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# Transgender Students: A Unique Frontier for Civil Rights

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*(Photo by LongLiveRock, via Wikimedia Commons)*

Starting at the age of 3, Lauren felt like a girl trapped in a boy's body. At school, due to her gender nonconformity, her classmates began calling her names such as "man beast." The harassment escalated to the point where students spit on her, parents insulted her, and on one occasion, peers tried tearing off her clothing to expose her genitals. According to her mother, Lauren's life became nightmarish, and she tried to hurt herself. She felt safer in the girl's bathroom, but her school refused her access. Lauren started skipping school and later refused to attend altogether. Unfortunately, Lauren's experience as a transgender student is not unique.

According to a report issued by the New York Civil Liberties Union (NYCLU), transgender and gender-nonconforming youth encounter significant obstacles at school. Approximately 75 percent of transgender students report being bullied with one-third suffering a physical assault. As a result, more than half experience chronic absenteeism and 15 percent drop out. Almost half of transgender youth will attempt suicide at least once. They will also disproportionately engage in drug use. Frequently, they face rejection from their families, substantially increasing their likelihood of experiencing homelessness that creates an additional barrier to completing their education. In fact, in New York, the average age of a transgender youth experiencing homelessness is only 13-and-a-half years old, approximately the age at which most students begin attending high school.

As one transgender woman explained when reflecting upon her childhood, transgender youth "deal with marginalization, cultural erasure, minority stress and overt acts of hostility from students, staff and family - things that are in no way conducive to the health or academics of any student." Given these stark statistics, it is not surprising that the rights of transgender students have jumped to the fore. The issue of

transgender equality has become the latest civil rights frontier especially in light of recently issued guidelines by the U.S. Department of Education (DOE) and the U.S. Department of Justice (DOJ) that seek to clarify the rights of these children and the school district's corresponding obligations to them.

The foundational legal landscape governing current questions of gender in the education setting begins in 1972. In that year, Congress passed the Equal Education Opportunity Act (EEOA). Title IX of the EEOA, along with its implementing regulations, prohibit federal funding recipients from excluding, denying the benefits to, or otherwise discriminating against students in educational programs or activities based upon their sex. Historically, Title IX's implementing regulations have carved out exceptions that allow schools to segregate by sex in access to bathrooms, locker rooms, shower facilities, and sports teams. But what were considered to be "common-sense" exceptions have posed some thorny questions about the rights of transgender students for equal access.

On May 13, the DOE and DOJ addressed this issue by issuing new guidelines. These guidelines recognize that under Title IX, a person's "sex" has historically been assigned at birth typically based upon original biological genitalia. Under the new guidelines, however, the DOE and DOJ equate an individual's "sex" to that individual's "gender identity." Gender identity refers to an individual's internal sense of gender, meaning that person's perception of self as female or male or both or neither. A cisgender student is one whose gender identity corresponds with that person's anatomical sex at birth. A transgender student, in contrast, is one whose gender identity varies from that person's anatomical sex at birth regardless of whether that student has chosen to socially, hormonally, or surgically change their sex to more fully match the student's gender identity.

Because the DOJ and the DOE now officially equate "sex" with "gender," under Title IX, a school may not treat transgender students differently from the way it treats other students of the same gender identity. Therefore, it is not appropriate for a school to provide independent facilities for transgender youth; the guidelines prohibit such segregation unless the same prescription exists for their cisgender peers.

Recently, a number of districts in Pennsylvania have passed policies in conformance with these guidelines. For example, on June 16, the Philadelphia School Reform Commission unanimously approved a policy that students may dress, use restrooms and locker rooms, and be referred to in interactions and in their official school records in a manner that matches their gender identity. Additionally, transgender students may be assigned to intramural sports teams based upon their gender identity as opposed to their sex at birth with participation on interscholastic athletic teams to be decided on a "case by case" basis. In April and May of this year, the school boards for the Great Valley, Upper Dublin, Cheltenham and Lower Merion school districts, among others, adopted similar practices and more districts in Pennsylvania are expected to follow suit.

Other jurisdictions, however, have resisted these guidelines. Officials from 12 different states, including Alabama, Arizona, Georgia, Louisiana, Maine, North Carolina, Oklahoma, Tennessee, Texas, Utah, West Virginia and Wisconsin have filed suit against the federal government, urging that states be entitled to segregate access to locker rooms and bathrooms based upon the person's sex assigned at birth. These state officials and the views they represent perceive the federal guidelines as a threat to deeply held beliefs that view men and women as naturally and unalterably determined at birth. These individuals also view the guidelines as an assault on the privacy rights of cisgender children. They are not alone in their feelings. A May 9 CNN poll reported that out of 1,001 Americans interviewed, 57 percent opposed laws permitting transgender individuals to use facilities that match their gender identity while only 38 percent of individuals support such practices.

Despite the national mood, there are good reasons for our country to support the new DOE/DOJ guidelines. As described earlier, the discrimination that transgender students faces places them at significant risk of harm from their peers, family members, and even themselves. In a nation competing in a global economy, our most valuable resources are our children. To leverage and optimize their talent, students need be able to access schools and feel authentically accepted, recognized, and valued; where their gender identities are not questioned; and where they can use bathrooms without harm.

Disagreements over the acceptance and implementation of the new guidelines are sure to play out in the public sphere and the court system for some time to come. In many ways, the struggle to prevent discrimination against transgender students appears to mirror the struggles against discrimination that define the civil rights litigation tradition more broadly. One narrative that defines this tradition has been the slow march to reconcile constitutional guarantees of liberty with the practical realities of exclusion. The story goes something like this: the United States represents a grand experiment in liberal-democratic principles. Yet our nation's founders ratified laws and institutionalized other practices that systematically excluded whole groups of people from participation in political life. African-Americans were enslaved. Women were barred from much of civil society. Sexual minorities lived in hiding. But over time, by appealing to constitutional and other liberal-democratic ideals, persons of color, women, religious minorities, gays and lesbians, and other traditionally marginalized groups won battles for legal equality. While the struggle continues, Dr. Martin Luther King Jr. captured this slowly progressive, emancipatory sentiment when he famously said, the "arc of the moral universe is long, but it bends toward justice."

Yet, the struggle to prevent discrimination against transgender students may represent more of a sea change than it initially appears. One critique of the civil rights litigation tradition claims that the near-singular focus on a civil rights discourse and movement has re-inscribed theoretically pernicious categories rather than transcended them. According to this critique, we still live in a world where conceptually irrelevant, binary categories such as black and white, men and women, gay and straight circumscribe opportunities and oppress individuals. Up until now, the arguments advanced by this critique have been marginalized by the courts; the law has been less effective at transcending these categories than it was at creating them. But this latest fight over the rights of transgender students under Title IX may present a new opportunity. For one of the first times in American history, civil rights laws are turning post-modern, by problematicizing the binary nature of gender, effectuating a more fluid conception of sexual identity, and in turn, increasing the emancipatory potential of our laws.



