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Transgender youth in schools: The Maine Supreme Court offers guidance on communal bathroom access

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A recent decision by the Maine Supreme Judicial Court provides guidance for Maine school officials who continue to be called upon to address issues that arise from teaching transgender youth in their school systems. In *Doe v. Clenchy*, Maine’s highest court held that, in some cases, Maine’s discrimination laws require that transgender students be permitted to use the communal bathroom consistent with their gender identity.¹ This article discusses the *Doe* ruling and what it means for Maine schools.

Background

Maine law expressly forbids discrimination against any transgender individual—including transgender youth within a school system—on the basis of the individual’s gender identity or gender expression.² One question that arises in public schools is: What does this mean for bathroom use? Bathroom issues prove to be particularly difficult for schools in part because the very existence of separate bathrooms for girls and boys is inherently discriminatory: it is simply a form of *legal* discrimination.³ Because an individual’s gender identity or gender expression may not necessarily correspond to an individual’s biological sex, determining who should or should not have access to a bathroom labeled as a “boys’ room” or a “girls’ room” is not necessarily a simple task.

The Court’s decision

In *Doe*, the Court was asked to consider whether a Maine school unit discriminated against a transgendered girl (a student who was born a male, but identified with the female gender) when it permitted her to use a unisex, non-communal bathroom. Teachers, counselors, and administrators had worked closely with the student and her parents to support her and ensure her success in school. The team worked out a plan that would enable her to use the girls’ communal bathroom, or to use a non-communal staff bathroom in the event any issues arose. When an issue did arise, school officials implemented the plan to have the student use the staff bathroom. The family sued, alleging that the school had violated the Maine Human Rights Act by not allowing the student to use the communal girls’ bathroom. Although the school unit prevailed at the trial court level, the family appealed the case to Maine’s Supreme Court.

On appeal, the Court overturned the lower court’s decision and determined that the school violated the Maine Human Rights Act by failing to let the student choose which bathroom she wished to use. The Court applauded the school and its staff for working so closely with the family to develop a thoughtful and sensitive plan that would ensure the educational success of the student. However, the Court took the view that the school overstepped when it informed the family that the student could no longer use the communal girls’ room out of a concern for her well-being. This decision, according to the Court, had the effect of treating the student differently than her peers due to her transgender status.

The Court stressed that its ruling was not without limits. The Court cautioned that its opinion “must not be read to require schools to permit students casual access to any bathroom of their choice.”⁴ “Thus, we do not suggest that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion without the plans developed in cooperation with the school and the accepted and respected diagnosis that are present in this case.”⁵ The Court’s majority continued:

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.⁶

Thus, the Court emphasized that this case involved a situation in which there was no question that the student is a girl. Indeed, her parents, friends, counselors, teachers, and school administrators all accepted that the student is a female. Further, the Court stressed that the student had received a diagnosis of gender dysphoria, which is the medical term for psychological distress resulting from having a gender identity different from the sex that one was assigned at birth. Critically, the school had acknowledged and accepted this diagnosis.

Recommendations

The Court’s ruling provides some needed clarity and guidance to school officials wrestling with the issue of gender identity in their districts. Where there is no question about a student’s gender identity, and where there is clear evidence that the student’s well-being will be adversely affected if he or she is not permitted to use the communal bathroom consistent with his/her gender identity, then schools take on a big risk if they do not honor the student’s desire to use the bathroom corresponding with his/her gender identity.

How then should school officials approach this issue when it arises? Best practices may include talking with the parents and the student about their concerns and preferences and considering the suggestions of any health care professionals. Some transgender students may be uncomfortable using group bathrooms, while others may want access to a group bathroom corresponding with their gender identity. It is vitally important to understand what the student and his or her family desires or needs. Schools should also be prepared to educate school staff and the broader school community about transgender issues. Ultimately, in each case, a school should make a deliberate decision that is informed by the needs of the student, the diagnoses and recommendations of the student’s health care professionals, the need to protect the safety of students, and the limitations that may exist in a school’s physical facilities. The school should not base its decisions “solely on a self-declaration of gender identity or confusion” by a student, but should work to establish “plans developed in cooperation” with the student and the student’s parents and counselors. Once the school accepts a “respected diagnosis,” it may be required to provide a transgender student who so desires with access to the communal bathroom with which the student gender identifies.

Although the Court’s ruling does provide some guidance in this complex area, it leaves a number of questions unanswered. For instance, the Court’s ruling does not address situations where a transgender student is uncomfortable accessing communal bathrooms of either gender, nor does it address situations in which a student’s parents and counselors may not agree with the student on what is required for the student’s psychological well-being. The ruling also does not deal with the issue of whether school can (or should) request an expert assessment of a student to assist in better understanding the student’s situation. Another issue not addressed by the Court’s ruling in *Doe* concerns the rights of transgendered students in several other contexts, such as participation in sports. ■

Endnotes

1. *Doe v. Regional School Unit 26*, 2014 ME 11, ¶ 24.

2. Me. Rev. Stat. Ann. tit. 5, § 4551 *et. seq.* For a discussion concerning the difference between “gender identity” and “gender expression”, please see the article in the Winter 2013 issue of the *School Law Advisory*.

3. *Compare* Me. Rev. Stat. Ann. tit. 5, § 4553(2) (defining “discriminate” to include, “without limitation, segregate, or separate.”); with Me. Rev. Stat. Ann. tit. 20-A, § 6501(1)(B) (“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.”); (94-348 C.M.R. Ch. 4, g 4.13 (permitting schools to provide separate bathrooms on the basis of sex).

4. 2014 Me. 11.

5. *Id.*

6. *Id.*