

TRANSGENDER CHILDREN AND ADOLESCENTS: *Mental* Health, Legal and Ethical Issues

Jan C. Costello

Loyola Law School - Los Angeles

TRANSGENDER DEFINITION

American Psychological Association (APA)

- ▶ Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth.
- ▶ Gender identity refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics.
- ▶ “Trans” is sometimes used as shorthand for “transgender.” While transgender is generally a good term to use, not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person.
- ▶ The ways that transgender people are talked about in popular culture, academia and science are constantly changing, particularly as individuals' awareness, knowledge and openness about transgender people and their experiences grow.

GENDER DYSPHORIA DEFINITION

- ▶ Gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify.
- ▶ People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender.
- ▶ People with gender dysphoria may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves (referred to as experienced or expressed gender) and their physical or assigned gender.
- ▶ The gender conflict affects people in different ways. It can change the way a person wants to express their gender and can influence behavior, dress and self-image.

GENDER DYSPHORIA - CHILDREN

- ▶ Children with gender dysphoria may express the wish to be of the opposite gender and may assert they are (or will grow up to be) of the opposite gender.
- ▶ They prefer, or demand, clothing, hairstyles and to be called a name of the opposite gender. (Medical transition is only relevant at and after the onset of puberty.)
- ▶ While some children express feelings and behaviors relating to gender dysphoria at 4 years old or younger, many may not express feelings and behaviors until puberty or much later.
- ▶ For some children, when they experience puberty, they suddenly find themselves unable to identify with their own body.
- ▶ Some adolescents become unable to shower or wear a bathing suit and/or undertake self-harm behaviors.

Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Fifth Edition. American Psychiatric Association. 2013

- ▶ DSM-5 provides for one overarching diagnosis of gender dysphoria with separate specific criteria for children and for adolescents and adults. In adolescents and adults gender dysphoria diagnosis involves a difference between one's experienced/expressed gender and assigned gender, and significant distress or problems functioning. It lasts at least six months and is shown by at least two of the following:

DSM-5 GENDER DYSPHORIA IN CHILDREN: CRITERIA

- ▶ In children, gender dysphoria diagnosis involves at least six of the following and an associated significant distress or impairment in function, lasting at least six months.
- ▶ A strong desire to be of the other gender or an insistence that one is the other gender
- ▶ A strong preference for wearing clothes typical of the opposite gender
- ▶ A strong preference for cross-gender roles in make-believe play or fantasy play
- ▶ A strong preference for the toys, games or activities stereotypically used or engaged in by the other gender
- ▶ A strong preference for playmates of the other gender
- ▶ A strong rejection of toys, games and activities typical of one's assigned gender
- ▶ A strong dislike of one's sexual anatomy
- ▶ A strong desire for the physical sex characteristics that match one's experienced

GENDER DYSPHORIA DIAGNOSIS: DOES IT HELP OR HARM?

- ▶ According to the DSM-5, people who experience intense, persistent gender incongruence can be given the diagnosis of gender dysphoria.
- ▶ Some contend that the diagnosis inappropriately pathologizes gender noncongruence and should be eliminated.
- ▶ Others argue it is essential to retain the diagnosis to ensure access to care.
- ▶ The International Classification of Diseases (ICD) is under revision, and there may be changes to its current classification of intense persistent gender incongruence as gender identity disorder.

AMERICAN PSYCHOLOGICAL ASSOCIATION (APA) ADVICE FOR PARENTS

- ▶ What should parents do if their child appears to be transgender or gender nonconforming? Parents may be concerned about a child who appears to be gender-nonconforming for a variety of reasons.
- ▶ Some children express a great deal of distress about their assigned sex at birth or the gender roles they are expected to follow. Some children experience difficult social interactions with peers and adults because of their gender expression.
- ▶ Parents may become concerned when what they believed to be a “phase” does not pass.
- ▶ Parents of gender-nonconforming children may need to work with schools and other institutions to address their children’s particular needs and ensure their children’s safety.
- ▶ It is helpful to *consult with mental health and medical professionals* familiar with gender issues in children to decide how to best address these concerns.
- ▶ It is not helpful to force the child to act in a more gender conforming way. Peer support from other parents of gender-nonconforming children may also be helpful.

▶ SCHOOL RESTROOM ACCESS CASE

Whitaker v. Kenosha Unified School District, 858 F.3d 1034
(7th Cir, 2017)

- ▶ Ashton Whitaker, 17 years old, with the support of his mother acting as his “next friend,” sued the school district.
- ▶ He was barred from using the facilities other boys used and was relegated instead to the girls’ restroom or a gender-neutral bathroom in the main office.
- ▶ This singling out, Whitaker’s lawsuit maintained, violated both the Fourteenth Amendment and [Title IX of the Education Amendments of 1972](#), which forbids sex discrimination by school entities receiving federal funding.
- ▶ The 7th Circuit agreed with both claims and upheld an injunction that directed the school to accommodate the student.

7TH CIRCUIT'S RELIANCE ON DSM DIAGNOSIS

- ▶ While Ash's birth certificate designates him as "female," he does not identify as one. Rather, in the spring of 2013, when Ash was in eighth grade, he told his parents that he is transgender and a boy. He began to openly identify as a boy during the 2013-2014 school year, when he entered Tremper as a freshman. He cut his hair, began to wear more masculine clothing, and began to use the name Ashton and male pronouns. In the fall of 2014, the beginning of his sophomore year, he told his teachers and his classmates that he is a boy and asked them to refer to him as Ashton or Ash and to use male pronouns.
- ▶ In addition to publicly transitioning, Ash began to see a therapist, who diagnosed him with Gender Dysphoria, which the American Psychiatric Association defines as "a marked incongruence between one's experienced/expressed gender and assigned gender...."⁴ *Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders* 452 (5th ed. 2013).
- ▶ In July 2016, under the supervision of an endocrinologist at Children's Hospital of Wisconsin, Ash began hormone replacement therapy.
- ▶ A month later, he filed a petition to legally change his name to Ashton Whitaker, which was granted in September 2016.

RELIANCE ON MENTAL HEALTH EXPERT TESTIMONY

- ▶ The district court was presented with expert opinions that supported Ash's assertion that he would suffer irreparable harm absent preliminary relief. These experts opined that use of the boys' restrooms is integral to Ash's transition and emotional well-being. Dr. Stephanie Budge, a psychologist who specializes in working with adolescents and adults who have Gender Dysphoria, met with Ash and his mother, and in her report noted that the treatment Ash faced at school "significantly and negatively impacted his mental health and overall well-being."
- ▶ Dr. Budge also noted that Ash reported current thoughts of suicide and that his depression worsened each time he had to meet with school officials regarding his bathroom usage. Ultimately, she opined that the School District's actions, including its bathroom policy, which identified Ash as transgender and therefore, "different," were "directly causing significant psychological distress and place [Ash] at risk for experiencing life-long diminished well-being and life-functioning." The district court did not clearly err in relying upon these findings when it concluded that Ash would suffer irreparable harm absent preliminary injunctive relief.
- ▶ Further, the School District's argument that Ash's harm was self-inflicted because he chose not to use the gender-neutral restrooms, fails to comprehend the harm that Ash has identified.

USE OF SECTION 504

Doe v. Regional School Unit 26, 86 A. 3d 600 (Maine: Supreme Judicial Court 2014)

- ▶ Susan Doe is a transgender girl. She was born male, but began to express a female gender identity as early as age two. Beginning in the first grade, she attended Asa Adams School in Orono. Susan generally wore gender-neutral clothing to school until her third-grade year, when her identity as a girl became manifest. At that time, the school principal first became aware that Susan was transgender.
- ▶ All third and fourth grade students at Asa Adams used single-stall bathrooms. Susan used the single-stall girls' bathroom with the support and encouragement of school staff. In third grade, teachers and students began referring to Susan as "she." By fourth grade, Susan was dressing and appearing exclusively as a girl.
- ▶ In early 2007, midway through Susan's fourth-grade year, school personnel implemented an educational plan, commonly referred to as a "504" plan, to address Susan's gender identity issues and her upcoming transition to the fifth grade, where students used communal bathrooms separated by sex. The 504 process is generally designed to identify impediments to learning for individual students and to implement steps to help those students succeed in school.

SECTION 504 & MAINE HUMAN RIGHTS ACT

- ▶ By the time she was preparing to enter the fifth grade, Susan 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. School officials recognized that it was important to Susan's psychological health that she live socially as a female. They did not interpret 20-A M.R.S. § 6501, or any other law, as prohibiting a person with Susan's diagnosis from using the girls' bathroom.
- ▶ A [504] team consisting of Susan's mother, her teachers, the school guidance counselor, and the director of special services agreed that school staff should refer to Susan, and encourage students to refer to Susan, by her female name. The school counselor expressed to the group that, for a transgender girl like Susan, using the communal girls' bathroom was the best practice. The team agreed that requiring Susan to use the boys' bathroom was not an acceptable option; the principal later testified that it would not have been safe for Susan to do so. The minutes of the 504 meeting reflected the team's recommendation that Susan use the girls' bathroom. The minutes also reflected the team's awareness that a unisex staff bathroom was available for Susan to use in the event that her use of the girls' bathroom became "an issue."
- ▶ Susan began the fifth grade in September 2007. Her use of the girls' bathroom went smoothly, with no complaints from other students' parents, **until a male student followed her into the restroom on two separate occasions, claiming that he, too, was entitled to use the girls' bathroom. The student was acting on instructions from his grandfather, who was his guardian and was strongly opposed to the school's decision to allow Susan to use the girls' bathroom.**

MAINE SUPREME COURT RELIES ON DIAGNOSIS OF GENDER DYSPHORIA

- ▶ The determination that discrimination is demonstrated in this case rests heavily on Susan's gender identity and **gender dysphoria diagnosis**, both of which were acknowledged and accepted by the school. The school, her parents, her counselors, and her friends all accepted that Susan is a girl.
- ▶ 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.** 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 Maine Human Rights Act (MHRA).

CALIFORNIA SAFE SCHOOLS ACT: PROTECTION OF TRANSGENDER CHILDREN

- ▶ California Education Code 220. No person shall be subjected to discrimination on the basis of disability, *gender, gender identity, gender expression*, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.

CALIFORNIA LEGAL GENDER CHANGE - INCLUDING MINORS

- ▶ Two laws signed into law in 2017 enable Californians to legally change their gender by simplifying the process of obtaining state-issued documents and court orders for the identity designation.
- ▶ [Senate Bill 179](#) allows people who petition for a gender change, *including minors*, to identify as male, female or nonbinary. Under SB 179, Californians who change their gender have a more streamlined process for aligning their name with their identity or getting a matching birth certificate. Starting Jan. 1, 2018 they can apply to alter the gender listed on their driver's license without any additional documents.
- ▶ “Mindful of all the people I know who are gender-nonconforming, and the families I know with transgender children, I wanted to make sure that California continued to be a leader in gender-identity equality,” the author of the bills, state Senate President Pro Tem Toni Atkins (D-San Diego) said.

ETHICAL ISSUES IN OPPOSITION

- ▶ American College of Pediatricians [<https://www.acped.org/health-professionals/issues-in-medical-ethics>]
- ▶ Gender dysphoria (GD) of childhood describes a psychological condition in which children experience a marked incongruence between their experienced gender and the gender associated with their biological sex. When this occurs in the pre-pubertal child, GD resolves in the vast majority of patients by late adolescence. Currently, there is a vigorous debate among physicians, therapists, and academics regarding what is fast becoming the new treatment standard for GD in children. This new paradigm is rooted in the assumption that GD is innate, but a review of the current literature suggests that this claim is founded upon an unscientific gender ideology and lacks an evidence base.
- ▶ On page 455 of the DSM-5 under “Gender Dysphoria without a disorder of sex development” it states: “Rates of persistence of gender dysphoria from childhood into adolescence or adulthood vary. In natal males, persistence has ranged from 2.2% to 30%. In natal females, persistence has ranged from 12% to 50%.” Simple math allows one to calculate that for natal boys: resolution occurs in *as many as* $100\% - 2.2\% = 97.8\%$ (approx. 98% of gender-confused boys). Similarly, for natal girls: resolution occurs in *as many as* $100\% - 12\% = 88\%$ gender-confused girls.

AMERICAN COLLEGE OF PEDIATRICIANS POSITION

- ▶ Our opponents advocate a new scientifically baseless standard of care for children with a psychological condition (GD) that would otherwise resolve after puberty for the vast majority of patients concerned. Specifically, they advise: affirmation of children's thoughts which are contrary to physical reality; the chemical castration of these children prior to puberty with GnRH agonists (puberty blockers which cause infertility, stunted growth, low bone density, and an unknown impact upon their brain development), and, finally, the permanent sterilization of these children prior to age 18 via cross-sex hormones.
- ▶ There is an obvious self-fulfilling nature to encouraging young GD children to impersonate the opposite sex and then institute pubertal suppression. If a boy who questions whether or not he is a boy (who is meant to grow into a man) is treated as a girl, then has his natural pubertal progression to manhood suppressed, have we not set in motion an inevitable outcome? All of his same sex peers develop into young men, his opposite sex friends develop into young women, but he remains a pre-pubertal boy. He will be left psychosocially isolated and alone. He will be left with the psychological impression that something is wrong. He will be less able to identify with his same sex peers and being male, and thus be more likely to self identify as "non-male" or female.
- ▶ Moreover, neuroscience reveals that the pre-frontal cortex of the brain which is responsible for judgment and risk assessment is not mature until the mid-twenties. Never has it been more scientifically clear that children and adolescents are incapable of making informed decisions regarding permanent, irreversible and life-altering medical interventions. For this reason, the College maintains it is abusive to promote this ideology, first and foremost for the well-being of the gender dysphoric children themselves, and secondly, for all of their non-gender-discordant peers, many of whom will subsequently question their own gender identity, and face violations of their right to bodily privacy and safety

ETHICAL ISSUES: NATIONAL CATHOLIC BIOETHICS CENTER

- ▶ A person's sex identity is not determined by one's subjective beliefs, desires or feelings. It is a function of his or her *nature*. Just as there are geometrical givens in a geometrical proof, sexual identity is an ontological given. Psycho-therapy and loving acceptance of such persons suffering from sexual identity confusion is the proper way to love them. Mutilating their bodies is not.
- ▶ The Catholic bioethicists on this website disapprove of such "mutilation" because it results in permanent impotence or sterility. It is ethically wrong, they conclude, to surgically remove healthy genitals in order to make a person "appear to be other than what he or she is." Their opinion is that a person who identifies as transgender is really suffering from self-hatred. The proper and loving response to such an individual "demands addressing the beliefs and self- understanding that give rise to this fundamental rejection of self."
- ▶ Mutilation results in a person being rendered impotent or sterile and dependent for the rest of one's life on a hormonal regimen which makes one appear to be other than what he or she is. There is nothing wrong with the genitalia of persons seeking such operations. But they are removed in order to conform to the person's subjective belief about who he or she wants to be. Doing violence to one's body when there is nothing wrong with it is an unjustifiable mutilation.

NATIONAL CATHOLIC BIOETHICS CENTER POSITION

The National Catholic Bioethics Center does regard as ethical:

- ▶ Certain procedures performed on sexually ambiguous persons, for example, those suffering from congenital adrenal hyperplasia (a species of which is androgen insensitivity syndrome), mosaicism, chimerism, or some other congenital cause of mixed sexual identity.
- ▶ These disorders present ambiguous sexual identity and certain operations done to confirm a person in the “dominant” sex aims to correct a pathological condition.
- ▶ Such operations should not be thought of as *changing* a person’s sex, but rather confirming what is originally ambiguous.

AUSTRALIAN ATTORNEY: FAMILY COURT PROCESS FOR TRANSGENDER MINORS

- ▶ <http://www.aitken.com.au/news-blog/blog/archive/201504/gender-dysphoria-family-court's-approach-cases-relating-transgender-ch>
- ▶ It is well established that it is within the scope of parental responsibility for parents to consent to their children undergoing medical treatment and of course, persons over the age of 18 can elect to undergo the above courses of treatment and procedures.
- ▶ However, what is the process for children under the age of 18 who have been diagnosed with Gender Dysphoria and are desperate to realign their physical appearance with their emotional gender?
- ▶ In the matter of Re: Jamie (2013) FLC 93-547 the Full Court held that the Stage 2 treatment of children with Gender Dysphoria fell into **the category of a “special case” that required the Court’s attention**. Parents of children with Gender Dysphoria wishing to commence Stage two treatment, would need to apply to the Court pursuant to Section 67ZC of the Family Law Act 1975 (Cth) and seek an order to do so.
- ▶ The Court must then consider if the child is “Gillick -competent”, meaning, does the child have a clear understanding of the treatment and consequences, and therefore have the capacity to consent to and authorise their own medical treatment? This threshold test was established in the matter of Gillick v West Norfolk A.H.A [1986].

AUSTRALIA CONTINUED

- ▶ In the recent matter of Re: Jordan [2015] Fam CA 175 an application was brought by the parents of Jordan, a 16 year old who was biologically female, however psychologically and emotionally identified as a male. Jordan had been living as a male for some time. He had changed his name on his birth certificate, he wore a boy's uniform to school, most of his friends were males and his friends and family, school teachers and classmates identified him as being a male.
- ▶ Jordan had received the Stage 1, reversible hormone treatment and had responded well both physically and emotionally and now wished to undergo treatment that would bring on male puberty (i.e. Stage 2).
- ▶ The Court considered the evidence of Jordan's **parents, his treating endocrinologist and his psychiatrist. All were unanimous that Jordan should undergo Stage 2 treatment.**
- ▶ It is interesting to also note, in the matter of Re: Jordan, leave was granted for an Affidavit to be filed by Jordan that expressed his views and opinions in relation to his application for further treatment. Typically, children that are the subject of Family Court proceedings are not permitted to file material, however the Judge in this matter found after considering Jordan's age and level of maturity that it was appropriate for an Affidavit to be filed to allow his views to be properly considered.
- ▶ The Family Court ultimately ordered that on the basis of the various evidence presented, "The benefits that the procedure and treatment would bring to Jordan's life and the avoidance of drastic detriments identified in the alternatives is determinative that the treatment will meet Jordan's best interests".

AUSTRALIA: WHY ISN'T PARENTAL CONSENT SUFFICIENT?

- ▶ The above cases should be of considerable comfort to parents of transgender children. Some parents may hold the view that if they are both in agreement as to the medical treatment of their child that they should be in a position to consent to such treatment occurring, without having to seek an Order from the Court.
- ▶ However, the involvement of the Court provides a mechanism or a system of compliance check, in that the appropriate medical professionals have been consulted, that their advice and recommendations are consistent, and that the parents and child are in agreement that the treatment should be carried out.
- ▶ It is important to remember that **Stage 2 of treatment is irreversible**, has serious consequences and should not be entered into without extensive consideration and involvement by experienced medical professionals. The Family Court's overarching consideration of the best interests of the child provides the scope for sensitivity to the needs for the child. In cases of children diagnosed with Gender Dysphoria, the case law has been consistent, in many cases the Court has found that the positive psychological consequences outweigh the risks associated with the treatment.

AUSTRALIA AND AUDIO-VISUAL!

- ▶ TV SERIES 'NEWTON'S LAW' COPYRIGHT 2017 EVERY CLOUD PRODUCTIONS PLY LTD, THE AUSTRALIAN BROADCASTING CORPORATION AND SCREEN AUSTRALIA.
- ▶ SEASON ONE, EPISODE TWO: THE BUTTERFLY EFFECT.

SOURCES

- ▶ [Diagnostic and Statistical Manual of Mental Disorders \(DSM-5\), Fifth Edition. 2013. \[American Psychiatric Association\]](#)
- ▶ <http://www.apa.org/topics/lgbt/transgender.aspx>. [American Psychological Association]
- ▶ [http://www.psychiatry.org/patients-families/gender-dysphoria/what is gender dysphoria](http://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria). [American Academy of Pediatrics]
- ▶ <https://www.acpeds.org/the-college-speaks/position-statements/sexuality-issues/gender-identity-issues-in-children-and-adolescents> [American College of Pediatrics]
- ▶ <https://journalofethics.ama-assn.org/article/suppression-puberty-transgender-children/2010-08> [American Medical Association]
- ▶ <https://www.ncbcenter.org> [The National Catholic Bioethics Center]

SOURCES CONTINUED

- ▶ <https://www.pbs.org/wgbh/frontline/article/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown/>
- ▶ <https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749/>
- ▶ <https://www.nytimes.com/2017/04/08/opinion/sunday/hannah-is-a-girl-doctors-finally-treat-her-like-one.html>
- ▶ <https://www.kidsinthehouse.com/teenager/sexuality/transgender/when-parents-disagree-about-gender-non-conforming-child>
- ▶ <http://transhealth.ucsf.edu/trans?page=guidelines-youth.org>
- ▶ <https://www.theguardian.com/society/2016/nov/13/transgender-children-the-parents-and-doctors-on-the-frontline>
- ▶ <https://vancouver.sun.com/news/local-news/parents-disagree-over-treatment-for-b-c-transgender-child-court-intervenes>
- ▶ <https://www.buzzfeed.com/ishmaeldaro/ontario-bill-89-gender-changes>