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**MEMORANDUM**

TO: Sheila E. Mitchell, Chief Probation Officer  
Laura Garnette, Deputy Chief Probation Officer

FROM: Lori E. Pegg, Acting County Counsel *[Signature]*  
Susan Swain, Lead Deputy County Counsel *[Signature]*

RE: Placement of Transgender Youth in Juvenile Detention Facility

DATE: September 5, 2012

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**INTRODUCTION**

It has come to the Probation Department's attention that there may be three known transgender minors in the County's juvenile justice detention facilities. You requested general background on the law in this area, and in particular with respect to a male to female (MTM) minor, in order to assist Probation in appropriately classifying and housing transgender minors in a juvenile detention facility. Specifically, Probation has requested clarification on the following issues:

- 1) Whether a transgender minor may be placed in a facility based on his or her gender identity rather than his or her birth gender?
- 2) What are some recommendations and model protocols on the treatment of transgender minors in the juvenile justice system?

**BRIEF ANSWERS**

- 1) Probation may house a transgender minor according to their gender identity rather than the minor's birth gender, though it should follow the California Code of Regulations factors in assigning a minor to a particular facility.
- 2) Several recommendations and model protocols on making housing and classification decisions for transgender minors in the juvenile justice system are provided with this memorandum.

## DISCUSSION

**I. Section 1352 of Title 15 of the California Code of Regulations, sets forth the factors Probation should apply when making classification decisions for any youth, including transgender youth.**

**A. Classification Factors**

Section 1352 of Title 15 of the California Code of Regulations describes the procedures for classifying minors for the purpose of determining housing placement in juvenile detention facilities. Section 1352 mandates that the procedure:

[P]rovide for the safety of the minor, other minors, facility staff, and the public by placing minors in the appropriate, least restrictive housing and program settings. Housing assignments shall consider the need for single, double or dormitory assignment or location within the dormitory.<sup>1</sup>

Section 1352 provides a non-exhaustive list of classification factors that must be considered upon admission. The classification factors must include, but are not limited to: “age, maturity, sophistication, emotional stability, program needs, legal status, public safety considerations, medical/mental health considerations and sex<sup>2</sup> of the minor.”<sup>3</sup> The classification procedure must also provide for periodic classification review, including provisions that consider the minor’s behavior while in custody.<sup>4</sup>

The manner in which the classification factors are listed in section 1352, with no numerical system, suggests that no one factor is more important than the other. Also, it is important to note that section 1352 specifically states that the list of classification factors is not exclusive. This implies that the Legislature intended probation officers be allowed the freedom and discretion to consider each minor’s individual qualities and characteristics when classifying

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<sup>1</sup> Tit. 15 Cal. Code of Regs., § 1352(a).

<sup>2</sup> Though section 1352 does not further define what is meant by considering the “sex” of the minor as a factor, in the absence of such a definition, we may turn by analogy to the definition of “sex” in other provisions of the California Code intended to prevent discrimination on the basis of sex. For instance, the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), which prohibits businesses from discriminating on the basis of “sex,” defines “sex” by reference to the definition of sex set forth in Government Code section 12926, subdivision (p) (the Fair Employment and Housing Act or FEHA), which prevents discrimination in employment and housing on the basis of sex. This provision in FEHA in turn defines “sex” by the definition of “gender” found in Penal Code section 422.56, subdivision (c). This latter section defines “gender” to mean “sex, and includes a person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” In the absence of a more specific definition of the meaning of “sex” in section 1352, it might be argued that the definitions in these other sections may be applied.

<sup>3</sup> Tit. 15 Cal. Code of Regs., § 1352(c).

<sup>4</sup> Tit. 15 Cal. Code of Regs., § 1352(d).

him or her for purposes of classification and facility placement. Probation's existing classification policy reflects the factors set forth in section 1352 and further takes into consideration the following factors: "admitting offense or reason, Juvenile Hall Detention file, statements of the minor, family, Probation Officer or Police Agency."<sup>5</sup> Since the classification factor list is non-exhaustive, it seems reasonable to conclude that the sexual orientation or gender identity of the minor may also be included as a factor to consider, and as noted *supra* at footnote 2, arguably it is already recognized as a factor under "sex." There is no legal prohibition against doing so, and in fact the literature on this topic consistently recommends housing minors according to their gender identity rather than their birth gender.<sup>6</sup>

## **B. Application of Placement Factors**

The following suggestions are based on a review of the literature in the placement of transgender minors. Probation should, of course, work with Mental Health and other professionals to review these suggestions with respect to the development of a policy regarding the classification and placement of transgender minors.

The safety and well-being of the transgender minor should be the primary concern when determining where to place the minor.<sup>7</sup> Dr. Bob Bidwell, a pediatrician at the Hawaii Youth Correctional Facility (HYCF)<sup>8</sup>, believes that MTF transgender minors should be housed with other females because such a placement is likely to keep the child physically safe.<sup>9</sup> Bidwell also believes that such a placement is better for the child's emotional well-being. He states that significant psychological harm is caused to a minor who identifies with one gender and is told by the system that they are, in fact, the other gender. Such a practice goes against the prevailing recommendations of pediatricians, psychologists, social workers and other youth-serving professionals that individuals should be treated in accordance with their identified gender.<sup>10</sup>

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<sup>5</sup> See e.g. Probation Department Juvenile Hall Procedures Manual, section 6.06.B.1.

<sup>6</sup> See e.g. MAJD, MARKSAMER & REYES, *SUPRA*; MURRAY D. SCHEEL & CLAIR EUSTACE, MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS (2002); JODY MARKSAMER, DEAN SPADE & GABRIEL ARKLES: A PLACE OF RESPECT: A GUIDE FOR GROUP CARE FACILITIES SERVING TRANSGENDER AND GENDER NON-CONFORMING YOUTH (2011).

<sup>7</sup> KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, EQUITY PROJECT: HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS 109 (Legal Services for Children, Fall 2009).

<sup>8</sup> HYCF has placed every MTF except one with other girls for the past 16 years. In 2007, the facility adopted a written policy relating to LGBT youth that commits the facility to making placement decisions related to all transgender youth on a case-by-case basis.

<sup>9</sup> Dr. Bidwell is a member of the Equity Project Advisory Committee (EPAC). The Equity Project represents a unique collaboration of individuals and organizations with diverse expertise relevant to LGBT minors in the juvenile justice system. EPAC includes individuals with expertise in juvenile court processing, professionals with experience working with LGBT minors in juvenile courts, and LGBT minors who have been in the juvenile justice system.

<sup>10</sup> MAJD, MARKSAMER & REYES, *supra*, note 10 at 108.

The appropriate placement is harder to evaluate when the placement involves a female to male (FTM) placement as placement of FTM transgender minors raise more difficult issues. “Ideally transgender boys would be housed with other boys, and in certain circumstances it may be possible, but because of the high level of violence in many boys’ facilities and the high risk of physical and sexual abuse that transgendered boys could face if other boys learned that they were not born male, many of the transgender boys would be safer in girls’ facilities.”<sup>11</sup> Therefore, if a FTM cannot be safely placed with males he may be placed with females, but his male identity needs to be acknowledged and respected by the staff and other minors.<sup>12</sup>

Probation should make an individualized assessment of each transgender minor when considering placement. The minor should be consulted as to his or her preferred placement with respect to gender identity or birth identity, the safety of the minor should be considered, including the minor’s own evaluation of the safest placement, and Mental Health staff should be consulted.<sup>13</sup>

Finally, Probation should take into account privacy issues arising from group facilities, such as where the transgender youth may shower and dress.<sup>14</sup>

## **II. Recommendations and Model Protocols on Placing Transgender Youth in Juvenile Detention Facilities**

Probation has a responsibility to ensure that all minors are treated with respect and that the rights of transgender minors are upheld, particularly with respect to their safety, mental health, and privacy. Isolating a transgender minor for his or her own protection, for instance, or allowing verbal, physical or sexual abuse of a transgender minor, may constitute a violation of the minor’s due process rights under the Fourteenth Amendment.<sup>15</sup> Additionally, if staff acts in a discriminatory fashion, their actions could subject the County and themselves to claims of discrimination, as well as intentional or negligent infliction of emotional distress. At the very least, staff who discriminate against transgender youth violate the County of Santa Clara Policy Against Discrimination, Harassment, and Retaliation.<sup>16</sup> It is therefore important that once Probation has developed new policies and procedures, that Probation staff are trained, and that

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<sup>11</sup> MAJD, MARKSAMER & REYES, *supra*, note 10 at p. 108.

<sup>12</sup> MAJD, MARKSAMER & REYES, *supra*, note 10 at p. 108.

<sup>13</sup> MARKSAMER, SPADE & ARKLES, *supra*, at p. 35.

<sup>14</sup> *Id.* at p. 43.

<sup>15</sup> *R. G. v. Koller* (D. Haw. 2006) 415 F. Supp.2d 1129, 1154-1159 [Notably, Dr. Bidwell, *supra*, was one of the experts in this case and testified he believed that a MTF transgender minor was “better off . . . with the girls than anywhere else at the [facility] and that this placement kept them physically and psychologically safe.” *Id.* at p. 1145.

<sup>16</sup> This policy provides that “. . . it is the policy of the Board of Supervisors that: . . . no person shall be denied, or provided unequal access to, programs, services or contracting opportunities on the basis of . . . gender, sexual orientation [or] gender identity . . .” The Policy further provides that the “County does not tolerate discrimination, harassment or retaliation in any form; therefore, any violation of this policy will generate prompt and appropriate action.”



they fully understand the new policies and procedures, comply with them and treat transgender minors with respect and dignity, as with any other minor.

The following recommendations are from the Equity Project Advisory Committee and are designed to help guide staff in detention and correctional facilities in making housing and classification decisions for transgender minors<sup>17</sup>:

- Intake staff in detention and correctional facilities should not automatically house transgender minors according to their birth gender.
- Individualized housing and classification decisions should be made based on the transgender youth's emotional and physical well-being, prioritizing the minor's evaluation of his or her safety.
- Staff should also consider the minor's privacy concerns, available housing options, and recommendations from the minor's mental health providers regarding appropriate housing or classification. Some facilities have developed specialized committees with particular expertise on these issues to make placement decisions for transgender minors.
- In most cases, facilities should house transgender minors according to their core gender identity rather than their birth gender. However, in some cases, it may be necessary to place transgender youth according to birth gender to protect their physical and emotional well-being. This is particularly true for transgender boys who face high risk of assault in boys' facilities if the other boys discover they are transgender.
- Facilities must accommodate transgender minors by providing access to private bathrooms and showers, when necessary, or a single room for sleeping. Privacy accommodations should not prevent transgender minors from full integration into the facilities' daily programming.
- Facilities might consider housing a transgender minor in a mixed-gender unit or program. Such placements reduce a transgender minor's vulnerability to violence and harassment and avoid some other difficulties associated with gender-segregated placements.

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<sup>17</sup> MAJD, MARKSAMER & REYES, *supra*, note 10 at p. 109.

### **CONCLUSION**

Probation may choose to place a MTF transgender minor in a female juvenile detention facility, if upon the initial classification or review of the classification of the minor, it is determined to be in her best interest. There are no specific laws that would make it unlawful for the Probation Department to house a MTF minor in a female facility; rather, state regulations suggest consideration of gender identity be considered in making classification decisions. Furthermore, experts in this subject believe housing a MTF minor with other females is the best choice for the minor's physical and emotional well-being.