

Cross-Gender Supervision of Children in Residential Group Homes

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Julia Sands and Daniel Pollack *Courtesy photos*

Children in residential group home settings have usually experienced trauma or abuse. The therapeutic setting they need must be safe, informed by an understanding of impaired attachment and developmental needs. Toward that end, children's group homes offer a 24-hour residential environment with targeted therapeutic informed models of care. Staff oversight may include such things as having general supervisory responsibility of clients during the day or night, while clients are active, stationary, or involved in private functions.

Excellent staff supervision is essential, and can be challenging. Particularly challenging is crossgender supervision. Numerous concerns arise:

- Will inappropriate relationships develop?
- Given their own history of sexual trauma, is cross-gender supervision therapeutically contraindicated if clients feel unduly uncomfortable?
- What limitations on cross-gender supervision make sense?
- What meaningful oversight mechanisms should be put in place?

There have been numerous legal cases in the corrections field dealing with cross-gender supervision that may be instructive for the residential group home arena. For instance, the Ninth

Circuit has held that a cross-gender strip search in the absence of an emergency violates a pretrial detainee's Fourth Amendment rights. *Byrd v. Maricopa Cty. Sheriff's Dep't* , 629 F.3d 1135 (9th Cir. 2011) (en banc). The Prison Rape Elimination Act National Standards echo this perspective.¹ The Fifth Circuit recently held that the trial court properly found that a visual strip and cavity search of a 12-year-old juvenile who was involved in a fight at school was reasonable as part of juvenile detention facility's routine intake procedures. The court held that the search of the juvenile did not violate the Fourth Amendment. The court explored the interests of the institution against the privacy interest of the juvenile and came down on the side of the importance of safety for the institution. The court cited *Florence v. Board of Chosen Freeholders* , 132 S. Ct. at 1513, and found that because the juvenile's attorney failed to show the detention center's search policy was an exaggerated or irrational response to the need for security, the court was not able to assess the appropriateness of the center's policy. *Nicole Mabry v. Lee County* , 849 F.3d 232 (5th Cir. 2017). Courts have seemingly struck a balance between the importance of the individual child's protection versus the need to uphold the standards and policies of the institution in order to keep the environment safe.

Snapshot of the Industry

The National Conference of State Legislatures (NCSL) reports that just over 400,000 children live in foster care and approximately 50,000 reside in placements known as "congregate care," which includes group homes, residential treatment facilities, psychiatric institutions, and emergency shelters. According to NCSL's data collected between 2009 and 2013, approximately 62 percent of children in congregate care are male, and 37 percent are female. "Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2009-2013," National Conference of State Legislatures, Feb. 10, 2017. The data is silent as to the gender percentages among the staff members employed by these facilities.

According to IBISWorld, which defines itself as "a provider of fully researched, dependable and up-to-date industry and procurement intelligence ... , most industry operators are small local organizations. This is because this industry provides residential care facilities primarily through group homes, children's villages, halfway homes and boot camps, which tend to be operated in a local sphere. In 2016, there [were] an estimated 7,614 organizations in this industry, of which 56.8% have less than 20 employees."

Child Protection Versus Employment Discrimination

Children in residential group home settings are particularly vulnerable. Due to their immense need for behavioral adjustments and in an attempt to avoid future incarceration, these children need guidance, structure and protection.

The adults charged with the duty to provide care for children in residential group homes bear a great responsibility. The staff must be especially mindful while caring for children, in particular

when the staff member is the opposite gender than the child. The children in these settings are entitled to a safe, protective environment and the staff members must constantly weigh whether a cross-gender care situation is improper or not, with even the appearance of impropriety possibly making a situation improper. This concept makes the cross-gender supervision issue a potentially complicated one to navigate for both staff and children.

Some children in group homes have a tendency to push the limits and boundaries through their actions, attitudes, and behavior, potentially opening the door for staff members to behave or react in inappropriate and damaging ways. Just as children are entitled to protection, staff members and employees of residential group homes are entitled to certain legal protections as well.

Employees are entitled to protection against employment discrimination, both gender-based and otherwise.

Staff members in residential group homes face particularly challenging situations. Not only are they responsible for caring for the children, they must also anticipate how their actions appear to the children, their superiors, and the public.

Discrimination based on gender in many settings is illegal. However, because this is a particularly sensitive and vulnerable population to work with, there is a potentially tricky balance between steering clear of discrimination while hiring and/or assigning work shifts, and ensuring that children in the group home remain safe. As previously stated, although the law is curiously silent as to cross-gender supervision of children in residential group home settings, principles may be inferred from issues that have arisen in the corrections world. This may inevitably result in greater vigilance, stressors at work, and increased vulnerability to false allegations. For example, in the complaint and jury demand in the case of *Samone Walker and Dashawn Walker v. City and County of Denver, Denver Sheriff Department*, Case 1:15-cv-02539-MSK, filed 11/18/15, (D. Colo.), an issue arose when female corrections officers felt discriminated against as a result of an unbalanced policy assigning them to supervise male inmates disproportionately compared to the frequency of male corrections officers being assigned to supervise female inmates. The female corrections officers asserted that this practice exposed them to sexual harassment from male inmates and put their safety and employment at greater risk than their male counterparts. So as not to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, plaintiffs suggested that the lawful and reasonable response was not to abolish crossgender supervision in the corrections setting, but to equally and proportionately distribute the burden of cross-gender supervision between deputies of both genders.

A State Example

In New York state, the Office of Children and Family Services exercises control and enforcement powers which may apply to residential facilities authorized by article 19-G of the executive law. McKinney's Social Services Law §462-b [Responsibility for Enforcement]. Both sources are silent as to cross-gender supervision of children in residential group home settings. States are generally not responsible for running group homes or writing the manuals for the facilities to follow. The state does, however, provide licensing policies. According to New York state regulations, 18 NYCRR 448.1(a), a "*child*" is defined as a person who has not attained

their 21st birthday, and, except for a sibling or a child whose mother is placed in the same facility, is at least five years of age.²

Section 448.2 outlines the conditions of operation of a group home program and mandates that only a professionally trained social worker, a person with experience in child welfare, or a person holding a master's degree in a related field who is in the employ of the agency shall supervise the group home program. Moreover, the agency must establish a procedure to obtain background and other information on each applicant for employment or volunteer and must inquire whether certain persons who may have regular and substantial contact with children being cared for by the group home are the subjects of indicated reports of child abuse or maltreatment. There is no specific mention of gender included in this provision.³

Section 448.3 outlines the requirements for each group home, including the meaning of adequate supervision, qualifications of child-care staff, staff member applications and background checks, etc. This section mandates that except for mothers and their children, children of different sexes over the age of five shall not sleep in the same room, that each child shall have a separate bed spaced at least two feet apart from other beds, and that staff members shall be provided with sleeping quarters separate from those of children. 18 NYCRR 448.3, 18 NY ADC 448.3. Aside from provisions mandating that children and staff members sleep in different rooms, there is no specific mention of gender differences or precautions addressed directly.

Supervision at Night

When determining which individual staff members will supervise during overnight shifts, there are several theoretical, practical and safety considerations that must be taken into account. Many residences allow cross-gender supervision. Each residence must put policies in place to safeguard both the residents of the house as well as the staff members. Finances permitting, residential facilities often try to assign more than one staff person to work an overnight shift. Moreover, most residences follow a different set of procedures at night than during the day because of the obvious potential for malfeasance. Ideally, children should be sleeping during most of the night shift. But issues arise when they are either unexpectedly awake, ill or upset, or unable to sleep. For these reasons, staff on night duty are tasked with staying awake at all times in order to maintain an active supervisory role.

One way to combat safety issues stemming from cross-gender supervision is to assign at least one staff member of each gender when dealing with a mixed gender residence. Security measures may also be taken such as the installation of recording devices throughout the residence in order to deter improper behavior by either the residents or staff members.

Room restrictions may also be put in place, prohibiting staff members from entering the room of a child of the opposite gender (or even the same gender) except for good cause. Policy can direct that cross-gender supervision must take place in common areas. Of course, for safety or good cause reasons, exceptions can be made.

Conclusion

Steering between being "gender-blind" and "gender-sensitive" is not an easy course to navigate. Supervision requirements do not lessen when residents are participating in "private" events, such

as showering or engaged in personal hygiene. The concerns that may follow from cross-gender supervision include humiliation, invasion of privacy, retraumatization, and boundary violations. Although there is sparse case law specifically deciding issues arising out of cross-gender supervision of children in residential facilities, there is much authority regarding cross-gender supervision in the correctional field. Many of the approaches taken in that field may be applicable to the cross-gender supervision of children in group home settings.

Endnotes:

1. See 28 CFR 115.215—Limits to cross-gender viewing and searches.

§115.215 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) As of August 20, 2015, or August 21, 2017 for a facility whose rated capacity does not exceed 50 residents, the facility shall not permit cross-gender pat-down searches of female residents, absent exigent circumstances. Facilities shall not restrict female residents' access to regularly available programming or other outside opportunities in order to comply with this provision.

(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female residents.

(d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.

(e) The facility shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status. If the resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner. (f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex residents, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

2. 18 NYCRR 448.1, 18 NY ADC 448.1:

(a) *Child* shall mean a person who has not attained his 21st birthday, and, except for a sibling or a child whose mother is placed in the same facility, is at least five years of age.

(b) *Sibling* shall mean a child who has a common parent with another child.

3. 18 NYCRR 448.2, 18 NY ADC 448.2: An authorized agency shall operate a group home program only after obtaining an operating certificate for such program. An operating certificate will be issued by the department only when the conditions of this Part and Parts 476 and 477 of this Title are met.

(a) A professionally trained social worker, a person with experience in child welfare, or a person holding a master's degree in a related field who is in the employ of the agency shall supervise the group home program.

(b) The determination as to the children to be placed in each group home shall be made by the person designated to supervise the program or by an interdisciplinary team, when it is the general practice of the agency to use such services.

(c) The agency must establish a procedure to obtain background and other information on each applicant for employment or to be a volunteer in the group home and to evaluate each such applicant as to his/her personal, employment and experiential qualifications in accordance with the requirements of this Part.

(d) The agency must inquire, in accordance with the provisions of section 448.3(c) of this Part, whether certain persons who may have regular and substantial contact with children being cared for by the group home are the subjects of indicated reports of child abuse or maltreatment on file with the Statewide Central Register of Child Abuse and Maltreatment or are found on the Register of Substantiated Category One Cases of Abuse

or Neglect ("staff exclusion list") maintained by Vulnerable Persons' Central Register ("VPCR"), as required by section 495 of the Social Services Law.

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