54, 76 & n.13 (Ct. App. 2012) (recognizing CAL. WELF. & INST. CODE § 16001.9 as giving rights to foster children in California); *Kinlaw v. Kozak*, No. C 07-00430, 2009 WL 3151157, at \*2 & n.5 (N.D. Cal. Sept. 22, 2009) (“Under Welfare and Institutions Code section 16001.9(a)(6), a foster child has the right to contact family members. A foster child also has the right to send and receive mail. *Id.* § 16001.9(a)(9). The social worker’s apparent refusal to allow the minor, Plaintiff Rohnbach, to have contact with her father is inconsistent with these obligations.”).

109. See Assemb. B. 2119, 2017–2018 Reg. Sess. (Cal. 2018).

110. *California Becomes First in Nation to Guarantee Gender Affirming Healthcare for Transgender Foster Youth*, ERIE GAY NEWS (Sept. 17, 2018), <https://www.eriegaynews.com/news/article.php?recordid=201810eqcaab2119> [<https://perma.cc/MR74-TZCP>]. The sponsoring organizations included ACLU of California, National Center for Lesbian Rights, Los Angeles LGBT Center, Lambda Legal, and Equality California. *Id.*

111. “Covered” gender affirming health care and gender affirming mental health care includes “Medi-Cal covered services for transgender beneficiaries.” See LEGISLATIVE COUNSEL’S DIGEST TO CAL. ASSEMB. B. NO. 2119 (2018).

112. Suppression of secondary sex characteristics, such as breasts and facial hair, is accomplished through prescribed hormones that effectively block the secretion of “endogenous sex

youth's physical body with their gender identity.<sup>113</sup> The bill introduced few direct changes to the Bill of Rights but further developed section 16010.2, which outlines oversight and coordination of health care services directly related to the Foster Youth Bill of Rights.<sup>114</sup> Additionally, AB 2119 "requires the California Department of Social Services . . . to develop guidelines on how to identify, coordinate, and support foster youth who wish to access gender-affirming healthcare."<sup>115</sup>

AB 2119 was introduced to the Assembly on February 8, 2018.<sup>116</sup> In the following six months, the bill was heard and amended by multiple Assembly and Senate committees.<sup>117</sup> Opposition to the bill was mainly based on an asserted lack of consensus among medical professionals as to whether hormonal treatments or gender-affirming surgeries should be supported for transgender and gender nonconforming youth.<sup>118</sup> Organizations in opposition to AB 2119 included the American College of Pediatricians, California Family Council, The Salt and Light Council, and Concerned Women for America, as well as numerous pastors from Christian churches in California.<sup>119</sup> However, supporters of the bill highlighted that "the American Medical Association, the American Psychiatric Association, the American Academy of Pediatrics, and the UCSF Center of Excellence for Transgender Health, as well as many other professional associations, recognize that access to gender-affirming behavioral health and medical care is critical to

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hormones (testosterone and estrogen) from the gonads, halting the progression of puberty." Jason Lambrese, *Suppression of Puberty in Transgender Children*, 12 VIRTUAL MENTOR 645, 646 (2010). The suppression of secondary sex characteristics in pre-pubescent youth is reversible. WORLD PRO. ASS'N TRANSGENDER HEALTH, *supra* note 68, at 18.

113. Assemb. B. 2119, 2017–2018 Reg. Sess. (Cal. 2018).

114. *Id.* (adding the right to be involved in the "development of case plan elements related to placement and gender affirming health care, with consideration of their gender identity" in section 16001.9(a)(19) and amending section 16010.2 to describe "[t]he right of minors and nonminors in foster care to health care and mental health care described in . . . Section 16001.9").

115. ERIE GAY NEWS, *supra* note 110; Assemb. B. 2119, 2017–2018 Reg. Sess. (Cal. 2018).

116. CAL. ASSEMB., HISTORY OF ASSEMB. B. NO. 2119, 2017–2018 Reg. Sess. (Cal. 2018).

117. *Id.*

118. *See, e.g., Hearing on Assemb. B. 2119 Before the S. Judiciary Comm.*, 2017–2018 Reg. Sess. (Cal. 2018) (statement of Rene Jax) [hereinafter Rene Jax] ("While some doctors support gender affirmation of children's gender choice, others do not. There is not a universal consensus within the medical and therapeutic communities which supports any specific treatment models for gender dysphoric kids.")

119. *See Foster Care: Gender Affirming Health Care and Mental Health Care: Hearing on Assemb. B. 2119 Before the S. Hum. Servs. Comm.*, 2017–2018 Reg. Sess. (Cal. 2018).

transgender and gender [nonconforming] youth.”<sup>120</sup> The bill’s final amended version was passed on August 29, 2018, by the State Assembly by a vote of 53–22, and Governor Jerry Brown signed AB 2119 into law on September 14, 2018.<sup>121</sup>

AB 2119 helped to fill the hole that existed in the Foster Youth Bill of Rights regarding specific medical and mental health care that transgender and gender nonconforming foster youth may need. Despite the opposition, the introduction of the right to access covered gender-affirming health care and gender-affirming mental health care is well supported by medical professionals.<sup>122</sup> The bill aims to “alleviate symptoms of gender dysphoria,”<sup>123</sup> which can cause transgender and gender nonconforming people intense distress.<sup>124</sup> The addition of this right to access gender-affirming healthcare and mental health services is expected to “improve the stability and long term health outcomes” of transgender and gender nonconforming youth in foster care in California.<sup>125</sup>

#### b. AB 175

Less than four months after AB 2119 was signed into law, AB 175 was introduced to the State Assembly by Assemblymember Mike Gipson.<sup>126</sup> The bill sought to expand and clarify the rights enumerated

120. *Hearing on Assemb. B. 2119 Before the S. Hum. Servs. Comm.*, 2017–2018 Reg. Sess. (Cal. 2018) (statement of Dr. Jennifer Hastings, Assistant Clinical Professor, UCSF) [hereinafter Dr. Jennifer Hastings].

121. CAL. ASSEMB., HISTORY OF ASSEMB. B. NO. 2119, *supra* note 116; ERIE GAY NEWS, *supra* note 110.

122. Am. Psych. Ass’n, *supra* note 64, at 842 (“[T]here is greater consensus that treatment approaches for adolescents affirm an adolescents’ gender identity. Treatment options for adolescents . . . include medical approaches. One particular medical intervention involves the use of puberty-suppressing medication . . . , which is a reversible medical intervention used to delay puberty for appropriately screened adolescents with gender dysphoria.”); see WORLD PRO. ASS’N TRANSGENDER HEALTH, *supra* note 68, at 12–13.

123. ERIE GAY NEWS, *supra* note 110. The American Psychiatric Association defines gender dysphoria as the “psychological distress that results from an incongruence between one’s sex assigned at birth and one’s gender identity.” *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (Aug. 26, 2021, 2:45 PM), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/KD7Q-WB6P>].

124. WORLD PRO. ASS’N TRANSGENDER HEALTH, *supra* note 68, at 12.

125. Dr. Jennifer Hastings, *supra* note 120; see also ERIE GAY NEWS, *supra* note 110 (“I want to thank Governor Brown for signing this bill into law—an act which I truly believe will save lives.”).

126. CAL. ASSEMB., HISTORY OF ASSEMB. B. NO. 175, 2017–2018 Reg. Sess. (Cal. 2019); Katy Grimes, *CA Bill Guarantees New ‘Rights’ to Foster Kids, Promotes Abortions, Rape Care, Phone Calls, Texts and Privacy from Adults*, CAL. GLOBE (July 11, 2019, 9:36 AM), <https://californiaglobe.com/section-2/ca-bill-guarantees-new-rights-to-foster-kids-promotes-abortions-rape-care-phone-calls-texts-and-privacy-from-adults/> [<https://perma.cc/7M5T-QQXF>].

in the California Foster Youth Bill of Rights.<sup>127</sup> AB 175 included a number of revisions aimed at improving the lives of LGBTQ2S+ youth in foster care, such as (1) removing gendered language from the Bill of Rights, such as “he or she,” and replacing it with the gender-neutral “they”;<sup>128</sup> (2) adding the right to receive clothing, grooming, and hygiene products in line with the youth’s gender identity and expression;<sup>129</sup> (3) adding the right to attend extracurricular, cultural, and personal enrichment activities consistent with their sexual identity, gender identity, and gender expression;<sup>130</sup> (4) adding the right to have legal counsel who has received training on best practices for LGBTQ2S+ youth in foster care;<sup>131</sup> (5) adding the right to be referred to by their preferred name and gender pronouns;<sup>132</sup> (6) and adding the right to have their LGBTQ2S+ identity remain private unless they choose to disclose it.<sup>133</sup> The bill also added a number of other rights applicable to all foster youth.<sup>134</sup> In total, AB 175 introduced six specific new rights for LGBTQ2S+ youth. Additionally, AB 175 codified the right to gender-affirming health care and mental health care in the Foster Youth Bill of Rights that had been introduced in AB 2119 but mostly contained in another statute.<sup>135</sup>

AB 175 was introduced to the Assembly on January 8, 2019.<sup>136</sup> The bill was heard and amended by multiple Assembly and Senate committees over the following eight months.<sup>137</sup> The LGBTQ2S+ rights enumerated in the bill received strong outside opposition from religiously affiliated non-profits, such as the California Family Council and Focus on the Family.<sup>138</sup> A consistent argument against the bill

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127. Assemb. B. 175, 2019–2020 Reg. Sess. (Cal. 2019).

128. Compare CAL. WELF. & INST. CODE § 16001.9 (West 2021), with CAL. WELF. & INST. CODE § 16001.9 (West 2018).

129. *Id.* at § 16001.9(a)(3) (West 2021).

130. *Id.* at § 16001.9(a)(16).

131. *Id.* at § 16001.9(a)(18).

132. *Id.* at § 16001.9(a)(19).

133. *Id.*

134. *Id.* at § 16001.9. These rights include the right to review their education records and child welfare records until they are twenty-six, to have access to computers and the internet, and to be involved in their own case planning starting at the age of ten. *Id.*

135. See *id.* at § 16001.9(a)(22)(A) (adding the right “[t]o access and receive medical, dental, vision, mental health, and substance use disorder services . . . includ[ing] covered gender affirming health care and gender affirming mental health care”); *id.* at § 16010.2.

136. CAL. ASSEMB., HISTORY OF ASSEMB. B. NO. 175, *supra* note 126.

137. *Id.*

138. See *Forced Transgender Pronoun Bill Advances*, CAL. FAM. COUNCIL (Mar. 13 2019), <https://www.californiafamily.org/2019/forced-transgender-pronoun-bill-advances/> [<https://perma.cc/8RUZ-YUYF>]; Jeff Johnston, *California Bill Gives Foster Children Abortion and Transgender*

was that by giving foster youth the right to be called by their preferred name and pronouns, the state was driving away potential foster parents from religious backgrounds who do not believe that a person's gender may vary from their biological sex.<sup>139</sup> However, AB 175 received support from a number of well-known organizations, including the American Academy of Pediatrics, the American Civil Liberties Union of California, the California Teachers Association, and the California Youth Connection, among others.<sup>140</sup> The American Academy of Pediatrics described the bill as directly addressing the exceptional difficulties that LGBTQ2S+ foster youth face in the foster care system.<sup>141</sup> The bill's final amended version was passed on September 9, 2019, by the State Senate by a vote of 61–10, and Governor Gavin Newsom signed AB 175 into law on October 2, 2019.<sup>142</sup>

AB 175 updated the Foster Youth Bill of Rights for LGBTQ2S+ youth in foster care by addressing youth-identified needs in the Bill of Rights that had arisen in the eighteen years since the Bill of Rights was first introduced.<sup>143</sup> The additions are expected to address the higher rates of placements and abuse that LGBTQ2S+ youth in foster care experience.<sup>144</sup> To aid in the enforcement of the additional rights, AB 175 also increased the responsibilities of the Office of the State Foster Care Ombudsperson (OFCO).<sup>145</sup> The OFCO is now required to

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"Rights," DAILY CITIZEN: FOCUS ON THE FAM. (July 8, 2019), <https://dailycitizen.focusonthefamily.com/california-bill-gives-foster-children-abortion-and-transgender-rights/> [<https://perma.cc/RFV7-K7QJ>]; "Tyrannical": CA Foster Care Bill Allows Secret Abortions, Forces Parents to Use Preferred Pronouns, CHRISTIAN BROAD. NETWORK NEWS (Oct. 4, 2019), <https://www1.cbn.com/cbnnews/us/2019/october/tyrannical-ca-foster-care-bill-allows-secret-abortions-forces-parents-to-use-preferred-pronouns> [<https://perma.cc/S35T-CCQU>].

139. See, e.g., *Hearing on Assemb. Bill 175 Before the Assemb. Judiciary Comm.*, 2019–2020 Reg. Sess. (Cal. 2019) (statement of Greg Burt, California Family Council) [hereinafter Greg Burt, California Family Council].

140. Letter from Melissa Ruiz, M.D., Governing Bd., Am. Acad. of Pediatrics, Cal., to Assemb. Gipson, Cal. Assemb. (May 27, 2019), <https://aap-ca.org/wp-content/uploads/2020/04/AB-175.pdf> [<https://perma.cc/35UF-TU5Z>]; S. RULES COMM., ANALYSIS OF ASSEMBLY BILL NO. 175, 2019–2020 Sess. (Cal. 2019) (Sept. 3, 2019) (supporters also included Alliance for Children's Rights, California CASA Association, Children's Law Center of California, County of L.A. Board of Supervisors, East Bay Children's Law Offices, Youth Forward, and National Association of Social Workers, California Chapter).

141. Letter from Melissa Ruiz, M.D., *supra* note 140.

142. CAL. ASSEMB., HISTORY OF ASSEMB. B. NO. 175, *supra* note 126.

143. S. RULES COMM., ANALYSIS OF ASSEMBLY BILL NO. 175, *supra* note 140 (noting "18 years ago the challenges that foster youth faced were different than they are today and it is critical that their rights evolve accordingly" and that to accomplish this task "stakeholders statewide [were consulted], including the California Youth Connection, to ensure any proposed revisions were strongly influenced by foster youth and advocates").

144. See Letter from Melissa Ruiz, M.D., *supra* note 140.

145. See S. RULES COMM., ANALYSIS OF ASSEMBLY BILL NO. 175, *supra* note 140.



provide training and assistance to “foster youth, social workers, . . . child welfare organizations, . . . and other interested parties on the rights of children and youth in foster care . . . listed in” the Foster Youth Bill of Rights.<sup>146</sup> Ultimately, the increased education and training for youth and foster parents on the rights of foster youth and the methods of contacting the OFCO with a complaint should help the OFCO to “investigate, and try to resolve, complaints regarding foster care,” providing the enforcement needed to make the rights effective.<sup>147</sup>

### III. OPPOSITION TO LGBTQ2S+ RIGHTS IN FOSTER CARE BILLS OF RIGHTS

Both AB 2119 and AB 175 faced repeated opposition from religious affiliated non-profit organizations, such as the California Family Council, in legislative hearings, letters in opposition, and online articles.<sup>148</sup> The opposition to the bills can be distilled into two primary categories: (A) concern over decreasing the pool of foster parents due to the foster youths’ rights conflicting with the foster parents’ religious beliefs, and (B) a belief the amendments to the bills were not sufficiently supported by scientific research.<sup>149</sup> Both categories of opposition ultimately proved unpersuasive due to the plethora of research supporting the amendments.

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146. CAL. WELF. & INST. CODE § 16164(a)(1)(A) (West Supp. 2021).

147. See S. RULES COMM., ANALYSIS OF ASSEMBLY BILL NO. 175, *supra* note 140.

148. See *supra* notes 118, 119, 138 and accompanying text. The American College of Pediatricians does not identify itself as a religious affiliated group, and instead defines itself as a “group of concerned physicians who saw the need for a pediatric organization that would not be influenced by the politically driven pronouncements of the day.” *About*, AM. COLL. OF PEDIATRICIANS, <https://acped.org/about> [<https://perma.cc/779C-HA9Z>]. However, the Southern Poverty Law Center identifies the American College of Pediatricians as “a fringe anti-LGBTQ hate group that masquerades as the premier U.S. association of pediatricians to push anti-LGBTQ junk science, primarily via far-right conservative media and filing amicus briefs in cases related to gay adoption and marriage equality.” *American College of Pediatricians*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians> [<https://perma.cc/K3MC-BCNS>].

149. Constitutional objections to the bills were mentioned in some hearings and articles, but the constitutional arguments never gained any traction. For example, in the Assembly Human Services Committee Hearing on February 26, 2019, Kevin Snider, on behalf of the Pacific Justice Center, stated that AB 175’s right for foster youth to be referred to by the name and pronoun of the youth’s preference “is a content-based restriction on speech [and] compelled speech.” *Hearing on Assemb. B. 175 Before the Assemb. Hum. Servs. Comm.*, 2019–2020 Reg. Sess. (Cal. 2019) (statement of Kevin Snider, Pacific Justice Center). While Mr. Snider mentioned a constitutional concern, he did not further explain the assertion and no legislators addressed the argument. See *id.*

### A. Personal Conflicts for Foster Parents with Religious Beliefs

The religious beliefs of foster parents have been a consistent point of opposition to the advancement of LGBTQ2S+ foster youth rights in California. For example, in 2005, the Foster Care Nondiscrimination Act (AB 458) was opposed by Concerned Women for America because the law “would force foster parents to support sexual behaviors and expressions among foster children that were contrary to those parents’ sincerely held religious beliefs.”<sup>150</sup> Similar religious-based oppositions to expanding the rights of LGBTQ2S+ foster youth reemerged with the introduction of AB 2119 and AB 175.

AB 2119, and its enactment of the right to seek and receive gender-affirming health care, was opposed by religious groups and socially conservative pediatricians.<sup>151</sup> In a letter to the California State Senate Judiciary Committee, the president of William Jessup University, a Christian university in California, argued the bill marginalized and possibly excluded a large segment of foster parents who are Christian.<sup>152</sup> AB 175 similarly faced opposition from conservative and religious groups.<sup>153</sup> The California Family Council argued that because AB 175 requires foster parents to respect a foster youth’s preferred name and pronouns, the bill would send a message to people of faith that “their help is not wanted.”<sup>154</sup> California Family Council further argued this would lead to a decrease in the number of foster families in California, worsening the existing high need for foster families.<sup>155</sup>

150. Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2397 (2019). In part, AB 458 amended the Foster Youth Bill of Rights to include the right “to have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, *sexual orientation*, *gender identity*, mental or physical disability, or HIV status.” Assemb. B. 458, 2003–2004 Reg. Sess. (Cal. 2003) (emphasis added).

151. Samantha Young, *Should ‘Gender-Affirming Health Care’ Be on the Radar for California’s Foster Kids?*, CAL. HEALTHLINE (June 27, 2018), <https://californiahealthline.org/news/should-gender-affirming-health-care-be-on-the-radar-for-californias-foster-kids/> [<https://perma.cc/KZ6M-KW2R>].

152. See Letter from Dr. John Jackson, President, William Jessup Univ., to Hon. Hannah-Beth Jackson, Chair, S. Judiciary Comm. (June 21, 2018), <https://californiahealthline.org/wp-content/uploads/sites/3/2018/06/william-jessup-letter1.pdf> [<https://perma.cc/MV5A-ECM9>].

153. See Katy Grimes, *supra* note 126 (“Opposing AB 175 are: American College of Pediatricians, California Catholic Conference, California Family Council, Eagle Forum of California, Pacific Justice Institute.”).

154. Greg Burt, California Family Council, *supra* note 139.

155. See *id.*; *Hearing on Assemb. Bill 175 Before the Assemb. Hum. Servs. Comm.*, 2019–2020 Reg. Sess. (Cal. 2019) (statement of Greg Burt, California Family Council) (“This law pushes them into a situation where they are going to have to make a decision they don’t want to make. Obey the State or obey God.”).

These same arguments were advanced on a number of conservative religious websites.<sup>156</sup>

At the time the bills were introduced, California had just experienced a significant decline in foster families, with the number of available foster homes declining by almost half over the few years prior to 2018.<sup>157</sup> In attempts to recover from this dramatic decline, churches and other faith-based communities were identified as potential pools of prospective foster parents.<sup>158</sup> Because California has identified faith-based communities as a solution to the lack of available foster families, the concern over possibly alienating potential foster parents from these communities must be considered. Unfortunately, California does not keep a statewide census of licensed and available foster homes to gauge any possible impact AB 2119 and AB 175 may have had on available foster families.<sup>159</sup>

The concern over a decline in available foster families did not go unaddressed by the legislators who proposed the bills. Assemblymember Gipson, who introduced AB 175, addressed this point directly in a hearing before the Assembly Human Services Committee.<sup>160</sup> Gipson asserted that the bill has “great potential of . . . increasing parents

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156. See, e.g., Jeff Johnston, *supra* note 138; NewsHound, *Forced Transgender Pronoun Bill Advances*, FULCRUM (May 9, 2019), <https://gerry-wagoner.squarespace.com/news/2019/5/9/forced-transgender-pronoun-bill-advances> [<https://perma.cc/7SD5-PS5R>].

157. Holden Slattery, *Despite Increased Funding for Recruitment, Three California Counties Struggle to Find New Foster Homes*, THE IMPRINT (Dec. 27, 2017, 7:00AM), <https://imprint-news.org/news-2/despite-increased-funding-for-recruitment-three-california-counties-struggle-to-find-new-foster-homes/29008> [<https://perma.cc/8YEX-4953>] (“The number of foster homes in California declined by 752 between 2012 and 2017.”); Holden Slattery, *Can Churches Help Supply the Foster Homes L.A. County Needs?*, THE IMPRINT (May 17, 2017, 3:38 AM), <https://imprint-news.org/news-2/can-places-worship-supply-foster-homes-l-county-needs/26883> [<https://perma.cc/89XB-SLWT>] (L.A. County “lost more than 50 percent of its foster homes between 2005 and 2015”).

158. FOSTER TOGETHER NETWORK: UNITING TO GROW NURTURING HOMES FOR KIDS IN CRISIS 3, <https://extraordinaryfamilies.org/wp-content/uploads/2020/09/Foster-Together-Network-Info.pdf> [<https://perma.cc/44NB-NPLW>]; Gita Cugley & Assocs. Consulting, *Landscape Analysis of Recruitment of Resource Families for Children Ages 0–5 in Los Angeles County*, SOCAL GRANTMAKERS 23, 28–30 (2018); Slattery, *Can Churches Help Supply the Foster Homes L.A. County Needs?*, *supra* note 157.

159. See Nina Williams-Mbengue, *How to Support Foster Families: FAQs for State Legislators*, NAT’L CONF. STATE LEGS. 3 (Dec. 2019), [https://www.ncsl.org/Portals/1/Documents/cyf/Support-Foster-Families\\_32702.pdf](https://www.ncsl.org/Portals/1/Documents/cyf/Support-Foster-Families_32702.pdf) [<https://perma.cc/UH3A-T43A>]. This dearth of data on available foster families is a national problem that President Donald J. Trump attempted to address by Executive Order on June 24, 2020. Exec. Order No. 13,930, 85 Fed. Reg. 38,741 (June 29, 2020). The executive order requires development of a systematic approach to collect data on foster youth and families across the country, including “the number of currently available foster families and their demographic information.” *Id.*

160. *Hearing on Assemb. B. 175 Before the Assemb. Hum. Servs. Comm.*, 2019–2020 Reg. Sess. (Cal. 2019) (statement of Assemblymember Mike Gipson).

taking in foster children” and in helping foster parents understand the trauma that LGBTQ2S+ foster youth experience.<sup>161</sup> Assemblymember Ash Kalra also pushed back against the argument that those with religious objections to the bill would no longer be foster parents, saying, “[i]f someone cannot support a foster youth for who they are, they should reconsider whether or not they should be foster parents for any youth.”<sup>162</sup>

The data substantiate Gipson’s and other legislators’ assertions that making foster care more inclusive of LGBTQ2S+ people may increase the number of available foster parents.<sup>163</sup> LGBTQ2S+ adults present a viable option to address the lack of available foster parents because “same-sex couples are six times more likely than their different-sex counterparts to be raising foster children.”<sup>164</sup> Moreover, potential LGBTQ2S+ parents are more likely to become foster parents when they see overtly welcoming and LGBTQ2S+-friendly messaging or signs that the system or organization is culturally competent, such as enumerated rights for LGBTQ2S+ youth.<sup>165</sup> Research also suggests that LGBTQ2S+ youth raised by LGBTQ2S+ parents have a more positive experience coming out, which would help address many of the underlying issues for LGBTQ2S+ foster youth discussed above.<sup>166</sup> While the actual impact on the number of foster parents after AB 2119 and AB 175 has not been seen, increased recruitment efforts toward LGBTQ2S+ people could help increase the number of available foster parents.

### B. Scientific Opposition

AB 2119’s right for foster youth to seek gender-affirming healthcare and mental health services faced additional opposition from religious affiliated non-profits. While AB 2119 was heavily supported

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161. *Id.* It should be noted that Gipson did not state how this increase would be actualized.

162. *Hearing on Assemb. B. 175 Before the Assemb. Judiciary Comm.*, 2019–2020 Reg. Sess. at 52:09–14 (Cal. 2019) (statement of Assemblymember Ash Kalra).

163. *See infra* notes 164–165 and accompanying text.

164. GARY J. GATES, *LGBT PARENTING IN THE UNITED STATES* 3 (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting-US-Feb-2013.pdf> [<https://perma.cc/V27Y-UDBZ>]; Woods, *supra* note 150, at 2399 n.362 (citing a report that found “2.9% of same-sex couples are fostering children compared to 0.4% of different sex couples”).

165. *See* NAT’L RES. CTR. FOR ADOPTION ET AL., *STRATEGIES FOR RECRUITING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FOSTER, ADOPTIVE, AND KINSHIP FAMILIES* 9–10 (2012), [https://adoptuskids.org/\\_assets/files/strategies-for-recruiting-LGBT-foster-adoptive-kinship-families.pdf](https://adoptuskids.org/_assets/files/strategies-for-recruiting-LGBT-foster-adoptive-kinship-families.pdf) [<https://perma.cc/UW72-8QSZ>].

166. *See* Gilliam, *supra* note 19, at 1041.

by professional groups,<sup>167</sup> the opposition claimed the scientific research did not support providing gender-affirming treatment to youth.<sup>168</sup> At the Hearing on Assembly Bill 2119 before the Senate Judiciary Committee on June 12, 2018, Rene Jax, an author and self-described “male-to-female post-operative transsexual,” and Dr. Michael Laidlaw, an endocrinologist, spoke in opposition to the bill.<sup>169</sup> The opposition described a lack of sufficient research into the long-term effects of gender-affirming care, such as puberty blockers and gender-affirmation surgeries, and claimed most transgender identifying youth later identify with their assigned gender at birth.<sup>170</sup> These claims were strongly rebutted by proponents of AB 2119.<sup>171</sup>

AB 2119 received support from numerous professional organizations and non-profits, including medical professional organizations, social worker professional organizations, and LGBTQ2S+ non-profits.<sup>172</sup> While there may be some disagreement among medical professionals regarding proper medical treatment for transgender patients, “there is greater consensus that treatment approaches for adolescents affirm an adolescents’ gender identity.”<sup>173</sup> The self-affirmed gender identity of adolescents with a long history of gender nonconformity is

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167. *Hearing on Assemb. Bill 2119 Before the S. Judiciary Comm.*, 2017–2018 Reg. Sess. (Cal. 2018) (The Health Officers Association of California and the Juvenile Court Judges of California section of the California Judges Association supported the bill).

168. Rene Jax, *supra* note 118. AB 2119 was opposed by a number of conservative groups, including “Equipped to Love, Bethel Church, William Jessup University, American College of Pediatricians, and 936 individuals.” Joanna Kwasniewski, *A Safe Place to Talk—New Law Requires Support Services for Transgender Youth in Foster Care*, CONTRA COSTA CNTY. BAR ASS’N (Mar. 2019), <https://www.cccba.org/article/a-safe-place-to-talk/> [<https://perma.cc/LNK8-JW69>].

169. Rene Jax, *supra* note 118; *Hearing on Assemb. B. 2119 Before the S. Judiciary Comm.*, 2017–2018 Reg. Sess. (Cal. 2018) (statement of Dr. Michael Laidlaw) [hereinafter Dr. Laidlaw].

170. Rene Jax, *supra* note 118 (“[N]either science nor medicine yet fully understands the root cause of gender confusion. Nor has there been enough research into the effects of puberty blockers and surgeries on gender dysphoric children to understand or forewarn us of any short and long term consequences that this prospective legislation will cause.”); Dr. Laidlaw, *supra* note 169 (“Multiple recent studies have proven 80–95% of children and adolescents will actually grow out of their gender confusion.”).

171. *See infra* notes 172–178 and accompanying text.

172. National Center for Lesbian Rights, Equality California, Lambda Legal, ACLU of California, LA LGBT Center, National Center for Youth Law, County Welfare Directors Association, Santa Clara County, California LGBT Health and Human Services Network, American Academy of Pediatrics California Division, California Coalition for Youth, National Association of Social Workers California Chapter, Alliance for Children’s Rights, Planned Parenthood Affiliates of California, and California Alliance of Child and Family Services all supported AB 2119. ASSEMB. COMM. ON HUM. SERVS., ANALYSIS OF ASSEMBLY BILL NO. 2119, 2017–2018 Reg. Sess. at 11 (Cal. 2018).

173. Am. Psych. Ass’n, *supra* note 64, at 842.

even more likely to remain stable.<sup>174</sup> Along with many other professional organizations, the American Medical Association, the American Psychiatric Association, the American Academy of Pediatrics, and the UCSF Center for Excellence for Transgender Health all recognize gender-affirming medical and mental health services as critical for transgender and gender nonconforming youth.<sup>175</sup> The leading professional standards of care and guidelines on gender-affirming health care emphasize an individualized medical plan,<sup>176</sup> which recognizes that what “helps one person alleviate gender dysphoria might be very different from what helps another person.”<sup>177</sup> In the Senate Human Services Committee hearing on June 12, 2018, Dr. Jennifer Hastings highlighted that “those [opposing AB 2119] cite outdated and inaccurate research steeped in bias.”<sup>178</sup>

While there does not exist unanimity in the medical opinions regarding proper care for transgender and gender nonconforming youth, many professional and medical organizations support gender-affirming medical and mental health services for youth when applied in an individualized manner.<sup>179</sup>

#### IV. A SURVEY OF THE RIGHTS OF FOSTER YOUTH ACROSS THE UNITED STATES

The lack of uniformity in the existence and extent of the Foster Youth Bills of Rights and the individual rights for each state makes comparisons between the states complex. Each state approaches the needs of foster youth differently—some enacting statutes, some promulgating regulations, and others creating policies within their respective departments of social services.<sup>180</sup> This survey focuses on the statutes, regulations, and policies that protect LGBTQ2S+ foster youth from discrimination or provide additional rights in their foster homes.<sup>181</sup>

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174. *Id.* at 843.

175. Dr. Jennifer Hastings, *supra* note 120.

176. *Id.*; WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 68, at 5.

177. WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 68, at 5.

178. Dr. Jennifer Hastings, *supra* note 120.

179. *Id.*

180. *See infra* Section IV.E.

181. The National Association of Social Workers bans all practices that discriminate based on sexual orientation, gender identity or expression, but foster parents are not bound by the Association’s Code of Ethics. *See e.g.*, *Code of Ethics* § 4.02, NAT’L ASS’N OF SOC. WORKERS, <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English>

This part analyzes the existence of three major categories of protections for LGBTQ2S+ foster youth across the fifty states and the District of Columbia: (A) the existence of a Foster Youth Bill of Rights that consolidates rights for foster youth; (B) the existence of anti-discrimination provisions prohibiting discrimination based on sexual orientation, gender identity, or gender expression; and (C) the existence of any other right aimed at protecting LGBTQ2S+ youth (referred to as “affirmative rights”). There are only five states that do not have any of the above protections: Alabama, Georgia, Nebraska, South Carolina, Virginia.<sup>182</sup>

*A. A Survey of Rights of LGBTQ2S+ Foster Youth Across the U.S.*

This section surveys the status of LGBTQ2S+ foster youth’s rights across the United States by analyzing existing statutes, regulations, and policies in all fifty states and the District of Columbia. The survey notes varying levels of state protections for LGBTQ2S+ foster youth, from states with no anti-discrimination provisions or affirmative rights for LGBTQ2S+ foster youth to states with comprehensive anti-discrimination statutes and a wide range of affirmative rights aimed at protecting and supporting LGBTQ2S+ foster youth.<sup>183</sup> The survey also revealed that in many states, even those with a Foster Youth Bill of Rights, the rights of LGBTQ2S+ youth lay in numerous different statutes, regulations, and policies and are not consolidated in one place that is easily accessible to foster youth.<sup>184</sup>

Below is Table 1, which summarizes the survey of the fifty states and the District of Columbia. Table 1 notes whether the state has a statute enacted by a legislative body (Statute = S), a regulation promulgated by an administrative agency (Regulation = R), or a policy enacted by a social services department (Policy = P).

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[<https://perma.cc/GXC2-QDMG>] (“Social workers should not practice . . . any form of discrimination on the basis of . . . sexual orientation, gender identity or expression . . .”).

182. See *infra* Sections IV.A and IV.E.

183. Compare *infra* note 212 and accompanying text, with *infra* notes 257–259 and accompanying text.

184. See, e.g., *infra* notes 261–266 and accompanying text. Author’s Note: Due to the difficulties in locating some state documents and the complexities of the policies, it is possible that documents for some states were not discovered or were not publicly accessible at the time of research or publication.

**Table 1**

|                                             | Foster Youth Bill of Rights | Anti-Discrimination: Sexual Orientation | Anti-Discrimination: Gender Identity | Anti-Discrimination: Gender Expression | LGBTQ2S+ Training | Social Activities | Preferred Name and Pronouns | Clothing and Grooming Products | Gender-Affirming Healthcare |
|---------------------------------------------|-----------------------------|-----------------------------------------|--------------------------------------|----------------------------------------|-------------------|-------------------|-----------------------------|--------------------------------|-----------------------------|
| S = Statute<br>R = Regulation<br>P = Policy |                             |                                         |                                      |                                        |                   |                   |                             |                                |                             |
| State                                       |                             |                                         |                                      |                                        |                   |                   |                             |                                |                             |
| Alabama                                     |                             |                                         |                                      |                                        |                   |                   |                             |                                |                             |
| Alaska                                      | P                           | P                                       | P                                    |                                        |                   |                   |                             |                                |                             |
| Arizona                                     | S                           |                                         |                                      |                                        |                   |                   |                             |                                |                             |
| Arkansas                                    | S                           |                                         |                                      |                                        |                   |                   |                             |                                |                             |
| California                                  | S                           | S                                       | S                                    | S                                      | S                 | S                 | S                           | S                              | S                           |
| Colorado                                    | S                           | S                                       |                                      |                                        |                   |                   |                             | R                              |                             |
| Connecticut                                 | S                           | P                                       | P                                    | P                                      |                   |                   | P                           | P                              | P                           |
| Delaware                                    | S                           | P                                       | P                                    | P                                      |                   |                   |                             |                                |                             |
| District of Columbia                        | R                           | R                                       | R                                    | R                                      |                   |                   |                             |                                |                             |
| Florida                                     | S                           | R                                       | R                                    | R                                      |                   |                   |                             | R <sup>185</sup>               |                             |
| Georgia                                     |                             |                                         |                                      |                                        |                   |                   |                             |                                |                             |
| Hawaii                                      | S                           | S                                       | S                                    | S                                      |                   |                   |                             |                                |                             |
| Idaho                                       | P                           | P                                       | P                                    | P                                      |                   |                   |                             |                                |                             |
| Illinois                                    | S                           | S                                       | S                                    |                                        | S                 |                   |                             |                                |                             |
| Indiana                                     | P                           | P                                       | P                                    |                                        |                   |                   |                             |                                |                             |
| Iowa                                        | P                           |                                         |                                      |                                        |                   |                   |                             |                                |                             |

185. Florida's regulation giving the right to clothing and grooming products that align with a youth's gender identity and expression is in a subsection that applies only to child-caring agencies, which would include group homes but not other foster homes. *See* FLA. ADMIN. CODE ANN. r. 65C-46.008(7), (8) (2021).



|                |   |   |   |   |   |   |   |   |   |
|----------------|---|---|---|---|---|---|---|---|---|
| Kansas         | P |   |   |   |   |   |   |   |   |
| Kentucky       | S | P | P | P |   |   |   |   |   |
| Louisiana      | S | R |   |   |   | P |   |   |   |
| Maine          | P | S | S | S |   |   |   |   |   |
| Maryland       | P | R | P |   |   |   | P | P | P |
| Massachusetts  | R | R | P | P |   |   | P | P |   |
| Michigan       | P | P | P | P |   |   |   |   |   |
| Minnesota      | R | R | R | R | R |   |   |   |   |
| Mississippi    | P | P | P |   |   |   |   |   |   |
| Missouri       | S | P | P | P |   |   |   |   |   |
| Montana        | P | P |   |   |   |   |   |   |   |
| Nebraska       |   |   |   |   |   |   |   |   |   |
| Nevada         | S | S | S | S | S |   |   |   |   |
| New Hampshire  | S | S | S |   |   |   |   |   |   |
| New Jersey     | S | P | P | P |   | P | P | P |   |
| New Mexico     | P | R | R |   | R |   |   |   |   |
| New York       | P | P | P | P |   |   |   |   | S |
| North Carolina | S |   |   |   |   |   |   |   |   |
| North Dakota   | P | P |   |   |   |   |   |   |   |
| Ohio           | R | R | R |   |   |   |   | R |   |
| Oklahoma       | P | R | R |   |   | P |   | P |   |
| Oregon         | S | P | P |   |   |   |   |   |   |
| Pennsylvania   | S | S |   |   |   |   |   |   |   |
| Rhode Island   | S | S | S | S | P |   | P |   |   |
| South Carolina |   |   |   |   |   |   |   |   |   |
| South Dakota   |   | P | P |   |   |   |   |   |   |
| Tennessee      |   | P | P | P |   | P | P | P | P |
| Texas          | R |   |   |   |   |   |   |   |   |
| Utah           | R | R | P | P | P |   | P | P | P |
| Vermont        | P | P | P |   |   |   |   |   |   |
| Virginia       |   |   |   |   |   |   |   |   |   |
| Washington     |   | S | R | P |   |   | P |   | P |

|               |   |   |   |  |   |  |  |  |  |
|---------------|---|---|---|--|---|--|--|--|--|
| West Virginia | S | P | P |  | P |  |  |  |  |
| Wisconsin     |   | R |   |  |   |  |  |  |  |
| Wyoming       | R | R |   |  |   |  |  |  |  |

### B. *The Existence of Foster Youth Bills of Rights Across the United States*

In 1973, the National Foster Parent Association ratified the “Bill of Rights for Foster Children” at Congress Hall in Philadelphia.<sup>186</sup> The Philadelphia Bill of Rights for Foster Children heavily influenced the adoption of Foster Youth Bills of Rights across the country, and many states that adopted them modeled them after the Philadelphia Bill of Rights for Foster Children.<sup>187</sup> There are now forty-one states and the District of Columbia that have enacted a Foster Youth Bill of Rights, either by statute, regulation, or policy.<sup>188</sup> Twenty foster youth bills of rights are statutorily based,<sup>189</sup> seven are regulation based,<sup>190</sup> and fifteen are policy-based.<sup>191</sup> The bills vary in the number of rights

186. Jill Reyes, *Child Welfare Bills of Rights for Foster Children*, 31 CHILD L. PRAC. 156, 156 (2012); *Foster Child Bill of Rights*, NAT’L FOSTER PARENT ASS’N (May 4, 1983), <https://nfpaonline.org/page-1105707> [<https://perma.cc/K6AK-D5E8>].

187. See Reyes, *supra* note 186, at 156.

188. See *supra* Table 1; *infra* Section IV.E. Due to the widely varying language used by states, for the purpose of this Note any statute, regulation, or policy that consolidated rights or included a list of rights of foster youth was generally interpreted to be a Foster Youth Bill of Rights.

189. ARIZ. REV. STAT. § 8-529 (2020); ARK. CODE ANN. § 9-28-1003 (2021); CAL. WELF. & INST. CODE § 16001.9 (West 2018 & Supp. 2021); COLO. REV. STAT. §§ 19-7-101–19-7-103 (2021); CONN. GEN. STAT. § 17a-10e (2021); DEL. CODE ANN. tit. 13, § 2522 (2021); FLA. STAT. § 39.4085 (2020); HAW. REV. STAT. § 587A-3.1 (2020); 20 ILL. COMP. STAT. 521/5 (2021); KY. REV. STAT. ANN. § 620.363 (West 2021); LA. STAT. ANN. § 46:286.16 (2021); MO. REV. STAT. § 210.564 (2017); NEV. REV. STAT. § 432.525(7)(e) (2019); N.H. REV. STAT. ANN. § 170-G:21 (2021); N.J. STAT. ANN. § 9:6B-4 (West 2021); N.C. GEN. STAT. § 131D-10.1 (2021); OR. REV. STAT. § 418.201–.202 (2021); 11 PA. CONS. STAT. § 2633 (2021); 42 R.I. GEN. LAWS § 42-72-15(q) (2021); W. VA. CODE § 49-2-126 (2020).

190. D.C. Code Mun. Regs. tit. 29 § 6004 (LexisNexis 2021); 110 MASS. CODE REGS. 7.104; MINN. R. 2960.0050 (2008); OHIO ADMIN. CODE 5101:2-5-35 (2021); TEX. FAM. CODE ANN. § 263.008 (West 2021); UTAH ADMIN. CODE r. 501-12-13 (LexisNexis 2021); 049-0029-3 WYO. CODE R. § 23 (2021). Utah also has a policy-based Foster Care Bill of Rights. UTAH DEP’T OF HUM. SERVS., UTAH FOSTER CARE BILL OF RIGHTS, <https://dcfs.utah.gov/wp-content/uploads/2017/10/Utah-Foster-Care-Bill-of-Rights-updated-4.16.15.pdf> [<https://perma.cc/F7Y6-6FFA>].

191. OFF. OF CHILD.’S SERVS., DEP’T OF HEALTH & SOC. SERVS., ALASKA FOSTER CHILDREN AND YOUTH RIGHTS, [http://dhss.alaska.gov/ocs/documents/FosterYouth\\_Rights.pdf](http://dhss.alaska.gov/ocs/documents/FosterYouth_Rights.pdf) [<https://perma.cc/4XW5-5SWL>]; IDAHO DEP’T OF HEALTH & WELFARE, IDAHO YOUTH IN CARE BILL OF RIGHTS 1–2 (2015), <https://web.archive.org/web/20191028221332/https://healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/YouthInCare-BillofRights.pdf>; IND. DEP’T OF CHILD SERVS., INDIANA BILL OF RIGHTS FOR YOUTH IN FOSTER CARE, [https://www.in.gov/dcs/files/Indiana\\_DCS\\_Bill\\_of\\_Rights\\_for\\_Youth\\_in\\_Care.pdf](https://www.in.gov/dcs/files/Indiana_DCS_Bill_of_Rights_for_Youth_in_Care.pdf) [<https://perma.cc/Q4X2-WNK4>]; IOWA DEP’T OF HUM. SERVS., IOWA FOSTER CHILD AND YOUTH BILL OF RIGHTS, [https://dhs.iowa.gov/sites/default/files/AMP\\_Bill\\_of\\_Rights\\_2013.pdf](https://dhs.iowa.gov/sites/default/files/AMP_Bill_of_Rights_2013.pdf) [<https://perma.cc/YUP3-QLTR>]; KAN. YOUTH ADVISORY COUNCIL, KAN. DEP’T FOR CHILD. & FAMS., DO YOU KNOW YOUR RIGHTS AS A KANSAS FOSTER YOUTH? (2012), <http://www.dcf.ks.gov/services/PPS/Documents/Bill%20of%20Rights%20for%20Foster%20Youth.pdf> [<https://perma.cc/BPB2-67P2>]; ME. DEP’T OF HEALTH & HUM. SERVS., *The Maine Youth in Care Bill of Rights*, <https://www.maine.gov/future/sites/maine.gov.dhhs/files/documents/ocfs/documents/MaineYouth>

included, overall content, and their inclusion of rights aimed at protecting LGBTQ2S+ foster youth.<sup>192</sup> Foster youth and advocates continue to advocate for the enactment of Foster Youth Bills of Rights in the states without them.<sup>193</sup>

While the Foster Youth Bills of Rights vary in their form and substance, they all help to consolidate the rights of youth into one document that makes the rights more accessible to youth and increases the likelihood the rights will be recognized and respected by social workers, attorneys, and foster parents.<sup>194</sup> In some states, these bills are less exhaustive of the rights that youth have, and the youth may have certain rights in policy or regulation that are not included in a Bill of Rights codified in a statute.<sup>195</sup> For example, in New Jersey, the Foster

InCareBillofRights.pdf [https://perma.cc/8VVE-BYLJ]; MD. DEP'T OF HUM. SERVS., BILL OF RIGHTS: YOUTH MATTER, https://dhs.maryland.gov/documents/Manuals/Foster%20Care/Bill-of-Rights-12.28.pdf [https://perma.cc/Q2D2-ZLJP]; MICH. DEP'T OF HEALTH & HUM. SERVS., RIGHTS AND RESPONSIBILITIES FOR CHILDREN AND YOUTH IN FOSTER CARE, https://www.michigan.gov/documents/dhs/DHS-5307\_493322\_7.pdf [https://perma.cc/5THG-4B66]; DIV. OF FAM. & CHILD.'S SERVS., MISS. DEP'T OF HUM. SERVS., SECTION D: FOSTER CARE POLICY (2017), https://www.mdcpms.ms.gov/wp-content/uploads/2017/09/DFCS-Policy-Section-D-09-11-17.pdf [https://perma.cc/Y94Z-2EMJ]; CHILD & FAM. SERVS. DIV., MONT. DEP'T OF PUB. HEALTH & HUM. SERVS., THE POLICY OF THE STATE OF MONTANA REGARDING RIGHTS OF YOUTH IN FOSTER CARE (2015), http://web.archive.org/web/20190701213724/https://dphhs.mt.gov/Portals/85/cfsd/documents/cfsdmanual/MTFosterYouthRights.pdf; N.M. CHILD., YOUTH & FAMS. DEP'T, NEW MEXICO FOSTER CHILD AND YOUTH BILL OF RIGHTS, https://cyfd.org/docs/foster\_child\_bill\_of\_rights.pdf [https://perma.cc/7EWL-QG72]; N.Y. STATE OFF. OF CHILD. & FAM. SERVS., 15-OCFS-ADM-18, ADMINISTRATIVE DIRECTIVE: NEW YORK STATE BILL OF RIGHTS FOR CHILDREN AND YOUTH IN FOSTER CARE (2015), https://ocfs.ny.gov/main/policies/external/OCFS\_2015/ADMs/15-OCFS-ADM-18.pdf [https://perma.cc/A3HA-KM3K]; N.D. YOUTH LEADERSHIP BD., N.D. DEP'T OF HUM. SERVS., NORTH DAKOTA FOSTER CARE HANDBOOK FOR YOUTH 10 (2016), https://www.nd.gov/dhs/info/pubs/docs/cfs/foster-youth-handbook.pdf [https://perma.cc/6XZX-F69B]; OKLA. DEP'T OF HUM. SERVS., OKLAHOMA SUCCESSFUL ADULTHOOD PROGRAM 56 (2016), https://oksa.ou.edu/sites/default/files/event\_flyers/Combined%20OKSA%20Manual.pdf [https://perma.cc/89WH-N8FE]; NEW ENGLAND YOUTH COALITION, VT. DEP'T FOR CHILD. & FAMS., NORMALCY BILL OF RIGHTS (2016), https://dcf.vermont.gov/sites/dcf/files/FSD/Docs/Normalcy-Bill-Rights.pdf [https://perma.cc/34QY-EW6Q].

192. Compare N.C. GEN. STAT. § 131D-10.1 (2021) (enumerating eleven rights, none of which are aimed at protecting LGBTQ2S+ youth), with CAL. WELF. & INST. CODE § 16001.9 (West Supp. 2021) (enumerating forty-one rights, including numerous rights aimed at LGBTQ2S+ foster youth), and *Foster Child Bill of Rights*, MASS. DEP'T OF CHILD. & FAMS., https://www.mass.gov/doc/foster-child-rights-0/download [https://perma.cc/N6AT-H2TP] (with eighteen rights, including the right to "be treated with respect by . . . foster parents and providers without regard to . . . sexual orientation [or] gender identity").

193. See *infra* note 215 and accompanying text.

194. See Reyes, *supra* note 186, at 157.

195. E.g., N.J. STAT. ANN. § 9:6B-4 (West 2021); N.J. DEP'T OF CHILD. & FAMS., NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES POLICY MANUAL 1-2 (2016), https://www.state.nj.us/dcf/policy\_manuals/PPP-VI-B-1-500.pdf [https://perma.cc/24GF-H676] ("[C]ontracted providers are prohibited from engaging in any form of discrimination, bias[,] or harassment on the basis of . . . gender identity or expression, [or] sexual orientation . . . Individuals are referred to by the [name

Youth Bill of Rights, which is codified in a statute, does not include any anti-discrimination provisions for LGBTQ2S+ youth or provide any information about their right to be referred to by their preferred name and pronoun, but the policy manual that social workers receive includes those rights.<sup>196</sup>

Whether the Foster Youth Bills of Rights are codified as statutes, promulgated as regulations, or adopted as policies of state child welfare agencies is important. While rights contained in a Foster Youth Bill of Rights codified in a statute cannot be removed or modified without the legislature passing a subsequent bill, rights contained in a Foster Youth Bill of Rights found in a regulation or policy can be changed more easily.<sup>197</sup> While creating regulations, referred to as rule-making, generally requires “notice, public hearing, and public comment,”<sup>198</sup> codifying or amending a statute generally involves a more extensive process including a vote of the state assembly and senate.<sup>199</sup> Future administrative agencies may be less interested in maintaining enumerated rights for LGBTQ2S+ foster youth—despite the need for them—and could rollback existing protections more easily.<sup>200</sup> Accordingly, codifying Foster Youth Bills of Rights in a statute is the preferred method of implementation to protect the rights of LGBTQ2S+ foster youth.

### *C. The Existence of Anti-Discrimination Provisions for LGBTQ2S+ Foster Youth Across the United States*

Anti-discrimination policies for LGBTQ2S+ foster youth exist in a majority of states, but the language varies widely. Many of the anti-discrimination provisions protect only against discrimination based on sexual orientation but not on gender identity or gender expression.<sup>201</sup>

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and] pronounce that he/she/they prefer which reflects his/her/their identity or expression. Staff will understand the concept of the choice of a preferred name and/or pronoun that is consistent with the youth’s gender identity.”)

196. N.J. STAT. ANN. § 9:6B-4; N.J. DEP’T OF CHILD. & FAMS., *supra* note 195, at 1–2.

197. 2 AM. JUR. 2D *Administrative Law* §§ 131, 183, 202, 207 (2014); *see Policy*, CHILD WELFARE INFO. GATEWAY: U.S. DEP’T OF HUM. SERVS., <https://www.childwelfare.gov/topics/management/reform/soc/communicate/initiative/ntaac/soctoolkits/policy/> [<https://perma.cc/TM6R-QDVX>].

198. 2 AM. JUR. 2D *Administrative Law* § 183 (2014).

199. *See, e.g., Legislative Process*, CAL. STATE S., <https://www.senate.ca.gov/legislativeprocess> [<https://perma.cc/LVH3-3JG4>]; RICHARD S. BETH, CONG. RSCH. SERV., RS20617, HOW BILLS AMEND STATUTES 1–2 (2008).

200. *See, e.g.,* 40 TEX. ADMIN. CODE § 749.1003 (2016); 41 Tex. Reg. 4175 (June 10, 2016).

201. *See supra* Table 1; *infra* Section IV.E.

Twenty-one states and the District of Columbia protect against discrimination based on sexual orientation, gender identity, and gender expression; ten states protect against discrimination based on sexual orientation and gender identity; and eight states only protect against discrimination based on sexual orientation.<sup>202</sup>

There are eleven states that have no identified statute, regulation, or department policy regarding discrimination against foster youth based on their sexual orientation, gender identity, or gender expression.<sup>203</sup> Notably, Texas had a regulation protecting foster youth from “discrimination on the basis of . . . sexual orientation,” until the language was removed on January 1, 2017.<sup>204</sup> Of the states without any anti-discrimination provisions, five have codified a Foster Youth Bill of Rights, but the bills provide no anti-discrimination protections or affirmative rights for LGBTQ2S+ foster youth.<sup>205</sup>

#### *D. Additional Recurring Affirmative Rights for LGBTQ2S+ Foster Youth*

The final category of enumerated rights for LGBTQ2S+ foster youth surveyed is the additional affirmative rights, which includes any right aimed at protecting or supporting LGBTQ2S+ foster youth beyond anti-discrimination. The most commonly included affirmative rights, from most common to least common, are: (1) the right to clothing and grooming products that align with the gender identity of the youth,<sup>206</sup> (2) the right to be referred to by the youth’s preferred name and pronouns,<sup>207</sup> (3) the right to caregivers that have received training on LGBTQ2S+ issues,<sup>208</sup> (4) the right to gender-affirming health care

202. See *supra* Table 1; *infra* Section IV.E.

203. See *supra* Table 1; *infra* Section IV.E (Alabama, Arizona, Arkansas, Georgia, Iowa, Kansas, Nebraska, North Carolina, South Carolina, Texas, and Virginia).

204. 40 TEX. ADMIN. CODE § 749.1003; 41 Tex. Reg. 4175 (“New § 749.1003: . . . changes the ‘right to be free from discrimination’ to the ‘right to fair treatment’ and deletes the laundry list of discrimination grounds.”).

205. See ARIZ. REV. STAT. ANN. § 8-529 (2020); ARK. CODE ANN. § 9-28-1003 (2021); N.C. GEN. STAT. § 131D-10.1 (2021); 11 PA. CONS. STAT. § 2633 (2021); TEX. FAM. CODE ANN. § 263.008 (West 2021).

206. See *supra* Table 1; *infra* Section IV.E (California, Colorado, Connecticut, Maryland, Massachusetts, New Jersey, Ohio, Oklahoma, and Tennessee).

207. See *supra* Table 1; *infra* Section IV.E (California, Connecticut, Maryland, Massachusetts, Rhode Island, Tennessee, Utah, Washington).

208. See *supra* Table 1; *infra* IV.E (California, Illinois, Minnesota, Nevada, New Mexico, Rhode Island, Utah, and West Virginia).

and/or mental health care,<sup>209</sup> and (5) the right to participate in extracurricular and social activities that align with the youth's sexual orientation, gender identity, or gender expression.<sup>210</sup>

Overall, nineteen states had at least one affirmative right for LGBTQ2S+ foster youth included in statute, regulation, or policy. While Tennessee comes close, the only state to include all the listed affirmative rights for LGBTQ2S+ foster youth is California.<sup>211</sup>

### *E. State-by-State Overview*

#### **Alabama**

Alabama has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>212</sup> The state also does not have a Foster Youth Bill of Rights at the time of writing this Note.<sup>213</sup>

#### **Alaska**

Alaska has a policy-based Foster Youth Bill of Rights, titled the "Alaska Foster Children and Youth Rights," that lists the right to "protection against being discriminated against or harassed on the basis of your sexual or gender identity."<sup>214</sup>

Members of Facing Foster Care in Alaska, a non-profit advocating for the rights of youth, "are currently working to secure passage of a foster youth bill of rights that would include . . . the right[] to be free from discrimination on the basis of . . . sexual or gender identity."<sup>215</sup>

#### **Arizona**

Arizona has a codified Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>216</sup>

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209. See *supra* Table 1; *infra* Section IV.E (California, Connecticut, Maryland, New York, Tennessee, Utah, Washington).

210. See *supra* Table 1; *infra* Section IV.E (California, Louisiana, New Jersey, Tennessee).

211. See *supra* Table 1; *infra* Section IV.E

212. MOVEMENT ADVANCEMENT PROJECT, STATE LAWS, AGENCY POLICIES, OR REGULATIONS RELATED TO LGBTQ YOUTH IN THE CHILD WELFARE SYSTEM I (2021), <https://www.lgbtmap.org/img/maps/citations-adoption-youth-in-child-welfare.pdf> [<https://perma.cc/5EBS-J2T5>].

213. DEP'T OF HUM. RES., STATE OF ALA., CHILD AND FAMILY SERVICES PLAN 2020–2024 142 (2019) ("DREAM Ambassadors work closely with their peer foster youth in their monthly meetings to develop relevant services and supports. They are currently working on a Foster Youth Bill of Rights.").

214. OFF. OF CHILD.'S SERVS., DEP'T OF HEALTH & SOC. SERVS., *supra* note 191, at 2.

215. Complaint for Declaratory and Injunctive Relief at 9–10, Cal. Tribal Fams. Coal. v. Azar, No. 20-cv-06018 (N.D. Cal. Aug. 27, 2020), [https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/california\\_ca\\_20200827\\_complaint.pdf](https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/california_ca_20200827_complaint.pdf) [<https://perma.cc/ES22-P3R9>].

216. ARIZ. REV. STAT. ANN § 8-529 (2020).

**Arkansas**

Arkansas has a codified Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>217</sup>

**California**

As discussed extensively above,<sup>218</sup> California has an expansive Foster Youth Bill of Rights that includes a number of provisions aimed directly at improving the experiences of LGBTQ2S+ foster youth.<sup>219</sup>

**Colorado**

Colorado has a codified Foster Youth Bill of Rights, which includes the right to be free from discrimination “on the basis of actual or perceived . . . sexual orientation [or] gender identity.”<sup>220</sup> The state also has regulations providing that foster youth shall “receive training in good habits of personal care, hygiene, and grooming appropriate to their age, gender, and identity” and that they shall receive “clothing . . . appropriate to age, gender, individual needs, and identity.”<sup>221</sup>

**Connecticut**

Connecticut has a codified Foster Youth Bill of Rights, titled the Children in Care Bill of Rights and Expectations, which includes the right to “[d]evelop and maintain the child’s own values, hopes, goals, religion, spirituality and identity, including, but not limited to . . . sexual and gender identity, in a safe and caring environment.”<sup>222</sup> The state also includes a wide range of protections for LGBTQ2S+ foster youth in its Department of Children and Families Policy Manual.<sup>223</sup> These policies instruct social workers and foster parents to “address the youth by his or her chosen name and use the correlative gender pronouns” and to “not punish, shame[,] or ridicule a youth for wearing clothing, behaving[,] or appearing physically in ways consistent with his or her gender identity.”<sup>224</sup> Further, the Department’s Practice

217. ARK. CODE ANN. § 9-28-1003 (2021).

218. *See supra* Part II.

219. CAL. WELF. & INST. CODE § 16001.9 (West 2018 & Supp. 2021).

220. COLO. REV. STAT. §§ 19-7-101 to 19-7-103 (2021).

221. 12 COLO. CODE REGS. § 2509-8:7.708.43-.44 (2021).

222. CONN. GEN. STAT. § 17a-10e (2021).

223. CONN. DEP’T OF CHILD. & FAMS., SPECIALIZED CHILD WELFARE SUBJECT MATTER: NON-DISCRIMINATION OF LGBTQQIAA INDIVIDUALS 21-16 1 (2019), <https://portal.ct.gov/-/media/DCF/Policy/Chapters/21-16.pdf> [<https://perma.cc/Q76K-3JZT>]; CONN. DEP’T OF CHILD. & FAMS., WORKING WITH TRANSGENDER YOUTH AND CAREGIVERS PRACTICE 7–11 (2018) [hereinafter POLICY 21-16PG], <https://portal.ct.gov/-/media/DCF/Policy/BPGuides/21-16PG-Transgender.pdf> [<https://perma.cc/LJ3B-RX49>].

224. POLICY 21-16PG, *supra* 223, at 10.



Guide asserts that “DCF shall ensure that youth receive care and treatment that are deemed medically necessary, including but not limited to, puberty blockers, cross-gender hormones[,] and medically appropriate surgeries.”<sup>225</sup>

### **Delaware**

Delaware has a codified Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>226</sup> The state does have a non-discrimination policy that protects foster youth from discrimination based on sexual orientation, gender identity, and gender expression.<sup>227</sup>

### **District of Columbia**

The District of Columbia has a regulation-based Foster Youth Bill of Rights, which does not include any affirmative rights for LGBTQ2S+ foster youth.<sup>228</sup> However, the bill does include the right not to be subjected to discrimination based on sexual orientation, gender identity, or gender expression.<sup>229</sup>

### **Florida**

Florida has a codified Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>230</sup> Florida has statewide regulations forbidding group home facility staff from “[e]ngag[ing] in discriminatory treatment or harassment on the basis of a child’s . . . gender expression [or] sexual orientation,”<sup>231</sup> from “[p]ermit[ting] harassment or bullying of children by staff or other youth based on their . . . gender, gender expression, [or] sexual orientation,”<sup>232</sup> or from “[a]ttempt[ing] to change or discourage a child’s sexual orientation, gender identity, or gender expression.”<sup>233</sup> Children in group homes are also granted the right to have personal hygiene and grooming products and “training in personal care, hygiene [sic], and grooming appropriate to the child’s . . . gender [and] gender expression,” which may not be restricted “based on the child’s

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225. *Id.* at 8.

226. DEL. CODE ANN. tit. 13, § 2522 (2021).

227. DE. DEP’T OF SERVS. FOR CHILD., YOUTH & THEIR FAMS., DELAWARE CHILDREN’S DEPARTMENT POLICY NO. 217 1 (Apr. 1, 2019), <https://kids.delaware.gov/policies/dscyfd/dsc217-non-discrimination.pdf> [<https://perma.cc/G85Y-8A2C>].

228. D.C. Code Mun. Regs. tit. 29 § 6004 (LexisNexis 2021).

229. D.C. Code Mun. Regs. tit. 29 § 6004.1(g) (LexisNexis 2021); D.C. CODE § 2-1401.01 (2020).

230. FLA. STAT. § 39.4085 (2020).

231. FLA. ADMIN. CODE ANN. r. 65C-46.009(3)(h) (2021).

232. *Id.* at r. 65C-46.009(3)(i).

233. *Id.* at r. 65C-46.009(3)(j).

gender identity or expression.”<sup>234</sup> Child-care agencies are also prohibited from denying service to LGBTQ2S+ foster youth because of their “gender expression, sexual orientation, or transgenderism.”<sup>235</sup>

### **Georgia**

Georgia has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>236</sup>

### **Hawaii**

Hawaii enacted its Foster Youth Bill of Rights in 2018, which includes the right to “receive care and services that are culturally responsive and free from discrimination based on . . . gender identity, gender expression, [and] sexual orientation.”<sup>237</sup> The bill does not include any affirmative rights for LGBTQ2S+ foster youth.<sup>238</sup>

### **Idaho**

Idaho’s Youth in Care Bill of Rights is policy based and includes the “right to receive care and services that are free of discrimination based on . . . gender identity and gender expression, . . . [and] sexual orientation.”<sup>239</sup> The bill further provides that youth have a “right to learn about their sexuality in a safe and supportive environment.”<sup>240</sup>

### **Illinois**

Illinois has a codified Foster Youth Bill of Rights, which includes the right to “have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived . . . sexual orientation [or] gender identity.”<sup>241</sup> The bill also gives LGBTQ2S+ foster youth the right “[t]o have caregivers and child welfare personnel who have received instruction on cultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home care.”<sup>242</sup>

### **Indiana**

Indiana’s Bill of Rights for Youth in Care is policy based and includes “the right not to be discriminated against based on . . . sexual

234. *Id.* at r. 65C-46.008(7)(b), (9).

235. *Id.* at r. 65C-46.012(5).

236. MOVEMENT ADVANCEMENT PROJECT, *supra* 212, at 3.

237. HAW. REV. STAT. § 587A-3.1(b)(1) (2020).

238. *Id.* § 587A-3.1.

239. IDAHO DEP’T OF HEALTH & WELFARE, *supra* note 191, at 2.

240. *Id.* at 1.

241. 20 ILL. COMP. STAT. 521/5(23) (2021).

242. *Id.* at 521/5(25).

orientation, or gender identity” and “the right to learn about these things in a safe and supportive environment.”<sup>243</sup>

### **Iowa**

Iowa has a policy-created Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>244</sup> Iowa’s Department of Human Services adopted a policy to provide equal treatment based on sexual orientation and gender identity, though it is unclear if the policy prevents foster parents from discriminating against LGBTQ2S+ youth in their homes or whether it applies only to social workers.<sup>245</sup>

### **Kansas**

Kansas has a policy-based Foster Youth Bill of Rights that was created by the Kansas Youth Advisory Council, but the document does not include any anti-discrimination provisions or affirmative rights for LGBTQ2S+ foster youth in Kansas.<sup>246</sup> Kansas also has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>247</sup>

### **Kentucky**

Kentucky recently codified a Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>248</sup> Governor Andy Beshear, by executive order, ordered that it “be the policy of the Commonwealth of Kentucky to prohibit discrimination in . . . the provision of public services because of . . . sexual orientation, gender identity or expression.”<sup>249</sup>

### **Louisiana**

Louisiana enacted a Foster Youth Bill of Rights on June 17, 2021.<sup>250</sup> While the Bill of Rights does not provide any explicit protections or affirmative rights to LGBTQ2S+ foster youth, it does state that foster youth have “[t]he right to be free from discrimination of any kind on the basis of the youth’s race, color, sex, . . . or other

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243. IND. DEP’T OF CHILD SERVS., *supra* note 191.

244. IOWA DEP’T OF HUM. SERVS., *supra* note 191.

245. *Non-Discrimination Policy*, IOWA DEP’T OF HUM. SERVS., <https://dhs.iowa.gov/non-discrimination> [<https://perma.cc/W6CY-UZY5>] (“It is the policy of the Iowa Department of Human Services to provide equal treatment in employment and provision of services to applicants, employees and clients without regard to . . . sexual orientation [or] gender identity.”).

246. KAN. YOUTH ADVISORY COUNCIL, *supra* note 191.

247. MOVEMENT ADVANCEMENT PROJECT, *supra* note 212, at 4.

248. KY. REV. STAT. ANN. § 620.363 (West 2021).

249. Ky. Exec. Order No. 2020-554 (June 29, 2020), [https://governor.ky.gov/attachments/20200629\\_Executive-Order\\_220-554\\_EqualEmployment.pdf](https://governor.ky.gov/attachments/20200629_Executive-Order_220-554_EqualEmployment.pdf) [<https://perma.cc/X4LS-L3MA>].

250. LA. STAT. ANN. § 46:286.16 (2021).

status,”<sup>251</sup> which may be interpreted to include sexual orientation, gender identity, and gender expression. The state’s licensing requirements for foster care providers require that the licensee not “discriminat[e] on the basis of . . . sexual orientation.”<sup>252</sup> Further, the Louisiana Code of Ethics for Foster Parents provides foster parents should “[p]rovid[e] positive guidance that promotes self-respect while respecting . . . sexual orientation, gender identity and expression” and arrange “activities to meet the child’s individual . . . sexual orientation, [and] gender identity and expression.”<sup>253</sup>

### **Maine**

Maine’s anti-discrimination statutes protect foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>254</sup> The state’s policy-based Youth in Care Bill of Rights also provides that “[e]very foster child . . . [s]hall be provided care and services that are free from discrimination based on . . . gender, gender identity and expression, . . . [and] sexual orientation.”<sup>255</sup> The bill further provides that youth “[s]hall be allowed to discover and express their gender and sexual identity” and have “the right to learn about their sexuality in a safe and supportive environment.”<sup>256</sup>

### **Maryland**

Maryland has a policy-based Foster Youth Bill of Rights stating foster youth are entitled “[t]o fair treatment, whatever [their] gender, gender identity, race, ethnicity, religion, national origin, disability, medical needs, and/or sexual orientation.”<sup>257</sup> The state’s regulations for child and youth practitioners state child and youth practitioners “may not . . . [p]ractice, condone, or facilitate discrimination, or collaborate to discriminate on the basis of . . . sexual orientation.”<sup>258</sup> Further, the state department includes the right to (1) select and wear clothing, accessories, and/or hairstyles that suit their gender identity; (2) be called by their preferred name and pronoun; and (3) receive

251. *Id.* § 46:286.16(C)(16).

252. LA. ADMIN. CODE tit. 67, § 7115(A)(5)(b) (2021).

253. LA. DEP’T OF CHILD. & FAM. SERVS., CODE OF ETHICS FOR FOSTER PARENTS, <http://www.dcfslouisiana.gov/assets/docs/searchable/QPI/lfapa%20code%20of%20ethics%20foster%20parent.pdf> [https://perma.cc/5RMR-AB8L].

254. *See* ME. STAT. tit. 5, §§ 4553(8), (8-B), (9-C), (10)(G), 4591 (1995, 2005, 2019) (defining the terms public accommodation, sexual orientation, and unlawful discrimination and protecting equal access to public accommodations, including foster facilities).

255. ME. DEP’T OF HEALTH & HUM. SERVS., *supra* note 191, at 1.

256. *Id.*

257. MD. DEP’T OF HUM. SERVS., *supra* note 191, at 1.

258. MD. CODE REGS. 10.57.05.03(C)(5) (2021).

gender-affirming transition-related care.<sup>259</sup> The Social Services Administration also requires competency training on LGBTQ2S+ issues for all caseworkers and supervisors and will provide it to all new staff.<sup>260</sup>

### **Massachusetts**

Massachusetts has a regulation-based Foster Child Bill of Rights, which includes the right of LGBTQ2S+ youth to have their gender identity and sexual orientation supported and respected by their foster parents.<sup>261</sup> The state also has a policy-based Bill of Rights created by the Department of Children and Families, which provides that “[e]very foster child . . . [s]hall be treated with respect by DCF staff, foster parents and providers without regard to race, ethnicity, sexual orientation, gender identity, religion[,] and/or disability.”<sup>262</sup> Former Governor Deval L. Patrick further declared, by executive order, that “[a]ll programs, activities, and services provided . . . for by the state shall be conducted without unlawful discrimination based on . . . gender, . . . sexual orientation, gender identity or expression.”<sup>263</sup>

The Massachusetts’ Department of Children & Families Guide for Working with LGBTQ Youth and Families states that “[t]ransgender youth have the right to be identified by the name and pronouns that accord with their gender identity . . . and to wear clothing consistent with their gender identity.”<sup>264</sup> LGBTQ2S+ youth in Massachusetts also “have the right to be free from religious indoctrination that condemns or puts down [their] sexual orientation or gender identity or expression.”<sup>265</sup> Finally, the Massachusetts Department of

259. SOC. SERVS. ADMIN., MD. DEP’T OF HUM. SERVS., POLICY DIRECTIVE SSA-CW No. 18-13 5-6 (2018), <https://dhs.maryland.gov/documents/SSA%20Policy%20Directives/Child%20Welfare/SSA%2018-13%20CW-Revised-Working-with-Lesbian-Gay-Bisexual-Transgender-and-Questioning-LGBTQ-Youth-and-Families.pdf> [<https://perma.cc/3VPZ-NJVX>].

260. *Id.* at 6.

261. *See* 110 MASS. CODE REGS. 7.104 (2021); MASS. DEP’T OF CHILD. & FAMS., LGBTQ: A GUIDE FOR WORKING WITH YOUTH AND FAMILIES A-3 (2015), <https://www.mass.gov/doc/lgbtq-a-guide-for-working-with-youth-and-families/download> [<https://perma.cc/2V8V-P2C5>] (“The DCF Foster Child Bill of Rights . . . [at] 110 CMR 7.104.”).

262. *Foster Child Bill of Rights*, *supra* note 191.

263. Mass. Exec. Order No. 526 (Feb. 17, 2011), <https://www.mass.gov/executive-orders/no-526-order-regarding-non-discrimination-diversity-equal-opportunity-and-affirmative-action#downloads%20Collected%208/24/2021> [<https://perma.cc/2TKM-UADY>]; *see also* 110 MASS. CODE REGS. 1.09 (2021) (“No applicant for or recipient of Department services shall, on the ground of . . . sex [or] sexual orientation . . . , be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in connection with, any service, program, or activity administered or provided by the Department.”).

264. MASS. DEP’T OF CHILD. & FAMS., *supra* 261, at F-24.

265. *Id.*

Children & Families states transgender youth have the right to medical care by “medical professionals knowledgeable about medical care of transgender youth.”<sup>266</sup>

### **Michigan**

Michigan’s Foster Youth Bill of Rights, titled Rights and Responsibilities for Children and Youth in Foster Care, includes a statement that “[t]he Michigan Department of Health and Human Services (MDHHS) does not discriminate against any individual or group because of . . . sexual orientation, gender identity or expression.”<sup>267</sup> The Foster Youth Bill of Rights does not include any other affirmative rights for LGBTQ2S+ foster youth.<sup>268</sup>

### **Minnesota**

Minnesota has a regulation-based Foster Youth Bill of Rights that grants the “right to be free from bias and harassment regarding race, gender, age, disability, spirituality, and sexual orientation.”<sup>269</sup> Minnesota defines sexual orientation broadly, including sexual orientation, gender identity, and gender expression.<sup>270</sup> Regulations also require training for staff regarding sexual orientation and prohibit foster parents from verbally abusing a foster youth due to their sexual orientation.<sup>271</sup>

### **Mississippi**

Mississippi has two policy-based Foster Youth Bills of Rights, titled Notice of Rights and Responsibilities, one for children 13 and under and one for youth 14 and older.<sup>272</sup> Both include “the right to . . . fair treatment, whatever [your] gender, gender identity, . . . or sexual

266. *Id.* at F-25.

267. MICH. DEP’T OF HEALTH & HUM. SERVS., *supra* note 191; *see also Nondiscrimination Statement*, MICH. DEP’T HEALTH & HUM. SERVS., [https://www.michigan.gov/mdhhs/0,5885,7-339-73970\\_7701\\_76675-77286--,00.html](https://www.michigan.gov/mdhhs/0,5885,7-339-73970_7701_76675-77286--,00.html) [<https://perma.cc/956L-FTZK>] (“The Michigan Department of Health and Human Services will not exclude from participation in, deny benefits of, or discriminate against any individual or group because of race, sex, . . . gender identification or expression, [or] sexual orientation.”).

268. MICH. DEP’T OF HEALTH & HUM. SERVS., *supra* note 191.

269. MINN. R. 2960.0050(1)(P) (2008).

270. MINN. STAT. § 363A.03(44) (2004) (“‘Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.”).

271. MINN. R. 2960.0150(4)(C)(4) (2008); *Id.* 2960.3080(8)(A)(2).

272. DIV. OF FAM. & CHILD.’S SERVS., *supra* note 191, at 197, 200, <https://www.mdcp.ms.gov/wp-content/uploads/2017/09/DFCS-Policy-Section-D-09-11-17.pdf> [<https://perma.cc/Y94Z-2EMJ>].

orientation.”<sup>273</sup> The bills do not include any affirmative rights for LGBTQ2S+ foster youth.<sup>274</sup>

### **Missouri**

Missouri has a codified Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>275</sup> The Missouri Department of Social Services provides that “recipients of[] services from DSS are treated equitably regardless of . . . sexual orientation.”<sup>276</sup> In its guide to social workers on best practices for LGBTQ2S+ youth, the department states that “youth also have the right to be treated equally, to express their gender identity, and to have the choice to be open or private about their sexual orientation.”<sup>277</sup>

### **Montana**

Montana has a policy-based Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>278</sup> The State’s Department of Public Health and Human Services’ Nondiscrimination Policy sets out that the “Department of Public Health & Human Services does not exclude, deny benefits to, or otherwise discriminate against any person on the basis of . . . sexual orientation.”<sup>279</sup>

### **Nebraska**

Nebraska has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>280</sup> A Foster Youth Bill of Rights was introduced to the legislature on January 13, 2020, but the bill was indefinitely postponed on August 13, 2020.<sup>281</sup> The bill would have provided youth the right to be free from discrimination based on sexual orientation and

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273. *Id.*

274. *See id.*

275. *See* MO. REV. STAT. § 210.564 (2017).

276. *Missouri DSS Nondiscrimination Policy Statement*, MO. DEP’T OF SOC. SERVS., <https://dss.mo.gov/files/missouri-nondiscrimination-policy-statement.htm> [<https://perma.cc/L5L4-J4C4>].

277. CHILDS. DIV., MO. DEP’T OF SOC. SERVS., *BEST PRACTICE GUIDANCE FOR SUPPORTING LGBTQ YOUTH IN FOSTER CARE FOR CHILD WELFARE STAFF 3* (2020), <https://dss.mo.gov/cd/older-youth-program/files/best-practice-guide-for-staff.pdf> [<https://perma.cc/BRA3-996S>].

278. *See* CHILD & FAM. SERVS. DIV., MONT. DEP’T PUB. HEALTH & HUM. SERVS., *supra* note 191.

279. *Nondiscrimination Policy and Notice*, MONT. DEP’T PUB. HEALTH & HUM. SERVS., <https://dphhs.mt.gov/NondiscriminationPolicy/> [<https://perma.cc/T3ZR-JXHA>].

280. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 212.

281. Leg. B. 941, 106th Leg., 2d Sess. (Neb. 2020); NEB. LEG., HISTORY OF LEGISLATURE BILL NO. 941, 106th Leg., 2d Sess. (Neb. 2020).

gender identity.<sup>282</sup> On January 13, 2021, Senator Megan Hunt introduced Legislative Bill 357, which would create the Nebraska Youth in Care Bill of Rights.<sup>283</sup> The bill would provide youth in foster care the right to be “free from discrimination on the basis of . . . sex, gender, . . . gender identity, or sexual orientation” and provides a procedure for youth to file grievances.<sup>284</sup>

### **Nevada**

Nevada has a statutorily-based Foster Youth Bill of Rights that grants foster youth the “right . . . to be free from . . . [d]iscrimination or harassment on the basis of his or her actual or perceived . . . sexual orientation, gender identity or expression.”<sup>285</sup> The bill does not provide any affirmative rights to LGBTQ2S+ foster youth.<sup>286</sup> Nevada also requires foster parents to receive “training . . . [including] instruction concerning: . . . [w]orking with lesbian, gay, bisexual, transgender and questioning children.”<sup>287</sup>

### **New Hampshire**

New Hampshire has a policy-created Foster Youth Bill of Rights, which does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>288</sup> The state also has a statute-based Foster Care Children’s Bill of Rights that grants the right “[t]o be treated with courtesy and respect by department staff, foster parents, residential staff, and providers without regard to . . . sexual orientation [or] gender identity.”<sup>289</sup>

282. Leg. B. 941, 106th Leg., 2d Sess. (Neb. 2020).

283. Leg. B. 357, 107th Leg., 1st Sess. (Neb. 2021).

284. *Id.*

285. NEV. REV. STAT. § 432.525(7)(e) (2019).

286. *See id.*

287. *Id.* § 424.0365(1)(h).

288. *See* DIV. FOR CHILD., YOUTH & FAMS., N.H. DEP’T OF HEALTH & HUM. SERVS., BILL OF RIGHTS FOR NEW HAMPSHIRE YOUTH IN CARE (2015), <https://www.dhhs.nh.gov/dcyf/documents/youth-bill-of-rights.pdf> [<https://perma.cc/DJ92-MBAB>]. While the Bill of Rights does not protect youth against discrimination, it does state that foster youth have the right “[t]o be treated with *courtesy and respect* by DCYF staff, foster parents, residential staff, and providers without regard to . . . sexual orientation [or] gender identity . . .” *Id.* at 5 (emphasis added).

289. N.H. REV. STAT. ANN. § 170-G:21(V) (2021); *see also* N.H. DIV. CHILD., YOUTH & FAMS., POLICY MANUAL 10 (2017), <https://www.dhhs.nh.gov/dcyf/documents/dcyfpolicy1051.pdf> [<https://perma.cc/S3CF-5SR6>] (“Discrimination is prohibited. Staff shall not discriminate because of . . . sexual orientation [or] gender identity. . . . The Division shall work with LGBTQ2I (lesbian, gay, bisexual, transgender, queer/questioning, 2 spirit, and intersex) children/youth and families in an individualized manner to identify and support the services that will best meet their needs without discrimination.”).



### **New Jersey**

New Jersey has a codified Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>290</sup> The state's Department of Children and Families' Policy Manual provides protection from discrimination and harassment for foster youth on the basis of sexual orientation, gender identity, or gender expression.<sup>291</sup> The Policy Manual further provides that foster youth "are referred to by the [name and] pronoun that he/she/they prefer which reflects his/her/their identity or expression."<sup>292</sup> Additionally, the Policy Manual encourages social workers to inform LGBTQ2S+ youth of organizations and activities that are relevant to their sexual orientation or gender identity and to support the foster youth's grooming and clothing style choices.<sup>293</sup>

### **New Mexico**

New Mexico has a policy-created Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>294</sup> State regulations require that child welfare agencies "not discriminate against . . . clients . . . based on . . . sexual orientation or gender identity."<sup>295</sup> Regulations also require agencies to "educate prospective and current foster or adoptive families on how to create a safe and supportive home environment for youth in foster care regardless of their sexual orientation, gender identity[,], or gender expression."<sup>296</sup> Finally, the state regulations prohibit any discipline that includes verbal assaults ridiculing the youth's "sex or gender; gender identity; gender expression; sexual orientation; . . . [or] intersex traits."<sup>297</sup>

### **New York**

New York has a policy-created Foster Youth Bill of Rights that gives LGBTQ2S+ foster youth the right "to receive care and services that are free of discrimination based on . . . gender identity or gender expression, [or] sexual orientation."<sup>298</sup> A state statute also mandates that "necessary medical or surgical care . . . [is provided] for any child

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290. See N.J. STAT. ANN. § 9:6B-4 (West 2021).

291. N.J. DEP'T CHILD. & FAMS., *supra* note 195, at 1.

292. *Id.* at 2.

293. *Id.* at 4.

294. See N.M. CHILD., YOUTH & FAMS. DEP'T, *supra* note 191.

295. N.M. CODE R. § 8.26.5.15(B)(5) (LexisNexis 2021).

296. *Id.* § 8.26.5.18(A)(3).

297. N.M. CODE R. § 8.26.2.12(E) (LexisNexis 2021).

298. N.Y. STATE OFF. OF CHILD. & FAM. SERVS., *supra* note 191, at 3.

needing such care and pay for such care [will come] from public funds, if necessary.”<sup>299</sup> Subject to some limitations, youth in care have the right to receive gender-affirming treatments and procedures that are endorsed by the World Professional Association for Transgender Health’s Standards of Care.<sup>300</sup>

### **North Carolina**

North Carolina has a codified Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>301</sup> The Bill of Rights does not “create a cause of action . . . against the State, Department of Health and Human Services, or a person or entity providing foster care,”<sup>302</sup> making the rights virtually unenforceable. North Carolina has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>303</sup>

### **North Dakota**

North Dakota has a policy-based Foster Youth Bill of Rights that gives foster youth the right to “[b]e treated fairly and without discrimination or put-downs because of [their] race, gender, age, sexual orientation, disabilities, or religious beliefs.”<sup>304</sup> The bill does not provide any affirmative rights for LGBTQ2S+ foster youth.<sup>305</sup>

### **Ohio**

Ohio has a regulation-based Foster Youth Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>306</sup> State regulations state a “foster caregiver shall not discriminate in providing care and supervision to foster children on the basis of . . . sexual identity [or] sexual orientation,”<sup>307</sup> and that a “foster caregiver shall not subject a foster child to . . . derogatory remarks about foster children[’s] . . . sexual identity [or] sexual orientation.”<sup>308</sup> Further, the regulation requires foster caregivers to ensure foster youth

299. N.Y. SOC. SERV. LAW § 398(6)(c) (McKinney 2021).

300. See *In re D.F. v. Carrion*, 986 N.Y.S.2d 769, 772–73 (Sup. Ct. 2014). See generally WORLD PRO. ASS’N TRANSGENDER HEALTH, *supra* note 68.

301. See N.C. GEN. STAT. § 131D-10.1 (2021).

302. *Id.* § 131D-10.1(a)(11).

303. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 212.

304. N.D. YOUTH LEADERSHIP BD., N.D. DEP’T HUM. SERVS., *supra* note 191, at 10.

305. See *id.*

306. See OHIO ADMIN. CODE 5101:2-5-35 (2021).

307. *Id.* 5101:2-7-09(B).

308. *Id.* 5101:2-7-09(D).

have clothing appropriate to their gender identity and toiletries appropriate to their gender, sexual identity, and sexual orientation.<sup>309</sup>

### **Oklahoma**

Oklahoma has a policy-based Foster Youth Bill of Rights that grants LGBTQ2S+ foster youth the right to “receive respect, be nurtured, and attend activities in accordance with [their] . . . gender identity, and sexual orientation,” and to “dress and groom [themselves] according to [their] culture [and] identity.”<sup>310</sup> State regulation also grants youth in foster care the “right to fair and equal access to all available services . . . and to not be subjected to discrimination or harassment on the basis of actual or perceived . . . sexual orientation [or] gender identity.”<sup>311</sup>

### **Oregon**

Oregon has a codified Foster Children’s Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>312</sup> The State’s Department of Human Services also has a policy-based Foster Children’s Bill of Rights that grants youth the right “[t]o determine and express [their] gender and sexual identity for” themselves.<sup>313</sup> The Department of Human Service’s Policy further protects LGBTQ2S+ foster youth from discrimination or denial of services based on sex, gender, and sexual orientation but does not explicitly mention gender identity or gender expression.<sup>314</sup> Until June 23, 2021, this protection against discrimination based on sexual orientation was inclusive of gender identity and gender expression because of a statute defining sexual orientation broadly.<sup>315</sup> However, House Bill 3041 eliminated the reference to gender identity from section 174.100(7) of the Oregon Revised Statutes and created a new subsection defining gender identity.<sup>316</sup>

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309. *Id.* 5101:2-7-09(N).

310. OKLA. DEP’T OF HUM. SERVS., *supra* note 191, at 57.

311. OKLA. ADMIN. CODE § 340:75-14-1(b) (2020).

312. *See* OR. REV. STAT. § 418.201–.202 (2021).

313. OR. DEP’T OF HUM. SERVS., *supra* note 39.

314. OR. DEP’T OF HUM. SERVS., OFF. OF CHILD WELFARE PROGRAMS, CLIENT RIGHTS—POLICY NO. I-A.1 (2021), [http://www.dhs.state.or.us/policy/childwelfare/manual\\_1/I-A.1.pdf](http://www.dhs.state.or.us/policy/childwelfare/manual_1/I-A.1.pdf) [<https://perma.cc/V5P2-AL7S>].

315. *See* OR. REV. STAT. § 174.100(4), (7) (2021) (“‘Gender identity’ means an individual’s gender-related identity, appearance, expression or behavior, regardless of whether the identity, appearance, expression or behavior differs from that associated with the gender assigned to the individual at birth. . . . ‘Sexual orientation’ means an individual’s actual or perceived heterosexuality, homosexuality, or bisexuality.”).

316. H.B. 3041, 81st Leg. Assembly, 2021 Reg. Sess. (Or. 2021); OR. REV. STAT. § 174.100(4) (2021). The bill also renumbered the statute defining sexual orientation. *See id.* § 174.100(7).

### **Pennsylvania**

Pennsylvania has a codified Foster Children’s Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>317</sup> The state has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>318</sup> However, there is a protection for youth in “child residential facilities . . . operated in a 24-hour living setting” to not “be discriminated against because of . . . sexual orientation . . . or sex.”<sup>319</sup>

### **Rhode Island**

Rhode Island has a statutorily based Children’s Bill of Rights that protects foster youth from being “discriminated against on the basis of . . . sexual orientation, gender identity or expression.”<sup>320</sup> However, the bill contains no affirmative rights for LGBTQ2S+ foster youth.<sup>321</sup>

The State’s Department of Children, Youth and Families’ Operating Procedures provides that staff shall “refer to transgender youth by their preferred name and utilize pronouns (including gender neutral pronouns) that reflect the youth’s preferences.”<sup>322</sup> Further, staff are required to “receive training about LGBTQI youth during their orientation taught by a qualified trainer with expertise in working with LGBTQI youth.”<sup>323</sup>

### **South Carolina**

South Carolina has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>324</sup>

### **South Dakota**

South Dakota does not have a Bill of Rights for Foster Youth at the time of writing this Note, but the state Department of Social Services’ Nondiscrimination Policy states that the Department “does not exclude, deny benefits to or otherwise discriminate against any person . . . on the basis of actual or perceived . . . gender identity, sexual

317. See 11 PA. CONS. STAT. § 2633 (2021).

318. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 212.

319. 55 PA. CODE § 3800.2 (2020); *id.* § 3800.32(a).

320. 42 R.I. GEN. LAWS § 42-72-15(q) (2021).

321. See *id.*

322. *DCYF Policies & Operating Procedures, No. 100.0100: Sexual Orientation, Gender Identity and Expression*, R.I. DEP’T OF CHILD., YOUTH & FAMS.: POL’Y & OPERATING PROCS. (Nov. 10, 2016), <https://dcyf.ri.gov/about-us/dcyf-policies-operating-procedures> [<https://perma.cc/E2SC-WYNT>].

323. *Id.*

324. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 212.

orientation or disability in admission or access to . . . its programs, activities or services.”<sup>325</sup>

### **Tennessee**

Tennessee does not have a Bill of Rights for Foster Youth at the time of writing this Note, but the Department of Children’s Services’ Administrative Policies prohibit employees “from discrimination on the basis of . . . gender identity, gender expression, [or] sexual orientation.”<sup>326</sup> The Administrative Policies also include “Guidelines for Managing Children/Youth in DCS Custody Related to Sexual Orientation, Gender Identity and Expression” that enumerate a number of rights of LGBTQ2S+ youth, including the right: (1) to dress and present consistent with their gender identity; (2) to receive gender-affirming medical and mental health services (with some limitations); (3) “to participate in extracurricular, cultural, enrichment, and social activities with their identified peer groups and be supported in creating their own safe spaces”; and (4) for transgender youth to be referred to by “their preferred names and pronoun[s].”<sup>327</sup>

### **Texas**

Texas has a regulation-based Foster Children’s Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>328</sup> Foster youth had “the right to be free from discrimination on the basis of gender . . . , race, religion, national origin, or sexual orientation” until the Health and Human Services Commission removed the protection on January 1, 2017, on behalf of the Department of Family and Protective Services.<sup>329</sup> Texas has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>330</sup>

### **Utah**

Utah has a regulation-based Foster Youth Bill of Rights, which provides the right to “be protected from discrimination based upon . . .

325. *Notice of Nondiscrimination, Discrimination Complaints and Civil Rights Training*, S.D. DEP’T SOC. SERVS., <https://dss.sd.gov/keyresources/discrimination.aspx> [<https://perma.cc/8S2P-USZL>].

326. TN. DEP’T OF CHILD.’S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES: 20.20 1 (2015), <https://files.dcs.tn.gov/policies/chap20/20.20.pdf> [<https://perma.cc/P9YT-LCM4>].

327. *Id.*

328. *See* TEX. FAM. CODE ANN. § 263.008(b)(2) (West 2021).

329. 40 TEX. ADMIN. CODE § 749.1003 (2016); 41 Tex. Reg. 4170, 4175 (June 10, 2016) (“New § 749.1003: . . . changes the ‘right to be free from discrimination’ to the ‘right to fair treatment’ and deletes the laundry list of discrimination grounds . . .”).

330. MOVEMENT ADVANCEMENT PROJECT, *supra* note 212.

sexual orientation.”<sup>331</sup> Utah also has a policy-based Foster Care Bill of Rights that includes protection against discrimination based on gender, sexual orientation, and gender expression.<sup>332</sup> The State’s Division of Child and Family Services also includes numerous affirmative rights for LGBTQ2S+ foster youth in its Out-Of-Home Services Practice Guidelines.<sup>333</sup> The Guidelines include the right of foster youth to “request the use of a preferred name,” use grooming products that align with their gender identity, and seek gender-affirming medical and mental health services.<sup>334</sup> The Guidelines also ensure that all foster families will have access to adequate training to provide the best care for LGBTQ2S+ foster youth.<sup>335</sup>

### **Vermont**

Vermont has a policy-based Foster Youth Bill of Rights that provides that “[e]very foster child . . . [s]hall be able to express their identity as they choose, . . . be allowed to discover and express their gender and sexual identity regardless of placement, and shall not be subjected to discrimination or fear for their safety because of their gender or sexual identity.”<sup>336</sup> The Department for Children and Families notes this bill of rights is not a statute and is not a legal right, but rather is policy guidance.<sup>337</sup> The Agency of Human Services’ Non-Discrimination Policy protects foster youth from discrimination based on sexual orientation or gender identity.<sup>338</sup>

331. UTAH ADMIN. CODE r. 501-12-13(1)(f) (LexisNexis 2021).

332. UTAH DEP’T OF HUM. SERVS., *supra* note 190.

333. *Out-of-Home Services Practice Guidelines*, UTAH’S DIV. CHILD AND FAM. SERVS. (Nov. 2020), <https://www.powerdms.com/public/UTAHDHS/documents/274994> [<https://perma.cc/VFN6-D7SC>].

334. *Id.* § 300.5, at 5–12 (the right to gender-affirming medical services is described as follows: “Children and youth who voice anxiety at the prospect of facing puberty outcomes that conflict with their gender identity will be referred to a psychiatrist who is aware of the needs and best practices for those populations for medication evaluation.”).

335. *Id.* at 11 (“All foster families will be given the support and training needed to provide optimal care for children and youth regardless of sexual orientation, gender identity, and gender expression.”).

336. NEW ENGLAND YOUTH COALITION, *supra* note 191.

337. *Bill of Rights for Children and Youth*, VT. AGENCY HUM. SERVS., <https://dcf.vermont.gov/fsd/laws-rules/bill-of-rights> [<https://perma.cc/2FS3-ESHS>].

338. VT. AGENCY OF HUM. SERVS., NON-DISCRIMINATION REGARDING RECEIPT OF SERVICES AND BENEFITS, [https://humanservices.vermont.gov/sites/ahsnew/files/doc\\_library/non-discrimination.pdf](https://humanservices.vermont.gov/sites/ahsnew/files/doc_library/non-discrimination.pdf) [<https://perma.cc/8JVN-CDZC>].

### **Virginia**

Virginia has no statewide law or policy protecting foster youth from discrimination based on sexual orientation, gender identity, or gender expression.<sup>339</sup>

### **Washington**

Washington does not have a Foster Youth Bill of Rights at the time of writing this Note, but the state has a statute, regulation, and department policy that collectively protect foster youth from discrimination based on sexual orientation, gender identity, and gender expression.<sup>340</sup> State regulation also requires foster parents to “connect a child with resources that meets a child’s needs regarding race, religion, culture, sexual orientation[,] and gender identity.”<sup>341</sup> The state Department of Children, Youth & Families’ Practices and Procedure gives LGBTQ2S+ foster youth the right to express their gender identity freely, use their preferred name and pronouns, access gender-affirming medical services, and have assistance in updating their name and gender on their birth certificate.<sup>342</sup>

### **West Virginia**

West Virginia has a codified Foster Children’s Bill of Rights, but it does not include any protections or affirmative rights for LGBTQ2S+ youth.<sup>343</sup> The state’s Bureau for Children and Families states in its Youth Services Policy that it “does not discriminate against individuals due to . . . sexual orientation [or] gender identity.”<sup>344</sup> Employees of Residential Child Care facilities must also be trained on LGBTQ2S+ issues.<sup>345</sup>

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339. MOVEMENT ADVANCEMENT PROJECT, *supra* note 212.

340. WASH. REV. CODE § 49.60.030 (2020) (“The right to be free from discrimination because of . . . sexual orientation . . . .”); WASH. ADMIN. CODE § 110-147-1595 (2019) (“You must treat foster children in your care with dignity and respect regardless of . . . sexual orientation and gender identity.”); WASH. ADMIN. CODE § 110-148-1520 (2019); *6900 Supporting LGBTQ+ Identified Children and Youth*, WASH. DEP’T CHILD., YOUTH & FAMS., <https://www.dcyf.wa.gov/6000-operations/6900-supporting-lgbtq-identified-children-and-youth> (declaring as procedure that LGBTQ2S+ youth “not be subjected to discrimination or harassment on the basis of actual or perceived sex, sexual orientation, gender identity or gender expression”).

341. WASH. ADMIN. CODE § 110-148-1520(7) (2019).

342. *6900. Supporting LGBTQ+ Identified Children and Youth*, *supra* note 340.

343. *See* W. VA. CODE § 49-2-126 (2020).

344. OFF. OF CHILD. & ADULT SERVS., W. VA. DEP’T OF HEALTH & HUM. SERVS., YOUTH SERVICES POLICY 67 (2019), <http://dhhr.wv.gov/bcf/policy/Documents/Youth%20Services%20Policy.pdf> [<https://perma.cc/77ZG-7R6K>].

345. W. VA. CODE R. § 78-3-11.2.2.c (2020).

### Wisconsin

In 2009, Wisconsin attempted to create a Foster Youth Bill of Rights, but that portion of the bill did not make it through the legislature.<sup>346</sup> Instead, a state regulation provides protection for foster youth from “discriminat[ion] against the child because of the child’s . . . sexual orientation.”<sup>347</sup> The state does not have any anti-discrimination provisions protecting youth against discrimination on the bases of gender identity or gender expression or any affirmative rights for LGBTQ2S+ foster youth.<sup>348</sup>

### Wyoming

The state has a regulation-based Foster Youth Bill of Rights that protects youth from discrimination on the basis of sexual orientation only.<sup>349</sup> The state does not have any statutes, regulations, or policies providing any affirmative rights for LGBTQ2S+ foster youth.<sup>350</sup>

## F. Survey Summary

Depending on where an LGBTQ2S+ youth is born or where they are taken into the foster care system, the protections and affirmative rights they receive varies widely. While many states have a Foster Youth Bill of Rights and some form of anti-discrimination provision, a number of states provide none of these protections. The existence of additional affirmative rights varies even more widely. California is the only state to have anti-discrimination provisions for sexual orientation, gender identity, and gender expression and have all of the listed affirmative rights. Further, California is the only state to include all these rights in the Foster Care Bill of Rights, which ensures that foster youth are informed of these rights and given a copy of the bill.<sup>351</sup>

## V. WHY A CLEAR AND UNIFORM FOSTER YOUTH BILL OF RIGHTS IS NEEDED

Research shows that LGBTQ2S+ youth are overrepresented in the foster care system and have different needs from their non-

346. See Assemb. B. 75, 99th Leg. Sess., Reg. Sess. (Wis. 2009); WIS. ASSEMB. HISTORY OF ASSEMB. B. NO. 75, 2009–2010 Leg. (Wis. 2009).

347. WIS. ADMIN. CODE DCF § 56.09(1)(e) (2020); see also WIS. ADMIN. CODE DCF §§ 52.11(24), 54.04(1)(a), 57.05(1)(f) (2021).

348. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 212.

349. 049-0029-3 WYO. CODE R. § 23(b) (2021) (“Every child and family shall have equal access to services regardless of . . . sexual orientation . . .”).

350. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 212.

351. See *supra* Table 1; *supra* Section IV.E



LGBTQ2S+ peers in foster care.<sup>352</sup> This Note proposes that each state should adopt a Foster Youth Bill of Rights that grants youth certain rights that are shown to improve the outcomes of LGBTQ2S+ foster youth. The Foster Youth Bills of Rights should consolidate the rights of youth into one central document that is provided to foster youth on a regular basis. The Bills should also include mandatory training for key people in the youths' lives, such as social workers, lawyers, foster parents, and other caregivers. California's Foster Youth Bill of Rights is the only such bill in the United States that adequately addresses the needs of LGBTQ2S+ foster youth as determined by current research and should be adopted by other states as a model.<sup>353</sup>

Social science research shows that LGBTQ2S+ foster youth need rights that help protect them from the increased rates of harassment and violence, mental health issues, and lack of permanency and stability that they experience in the foster care system.<sup>354</sup> Research also indicates that in order for these rights to be effective, foster parents, social workers, and lawyers in the foster youth's life must be familiar with the existence of the rights and best practices for working with LGBTQ2S+ youth.<sup>355</sup> Requiring foster parents, social workers, lawyers, and other caregivers to participate in training that educates them on the different needs of LGBTQ2S+ youth and the ways that the rights are intended to support the youth increases the likelihood that the youth's rights will be properly protected, and in turn protects the youth from the negative effects of the system they currently experience at higher rates.<sup>356</sup> Further, there must be enforcement mechanisms for the rights to be effective—such as an anonymous way to file complaints, an ombudsperson's office overseeing complaints, and ensuring that the rights are recognized as enforceable in court.<sup>357</sup>

California's Foster Youth Bill of Rights addresses each of these areas. At the base level, the Bill has anti-discrimination provisions based on sexual orientation, gender identity, and gender expression.<sup>358</sup> Further, the Bill provides a number of affirmative rights shown to improve the experience of LGBTQ2S+ foster youth, such as (1) the right

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352. See discussion *supra* Section II.A.

353. See CAL. WELF. & INST. CODE § 16001.9 (West 2018 & Supp. 2021); *supra* Section II.A.

354. See discussion *supra* Part II.

355. See HUM. RTS. CAMPAIGN, *supra* note 17, at 5.

356. See *supra* notes 74–78 and accompanying text.

357. See *supra* note 88 and accompanying text.

358. CAL. WELF. & INST. CODE § 16001.9(a)(17) (West Supp. 2021).

to clothing and grooming products that respect the youth’s gender identity and expression;<sup>359</sup> (2) the right to participate in extracurricular and social activities that are consistent with the youth’s sexual orientation, gender identity, and gender expression;<sup>360</sup> (3) the right to be referred to by their preferred name and pronouns;<sup>361</sup> and (4) the right to “covered gender affirming health care and gender affirming mental health care.”<sup>362</sup> Further, the Bill requires that each foster youth is given a copy of the Bill of Rights at least every six months and informed of the rights’ meaning in an age-appropriate way.<sup>363</sup> The Bill also requires foster parents, social workers, and lawyers to “receive[] instruction on cultural competency and sensitivity relating to sexual orientation, gender identity and expression, and best practices for providing adequate care to [LGBTQ2S+ youth] in out-of-home care.”<sup>364</sup> California has the most comprehensive Foster Youth Bill of Rights that addresses the key needs of LGBTQ2S+ foster youth. Further, the Bill provides youth a way to report any violations of their rights through a dedicated office.<sup>365</sup>

California’s Foster Youth Bill of Rights also avoids a major concern of groups advocating against adopting LGBTQ2S+ focused protections, namely, that it may decrease the already low number of available foster parents. The Bill may encourage more LGBTQ2S+ adults to become foster parents by protecting the rights of LGBTQ2S+ foster youth and signaling to potential LGBTQ2S+ foster parents that the

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359. *Id.* § 16001.9(a)(3).

360. *Id.* § 16001.9(a)(16).

361. *Id.* § 16001.9(a)(19).

362. *Id.* § 16001.9(a)(22)(A).

363. *Id.* § 16001.9(a)(40) (enumerating the right “[t]o be informed of these rights [contained in § 16001.9] in an age and developmentally appropriate manner by the social worker or probation officer and to be provided a copy of the rights in this section at the time of placement, any placement change, and at least once every six months or at the time of a regularly scheduled contact with the social worker or probation officer”).

364. *Id.* § 16001.9(a)(18).

365. *Id.* §§ 16001.9(a)(41), 16164. Youth may contact the Office of the State Foster Care Ombudsperson to report any violations of these rights. The Office of the Ombudsperson is tasked with investigating and attempting to resolve any complaints and with disseminating information and providing training on the rights of foster youth to foster parents, social workers, lawyers, and other interested parties. *Id.* § 16164(a)(1)(A), (a)(2); *see also* CAL. FOSTER CARE OMBUDSPERSON ET AL., FOSTER YOUTH RIGHTS HANDBOOK 40–41 (2020) [hereinafter FOSTER YOUTH RIGHTS HANDBOOK], [https://fosteryouthhelp.ca.gov/wp-content/uploads/sites/276/2020/11/EnglishHandbook\\_Final1.19.21.pdf](https://fosteryouthhelp.ca.gov/wp-content/uploads/sites/276/2020/11/EnglishHandbook_Final1.19.21.pdf) [<https://perma.cc/H44D-2W56>]; CAL. FOSTER CARE OMBUDSPERSON, FOSTER YOUTH BILL OF RIGHTS COLORING ACTIVITY BOOK 20 (2020), [https://fosteryouthhelp.ca.gov/wp-content/uploads/sites/276/2020/11/EnglishColoringBook\\_Final1.19.21.pdf](https://fosteryouthhelp.ca.gov/wp-content/uploads/sites/276/2020/11/EnglishColoringBook_Final1.19.21.pdf) [<https://perma.cc/V7G3-QBLV>].

child welfare system is inclusive of gender and sexuality minorities.<sup>366</sup> In addition to potentially increasing the large number of same-sex couples interested in fostering,<sup>367</sup> the Bill focuses on protecting the rights of youth by providing them the best potential placement.<sup>368</sup>

While foster parents from a religious background may be a great fit for some foster youth, they may not be the best fit for all foster youth.<sup>369</sup> The Office of the Ombudsperson explicitly provides in its Foster Youth Rights Handbook that if a youth's foster parents "do not accept [their] gender identity, gender expression, or sexual orientation and [they] feel unsafe, [they] have the right to move to a different place."<sup>370</sup> This balancing allows foster parents from religious backgrounds to continue fostering without ignoring any of their sincerely held beliefs that may make them feel that they cannot or should not accept a foster youth's sexual orientation, gender identity, or gender expression, while still ensuring that LGBTQ2S+ foster youth have the right to be raised in a home that is accepting and affirming of their sexual orientation, gender identity, and gender expression. However, it should be noted this balancing undermines the foster care system's goal of promoting permanency and stability for foster youth and should not be employed lightly.<sup>371</sup>

However, the California Foster Youth Bill of Rights is not without its faults. For example, some of the terminology used is already considered outdated.<sup>372</sup> States choosing to model their Foster Youth Bill of Rights after California's should pay close attention to changing language such as "correct name and pronouns" rather than California's "preferred name and gender pronoun[s]."<sup>373</sup> Further, other states grant rights addressing needs of LGBTQ2S+ foster youth that California does not, such as the "right to be free from religious indoctrination that

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366. See *supra* notes 163–166 and accompanying text.

367. Woods, *supra* note 150, at 2399 n.362.

368. See CAL. WELF. & INST. CODE § 16001.9(a)(1), (4), (5), (7), (17)–(19) (West 2018 & Supp. 2021).

369. See Gilliam, *supra* note 19, at 1060–62 (discussing the existence and constitutionality of provisions matching foster youth with foster families from the same religious background).

370. FOSTER YOUTH RIGHTS HANDBOOK, *supra* note 365, at 19.

371. See *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727 (Ct. App. 2001).

372. See Clarke, *supra* note 7.

373. *Id.*; CAL. WELF. & INST. CODE § 16001.9(a)(19) (West Supp. 2021).

condemns or puts down [a youth's] sexual orientation or gender identity or expression" found in Massachusetts.<sup>374</sup>

## VI. CONCLUSION

LGBTQ2S+ youth are significantly overrepresented in the foster care system across the United States. They face violence and harassment at high rates, face mental health challenges at high rates, and have low rates of permanency and stability, all of which are identified as key barriers to their continued success and wellbeing upon aging out of the system. The sociological and psychological research shows that there are best practices that can be adopted to address these unique needs that LGBTQ2S+ youth in foster care have.

Over the past twenty years, California has instituted and developed the most comprehensive Foster Youth Bill of Rights in the United States that addresses the needs of LGBTQ2S+ foster youth based on the available research. California Welfare and Institutions Code section 16001.9 is the only Foster Youth Bill of Rights across the United States that incorporates a right to be free from discrimination based on sexual orientation, gender identity, and gender expression, and includes all the affirmative rights listed and identified earlier in this Note as having a positive effect on the well-being of LGBTQ2S+ youth. It is the purpose of the child welfare system to look after the best interests of the youth in their care and prepare the youth to succeed when they leave the system, whether through reunification, adoption, or aging out. California's Foster Youth Bill of Rights is the only Bill of Rights across the United States that ensures the unique areas of need for LGBTQ2S+ youth are explicitly included and addressed. California's Foster Youth Bill of Rights should be adopted as a model by other state legislatures because it codifies the most expansive list of rights for LGBTQ2S+ foster youth, which effectively address their unique needs, into one central and enforceable Bill of Rights.

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374. MASS. DEP'T OF CHILD. & FAMS., *supra* note 261, at F-24. For information on why exposure to religious indoctrination condemning a youth's sexual orientation, gender identity, or gender expression is harmful, please see *supra* note 19.

