

Written Statement of
The Equity Project

Submitted to
Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety
Consequences

Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and
Human Rights
February 25, 2014,
2:30 p.m.

For further information, contact Christina Gilbert, Equity Project Director, at
cgilbert@njdc.info

Dear Chairman Durbin and Members of the Subcommittee,

The Equity Project is grateful for the opportunity to submit testimony regarding lesbian, gay, bisexual, and transgender (LGBT) youth in solitary confinement (also defined in this testimony as “isolation”) in the juvenile justice system. The Equity Project is a collaborative initiative (of the National Juvenile Defender Center, National Center for Lesbian Rights, and Legal Services for Children) dedicated to ensuring that LGBT youth in juvenile delinquency courts are treated with dignity, respect, and fairness. The Equity Project examines issues of sexual orientation, gender identity, and gender expression at all stages of a delinquency case, from arrest through post-disposition.

Solitary Confinement has Long-term, Permanent, Harmful Impacts, and is Inconsistent with Policies of Professional Medical and Mental Health Organizations in the United States, as well as International Human Rights Principles.

Solitary confinement has resulted in an array of negative physical and psychological effects for individuals, including anxiety, depression, lethargy, aggression, self-harm and increased risk of suicide.ⁱ International human rights experts, such as the United Nations Special Rapporteur, have found that isolation may amount to torture, and have called for sweeping reform of solitary confinement, including a complete ban of solitary confinement for juveniles.ⁱⁱ Given the research on adolescent development and the brain, isolation is likely to cause even greater harm to youth than it does to adults,ⁱⁱⁱ causing leading organizations such as the American Academy of Child and Adolescent Psychiatry to issue policy statements against such practices.^{iv}

Solitary Confinement of Children is Particularly Harmful and Interferes with the Rehabilitative Goals of the Juvenile Justice System

There is an inherent difference between children and adults. The juvenile justice system was founded on the principles of rehabilitation rather than punishment. The inappropriate and excessive use of solitary confinement of young people results in detrimental mental health effects and is traumatizing for youth. Yet, children are often put in isolation for “protection” or for disciplinary infractions. Solitary confinement of children also often interferes with their education and other programming.^v

Research has shown that children are different than adults, in that children’s brains are still developing, making them even more vulnerable to the damaging effects of long periods of isolation.^{vi} Additionally, disproportionate numbers of youth in the juvenile justice system have substance abuse disorders, mental health problems, and have experienced trauma. Isolation often exacerbates these problems.^{vii}

A report from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) found a strong correlation between youth who had committed suicide in juvenile facilities and those youth who were in isolation at the time.^{viii} The American Psychiatric Association has stated that “[c]hildren should not be subjected to isolation, which is a form of punishment that is likely to produce lasting psychiatric symptoms.”^{ix} Rather than protecting youth, isolation puts children at greater risk of self-harm and suicide. Given these increased risks, including for depression, anxiety, and suicide attempts, many organizations oppose the use of solitary confinement for children.^x The Special Litigation Section of the United States Department

of Justice Civil Rights Division has also made numerous findings of inappropriate and excessive use of solitary confinement for juveniles over the last ten years.^{xi} Additionally, courts have found that the isolation of youth amounts to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.^{xii} While no youth should be held in solitary confinement, the Equity Project has found that LGBT youth are particularly susceptible to the overuse of isolation in the juvenile justice system.

LGBT Youth are Inappropriately and Excessively Placed in Solitary Confinement

LGBT youth are particularly vulnerable to harassment and abuse when incarcerated.^{xiii} Some facilities automatically isolate LGBT youth for their “protection” or due to a completely erroneous belief that LGBT youth are sexual predators based on their sexual orientation or gender identity alone. Isolating LGBT youth solely based on sexual orientation or gender identity not only violates their constitutional rights, but also harms their emotional wellbeing.^{xiv} For example, Antoine, a 17-year old in the California Youth Authority (CYA), with no accusations or charges of a sexual offense, was automatically placed in a sex offender unit for identifying as bisexual. Other youth and staff consistently abused Antoine, verbally, physically, and sexually. Antoine was placed in solitary confinement for his “protection” from such ongoing abuse. Antoine was confined to his cell and excluded from education for up to 23 hours a day for several months, resulting in a denial of his right to an adequate education.^{xv}

Juvenile detention staff, who witness the abuse of LGBT youth, like Antoine, may feel that their only option to protect these children is to put them in isolation, viewing such use as non-punitive. However, the conditions of such “non-punitive” isolation are generally indistinguishable from punitive isolation. Placing an LGBT youth in these conditions is in effect punishing the youth for his or her identity (*i.e.* not being heterosexual and/or cisgender). This continual isolation can lead to lowered self-esteem and mental distress.^{xvi}

In *R.G. v. Koller*,^{xvii} a groundbreaking case against the Hawai'i Youth Correctional Facility (HYCF), the court granted the plaintiff (a group of LGBT and LGBT-perceived youth)'s motion for a preliminary injunction, finding that the youth would likely prevail at trial in showing that HYCF violated their due process rights by putting them in isolation. Specifically, the court found that HYCF (1) failed to protect the plaintiffs from physical and psychological abuse, (2) used isolation as a means to protect LGBT youth from abuse, (3) failed to provide policies and training necessary to protect LGBT youth, (4) did not have adequate staffing and supervision or a functioning grievance system, and (5) failed to use a classification system that protects vulnerable youth.^{xviii}

In a declaration by the medical expert in *R.G. v. Koller*, Dr. Robert Bidwell made a statement about the well-known negative psychological impact of long periods of isolation: “With respect to LGBT[Q] youth, isolation may be perceived as punishment for being LGBT[Q], which evokes feelings of rejection and depression and may manifest itself through a variety of physical symptoms ranging from headaches to self-mutilation.”^{xix}

In addition to isolating youth for protection, facility staff also punish LGBT youth for benign behaviors that they mistakenly assume are sexually predatory. According to Devon, a young lesbian, “If I was talking to another girl, they’d think something sexual was happening. Once I was put on isolation for two weeks, they thought I was getting too close to a female...that made me feel real depressed.”^{xxx}

Equity Project findings indicate that these experiences are not unique. Professionals interviewed overwhelmingly agreed that LGBT youth face particularly acute abuse, harassment, isolation, and disrespect while incarcerated, because of their sexual orientation or gender identity.^{xxxi}

Positive Steps to Reform the Use of Solitary Confinement for Juveniles

The Equity Project commends the work being done in states around the country to reform the use of solitary confinement of children. For example, the juvenile standards issued by the Department of Justice under the Prison Rape Elimination Act (PREA), require, “Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged. During any period of isolation, agencies shall not deny residents daily large-muscle exercise and any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible.”^{xxxii}

Earlier this month, the New York State Department of Corrections and Community and Supervision reached an agreement with sweeping reform on the use of solitary confinement in New York State, including taking immediate action to remove youth from isolation.^{xxxiii} Nevada has also created new limits on isolation of youth in juvenile facilities, specifically banning the use of isolation for a juvenile for longer than 72 hours.^{xxxiv} West Virginia also has a ban on punitive isolation in juvenile facilities.^{xxxv} Additionally, Texas has passed legislation for a comprehensive review of solitary confinement, including in juvenile facilities.^{xxxvi} However, much more needs to be done. Congress should support and encourage sweeping reform of the use of solitary confinement for juveniles.

Recommendations

- **Support increased federal oversight, monitoring, transparency, and funding for alternatives to solitary confinement.**
 - Ban solitary confinement for all children under the age of 18.
 - Support the development of responses to abuse or harassment (or threat of abuse or harassment) of LGBT youth that do not rely on the isolation or segregation of LGBT youth.
 - Create regulations that require all vulnerable youth are placed in the least restrictive environment necessary to ensure safety and provide youth with equal access to facility services.
 - Support technical assistance efforts to assist juvenile facilities in revising their policies and practices to ensure that youth are not subjected to solitary confinement.

- Support the reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJDP A) and condition funding to the States on elimination of solitary confinement for juveniles as an additional core mandate.
- Provide funding for DOJ to investigate solitary confinement in juvenile facilities, including explicit provisions regarding LGBT youth.
- Provide federal funding through the Bureau of Justice Assistance (BJA) or another entity to support federal, state, and local efforts to reduce the use of solitary confinement of juveniles, with a focus on programming and other alternatives.
- Require juvenile facilities to report to the Bureau of Justice Statistics (BJS) which juveniles are held in solitary confinement, for what reason and how long, as well as the impact of the practice on cost, facility safety, incidents of self-harm, and recidivism.
- On an annual basis the raw data and statistical analysis should be published by BJS, presenting a comprehensive review of the use of solitary confinement in the United States. In conjunction with the annual release of these statistics, a review panel of appointed experts would conduct public hearings to review the findings, hear from stakeholders, and issue recommendations.
- **Require reforms to the use of solitary confinement in federal facilities operated by the Bureau of Prisons (BOP).**
 - BOP should immediately implement a ban on the solitary confinement of juveniles held in federal custody
- **Ensure that the United States fully engages in the international effort to reform the use of solitary confinement.**
 - The Subcommittee should formally request that the U.S. Department of State play an active role in the overdue process of updating the United Nations Standard Minimum Rules for the Treatment of Prisoners. New provisions should be included to ban the solitary confinement of juveniles and to prohibit the use of “gender identity” and “sexual orientation” as grounds for discrimination in juvenile facilities.
 - The Subcommittee should formally request that the U.S. Department of State stop impeding the longstanding formal request by the United Nations Special Rapporteur on Torture to investigate of the use of solitary confinement in the United States.
- **Support rulemaking to reduce the use of solitary confinement in juvenile facilities**
 - The Subcommittee should call for rulemaking by the U.S. Department of Justice that ensures the development of smart, humane and evidence-based national best practices and regulations that will limit the use of all forms of isolation and solitary confinement.

Endnotes

- ⁱ Sandra Simkins et al., *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U.J.L. & POL'Y 241, 254 (2012).
- ⁱⁱ The Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman, or degrading treatment or punishment, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, delivered to the General Assembly*, U.N. Doc. A/66/268 (Aug. 5, 2011).
- ⁱⁱⁱ Simkins et al., *supra* note i at 257.
- ^{iv} Academy of Child and Adolescent Psychiatry, Juvenile Justice Reform Committee, Solitary Confinement of Juvenile Offenders (Apr. 2012), available at http://www.aacap.org/cs/root/policy_statements/solitary_confinement_of_juvenile_offenders
- ^v Simkins et al., *supra*, note iii.
- ^{vi} Academy of Child and Adolescent Psychiatry, *supra*, note iv; Simkins et al., *supra*, note i at 257-61.
- ^{vii} Simkins et al., *supra*, note i at 259.
- ^{viii} Lindsay M. Hayes, Juvenile Suicide in Confinement: A National Survey, Office of Juvenile Justice and Delinquency Prevention (February 2009).
- ^{ix} Press Release, American Psychiatric Association, Incarcerated Juveniles Belong in Juvenile Facilities (Feb. 27, 2009), available at http://www.nijn.org/uploads/digital-library/resource_1050.pdf
- ^x American Academy of Child and Adolescent Psychiatry, *supra* note iv.
- ^{xi} See, e.g., Findings Letter from Ralph F. Boyd, Jr., Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Ronnie Musgrove, Governor, State of Mississippi (June 19, 2003), available at http://www.justice.gov/crt/about/spl/documents/oak_colu_miss_findinglet.pdf; Findings Letter from Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Mitch Daniels, Governor, State of Indiana (Jan. 29, 2010), available at http://www.justice.gov/crt/about/spl/documents/Indianapolis_findlet_01-29-10.pdf; Findings Letter from R. Alexander Acosta, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Jennifer M. Granholm, Governor, State of Michigan (Apr. 19, 2004), available at http://www.justice.gov/crt/about/spl/documents/granholm_findinglet.pdf.
- ^{xii} Simkins et al., *supra*, note i at 263.
- ^{xiii} Majd, Marksamer, and Reyes, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts," (hereinafter "Hidden Injustice") (2009) at 102.
- ^{xiv} *Id.* at 5.
- ^{xv} *Id.* at 127.
- ^{xvi} Valentino, Amanda, "Part 1: LGBTQ Youth in the Juvenile Justice System," LGBT Litigator, American Bar Association (2011), available at: <https://apps.americanbar.org/litigation/committees/lgbt/articles/winter2011-valentino-juvenile-justice-system.html>
- ^{xvii} *R.G. v. Koller*, 415 F. Supp.2d 1129, 1133 (D. Haw. 2006)
- ^{xviii} Hidden Injustice *supra*, note xiii, at 101.
- ^{xix} Declaration of Robert J. Bidwell, M.D., *R.G. v. Koller*, 415 F. Supp. 2d 1129 (2006) (Civ. No. 05-566 JMS/LEK) (Sept. 2005).
- ^{xx} Hidden Injustice, *supra*, note xiii at 104.
- ^{xxi} *Id.* at 107.
- ^{xxii} Prison Rape Elimination Act (PREA) Juvenile Standards, 28 C.F. R. § 115.342 (b)
- ^{xxiii} See Stipulation for a Stay with Conditions, Docket No. 11-CV-2694 (SAS), Peoples v. Fischer, (S.D.N.Y. Jan. 24, 2014), available at http://www.nyclu.org/files/releases/Solitary_Stipulation.pdf.
- ^{xxiv} See Nev. SB 107, available at <http://www.leg.state.nv.us/Session/77th2013/Reports/history.cfm?billname=SB107>.
- ^{xxv} See Associated Press, *W.Va. Ends Solitary Confinement for Juveniles*, TIMES W.V., Apr. 26, 2012, available at <http://www.timeswv.com/westvirginia/x130096856/W-Va-ends-solitary-confinement-for-juveniles>.
- ^{xxvi} <http://www.capitol.state.tx.us/billlookup/Text.aspx?LegSess=83R&Bill=SB1003#>.