
**TRANSGENDER YOUTH IN PUBLIC SCHOOLS:
WHY IDENTITY MATTERS IN THE RESTROOM**

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I. INTRODUCTION

*In a just regime, one that celebrates individuals as authors of their own lives, one's gender identity should be the deciding factor in determining one's legal sex.*¹

The year 2013 was a big one for the LGBT community. Amid much fanfare, the United States Supreme Court knocked down the Defense of Marriage Act² and effectively did the same to California's Proposition 8 ban on same-sex marriage.³ Betty Crocker donated custom cakes for the first same-sex marriages in Minnesota.⁴ Maryland,⁵ Rhode Island,⁶ Delaware,⁷ and New Jersey⁸ also joined the ranks of states that have legalized same-sex marriage. A six-year-old transgender student in Colorado returned to school without having to worry about what restroom she would use.⁹ And of course, Batwoman is engaged to marry her longtime girlfriend.¹⁰

But like any and every year before it, 2013 was also a year of injustice and heartbreak. High school sophomore Jadin Bell hung himself after being bullied for being openly gay.¹¹ Mark Carson was

1. Paisley Currah, *The Transgender Rights Imaginary*, 4 GEO. J. GENDER & L. 705, 714 (2003).

2. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

3. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

4. Sasha Aslanian, *Betty Crocker Bakes Cakes for State's First Same-Sex Weddings*, MINN. PUB. RADIO (July 29, 2013), <http://minnesota.publicradio.org/display/web/2013/07/29/news/general-mills-cake-same-sex-wedding>.

5. *See* Civil Marriage Protection Act, ch. 2, 2012 Md. Laws 9.

6. *See* R.I. GEN. LAWS ANN. § 15-1-1 (West, Westlaw through ch. 534 of the 2013 Reg. Sess.).

7. *See* DEL. CODE ANN. tit. 13, § 101 (West, Westlaw through 79 Laws 2014).

8. *See* *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. 2013); Kate Zernike & Marc Santora, *Judge Orders Gay Marriage in New Jersey*, N.Y. TIMES, Sept. 28, 2013, at A1, available at 2013 WLNR 24295971.

9. *See infra* Part III.B.

10. *See* Kevin Melrose, "Batwoman" #17 Puts Marriage Equality in the Spotlight, COMIC BOOK RESOURCES (Feb. 20, 2013, 7:33 AM), <http://www.comicbookresources.com/?page=article&id=43851>. Unfortunately, however, the superhero will not actually get to marry her ladylove. *See* Andrew Belonsky, *DC Won't Let Lesbian Batwoman Get Married, Say Writers*, OUT MAG. (Sept. 5, 2013), <http://www.out.com/entertainment/popnography/2013/09/05/dc-wont-let-lesbian-batwoman-get-married-say-writers>.

11. *Bullied Gay Teen Jadin Bell Dies at OHSU*, KATU (Feb. 4, 2013), <http://www.katu.com/news/local/Bullied-gay-teen-Jadin-Bell-dies-at-OHSU-189666081.html>.

shot and killed while walking with his boyfriend after the gunman assailed him with homophobic hate speech.¹² Twenty-one-year-old Islan Nettles became another casualty of violent transphobia¹³ after being beaten to death outside of an NYPD precinct.¹⁴ As of August 2013, the growing number of anti-gay hate crimes in New York City was on track to double the number of reported attacks in 2012.¹⁵ And in Maine, transgender teen Nicole Maines waited for the decision of the state's highest court, hoping that the justices would recognize her right to attend school without being bullied by peers or administrators.¹⁶

While all members of the LGBT community face heightened risk of discrimination, violence, and death, transgender individuals are among those most at risk.¹⁷ Anti-LGBTQH¹⁸ murders increased

12. *Police: Gunman Used Anti-Gay Slurs Before Killing Man in Greenwich Village*, CBS N.Y. (May 18, 2013, 10:30 PM), <http://newyork.cbslocal.com/2013/05/18/man-shot-killed-at-busy-greenwich-village-intersection>.

13. Transphobia takes many forms as a means of expressing fear, loathing, and discrimination towards people whose identity or gender presentation (or perceived gender or gender identity) does not 'match' the sex they were assigned at birth. It is based around the idea that there are only two sexes, and that people who fit gender stereotypes (by sounding, looking, or behaving like men and women are 'supposed to') are somehow better than those who don't. Trans* people, gender queer people, and individuals with a transsexual history may also experience homophobia, because the abuser often neither knows nor cares how a person identifies, just that they are different in some way. See Eric Grollman, *What Is Transphobia? And, What Is Cissexism?*, KINSEYCONFIDENTIAL (Jan. 24, 2012), <http://kinseyconfidential.org/transphobia>. See generally QUESTIONING TRANSPHOBIA, <http://www.questioningtransphobia.com> (last visited Apr. 14, 2014).

14. *Call for Action in Wake of Transgender Woman's Beating Death*, CBS N.Y. (Aug. 27, 2013, 10:34 PM), <http://newyork.cbslocal.com/2013/08/27/call-for-action-in-wake-of-transgender-womans-beating-death>.

15. *Anti-Gay Hate Crimes Set to Double in New York City in 2013*, RUPTLY (Aug. 19, 2013, 10:37 PM), <http://rt.com/usa/anti-gay-crimes-double-691>.

16. See *infra* Part III.C.

17. See, e.g., Emilia L. Lombardi et al., *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89 (2002); Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAV. 170 (2009).

18. For consistency's sake, I will use the acronym LGBT throughout this note to refer to the lesbian, gay, bisexual, and transgender community with the understanding that transgender encompasses "anyone whose identity or behavior falls outside of stereotypical gender norms." See *infra* Part II.A.3. The National Coalition of Anti-Violence Programs report, however, refers to members of the "lesbian, gay, bisexual, transgender, queer, and HIV-affected (LGBTQH)

from twenty-seven in 2010 to thirty in 2011, an eleven percent increase—the highest number of murders ever recorded by the National Coalition of Anti-Violence Programs.¹⁹ Forty percent of all hate violence murder victims in 2011 were transgender women, while representing only ten percent of overall hate violence survivors.²⁰ The 2011 study found that transgender people were 1.76 times as likely to require medical attention as compared to overall survivors of hate violence, and were 1.67 times as likely to experience police violence.²¹ Additionally, transgender people of color were 2.38 times as likely to experience police violence and 1.85 times as likely to experience discrimination.²² A combined study from the National Center for Transgender Equality and the National Gay and Lesbian Task Force suggests that a staggering forty-one percent of trans*²³ people have attempted suicide, compared to 1.6 percent of the general population.²⁴ The study

communities,” which is largely overlapping but not necessarily identical. *See infra* note 19.

19. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED COMMUNITIES IN THE U.S. IN 2011, at 9 (2012).

20. *Id.*

21. *Id.*

22. *Id.*

23. In recent years, the term “trans*” (with an asterisk) has seen rising popularity. As explained by activist and author Sam Killermann:

Trans* is an umbrella term that refers to all of the identities within the gender identity spectrum. There’s a ton of diversity there, but we often group them all together Trans (without the asterisk) is best applied to trans men and trans women, while the asterisk makes special note in an effort to include all non-cisgender gender identities, including transgender, transsexual, transvestite, genderqueer, genderfluid, non-binary, genderfuck, genderless, agender, non-gendered, third gender, two-spirit, bigender, and trans man and trans woman.

The origin behind the asterisk, as I understand it, is a bit computer geeky. When you add an asterisk to the end of a search term, you’re telling your computer to search for whatever you typed, plus any characters after (e.g., [search term*][extra letters], or trans*[-gender, -queer, -sexual, etc.]). The idea was to include trans and other identities related to trans, in the most technically awesome way.

Sam Killermann, *What Does the Asterisk in Trans* Stand For?*, IT’S PRONOUNCED METROSEXUAL, <http://itspronouncedmetrosexual.com/2012/05/what-does-the-asterisk-in-trans-stand-for> (last visited Mar. 13, 2014).

24. JAIME M. Grant ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY

found that trans* individuals are consistently abused, discriminated against (in areas of employment, housing, police interactions, and health care, among others), harassed, and assaulted.²⁵ Many trans* individuals live in extreme poverty and are almost four times more likely than heterosexual and LGB-identified people to have a household income of less than \$10,000 per year.²⁶ Individuals who “expressed a transgender identity or gender non-conformity while in grades K–12 reported alarming rates of harassment (78%), physical assault (35%), and sexual violence (12%); harassment was so severe that it led almost one-sixth (15%) to leave a school in K–12 settings or in higher education.”²⁷

Transgender individuals have to fight for equal protection and treatment in numerous and varied areas. This Note focuses on one facet of harm caused to gender nonconforming²⁸ students in the K–12 setting by examining the right of transgender students in public schools to use restrooms that correspond with their gender identity rather than their biological sex. Part II of this Note provides an introduction to transgender terminology and gives an overview of transgender jurisprudence in the United States by discussing two key transgender cases, one in the Seventh Circuit and one decided by the Minnesota Supreme Court. Part III addresses the specific issues related to restrooms in public schools, and examines two recent rulings on the subject: a 2013 decision from the Colorado

& LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011). With over 6000 respondents, the National Transgender Discrimination Survey is the largest survey of transgender and gender nonconforming adults to date. In January 2014, the Williams Institute and the American Foundation for Suicide Prevention released a new report analyzing the data reported in the Survey, seeking to increase understanding of the disproportionately high numbers and identifying key characteristics and experiences associated with lifetime suicide attempts in the Survey sample as a whole. See ANN P. HAAS ET AL., AM. FOUND. FOR SUICIDE PREVENTION & WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2014).

25. GRANT ET AL., *supra* note 24, at 2–8.

26. *Id.* at 2.

27. *Id.* at 3.

28. While recognizing that there are psychological, medical, and/or sociological differences in the ways that the following terms are assigned, used, and assumed, for the purposes of this note the terms “transgender,” “trans*,” “gender-variant,” and “gender nonconforming” are meant to include the widest possible range of people who do not fit into traditional social gender norms. See *infra* Part II.A.3.

Civil Rights Division and a 2014 decision from the Maine Supreme Court. Finally, Part IV recognizes the important role that schools play in the well-being of transgender youth and considers nondiscriminatory policies implemented by individual schools nationwide, as well as solutions offered on the national and state levels.

II. BACKGROUND

A. *What is Transgender?*

1. *Terminology: “Sex” versus “Gender”*

In everyday language, the terms “gender” and “sex” are often used interchangeably.²⁹ In actuality, the terms have different and unique meanings, and the distinction between the two is a crucial one. “Sex” refers to a person’s biological or anatomical identity as (most often) male or female,³⁰ while “gender” is the “complex interrelationship between [physical] traits and one’s internal sense of self as male, female, both or neither[—gender identity—]as well as one’s outward presentations and behaviors related to that perception[—gender expression].”³¹ In other words, gender can be thought of as a socially constructed system of classification used to refer to the “cultural or attitudinal qualities that are characteristic of a particular sex”³² (i.e., qualities that are categorized as being

29. Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, THE POLICY INST. OF THE NAT’L GAY & LESBIAN TASK FORCE & THE NAT’L CTR. FOR LESBIAN RIGHTS, *TRANSGENDER EQUALITY* 1, 2 (2000), available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>.

30. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271–74 (1999).

The assumption is that there are two separate roads, one leading from XY chromosomes at conception to manhood, the other from XX chromosomes from conception to womanhood. The fact is that there are not two roads, but one road with a number of forks that turn in the male or female direction. Most of us turn in the same direction at each fork. The bodies of millions of intersexed people have taken a combination of male and female forks and followed the road less traveled.

Id. at 278.

31. *Understanding Gender*, GENDER SPECTRUM, <https://www.genderspectrum.org/understanding-gender> (last visited Apr. 14, 2014).

32. Greenberg, *supra* note 30, at 274.

masculine or feminine), while sex is determined by a combination of physical attributes including chromosomes, hormones, and external genitalia, among other factors.³³ A “traditional” view links sex and gender rigidly together; a trans* identity can only begin to be understood with the acknowledgement that things are more complicated than that and that there is no compulsory link between the two.³⁴

It is not only in everyday use that the terms sex and gender have been conflated; they have frequently been used interchangeably by courts, legislatures, and administrative agencies.³⁵ Given the prevalence of regulations and statutes that differentiate between individuals based upon their sex or gender, one might assume that these terms have clear legal meanings.³⁶

33. See *id.* at 278 (discussing the eight or more factors that contribute to the determination of an individual’s sex); see also *Understanding Gender*, *supra* note 31.

34. For an entertaining video explanation of the terms, see Vlogbrothers, *Human Sexuality Is Complicated*, YOUTUBE (Oct. 12, 2012), <http://www.youtube.com/watch?v=xXAoG8vAyzI> (discussing sex, gender, sexual orientation, and sexual behavior).

35. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–41 (1989) (using “sex” and “gender” interchangeably); *Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011) (noting that in the Equal Protection context, the Supreme Court uses the words “sex” and “gender” “interchangeably”); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001) (“[T]he term ‘sex’ refers to gender. In the context of Title VII these terms are used interchangeably.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that the Gender Motivated Violence Act and Title VII “prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms ‘sex’ and ‘gender’ have become interchangeable.”); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999) (noting that the terms “sex” and “gender” are used interchangeably in employment discrimination cases and are not considered to be distinct concepts for Title VII purposes).

Because Congress intended that the term “sex” in Title VII mean simply “man” or “woman,” there is no need to distinguish between the terms “sex” and “gender” in Title VII cases. . . . Some academic writers, however, seek to maintain or to heighten a distinction between the terms “sex” and “gender,” asserting that “gender” connotes cultural or attitudinal characteristics distinctive to the sexes, as opposed to their physical characteristics. While it may be useful to disaggregate the definition of “gender” from “sex” for some purposes, in this opinion we make no such effort, using the terms interchangeably to refer to whether an employee is a man or a woman.

Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 749 n.1 (4th Cir. 1996) (citations omitted).

36. Greenberg, *supra* note 30, at 270.

Unfortunately, the law defines these terms inconsistently at best, or worse, fails to define them at all.³⁷ The difficulties presented by this lack of legal definition are easily seen in the widely varying outcomes of cases that grapple with issues of gender and sexuality, not only in the outcomes of different cases, but in the inconsistent rulings in the same case as it moves through the judiciary from lower to appellate courts.³⁸

2. *Trans* as a Medical Identity*³⁹

May of 2013 saw the publication of the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders, in which the diagnosis of gender identity disorder⁴⁰ was replaced with gender

37. *Id.*

38. Currah, *supra* note 1, at 711. U.S. Supreme Court Justice Ruth Bader Ginsburg may be partially to blame for the interchangeable use of the words sex and gender in the law. Professor Mary Anne Case relates the following anecdote:

[Justice Ginsburg] explained that a secretary once told her, "I'm typing all these briefs and articles for you and the word sex, sex, sex, is on every page. Don't you know those nine men [on the Supreme Court], they hear that word and their first association is not the way you want them to be thinking? Why don't you use the word gender? It is a grammatical term and it will ward off distracting associations."

Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995).

39. For a detailed account of the history of transsexuality as a medical phenomenon, see JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES* (2004).

40. As explained by the fourth edition of the DSM:

There are two components of Gender Identity Disorder, both of which must be present to make the diagnosis. There must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex (Criterion A). This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex (Criterion B). The diagnosis is not made if the individual has a concurrent physical intersex condition . . . (Criterion C). To make the diagnosis, there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion D).

AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTIC MANUAL OF MENTAL DISORDERS* 576 (4th ed. 1994).

dysphoria.⁴¹ The term “gender dysphoria” was popularized by Norman Fisk in the early 1970s as a diagnostic term used in evaluating individuals who “were intensely and abidingly uncomfortable in their anatomic and genetic sex and their assigned gender.”⁴² The way in which transgenderism is defined medically has significant impact in the courts. The Supreme Court relied on the American Medical Association and the American Psychiatric Association and adopted the gender identity disorder framework in defining a transsexual as “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.”⁴³

From a legal perspective, the classification of gender dysphoria as a diagnosable condition is extremely harmful to some trans* people but surprisingly beneficial to others. Having a gender dysphoria diagnosis can serve as the basis for an argument that a transgender parent is mentally ill and so should not receive custody of his or her child, but it can also be a diagnosis that justifies

41. See *Gender Dysphoria*, AM. PSYCHIATRIC ASS’N (2013), <http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf> (explaining the revisions as intended to decrease associated stigma while “offering a diagnostic name that is more appropriate to the symptoms and behaviors . . . experience[d] without jeopardizing . . . access to effective treatment options.”); see also AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTIC MANUAL OF MENTAL DISORDERS* 451–59 (5th ed. 2013) (“Gender dysphoria refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender The current term is more descriptive than the previous DSM-IV term gender identity disorder and focuses on dysphoria as the clinical problem, not identity per se.”).

42. Norman Fisk, *Gender Dysphoria Syndrome (The How, What and Why of a Disease)*, in *PROCEEDINGS OF THE SECOND INTERDISCIPLINARY SYMPOSIUM ON GENDER DYSPHORIA SYNDROME* 7, 10 (Donald R. Laub & Patrick Gandy eds., 1973).

43. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (quoting AM. MED. ASS’N, *ENCYCLOPEDIA OF MEDICINE* 1006 (1989)). The Supreme Court is far from the only authority to rely on an individual’s desire for “medical treatment” as an indicator of his or her transsexuality. See, e.g., Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 *HARV. C.R.-C.L. L. REV.* 329, 329 (1999) (“A transsexual is someone who undergoes or contemplates undergoing anatomical and hormonal modifications in order to live in and be recognized as a different gender than the one attributed at birth.”). *Contra Definition of Terms*, GEND. EQUITY RES. CTR., http://geneq.berkeley.edu/lgbt_resources_definition_of_terms#transsexual (last visited Mar. 13, 2014) (“Not all transsexuals can have or desire surgery.”).

insurance coverage for gender reassignment surgery and other medical procedures that sometimes accompany a transition.⁴⁴ Importantly, and most relevant to this Note, modern medical practice counsels that an individual's sex for purposes of accessing segregated facilities should be determined by that individual's gender identity.⁴⁵

3. *The Transgender Umbrella*

While many transsexual individuals may identify as transgender, "transgender" is a broader, more encompassing term, often used without the medical and psychiatric diagnoses associated with the term transsexual.⁴⁶ Rather,

[i]n contemporary usage, transgender has become an "umbrella" term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative, and non-operative transsexual people; male and female cross-dressers (sometimes referred to as "transvestites," "drag queens" or "drag kings"); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical.⁴⁷

44. See Camille Beredjick, *DSM-V to Rename Gender Identity Disorder 'Gender Dysphoria'*, ADVOCATE (July 23, 2012, 8:00 PM), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>. For a review of the critique of the medical model in transgender rights litigation, see Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51 (1999).

45. See NAT'L ASS'N OF SOCIAL WORKERS, SOCIAL WORK SPEAKS: NASW POLICY STATEMENTS 2009–2012, at 346–47 (8th ed. 2009); *Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH 3 (June 17, 2008), http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf; *Position Statement on Discrimination Against Transgender and Gender Variant Individuals*, AM. PSYCHIATRIC ASS'N (July 2012), http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderDiscrimination.pdf; *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, AM. PSYCHOL. ASS'N (Aug. 2008), <http://www.apa.org/about/policy/transgender.aspx>.

46. Green, *supra* note 29, at 3–4.

47. *Id.* at 3. There are those, however, who argue that the idea of an umbrella term comes with its own set of problems. See, e.g., Mercedes Allen, *The Death of the 'Transgender' Umbrella*, BILERICO PROJECT (June 1, 2011, 8:00 PM), http://www.bilerico.com/2011/06/the_death_of_transgender.php.

Although the term “transgender” has been in use since the late 1960s,⁴⁸ the contemporary understanding of transgender arose in the mid-1990s.⁴⁹ “In its broadest sense, transgender encompasses anyone whose identity or behavior falls outside of stereotypical gender norms.”⁵⁰ Other terms that may be used in place of transgender include “gender variant,” “gender different,” and “gender non-conforming.”⁵¹ The broader spectrum of experience covered by transgender has allowed many LGB individuals to adopt the transgender label because it describes their own experience of living outside the gender binary or, in the instance of transsexual people, helps describe their ongoing consciousness of gender transgression, even after they have changed their sex to reflect their gender identity. In this Note, use of the terms “transgender” or “trans*,” as well as “gender-variant” and “gender non-conforming,” are meant to include the widest possible range of people who do not fit into traditional social norms about gender.

B. *Transgender Jurisprudence*

1. *Title VII and Ulane v. Eastern Airlines, Inc.*

Federal courts from the 1970s through the 1990s generally denied sex-discrimination claims brought by transgender individuals.⁵² The precedent for transsexual legal status under the

48. There is considerable debate about the origins of the word “transgender,” but LGBT scholars generally agree that the word was more or less commonly in use by the 1970s (albeit with several different meanings). Two sources that are often cited as the first appearance of the term are psychiatrist John F. Oliven’s *Sexual Hygiene and Pathology* (1965) and Virginia Prince’s article in the December 1969 issue of the magazine *Transvestia*. For more about the history of the term and its evolution over the decades, see Richard Ekins & David King, *Remarks at the Eighth International Gender Dysphoria Conference: Rethinking ‘Who Put the “Trans” in Transgender?’* (2004), *published in part in VIRGINIA PRINCE: PIONEER OF TRANSGENDERING* (Richard Ekins & David King eds., 2006), *full transcript available at* <http://www.gender.org.uk/conf/2004/04ekins.htm>; Cristan Williams, *Tracking Transgender: The Historical Truth*, EHIPASSIKO, <http://www.cristanwilliams.com/b/tracking-transgender-the-historical-truth> (last visited Apr. 14, 2014); Cristan Williams, *The Rise of “Transgender,”* BILERICO PROJECT (July 12, 2011, 3:00 PM), http://www.bilerico.com/2011/07/the_rise_of_transgender.php.

49. Green, *supra* note 29, at 3.

50. *Id.* at 3–4.

51. *Id.* at 4.

52. *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)

Civil Rights Act of 1964 comes from *Ulane v. Eastern Airlines, Inc.*⁵³ The plaintiff was Karen Ulane, who worked as a pilot for Eastern Airlines from 1968 to 1981 (while living as Kenneth Ulane) and was fired after undergoing sexual reassignment surgery.⁵⁴ Ulane brought a charge of sex discrimination under Title VII.⁵⁵ Although the district judge found that Eastern Airlines discharged Ulane because she was a transsexual and that Title VII prohibited discrimination on that basis, the Seventh Circuit reversed, holding that “Title VII does not protect transsexuals.”⁵⁶

More recently, however, a number of federal courts, including the First, Sixth, Ninth, and Eleventh Circuits, have held that transgender or gender nonconforming individuals are protected under federal sex-discrimination laws such as Title VII.⁵⁷ In 2012,

(holding that “[t]he words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., . . . a person born with a female body who believes herself to be male”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (holding that, where plaintiff claims discrimination is based on transsexual status rather than sex, such claim is “not actionable under Title VII and is certainly not in violation of the doctrines of Due Process and Equal Protection”); *James v. Rand Mart Hardware, Inc.*, 881 F. Supp. 478, 481 (D. Kan. 1995) (“[Plaintiff] cannot state an actionable claim under Title VII . . . for employment discrimination based upon transsexualism.”).

53. 742 F.2d 1081 (7th Cir. 1984).

54. *Id.* at 1082–83.

55. *Id.*

56. *Id.* at 1084.

57. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (“We conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding that transsexual police officer was a member of a protected class for purposes of Title VII claim because alleged discrimination was based on his “failure to conform to sex stereotypes”); *Smith v. City of Salem*, 378 F.3d 566, 578 (6th Cir. 2004) (holding that transsexual city fire department employee stated a valid sex discrimination claim under either Title VII or the Equal Protection Clause); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (reinstating Equal Credit Opportunity claim on behalf of transgender plaintiff who alleged that he was denied an opportunity to apply for a loan because he was presenting as gender nonconforming); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that transsexual inmate could state a claim under the Gender Motivated Violence Act, because “sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03–CV–0375E(SC), 2003

the Equal Employment Opportunity Commission determined that discrimination against an employee or applicant on the basis of the person's gender identity amounts to sex discrimination in violation of Title VII.⁵⁸

2. *The Restroom Problem: Goins v. West Group*

On a fundamental, everyday level, the decision of what restroom to use is one of the most basic and essential concerns facing transgender individuals.⁵⁹ While many cisgender⁶⁰ individuals likely have never thought twice about what restroom to walk into, transgender individuals do not have the luxury of taking that decision for granted. The right to use the restroom corresponding to one's gender identity is one of the most basic aspects of nondiscrimination for a transgender person,⁶¹ as well as one of the most uncertain and untested areas of law. Until 2014, there had been only one decision on this issue from a state's highest court—*Goins v. West Group*⁶² in 2001.

Goins was the Minnesota Supreme Court's first interpretation of the Minnesota Human Rights Act as it pertains to the

WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding transsexual plaintiff may state a claim under Title VII "based on the alleged discrimination for failing to 'act like a man'").

58. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012) ("[W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."). For a more in-depth examination of transgender rights and Title VII, see Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561 (2007).

59. STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS* 190 (2010).

60. A cisgender person is someone who identifies as the gender that corresponds with that individual's biological sex or that is affirmed by society (e.g., being both male-gendered and male-sexed). See *Trans 101: Cisgender*, BASIC RIGHTS ORE. (Oct. 9, 2011), <http://www.basicrights.org/uncategorized/trans-101-cisgender>. For a comprehensive discussion of the terms cis-, cissexual, and cisgender, see Julia Serrano, *Whipping Girl FAQ on Cissexual, Cisgender, and Cis Privilege*, LIVEJOURNAL (May 14, 2009, 8:46 AM), <http://juliaserrano.livejournal.com/14700.html>.

61. NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE* 176 (4th ed. 2004).

62. 635 N.W.2d 717 (Minn. 2001).

prohibition of discrimination against transgender people.⁶³ The plaintiff, Julianne Goins, had been designated male at birth, but had been publicly presenting herself as female since age twenty-two.⁶⁴ Born Justin Goins, she legally changed her name in 1995, and also had her legal gender changed from genetic male to reassigned female.⁶⁵ After transferring from a New York office of West Group to its facility in Eagan, Minnesota, Goins was informed that she would be required to use a single-occupancy unisex restroom, located either on a different floor of the building in which she worked⁶⁶ or in an entirely different building.⁶⁷ Objecting to the policy, Goins “refrained from eating or drinking during the work day to avoid having to use the women’s restroom,”⁶⁸ but at times she used the women’s restroom located nearest to her workspace.⁶⁹ Approximately one month after Goins transferred to the Eagan office, West’s human resources director warned Goins that if she continued to use the women’s restroom she would be disciplined.⁷⁰ Two months later, Goins resigned and brought an action against West, alleging that West had discriminated against her by denying her access to the women’s restroom.⁷¹

63. Despite the disappointing outcome in Goins, Minnesota has a proud history of being a leader in recognizing the rights of transgender individuals. In 1975, Minneapolis passed the first known statute prohibiting discrimination against transgender people. CURRAH & MINTER, *supra* note 29, at 15. Eighteen years later, with the adoption of an amendment to the Minnesota Human Rights Act to include gay, lesbian, bisexual, and transgender people, Minnesota became the first state to enact an antidiscrimination law that includes express protections for transgender and gender variant people in employment, housing, education, and public accommodations, as well as providing for enhanced penalties for hate crimes committed against transgender and gender variant people. *See* Act of Apr. 2, 1993, ch. 22, subdiv. 45, 1993 Minn. Laws 121, 122; *see also* Jenifer M. Ross-Amato, *Transgender Employees & Restroom Designation—Goins v. West Group, Inc.*, 29 WM. MITCHELL L. REV. 569, 570 (2002); Donna Halvorsen, *They Know Whereof They Legislate*, STAR TRIB. (Minneapolis), Apr. 2, 1993, at 1B (interviewing Senator Allan Spear and Representative Karen Clark on the significance of the passage of the “gay-rights bill”).

64. Ross-Amato, *supra* note 63, at 571.

65. *Id.*

66. *Id.* at 572.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

The Minnesota Supreme Court held that, despite the state's antidiscrimination law, Goins' employer was not prohibited from requiring a transgender person to alter her biological sex before being permitted to use the restroom consistent with her gender identity.⁷² The court found that West's restroom policy was not based on sexual orientation and so was not prohibited by the state's Human Rights Act.⁷³ It additionally found that Goins had not met the burden of showing that she was eligible to use the women's restroom.⁷⁴ In a concurring opinion, Justice Page elaborated that, "[t]o satisfy this element [of eligibility], Goins must establish that she is *biologically* female."⁷⁵

72. Goins v. W. Grp., 635 N.W.2d 717, 723, 725 (Minn. 2001). *But see* Jones v. Johnson Cnty. Sheriff's Dep't, CP No. 12-11-61830, ¶ 6 (Iowa Civil Rights Comm'n Mar. 5, 2013) (finding probable cause that denying transgender woman access to the women's restroom violated Iowa law). The Iowa Civil Rights Commission has clarified that Iowa law requires "that individuals are permitted to access . . . restrooms in accordance with their gender identity, rather than their assigned sex at birth." IOWA CIVIL RIGHTS COMM'N, SEXUAL ORIENTATION & GENDER IDENTITY: A PUBLIC ACCOMMODATIONS PROVIDER'S GUIDE TO IOWA LAW (2012). Other civil rights agencies have issued similar guidance stating that refusing transgender individuals use of the restroom that matches their gender identity is discrimination under public accommodations antidiscrimination law. Such jurisdictions include Nevada, New York, San Francisco, Washington, and the District of Columbia. *See, e.g.*, D.C. CODE MUN. REGS. tit. 4, § 802 (2006); N.Y.C. COMM'N ON HUMAN RIGHTS, GUIDELINES REGARDING GENDER IDENTITY DISCRIMINATION 7 (2006), available at http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis_English.pdf; *Compliance Guidelines to Prohibit Gender Identity Discrimination*, S.F. HUM. RIGHTS COMM'N (Dec. 10, 2003), <http://sf-hrc.org/compliance-guidelines-prohibit-gender-identity-discrimination>; *Facts About Gender Identity or Expression Discrimination*, NEV. EQUAL RIGHTS COMM'N, http://www.detr.state.nv.us/nerc_pages/NERC_docs/Facts_About_Gender_Identity_or_Expression_Discrimination.pdf (last visited May 15, 2014); *Sexual Orientation/Gender Identity Questions*, WASH. STATE HUM. RIGHTS COMM'N, <http://www.hum.wa.gov/faq/FAQSexualOrientation3.html> (last visited May 15, 2014).

73. Goins, 635 N.W.2d at 725–26.

74. *Id.* at 725.

75. *Id.* at 726 (emphasis added). Compare this to the standards developed by the San Francisco Human Rights Commission, which requires businesses and places of public accommodation to allow persons to use the restroom consistent with their gender identity so long as they have at least one piece of current identification that aligns their sex with their gender identity. *Compliance Guidelines to Prohibit Gender Identity Discrimination*, *supra* note 72. Note that this standard assumes that transsexual persons, regardless of whether they have undergone any medical treatment, can obtain a driver's license or other documentation on which their sex is aligned with their gender identity. *See id.*

III. TRANSGENDER YOUTH AND PUBLIC SCHOOL RESTROOMS

The difficulties posed by restrooms are hardly limited to transgender adults. A survey conducted by the San Francisco Human Rights Commission found that the lack of safe bathrooms was among the greatest challenges faced by gender-nonconforming students.⁷⁶ Researchers and teachers who work with transgender and gender-variant children and teens have observed that, “[r]ather than go to the facility of their assigned gender, transgender . . . youth frequently simply do not go [to] the bathroom [at all].”⁷⁷ For younger children, this can mean humiliating accidents; for older ones, various health risks, as well as distractedness in school and a greater likelihood of dropping out.⁷⁸ “For the child to use a restroom that does not match affirmed gender is a very concrete rejection of his/her own reality, a betrayal of who one knows oneself to be.”⁷⁹

A. California Education Committee, *L.L.C. v. O’Connell*

In *California Education Committee, L.L.C. v. O’Connell*,⁸⁰ anti-gay organizations Advocates for Faith and Freedom and the Alliance

76. See S.F. HUMAN RIGHTS COMM’N, GENDER NEUTRAL BATHROOM SURVEY RESULTS (2002), available at http://archive.srlp.org/files/documents/toolkit/gnb_survey.pdf.

77. Interview by Stuart Biegel with Joel Baum, Dir. of Educ. & Training, Gender Spectrum (Aug. 2, 2009), in BIEGEL, *supra* note 59, at 190; accord JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 90 (2010), available at [http://transequality.org/PDFs/US%20Civ%20Rts%20Commn%20NCTE%20statement%205%206%2011.pdf](http://glsen.org/download/file/NDIyMw==; Peer Violence and Bullying Against Transgender and Gender Nonconforming Youth, NAT’L CTR. FOR TRANSGENDER EQUAL. 4 (May 2011), <a href=).

78. Interview with Joel Baum, *supra* note 77, at 190.

79. *Id.* at 266 n.50.

80. Minute Order, Cal. Educ. Comm. *L.L.C. v. O’Connell*, No. 34-2008-00026507-CU-CR-GDS (Cal. Super. Ct. June 1, 2009). A similar controversy made headlines four years prior, when a school board in Orange County, California, risked the loss of millions of dollars in state money rather than adopt a new policy protecting gender nonconforming youth. The school board’s 3-2 decision made national headlines, largely due to the outspokenness of the board members who opposed the adoption of the antidiscrimination policy. One board member is quoted as saying, “I might take a lot of heat for [the decision] today, but the rewards are going to be great in heaven.” See Fermin Leal, *Board Defying Rules on*

Defense Fund filed a lawsuit challenging Senate Bill 777 (SB 777), a 2007 legislative act that strengthened California's hate crimes laws and antidiscrimination protections for students. Among other things, SB 777 codified the definition of gender, stating that "[g]ender' means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."⁸¹ Plaintiffs specifically objected to the bill's definition of gender, arguing that the codified definition "recklessly abandon[ed] the traditional understanding of biological sex in favor of an elusive definition that is unconstitutionally vague," and alleged that the legislation violated non-transgender students' rights to privacy and safety under the California Constitution.⁸² Plaintiffs were especially concerned that students would be "subjected to extreme embarrassment, humiliation, anxiety, intimidation, and emotional distress" if schools permitted transgender students to use gender-corresponding restrooms, even suggesting that such a policy would create "substantial danger to the physical safety" of school employees and students.⁸³ In response to the alleged privacy concerns, Equality California and the Gay-Straight Alliance Network filed a lengthy amicus brief providing extensive support for the proposition that "[n]o legally protected privacy interest is implicated when schools permit transgender students to use gender-segregated facilities consistent with their gender identity."⁸⁴

Gender, ORANGE COUNTY REG. (Mar. 9, 2004), <http://www.goldtalk.com/forum/showthread.php?t=24108>; R. Scott Moxley, *Gays 1, Phobes 0: The Passion of the Westminster School Board*, ORANGE COUNTY WKLY. (May 6, 2004), <http://www.ocweekly.com/2004-05-06/news/gays-1-phobes-0/>; Mason Stockstill, *School Trustees in Westminster Won't Recognize Transgender Rule*, SAN DIEGO UNION TRIB. (March 30, 2004, 11:56 AM), <http://legacy.utsandiego.com/news/state/20040330-1156-ca-transgenderrights.html>.

81. California Student Civil Rights Act, ch. 569, § 4, 2007 Cal. Stat. 4642, 4642–43 (codified at CAL. EDUC. CODE § 210.7 (West, Westlaw through 2013 Reg. Sess. laws)).

82. See First Amended Complaint for Declaratory & Injunctive Relief at 2, 10, Cal. Educ. Comm. L.L.C. v. O'Connell, No. 37-2008-00077546-CU-CRCTL.

83. *Id.* at 10.

84. [Proposed] Memorandum of Points and Authorities of Amici Curiae Equality California and Gay-Straight Alliance Network in Support of Defendant's Demurrer at 11, Cal. Educ. Comm. L.L.C. v. O'Connell, No. 34-2008-00026507-CU-CR-GDS. Similarly, in 2004, a federal district court in Arizona held that a community college's policy prohibiting transgender employees from using the restroom that corresponded with their gender identity bore no rational

Superior Court Judge Shelleyanne W.L. Chang ruled for the defendants, finding, among other things, that the pleading was “inadequate to allege any invasion of privacy” and that allegations of safety contraventions were “conclusory and . . . unsupported.”⁸⁵

In contrast, the safety concerns that transgender individuals face every day are real, substantial, and well documented, as well as the “extreme embarrassment, humiliation, anxiety, intimidation, and emotional distress”⁸⁶ that accompanies having to routinely assert and defend one’s gender identity.⁸⁷ While transgender individuals get harassed and discriminated against in a variety of situations, “public restrooms tend to invite extra scrutiny of people’s appearance based on comparisons to stereotypes about how men and women are supposed to look or act.”⁸⁸

B. Coy Mathis and the Colorado Civil Rights Determination

In December of 2012, Superintendent Cheryl Serrano received a letter sent on behalf of Kathryn and Jeremy Mathis, parents of a first grader enrolled at Eagleside Elementary. The letter, sent by the Transgender Legal Defense and Education Fund (TLDEF),

relationship to any privacy interest and rejected as baseless the assumption that “the presence of a biological woman with male genitalia invades the privacy and/or threatens the safety of other women.” *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, Civ. No. 02–1531PHX–SRB, 2004 WL 2008954, at *8 (D. Ariz. June 3, 2004). In *Cruzan v. Special School District, No. 1*, 294 F.3d 981, 982–83 (8th Cir. 2002), the Eighth Circuit rejected a claim brought by a Minnesota teacher alleging that she had been harmed by the school district’s policy allowing a transgendered coworker to use the women’s faculty restroom. The court held that school’s policy did not create a hostile work environment. *Id.* at 984.

85. Minute Order at 3, Cal. Educ. Comm. L.L.C. v. O’Connell, No. 34-2008-00026507-CU-CR-GDS.

86. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 82, at 10.

87. See, e.g., Grant et al., *supra* note 24, at 2–9; EMILY A. GREYAK ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 18–23 (2009); NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, *supra* note 19, at 19–50; Lombardi et al., *supra* note 17, at 90–91, 93–100; Stotzer, *supra* note 17, at 170–177.

88. LAMBDA LEGAL, EQUAL ACCESS TO PUBLIC RESTROOMS 1 (2011) (emphasis omitted). The prevalence of harassment, discrimination, and violence facing gender variant individuals using public restrooms has spurred the creation of resources such as SaferStalls, a nationwide directory and searchable map of gender-neutral or single-stall bathrooms. SAFERSTALLS, <http://saferstalls.github.io/SaferStalls> (last visited Apr. 14, 2014).

addressed the school district's decision to refuse the Mathises' daughter, Coy, access to the girls' restrooms at school.⁸⁹ Coy was identified as male at birth, but self-identified as female "as soon as she could express herself,"⁹⁰ and had attended school as a girl since December 2011.⁹¹ Additionally, the U.S. government recognizes Coy as a girl on her U.S. passport, as does the State of Colorado on her state-issued ID.⁹² Early in Coy's kindergarten year, the Mathises met with the school to discuss Coy's gender variance.⁹³ School officials were accepting of Coy's gender expression, and her early experiences at Eagleside were positive ones; the school "permitted Coy to wear girls' clothing and to be identified and referred to as a girl in the school environment as soon as [Coy's] gender identity issue was brought to its attention."⁹⁴ This included allowing Coy to use the girls' bathroom and stand in girls' lines;⁹⁵ however, in December 2012, Eagleside Principal Jason Crow informed the Mathis family that Coy would no longer be permitted to use the girls' restrooms, but instead would be required to use the boys' restrooms, the single-user staff restroom, or the single-user restroom in the health room.⁹⁶ When the school district refused to reconsider its decision, TLDEF filed a complaint with the Colorado Civil Rights Division, alleging that Coy had been discriminated against in violation of the Colorado Anti-Discrimination Act.⁹⁷

89. Letter from Michael D. Silverman, Exec. Dir., Transgender Legal Def. & Educ. Fund, to Cheryl Serrano, Superintendent of Sch., Fountain-Fort Carson Sch. Dist. No. 8 (Dec. 26, 2012) [hereinafter TLDEF Letter], http://www.transgenderlegal.org/media/uploads/doc_490.pdf.

90. Siera Santos, *Transgender First-Grader's Bathroom Use Spurs School Discrimination Complaint*, KOAA (Feb. 27, 2013, 8:18 PM), <http://www.koaa.com/news/transgender-first-grader-s-bathroom-use-spurs-school-discrimination-complaint>.

91. TLDEF Letter, *supra* note 89.

92. Rebuttal Statement in Response to Fountain-Fort Carson School District's Position Statement at 3, Mathis v. Fountain-Fort Carson Sch. Dist. No. 8, No. P20130034X (Colo. Civ. Rights Div. 2013) [hereinafter TLDEF Rebuttal Statement].

93. Santos, *supra* note 90.

94. TLDEF Rebuttal Statement, *supra* note 92, at 1.

95. Santos, *supra* note 90.

96. TLDEF Letter, *supra* note 89.

97. Determination at 1, Mathis v. Fountain-Fort Carson Sch. Dist. No. 8, No. P20130034X, (Colo. Civ. Rights Div. 2013) [hereinafter C.C.R.D. Determination].

The Colorado Anti-Discrimination Act (CADA) prohibits schools from discriminating against transgender students. Specifically, CADA states:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, . . . sex, [or] sexual orientation, . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation⁹⁸

CADA defines “public accommodation” to include “an educational institution,”⁹⁹ such as Eagleside,¹⁰⁰ and defines “sexual orientation” to include “transgender status.”¹⁰¹ Colorado regulations further clarify that transgender “means having a gender identity or gender expression that differs from societal expectations based on gender assigned at birth.”¹⁰²

The relevant rule from the Colorado Code of Regulations provides: “All covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity. Gender-segregated facilities include, but are not limited to, restrooms, locker rooms, dressing rooms, and dormitories.”¹⁰³

Similar to the plaintiff’s argument in *Goins*, TLDEF argued that denying Coy access to the bathroom that corresponded to her gender identity was inherently stigmatizing, and would lead to Coy

98. COLO. REV. STAT. ANN. § 24-34-601(2) (West, Westlaw through May 2, 2014).

99. *Id.* § 24-34-601(1).

100. Recognizing that educational institutions are places of public accommodation under Colorado Revised Statutes section 24-34-601(1), many Colorado school districts have already implemented policies supportive of transgender students. *See, e.g.*, BOULDER VALLEY SCH. DIST., GUIDELINES REGARDING THE SUPPORT OF STUDENTS WHO ARE TRANSGENDER AND GENDER NONCONFORMING 3 (2013) (“Students shall have access to the restroom that corresponds to their gender identity consistently asserted at school. Any student who is transgender and who has a need or desire for increased privacy, regardless of the underlying reason, should be provided access to a single stall restroom, but no student shall be required to use such a restroom.”).

101. COLO. REV. STAT. ANN. § 24-34-301(7) (Westlaw). (“Sexual orientation” means a person’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person’s perception thereof.”).

102. 3 COLO. CODE REGS. § 708-1:81.2(B) (2014).

103. *Id.* § 708-1:81.11(B).

being singled out, harassed, and even bullied.¹⁰⁴ The Colorado Civil Rights Division found that the school's refusal to allow Coy use of the girls' restroom created "an environment rife with harassment and inapposite to a nurturing school atmosphere"¹⁰⁵ and concluded that "telling [Coy] that she must disregard her identity while performing one of the most essential human functions constitutes severe and pervasive treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive."¹⁰⁶

C. *Identity or Biology?* Doe v. Clenchy

1. *Background*

Almost two years before TLDEF filed its Charge of Discrimination against the Fountain-Fort Carson School District, Gay & Lesbian Advocates & Defenders (GLAD), a nonprofit legal rights organization, filed a complaint in Maine Superior Court, "outlining counts of discrimination in education and public accommodation, harassment, and infliction of emotional distress."¹⁰⁷ The plaintiff was Nicole Maines, a fifth-grade student at Asa Adams Elementary.¹⁰⁸

Like Coy, Nicole was identified as male at birth, but self-identified as female at a very young age.¹⁰⁹ Although she entered school as a boy, by third grade Nicole was essentially living entirely as a female, both at home and at school.¹¹⁰ She sang in the girls' section of the chorus, dressed in typically "feminine" clothing and accessories, and friends, teachers, and other students referred to

104. TLDEF Rebuttal Statement, *supra* note 92, at 2.

105. C.C.R.D. Determination, *supra* note 97, at 13.

106. *Id.* at 12.

107. See *Doe v. Clenchy*, GAY & LESBIAN ADVOCATES & DEFENDERS, <http://www.glad.org/work/cases/doe-v-clenchy> (last visited Apr. 14, 2014).

108. *Doe v. Clenchy*, No. CV-09-201, slip op. at 2 (Me. Super. Ct. Nov. 20, 2012), *vacated sub nom. Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014). In court documents, family members are not named but referred to as the Does, with the transgender student referred to by the pseudonym "Susan Doe." News stories, however, identified the plaintiff as Nicole Maines, now fifteen. Since this note directs readers to sources outside of court documents, I refer to the plaintiff by her given name for consistency's sake.

109. Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 2-3, *Doe*, No. CV-09-201.

110. *Id.* at 3.

her by female pronouns.¹¹¹ Beginning in third grade, and with the agreement and support of school staff, Nicole used the girls' restroom at school without incident, and continued to do so throughout her fourth-grade year.¹¹² She continued using the girls' restroom at the start of her fifth-grade year until, on September 28, a male student followed her into the restroom, evidently on the instruction of his grandfather, who objected to Nicole's use of the girls' restroom.¹¹³ A second, similar incident took place when the same student again violated the school's anti-harassment policy by disrupting Nicole's use of the girls' restroom on October 3.¹¹⁴ Rather than address the violation of the anti-harassment policy, the school abruptly terminated Nicole's use of the girls' restroom and required that she use a separate staff-only restroom.¹¹⁵

In April of 2008, and again in November of 2009, Nicole's mother filed a complaint with the Maine Human Rights Commission (MHRC) alleging violations of the Maine Human Rights Act (MHRA).¹¹⁶ Both times, the Commission unanimously found reasonable grounds to believe that Superintendent Kelly Clenchy, the Orono School Department, and School Union Number 87 had engaged in "unlawful education and public accommodation discrimination" when they denied Nicole access and use of the girls' restroom facilities.¹¹⁷

In May of 2011, GLAD filed a complaint in Maine Superior Court on behalf of the Maines family and the MHRC, outlining several counts of discrimination and harassment.¹¹⁸ The following November, the trial court judge granted summary judgment for the defendants, finding that denying Nicole access to the girls' restroom did not violate the state's antidiscrimination law.¹¹⁹ GLAD immediately appealed the decision, and on June 12, 2013, the case was argued before the Maine Supreme Court.¹²⁰

111. *Id.*

112. *Id.*

113. *Id.* at 6.

114. *Id.* at 2, 6.

115. *Id.* at 6–7.

116. Amended Complaint at 5–6, *Doe v. Clenchy*, No. CV-09-201, (Me. Super. Ct. Nov. 20, 2012).

117. *Id.* at 5.

118. *See id.* at 4–6.

119. *Doe*, No. CV-09-201, slip op. at 25.

120. Press Release, GLAD, GLAD Argues Transgender Girl's Case Before Maine High Court (June 12, 2013), <http://www.glad.org/current/press-release>

2. *Superior Court Decision*

The MHRA declares that it is the policy of the state to “prevent discrimination in . . . access to public accommodations . . . and . . . education on account of sex, sexual orientation or physical or mental disability.”¹²¹ The term “sexual orientation” is defined in the MHRA as “a person’s actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.”¹²² Justice William Anderson, writing for the superior court, found that, based on the plain meaning of section 4591(1) of the Maine Revised Statutes, “it is unlawful to separate or segregate persons in restroom usage by sex or sexual orientation in a school” and that “there is no question that as a transgender student, the [MHRA] protects [Nicole].”¹²³ However, Justice Anderson determined that, lacking direction from the Maine Supreme Court on the subject, the standard to be applied in a case of alleged discrimination in an educational setting was the “deliberate indifference standard” developed under Title IX,¹²⁴ which requires a showing of deliberate indifference to known harassment.¹²⁵ In contrast, the Title VII¹²⁶ discrimination standard requires only a showing that the harassment is known or should be known and that there has been a failure to take appropriate remedial action.¹²⁷ Justice Anderson found that the deliberate indifference standard of Title IX had not

/glad-argues-transgender-girls-case-before-maine-high-court.

121. ME. REV. STAT. ANN. tit. 5, § 4552 (West, Westlaw through 2013 2d Reg. Sess.); *see also id.* § 4602(4)(A) (prohibiting discrimination in education on the basis of sexual orientation); *id.* § 4592(1) (prohibiting denial of public accommodations on the basis of sexual orientation).

122. *Id.* § 4553(9-C).

123. *Doe*, No. CV-09-201, slip op. at 9–10.

124. *Id.* at 21–23. Title IX states in part, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C. § 1681(a) (2012).

125. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641–43 (1999); *Santiago v. Puerto Rico*, 655 F.3d 61, 73 (1st Cir. 2011).

126. Title VII states in part, “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin” 42 U.S.C. § 2000e-2(a).

127. *See, e.g., Espinal v. Nat’l Grid NE Holdings 2, L.L.C.*, 693 F.3d 31, 36 (1st Cir. 2012); *Wilson v. Moulison N. Corp.*, 639 F.3d 1, 7 (1st Cir. 2011).

been met.¹²⁸ The trial court additionally found that the defendants had acted within the law under MHRC Rule 4.13¹²⁹ and title 20-A, section 6501 of the Maine Revised Statutes,¹³⁰ which work together to permit schools to separate restroom usage by sex. Relying in part on the Minnesota Supreme Court's decision in *Goins*,¹³¹ Justice Anderson concluded that there was a distinction between sexual orientation discrimination—which is prohibited by both Maine and Minnesota's Human Rights Acts—and permissible sex segregation as it relates to restroom usage.¹³² The court pointed out that the *Goins* decision, along with a New York case that adopted the *Goins* rationale,¹³³ supported its reasoning, as both the Minnesota and New York courts held that their states' human rights laws restricting restroom usage on the basis of biological sex did not violate transgender individuals' rights under those laws.¹³⁴ The superior court additionally found that, regardless of Nicole's irrefutable status as someone protected by the Maine Human Rights Act, "sex" in the context of Rule 4.13 meant solely biological sex, and did not include sexual orientation or gender identity.¹³⁵

128. *Doe*, No. CV-09-201, slip op. at 22–23.

129. "An educational institution may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 94-348-4 ME. CODE R. § 4.13 (West, Westlaw through Apr. 15, 2014).

130. ME. REV. STAT. ANN. tit. 20-A, § 6501(1)(B) (West, Westlaw through 2013 2d Reg. Sess.) ("A school administrative unit shall provide clean toilets in all school buildings, which shall be . . . [s]eparated according to sex and accessible only by separate entrances and exits[.]"). Without such statutes and regulations, the general establishing of boys' and girls' restrooms, showers, or locker rooms in a public school would constitute unlawful discrimination because establishing such facilities requires de facto sex segregation.

131. *Goins v. W. Grp.*, 635 N.W. 2d 717 (Minn. 2001).

132. *Doe*, No. CV-09-201, slip op. at 13–15.

133. *Hispanic Aids Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 47 (App. Div. 2005) (holding that a lease provision requiring that the tenant not allow transgender persons to use the restroom corresponding with their gender identity was not discriminatory, but rather an inherently acceptable practice of designation of restroom used based on biological sex).

134. *Doe*, No. CV-09-201, slip op. at 13–14.

135. *Id.* at 16.

3. A “Momentous Decision”¹³⁶—*Victory at the Supreme Court*

The MHRC, which joined the Maines family as plaintiffs in the lawsuit, argued that the superior court had seriously misinterpreted Rule 4.13.¹³⁷ In its brief, the MHRC pointed out that it had adopted Rule 4.13 in 1984, long before gender identity was added to the MHRA as a protected class,¹³⁸ and argued that it was an error for the superior court to rely on the dictionary definition in defining “sex” as “biological sex.”¹³⁹ The Commission advocated for an interpretation of “sex” that reconciled Rule 4.13, section 6501(1), and the MHRA, while simultaneously remaining consistent with the nondiscriminatory purpose of the MHRA as a whole.¹⁴⁰ Although the Commission’s interpretation of Rule 4.13 is not conclusive, both Maine and federal law advocate deference to the statutory interpretation of the administering agency.¹⁴¹

On January 30, 2014, the Maine Supreme Court overturned the decision of the superior court, marking the first time a state court has ruled that transgender students must be allowed to use bathrooms that match their gender identity.¹⁴² The court’s carefully worded majority opinion focused on students’ educational needs as

136. In a press release following the Supreme Court’s decision, GLAD attorney Jennifer Levi stated, “This is a momentous decision that marks a huge breakthrough for transgender young people Schools have a responsibility to create a learning environment that meets and balances the needs of all kids and allows every student to succeed.” Press Release, Gay & Lesbian Advocates & Defenders, GLAD Celebrates Breakthrough Ruling in Favor of Transgender Student (Jan. 30, 2014) (internal quotation marks omitted), <http://www.glad.org/current/press-release/glad-celebrates-breakthrough-ruling-in-favor-of-transgender-student>.

137. Brief of Appellant Maine Human Rights Commission at 20, *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600 (Me. 2014) (No. Pen–12–582), 2013 WL 8351143.

138. *Id.*

139. *Id.*; see *Doe*, No. CV-09-201, slip op. at 16.

140. Brief of Appellant Maine Human Rights Commission, *supra* note 137, at 27–28.

141. See *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (“Just as we defer to an agency’s reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.” (internal citations omitted)); *Mar. Energy v. Fund Ins. Review Bd.*, 767 A.2d 812, 814 (“When the dispute involves an agency’s interpretation of a statute administered by it, the agency’s interpretation, although not conclusive, is entitled to great deference” (internal quotation marks omitted)).

142. See *Doe*, 86 A.3d at 607.

well as antidiscrimination laws, and emphasized the weight given to the “accepted and respected diagnosis that [is] present in this case.”¹⁴³

Our opinion must not be read to require schools to permit students casual access to any bathroom of their choice. Decisions about how to address students’ legitimate gender identity issues are not to be taken lightly. Where, as here, it has been clearly established that a student’s psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the MHRA.¹⁴⁴

The court’s decision relied heavily on issues of statutory construction, closely echoing the arguments made by the MHRC:

Seemingly contradictory provisions should not be viewed as irreconcilable when they serve different purposes

. . . When one construction would lead to a result that is inimical to the public interest, and a different construction would avoid that result, the latter construction is to be favored unless the terms of the statute absolutely forbid it.¹⁴⁵

The court found that “the sole purpose of the public-accommodations and educational-opportunities provisions of the MHRA is to ensure equal enjoyment of and access to educational opportunities and public accommodations and facilities,” and noted that “[t]he public-accommodations and educational-opportunities provisions were amended in 2005 to prohibit discrimination against transgender students in schools.”¹⁴⁶ In contrast, the chapter containing section 6501 of the Maine Revised Statutes had not been amended since 1983, and the court noted that the purpose of that section was to “establish cleanliness and maintenance requirements for school bathrooms, as well as requirements for the physical layout of toilet facilities.”¹⁴⁷

143. *Id.* (referring to Nicole’s diagnosis of gender dysphoria).

144. *Id.*

145. *Id.* at 604–05.

146. *Id.* at 605 (footnote omitted).

147. *Id.*

Because these statutes serve different purposes, they are not irreconcilable Although school buildings must, pursuant to section 6501, contain separate bathrooms for each sex, section 6501 does not—and school officials cannot—dictate the use of the bathrooms in a way that discriminates against students in violation of the MHRA.¹⁴⁸

The MHRA prohibits discrimination (including segregation¹⁴⁹) on the basis of sexual orientation, both in regard to public accommodation and education.¹⁵⁰ The term “sexual orientation” is defined to include “a person’s actual or perceived . . . gender identity or expression,”¹⁵¹ and the MHRC’s employment regulations define the term “gender identity” as “an individual’s gender-related identity, whether or not that identity is different from that

148. *Id.* at 606. Regarding Rule 4.13, the court noted:

This regulation simply confirms that schools may provide separate bathrooms in compliance with 20-A M.R.S. § 6501 (2013) and emphasizes that neither sex may be given preferential treatment. Like section 6501, however, it predates by more than twenty years the inclusion of sexual orientation in the MHRA. It offers no guidance concerning use of sex-separated facilities by transgender students, and is therefore of minimal relevance to the present analysis.

Id. at 606 n.9.

149. ME. REV. STAT. ANN. tit. 5, § 4553(2) (West, Westlaw through 2013 2d Reg. Sess.) (“Discriminate” includes, without limitation, segregate or separate.”).

150. The Act proscribes unlawful public accommodations discrimination, in relevant part, as follows:

It is unlawful public accommodations discrimination, in violation of this Act: For any [covered entity] . . . to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . sexual orientation . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the . . . terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

Id. § 4592(1). The Act proscribes unlawful education discrimination, in relevant part, as follows:

It is unlawful education discrimination in violation of this Act, on the basis of sexual orientation, to: . . . Exclude a person from participation in, deny a person the benefits of or subject a person to discrimination in any academic, extracurricular . . . or any other program or activity.

Id. § 4602.

151. *Id.* § 4553(9-C).

traditionally associated with that individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender."¹⁵² Based on the above, the Maine Supreme Court found that the school district's refusal to grant Nicole access to the girls' bathrooms constituted sexual orientation discrimination in violation of the MHRA and, accordingly, vacated the judgment of the superior court.¹⁵³

VI. IDENTITY AS THE DETERMINING FACTOR: A CALL FOR CHANGE

A. *Identity over Biology*

The *Clenchy* decision gave the Maine Supreme Court the opportunity to recognize the legislature's intent to support the state's LGBT students and protect their ability to be safe and participate equally in school programs and activities. Particularly for adolescents, school is the primary social setting of a student's day-to-day existence, and their psychosocial development "is centrally connected to the quality of the social interactions that take place within the school setting."¹⁵⁴ As one author has noted,

Children spend the majority of their waking hours in school. Over the years they spend significantly more time with their classmates and teachers than they do with their parents. A child's experience at school can significantly enhance or undermine their sense of self. Furthermore, children need to feel emotionally safe in order to learn effectively.¹⁵⁵

Singling out trans* students by requiring them to use separate bathrooms from other students precludes them from the socialization and bonding that takes place in these settings. It disrupts their ability to develop normal peer relationships, while marginalizing and isolating them. Students, especially adolescents, are well attuned to messages of difference and exclusion. Teenagers are often hyper-conscious of ways in which their bodies

152. 94-348-3 ME. CODE R. § 3.02(C)(2) (West, Westlaw through Apr. 15, 2014).

153. *Doe*, 86 A.3d at 607.

154. Deana F. Morrow, *Social Work Practice with Gay, Lesbian, Bisexual, and Transgender Adolescents*, 85 FAM. SOC'Y 91, 93 (2004).

155. STEPHANIE A. BRILL & RACHEL PEPPER, *THE TRANSGENDER CHILD: A HANDBOOK FOR FAMILIES AND PROFESSIONALS* 153 (2008).

differ from others around them,¹⁵⁶ and requiring trans* students to use a separate bathroom sends a clear message that the school, and the accompanying teachers, peers, administrators, and officials, think of those students as not really the gender they identify as, but as something ‘other.’ As U.S. District Judge Donovan Frank noted,

The teenage years are a time of discovery as all of our youth assert their individuality and sexuality. Those students who identify themselves as gay, lesbian, bisexual, or transgender . . . struggle with the added pressures of potential alienation from friends, family, and community, and the potential for ridicule or even violence . . . Schools, in particular, are vital environments that can provide an education of both the substance of diversity and the responsible manner with which such diversity is approached and expressed.¹⁵⁷

The disparate treatment of transgender youth under schools’ sex-segregated facilities policies is part of a larger problem of harassment and discrimination in schools, and the time has come for schools to step up and take responsibility by addressing the ways in which their policies allow and even encourage discrimination.

B. Moving Forward: Suggestions for a More Equal Future

1. GLSEN and the Model District Policy

Founded in 1990 by a group of public school teachers, the Gay, Lesbian & Straight Education Network (GLSEN) has grown into the leading national organization focused on ensuring safe schools for all children.¹⁵⁸ GLSEN provides resources and workshops for schools and teachers on how to support LGBT students, supports youth-led diversity education efforts in schools and communities, and conducts research on the experiences and

156. See, e.g., AM. PSYCHOLOGICAL ASS’N, DEVELOPING ADOLESCENTS: A REFERENCE FOR PROFESSIONALS 8 (2002) (“[T]his is a period in which physical appearance commonly assumes paramount importance.”).

157. *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1073 (D. Minn. 2001) (holding that the prohibition of a “Straight Pride” shirt worn by a high school student was unconstitutional because “[m]aintaining a school community of tolerance includes the tolerance of such viewpoints”).

158. *Who We Are: Improving Education, Creating a Better World*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, <http://glsen.org/learn/about-glsen> (last visited Apr. 14, 2014).

needs of LGBT students in K–12 settings.¹⁵⁹ In 2013, GLSEN, in partnership with the National Center for Transgender Equality (NCTE), released the Model District Policy on Transgender and Gender Nonconforming Students.¹⁶⁰ The Model Policy “outlines best practices for schools to ensure that all students are safe, included and respected in school, regardless of their gender identity or expression” and presents policy objectives and alternative options in a format intended to be easily adaptable to fit individual schools’ needs, “while keeping the original intent of the policy intact.”¹⁶¹ The Model Policy addresses privacy and confidentiality issues,¹⁶² identity documents,¹⁶³ bullying and harassment,¹⁶⁴ student transitions,¹⁶⁵ and access to gender-segregated activities and spaces,¹⁶⁶ among other topics. Regarding access to gender-segregated facilities such as restrooms, locker rooms, and changing facilities, the Model Policy specifies that

students shall have access to facilities that correspond to their gender identity [R]equiring a transgender or gender nonconforming student to use a separate, nonintegrated space threatens to publicly identify and marginalize the student as transgender and should not be done unless requested by a student. Under no circumstances may students be required to use sex-segregated facilities that are inconsistent with their gender identity.¹⁶⁷

Schools in Connecticut,¹⁶⁸ California,¹⁶⁹ Colorado,¹⁷⁰ Massachusetts,¹⁷¹ and Washington,¹⁷² as well as Toronto,¹⁷³ have adopted

159. *Id.*

160. GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT’L CENTER FOR TRANSGENDER EQUAL., MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS (2013).

161. *Id.* at 1.

162. *Id.* at 4.

163. *Id.* at 2.

164. *Id.* at 3.

165. *Id.* at 8.

166. *Id.* at 6–7.

167. *Id.*

168. *See* CONN. SAFE SCH. COAL., GUIDELINES FOR CONNECTICUT SCHOOLS TO COMPLY WITH GENDER IDENTITY AND EXPRESSION NON-DISCRIMINATION LAWS 7–8 (2012) (discussing gender identity or expression as prohibited grounds for discrimination, and asserting the right of students to use restrooms and locker rooms corresponding with their gender identity).

169. *See* L.A. UNIFIED SCH. DIST., TRANSGENDER AND GENDER VARIANT

policies similar to the Model Policy, recognizing the right of students to use restrooms that correspond with their gender identity. However, these schools are still the minority, and while each school district's independent recognition of the importance and validity of a student's gender identity is a step in the right direction, it is a slow march toward equality that leaves countless transgender youth unprotected at a national level.

2. *A Matter for Congress?*

On March 14, 2013, California Representative Linda Sánchez introduced the Safe Schools Improvement Act of 2013.¹⁷⁴ If passed, the Act would require schools receiving federal funding to implement policies to ban bullying, including bullying on the basis of sexual orientation and gender identity.¹⁷⁵ Just over a month later, Colorado Representative Jared Polis introduced the Student Non-Discrimination Act of 2013, which prohibits public school students from being excluded from participating in, or being subject to

STUDENTS—ENSURING EQUITY AND NONDISCRIMINATION, REF-1557.1, at 5 (2011), (“[S]tudents shall have access to the restroom that corresponds to their gender identity asserted at school”).

170. See BOULDER VALLEY SCH. DIST., *supra* note 100.

171. See MASS. DEPT. OF ELEMENTARY AND SECONDARY EDUC., GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT: NONDISCRIMINATION ON THE BASIS OF GENDER IDENTITY (2013) (“[T]he principal should be clear with the student (and parent) that the student may access the restroom, locker room, and changing facility that corresponds to the student’s gender identity Transgender students who are uncomfortable using a sex-segregated restroom should be provided with a safe and adequate alternative.”).

172. See RANDY I. DORN, PROHIBITING DISCRIMINATION IN WASHINGTON PUBLIC SCHOOLS: GUIDELINES FOR SCHOOL DISTRICTS TO IMPLEMENT CHAPTERS 28A.640 AND 28A.642 RCW AND CHAPTER 392-190 WAC, at 30 (2012) (“School districts should allow students to use the restroom that is consistent with their gender identity consistently asserted at school.”).

173. See TORONTO DIST. SCH. BOARD, TDSB GUIDELINES FOR THE ACCOMMODATION OF TRANSGENDER AND GENDER NON-CONFORMING STUDENTS AND STAFF 7 (2011) (“All students have a right to safe restroom facilities and the right to use a washroom that best corresponds to the student’s gender identity, regardless of the student’s sex assigned at birth. Requiring students to ‘prove’ their gender (by requiring a doctor’s letter, identity documents, etc.) is not acceptable. A student’s self-identification is the sole measure of the student’s gender.”).

174. Safe Schools Improvement Act of 2013, H.R. 1199, 113th Cong. (2013).

175. *Id.* § 3.

discrimination under, any federally-assisted educational program on the basis of their actual or perceived sexual orientation or gender identity.¹⁷⁶ Whereas the Safe Schools Improvement Act requires primary and secondary schools to take a proactive role in preventing harassment and discrimination by adopting and enforcing antibullying policies,¹⁷⁷ the Student Non-Discrimination Act establishes the legal rights of victims of bullying and delineates the federal government's response to schools condoning LGBT discrimination.¹⁷⁸ As of February 2014, both bills have been referred to the House Subcommittee on Early Childhood, Elementary, and Secondary Education, and neither is expected to make it past the committee or to be enacted.¹⁷⁹ While both bills, if enacted, would mean greater protection for LGBT students in public schools, neither addresses the question of restroom access based on gender identity.

3. *A State-by-State Solution: California's School Success and Opportunity Act*

In August 2013, California Governor Jerry Brown signed into law an amendment to California Education Code section 221.5, which, as it previously existed, prohibited public schools from discriminating on the basis of specified characteristics, including gender, gender identity, and gender expression, and specifies various statements of legislative intent and the policies of the state in that regard.¹⁸⁰ Assembly Bill (AB) 1266, known as the School Success and Opportunity Act, added a single sentence to the code: "A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and *use facilities consistent with his or her gender identity, irrespective of*

176. Student Non-Discrimination Act of 2013, H.R. 1652, 113th Cong. (2013).

177. H.R. 1199 § 3.

178. H.R. 1652.

179. *Overview of H.R. 1199: Safe Schools Improvement Act of 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr1199> (last visited Apr. 14, 2014); *Overview of H.R. 1652: Student Non-Discrimination Act of 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr1652> (last visited Apr. 14, 2014).

180. See CAL. EDUC. CODE § 221.5 (West, Westlaw through ch. 15 of 2014 Reg. Sess.); see also *Victory! CA Bill Will Ensure the Success and Well-Being of Transgender Students*, TRANSGENDER L. CENTER, <http://transgenderlawcenter.org/archives/3544> (last visited Apr. 14, 2014) [hereinafter *Victory!*].

the gender listed on the pupil's records."¹⁸¹ The Act went into effect on January 1, 2014, and, despite efforts by conservative organizations such as National Organization for Marriage and Privacy for All Students, a referendum seeking to repeal the Act did not qualify for the November 2014 ballot.¹⁸²

The impact of the Act was apparent even before it was signed into law. Just three weeks after the California Senate approved the bill by a vote of 21–9,¹⁸³ the U.S. Department of Justice, joined by the U.S. Department of Education's Office for Civil Rights, announced a settlement agreement with the Arcadia Unified School District in Arcadia, California, to resolve an investigation into allegations of discrimination against a transgender student.¹⁸⁴ The complaint alleged that the district had denied the student educational opportunities on the basis of sex when it prohibited him from accessing facilities consistent with his male gender identity, including restrooms and locker rooms at school, as well as prohibiting him access to sex-specific, overnight accommodations during a school-sponsored, academic trip.¹⁸⁵ School board officials unanimously approved the agreement, under which the school will:

[1] work with a consultant to support and assist the district in creating a safe, nondiscriminatory learning environment for students who are transgender or do not

181. School Success and Opportunity Act, 2013 Cal. Legis. Serv. Ch. 85 (West) (codified at Cal. Educ. Code § 221.5 (Westlaw)) (emphasis added).

182. The referendum effort fell 17,276 signatures short of the 504,760 needed to qualify for the ballot. See Melanie Mason, *Measure to Block Transgender Student Law Fails to Make Ballot*, L.A. TIMES (Feb. 24, 2014, 5:58 PM), <http://www.latimes.com/local/political/la-me-pc-transgender-student-initiative-20140224,0,68994.story#ixzz2uSggdPc0>. See generally *Students and Families Optimistic That School Success and Opportunity Act (AB1266) Will Remain Law*, LGBTWEEKLY (Jan. 8, 2014), <http://lgbtweekly.com/2014/01/08/students-and-families-optimistic-that-school-success-and-opportunity-act-ab1266-will-remain-law/> (discussing the first count vote from January 2014).

183. Don Thompson, *Transgender Bathroom Rights Bill Passed by California Lawmakers*, HUFFINGTON POST (July 3, 2013, 9:01 PM), http://www.huffingtonpost.com/2013/07/03/transgender-bathroom-rights_n_3543601.html.

184. Press Release, U.S. Dep't of Justice, U.S. Reaches Agreement with Arcadia, Cal., Sch. Dist. to Resolve Sex Discrimination Allegations (July 24, 2013), <http://www.justice.gov/opa/pr/2013/July/13-crt-838.html>.

185. *Id.*; see also Resolution Agreement, Arcadia Unified Sch. Dist.-U.S. Dep't of Educ., Office for Civil Rights-U.S. Dep't of Justice, Civil Rights Div., July 24, 2013, OCR No. 09-12-1020, DOJ No. 169-12C-70 [hereinafter Arcadia Resolution Agreement].

conform to gender stereotypes; [2] amend its policies and procedures to reflect that gender-based discrimination, including discrimination based on a student's gender identity, transgender status, and nonconformity with gender stereotypes, is a form of discrimination based on sex; and [3] train administrators and faculty on preventing gender-based discrimination and creating a nondiscriminatory school environment for transgender students.¹⁸⁶

Although other states have adopted policies that are in line with AB 1266, this law is the first of its kind in the country, ensuring that public schools statewide will respect students' gender identity and making sure that students can fully participate in all school activities, sports teams, programs, and facilities that match their gender identity.¹⁸⁷

V. CONCLUSION

The promise of an equal education opportunity for transgender students can be fulfilled only if the students are able to fully live as the gender they are. When a school denies a transgender student access to the restroom that matches his or her gender identity, the school is denying a critical part of that student's sense of self and exposing the student to rejection and discrimination. The impact to trans* students—who identify as one gender, are recognized by classmates and family members as that gender, and then are told by a school or court that they cannot use the corresponding restroom—is one with life-long repercussions. Courts are slowly but surely recognizing that there is no clear, settled definition of the term “sex” and that the criteria used in determining sex are expansive and evolving.¹⁸⁸

186. Press Release, U.S. Dep't of Justice, *supra* note 184; *see also* Arcadia Resolution Agreement, *supra* note 185.

187. *Victory!*, *supra* note 180.

188. Thirty years ago, in his opinion finding that Karen Ulane had been the victim of sexual discrimination, Judge John Grady observed:

Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. That there could be any doubt about that question had simply never occurred to me After listening to the evidence in this case, it is clear to me that there is no settled definition . . . as to what we mean by sex.

Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 823 (N.D. Ill. 1983), *rev'd*, 742

In its determination that Colorado state law requires schools to recognize students' gender identity, the Colorado Human Rights Commission acknowledged the impact and necessity of a nondiscriminatory policy in the school setting:

The [school] perceives that as long as the [student] has access to a restroom, it is satisfying its obligation to provide services to the [student]. This perception is reminiscent of the "separate but equal" philosophy, which revealed, at least in terms of protected classes, that separate is very rarely, if ever, equal. School is not merely an institution for educating children through books and structured classes. It provides children with a platform that enables them to self-actualize into productive individuals. Children also learn social skills, such as respect, communication, trust, how to appropriately interact with people from different backgrounds, and how to become part of a community. Thus, a very important component of school is being accepted by one's peers. It enhances one's ability to learn and develop a healthy ego,¹⁸⁹ which in turn ensures a positive educational experience.

When trans* students are marginalized by schools and courts, there is a significant risk of the student internalizing the categorization of "other." As the Colorado Civil Rights Division noted, the school years are a time for youth to develop healthy egos and a sense of belonging to a community.¹⁹⁰ For transgender youth specifically, "there is the additional challenge of integrating a complex gender identity with their cultural and ethnic backgrounds, personal characteristics, and family circumstances."¹⁹¹ Supported and empowered transgender youth will have a direct impact on the overwhelmingly disproportionate rates of homelessness, violence, suicide, poverty, and harassment in the transgender community as a whole.¹⁹² Ideally, the needs and rights of these students will be recognized by the states through laws like California's School

F.2d 1081 (7th Cir. 1984).

189. C.C.R.D. Determination, *supra* note 97, at 13.

190. *See id.*

191. Arnold H. Grossman & Anthony R. D'Augelli, *Transgender Youth: Invisible and Vulnerable*, 51 J. HOMOSEXUALITY 111, 113 (2006).

192. *See, e.g.,* GRANT ET AL., *supra* note 24; GREYAK ET AL., *supra* note 87; NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, *supra* note 19; NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED HATE VIOLENCE IN 2012 (2013); Lombardi et al., *supra* note 17; Stotzer, *supra* note 17.

Success and Opportunity Act, or by the schools through policies similar to GLSEN's Model District Policy. Until then, however, transgender students rely on courts to ensure that the promise of an equal education opportunity is not an empty one.