

BANGOR DAILY NEWS

Respect gender identity

By Jeffrey Neil Young, Special to the BDN

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In 2005, Maine voters endorsed a law protecting gay, lesbian, and transgender individuals. Despite opposition to the law from organizations like the Christian Civic League and several efforts before its passage to carve out exceptions to it, the law passed with overwhelming support. Efforts at partial repeal since its endorsement have also failed.

Nonetheless, the question of whether businesses and public entities in Maine have to allow transgender individuals to use bathrooms consistent with their own sense of who they are as male or female — their gender identity — rather than their “assigned” sex at birth has proved quarrelsome. This is particularly true when the individual in question has completed gender transition by taking cross-gender hormones but has not had any sex reassignment surgery. Such surgery is expensive and generally not covered by insurance.

In a case I handled last year along with GLAD (Gay and Lesbian Advocates and Defenders), Denny’s Restaurant in Auburn required a transgender woman to continue using the men’s room even though my client identified and lived as female and had developed female characteristics through medically supervised gender transition. Denny’s claimed its policy required individuals to use the restroom of their assigned sex at birth.

Ultimately, after the Maine Human Rights Commission found in my client’s favor and she had filed suit, Denny’s settled the case and also adopted a policy whereby transgender patrons at all Maine Denny’s restaurants are allowed to use the bathroom that aligns with their gender identity.

Now, the issue of what bathrooms transgender individuals may use has reached the schools. On Nov. 20, the Penobscot County Superior Court held that the Orono School Department did not violate the Maine Human Rights Act when it required “Susan,” a transgender female student in the sixth grade, to use a single-stall unisex restroom designated for staff rather than the girls’ room she had been using for several years.

Although assigned male at birth, Susan had always identified as a female. Indistinguishable from her female peers, Susan’s teachers and classmates accepted and treated her as a girl. School officials, in fact, testified that it was important to Susan’s social and educational development that she be treated as a girl in all aspects of life at school. Susan had used the girls’ bathroom without incident until a boy, acting at the direction of his grandfather, entered the girls’ room on several occasions and proclaimed that if Susan could use the girls’ room, he could too.

Although the school instructed the boy to stop using the girls’ room, the boy continued to do so until ultimately the school ordered Susan to stop using the girls’ room as well and instead told her to use the single-stall unisex bathroom. The effect of this was to separate her from her peers and make her an outcast at her school.

In reaching its decision, the Superior Court relied heavily on the fact that the MHRC had adopted a regulation that “permitted schools to separate restroom usage by sex.” However, the regulation in question was adopted long before voters in 2005 amended the act to prevent discrimination based on sexual orientation, which includes transgender individuals. Consequently, although the court claimed to base its decision upon a regulation adopted by the MHRC, the commission itself found reasonable grounds to believe that Orono had discriminated against Susan and even had intervened in the suit on Susan’s behalf.

Cases involving appropriate restroom access for transgender individuals present novel issues. Despite the law, widespread misunderstanding and fear about transgender people remain. While it is understandable that businesses and schools

struggle with what to do when faced with a new issue and little guidance, it is disappointing that the Penobscot Superior Court was unwilling to apply the law as written and as ratified by the voters. The case is now likely headed to the Law Court for resolution.

I hope and expect that the Law Court will construe the law according to its terms and not endorse the exception created by the Superior Court. While the unfamiliar makes some of us uncomfortable, that discomfort can be overcome with education and acceptance.

Indeed, a primary purpose of passing nondiscrimination laws is to ensure that the discomfort some people find with other people's differences is not a basis for different or adverse treatment. I was reminded of this in a discussion with my teenage daughter on the topic. In response to my asking her how she would feel if she had to share a restroom or locker room with a transgender girl, she responded that it might be awkward or uncomfortable at first but that she would get used to it.

My daughter's response highlights the point of nondiscrimination laws, which is to ensure that one person's awkwardness or discomfort does not result in the exclusion of the other. Maine voters have spoken in endorsing the law. We now look to our court for its robust enforcement.

Jeffrey Neil Young is an attorney and partner at McTeague Higbee who focuses much of his work on helping those facing discrimination.