LOIS K. PERRIN #8065
ACLU OF HAWAII FOUNDATION
P.O. Box 3410
Honolulu, HI 96801
Telephone: (808) 522-5907; Facsimile: (808) 522-5909
Email: lperrin@acluhawaii.org

CIVIL NO. 05-566 JMS/LEK
[Civil Rights Action]

TAMARA LANGE *Admitted Pro Hac Vice*
ACLU FOUNDATION
LESBIAN & GAY RIGHTS PROJECT
1663 Mission Street, Suite 460
San Francisco, CA 94103
Telephone: (415) 621-2493; Facsimile: (415) 255-8437
Email: tlange@aclu.org

ALSTON HUNT FLOYD & ING
PAUL ALSTON #1126
MEI-FEI KUO #7377
ASB Tower
1001 Bishop Street, 18th Floor
Honolulu, HI 96813
Telephone: (808) 524-1800; Facsimile: (808) 524-4591
Email: palston@ahfi.com

MORRISON & FOERSTER LLP
ANGELA L. PADILLA *Admitted Pro Hac Vice*
MATTHEW I. HALL *Admitted Pro Hac Vice*
DERIK T. FETTIG *Admitted Pro Hac Vice*
NATALIE NAUGLE *Admitted Pro Hac Vice*
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000; Facsimile: (415) 268-7522
Email: apadilla@mofo.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

R.G., an individual; C.P., an individual by and through her next friend, A.W.; and J.D., an individual, Plaintiffs, v. LILLIAN KOLLER, Director of the State Department of Human Services, in her individual and official capacities; SHARON AGNEW, Director of the Office of Youth Services, in her individual and official capacities; KALEVE TUFONO-IOSEFA, Hawaii Youth correctional Facility Administrator, in her individual and official capacities; *et al*., Defendants.	CIVIL NO. 05-566 JMS/LEK [CIVIL RIGHTS ACTION] PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

PRELIMINARY FINDINGS OF FACT

Background

1. The Hawaii Youth Correctional Facility ("HYCF") is a secure juvenile correctional facility operated by Office of the Youth Services ("OYS") and located in Kailua, Hawaii. OYS is administratively associated with the Department of Human Services ("DHS").[1]

2. Children who have been adjudicated delinquent in court may be committed to HYCF, the only such secured facility in the State of Hawaii. (Declaration of Lois Perrin, Ex. B, "DOJ Report" at 3 ("DOJ Report").) HYCF is separated into three housing units: the Secured Care Facility, which is comprised of three housing modules for boys, the Observation and Assessment Cottage ("O & A") for girls, and Ho'okipa Makai, a cottage for housing short-term boys. (Declaration of Kaleve Tufono-Iosefa ("Tufono-Iosefa Decl.") ¶¶ 6, 7, 8, 9.)

3. Plaintiffs are three teenagers who have been confined at the Hawaii Youth Correctional Facility and who have been subjected to a campaign of unrestrained harassment, abuse, discrimination and isolation because they are or are perceived to be lesbian, gay, bisexual or transgender ("LGBT"). Each of the

[1] The Court's findings herein are based on the limited record before the Court, and are preliminary in nature.

Plaintiffs has been confined at HYCF on more than one occasion. (*See* Findings of Fact 4, 5, 6.) Plaintiffs sought and received permission to proceed in this action using pseudonyms. (FAC ¶ 19; 9/6/05 Order.)

4. Plaintiff R.G. is a gay female who has been confined at HYCF on three occasions, for a total of approximately 15 months. (Declaration of R.G. ("R.G. Decl.") ¶ 2, 3,7, 44-47.) R.G. was first confined at HYCF from March 2004 to June 2004. (*Id*.; Tufono-Iosefa Decl. Ex. G.) R.G. was later returned to HYCF in August 2004 and remained there until August 2005. (R.G. Decl. ¶ 7; Tufono-Iosefa Decl. Ex. G.). R.G. was returned to HYCF a third time on September 8, 2005, after the complaint in this action had been filed. (R.G. Decl. ¶ 47.)

5. Plaintiff J.D. is a boy who was perceived to be gay while at HYCF and has been confined at HYCF on two occasions, for a total of approximately six months. J.D. was first confined at HYCF from July 27, 2004 until January 4, 2005. (Tufono-Iosefa Decl. Ex. I.) J.D. was returned to HYCF a second time on June 20, 2005 and remained there until July 5, 2005. (Declaration of J.D. ("J.D. Decl.") ¶¶ 50, 53; Tufono-Iosefa Decl. Ex. I.)

6. Plaintiff C.P. is a transgender girl who was first confined at HYCF in February 2004. (Declaration of C.P. ("C.P. Decl.") ¶ 10.) C.P. remained at HYCF for most of 2004, excepting a short-lived foster placement in July of

2004. (C.P. Decl., ¶ 11, 25.) C.P. was placed in a foster program in December of 2004 and remained in foster placements until her return to HYCF in August of 2005, just weeks before this action was filed. (C.P. Decl. ¶ 51-52.) C.P.'s confinement at HYCF totaled approximately eight months.

7. Defendants are, in their individual and official capacities: Lillian Koller, Director of the DHS; Sharon Agnew, Director of OYS; Kaleve Tufono-Iosefa, the Hawaii Youth Correctional Facility Administrator ("YFA"); and the following Youth Corrections Officers ("YCO") and Youth Corrections Supervisors ("YCS"): YCO Cynthia Hubbell, YCS Phyllis Rosete, YCO Earlene Josiah, YCO Leila Holloway, YCO Henry Haina (also a HYCF Investigator), former YCO and current YCS Mitch Simao and YCO Michael Kim.[2] (FAC ¶¶ 21-31.)

8. Plaintiffs filed a motion for preliminary injunction seeking relief on their due process, equal protection, establishment clause and access to counsel claims. Plaintiffs ask the Court to require defendants to refrain from harassing, abusing, discriminating against, or isolating plaintiffs based on their actual or perceived sexual orientation, gender identity or sex; to refrain from failing to

[2] Plaintiffs have informed Defendants of their intent to dismiss Defendant YCOs Alvaro and Koehler from this action in both their individual and official capacities, as well as YCS Phyllis Rosete in her individual capacity.

protect plaintiffs from anti-LGBT and sex stereotyping peer harassment and abuse; to refrain from endorsing religion and engaging in religious indoctrination, and to refrain from obstructing plaintiffs' access to counsel. Plaintiffs also ask the Court to direct defendants to take measures necessary to redress the alleged severe climate of anti-LGBT and sex-stereotyping harassment at HYCF, including the prompt retention of a mutually agreed-upon corrections expert to guide development and implementation of necessary policies, procedures, and training.[3]

Defendants Knew That Conditions at HYCF Were Unsafe for Vulnerable Youth Long Before R.G., J.D. and C.P. Were Sent There

9. On August 14, 2003, the ACLU of Hawaii issued a report detailing systemic problems at HYCF, including many of the unsafe conditions that plaintiffs allege persist to this day and threaten them with irreparable harm if not enjoined, including excessive confinement in isolation cells, inadequate supervision and training of YCOs, lack of access to counsel, and a completely defunct grievance procedure. (Perrin Decl. ¶ 2 & Ex. A at 3.)

10. Since the summer of 2003, the ACLU of Hawaii and co-counsel Alston, Hunt, Floyd & Ing have monitored conditions at HYCF and have tried, without success, to obtain cooperation from state officials, including

[3] For the Court's convenience, plaintiffs intend to file a proposed injunction in addition to these proposed findings of fact and conclusions of law.

Defendants Agnew and Tufono-Iosefa, to correct acknowledged but uncorrected deficiencies that plaintiffs contend threaten to subject them to unsafe conditions at HYCF. These include the need for adequate training of staff regarding treatment and care of vulnerable youth and LGBT youth in particular, the need for adoption of an effective grievance system, the need to cease the practice of endorsing religion generally and specific anti-LGBT Christian denominations in particular, and the need to ensure meaningful access to counsel and the courts. (Perrin Decl. ¶ 3 & Exs. E, G; Alston Decl. ¶¶ 7-8 & Exs. 1-4, 6.)

11. On August 16, 2004, when all three of the plaintiffs were confined at HYCF, the United States Department of Justice ("DOJ") launched a year-long investigation of conditions, policies and practices at HYCF. (Perrin Decl. ¶ 4 & Ex. B.) At the conclusion of DOJ's initial visit to HYCF on October 8, 2004, DOJ provided defendants with two extensive oral debriefings informing Defendants Agnew and Tufono-Iosefa as well as former First Deputy Attorney General Richard Bissen of DOJ's preliminary findings. (DOJ Report, at 1-2.)

12. On August 4, 2005, the DOJ issued a report finding major constitutional deficiencies at HYCF, including failure to protect wards from self-harm, staff violence, and youth-on-youth violence, excessive use of disciplinary isolation, lack of adequate supervision, and an inadequate grievance system. (DOJ Report at 5–6.)

13. The DOJ Report is admissible pursuant to Fed. R. Evid. 803(8), and the Court accords substantial weight to its factual findings regarding the conditions, policies, patterns and practices at HYCF as of October 2004, as those findings are the result of a thorough on-site investigation by neutral investigators from a government agency charged with the responsibility of seeking "remedies for any pattern or practice of conduct that violates the constitutional or federal statutory rights of children in juvenile justice institutions." (DOJ Report at 1.)

14. Although defendants are currently in negotiations with the Department of Justice, they have offered no evidence that those negotiations encompass LGBT issues, or that the outcome of those negotiations will address the core issue presented by plaintiffs' Motion: anti-LGBT and sex stereotyping harassment, abuse, and discrimination.

Plaintiffs' Experiences At HYCF Establish a Pattern and Practice of Unrestrained Anti-LGBT Treatment and Sex Stereotyping At HYCF

Plaintiffs Were Subjected to Relentless Verbal Abuse By Staff and Other Wards Based on Plaintiffs' Actual or Perceived Sexual Orientation or Gender Identity

15. Plaintiffs submitted extensive evidence that they were subjected by HYCF staff and by other wards to a relentless campaign of verbal abuse, including derogatory comments and name calling, based on plaintiffs' actual or perceived sexual orientation or gender identity. Much of the verbal abuse

occurred in the presence of or was reported to HYCF staff, to the YFA, or even to the Director of OYS, yet investigation and discipline of offending staff and wards were at best infrequent and at worst non-existent.

16. The record before the Court is replete with documents and testimonial evidence demonstrating a barrage of verbal harassment and abuse. The examples listed below are intended to be illustrative and not exhaustive.

17. The staff at HYCF, including Defendants Josiah and Hubbell, routinely referred to R.G. as "butchie" or other slurs based on sexual orientation or failure to conform to gender stereotypes. (R.G. Decl. at ¶ 10; Transcript of 12/20/05 Hearing ("Tr. I") at 11:15-12:21 (R.G.); Transcript of 12/21/05 Hearing ("Tr. II") at 71:1-72:11 (Hadley); Joint Exs. 26 (Daily Report written by Defendant Hubbell stating that R.G. "carries herself like she's the bull or something"); 27 (Daily Report written by Defendant Josiah that that the other wards complained about how "sick" R.G. and T.R.'s "butchie action" is, that it is "nauseating," "unwelcoming" and "just down right nasty"); 29 (Daily report written by Defendant Josiah noting that R.G. "has an identity problem. Too much thinking that she is a boy."); 30 (Defendant Josiah stating that that "staff is getting tired of the butchie action,"); 32 (Daily report written by defendant Hubbell, stating that R.G. is "playing the bull"); 38 (Comment Report written by Defendant Hubbell describing "footsies" as "butchy action").)

18. Defendant Hubbell regularly referred to R.G. and other female wards as "fucking bitches," or "fucking cunts," and referred to female wards who identify as gay, who express romantic feelings for other girls or who fail to conform to sex stereotypes as "butchie." (Tr. II at 71:1-72:11 (Hadley); 86:9-16 (R.G.); 87:11-88:16 (J.D.))

19. Defendant Tufono-Iosefa held a group meeting on April 20, 2005 focusing on R.G.'s romantic relationship with another female ward, T.R. (R.G. Decl. ¶ 27-35; Tufono-Iosefa Decl. ¶ 37; Tr. at 183:16-187:15; 199:4-18.) During this meeting, Defendant Tufono-Iosefa expressed her own views that being gay was "wrong" and "disgusting" and required the other wards to develop rules and punishments for R.G. and T.R. R.G. Decl. ¶¶ 27-35; Hadley Decl. ¶ 3; Tr. II at 74:6-76:1 (Hadley).

20. Being repeatedly referred to as a "butchie" (a word that R.G. had never heard prior to being confined at HYCF) made R.G. feel "ugly." (Tr. I at 11:15-12:14.) Such consistently negative comments from HYCF staff, including the YFA, to R.G. regarding her sexual orientation has changed the way that R.G. views herself and others. R.G. feels as if she is not "normal" and believes that relationships with other women are not "romantic." (R.G. Decl. ¶ 42). Instead, R.G. now refers to dynamics in her relationship "butchie shit" even though that word makes her feel badly about herself. (*Id.*)

21. On a regular basis, other wards called J.D. names such as "Wahine" "pussy," "gay fucker," "head," "dick sucker," "faggot," "mahu," "gay motherfucker," and "fucking gay bitch," (J.D. Decl. ¶¶ 6, 18, 19, 24, 29 & Exs. A, B; Joint Exs. 57, 61, 86.) Defendant Haina, when asked by another ward if J.D. was gay, replied, in the presence of other wards, "Yes, [he] is a legal known fag." (Bidwell Decl. ¶ 31; Joint Ex. 86.) In his declaration testimony, defendant Haina did not deny making this statement.

22. Many of these incidents occurred in the presence of HYCF staff, or were reported to staff, but the paucity of disciplinary records submitted by defendants indicates that, with respect to the vast majority of instances, staff took no action. (Joint Ex. 61.) Even when staff documented incidents, disciplinary measures were either non-existent or were ineffective in stopping further harassment. (Joint Exs. 65 (no discipline for ward J.D. said "grabbed his nuts"); 66-67 (discipline for "fighting" for ward J.D. said called him mahu and who staff saw spit on and hit J.D.); 79 (J.D. reported harassment and social worker talked to wards); 80 (YCO describes relentless harassment, stating she talked to wards); 81 (YCO describes continuing harassment, no evidence of discipline).

23. Certain YCOs and YCSs routinely called C.P. derogatory names based on her sexual orientation and/or gender identity. Defendant YCS Mitch

Simao repeatedly referred to C.P. as "cupcake" and "fruitcake." (C.P. Decl. ¶¶ 17, 20; Tr. I at 131:3-8 (C.P.).) Another YCO, Tavako, regularly referred to C.P. as "twinkle toes" and "fairy." (C.P. Decl. ¶ 18; Tr. I. at 131:17-20 (C.P.).)

24. Although C.P. was originally housed with the girls at O & A, most of the male staff at HYCF still referred to her as a boy, or "he." (C.P. Decl. ¶ 15, 21.) Although defendant Haina typically referred to wards only by their last names, he regularly referred to C.P. as "Mr." and consistently referred to C.P. as "he" or "him" (Tr. I at 132:15-22.)

25. On one occasion, when female wards were braiding each other's hair, Defendant YCS Simao told C.P. she could not have her hair up, and that she was not allowed to play with her hair "like the girls." Various YCOs threatened to cut off C.P.'s hair, to send her "over to the boys" side or put her in isolation or lockdown because she is a transgender girl. (C.P. Decl. ¶¶ 16, 19, 21; Tr. I at 130-1-16.)

26. Wards at HYCF also routinely called C.P. derogatory names, such as "fucking faggot" and "fucking mahu," in the presence of staff. (C.P. Decl. ¶ 19; Tr. I at 131:15.) Staff testified that such name-calling was a daily occurrence. (Tr. I at 220:19-22 (Alvaro).) Although such comments were made in the presence of HYCF staff, and although C.P. complained about such harassment even when it occurred outside the presence of HYCF staff, the staff

failed to discipline or stop the wards from calling her names. (C.P. Decl. ¶ 19.) C.P.'s account is corroborated by contemporaneous medical notes by her treating physician over a period of nearly a year, that relate material details of the harassment suffered by C.P., including that certain YCOs routinely ignored such harassment. (*See* Exh. 54 (bates no. 1498, 10/6/04), (bates no. 1499 (11/29/04), (bates nos. 1500-01, 1503, 8/15/05 to 8/17/05).)[4]

27. The record before the Court establishes that such verbal abuse and harassment is commonplace at HYCF. (Tr. I at 64:9-15; 73:23-75:15 (Bidwell); *id.* at 220:19-22 (Alvaro (stating that, although he did not recall hearing wards call J.D. names like "faggot," "it's a daily thing.")), and continues unabated with no regard for the detrimental effects that it has on plaintiffs and other wards at HYCF. (Tr. I. at 71:20-73:5 (Bidwell); Bidwell Decl. ¶ 16.) Additionally, the conduct of staff and other wards in this regard frequently has been investigated inadequately or not at all. Indeed, the limited evidence

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[4] The court finds that statements made by wards to Dr. Bidwell, Nurse Hadley and other medical staff in the context of medical visits and for purposes of defining or explaining the patient's own mental or physical state, including, for instance, anxiety, depression, or other psychological or emotional upset, are admissible as statements for purposes of medical diagnosis. Fed. R. Evid. 803(4).

defendants have adduced regarding discipline of wards responsible for the harassment and abuse reported by plaintiffs supports plaintiffs' claims that staff and wards were virtually never disciplined for such conduct. *See supra* ¶ 22.

28. Dr. Robert Bidwell is the treating physician at HYCF as well as a professor at the University of Hawaii Medical School, and is an expert in the field of adolescent medicine with special expertise in adolescent medicine in the juvenile correctional setting, and in the treatment of LGBT adolescents. Dr. Bidwell testified that the use by HYCF staff of terms like "faggot," "mahu," and "butchie" to refer to wards is a daily occurrence at HYCF, and is symptomatic of a culture of abuse toward LGBT wards at HYCF. (Tr. I. at 73;23-75:5.)

29. Dr. Bidwell testified that such name-calling directed at teenagers confined at HYCF is far more damaging than similar name-calling directed at adults. (Tr. I at 69:21-70:17.) First, whereas adults may have a well-defined sense of self, for adolescents, in general, identity development is a core developmental task, (Ryan Decl., Ex. B at 3) and thus adolescents are far more likely to be psychologically and emotionally affected by name-calling and other identity-based harassment than adults (Tr. I at 69:21-70:17; Ryan Decl., Ex. B at 4-5.) Second, LGBT adolescents are a particularly vulnerable population in this respect because their developing sense of identity includes issues of sexual orientation and gender identity, and many LGBT adolescents previously have

received negative messages from authority figures regarding their sexual orientation and gender identity. (Bidwell Decl., ¶ 17). Third, in the youth correctional setting at HYCF, the guards form something of an extended family for the youth, and, unlike youth in non-custodial settings, wards at HYCF cannot retreat to the safety of their home and family at the end of the day. (Bidwell Decl., ¶ 17). Indeed, wards typically call YCOs and YCSs Aunty or Uncle. (Bidwell Decl. ¶17.) Thus, name-calling and other identity-based harassment based on actual or perceived sexual orientation or gender identity by guards at HYCF often is acutely damaging to wards who have been entrusted to the state's care by the family court. (Tr. I. at 68:24-70:7; Bidwell Decl., ¶¶ 16-17; *see also* Ryan Decl., Exh. B at 6-7.)

30. The casual use of the word "butchie" during court room testimony by Defendants' witness YCO Lawrence Alvaro reinforces plaintiffs' testimony that that word is used commonly at HYCF to refer to girls who identify as gay, who express romantic feelings for other girls, or who fail to conform to sex stereotypes. (Tr. I at 218:12-17).

31. Based on the record before the Court, it is likely that plaintiffs will again be subjected to unrestrained verbal harassment and abuse by staff and other wards should they return to HYCF.

Plaintiffs J.D. and C.P. Endured Physical and Sexual Assaults By Other Wards and Threats of Sexual Assaults Based on Plaintiffs' Actual or Perceived Sexual Orientation or Gender Identity

32. The record before the Court contains extensive documentation of anti-LGBT sexual assaults, physical assaults and threats of sexual assault, including rape. The examples listed below are intended to be illustrative and not exhaustive.

33. J.D. suffered unabated anti-gay sexual harassment and abuse by other wards at HYCF, including physical assaults and frequent threats of rape. (J.D. Decl. ¶¶ 5, 17, 18, 19, 22, Exs. A, B.)

34. Many wards threatened to physically and/or sexually assault J.D. on a regular basis, Tr. I. at 82:11-15, and several assaulted him repeatedly by subjecting him to various forms of unwanted sexual touching. For example, after making threats of rape and demanding that J.D. "give him head," J.D.'s roommate climbed on J.D.'s back while J.D. slept. (J.D. Decl. ¶ 3.) The incident made J.D. so frightened that he began to sleep sitting on the toilet to keep from being attacked from behind. (*Id.*)

35. Other wards also jumped on J.D. and pantomimed engaging in anal sex with him. (J.D. Decl., Ex. A). They grabbed J.D.'s buttocks or rubbed suggestively against him, in one case while he was in the shower. (J.D. Decl. ¶¶ 9, 19, 22 & Exs. A, B). Wards placed their pubic hairs on J.D.'s head or body.

And wards repeatedly told J.D. to "give [them] head" or "be their bitch," meaning have anal sex with them. (J.D. Decl. ¶ 3, 13, 23, Ex. B.)

36. One ward repeatedly hung his testicles out of his shorts and asked J.D. to look at his "eight pack," put his testicles in J.D.'s hands, said to J.D. "suck on this [referring to his penis], don't use your teeth," and repeatedly sprinkled pubic hair on J.D.'s head and body. (J.D. Decl. ¶ 17, 18 & Ex. B; Joint Exs. 51, 61, 62, 81.) Another ward rubbed semen on J.D.'s face, exposed his penis and demanded that J.D. join him in the shower. (J.D. Decl. ¶ 19.)

37. On August 2, 2004, J.D. wrote a grievance to Defendant Tufono-Iosefa spelling out in some detail the campaign of anti-gay verbal and physical harassment, sexual abuse, and threats of rape and other physical harm directed at him. (Joint Ex. 61.) Although J.D.'s grievance specified that his roommate had threatened to rape him and had jumped on him "motioning having anal sex" and that *other* wards had "done the same," had entered the showers while he was showering, were sitting next to him "rubbing up on [him]," and were putting pubic hairs on his head, Defendant Tufono-Iosefa's only response was to order that J.D. be placed in a single cell and to instruct YCOs "to pay extra attention on [J.D.] to prevent other wards from harassing him." (*Id.*)

38. Moreover, despite the instruction to single-cell J.D. and to watch out for him, YCOs continued to ignore harassment and refused to take action

when J.D. reported it to them. (Tr. I at 81:25-82:10; 85:8-86:9; 91:6-23; Joint Ex. 61.) In fact, YCOs also disregarded the instruction to keep J.D. in a single cell, and on several occasions he was required to share a room with other wards. (J.D. Decl. ¶ 12.)

39. On August 8, 2004, J.D. wrote a letter to Defendant Tufono-Iosefa describing the continuing harassment and explaining that

> this issue is not diminishing. It is progressing i.e. threats, exposure, sexual harassment, frottage, and fondling, intimidation. This crap happens on a daily basis and I am not exaggerating. For me this is too much shit for me and way too much stress. . . . I haven't even been here a month and I gotta deal with all this SHIT!
>
> I am not threatening you but very soon I will either hurt myself or someone else and I know none of us want this to happen." (Joint Ex. 57.)

Defendant Tufono-Iosefa received the letter on August 8th, but it was not until August 12th, four days later, that a social worker referred J.D. for a mental health assessment, leaving J.D. at risk of self-harm for four days without any intervention. (Joint Ex. 61.) Although he was cleared by medical staff on August 16th, (Joint Ex. 61), J.D. was kept in isolation "to provide [him] with a reasonably safe environment," Tufono-Iosefa Decl. at ¶ 32, until some time between August 23, when medical records reflect he was still in a holding cell, and August 31, by which point he had been released back to his module. (Joint Ex. 85.)

40. J.D.'s public defender had grave concerns about his emotional and physical well-being and safety and thus brought a petition for writ of habeas

corpus to have J.D. released from HYCF. (Brown Decl. ¶ 6.). The matter came on for hearing in August and September 2004 and resulted in a written opinion issued by Judge Frances Wong in March 2005. (Brown Decl. ¶ 7; Bidwell Decl. ¶ 32; Supp. Bidwell Decl., Ex. 1.) That opinion informed the supervisory defendants of the urgent need for "policies and operation procedures that are appropriate to the treatment of [LGBT] youth, that set standards for the conduct of youth correctional officers and other staff, and that provide on-going staff training and oversight" in order to address the "systemic" problem of anti-LGBT harassment at HYCF. (Bidwell Decl. ¶ 32; Supp. Bidwell Decl. Ex. 1 at 11.)

41. Although J.D. continued to report harassment on occasion, (Joint Exs. 65, 78, 79, 80, 81, 82, 86.), Dr. Bidwell testified that J.D. demonstrated over time a "growing cynicism that anything would make a difference. He did everything he should have done. . . . and I think eventually he decided that the system just wasn't working, that there was no use, and so he kind of stopped talking about stuff." (Tr. I 66:15-67:5.)

42. When J.D. was returned to HYCF in June of 2005, the harassment and threats of assault continued because wards who had known J.D. from his previous commitment told new wards that J.D. was gay. (J.D. Decl. ¶¶ 47, 51.)

43. Over the medical staff's objections, Defendant Tufono-Iosefa transferred C.P. in September 2005 from the girls unit to the boys' unit. (Tr. I at 180:8-16; 181:5-9.) After C.P.'s transfer, C.P. was subjected to escalating harassment and abuse from other wards, including physical and sexual assaults, masturbation directed at her, and threatening commands such as "suck my dick", "put this in your mouth and suck on it", or "give me head," and threats of rape and assault. (C.P. Decl. ¶¶ 32, 33, 34, 36, 40; Bidwell Decl. ¶ 46; Tr. I at 131:15-23; *compare* Joint Ex. 45 (10/22/04 C.P. Ltr. to YFA, reporting only minor problems) *with* Joint Ex. 48 (11/17/04 C.P. Ltr. to YFA reporting "hard time" from boys' teasing, name calling, and "making trouble," and stating "I feel hurt and it makes me go insane and angry.").)

44. Some of the male wards touched C.P., pulled her hair, threw things at her, told her to "give [them] head," or asked permission to rub her legs. (C.P. Decl. ¶ 33, 36.) Other male wards made comments like, "I want to feel your ass," "I want to fuck you," or asked her to show her breasts. (C.P. Decl. ¶ 34; Tr. I at 131:19-23.) Other male wards mooned her, pulled out their erect penises and showed them to her, or started masturbating in front of her. (C.P. Decl. ¶ 34.)

45. Dr. Bidwell testified that C.P. told him repeatedly during her stays at HYCF of the "daily harassment, verbal harassment, some physical

harassment, [and] sexual overtures," that she experienced. He further testified that the harassment was so severe that C.P. had "threatened suicide because of what she was going through," (Tr. I 65:21-24) and that C.P., as well as R.G. and J.D., exhibited several symptoms of post-traumatic stress. (Tr. I 67:9-68:23.)

46. The testimony of defendants' witness, YCO Rosete, indicates an awareness on the part of HYCF staff that C.P. would be harassed and abused if she were transferred to the boys' side. (Tr. II at 8:12-9:6.)

47. Defendants' own former juvenile corrections experts submitted declarations stating their expert opinion that they believed MTF transgender wards were "better off in O & A with the girls than anywhere else at HYCF and that the placement kept them physically and psychologically safe." (Griffis Decl. at ¶ 8, 11; *see also* Miesner Decl. at ¶ 7, 10; Roush Decl. at ¶ 11.)

48. Plaintiffs' testimony and supporting declarations and testimony from Dr. Bidwell indicate that defendants' pattern and practice of failing to take appropriate measures to stop and to prevent verbal, sexual and physical anti-LGBT harassment has severe medical and psycho-social repercussions for plaintiffs. (R.G. Decl. 42; J.D. Decl. 55-56; C.P. Decl. 65; Bidwell Decl. ¶ 16-18; Tr. I. at 67:9-68:10, 73:23-75:15 (Bidwell); Joint Exs. 1,2.) Similarly, declaration testimony from Caitlin Ryan provides evidence of clinical research results indicating that unrestrained anti-LGBT harassment of teenagers leads to

dramatically higher risk of depression and suicide attempts and has long-term repercussions for mental health. (Ryan Decl., Ex. B at 3-5 ("LGBT young adults (ages 21-25) who experienced high levels of anti-gay victimization in middle or high school were twice as likely to report symptoms of depression and substance abuse problems associated with addition as were their LGBT peers who experienced low levels of victimization. Moreover, 44% of LGBT young adults with high levels of victimization during adolescence reported suicidal ideation during the past six months, compared with 8% who had experienced low levels of victimization. More than two thirds (68%) had attempted suicide, compared with 20% who reported low victimization levels during adolescence.").)

49. Based on the record before the Court, it is likely that plaintiffs will again be subjected to unrestrained physical and sexual assaults and threats of assault by other wards should they return to HYCF, and that such treatment will inflict significant harm on plaintiffs.

Defendants Responded to Anti-LGBT Harassment by Isolating Plaintiffs

50. Defendants, as a matter of policy, employed isolation as a means of "protecting" certain LGBT wards, including C.P. and J.D., from conditions at HYCF. (Tufono-Iosefa Decl. ¶¶ 14, 25, 29, 32.)

51. In response to grievances filed by J.D. in August of 2004, regarding the continuous harassment he faced from other wards at HYCF, Defendant Tufono-Iosefa directed that J.D. be placed in isolation for his "safety." (J.D. Decl. ¶ 11–12, 32; Joint Ex. 61; Tufono-Iosefa Decl. ¶ 29.)

52. While J.D. was in the isolation cell, he was prevented from making any phone calls or writing any letters, allowed one hour of solo recreational time and one shower per day, and was allowed only a Bible and a book given to him by the nursing staff. (J.D. Decl. ¶¶ 34-36.)

53. The conditions in isolation were unbearable for J.D. (*id.* at ¶¶ 33-36), causing him to cut up his Remeron (sleep medication) into small pieces and take a little bit at a time so he could sleep all day. (J.D. Decl. ¶ 32 & Ex. A; Joint Exs. 59-60, 63; Tr. I at 118:14-20.)

54. Similarly, when Judge Wong asked at J.D.'s *habeas corpus* hearing, which was held at the end of September 2004, that defendant Tufono-Iosefa be told of the family court's concerns about the harassment, (Joint Ex. 76), defendant Tufono-Iosefa again ordered that he be placed in isolation. (J.D. Decl. ¶ 32 & Ex. A.) J.D. was returned to the module approximately one week later. (Tr. I 88:23-89:8.)

55. J.D. found solitary confinement so psychologically difficult that both times he was isolated he requested to return to the module rather than

remain in isolation, despite his knowledge that he would suffer further harassment in the module. (J.D. Decl. ¶ 36; Tr. I at 88:9-89:12.)

56. Similarly, in response to C.P.'s complaints of harassment, Defendants first subjected her to social isolation by physically segregating her from the other wards in the module and later by sending her to a holding cell. (C.P. Decl. ¶¶ 38, 39; Exs. A, B; Joint Ex. 48.) When not locked down, C.P. was instructed by YCOs not to have anything to do with any of the male wards—she was not supposed to sit with or near them, speak with them, look at them, or interact with them in any way. (C.P. Decl. ¶ 38, Joint Ex. 48.)

57. When C.P. returned to HYCF in August 2005, defendants held her in solitary confinement for 6 days, again, allegedly for her "protection." (C.P. Decl. ¶ 55; Tufono-Iosefa Decl. ¶ 25-27.) She was isolated in a holding cell, under video surveillance for 23 hours a day with nothing in her cell other than her pillow and a blanket. (C.P. Decl. ¶ 55.) She was allowed one hour a day to leave the cell for recreation and showering. (C.P. Decl. ¶ 55.) She was not permitted letters, writing instruments, radio, or television, nor was she allowed to interact with any other wards. (C.P. Decl. ¶ 55.) C.P. reported to Dr. Bidwell that she was "going crazy" in the holding cell. (Joint Ex. 54 (bates no. 1503).)

58. Although R.G. was not put in a holding cell, she repeatedly was threatened with lock-down or early dorms based on YCOs' disapproval of her

sexual orientation. (R.G. Decl. ¶ 13.) Lock-down refers to being held in a locked cell. (Tr. I at 14:22-15:13.) Early dorms means that the ward is sent to his or her cell earlier than the others and locked-down for the remainder of the night.

59. The expert evidence before the Court regarding the use of isolation in juvenile corrections comes from three nationally-recognized experts retained at one point by defendants. (Tufono-Iosefa Decl. ¶¶ 10-11.) Those experts uniformly conclude that long-term segregation or isolation of youth is *inherently* punitive, and that imposing such isolation as a form of protection is "not an acceptable correctional practice for juveniles," (Roush Decl. ¶12-13; *see also* Miesner Decl. ¶11; Griffis Decl. ¶12.). Indeed, one of those experts characterized such treatment as "inexcusable." (Miesner Decl. ¶ 11.) Another stated that HYCF may be the only juvenile facility in the country that employs this practice. (Griffis Decl. ¶12.)

60. Roush, Miesner and Griffis also confirm Dr. Bidwell's testimony and the testimony of plaintiffs J.D. and C.P. themselves that social isolation is experienced as punishment, (Roush Decl. ¶ 12) and that prolonged isolation can cause serious psychological consequences. (Miesner Decl. ¶ 11; Roush Decl. ¶ 12; Griffis Decl. ¶ 12; Bidwell Decl., ¶ 26). Due to its misuse by corrections staff, psychiatrists have recommended that the use of isolation in juvenile

corrections be eliminated entirely. (Roush Decl. ¶ 12.) And when isolation or segregation is used, it is accepted among professionals that it should be used "sparingly" and only in response to serious behavioral infractions and for short periods of time "while the ward poses an imminent danger to others." (Miesner Decl. ¶ 11; *see also* Roush Decl. ¶ 13; Griffis Decl. ¶ 12.)

61. The only evidence submitted by Defendants in support of their practice of isolating LGBT wards for their own "protection" was the opinion of Defendant Tufono-Iosefa that it was an appropriate way to protect J.D. and C.P. from harm. Notably, however, defendants did not seek to qualify Tufono-Iosefa as an expert in the area of juvenile corrections.

62. Based on the record regarding defendants' practice of using isolation as a form of protection, it is likely that defendants will isolate plaintiffs from other wards should they return to HYCF. Such a practice is inherently punitive, and will cause the Plaintiffs further serious harm.

Defendants Imposed Disparate Punishment and/or Treatment on Plaintiffs Based on Their Actual or Perceived Sexual Orientation or Gender Identity

63. The evidence before the Court also reflects a pattern of selective and unequal enforcement of "rules" and policies by certain YCOs, with knowledge of the supervisory defendants and no response to curtail such discrimination. The following examples of discriminatory treatment on the

basis of sexual orientation or gender identity are intended to be illustrative and not exhaustive.

64. Although defendants assert that they investigate all grievances and that the protocol at HYCF is to refer all assaults to the police for prosecution, (Tr. I 177:20-178:6), it does not appear that defendants seriously investigated plaintiffs allegations of verbal abuse, threats and assaults, and defendants have adduced evidence that indicates they rarely disciplined the wards responsible for such conduct, and have provided no evidence that they ever reported any of the assaults or threats against plaintiffs to the police. *See, e.g.*, H.R.S. § 707-716 (terroristic threatening) § 707-733 (sex assault in the fourth degree). For example, there is no evidence that J.D.'s August 8, 2004 complaint that wards were forcing him to give them his sleep medication, Joint Ex. 57 at 4, was ever investigated, yet on September 9, 2004, J.D. was disciplined for giving his medication to another ward, Joint Ex. 63.

65. Staff threatened to send R.G. to "the boys side" of the facility or to isolation if R.G. talked with or about her girlfriend, including saying "I love you" or calling her "love," although staff and other wards were permitted to talk far more graphically about their heterosexual relationships. (R.G. Decl. ¶ 10, 11, 13, 33, 36; Tr. I 12:23-13:15 (R.G.); Joint Exs. 13, 18.)

66. On April 20, 2005, Defendant Tufono-Iosefa called a meeting of all female wards to discuss the relationship between R.G. and T.R. During that meeting, Tufono-Iosefa threatened the female wards with disciplinary write-ups and loss of privileges if they failed to participate in criticism of R.G. and T.R.'s relationship. (R.G. Decl. ¶ 28; Tr. II 74:6-75:22 (Hadley).) Tufono-Iosefa led the female wards and staff in attendance in developing a set of rules to be applied to R.G. and T.R. These rules included that R.G. and T.R. were not permitted to talk with each other without permission from staff, were not allowed to communicate non-verbally, such as by hand signals, and were not permitted to write letters to each other. The consequences for breaking the rules were first a verbal warning, second a time-out in cells, and third, for total non-compliance, a referral to HYCF staff. (R.G. Decl. ¶ 35.) The rules and consequences developed at the April 20, 2005 meeting were documented in an Internal Communications Form ("ICF") dated April 21, 2005, which identifies Defendant Tufono-Iosefa "YFA" as the "originator." (R.G. Decl. ¶ 35, Ex. A; Tr. I. 208:7-209:15.) Ms. Tufono-Iosefa now maintains this meeting concerned the general topic of "the importance of all wards following the institution's rules." (Tufono-Iosefa Decl. ¶37.) Yet, HYCF's own internal report, authored by Ms. Tufono-Iosefa, shows the meeting was to set goals *concerning R.G. and*

her girlfriend (R.G. Decl. Ex. A), and several girls who were present confirmed the meeting focused on their relationship. (Hadley Decl. ¶3.)

67. In contrast, defendant Hubbell actively encouraged a dating relationship between R.G.'s girlfriend T.R. and a male ward, passing notes between the two of them while both were housed at HYCF, telling R.G. that she should let T.R. go so she could have a "normal" life and that "[T.R.] deserves better you know, you should let her go because [T.R.] can have a better life with boys and she deserves a family." R.G. Decl. ¶¶ 17-20, 23. Defendant Hubbell tormented R.G. by waving in R.G.'s face a note from a male ward to R.G.'s girlfriend T.R. (R.G. Decl. ¶ 23.)

68. Defendant Josiah wrote a disciplinary report regarding C.P. on August 20, 2004, stating that wards are not permitted "to use their journals as a way of [sic] means to communicate homosexual relationships and behavior. If such disallowed and inappropriate behavior persists, the priviledge [sic] of having a journal will be taken away." (Joint Ex. 51.) The record is devoid of evidence that any rule existed barring heterosexual wards from writing about their relationships in their journals, or that any heterosexual ward was ever disciplined for such conduct.

69. Based on the record regarding defendants' practice of selective and unequal enforcement of "rules" and policies by certain YCOs, it is likely that

plaintiffs will be treated in such a manner again should they return to HYCF, which will cause the Plaintiffs further serious harm.

Defendants Have Been on Notice of the Systemic Nature of the Anti-LGBT Climate at HYCF For At Least A Year And Have Failed To Properly Investigate the Claims or to Adopt Policies and Procedures or Implement Training

70. The record before the Court contains substantial evidence that discrimination and verbal, sexual and physical harassment and abuse based on actual or perceived sexual orientation or gender identity are systemic problems at HYCF that have not adequately been addressed by defendants.

71. The Comment Forms and Daily Reports are used as a means by HYCF staff to communicate with each other about the conduct of the wards on a daily basis. (Tr. II 43:21-44:3; 44:14-25 (Hubbell).) Thus, although a number of staff members at HYCF were aware of that both staff and wards routinely referred to R.G. and other wards who failed to conform to sex stereotypes as "butchie," "bull" or other derogatory terms, defendants presented no evidence that any staff member or ward was ever investigated or disciplined for this verbal abuse and harassment. (Joint Exs. 26, 27, 29, 30, 32, 38.)

72. By contrast, defendants investigated minor behavioral infractions by R.G. on a routine basis and often imposed disciplinary measures on R.G. as a result of the staff's findings. For example, R.G. was disciplined for having fruit punch in her room (Tr. I 32:4-12 (R.G.)), for staring too long at her girlfriend

(Tr. II 46:21-47:9), for making a plate of chicken salad for her girlfriend and for drinking out of her girlfriend's cup. (Tr. II 45: 2-10 (Hubbell).)

73. Defendants have been on notice of plaintiff R.G.'s claims of anti-LGBT harassment, discrimination and abuse since at least February 2005 through the filing of grievances, and through ICFs and correspondence from Dr. Bidwell to the supervisory defendants in and after April of 2005. (R.G. Decl. ¶¶ 15, 39, 40; Bidwell Decl. ¶ 54-55.)

74. Despite being on notice of R.G.'s first formal complaint of discrimination and harassment in February 2005 (R.G. Decl. ¶ 15), HYCF did not initiate an investigation for months thereafter. (Tufono-Iosefa Decl. ¶ 38.) Nearly one year after R.G.'s initial complaint, that investigation has yet to be completed. (Tufono-Iosefa Decl. ¶ 38; Tr. I at 201:22-202:7.)

75. With respect to J.D., he stated in his August 2, 2004 grievance that he had not "notified any YCO's [for] fear of retaliation from wards and also fear of YCO's teasing and even wanting to do something to [him]." (Joint Ex. 61.) DOJ's findings suggest that fear was well founded. DOJ Report at 20. Yet nothing in the record suggests that the supervisory defendants ever provided staff with any directive or training about their obligation to intervene when they see or hear such harassment, to investigate and file a report when harassment is reported to them, and to refrain from participating in such harassment.

Moreover, defendants presented no evidence that they ever conducted any investigation regarding YCO participation in harassment of J.D. or even informed YCOs that they must refrain from such harassment. J.D. testified that no one ever told him that he should not fear reprisals for telling YCOs about harassment or that he should report any YCO harassment to defendant Tufono-Iosefa. (Tr. I at 81:19-82:10.) J.D. also testified that a couple of the YCOs did intervene to stop the harassment, but that most did not and that defendant Haina witnessed incidents of harassment and did nothing. (Tr. I at 85:1-86:9; Joint Ex. 62.) Instead, one YCO told J.D. to go "kick [the harasser's] ass." (Tr. I at 91:6-23.)

76. In March of 2005, the family court issued a decision about J.D.'s habeas petition. The 2005 family court opinion appended "The Model Standards Project: Creating Inclusive Systems for LGBTQ Youth in Out-of-Home Care," which sets forth recommendations for creating child welfare settings that are safe, respectful and nurturing for lesbian, gay, and transgender youth. (Perrin Decl., ¶ 17, Ex. L.) The decision recommended the adoption of LGBT protective standards without delay. Although notice of this decision was provided to defendants Tufono-Iosefa, Koller, and Agnew (Bidwell Decl. Ex. F; Tr. 71:8-19), defendants have taken no steps to address the harassment of LGBT youth at HYCF. (Perrin Decl. ¶ 10, Ex. H.) As a result, J.D. was

subjected to the same unsafe conditions and practices during his second stay at HYCF.

77. As to C.P., defendants have been on notice of verbal harassment and abuse since February 2004. (Bidwell Decl., Ex. B.) The medical staff objected to her transfer to the boys' side in September 2004 (*Id.* Ex. C) and detailed the potential for abuse. C.P.'s own grievances regarding her treatment on the boys' side began in October 2004, shortly after her transfer. (C.P. Decl. Exs. A, B.)

78. The numerous attempts by both Dr. Bidwell and Nurse Hadley to address the harassment and abuse perpetrated by HYCF staff and other wards against Plaintiffs have been ignored by the current administration. (Tr. I at 71:8-73:5 (Bidwell); 202:12-19; Declaration of Dr. Bidwell ("Bidwell Decl.") ¶¶ 15, 22, 24, 40-50, 54, 57; Supplemental Declaration of Dr. Bidwell ("Supp. Bidwell Decl.") ¶¶ 5-8; Declaration of Linda Hadley ("Hadley Decl.") ¶ 5.) Dr. Bidwell testified – and contemporaneous documents reflect – that the current administration was aware of the abuse and harassment of plaintiffs and other youth and that the abuse is systemic. (Tr. I at 71:8-19; 73:23-75:15; 64:9-15; Bidwell Decl. Exs. C, D, E, F.)

79. Although defendants adduced evidence that they investigated a few specified instances of harassment against plaintiffs, it appears that many more

incidents of threats and assaults were not investigated. Defendants adduced no evidence that they ever disciplined the wards responsible for the assaults, abuse, and harassment against plaintiffs, or that they reported the assaults to the police. This is particularly notable in light of defendant Tufono-Iosefa's testimony that the protocol at HYCF is to refer *all* assaults to the police department for prosecution. (Tr. I 177:20-178:6.) In sum, the record reflects a pattern of differential treatment of incidents of anti-LGBT harassment.

80. Moreover, none of the supervisory defendants (Director Koller, Director Agnew or YFA Tufono-Iosefa) have ever responded in writing to any of the communications by medical staff regarding the anti-LGBT treatment of plaintiffs in this case – even after one of Dr. Bidwell's letters, copied to Defendants Koller and Agnew, referenced the family court's opinion concerning the systemic problems of anti-LGBT abuse and harassment at HYCF. (Tr. I at 71:20-25 (Bidwell), 202:12-19 (Tufono-Iosefa); Agnew Decl. ¶ 11; Bidwell Decl. Ex. F; Supp. Bidwell Decl. ¶ 3-5.)

81. Despite being on notice of plaintiffs' claims of harassment, discrimination and abuse for over one year, defendants have failed to implement adequate policies and procedures to ensure safe conditions of confinement for HYCF wards who are or who are perceived to be LGBT. (Perrin Decl., ¶ 10 & Ex. H; Supp. Perrin Decl. ¶ 17.) Indeed, Defendants have not stated that they

intend to adopt any new policies for the protection of LGBT youth, nor have they offered any evidence that their negotiations with the Department of Justice are addressing the lack of policies, procedures, and training as to these issues.

HYCF Remains Hampered By Inadequate Policies and Procedures

82. The DOJ Report found that the "most fundamental problem that plagues HYCF is the absence of policies or procedures to govern the facility." (DOJ Report at 3.)

83. The absence of adequate policies and procedures is compounded by defendants' failure to train the individuals expected to enforce them. (*Id.* at 4) ("*Security staff . . . have received no training in over five years and have no rules to guide their decisions*.") (emphasis added). DOJ found that "staff and administrators were either unaware of the existence of any policies or procedures or were cognizant of their existence yet ignorant of their content." (Id at 4 n.4.)

84. In fact, as of April 2004, none of the HYCF staff had received any formal training since the 1980s. (Tr. I at 190:20-191:4 (Tufono-Iosefa).)

85. Since the filing of the Complaint in this action, defendants have readopted the same 1984 policies that DOJ condemned as "outdated and intended for an adult institution." (DOJ Report at 4 n.4; Perrin Decl. Ex. D.) On September 21, 2005, Defendant Tufono-Iosefa issued an ICF, which

provides, in part, "Effective immediately, per [defendant] Sharon Agnew's verbal directive on September 13, 2005, the HYCF Policies and Procedures series dated 1984–1990s is considered as existing facility policies and procedures used to govern HYCF daily operations." (*Id.* ¶ 6 & Ex. D.)

86. Most strikingly, since the release of the ACLU Report in August 2003, HYCF has adopted and implemented only six new policies and procedures to govern HYCF, which became effective on October 24, 2005. (Tufono-Iosefa Decl. ¶ 41 & Ex. D.).[5] These six policies took approximately one year to draft and adopt. (Tr. I at 202:20-203:15 (Tufono-Iosefa).) This lengthy period is due in part to the fact that, although not required to do so under the governing collective bargaining agreements with HYCF staff, OYS and HYCF choose to follow past practices and engage in a lengthy and "grueling" process with respect to every new policy that is proposed at HYCF. (Tr. I at 202:20-204:10 (Tufono-Iosefa).)

87. The House Committee on Human Services, the Senate Committee on Human Services, the House Committee on Judiciary ("JUD"), and the Senate Committee on Judiciary and Hawaiian Affairs ("JHW") commenced an informational briefing in November of 2005. (Supp. Perrin Decl. ¶ 7 & Ex. 2.)

[5] One of the six new policies is apparently being rewritten due to problems with its implementation. (Tr. I 153:25-154:12.)

Defendants Agnew and Tufono-Iosefa were present at all four of the informational briefings. (Tr. I at 188:16-23.) Defendants concede that HYCF requires approximately an additional 79 policies and that it will take 1½ to 2 years to complete the drafting and negotiation process for the remaining policies. (Tr. I 173:6-174:16; Supp. Perrin Decl., ¶¶ 9-10 & Ex. 2.)

88. HYCF does not have policies in place to protect LGBT youth – or any other vulnerable youth – from harm. (Bidwell Decl. ¶¶ 13, 14; Supp. Perrin. Decl. ¶ 18.) Defendant Agnew expressly admitted in a September 2005 news interview on KITV that no policies were in place for gay and lesbian youth. (Perrin Decl. ¶ 10 & Ex. H.)

89. Even after the six new policies went into effect at HYCF, Defendant Tufono-Iosefa, while testifying to the Hawaii Legislature, could not identify a specific policy regarding sexual orientation. (Supp. Perrin Decl. ¶ 17.) Furthermore, both Dr. Bidwell and Nurse Hadley testified before the Legislature that as of November 2005, there are no policies at HYCF concerning gender identity. (Supp. Perrin Decl. ¶ 18.)

90. Defendants have offered no evidence that they have, or are considering, any policy to address LGBT issues, including appropriate responses to the persistent patterns and practices of staff discrimination, harassment and abuse of wards based on their actual or perceived sexual

orientation or gender identity and staff failure to protect plaintiffs from ward-on-ward verbal, physical and sexual harassment and abuse based on actual or perceived sexual orientation or gender identity. Given that defendant Tufono-Iosefa herself has participated in harassment of and discrimination against R.G., these conditions are unlikely to change without outside guidance.

Defendants Tufono-Iosefa, Agnew, and Koller Failed to Ensure Adequate Staffing, Training, Classification and Supervision

91. Defendants' former experts – whose expertise in juvenile corrections is undisputed – performed a staffing study and training needs assessment of HYCF in June 2004, after which they advised defendants Agnew and Tufono-Iosefa that HYCF "was in desperate need of more staff to protect the safety of wards" and that they should "use revised and expanded staff training to establish a juvenile corrections culture." (Roush Decl. ¶ 7-8; *see also* Miesner Decl. ¶ 5 ("HYCF did not have sufficient staff, . . . the staff was not properly trained and . . . most of the staff did not have the proper attitudes or demeanor to work with troubled youth"); Griffis Decl. ¶ 5.)

92. Griffis testified that, based on his observations, HYCF "did not have a classification system for aggressive vs. vulnerable wards, and there were no policies, training or supervision, rendering the environment very unsafe for the wards." (Griffis Decl. ¶ 5.) Roush concluded his testimony by explaining that "it is the responsibility of the administration to create an environment that

is physically and psychologically safe for the wards without violating the wards' rights." (Roush Decl. ¶ 13; *see also* Miesner Decl. ¶ 5; Griffis Decl. at ¶ 5.)

93. In August 2005, DOJ suggested remedial measures necessary to bring staffing and supervision at HYCF into conformity with constitutional requirements, including: (1) training existing staff so that they perform their duties adequately; (2) ensuring that there are sufficient staff to safely supervise youth; (3) providing staff with adequate training and equipment to supervise youth at risk of suicide; (4) providing staff with training on HYCF's suicide prevention policy; (5) developing and implementing adequate policies and procedures to ensure that youth are adequately protected from physical violence; and (6) developing and implementing adequate policies and procedures regarding the proper use of force by YCOs and staff. (DOJ Report at 26–28.)

94. As of August 12, 2005, HYCF had not provided training on certain core issues such as adequately trained staff to supervise youth, the proper use of force, investigation techniques, and the identification and protection of vulnerable youth. (Perrin Decl. ¶ 5, Ex. C.)

Defendants Tufono-Iosefa, Agnew, and Koller Failed to Ensure a Functioning Grievance System

95. In 2003, the ACLU found the grievance process at HYCF to be "completely defunct." The wards found the process futile—many saw supervisors throw away their grievances, or were told by the guards that they were thrown away or ignored. (Perrin Decl. Ex. A at 28–29.)

96. Two years later, the DOJ Report again concluded that "HYCF's grievance system is dysfunctional." (DOJ Report at 20.) The most significant legal deficiencies were "difficulty in filing claims and the common presence of intimidation and retaliation against those youth who are able and dare to do so." (*Id*.) The DOJ found that the subjects of the complaints, usually the supervising YCO, often retaliated against the complainants. (*Id*.)

97. Plaintiffs' experiences demonstrate the futility of HYCF's grievance system. Some grievances take months to receive a response (Joint Exs. 9, 49; C.P. Decl. Exs. A, B) while others receive no response at all (R.G. Decl. ¶ 38 (February 2005 ICF).) And even when a grievance gets a response, it is not treated confidentially, putting wards at risk for retaliation. *See, e.g.*, Joint Ex. 86 (medical notes indicating J.D. complained that YCOs had shown other wards his grievance form).)

98. Although HYCF recently adopted another new grievance system (Tufono-Iosefa Decl. ¶ 41 & Ex. D), the new system is still ineffective.

Defendants Agnew and Tufono-Iosefa testified before the Legislature that the new grievance procedure still takes 3 months on average to complete an investigation of abuse and/or neglect and has no procedure in place to address conflicts of interest such as when a complaint is about a supervisor or the YFA. (Perrin Supp. Decl. ¶¶ 14-16.) The HYCF staff testified that the new procedure works no better than the old procedure, and is regarded as a "waste of time." (Tr. I 161:14-162:6.)

99. The absence of a meaningful grievance system at HYCF renders HYCF unable to address plaintiffs' complaints concerning the conditions of their confinement should they be returned to HYCF.

Defendants Are Not Qualified to Make Decisions Regarding the Protection of LGBT Youth From Harm

100. Prior to accepting the position as the YFA at HYCF, Defendant Tufono-Iosefa had never worked in a managerial capacity at any corrections facility. (Tr. I at 190:1-4; Tufono-Iosefa Decl. Ex. A). Indeed, Defendant Tufono-Iosefa had never worked before in a juvenile facility at all, and her only professional experience with juveniles was in 1981-1982. (Tr. I at 190:12-16; Tufono-Iosefa Decl. Ex. A).

101. Defendants failed to establish defendant Tufono-Iosefa as an expert in any area, including that of juvenile corrections management. Furthermore, defendants set forth no evidence that Tufono-Iosefa has received any training in

how to administer a juvenile correctional facility or how to ensure the safety of vulnerable youth, including LGBT youth, in a juvenile corrections setting. Similarly, defendants failed to offer any evidence that defendant Agnew has been trained in these areas or has the expertise necessary to provide defendant Tufono-Iosefa with guidance in these areas.

102. On this factual record, it is undisputed that defendants Agnew and Koller have ratified the key HYCF practices challenged by plaintiffs: anti-LGBT harassment by HYCF employees, failure by HYCF employees to take adequate remedial measures in response to known peer harassment based on sexual orientation and gender identity, placement of C.P. on the boys' side, and the use of isolation in lieu of protection of vulnerable wards. Despite being on notice of such practices and conditions, there is no evidence in the record to suggest that defendants Agnew or Koller have intervened to ensure that defendant Tufono-Iosefa and other HYCF staff's decisions about plaintiffs' safety and the use of isolation are made based on an exercise of professional judgment. Dr. Bidwell sent copies to defendants Agnew and Koller of his letter to defendant Tufono-Iosefa detailing extensive harassment of R.G. and quoting Judge Wong's decision regarding harassment of J.D. (Bidwell Decl. at ¶ 32, 33, 54 , Ex. F.) The record contains no evidence that either defendant Agnew or defendant Koller took any action in response to the letter. Similarly, copies

of complaints regarding C.P.'s transfer to the boys' side and about her isolation in a holding cell were provided to defendant Agnew, (Bidwell Decl. ¶ 44, 49 Ex. C, E), and there is no evidence that defendant Agnew took any responsive action. (Bidwell Decl. 45, 50.)

103. Indeed, defendant Agnew's actions appear to have impeded the ability of defendant Tufono-Iosefa and her staff to obtain needed expert guidance and training regarding the range of acceptable professional decisions regarding ward safety and the use of isolation. Although defendant Agnew initially requested assistance from the National Juvenile Detention Association Center for Research and Professional Development("NJDA CRPD") and contracted with them to conduct an assessment and report on HYC staffing, training needs and conditions, in June 2004 she cancelled the conditions assessment, the most critical piece of the project, terminating a team of nationally-recognized experts whose work for HYCF was funded in part by a grant from the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") (a division of the United States Department of Justice). Roush Decl. ¶¶ 2, 6-7. After terminating the NJDA CRPD team, defendant Agnew retained a new consultant, Nancy Emmert, to advise HYCF on policies and training. Tr. I at 193:15-25.

104. Moreover, after defendant Agnew was told in exit interviews by the NJDA CRPD team that HYCF was being operated with policies and practices more appropriate for an adult correctional facility, which is problematic in juvenile facilities, and that it should use revised and expanded staff training to establish a juvenile corrections culture, *id*. at ¶ 8, after the DOJ report was issued, and after this lawsuit was filed, defendant Agnew ordered the reinstatement at HYCF of the same outdated policies that DOJ characterized as "outdated and intended for an adult institution." (Perrin Decl., ¶ 6 Ex. B at 4 n.4 (DOJ Report).) Despite evidence that their collective bargaining agreements do not require union approval for policy changes, it appears from the record that defendant Agnew has elected to delay the adoption and implementation of new policies by agreeing informally to negotiate all proposed policy changes with the unions. (Tr. I at 203:10-204:13.)

105. Although defendants have hired a new consultant, Nancy Emmert, defendant Tufono-Iosefa, who runs the day-to-day operations at HYCF, was never consulted formally about hiring Ms. Emmert. (Tr. I at 193:21-25.)

106. More importantly, defendants neither sought to qualify Ms. Emmert as an expert in juvenile corrections management nor presented any evidence of her qualifications to the Court. Indeed, Ms. Emmert's name is

conspicuously absent from defendants' opposition brief and supporting declarations.

107. Ms. Emmert has never been retained by another state facility as an expert for the administration of a secure juvenile facility, has no professional experience working in or advising a secure juvenile facility, and in fact has only four months of professional experience working in any secure correctional facility prior to her retention to advise HYCF. (Tr. I 206:11-207:16.)

108. Ms. Emmert's lack of qualification with respect to the protection of LGBT youth is evident from her statements that any MTF transgender ward at HYCF who had not obtained genital surgery would have her head shaved and be placed with the boys. (Tr. I 155:15-156:18; Hardy Dec. ¶ 5; Hadley Decl. ¶ 10).

HYCF Staff Endorsed Religion In The Course of Performing Their Duties and Endorsed Specific Christian Denominations That View Homosexuality as a Sin

109. There was a consistent past practice at HYCF of allowing no personal items or reading materials in wards' cells other than a Bible. (R.G. Decl. ¶ 9, 10 ; C.P. Decl. ¶ 23; Perrin Decl. ¶¶8-9 & Ex. F.) Although the practice formally was prohibited by a June 2004 order from Defendant Tufono-Iosefa, the new policy was not enforced, and YCOs continued to restrict reading

material, allowing wards to have only the Bible in their cells. (Perrin Decl. Ex. G).

110. Plaintiff C.P. testified that in 2004 there was a period of months during which she, and other wards, were not allowed to have any reading material in their cells other than the Bible. (C.P. Decl. ¶ 23.)

111. The record also reflects that it was well known that certain YCOs brought their Bible to work (Tr. I at 219:16-18 (Alvaro)) and that HYCF staff engaged in discussions of a religious nature with wards. (Tr. II at 18:21-19:12; 23:24-24:1 (Rosete).)

112. R.G. testified that several HYCF staff members singled her out for proselytizing, including YCO Josiah and teacher Barbara Tanji. (R.G. Decl. ¶¶ 9-10, 14.) The record also establishes frequent religious discussions between R.G. and Defendant Rosete while R.G. was confined at HYCF. These discussions included accounts that the Bible says that being gay is "not of God" and that the Bible states that "man should not lay with man" and that anyone who did so would be punished and go to hell. (R.G. Decl. ¶¶ 4-5, 9; Tr. II 10:6-17; 21:9-22:19 (Rosete).)

113. It is also clear that while Defendant Rosete may not have initiated all of the conversations with R.G. concerning Rosete's religious views about

homosexuality, Rosete initiated at least some of them. (Tr. I at 17:19-25 (R.G.); Tr. II at 19:5-12 (Rosete).)

114. HYCF's lack of appropriate operating policies, procedures and training permitted YCOs to institute informal policies and practices based on their individual religious views (DOJ Report 3-4). Supervisory defendants knew about these policies and practices (Bidwell Decl. Ex. F, 5/17/05 letter; Perrin Decl. Exs. E-G), and ratified and endorsed them by ignoring complaints or taking inadequate steps to prevent further violation. (*Id*.)

Defendants Denied Requests by R.G., C.P. and Other Wards to Speak to A Lawyer

115. After the ACLU of Hawaii issued its Report in 2003, HYCF began requiring written consent of parents and guardians to allow the wards to speak with the ACLU concerning the conditions, policies, and practices at HYCF. (Perrin Decl. ¶ 12; Tufono-Iosefa Decl. Ex. C.)

116. The timing of this policy change supports an inference that it was adopted with the purpose of hindering wards' access to counsel to challenge the conditions of their confinement. This inference is further supported by evidence that Defendants Agnew and Tufono-Iosefa have not applied uniformly any policy restricting meetings between lawyers and wards, but have permitted meetings between wards and defense counsel in this action. Specifically, Defendant Tufono-Iosefa testified that she permitted wards to meet with

attorneys representing herself and the other Defendants in this action, in order to assist the Defendants in preparing their defense, and that she did not believe that it was necessary to obtain parental consent for these meetings. (Tr. I 195:14-196:1.) Tufono-Iosefa also testified that, in deciding to permit their own lawyers to meet with J.N., she and defendant Agnew "didn't base the decision on the best interest of J.N.," and that in fact she did not "believe it was" in J.N.'s best interest. (Tr. I 196:10-18.) Agnew and Tufono-Iosefa allowed the meetings to take place nonetheless, and even allowed JN to be deposed at defense counsel's request. (Tr. I 196:10-197:6.)

117. HYCF does not have a law library, nor does it provide wards with legal assistance from trained paralegals or lawyers in the community. (Perrin Decl. ¶ 11; Tr. I at 162:7-17.)

118. HYCF's current policies and practices have prevented plaintiffs from contacting counsel concerning the conditions of their confinement at HYCF. For example, in August 2005, shortly after the release of the DOJ Report, R.G was denied permission to call her attorney at the ACLU. (R.G. Decl. ¶ 43.)

119. Similarly, when C.P. was returned to HYCF in August, 2005, just weeks before this action was filed, Defendant Tufono-Iosefa refused the

ACLU's request to see C.P., and stated that all requests were to be referred to the Attorney General's office. (Perrin Decl. ¶ 13; C.P. Decl. ¶ 63.).

120. HYCF's policy and practice of requiring parental consent also has hindered other potential plaintiffs in this lawsuit from contacting the ACLU. (Supp. Perrin Decl. ¶ 19.)

121. HYCF's "new" practice of allowing wards to request a visit with the ACLU, which was developed several weeks after plaintiffs' motion for preliminary injunction was filed, is insufficient to ensure that wards have access to civil counsel of their choice, even if that choice is the ACLU. The new practice has not been adopted formally at HYCF, the staff has not been trained in the use of the policy (Hardy Decl. ¶¶ 10-11, Ex. 1.), and defendants are free to return to their former policy of restricting access to counsel.

122. Given the inconsistent enforcement of HYCF's policies and practice concerning access to counsel, and the absence of any evidence that defendants have provided staff with training regarding plaintiffs' right to speak with counsel, plaintiffs may well be denied the opportunity to speak with counsel should they be returned to HYCF.

Credibility Determinations

The findings set forth above are based in part on the Court's preliminary credibility determinations, including the specific determinations explained below.

123. Defendants requested, and the Court ordered, the evidentiary hearing on plaintiffs' Motion to allow defendants to test the credibility of the plaintiffs.

124. Defendants offered as evidence of bias relevant to plaintiffs' credibility a series of instances in which plaintiffs were disciplined for various infractions of HYCF rules. The Court finds for purposes of this motion, however, that plaintiffs' testimony was credible, including their testimony that they did not fabricate allegations in order to get back at defendants for discipline they imposed. This preliminary finding is based on: (1) plaintiffs' demeanor on the stand; (2) defendants' own documents, which, for example, corroborate the frequent use by HYCF staff of the term "butchie" to describe R.G., (Joint Exs. 26, 27, 29, 30, 38), and otherwise provide contemporaneous corroboration of other material details of plaintiffs' testimony; (3) corroboration by other witnesses, who reported their personal observations to medical staff in the course of seeking medical treatment (Bidwell Decl. Exs, B, C, D, E, F; Tr. II at 74:6-76:1 (Hadley); Joint Exs. 54 (C.P.); 86 (J.D.); and (4) the expert medical

opinion of Dr. Bidwell that plaintiffs' contemporaneous and subsequent conduct is consistent with that of victims of traumatic harassment. (Tr. I 67:9-68:10.)

125. Moreover, plaintiffs' stories are supported by their own contemporaneous grievances and statements to medical staff and are further corroborated by the testimony of Dr. Bidwell that "every single one" of the approximately 12 to 15 LGBT wards who have been openly LGBT at HYCF have complained of similar harassment and abuse. (Tr. I at 75:6-15.)

126. The Court has serious reservations, however, about defendant Tufono-Iosefa's credibility in light of what, at best, can be characterized as misrepresentations to the Court.

127. First, Ms. Tufono-Iosefa declared under oath that HYCF's retained experts, Larry Meisner and Nelson Griffis, told her that it was appropriate to house male-to-female ("MTF") transgender youth with the boys, and that the norm in juvenile corrections is to house wards based on their genitalia. (Tufono-Iosefa Decl. ¶¶ 10-11, 22). Both Meisner and Griffis submitted declarations flatly denying that they ever made such statements. (Meisner Decl. ¶ 8-10; Griffis Decl. ¶ 9-11.) Moreover, there is little likelihood of an innocent misunderstanding, because both Messrs. Griffis and Miesner declared that they would not have rendered such opinions, because in their professional judgment housing MTF transgender youth with male wards at HYCF is unsafe and

inappropriate. (Meisner Decl. ¶ 10, Griffis Decl. ¶ 11.) Despite being given the opportunity to explain her inaccurate declaration testimony before the Court, Defendant Tufono-Iosefa failed even to address the issue.

128. Second, Defendant Tufono-Iosefa testified, in response to questions from both plaintiffs' counsel and the Court, that she did not direct nor did she have any knowledge of an April 21, 2005 ICF that memorializes the results of the group meeting of the female wards concerning plaintiff R.G. and her girlfriend T.R. (Tr. I at 187:1-11). However, defendant Tufono-Iosefa also testified that an ICF ordinarily would not bear her name unless she or her secretary created it, that she did not create the April 21, 2005 ICF or direct her secretary to do so, and that her secretary would not create the document absent defendant Tufono-Iosefa's authorization. (Tr. I 208:7-209:15.)

129. Rebuttal witness Shauna Kamaka, a HYCF social worker, who was present at the April 20 group meeting, testified that she received the ICF from Defendant Tufono-Iosefa's secretary with instructions to review the ICF with R.G. and T.R. Kamaka distributed the ICF to other staff members, who had requested documentation of the newly-created rules from the April 20 meeting. (R.G. Decl. Ex. A; Tr. II at 62:10-63:15 (Kamaka).)

130. While it makes little difference legally whether this instance of alleged discrimination was a matter of official policy or simply part of an

accepted practice, it appears to the Court that Defendant Tufono-Iosefa attempted to dissociate herself from the ICF she issued in order to make it appear to the Court that the document does not reflect official policy, that she is not personally responsible for the allegedly discriminatory restrictions outlined in the ICF, and that the ICF should not be treated as corroboration of R.G.'s version of the April 20 meeting, including R.G.'s testimony that the meeting was run by defendant Tufono-Iosefa (and was not "group therapy" as Tufono-Iosefa asserted), and R.G.'s testimony that defendant Tufono-Iosefa called her relationship with T.R. "disgusting" and "wrong" because it is a same-sex relationship (which Tufono-Iosefa denies). On this record, the Court concludes that defendant Tufono-Iosefa was in fact the originator of the ICF and misrepresented her role and her statements in the meeting and in issuance of the ICF itself.

131. Third, Defendant Tufono-Iosefa testified that her decision to isolate J.D. was also based on her concerns arising out of a psychological assessment of J.D. (Tr. I at 181:25-183:6), however this testimony is undermined by the fact that the assessment to which Defendant Tufono-Iosefa referred was not requested until November 1, 2004 – months *after* both of J.D.'s periods of isolation. (Tr. I at 210:24-211:11.) Furthermore, after his two periods of isolation, when J.D. again requested isolation in order to have a

reprieve from the continuous harassment, Defendant Tufono-Iosefa denied J.D.'s request. (Joint Ex. 82.)

132. Finally, it appears to the Court that certain of defendant Tufono-Iosefa's decisions have been inappropriately motivated by her interests in defending this action. *See supra* Finding of Fact 116.

133. In light of defendant Tufono-Iosefa's apparent misrepresentations to the Court, the Court finds her testimony regarding other disputed matters is not credible, including her testimony that she did not call R.G.'s relationship with T.R. "disgusting" and "wrong," her testimony that defendants investigated C.P.'s allegations of derogatory comments (Tufono-Iosefa Decl. ¶ 18) but found insufficient evidence, and her testimony concerning the reasons for decisions regarding where to house C.P.

134. The Court has concerns as well with respect to defendant Hubbell's credibility. Although defendant Hubbell testified that she never called the wards names nor treated them differently on the basis of their actual or perceived sexual orientation, this testimony is undermined by numerous documents authored by defendant Hubbell referring to R.G. as "butchie" or the "bull" as well as by the testimony of R.G., J.D. and Nurse Practitioner Linda Hadley. (Tr. II at 71:1-72:11 (Hadley); 86:9-16 (R.G.); 87:11-88:16 (J.D.).)

The Court thus finds at this stage that defendant Hubbell's testimony is not credible.

At The Time Of Filing, Plaintiffs Had A Reasonable Expectation Of Return to HYCF

135. Plaintiff J.D. is 18-years old and has been at HYCF on two occasions and is subject to HYCF's jurisdiction until his 19th birthday, pursuant to a stayed mittimus order. (J.D. Decl. ¶ 2, 50, 54; Declaration of Carolyn Brown ("Brown Decl.") ¶¶ 10-13 & Exs. 1-2.) Plaintiff J.D. is currently on probation from the Family Court. (J.D. Decl. ¶ 54; Brown Decl. ¶ 9-13 & Ex. 1.) J.D. remains subject to return to HYCF until his 19th birthday (July 2006) even for a technical probation violation. (*See* Brown Decl. ¶¶ 9-13, Exs.1-3.)

136. With respect to wards who, like J.D., are on probation, the Attorney General found that "[c]ommitments for probation revocation accounted for 27%" of first-time commitments to HYCF. (Supp. Perrin Decl. Ex. 1 ("AG Report") at 2,13; see also Brown Decl. ¶¶12-14 (stating that the percentage of revocations in Ms. Brown's twenty years of experience as a Public Defender in Family Court is up to 30%.))

137. Plaintiff R.G. is 18 years old and has been confined at HYCF on three occasions, including once after this action was filed. (R.G. Decl. ¶¶ 3, 7, 47.) R.G. is under HYCF's jurisdiction until her 19th birthday. (*Id*. ¶ 2;

Tufono-Iosefa Decl. Ex. G.) R.G. is currently on parole from HYCF and has been placed in an independent residential program. (R.G. Decl. ¶ 50.)

138. Paroled wards may be returned to HYCF for suspicion of misconduct that falls well short of unlawful activity. (Kamaka Decl. ¶5-9, Ex.1; Hardy Decl. ¶8-9.) There are many examples of lawful conduct that can trigger a return to HYCF, including breaking curfew, not following program rules, not attending school on a regular basis, running away, or even quitting a job. (Kamaka Decl. ¶9, Ex.1).

139. Paroled wards may even be returned to HYCF based solely on the actions of a third party. (Kamaka Decl. ¶5-9, Ex.1; Hardy Decl. ¶8-9.)

140. Nearly half of paroled wards are returned to HYCF for parole violations. (Supp. Perrin Decl. Ex.1 at 2, 13; Hardy Decl. ¶¶7-9.)

141. Defendant Tufono-Iosefa testified that a conservative estimate of the number of wards returned every month to HYCF from parole is five. (Tr. I at 192:20-24.)

142. Plaintiff C.P. is an 18-year-old transgender girl who has been confined at HYCF on three occasions. (C.P. Decl. ¶¶ 2, 10-25, 51-52.) C.P. was subject to the continuing jurisdiction of HYCF until her 18th birthday on December 8, 2005. (*Id.* ¶ 10; Tufono-Iosefa Decl., Ex. H.) Thus, at the time of filing her expectation of return was reasonable for the same reasons as R.G.

R.G. Still Has a Reasonable Expectation of Return to HYCF

143. In November of 2005, Plaintiff R.G. did not return to her residential placement program as scheduled and Devon Enesa, HYCF's parole coordinator, testified that he intended to recommend that R.G. be detained at Oahu Community Correctional Center ("OCCC") until her 19th birthday should R.G. fail to return to her program by November 30, 2005. (11/21 Tr. at 15:18-16:20.) Mr. Enesa's recommendation was due in part to his belief that HYCF was not a "good place" for R.G. because he feared that she would subjected to harassment by HYCF staff if she were returned to HYCF. (11/21 Tr. at 23:6-24.)

144. Although R.G. returned to her residential placement on November 23, 2005 and remains on parole from HYCF and subject to return at any time, for any number of reasons, defendants continue to assert that R.G. will not be returned to HYCF under any circumstances and instead will be sent to OCCC. But Mr. Enesa, does not have the authority to determine whether R.G. will be returned to HYCF or held at OCCC until her 19th birthday. (11/21 Tr. at 15:18-16:20.) That is a decision that is subject to the decisions of the prosecutor's office and the adult court (11/21 Tr. at 26:24-27:20.) Additionally, Mr. Enesa

testified in response to questions from the Court that should R.G. not be prosecuted for an adult criminal charge of escape and should her program refuse to accept her, that she would be remanded back to HYCF and that HYCF would search for another program placement. (11/21 Tr. at 27:16-20.). Furthermore, Mr. Enesa's intent to recommend that R.G. be placed at OCCC was limited to the time period in November 2005 when she failed to return to her program.

C.P. Could Be Returned to HYCF

145. Now that she is 18, C.P. could be returned to HYCF in the event that she is adjudicated delinquent for acts that occurred before she reached the age of majority. (*Cf.* J.D. Decl. ¶54; Brown Decl. ¶¶ 8-10 & Ex. 1.).

PROPOSED CONCLUSIONS OF LAW

A preliminary injunction is warranted when plaintiffs show either

> (1) a likelihood of success on the merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [their] favor. These two alternatives represent extremes of a single continuum, rather than two separate tests. Thus, the greater the relative hardship to [plaintiffs], the less probability of success must be shown.

Warsoldier v. Woodford, 418 F.3d 989, 993-94 (9th Cir. 2005) (internal citations omitted). In addition, "advancement of the public interest" is one of the "traditional equitable criteria for granting a preliminary injunction." *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (citation omitted).

Thus, to be entitled to injunctive relief, plaintiffs need only show that their claims raise "serious questions," and that they have "a fair chance of success on the merits." *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988).

> Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits.

Id. (citation and quotations omitted).

On this motion, plaintiffs seek mandatory relief in addition to a prohibitory injunction, in the form of an order directing defendants to retain a mutually-agreeable expert to guide them in reforming practices prohibited by the Court. Plaintiffs contend that defendants lack the expertise necessary to

prevent further violation of plaintiffs' rights or to select an expert to guide them. *See supra* ¶¶ 100-108. When a party "seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction." *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). Nevertheless, it is appropriate to issue a mandatory preliminary injunction when both "the facts and law clearly favor the moving party." *Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (upholding district court's granting of mandatory preliminary injunction requiring pharmaceutical company to continue to administer medication to participants in an experimental program after completion of the study).

I. PLAINTIFFS HAD STANDING AND THEIR CLAIMS ARE NOT MOOT

A. Plaintiffs Had Standing to Assert Claims for Injunctive Relief

Standing is determined based on the facts at the time of filing. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001). To satisfy Article III standing, a plaintiff must show she has "personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant that can be fairly traced to the defendant's challenged conduct, and which is likely to be redressed by a favorable decision." *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985) (internal citations omitted). A plaintiff seeking injunctive relief must show that she "can reasonably expect to encounter the same injury in the future." 13 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 3531.2 (2d ed. 1984) (citing *Los Angeles v. Lyons*, 461 U.S. 95

(1983)); *LaDuke*, 762 F.2d at 1324 (plaintiff must show a "likelihood of similar injury in the future."); *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001).

In this case, the showing of a threat of repetition has two components: (1) that plaintiffs reasonably expected, at the time of filing the complaint, to be returned to HYCF, and (2) that plaintiffs reasonably expected, at the time of filing the complaint, that if returned, they would be subjected to similar conditions.[6] Plaintiffs' showing suffices on both counts; plaintiffs' claims were neither speculative nor hypothetical as in *Los Angeles v. Lyons*.

First, *Lyons* held that "standing is inappropriate where the future injury could be inflicted *only* in the event of future *illegal* conduct by the plaintiff." *Armstrong*, 275 F.3d at 865 (citing *Lyons*, 461 U.S. at 108) (emphasis added). The Ninth Circuit has distinguished *Lyons* when the conduct that may trigger a future violation is not unlawful. *Armstrong*, 275 F.3d at 866; *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999); *see also Demery v. Arpaio*, 378 F.3d 1020, 1025, 1027 (9th Cir. 2004) (affirming entry of a preliminary injunction based on determination that plaintiffs who had been arrested and incarcerated repeatedly were likely to be reincarcerated and subjected to the same unconstitutional conditions), *cert. denied*, 125 S. Ct. 2961 (2005).[7]

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[6] Defendants' arguments concerning events subsequent to the filing of the Complaint are discussed *infra*, under mootness.

[7] Defendants assert that *Demery* does not apply because it concerned mootness. But the "likelihood of similar injury" standing inquiry is substantively similar to the second element of the capable-of-repetition-yet-

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This is such a case, as plaintiffs need not engage in illegal conduct to be returned to HYCF. (Supp. Perrin Decl. Ex. 1 (Attorney General of Hawaii Report to OYS Feb. 2001 ("AG Report") at 13-15) (identifying legal behavior that can result in return to HYCF); Kamaka Decl. ¶¶ 5-9, Ex.1; Hardy Decl. ¶¶ 8-9; Brown Decl. ¶ 14, Ex. 3.) At the time of filing, plaintiffs C.P. and R.G. were on parole from HYCF, and subject to return at any time, for any number of reasons, including breaking curfew, not following program rules, not attending school on a regular basis, running away, or even quitting a job. (Kamaka Decl. ¶ 9, Ex. 1.) Plaintiff J.D. was on probation and subject to return to HYCF until his 19th birthday, in July 2006, even for a technical violation. (*See* Brown Decl. ¶¶ 9-13, Exs. 1-3.) Plaintiffs presented evidence that they could be returned to HYCF for mere suspicion of misconduct that falls well short of unlawful activity or even because of third-party conduct. (Kamaka Decl. ¶ 5-9, Ex. 1; Hardy Decl. ¶ 8-9.) Indeed, R.G. has been returned to HYCF once already since the complaint was filed, for no misconduct of her own. (R.G. Decl. ¶ 45.)[8]

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evading-review exception to mootness, which, in the context of former detainees, requires "a 'reasonable expectation' that they [will] be transferred back to [the facility] or released and reincarcerated." *See Demery v. Arpaio*, 378 F.3d 1020, 1027 (9th Cir. 2004). Mootness is discussed fully *infra*.

[8] Statistics regarding parole revocation further confirm plaintiffs' reasonable expectation of return to HYCF as of the time of filing. Nearly half of paroled wards are returned to HYCF for parole violations. (Supp. Perrin Decl. Ex. 1 (AG Report at 2, 13); Hardy Decl. ¶¶ 7-9.) Defendant Tufono-Iosefa, the Youth Facility Administrator of HYCF, testified that a "conservative estimate" was that 5 youth were returned to HYCF from parole each month. (Tr. I. at 192:20-24.) With respect to wards who, like J.D., are on probation, the

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Second, *Lyons* "pointed to the absence of 'any [record] evidence showing a pattern of [unconstitutional] police behavior.'" *LaDuke*, 762 F.2d at 1324 (quoting *Lyons*). In contrast, here, plaintiffs' expectation that they would be subjected to unconstitutional conditions if returned to HYCF objectively was reasonable in light of defendants' history of repeated and persistent unconstitutional conduct and resistance to reform. *See Armstrong*, 275 F.3d at 861 ("[W]here the defendants have repeatedly engaged in the injurious acts in the past, there is a sufficient possibility that they will engage in them in the near future to satisfy the 'realistic repetition' requirement.").

On this record, plaintiffs have demonstrated a reasonable expectation that they will be returned to HYCF and have shown that the pattern of constitutional violations at HYCF continues unabated. (*See also* Mem. at 10-12.)

B. R.G. and C.P.'s Claims Are Not Moot[9]

The burden of demonstrating that events subsequent to the filing of the complaint have mooted a claim rests on the party asserting mootness. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993) ("While the initial burden of establishing the trial court's jurisdiction rests on the party invoking that jurisdiction, once that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an

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AG found that "[c]ommitments for probation revocation accounted for 27%" of first-time commitments to HYCF. (Supp. Perrin Decl. Ex. 1 (AG Report at 2,13); *see also* Brown Decl. ¶¶ 12-14.) This is neither remote nor speculative.

[9] Defendants have not asserted that J.D.'s claims for injunctive relief are moot.

appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result."); *see also Demery*, 378 F.3d at 1025-26; *Mujahid v. Daniels*, 413 F.3d 991, 994 (2005); *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001).

The Ninth Circuit explained in *Demery* the organizing principle that governs mootness determinations: "Once a defendant has engaged in conduct the plaintiff contends is unlawful and the courts have devoted resources to determining the dispute, there is Article III jurisdiction to decide the case as long as 'the parties [do not] plainly lack a continuing interest." 378 F.3d at 1026 (quoting *Friends of the Earth*, 528 U.S. at 192). Consequently, "a party moving for dismissal on mootness grounds bears a heavy burden," *id.* at 1025, and must demonstrate that "by virtue of an intervening event, [the court] cannot grant any effectual relief whatever in favor of the appellant." *Mujahid*, 413 F.3d at 994 (citation and quotation omitted).

1. Defendants' Voluntary Intentions to Avoid R.G.'s Future Placement at HYCF Do Not Moot Her Claims for Injunctive Relief

After plaintiffs filed this motion, and while R.G. was absent from her residential placement program in November 2005, defendants submitted testimony to the Court setting forth their intention to avoid placing R.G. back in HYCF for a parole violation, in part because defendants feared that she would be harassed by HYCF staff members. (11/21 Tr. 15:9-16:20). However, defendants' asserted intentions do not moot R.G.'s claims.

Defendants have not met their "heavy burden" to submit evidence of events subsequent to filing that deprive R.G. of a continuing interest in conditions at HYCF. *Demery*, 378 F.3d at 1025. Defendants' statement of intent to *recommend* that R.G. not be returned to HYCF neither establishes that she will not be sent back to HYCF nor gives her the relief she has requested. Accordingly, the Court still can grant her effectual relief, and her claims are not moot. *See Mujahid*, 413 F.3d at 994.

Indeed, where an assertion of mootness is based on defendants' voluntary cessation of a challenged practice the test for mootness is especially "stringent" and defendant bears a "formidable" burden. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000). First, it must be "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (citation omitted). Second, the defendant must demonstrate that "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal quotations and citations omitted) (emphasis added). The "heavy burden of persuading" the Court that the "challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal quotation marks omitted).

Under this standard, Mr. Enesa's recommendation that R.G. not be returned to HYCF for her November parole violation is not sufficient to moot R.G.'s claims. First, neither Mr. Enesa nor any of the defendants has the legal authority to detain R.G. at a facility other than HYCF. (11/21 Tr. at 15:18-

16:20.) That is a matter that is subject to the decisions of the prosecutor's office and the adult court, (11/21 Tr. at 26:24-27:20), and may be subject to approval by the family court. (*Id.*) Additionally, R.G. could be remanded to HYCF if she was not detained at OCCC. (11/21 Tr. at 27:16-20.). Second, in light of Mr. Enesa's prior testimony, R.G. might prevail on a challenge that such a recommendation to remand her to OCCC, like a decision to put her in isolation, is not within the range of acceptable professional decisions for how to keep juveniles safe from harassment and constitutes discriminatory treatment based on her sexual orientation and retaliation based on her decision to challenge the conditions at HYCF. Third, Mr. Enesa's recommendation was limited in time to R.G.'s November parole violation, and R.G. returned to her program in the allotted time, rendering Mr. Enesa's recommendation ineffective. And, finally, even if the Court assumes that Mr. Enesa would make a similar recommendation for R.G. if faced with a future parole violation, this assumption is too speculative for the Court to conclude that defendants have shouldered their "heavy burden" of showing that R.G. cannot be subjected to the same challenged conduct at HYCF.

2. Defendants Have Failed to Show That C.P.'s Claims for Injunctive Relief Are Moot

At the time the complaint was filed, all plaintiffs faced a reasonable expectation of return to HYCF. Defendants have asserted obliquely that C.P.'s claims for injunctive relief may be moot because she recently reached the age of majority. Plaintiffs responded that C.P. could be returned to HYCF if she is prosecuted for actions that occurred before she reached the age of majority,

which was just a few weeks ago. (Tr. II at 97:6-98:5.)[10] Indeed, this is exactly the set of events that resulted in J.D. being sent back to HYCF in 2005, and which continues to subject him to a reasonable expectation of return to HYCF until he is 19 years old.

In *Vitek v. Jones*, 445 U.S. 480 (1980), a prisoner challenged his involuntary transfer to a state mental hospital. While the case was pending, the prisoner was paroled, violated his parole, and was returned to prison (but not to the mental hospital). *Id.* at 486. Nevertheless, the Court found that the prisoner, who had a history of mental illness and remained a threat to himself and others, was still "in fact under threat of being transferred to the state mental hospital." *Id.* (internal quotation marks omitted). Because it was not "absolutely clear . . . that the allegedly wrongful behavior could not reasonably be expected to recur," the case was not moot. *Id.* at 487 (internal quotation marks omitted). *See also Olmstead v. L.C. ex. rel. Zemring*, 527 U.S. 581, 594 n.6 (1999) (finding that claims of two institutionalized women concerning their continuing confinement were not mooted by their release to community based programs because the challenged confinement was capable of repetition, yet evading review); *Demery*, 375 F.3d at 1025.

[10] Defendants elicited testimony from C.P. that she is no longer in state custody and cannot be returned to HYCF. Tr. I at 135:6-14. That testimony is of little weight in the mootness analysis, however, because it is apparent from the record that, as a matter of law, she can be returned to HYCF if she is arrested for acts that allegedly occurred before she turned 18. C.P.'s legal conclusion that she cannot be returned to HYCF does not alter that fact.

While the possibility that C.P. would be charged for an act allegedly committed before she turned 18 would likely have been too speculative to establish standing at the outset of the case, at this stage, C.P.'s claims are not moot because it is not "absolutely clear" that she cannot again be subjected to defendants' "allegedly wrongful behavior." *Vitek*, 445 U.S. at 487. Defendants have not shown that she "plainly lack[s] a continuing interest" in the outcome, *Demery*, 378 F.3d at 1026, and "that there is no effective relief remaining that the court could provide," *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1134 (9th Cir. 2004), *cert. denied*, 126 S. Ct. 367 (2005); *cf. Friends of the Earth*, 528 U.S. at 190 ("[T]here are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."). So long as C.P. can return to HYCF, an order from this court can grant her effective relief from the challenged conduct.

To meet their burden in these circumstances, defendants would have to demonstrate that it is not possible for C.P. to return to HYCF – a burden that they have not satisfied. In fact, the record demonstrates that merely attaining the age of 18 is no guarantee against return to HYCF. Rather, where a youth who, like C.P., has attained the age of 18 subsequently is charged with a crime committed while still a minor, the youth ordinarily will again be made subject to HYCF's jurisdiction until their 19th birthday. Indeed, this is precisely what happened to J.D. in this case. (J.D. Decl. ¶ 54; Brown Decl. ¶¶ 8-11.)

3. The Challenged Conduct at HYCF Continues to Date

Defendants' challenged practices continue unabated. Defendants continue to follow outdated policies intended for an adult institution, which are inappropriate for juveniles. (Mem. at 19; *see also* Roush Decl. ¶ 8; Miesner Decl. ¶ 5; Griffis Decl. ¶ 5.) HYCF has recently adopted a "Youth Rights" policy that provides that youth should not be discriminated against on the basis of "sexual orientation." (Tufono-Iosefa Decl. Ex. D.) Other than these two words, the current policies at HYCF remain silent with respect to the treatment and care of LGBT youth. (*Id*.; Hardy Decl. ¶ 4; Hadley Decl. ¶ 8; Supp. Bidwell Decl. ¶ 8.) And Ms. Tufono-Iosefa and the HYCF medical staff testified before the Legislature in November 2005, after issuance of the "Youth Rights" policy, that HYCF has no policies governing the treatment of LGBT wards. (Supp. Perrin Decl. ¶¶ 7, 18.) Thus, the Administrator herself appears not to view the Youth Rights policy as having any role in shaping the treatment of LGBT wards.

Moreover, defendants' voluntary adoption of a new policy does not moot plaintiffs' claims for injunctive relief. Again, in cases of voluntary cessation, defendant bears a "formidable" burden; it must be "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth*, 528 U.S. at 189, and the defendant must demonstrate that "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. at 631 (internal quotations and citations omitted) (emphasis added). Defendants have made no such showing. To the contrary, the only evidence in the record

concerning training of staff about the new Youth Rights policy indicates that unsafe conditions for LGBT wards are likely to continue unabated. On Tuesday, October 25, 2005, there was staff training on three new policies at HYCF, including Youth Rights. (Hardy Decl. ¶ 3; Hadley Decl. ¶ 9.) When one of the social workers asked the trainer, Ms. Emmert, what the new policy meant with respect to transgender wards, Ms. Emmert replied, "it is what is between their legs that matters," and that that MTFs would have their heads shaved and be placed with the boys. (Tr. I at 155:25-156:18 (Hardy); Hardy Decl. ¶ 5; Hadley Decl. ¶¶ 9-10.) Such statements indicate that Ms. Emmert's recommendations regarding treatment of LGBT wards are unlikely to improve unsafe conditions at HYCF and may even make it even more likely that plaintiffs will be subjected to similar or more egregious conditions upon a return to HYCF.

II. PLAINTIFFS ARE ENTITLED TO PRELIMINARY RELIEF ON THEIR DUE PROCESS CLAIM

A. Plaintiffs Are Likely to Succeed on the Merits on Challenges to Unsafe Conditions and Unreasonable Restraint at HYCF

1. The Fourteenth Amendment Governs the Constitutionality of Conditions at HYCF

Wards at HYCF have been adjudicated "delinquent," not convicted of crimes. H.R.S. § 571-1. Because they are confined without the "constitutional guarantees traditionally associated with criminal prosecutions," *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977), the "more protective" due process clause of the Fourteenth Amendment, rather than the Eighth Amendment, governs their conditions of confinement, *Gary H. v. Hegstrom*, 831 F.2d 1430,

1432 (9th Cir. 1987); *see also Youngberg v. Romeo*, 457 U.S. 307, 312 n.11 (1982) (holding district court improperly applied Eighth Amendment deliberate indifference standard to conditions of confinement of mentally disabled adults).

Courts applying the due process clause to assess conditions of confinement for incarcerated children have applied the standards set forth in two Supreme Court cases addressing similar populations: *Bell v. Wolfish*, 441 U.S. 520 (1979), which addressed the rights of adult pretrial detainees, and *Youngberg v. Romeo*, 457 U.S. 307 (1982), which concerned the rights of mentally disabled individuals involuntarily committed by the state.

In *Bell*, the Supreme Court considered the due process rights of pretrial detainees, who, like juveniles, are incarcerated but have not been convicted of crimes, and held that conditions are unconstitutional if they "amount to punishment." *Bell*, 441 U.S. at 535. Subjecting detainees to unsafe conditions or isolation amounts to punishment when done either with the express intent to punish or without a legitimate purpose. *Id.* at 538-39 n.20. Moreover, even where a legitimate non-punitive purpose is asserted, if the conditions imposed are "excessive" in relation to that non-punitive purpose, *id.* at 538, including when officials' response to operational considerations is "exaggerated," *id.* at 540 n.23, a due process violation is established.

In *Youngberg*, the Supreme Court held that a mentally disabled individual who was involuntarily committed to a state institution had a protected liberty interest in reasonably safe conditions of confinement and freedom from unreasonable bodily restraint. 457 U.S. at 315-16. The plaintiff in *Youngberg* was injured repeatedly by himself and by others and alleged that defendants

violated his rights to due process and freedom from cruel and unusual punishment when they "failed to institute appropriate preventive procedures" to keep him safe and instead restrained him for portions of each day for his own safety and for the safety of others. *Id.* at 310-11. The Court reiterated that determining whether conditions violate due process requires courts "to balance 'the liberty of the individual' and 'the demands of an organized society.'" *Id.* at 320. The Court elaborated on the analysis in *Bell*, explaining that whether state actors have "adequately protected the rights of the involuntarily committed," *id.* at 321, depends on whether it reflects the judgment of qualified professionals, *id.* at 321-22, or is "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment," *id.* at 323.

Thus, "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *Id.* at 321 (internal quotations omitted). The Supreme Court designed that standard in order to "limit [] judicial review of challenges to conditions in state institutions" and to minimize "interference by the federal judiciary with their internal operations." *Id.* at 322. However, the Supreme Court was careful to explain that such deference to state institutions is based on the recognition that they are run by appropriately qualified professionals. *Id.* at 323 n.30. In order words, the determination that professional judgment has been exercised must be based on a finding that the challenged decision was made by "a person competent, whether by education, training or experience, to make the particular

decision at issue" or a person "subject to supervision of qualified persons." *Id*. Several courts, including the Ninth Circuit, have relied on *Youngberg* in assessing the constitutionality of juvenile conditions of confinement. *See Gary H.*, 831 F.2d at 1432; *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 585 n.3 (3d Cir. 2004) (holding juvenile-detention center has duty to protect wards from harm "whether self-inflicted or inflicted by others"); *Alexander S. v. Boyd*, 876 F. Supp. 773, 797-98 (D.S.C. 1995) (same).

Based on the foregoing authorities, the due process inquiry in this case is whether defendants' harassment of plaintiffs, failure to take adequate measures to stop harassment of plaintiffs by staff and other wards, and use of isolation as a form of protection against harassment are within the range of professionally accepted choices for treatment of juvenile wards who are or who are perceived to be LGBT.

2. Injunctive Relief Is Necessary To Protect Plaintiffs From Unsafe Conditions and Improper Use of Isolation

The Court's preliminary factual findings establish that plaintiffs are likely to succeed on the merits of their due process claim. Indeed, both the facts and the law clearly favor the plaintiffs on their claim that defendants subject them to a pattern and practice of unsafe conditions, including a pervasive climate of sexual, physical and verbal anti-LGBT harassment and discrimination, and long periods of isolation. In so doing, defendants substantially depart from the range of accepted professional judgment and impose conditions that impermissibly punish plaintiffs, for whom reintegration into their families and communities is the ultimate goal. *See* H.R.S. § 352-2.1.

Indeed, DOJ found that conditions at HYCF not only violate wards' due process rights, but "are so egregious as to violate even the more stringent Eighth Amendment standard." (Perrin Decl. Ex. B (DOJ Report at 5).) Plaintiffs' showing likewise establishes that, even under the more stringent deliberate indifference standard applicable to Eighth Amendment claims, injunctive relief is appropriate to prevent further unrestrained harassment and isolation of plaintiffs. *See Youngberg*, 457 U.S. at 312 n.11 (holding district court erroneously used deliberate indifference standard in due process case involving repeated attacks on involuntarily committed mentally disabled child); *but see Luzerne County*, 372 F.3d at 579 (applying deliberate indifference standard in challenge to conditions at juvenile facility because "forethought about a resident's welfare is not only feasible but obligatory") (internal marks and citations omitted).

a. Plaintiffs Are Likely To Succeed on Their Claim that Defendants Failed to Protect Them from Anti-LGBT Harassment

Defendants have offered no evidence that their pattern and practice of failing to protect plaintiffs from anti-LGBT harassment by staff and other wards is within the range of accepted professional choices. As the Ninth Circuit said in the context of school harassment, it is difficult to conceive of "any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1138 (9th Cir. 2003). Likewise, when analyzing plaintiffs' due process claim, it is hard to imagine a legitimate, non-punitive purpose within the range of accepted professional responses for

permitting staff and other wards to harass, threaten and assault plaintiffs based on their actual or perceived sexual orientation or gender identity.

Defendants assert that plaintiffs did not suffer "any physical harm," and therefore are not entitled to injunctive relief. (Opp. at 21, 24.) But that argument is both factually and legally incorrect. As the Court's factual findings reflect, J.D.'s unrebutted testimony establishes a harrowing ordeal of physical, sexual and emotional abuse, including physical and sexual assaults and frequent threats of physical and sexual assault. Defendants also fail to rebut the physical manifestations of emotional and psychological abuse described by J.D., R.G. and C.P. (R.G. Decl. ¶¶ 5, 9, 15; C.P. Decl. ¶¶ 41, 47.) Moreover, a reasonably safe environment *includes* protection from psychological abuse. *See K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) ("*Youngberg v. Romeo* made clear . . . that the Constitution requires the responsible state officials to take steps to prevent children in state institutions from deteriorating physically or psychologically."). Extensive expert testimony also supports the conclusion that plaintiffs are likely to succeed on the merits of their claim that conditions at HYCF are unsafe for them both physically and psychologically.

3. Absence of Policies and Training to Protect LGBT Wards

Given their knowledge of the severity and the on-going nature of the harassment plaintiffs faced from staff and other wards, the supervisory defendants' failure to adopt policies and procedures and to provide training regarding how to ensure the safety of LGBT wards, including identification and protection of vulnerable youth, supervision of youth, appropriate reporting and

response to staff-on-youth and youth-on-youth abuse, and handling of grievances substantially departs from the range of accepted professional judgment, subjects plaintiffs to a punitive environment and establishes deliberate indifference to plaintiffs' safety. Most notable in light of the complaints defendants received from plaintiffs and from others on their behalf is the complete lack of training for staff about their obligations to refrain from harassment and discrimination, to intervene in ward-on-ward harassment and to investigate claims of harassment.

The Third Circuit recently considered a similar situation in *Luzerne County*, 372 F.3d 572. The plaintiff, a juvenile who was assaulted repeatedly by fellow wards in a detention facility, charged that the center's lack of policies to ensure youth safety and failure to train its staff on methods of identifying and protecting vulnerable youth violated his due process rights. *See id.* at 575. The court reversed summary judgment for the defendants, holding that a reasonable jury could find the plaintiff's injuries were a foreseeable consequence of the center's lack of policies and procedures and failure to train, which deviated substantially from accepted professional judgment. *Id.* at 580-86. Similarly, here, HYCF's lack of minimally adequate policies, procedures and training to ensure ward safety resulted in and threatens to cause additional harassment and abuse by staff and other wards so severe that it caused each of the plaintiffs to contemplate suicide and one of the plaintiffs to engage in self-mutilation and attempt suicide.

4. Absence of a classification system

Defendants admit that that they house the most violent wards together with the most vulnerable, but they offer no evidence that the absence of a classification system for protecting vulnerable wards is professionally acceptable in a juvenile corrections setting. In contrast, juvenile corrections experts Roush, Miesner and Griffis provide unrebutted testimony establishing that the absence of a classification system to protect vulnerable wards from aggressive wards, combined with the absence of policies, training and supervision, makes the environment at HYCF unsafe.

Similarly, DOJ found that HYCF's frequent failure to protect youth from assaults by other wards can be attributed in part "to the absence of a classification criteria for housing youth. . . . [S]taff place aggressive youth with vulnerable youth regardless of the risk of harm." (Perrin Decl. Ex. B (DOJ Report) at 16). A sound classification system is necessary to provide incarcerated juveniles with reasonably safe conditions, including the right "to reasonable protection from the aggression of others, whether 'others' be juveniles or staff." *Alexander S.*, 876 F. Supp. at 797-98; *see also Redman v. County of San Diego*, 942 F.2d 1435, 1440 n.7 (9th Cir. 1991) (*en banc*); (Perrin Decl. Ex. K (AG Report); (Perrin Decl. Ex. J at 6 (report of court-appointed expert regarding conditions at California Youth Authority noting the "growing professional consensus that effective classification systems are central to the safe and efficient operation of correctional systems").) Defendants' failure to classify wards and practice of placing aggressive youth with vulnerable youth, including placing J.D. and C.P. with sexually aggressive boys

and threatening to place R.G. with the boys, has resulted in and continues to threaten repeated physical and sexual assaults on J.D. and C.P., and pervasive verbal harassment of all plaintiffs. Based on the undisputed expert testimony and legal precedent before the Court, the decision not to employ a classification system is not a professionally acceptable choice and, indeed, rises to the level of deliberate indifference.

5. Inadequate staffing and supervision

Defendants do not dispute that staffing and supervision at HYCF is inadequate to provide a safe environment for plaintiffs in the modules. As the DOJ Report concluded, "the lack of supervision of youth is [a] contributing factor" to unconstitutionally hazardous conditions at HYCF." [check where this quote ends—we have two terminal quotation marks] *See also Luzerne County*, 372 F.3d at 581. Testimony from plaintiffs J.D. and C.P. that they frequently experienced ward-on-ward harassment when YCOs were not paying attention or were absent, is consistent with the DOJ finding that defendants have "employed an insufficient number of staff at HYCF to monitor youth, and the staff that are employed there have no training in adequate monitoring procedures. As a result, youth are frequently able to exploit the gaps in supervision and harm other juveniles." (Perrin Decl. Ex. B (DOJ Report) at 16.)

Indeed, by asserting that J.D. and C.P. were isolated for "protective purposes," (Opp. at 21, 24-25, 27-28), defendants concede that the modules at HYCF were unsafe for them and that staffing levels left defendants unable to ensure plaintiffs' safety by other means. Given the obvious relationship between staffing levels and safety in a custodial setting, defendants' chronically

inadequate staffing also supports a finding of deliberate indifference. *Luzerne County*, 372 F.3d at 581.

6. Ineffective Grievance Procedure

The DOJ Report found that "[t]he most significant legal deficiencies with the grievance system at HYCF are the difficulty in filing claims and the common presence of intimidation and retaliation against those youth who are able and dare to do so." (Perrin Decl. Ex. B (DOJ Report) at 20-21 (former administrator conceded "that he simply could not complete investigations" due to resistance and sick outs by YCOs).) Nothing in the evidence before the Court suggests that these deficiencies have been corrected by HYCF.

HYCF's former grievance policy, which was in place until after plaintiffs' Motion was filed, was ineffective in addressing plaintiffs' complaints. Although defendants have adopted a new grievance procedure after the filing of this Motion, testimony by defendants Agnew and Tufono-Iosefa before the Legislature demonstrates that this new policy remains inadequate to handle complaints of alleged mistreatment and complaints that implicate supervisory personnel at HYCF. (Supp. Perrin Decl. ¶¶ 14-16.) Investigations concerning alleged mistreatment take approximately three months and there is no mechanism in place to address a situation where a ward complains of mistreatment by a supervisory staff member. (*Id.*)

Moreover, defendants' change from a constitutionally inadequate system to an allegedly adequate system occurred only after this lawsuit commenced. The timing of that alone is sufficient to conclude (or create an inference) that this was a litigation-induced change, which is best viewed as an attempt at

voluntary cessation. The newly minted grievance policy, however, does not meet the "formidable" and "heavy burden" nor does it satisfies the "stringent" standard to moot plaintiffs' claims regarding the grievance system. *Friends of the Earth*, 528 U.S. at 189-90. First, nothing in the new policy or its implementation makes it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. (citation omitted). Second, defendants have failed to demonstrate that "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. at 631 (internal quotations and citations omitted)(emphasis added). And, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," for if it did, "the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth*, 528 U.S. at 189 (2000) (internal quotation marks and ellipsis omitted).

In *Luzerne County*, the court found that evidence of an inadequate policy for reviewing and acting on incident reports could support a finding that "the Center disregarded an obvious consequence of its action, namely, that residents of the Center could be at risk if information gleaned from the incident reports was not reviewed and acted upon." 372 F.3d at 583. Likewise, here, defendants' failure to establish an adequate policy for reviewing and acting upon grievances and incident reports contributes directly to the unsafe environment at HYCF.

7. Defendants' Use of Isolation Is Inconsistent with Professional Standards and Constitutes Punishment

Defendants admit that they use isolation as a means of "protecting" wards who are or are perceived to be LGBT, including C.P. and J.D., from abusive conditions at HYCF. (Opp. at 27-28; Tufono-Iosefa Decl. ¶¶ 25-27, 28-32) But the expert evidence and legal precedent before the Court uniformly concludes that long-term segregation or isolation of youth is *inherently* punitive and is well outside the range of accepted professional practices. (Mem. at 21-25; *see also* Roush Decl. ¶¶ 12-13; Miesner Decl. ¶ 11; Griffis Decl. ¶ 12.) Indeed, HYCF may be the only juvenile facility in the country that employs this practice. (Griffis Decl. ¶ 12.) Notably, the use of isolation for "protection" violates even HYCF's own written policies. (Tufono-Iosefa Decl. ¶ 42, Ex. E. (wards have the right to "not be isolated or segregated unless [their] behavior is in violation of HYCF rules and regulations.").)

It is well-established that the use of isolation for juveniles is punitive except where necessary to restrain a violent juvenile for a short period of time. *See, e.g.*, *Milonas v. Williams*, 691 F.2d 931, 942-43 (10th Cir. 1982) (affirming injunction against placing children in isolation for any reason other than to contain violent behavior); *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983) (experts' testimony on lack of therapeutic and disciplinary benefits from isolation sufficient to warrant remand for further factual findings); *Pena v. N.Y. State Div. For Youth*, 419 F. Supp. 203, 210 (1976) (discussing New York statute that requires solitary confinement only be used "'where a child constitutes a serious and evidence danger to himself and others'"). Even the

threat of isolation has been held to constitute punishment in certain circumstances. *See Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 206 (5th Cir. 1974) (characterizing the threat of solitary confinement as "mental punishment").

Defendants' assertion that they did not intend the isolation as "punishment" misses the point of the due process inquiry. Isolation is not permissible simply because defendants do not impose it with the intent to punish. Rather, under *Youngberg*, isolation—like any other condition or restraint—is permissible only to the extent defendants exercise professional judgment in imposing it. *See Morales v. Turman*, 364 F. Supp. 166, 174 (E.D. Tex. 1973) ("Placing inmates in solitary confinement or secured facilities, in the absence of any legislative or administrative limitation on the duration and intensity of the confinement and subject only to the unfettered discretion of correctional officers, constitutes cruel and unusual punishment[.]"); *see also People ex rel Schipski v. Flood*, 88 A.D.2d 197, 199-200 (N.Y. App. Div. 1982) ("[W]e find no compelling government necessity which can justify the blanket confinement for a minimum 22 hours per day of all inmates in protective custody at the Nassau County Correctional Center, and hold that the 22-hour lock-in policy simply does not pass constitutional muster."). Here, however, the factual record and the law clearly favor plaintiffs' contention that long-term isolation is never a "professionally acceptable choice," *Youngberg*, 457 U.S. at 321, for protecting youth in a juvenile correctional setting. *See, e.g., Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F. Supp. 473, 480 (S.D.N.Y. 1970) (holding plaintiff's solitary confinement unconstitutional after considering extensive

expert testimony stating that the extended use of isolation on children is "cruel and inhuman," as well as "counterproductive to the development of the child."); *Feliciano v. Barcelo*, 497 F. Supp. 14, 35 (D.P.R. 1979) ("Solitary confinement of young adults in unconstitutional."); *D.B. v. Tewksbury*, 545 F. Supp. 896, 905 (D. Or. 1982) (holding that "[p]lacement of younger children in isolation cells as a means of protecting them from older children" violates plaintiffs' due process rights under the fourteenth amendment). In short, plaintiffs are likely to prevail on the merits of their claim that isolating them for their own protection – or threatening isolation for being LGBT – violates due process.

Defendants' decision to use isolation to protect plaintiffs from harassment at HYCF is no more permissible than a decision to suspend children from school to protect them from harassment in the hallways. *See, e.g.*, *Gay-Straight Alliance Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1101-02 (E.D. Cal. 2001) (holding organization alleged "immediate or threatened injury" to student members who were harassed based on sexual orientation because, *inter alia*, defendant school administrators and teachers "deliberately ignored . . . students' pleas for help, or *actively sought the transfer of such students to [independent study] or adult alternative program[s]*") (emphasis added).

In light of the well-known adverse psychological and physical effects of isolation on children, neither administrative convenience nor the need to protect children from harassment and abuse is sufficient to warrant extended isolation. *See Milonas*, 691 F.2d at 942-43; *Bell*, 441 U.S. at 539. Juveniles are particularly vulnerable to the damaging psychological effects of isolation,

including extreme loneliness, anxiety, rage, and depression, among other potentially debilitating emotional and psychological problems. *See*, *e.g.*, *Hegstrom*, 831 F.2d at 1434 (Ferguson, J., concurring); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986) ("Juveniles are even more susceptible to mental anguish than adult convicts"); (Bidwell Decl. ¶ 26; Ryan Decl. Ex. B.). The likely perception by teenagers that isolation is imposed as punishment for being LGBT only compounds the harm. (Ryan Decl. Ex. B.) Defendants' practices are, at best, an excessive, and therefore unconstitutional, response to legitimate safety needs of the institution. *Bell*, 441 U.S. at 538. It may have been more convenient for defendants to isolate J.D. and C.P. than to address the underlying harassment in the modules, but convenience cannot justify such departure from professional standards and imposition of punishment.

The supervisory defendants' failure to correct the foregoing deficiencies and to intervene, in the face of repeated complaints about anti-LGBT abuse and improper use of isolation, directly contributed to plaintiffs' injuries and threatens continuing injury. *See Redman*, 942 F.2d at 1446 (["S]upervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.") (internal quotations omitted). Defendants' failure to take even minimal steps necessary to ensure a reasonably safe environment and to refrain from punitive isolation cannot be explained by any legitimate governmental interest, departs substantially from accepted professional practices, and

threatens to again subject plaintiffs to unconstitutional conditions and practices at HYCF.

Defendants do not dispute their duty to ensure reasonably safe conditions of confinement at HYCF, and freedom from unreasonable bodily restraint, and on this record they have failed effectively to refute plaintiffs' evidence that HYCF does not comply with these constitutional standards. Defendants rely heavily on the proposition that prison administrators should be accorded deference in selecting the actions necessary to preserve internal order. *Bell*, 441 U.S. at 547. Defendants offer no facts, however, to support such deference here. First, plaintiffs have made a strong showing that the supervisory defendants are not qualified professionals within the meaning of *Youngberg*, making it inappropriate at this juncture to afford their decisions the deference that normally is due to professional decision-making by state correctional managers. Second, even if the supervisory defendants were entitled to deference, the conditions, policies, and practices at HYCF are not within the spectrum of "professionally acceptable choices." *Youngberg*, 457 U.S. at 321. Rather, defendants' failure to take the basic steps necessary to correct conditions at HYCF that expose plaintiffs to both physically and psychologically damaging harassment and abuse by staff and other wards and defendants practice of isolating plaintiffs rather than taking such steps to stop the harassment depart so substantially from accepted professional standards that plaintiffs are likely to prevail on the merits of their due process claim. Indeed, both the law and the facts clearly favor them.

B. Irreparable Harm, Public Interest, Balance of Hardships

Defendants do not contest the plaintiffs' showing that they are threatened with irreparable harm as long as return to HYCF means facing either continued harassment, isolation or both, nor do defendants dispute the public interest in HYCF's adherence to constitutional norms.

Because of the likelihood that Plaintiffs will prevail on any or all of their claims, Plaintiffs need only show a *possibility* of irreparable injury. *Warsoldier*, 418 F.3d at 993-94. When a violation of constitutional rights is shown, no further showing of irreparable injury is required. *Associated Gen. Contractors of Cal.. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991).

Moreover, directing governmental entities to comply with the constitution is not a cognizable hardship for purposes of a preliminary injunction. In contrast, further harassment and abuse or isolation of plaintiffs is likely to cause them serious harm, with long-lasting repercussions. *See* Ryan Decl. Ex. B**,** so the balance of harms tips sharply in plaintiffs' favor.

C. Remedy

It is the duty of this Court "to make certain that minimal constitutional rights are preserved." *Gary H.*, 831 F.2d at 1433. Plaintiffs have demonstrated that injunctive relief is necessary to protect them against irreparable harm in light of (1) defendants' lack of policies and lack of training for staff about their obligations to refrain from anti-LGBT harassment and discrimination, to intervene in ward-on-ward harassment and to investigate claims of harassment, (2) defendants' failure to adopt or to implement a classification system for the identification and protection of vulnerable wards, (3) defendants' failure to

ensure adequate supervision of wards to prevent such treatment of plaintiffs, and (4) defendants' failure to establish a functional grievance procedure to allow plaintiffs' allegations of harassment to be addressed in a timely manner. Injunctive relief also is necessary to ensure that defendants do not subject plaintiffs to isolation instead of taking professionally appropriate measures to protect them from harassment by staff and other wards.

In this case, unlike in *Youngberg* and its progeny, plaintiffs' showing puts the very qualifications of the individuals who run HYCF at issue, making it difficult for the Court to craft injunctive relief that is meaningful yet respects the federalism concerns that normally require deference by federal courts to the professionals who run state institutions. Unfortunately, in this case, the record amply demonstrates that defendants have been on notice for several years that conditions at HYCF are dangerous for all wards, and have been on notice for well over a year that certain conditions put plaintiffs at particular risk of harm, yet defendants presented no evidence that they have taken or plan to take remedial measures to correct the deficiencies that make conditions at HYCF unsafe for plaintiffs. Rather, decisions about plaintiffs' safety are being made by an administrator who is entirely lacking in juvenile corrections management experience and training, whom defendants did not even seek to qualify as an expert at the hearing, who participated in and fostered anti-gay harassment of R.G., who personally directed that C.P. be housed with the boys rather than ordering that an appropriate, safe placement be found for her in the community, who ordered that C.P. and J.D. be isolated for their own protection (both with orders not to associate within the module and later with orders to put them in

holding cells for weeks at a time), and who appears to have made several material misrepresentations to this Court in sworn testimony.

Moreover, the record indicates that decisions about plaintiffs' safety are being ratified by the Director of the Office of Youth Services without any intervention to ensure that decisions are made in conformity with basic professional judgment. Indeed, Ms. Agnew's decision to terminate dealings with three nationally-recognized experts in juvenile corrections who had an outside grant to help HYCF identify problems and improve conditions and instead to hire a consultant with no prior experience with juvenile corrections and whose recommendations for treatment of transgender youth is outside the realm of professionally acceptable choices, indicates that if left to their own devices, defendants are unlikely to be able to select expert guidance to ensure that professional judgment is being exercised at HYCF.

Where, as here, the challenged decisions are not being made or overseen by qualified professionals, *Youngberg* establishes that the deference normally due from federal courts to the professionals who run state institutions is not appropriate. Moreover, even if such deference were warranted despite the YFA's lack of professional qualifications, it is apparent from the record that, as a matter of practice, decisions at HYCF regarding plaintiffs' safety and well-being are such a substantial departure from accepted professional judgment that it is evident no such professional judgment was in fact exercised.

While the Court normally would provide defendants an opportunity to correct the constitutional deficiencies and would issue only a prohibitory injunction, the facts and the law on this motion so clearly favor the plaintiffs,

and so clearly establish that defendants lack the professional qualifications necessary to craft their own remedial plan, that the Court is left with little option but to require some measure of mandatory relief to ensure that plaintiffs are not again subjected to the same unconstitutional conditions. In order to prevent the Court from becoming entangled in the day-to-day operations at HYCF, the Court will not appoint a special master or select a court-appointed expert to oversee management of the facility. Rather, the Court will order defendants to work with plaintiffs to identify a mutually-agreeable juvenile corrections expert to be retained by defendants and will order defendants to defer to the advice of that expert when the expert advises defendants in writing that a particular decision defendants wish to make is not consistent with accepted professional practices.

III. PLAINTIFFS ARE ENTITLED TO PRELIMINARY RELIEF ON THEIR EQUAL PROTECTION CLAIM

A. Plaintiffs Are Likely to Succeed on the Merits

To establish an equal protection violation under § 1983, "plaintiffs must show that defendants, acting under color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional" or that defendants "acted with deliberate indifference." *Flores*, 324 F.3d at 1134-35. Conversely, to survive rational basis review, defendants' discrimination must at least "bear[] a rational relationship to an independent and

legitimate [governmental purpose]." *Romer v. Evans*, 517 U.S. 620, 633 (1996).[11]

While *Flores* concerned the failure to protect students from harassment at school, the same equal protection principles apply in a juvenile correctional facility.[12] Defendants argue, without authority, that because a juvenile detention facility is a "tougher" environment than a school, conduct that would constitute "deliberate indifference" in a school setting is permissible at HYCF. (Opp. at 33.) The idea that a "tough" environment excuses defendants from preventing anti-LGBT harassment of wards, as required by *Flores,* is untenable.

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[11] As plaintiffs are likely to succeed on the merits even on rational basis review, there is no need for this Court to consider the open question of the appropriate level of equal protection scrutiny for discrimination based on sexual orientation or gender identity. *See Watkins v. United States Army*, 875 F.2d 699, 723 (9th Cir. 1989) (Norris, J., concurring); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (rejecting distinction for equal protection purposes between discrimination based on sexual orientation and discrimination based on same-sex sexual conduct (quoting *Romer*, 517 U.S. at 634).

[12] Although many constitutional challenges to correctional facility policies are subject to the test articulated in *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), the Supreme Court recently explained in *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141 (2005), that it applies "*Turner*'s reasonable-relationship test *only* to rights that are "inconsistent with proper incarceration." . . . *The right not to be discriminated against based on one's race* . . . is not a right that need necessarily be compromised for the sake of proper prison administration." *Id.* at 1149 (citation omitted) (emphasis added). The same principle applies here. Moreover, if *Turner* does not apply to pretrial detainees, *see Demery*, 378 F.3d 1028-29, it should not apply to incarcerated juveniles.

In any event, the outcome is the same under *Turner*, for it is not meaningful to ask "whether there are alternative means of exercising the right" to equal protection from harassment. 482 U.S. at 90. The impact on staff, other wards and HYCF resources of accommodating the right to equal protection from harassment can only be salutary. *See id*.

Undisputed expert testimony indicates that such abuse is even more pernicious in a juvenile corrections setting, where psychologically-vulnerable minors have no escape from peer and staff discrimination and perceive such treatment to be rejection by extended family members. (Mem. at 30-31; 9/30/05 Bidwell Decl. ¶ 17.) It is defendants' responsibility to ensure that HYCF's environment is not so "tough" as to fall short of constitutional standards. (Roush Decl. ¶ 13.)

As in *Flores*, the plaintiffs here are "members of an identifiable class" because they allege discrimination based on their actual or perceived sexual orientation, gender identity and sex. 324 F.3d at 1134-35. Plaintiffs are likely to succeed on the merits because the law and the facts strongly support their contentions that (1) defendants maintain a pattern and practice of intentionally discriminating against and harassing plaintiffs based on their sexual orientation or gender identity, are clearly unreasonable in the manner in which they responded to known peer harassment, and fail to take adequate remedial measures to address such harassment, and (2) such discrimination does not rationally advance any legitimate governmental interest. *Id.* at 1138.

B. Evidence of Differential Treatment and Unrestrained Anti-LGBT Harassment Support Preliminary Findings of Intentional Discrimination and Deliberate Indifference

In *Flores*, the Ninth Circuit found evidence of school administrators' failure to investigate complaints of harassment, to discipline harassing students, and to take appropriate remedial measures when students continued to complain of anti-LGBT harassment could support a finding of deliberate indifference. *Id.* at 1135-36; *see also Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 871, 875 (N.D. Ohio 2003). Although the school district had conducted

training about sexual harassment, the staff training "was limited and did not specifically deal with sexual orientation discrimination," and defendants inadequately conveyed their anti-harassment policies to students. *Flores*, 324 F.3d at 1136. The Ninth Circuit held a jury could find "that there was an obvious need for training and that the discrimination the plaintiffs faced was a highly predictable consequence of the defendants not providing that training." *Id.*

Plaintiffs' showing here goes well beyond that presented in *Flores* and supports their claim that defendants were "clearly unreasonable" in dealing with complaints of sexual, physical and verbal anti-LGBT harassment, *id.* at 1135, failed to take adequate remedial measures in response to repeated complaints from plaintiffs and medical staff, failed to discipline the perpetrators, failed to institute either universal policies and procedures for protecting wards or specific policies and procedures for protecting LGBT wards, failed to train staff and wards regarding such policies, told plaintiffs that the harassment was their fault, and punished plaintiffs by subjecting them to isolation. *See Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996) (citing failure to take action against perpetrators and rearrangement of victim's schedule to minimize exposure to offending students as evidence of deliberate indifference).

Plaintiffs also are likely to prevail on the merits of their claim that defendants intentionally discriminated against them, including by:

(1) Subjecting plaintiffs to a pattern and practice of anti-LGBT harassment by staff and supervisory personnel;[13]

[13] Defendants argue that "mere name calling" does not rise to the level of a constitutional violation, (Opp. at 30), but the authorities they cite

(Footnote continues on next page.)

(2) Failing to investigate plaintiffs' complaints or to discipline staff and wards who allegedly harassed or assaulted plaintiffs while investigating and disciplining plaintiffs for comparatively minor infractions;

(3) Punishing J.D. and C.P. for being the targets of anti-LGBT abuse by putting them in isolation while failing to discipline harassing staff and wards;

(4) Failing to refer wards who allegedly threatened or assaulted J.D. to the police for investigation and possible prosecution despite an avowed practice of referring all crimes to the police and despite having referred J.D. to the police for stealing a cell phone, *see Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) (selective prosecution based on sexual orientation violates equal protection); *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1220 (10th Cir. 2002) (deviation from procedure supports inference of improper motive);

(5) Encouraging and facilitating non-sexual aspects of a different-sex romantic relationship between R.G.'s girlfriend, T.R., and a male ward, including by passing notes between them, while discouraging and disparaging non-sexual aspects of R.G. and T.R.'s same-sex romantic relationship, *see Whitmire v. Arizona*, 298 F.3d 1134, 1136 (9th Cir. 2002) (finding no "common-sense connection" between a regulation that applied more restrictive rules for displays of affection between gay inmates and their same-sex visitors than for others);

(6) Disciplining R.G. and T.R. for saying "I love you" to one another and prohibiting them from talking, writing or signaling to one another while permitting heterosexual wards and staff to talk crudely and graphically about their sexual relationships, *see Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

The facts clearly favor plaintiffs' contention that this pattern of discriminatory treatment was motivated by defendants' disapproval of plaintiffs' actual or perceived LGBT status. *See Nabozny*, 92 F.3d at 457.

(Footnote continued from previous page.)

involved an isolated incident of a guard using racial epithets to refer to other prison staff in an adult prison, *see Dewalt v. Carter*, 224 F.3d 607, 610 (7th Cir. 2000), and an allegation of vulgarity in an adult prison, *see Oltarzewski v. Ruggiero*, 830 F.2d 136 (9th Cir. 1987). Neither case involved a pattern of targeted, identity-based name calling in a juvenile facility. Each of these distinctions establishes independently that this case is governed by *Flores* and not by *Dewalt* or *Oltarzewski*. Moreover, even if a pattern of verbal harassment by staff and the YFA were not sufficient standing alone to establish an equal protection violation, it still would provide "strong evidence of [anti-LGBT] animus." *Dewalt*, 224 F.3d at 612 n.3.

C. Evidence of Differential Treatment and Unrestrained Harassment Based on Sex Stereotypes Also Support Preliminary Findings of Intentional Discrimination and Deliberate Indifference

R.G., J.D. and C.P. all present evidence of harassment by staff and other wards based on sex stereotyping, including other wards calling J.D. a "bitch" and a "wahine," staff repeatedly referring to R.G. as "butchie" or "like a boy," and staff and wards harassing and discriminating against C.P. based on stereotypes about how boys and girls should act, dress, speak and identify.[14] Sex stereotyping is a form of sex discrimination, whether the claim is for disadvantage based on sex stereotypes, *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40, 251 (1989), or harassment based on sex stereotypes, *see Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enters., Inc*., 256 F.3d 864, 873-74 (9th Cir. 2001).

[14] Transgender people have an equal right to protection from discrimination based on sex stereotyping. *See Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (citation omitted) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination"); *Kastl v. Maricopa Cty. Cmty Coll. Dist.*, No. Civ. 02-1531-PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("The presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision"). Although the above cases involved statutory provisions, their reasoning is equally applicable to plaintiffs' constitutional challenge because the point they establish – that harassment based on sex stereotyping discriminates based on sex – stems from the concept of sex discrimination itself.

D. Defendants' Discriminatory Conduct Has No Rational Basis in Maintaining Order and Safety

Defendants assert that their treatment of plaintiffs contributed to order and safety at HYCF. (Opp. at 34.) To the contrary, defendants' practices quite plainly disserve the goals of maintaining order and safety at HYCF because they expose plaintiffs – and indeed all wards at HYCF – to a physically and psychological unsafe environment. (9/30/05 Bidwell Decl. ¶¶ 16-18, 20-59, Ryan Decl. Ex. B; Miesner Decl. ¶¶ 10, 11; Roush Decl. ¶ 13; Griffis Decl. ¶¶ 5, 12.) In the absence of any legitimate governmental interest, the only reasonable inference is that the basis for such actions was impermissible.[15] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer*, 517 U.S. at 633. Accordingly, plaintiffs are likely to succeed on the merits and the law and the facts clearly favor plaintiffs.

E. An Injunction is Necessary to Prevent Irreparable Harm

Absent injunctive relief, plaintiffs are threatened with irreparable harm in the form of unconstitutional punitive isolation, continued verbal, sexual and

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[15] Moreover, defendant Tufono-Iosefa's misrepresentation of the expert opinions of Messrs. Griffis and Meisner (Tufono-Iosefa Decl. ¶¶ 11, 12, 22), which was intended to place a veneer of professional respectability on her decision to transfer C.P. from the girls' unit to the boys' unit and then to keep her either with the boys or in isolation after the girls returned from Utah, provides powerful evidence that her *actual* motive was anti-LGBT animus. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("[T]he trier of fact can reasonably infer from the falsity of the explanation that the [party] is dissembling to cover up a discriminatory motive"). Likewise, defendant Tufono-Iosefa's misrepresentation regarding her reason for placing J.D. in isolation provides evidence that her actual motivation in putting him in isolation rather than taking measures to address the climate of anti-LGBT harassment in the modules included discriminatory motive.

physical harassment and discriminatory treatment. Moreover when a violation of constitutional rights is shown, no further showing of irreparable injury is required. *Associated Gen. Contractors*, 950 F.2d at 1412; *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (citation omitted) (an "alleged constitutional infringement will often alone constitute irreparable harm").

F. The Balance of Hardships Favors Plaintiffs and a Preliminary Injunction is in the Public Interest

The balance of hardships here is clear. On the one hand, plaintiffs will suffer serious harm if they are again subjected to the discriminatory environment at HYCF. On the other hand, defendants may be compelled to take to take appropriate measures to ensure ward safety and to refrain from punitive isolation. While requiring defendants to adopt polices, procedures and offer staff training to provide wards with a reasonable safe environment at HYCF may impose some administrative inconvenience, any burden on the defendants is minimal when viewed in light of defendants' legal responsibility to provide such an environment not only to the plaintiffs but to all of the State's wards that are entrusted to HYCF's custody and care. Thus, the balance of hardships tips decidedly in plaintiffs' favor.

Finally, protection of constitutional rights is a compelling public interest, *see United States v. Raines*, 362 U.S. 17, 27 (1960), and "weighs heavily in the balancing of harms, for the protection of those rights is not merely a benefit to plaintiff but to all citizens." *Int'l Soc'y for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116, 125 (E.D. Cal. 1978). The public interest is best served by issuing the requested injunction.

IV. PLAINTIFFS ARE ENTITLED TO PRELIMINARY RELIEF ON THEIR ESTABLISHMENT CLAUSE CLAIM

A. Plaintiffs Are Likely to Succeed on the Merits

Modern Establishment Clause jurisprudence centers on three tests: (1) the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); (2) the endorsement test from *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989); and (3) the coercion test from *Lee v. Weisman*, 505 U.S. 577, 580 (1992). Relief is proper upon a finding that defendants' actions violate any of the three tests. *See, e.g.*, *Newdow v. United States Cong.*, 328 F.3d 466, 487 (9th Cir. 2003), *rev'd on other grounds*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief," or "conveying . . . a message that a religion or particular religious belief is favored or preferred." (emphasis omitted). *County of Allegheny*, 492 U.S. at 593-94. Establishment Clause jurisprudence is especially protective of youth, recognizing that they are particularly susceptible to religious indoctrination. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992).

The Ninth Circuit explained in *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998) that a prison administration's failure to prevent known promotion of religious doctrine or organizations by prison staff would violate the Establishment Clause. The *Canell* court found no Establishment Clause violation in that case because there was no evidence that administrators knew about the staff conduct, staff training had addressed specifically the obligation to refrain from preaching and other proselytizing, and the challenged actions

consisted of isolated incidents of singing Christian songs, belittling other religions and mock-preaching by a single guard, over a period of only 18 days, that ended with the guard's transfer in response to plaintiff's complaint. *Id.* at 1214. Here, in contrast, plaintiffs have presented evidence of a more widespread, customary practice of endorsement of religion by multiple staff members, occurring over a much longer period of time, and, most importantly, ratified by HYCF's administration.

First, R.G. testified that several HYCF staff members singled her out for religious teachings, including YCOs Josiah and Rosete, and teacher Barbara Tanji. (R.G. Decl. ¶¶ 4-5, 9-10, 14.) Defendants Josiah and Rosete submitted declarations generally denying aspects of R.G.'s account. Rosete's testimony at the evidentiary hearing, however, revealed that she actually *had* made some of the statements that her declaration appeared to deny, and that she believed someone else may have made at least one of the statements that she denied making herself. Tr. II at 20:16-23:11. At this juncture, Josiah has not testified, and defendants did not submit a declaration from Tanji. But defendants had the opportunity to test R.G.'s credibility on this matter through cross-examination, and – as to this matter – confined their questioning to chronology and failed to undermine her credibility. (Tr. I. 23:23-25:23.) Moreover, R.G.'s testimony is supported by contemporaneous documents, including a May 17, 2005 letter from Dr. Bidwell to Ms. Tufono-Iosefa, which was copied to defendants Agnew and Koller. (Bidwell Decl. Ex. F.) That letter reported the salient details of some of the religious proselytizing alleged by R.G., and, in stark contrast to

Canell, defendants here have adduced no evidence that they responded to the letter or took any action based on it.

At this juncture, the record contains evidence sufficient to support a preliminary finding that these events occurred as described by R.G., and that the supervisory defendants ratified staff members' promotion of religious doctrine by failing to prevent it, despite notice that it was a common occurrence. *Canell*, 143 F.3d at 1214. Moreover, plaintiffs have made a strong showing that permitting such endorsement or sponsorship of religion is an unofficial "custom" at HYCF, and, unlike the facility in *Canell*, it is undisputed that HYCF staff have received no training "that preaching and other proselytizing by officers would unlawfully infringe on the First Amendment rights of [wards]." *Id.* at 1214.

Second, defendants concede that, until 2003, there was a "practice of allowing the wards at HYCF to only have Bibles in their cells." (Agnew Decl. ¶ 16.) The practices of allowing distribution of Bibles and forbidding wards access to other reading materials, if ultimately proven, would plainly violate the endorsement test. *County of Allegheny*, 492 U.S. at 593-94. Defendants do not contend otherwise, but merely argue that, as a matter of fact, "the practice of allowing the wards at HYCF to only have Bibles in their cells was discontinued in 2003." (Agnew Decl. ¶ 16.) However, plaintiff C.P. testified that for several months in 2004 she and other wards were not allowed to have any reading material in their cells other than the Bible. (C.P. Decl. ¶ 23.) The Bibles were supplied by a church group that was permitted to visit the facility to meet with wards. (*Id.*) Likewise, J.D. testified that when he was in a holding cell in 2004,

the only reading material available was a copy of the Bible, although medical staff provided him with one other book. (J.D. Decl. ¶ 34.) The Court, for purposes of this motion, finds plaintiffs' testimony credible based on their demeanor, the lack of live or declaration testimony contradicting their descriptions of the "Bibles only" practice, and documentary evidence corroborating that the practice continued as an unofficial custom for many months after defendants contend it was discontinued. (Perrin Decl. Ex. G (July 2004 letter).) The record supports the conclusion that the "Bibles only" practice persisted well beyond the date that it purportedly "was discontinued," that it was applied to more than one plaintiff, and that it occurred with the knowledge of responsible officials, who evidently permitted distribution of Bibles by a church group. *Canell*, 143 F.3d at 1214 ("government may not promote or affiliate itself with any religious doctrine or organization"). Moreover, in light of the evidence that the administration has been unsuccessful in previous attempts to discontinue this practice, the Court is unable to conclude on this record that it is "absolutely clear" that the "Bibles only" practice cannot reasonably be expected to recur. *Friends of the Earth*, 528 U.S. at 189. Accordingly, plaintiffs are likely to prevail on the merits of their Establishment Clause claim.

B. An Injunction is Necessary to Prevent Irreparable Harm

Absent injunctive relief, plaintiffs are threatened with irreparable harm in the form of state-sponsored religious indoctrination and discriminatory treatment in violation of their constitutional rights. When a violation of constitutional rights is shown, no further showing of irreparable injury is

required. *Associated Gen. Contractors*, 950 F.2d at 1412; *Monterey Mech. Co.*, 125 F.3d at 715.

C. The Balance of Hardships Favors Plaintiffs and a Preliminary Injunction is in the Public Interest

The continuation of the challenged practices will violate plaintiffs' constitutional rights, which itself may constitute irreparable harm. *Associated Gen. Contractors*, 950 F.2d at 1412; *Monterey Mech. Co.*, 125 F.3d at 715. On the other hand, defendants will not be harmed by an injunction that requires HYCF staff to stop promoting religious doctrine to wards, including condemning wards' sexual orientation based on staff's own religious beliefs, and that prohibits the supervisory defendants from turning a blind eye to such conduct when it occurs. Nor will defendants be harmed by an injunction that prohibits the "Bibles only" practice that they assert has already been discontinued. Thus, the balance of hardships tips sharply in plaintiffs' favor. Moreover, protection of constitutional rights is a compelling public interest. *Raines*, 362 U.S. at 27; *Int'l Soc'y for Krishna Consciousness*, 454 F. Supp. at 125.

V. PLAINTIFFS ARE ENTITLED TO PRELIMINARY RELIEF ON THEIR ACCESS TO COUNSEL CLAIM

A. Plaintiffs Are Likely to Succeed on the Merits

The right of access to the courts is protected by due process and equal protection, *see Ex parte Hull*, 312 U.S. at 642, *Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989), and requires that prisoners be afforded "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds v. Smith*, 430 U.S. 817, 825 (1977), *overruled in part on*

other grounds, *Lewis v. Casey*, 518 U.S. 343, 354 (1996). Prison officials must both eliminate undue barriers to inmate access and "shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Id.* at 824. For juveniles, courts have held that meaningful access to the courts requires access to counsel to allow children to assert violation of their civil rights related to their incarceration. *See John L. v. Adams*, 969 F.2d 228, 237 (6th Cir. 1992) (holding juveniles' access to counsel to challenge conditions of confinement and assert constitutional rights includes right to an attorney *compensated* by the State); *Cornett v. Donovan*, 51 F.3d 894, 898 (9th Cir. 1995); *Nami v. Fauver*, 82 F.3d 63 (3rd Cir. 1996).

Both the facts and the law clearly favor plaintiffs' contention that defendants have violated the principle that states may not erect barriers to or intentionally interfere with access to the courts without a legitimate penological purpose. After the ACLU released its report regarding HYCF in 2003 (Perrin Decl. Ex. A), HYCF began requiring parental consent to allow wards to speak with the ACLU about the conditions of their confinement. (Supp. Perrin Decl. ¶¶ 22, 38; Alston Decl. ¶¶ 6, 8, Ex. 6; Tufono-Iosefa Decl. Ex. C.) This parental consent practice prevented counsel from the ACLU from contacting plaintiff C.P. when she was returned to HYCF in August of 2005, just weeks before this action was filed. (C.P. Decl. ¶ 65; Perrin Decl., ¶¶ 12-13.) Additionally, HYCF has failed to adopt a policy and to train staff regarding a system for ensuring wards' rights to authorized legal calls and legal visits with civil counsel. (Hardy Decl. ¶¶ 10-11.) This failure resulted in plaintiff R.G. being denied permission to contact her retained attorney at the ACLU. (R.G. Decl. ¶ 43.).

Defendants appear to employ a double standard with respect to access to counsel. On the one hand, defendants hinder plaintiffs from contacting counsel of their choice. On the other hand, defendants Tufono-Iosefa and Agnew made every possible accommodation to afford their defense counsel the opportunity to interview minor wards at HYCF. (Tr. I at 195:11-197:6.) Defendants Tufono-Iosefa and Agnew made arrangements for their defense counsel to depose one ward, J.N., without obtaining consent of J.N.'s parent of guardian and without informing J.N. that she was entitled to have counsel present. (*Id.*). The decision to allow J.N.'s deposition was made to further the defendants' interests in this case and without due regard for J.N.'s best interests. (Tr. I. at 196:13-18.) Defendants' ad hoc practices in restricting access to counsel demonstrate that plaintiffs may be prevented from contacting civil counsel should they be returned to HYCF. Thus, plaintiffs are likely to prevail on the merits of their access to counsel claim.

B. An Injunction is Necessary to Prevent Irreparable Harm

Absent injunctive relief, plaintiffs are threatened with irreparable harm in the form of denial of access to courts and legal counsel in violation of their constitutional rights. *See Monterey Mech. Co.*, 125 F.3d at 715. This need for plaintiffs' access to counsel is particularly acute here where HYCF's own staff member testified that HYCF staff would be likely to harass plaintiff R.G. if she is returned to HYCF. (11/21 Tr. at 23:6-24.)

C. The Balance of Hardships Favors Plaintiffs and a Preliminary Injunction is in the Public Interest

Defendants will not be harmed by an injunction that requires them to provide plaintiffs with adequate access to courts and legal counsel, whereas plaintiffs' constitutional rights are violated by denial of such access. Thus, the balance of the harms tips sharply in plaintiffs' favor. Moreover, protection of plaintiffs' constitutional rights is a compelling public interest. *Raines*, 362 U.S. at 27; *Int'l Soc'y for Krishna Consciousness*, 454 F. Supp. at 125.

DATED: Honolulu, Hawaii, January 3, 2006.

/s/Matthew Hall

MATTHEW I. HALL
Attorneys for Plaintiffs