

LEGAL ISSUES FACING TRANSGENDER AND GENDER-EXPANSIVE YOUTH

BY ANGIE MARTELL



Over the past decade, increased visibility of youth whose gender identities and expressions challenge “conventional” expectations is teaching us that gender is not as simple as what is declared on a birth certificate. Across the nation and especially in the state of Michigan, transgender and gender-expansive children are embracing their identities. For some, self-realization can happen as early as age three, while for others it may happen in their preteens.¹ Parents are not typically aware that a child’s gender identity is different from their assigned sex at birth until their child or another person tells them. More children and teens are identifying as gender expansive than ever before.²

“Gender expansive” is a term used when a person’s identity or behavior is broader than the commonly held definitions of gender and gender expression in one or more aspects of life. This term is considered far more positive than the term “gender nonconforming,” which can negatively imply difference.³

Self-identification is broadening beyond just the compartmentalization of gender. Some transgender and gender-queer youth identify as non-binary, meaning their gender identities are not exclusively masculine or feminine—thus, outside binary gender and cisnormativity.⁴

Categorization of sex and binary gender— a changing legal landscape

A whole spectrum of gender identification exists between the binary biological sex categories of male and female. Like everyone else, transgender people are diverse and cannot be placed in discreet, all-encompassing boxes. Some use “she,” “he,” “they,” or other less common pronouns like “ze” to identify themselves. For many, the term LGBTQIA has become antiquated, with many individuals feeling excluded because they are gender fluid and believe they do not fit solely into one category.⁵

Historically, non-binary transgender people have largely been excluded from the discussion of transgender people, which has caused them to be further marginalized in legal circles.⁶ Non-binary transgender individuals—especially people of color—are at a higher risk of discrimination, violence, police surveillance, and incarceration.⁷

The inability to ascribe legal recognition of personhood is complex and evolving. In our society and especially in law, we take gender to be a static given rather than understanding it as a diverse and fluid spectrum. Legal entities like state and federal governmental bodies continue to categorize individuals with labels that do not capture an understanding or recognition that people exist outside of historic notions conflating biological sex and gender.⁸

Not everyone is cisgender, which is a term for those who exclusively identify as the sex assigned to them at birth.⁹ It is not indicative of gender expression, sexual orientation, hormonal makeup, physical anatomy, or how one is perceived in daily life.

According to *Time* magazine, “[T]oday in the United States alone there are approximately one million people who—from the moment of birth—cannot be clearly defined as either male or female.”¹⁰

This raises serious concerns of whether stringent adherence to a two-sex paradigm, as seen in the U.S., is not only inconsistent with actual science but also discriminatory against a plethora of people who have a right to equal protection under the law:

If modern science recognizes that sex has countless natural permutations, and if birth certificates, physical observation and even chromosomal testing cannot reliably categorize every individual as either male or female, then our judiciary cannot be required to make gender findings antithetical to that reality.¹¹

In 2016, two legal precedents arose in both Canada and the United States. In the U.S., Oregon and California have both legally recognized non-binary gender. Such recognition has the potential to change federal policy.

With respect to the Oregon matter *In re Sex Change of Jamie Shupe*,¹² Multnomah County Circuit Court Judge Amy Holmes Hehn previously granted Shupe’s petition and wrote: “The sex of Jaime Shupe is hereby changed from female to non-binary. Notice of this legal change shall be posted in a public place in Multnomah County as required by law.”¹³ Referencing the *Shupe* order, Lambda Deputy Legal Director Hayley Gorenberg said “[c]lassic gender markers don’t fit everybody” and that this petition was significant for helping people “exist without labels that don’t accurately describe them.”¹⁴

Pursuant to this case, the Oregon Department of Motor Vehicles has created forms that allow individuals to identify a

FAST FACTS

Transgender and gender-expansive legal landscapes are changing; classic gender markers do not fit everyone. Transgender and gender-expansive individuals face more and more hidden barriers and injustices. Is the strict adherence to a two-sex paradigm not only inconsistent with science but discriminatory? What do we need to know to best represent our clients and fulfill our ethical obligations?

sex other than M (for male) and F (for female) on drivers’ licenses, permits, and ID cards.¹⁵

In the California case, *In Petition of Sara M. Keenan*, Keenan became the second person to legally change their gender from female to non-binary.¹⁶

Also in 2016, the province of Ontario, Canada implemented new changes to health cards removing sex altogether and adding an X for gender-neutral identification to drivers’ licenses.¹⁷ In addition, nine Canadian provinces have explicit protection for gender identity under the Human Rights Code and six of those provinces also protect gender expression.¹⁸

This past February, the San Francisco Superior Court granted petitions of three California residents who had asked to change their gender to non-binary.¹⁹

Other countries, such as New Zealand, currently have third-gender designation instead of only the M and F markers that typically appear in the sex field.²⁰

These cases, orders, and changes demonstrate a movement away from compartmentalization in rigid, historical biological sex categories toward understanding the fluidity of gender and sex in science and society. For many, the necessity of markers based on sex in documents is being questioned as a basic premise as well. Why does one need to identify sex on a driver’s license? Could there be better, less offensive ways to categorize necessary information? These discussions may be a harbinger of things to come.

Family law and parenting

These issues can become complicated in the areas of family law and parenting. Parents often are either unaware of or become paralyzed amid the legal issues they may encounter raising a transgender or gender-expansive child. Whether it’s unfair treatment at school, custody threats by an unsupportive

co-parent or spouse, or initiation of abuse and neglect proceedings, parents and their attorneys rarely have the necessary knowledge or cultural competency to navigate these legal waters.

On May 30, 2017, the U.S. Court of Appeals for the Seventh Circuit ruled in favor of a transgender high school student in Wisconsin, finding that he has the right under Title IX of the Education Amendments of 1972 to use the restroom that corresponds to his gender identity.²¹ According to the court, “[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”²²

School and home environments are where children mature and form their identities and feelings of safety. While Title IX was interpreted to prohibit institutional discrimination against transgender students in *Whitaker*,²³ these children will still have difficulty reaching their full potential when there is bullying by peers or adults and lack of a supportive environment.²⁴

In a gender-focused society where we expect social conformity to biological sex, there are few substantive protections in place for transgender and gender-expansive youth:

- 75 percent of transgender youth report that they feel unsafe at school because of their gender expression.²⁵
- 60 percent of transgender students have been denied access to restrooms consistent with their gender identity.²⁶
- Those who expressed a transgender identity or gender expansiveness while in grades K–12 reported alarming rates of harassment (78 percent), physical assault (35 percent) and sexual violence (12 percent); harassment was so severe that it led almost one-sixth (15 percent) to leave a school in K–12 settings or in higher education.²⁷

- 54 percent of transgender students who were victimized in school did not report to school staff. Among those who did report incidents to school authorities, few (33 percent) believed that staff addressed the situation effectively.²⁸
- 30 percent of transgender youth report a history of at least one suicide attempt, and nearly 42 percent report a history of self-injury, such as cutting.²⁹

These issues may arise in the context of family law, such as when one parent accuses the other of harming the child or not acting in the child’s best interest when a child discloses they are transgender or gender expansive. In my experience of these cases, one parent might use non-affirming parenting that undermines a youth’s self-worth, or blame the other parent for allowing a youth to engage in gender-expansive behavior, deeming them directly responsible for the child’s identity and expression.

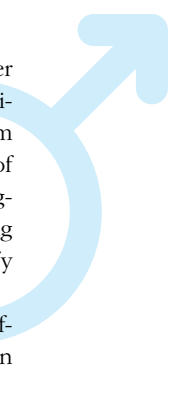
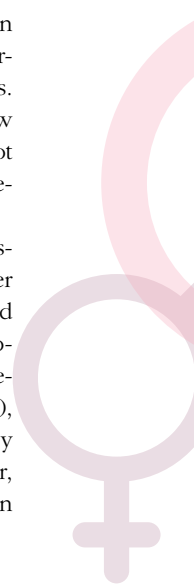
Courts consistently hold that it is insufficient to demonstrate harm to the child *or* allege parental misconduct—both must be present.³⁰ However, it is especially precarious for practitioners and parents who conflate accusations of harm and misconduct with a young child’s own reporting of often evolving self-understanding or their perceptions of their parents’ actions during already challenging and confusing times. Legal advocates, prosecutors, or the courts may also skew criteria used for best-interest factors if these entities do not entirely understand the nuances or lack the cultural competency to provide an accurate best-interest analysis.

Attorneys must navigate carefully and explore the assistance of legal and medical experts well versed in transgender or gender-expansive youth to help practitioners, parents, and the court understand issues like the use of appropriate pronouns, possible use of hormone blockers (e.g., there is no specific age when puberty-suppressing drugs can be prescribed), name changes, acceptance and understanding of the fluidity of gender and its expression by a child, bullying behavior, self-harm, alleged criminality, or juvenile problems rooted in the marginalization that the individual feels.

Additional protections and barriers for LGBTQIA youth—hidden injustices

Many school districts cite sexual orientation and gender identity in their existing bullying and nondiscrimination policies. Federal Title IX law also prohibits public schools from discrimination based on sex.³¹ The Michigan State Board of Education approved a set of guidelines in 2016 offering suggestions for schools on creating safe and supportive learning environments for all students, including those who identify as LGBT.³²

Yet studies reveal that gay and transgender youth are often mislabeled as aggressors in school conflicts, rather than



seen as victims.³³ A gender nonconforming youth may exhibit masculine traits when she is defending herself from bullying or taunts from her peers. School administrators may consider the actions aggressive based only on the youth's physical demeanor and suspend the student despite the "defensive nature of her actions."³⁴

Many transgender and gender-expansive students struggle with going to school and being themselves without being punished for wearing clothes or using facilities consistent with who they are. Some are denied opportunities to participate in sports and face bullying and victim-blaming, which can lead to disproportionate discipline and involvement with the juvenile justice system, creating a path toward criminalization and incarceration.³⁵

While many states, localities, and schools have adopted nondiscrimination and anti-bullying laws and policies that explicitly include gender identity and expression,³⁶ there are some areas of specific concern:

- **Identity documents/dress codes/sports locker rooms/school nondiscrimination policies**—What are transgender and gender-expansive youths' rights in the school system? Are the school discipline policies biased? Should parents seek a name change for their child before the child starts school? Has the school addressed the child appropriately? Are adequate safety measures in place for the minor given the increased likelihood of bullying and violence?
- **Criminal cases**—Are the youth's actions caused by abuse and harassment because they are LGBTQIA? If so, do attorneys have an ethical obligation to disclose this to the court and prosecutor?
- **Coming out and acceptance**—Transgender and gender-expansive youth who come out to their families are often homeless because of a lack of acceptance. According to recent statistics, in Michigan 40 percent of homeless youth were gay, lesbian, transgender, and non-binary.³⁷ Research shows that these youths are often more likely to have experienced family conflict, child abuse, bullying, and homelessness.³⁸

"[A]pproximately 300,000 gay and transgender youth are arrested and/or detained each year, of which more than 60 percent are black or Latino. Though gay and transgender youth represent just 5 percent to 7 percent of the nation's overall youth population, they compose 13 percent to 15 percent of those currently in the juvenile justice system."³⁹ They are often picked up for a variety of low-level crimes (e.g.,

trespassing, vagrancy, shoplifting). The lack of safety nets and guidance for juvenile justice professions working with these youth is disturbing.

According to a 2016 report by the Center for American Progress and the Movement Advancement Project, a past survey by the federal Bureau of Justice Statistics found that 12 percent of youth in juvenile facilities self-identified as non-heterosexual⁴⁰ and another survey of seven juvenile justice facilities across the United States found 20 percent identified as LGBT or gender nonconforming.⁴¹

Many of these youths depend on their families to meet their material needs, and rejection leaves them emotionally scarred and physically vulnerable. In some cases, these family conflicts result in the youth's first encounter with the juvenile justice system and problems exacerbate from there. Troublingly, "prosecutors frequently file charges against these youth for being 'incorrigible' or beyond the control of their parents or guardians, based largely on the [parents' or guardians'] objections to [the youth's] sexual orientation"⁴² or gender expression.

"Once in the juvenile justice system gay and transgender youth are denied basic civil rights, wrongly categorized as sexually deviant simply because of their sexual orientation, gender identity, or gender nonconformity, and even labeled sex offenders."⁴³

Youth wrongly categorized as sex offenders

Gay and transgender youth are more likely to be prosecuted for age-appropriate consensual sexual activity than their heterosexual peers.⁴⁴ In some cases, gay, lesbian, transgender, and gender-expansive youth may be ordered by the court to enter sex offender treatment programs or undergo sex offense risk assessments because of their sexual orientation or gender identity.⁴⁵

Out of 800,000 people on sex offender registries, 200,000 are under the age of 18. "A child as young as 8 years old can be labeled a deviant," and a disproportionate number of these youth are gay, queer, transgender, and gender-expansive.⁴⁶

The stigma of being registered as a sex offender means the individual may experience harassment and physical violence from others.⁴⁷ A sex offender may sometimes be denied access to education or housing because of residency restriction laws.⁴⁸ They are ostracized, socially isolated, and sometimes physically banished from their communities by child safety zones. Their lives are a struggle for employment, and they must regularly check in with law enforcement.⁴⁹

MANY SCHOOL DISTRICTS CITE SEXUAL ORIENTATION AND GENDER IDENTITY IN THEIR EXISTING BULLYING AND NONDISCRIMINATION POLICIES.



Under the Michigan Sex Offenders Registration Act,⁵⁰ juveniles involved in sexual offenses are not required to register unless they:

- received an order of disposition in Michigan, which is open to the public, or
- received an order of disposition or other adjudication in another state, and
- the juvenile was at least 14 years old at the time of the offense, and
- the offense would classify the juvenile as a tier III offender.⁵¹

Subject to exceptions, tier III juvenile offenders register for life.⁵² Juvenile offenders under the 2011 law that do not meet the above criteria are included in a database available to law enforcement.

Many of these issues are just the tip of the iceberg on LGBTQ issues for youth. We will continue to see a growing number of cases in our courts and, as such, we should prepare ourselves to best represent our clients zealously.

Attorneys' ethical obligations

Michigan Rule of Professional Conduct 1.1 requires attorneys to be competent to handle the cases they accept. Michigan Rule of Professional Conduct 1.3 also states that “a lawyer

shall act with reasonable diligence and promptness in representing a client.” This rule is further explained in comments, which state that “a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” Transgender and gender-expansive youth have unique needs and vulnerabilities in the legal arena. Attorneys are ethically bound to strive for cultural competency and advocate for the best interests of their client. Given the complexity of home environments or social circumstances and the possibility of serious repercussions, attorneys must allow the client to decide when and if to disclose his, her, or their sexual orientation or gender identity.⁵³ The decision to disclose belongs to the youth. As noted by the American Bar Association, it is the attorney’s duty to respect and act according to each client’s values and beliefs⁵⁴—in conjunction with the obligation of commitment and dedication to the interests of the client.

Educating the judiciary

Perhaps the most important task attorneys have in domestic and juvenile cases is educating the judiciary on transgender or gender-expansive youth, the dearth of LGBTQ-friendly youth programs, and numerous barriers for fair treatment. Many judges and opposing attorneys still do not understand what transgender or gender expressive means, especially in young children. Presently, there are no civil rights protections for LGBTQ individuals in Michigan, and outing someone in court documents may have devastating results for these youth. If an attorney receives consent from the client or youth to reveal their identity, the attorney should request a protective order in the case. ■



Angie Martell is an attorney and mediator with the Ann Arbor firm of Iglesia Martell. She has a general practice that concentrates in holistic law, LGBTQ issues, family law, and criminal law.

Thanks to Alyssa Sappenfield, associate attorney at Iglesia Martell Law Firm; Kerene Moore, Jim Toy Center legal clinic director; and the law students from the University of Michigan Law School Outlaws for their assistance with this article.

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