

## Discussing Inclusion & Access for Gender-Diverse Individuals

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This document is intended to help guide policymakers and those interested in learning more about gender-diverse people and experiences. Below are terms used in this document.

**Assigned sex at birth (ASB)** Refers to a doctor's designation of a newborn baby's legal sex. Typical designations are male or female. However, additional designations can include undesignated, intermediary, intersex, and "X". There are many countries including the U.S. where sex markers include more than male or female designations.

**Sex** describes anatomical and physiological aspects of sex development. Often referred to as biological sex.

**Gender** describes individual and group experiences around prescribed social roles and behaviors associated with sex.

**Gender identity (GI)** person's deeply-felt, inherent sense of gender. May be understood as an individual's relationship to their body and experience of self or wholeness. GI is not dependent on a doctor's assignment of sex.

**Gender expression** Individual's physical appearance, clothing, behaviors...that may communicate aspects of gender identity or gender role. Gender identity and role are often assumed from gender expression.

**Transgender** Is an umbrella term frequently used to describe individuals who identify with a gender other than their assigned sex at birth.

**Gender-nonconforming** is frequently used to describe individuals who express and/or identify with a gender that does not conform to social expectations around traditional gender roles and behaviors.

**Genderqueer** Is frequently used to define individuals who identify with a gender that is outside of traditional binary gender constructs.

**Intersex** Is frequently used to describe individuals with genetic and/or anatomical development that does not fit traditional expectations of pure male or female human sex development.

## Differences between assigning sex and legal sex

How society assigns sex to newborn children and how society defines legal sex are not always the same. Perhaps many of us believe that two categories can represent every person based on the outward appearance of reproductive organs. A visual inspection of external genitalia is often how doctors determine sex. However, it is not the only way sex is determined. In some cases, doctors use testing like karyotyping (the evaluation of size, shape, and number of chromosomes) and hormone levels to assign sex when children are born with intersex development.

An assessment within the parameters of a medical system is how sex assignment is designated on birth certificates. However, some states have defined legal sex differently from what is on a birth certificate. For example, in 1999, the Texas Court of Appeals decided that chromosomes determine legal sex in *Littleton v. Prang*. The court concluded, "Male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male." This language is offensive and degrading to many people. It is also very telling of why this decision was made and why chromosomes were selected as the basis for legal sex.

Several problems arise in using chromosomes as a legal determinant of sex that don't seem to be recognized in this decision. One problem is that doctors usually do not use karyotyping to assign sex, which means birth certificates are essentially meaningless in Texas. As such, everyone should need karyotyping to determine their legal placement within Texas law. This inconsistency raises questions about the purpose and usefulness of placing an M or F on birth certificates.

As a Professor of Biology at Stanford University, Joan Roughgarden (2013) stated, "Beyond gamete size, biologists do not recognize any other universal difference between male and female" (p. 23). The term male means small gamete (sperm), and female means large gamete

(egg). However, if gametes do not designate universal differences among humans, how is it that Texas has legally asserted that chromosomes can establish such universality? Using chromosomes as the basis for legal sex assumes that chromosomes are consistent determinants for reproductive development and the outward appearance of people (bodily appearance or perceived gender by others). Texas made this a law, and yet the statement by Dr. Roughgarden suggests the basis for this law is unfounded.

The Texas law raises questions about the actual function of identity documents if an M or F does not mean the same thing or convey meaningful information. This information may not represent reproductive anatomy or chromosomes. It may not even reflect how a person will look or their gender identity. It raises questions about what an M or F on identity documents represents and why we need this designation in the first place?

This document is intended for legislators, policymakers, and the general public and will examine four factors associated with legal sex:

*Chromosomes (often referred to as genetic sex)*

*Reproductive anatomy (often referred to as anatomical sex)*

*Outward appearance (gender often perceived by others)*

*Gender identity (sense of self & connection to one's body)*

Some of these factors are said to be determinants of sex. All of these factors play a significant role in how people live and function in American society. Each of these factors plays a role in where people can go, the information on their identity documents, and the opportunities and activities people will have and experience. These factors also play an important role in promoting healthy self-esteem and mental health.

To have this conversation requires us to examine deeply personal and even painful issues for some people and should be approached with sensitivity. This document represents many years of research and countless public conversations with organizations and community leaders. It is

not possible to have this conversation in sound bites or three-minute statements. It is also difficult to convey all this material through bullet points. I have made an effort to condense this content as much as possible. Understanding the issues discussed in this document requires time and hopefully ongoing discussion. This document includes web addresses and links to help connect the material to personal experiences.

### *Chromosomes as legal sex*

Most people are familiar with XX chromosomes and female development and XY chromosomes and male development. There are many other types of chromosomal patterns expressed in the human body besides XX or XY. For example, some people are born with a mosaic pattern of chromosomes in which an individual has both XX and XY chromosomes (XX/XY). Other chromosomal outcomes can include XXXXY, XXXY, XXY, XYY, X, Y, and more.

People do not always have an outward appearance that consistently aligns with a particular chromosome pattern. For example, some people are born with XY chromosomes (typically associated with male development) and outwardly appear more typical of female development (without medical intervention). It is rare for the public to hear about such experiences because they are often shrouded in secrecy and shame, which Katie (see next page) talks about in her story. Please take the time to follow the provided links below Katie's picture to learn about her experience.



This is Katie.

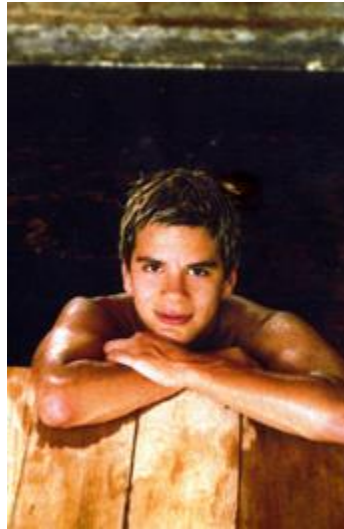
You can learn more about Katie's experience at:  
[Growing up intersex part I \(right click for hyperlink\)](https://youtu.be/I9a1rXOpluc)

You can also copy and paste this address in your browser:  
<https://youtu.be/I9a1rXOpluc>

According to the Texas Court of Appeals, someone like Katie would have to be legally designated male because she has a Y chromosome. Katie's outward appearance is typical of female development regardless of being born with a Y chromosome and testes. Additionally, Katie identifies (gender identity) as a woman despite this Y chromosome. Katie's story is an example of how having a Y chromosome does not mean every person will outwardly appear male. Moreover, having a Y chromosome does not mean every person will develop testes and a penis. If the Texas law is applied to everyone equally, Katie might be forced to use a male restroom and locker room despite her natural appearance and gender identity, which would likely be both dangerous and dehumanizing for Katie.

Even if we use the dominant system of categorizing people according to gamete production, Katie would be assigned a male sex despite the development of what Katie describes as a vaginal opening instead of a penis. How is Katie supposed to navigate and function in a system that was never inclusive of people like her? If the legal test is applied equally to everyone,

having a male designation means being forced to use the men's restroom and locker room. Having a male designation on an ID, which makes someone like Katie less safe and would likely be degrading to her self-esteem and mental health.



This is Hida.

You can learn more about Hida's story at: [Growing up intersex](https://youtu.be/l9a1rXOpluc) (right click for hyperlink)

You can also copy and paste this address in your browser:

<https://youtu.be/l9a1rXOpluc>

Some people are born with XX chromosomes (typically associated with female development) and have an outward appearance that most people associate with male development without medical intervention. In some cases, people like Hida experience their bodies in ways that are different from typical expectations for pure male or pure female development. According to Hida, they never felt the need to be limited by a fixed identity and are comfortable expressing masculine and feminine gender. Hida's outward appearance is often assumed to be male despite the absence of a Y chromosome. Hida's reproductive anatomy is also not typical of what people expect in terms of pure female development despite being born with XX chromosomes.



This is Ewa. You can learn more about Ewa’s story at:

<https://theolympians.co/tag/ewa-klobukowska/> (right click for hyperlink)

You can also copy and paste this address in your browser:

<https://theolympians.co/tag/ewa-klobukowska/>

Ewa Kłobukowska was a world-class athlete and competed in the 1964 Olympics, winning gold and bronze medals. Ewa won two gold and one silver medal in the 1966 European Championships. She set three world records in the process, but all were later stripped from her by the International Association of Athletics Federation after the results of a “gender identification test” determined that Ewa was not female. They based this conclusion on the presence of a Y chromosome. Ewa had what is known as a mosaic chromosome pattern of XX/XY. Because of the presence of a Y chromosome, Ewa’s three world records were erased and she was humiliated on the world stage. A few years later in 1968, Ewa gave birth to a son.

Ewa's story is another example of how having a Y chromosome does not mean people will look male or develop testes and a penis.

There is a long history of women being scrutinized and rejected from sports due to the enforcement of purity tests, and yet most people, including policymakers, are generally unaware that such people and experiences even exist. Stories like Ewa Kłobukowska's highlight the kind of interrogations that are reserved for people who are suspected of being "imposters" when such people are simply different from the understanding and expectation that most people have about the human body and human experience. Policies that were intended to protect women's sports hurt vulnerable women and arguably women's sports. The International Olympic Committee changed its policy of "sex-testing" in 1999, which had required suspect athletes to undergo a visual inspection of their genitalia and perhaps additional testing to determine if they were "real women."

Another critical factor that seems to be overlooked by the Texas Court of Appeals is roughly 1 in 20,000 assigned males are born without a Y chromosome (Sytsma, 2006). According to Texas law, such people should be reassigned a female sex. Undoubtedly, this has not happened because it would cause many problems and an uprising against the law. The point is that these laws often reserve scrutiny for those who raise suspicion or do not fit a particular gender stereotype while those who fit the stereotype are not scrutinized. The Texas law exists because most people do not understand the problems with the law.

While all of this might seem a bit confusing, there are some relatively straightforward points:

- Chromosomes are not a consistent universal predictor of outward appearance, reproductive anatomy, or gender identity for all humans.
- Having a Y chromosome does not mean a person will have a masculine appearance, a penis, and testes, and identify as a man.
- Chromosomes are more complex than XX or XY



*Key questions to consider:*

- Should someone like Katie be forced to use a male restroom or locker room because she has a Y chromosome?
- Should someone like Katie be excluded from participating in women's sports because of the presence of a Y chromosome or once having testes?
- Should Katie be legally affirmed in her experience because she identifies as a woman and should this be different from a transgender person who identifies as a woman but was assigned a male sex at birth?

*Reproductive anatomy as legal sex*

As we have discussed, states like Texas decided that anatomy should not determine sex. Estimates suggest that five children are born with intersex development in the United States each day, resulting in nearly 2,000 births each year (Haas, 2004). Some estimates suggest 1 in every 2,000 children are born with visible intersex development, and others say the number is closer to 1 in every 500 births. These numbers are a bit misleading because intersex development is not always identified at birth.

Most statistical data on intersex frequencies come from hospital birth records and medical procedure records which means the real prevalence of intersex development is likely higher. Some people live and die without ever knowing they were born with intersex development. The lack of social inclusion and acknowledgment of people with intersex development makes it difficult to gain an accurate estimation of the population. It seems safe to say there are at least hundreds of thousands of people with intersex development living in the U.S. today.

Like chromosomes, reproductive development does not follow a universally consistent path that can encompass all people. A study is not needed to make this determination. We need to acknowledge the visible differences in the ways bodies look when they are born into the world. We need to question why societies respond to this diversity by cutting away flesh to

homogenize appearance without a medical emergency. We need to question why children are not being given the opportunity to mature enough to participate in their own life-changing medical decisions when no medical emergency exists.

Some children are assigned 'undesigned' sex when a doctor is unable to make a clear determination. This is true for children around the world and especially where people have less access to advanced medical care. Such experiences often catch parents off guard because most are unaware that people with intersex development even exist. It also takes individuals off guard when they come to discover that they are the ones with intersex development. This was the case for Stevie Crecelius (learn more by following the provided links below).



This is a Steve Crecelius, known today as Stevie. You can learn more about Stevie's story at:

[From Steve to Stevie... \(Right click and open hyperlink\)](#)

You can also copy and paste this address in your browser:

<https://youtu.be/8cL1m8d2erg>

You can also copy and paste this address in your browser to read article:

<http://abcnews.go.com/blogs/health/2012/05/25/man-admitted-to-hospital-for-kidney-stone-discovers-hes-a-woman/>

Stevie's story is an example of intersex development not being identified at birth. It is a critical issue often missing from discussions on transgender inclusion and access. We do not always know when someone who identifies as transgender has undiscovered intersex development. Stevie could have lived and died without ever knowing she was born with intersex development if she had not developed a kidney stone. She could have still not known without access to modern medical testing.

Her story demonstrates how reproductive anatomy is not always reflective of a person's outward appearance or gender identity. Like Ewa, Stevie has children. Stevie seems to have identified as a woman from a young age, which is different from Ewa's experience; Ewa's outward appearance and gender identity seem to have been the same. Stevie's chromosome makeup is less clear, as it is for most people. However, we can look at Katie, Hida, and Ewa's life experiences to see that reproductive anatomy is not always predictive of every person's chromosomes.

Here are two additional links to stories of individuals who found out they were intersex later in life:

<http://www.cbsnews.com/news/chinese-man-goes-to-hospital-finds-out-hes-woman-with-ovarian-cyst/>

<http://www.cbsnews.com/news/man-goes-to-hospital-with-stomach-ache-gets-uterus-removed/>

The way these two experiences are covered is less helpful because such portrayals tend to discard the human impact and add to the stigma that causes shame and concealment. The articles are examples of intersex development not being identified at birth. They provide a window into how different societies view and respond to this diversity.

Some societies alter the bodies of young children to fit a social expectation rather than the social expectation changing to fit how children are born. *Genital Autonomy is the principle that children should be protected from genital cutting that is not medically necessary* (Svoboda, 2013). In 2013, the United Nations General Assembly upheld this principle in voting to pass recommendations made by the Special Rapporteur that call on nations:

*...to repeal law[s] allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies', when enforced or administered without the free and informed consent of the person concerned* (Méndez, 2013, p. 23)

It is not uncommon for people with undiagnosed intersex development to come to understand themselves as transgender first. There are several reasons for this. One reason is medical policies that often encourage parents to hide the truth from children born with intersex development. Another reason is the experiences of transgender people are generally more visible in the public sphere. One of the main reasons is individuals who seek medical support as part of their transition sometimes come to discover they have intersex development after medical assessment and testing.

If intersex development is not always identifiable at birth and people can live without ever knowing they have intersex development, we do not necessarily know the difference between the people who are transgender and the people who have intersex development. We make assumptions due to a lack of widespread awareness, inclusion, and visibility.

This assumption has direct implications on legislation like H.B. 92, which seeks to create a separate system of medical care for gender-diverse youth. One that is established and controlled by politicians instead of the field of medicine. This bill argues that the same medical procedures and medications used on children with intersex development are too dangerous or inappropriate for transgender and gender nonconforming young people.

Proponents suggest this medical care is inappropriate despite a medical doctor being able to provide that same care to a child with intersex development. H.B. 92 provides exceptions to make sure individuals with intersex development can still have access to medical care. Maintain access to medical care is a good thing. What proponents fail to recognize is sometimes we do not know when a transgender-identified individual may also have intersex development. Moreover, testing may not always be readily available or affordable.

This assumption also has direct implications for H. B. 302, which seeks to protect women's high school sports by excluding transgender students who want to participate. We do not always know the internal biology of people. We generally assume biology based on appearance and adherence to gender stereotypes and reserve scrutiny for suspect people like Stella Walsh.

Stella Walsh is still one of the greatest athletes in human history. Her story is an example of how scrutiny plays a unique role in isolating and targeting suspect people (see below).



This is Stella Walsh (see page 13). You can learn more about Stella's story by following these two links:

<https://longreads.com/2016/08/18/the-life-and-murder-of-stella-walsh-intersex-olympic-champion/>

[The Olympic Sprinter Who Nearly Lost Her Medals Because of Her Autopsy | Mental Floss](#)

People once paid little attention to Stella until she began to set world records. Stella increasingly gained more and more notoriety as one of the fastest female runners. That is when people began to openly speculate and claim that Stella was not feminine enough to be a real woman. People openly scrutinized the hair on her legs, the size of her breasts, and the width of her shoulders to debase the legitimacy of Stella being a woman. Accusations began to circulate that Stella was a man disguised as a woman to have an advantage over "real women." As a result of these accusations, Stella was the first person to be forced to submit to a "genital inspection" by the Olympic Committee to be cleared of "gender fraud." Eventually, Stella was allowed to continue competing in female sports.

Stella would become one of the most accomplished track and field athletes in human history and set 20 world records in the process. Tragically, in 1980, Stella was murdered. An autopsy conducted after the murder revealed that she had intersex development. People began to call for the erasure of her records and medals because they claimed she was a man.

This issue of trying to determine who should rightfully compete in female sports is not new. Establishing laws to ensure purity in high school sports will likely lead to more speculation and rumors about students. We will be encouraging gender policing among Utah children and young adults. We will likely expose young people to the same cruel and degrading speculation that both Stella and Ewa experienced.

While all of this might seem a bit confusing, there are some relatively straightforward points:

- Intersex development is not always identifiable at birth, and people are not always aware they have intersex development.
- Reproductive anatomy is not a consistent universal predictor of chromosomes, outward appearance, or gender identity for all humans.

*Key questions:*

- Should Stevie have been prevented from accessing puberty blockers or HRT because she had undiagnosed intersex development when she was under 18 years of age?
- Does our system of categorizing people as either male or female serve all people or an ideology that restricts nonconforming experiences?
- Should someone like Stella be excluded from participating in female sports because of the presence of intersex development?
- Are the problems we face today largely because of the system we use to categorize people or the people who do not fit that system?

*Outward Appearance as legal sex*

Access in our current system is largely based on the outward appearance of a person. People are ultimately able to access most restroom or locker room facilities as long as they do not raise suspicion by failing to fit the appropriate gender stereotype for that space. People undoubtedly access bathrooms and locker room facilities with chromosomal patterns that would violate laws like the one established by Texas regardless of what is on their identity documents.

On the other hand, the way we design bathrooms and locker room spaces means that people who are born with intersex development or do not fit a particular stereotype may not be able to safely access these spaces. Such people likely take extra precautions to make sure no one can see their body. These might be people like Hida, Ewa, and Stella who would have to be

concerned about how people would respond to seeing their bodies. One misstep could be life-changing. This includes young people today who must navigate spaces at school not built for people like them. It seems safe to say that some of these young people would likely opt out of gym class or other activities that would require them to use a locker room. It means that transgender and gender-nonconforming youth are also more likely to opt-out of such things. It is the kind of dynamic that increases things like anxiety and degrades mental health.

In some cases, perhaps exceptions are being made to accommodate individuals with intersex development. Making accommodations to help people function better in society is a good thing, but such accommodations are likely being made on a case by case basis by people in positions of authority who can quietly make those kinds of exceptions to the law instead of the law naturally being able to apply to everyone equally. This helps to maintain the illusion that such laws are just because such secretive actions maintain the appearance that the laws are being applied to everyone equally when they are not.

### *Key points*

- Access to public restrooms and locker rooms is generally based on outward appearance regardless of a marker on a birth certificate or ID.
- There is no single determinant of legal sex like outward appearance that could consistently align every person's chromosomes, reproductive organs, and gender identity.
- The gender-segregated spaces we build tend to create conditions where people with bodily differences are likely to be avoidant or concealed.
- The gender-segregated spaces we create tend to be degrading, less safe, and more stressful for people who do not fit the stereotypes associated with those spaces regardless of being transgender, gender-nonconforming, intersex, or not.



## *Gender Identity as legal sex*

Much of the ongoing debate over public access and inclusion is over identity vs. assigned sex, which was the case when North Carolina passed H.B. 2 in March of 2015. The law criminalized bathroom and locker room access for individuals who failed to have the appropriate sex marker on their birth record. H.B. 2 was a reaction to transgender people increasingly accessing sex-segregated public spaces that affirmed gender identity in addition to sex assignment.

Gender identity is perhaps the most consistent approach to ensure equal access, equal protections, and genuine inclusion. Chromosomes, reproductive organs, outward appearance, and gender identity determine sex depending on where one lives. Some systems, like Texas, use chromosomes, and some, like North Carolina, use reproductive organs. Many also use gender identity depending on where you live in the U.S. The impact of this inconsistent and sometimes exclusive system is significant in terms of the ability to function in society.

The State requires designation in a highly regulated system. It also controls a narrow set of options and the right to amend legal documents that purportedly represent a person's identity and bodily experience. Given the diversity of the body, this seems unlikely. Another person designates a child's identity, and it is supposed to be legally binding for life. The system regulates people and restricting nonconformity. Laws in the U.S. continue to displace gender-nonconforming individuals from access to safe and appropriate public spaces. Especially in public schools.

People need identity documents that reflect their appearance and sense of self. It can be problematic and even dangerous to have documents that fail to do so. We live in a society that makes identity documents a central function of survival. We should also live in a society that ensures access to identity documents congruent with the way people experience themselves and the connection with their body. What are freedom, justice, and liberty if these things are so easy to take away and be controlled by others? Despite the Texas law, much of the current

debate over public access and inclusion is based on individual identity vs. assigned sex. North Carolina made this clear when it passed H.B. 2 in March of 2015. The law mandated that people must use a bathroom or locker room that corresponded with the sex marker on their birth certificate. This position assumes that reproductive organs are the basis for legal sex and doctors should be the arbitrators. It was introduced in response to transgender people increasingly gaining access to public spaces and activities that corresponded to their gender identity.

### *Key points*

- Gender identity is perhaps the most consistent basis for establishing legal sex and places individuals in control of their identity documents.
- The fact that gender identity is the most consistent factor raises questions about the need to put an M or an F on identity documents in the first place. These markers are incapable of informing us about every person's biology. Why do we have them on identity documents when they are not based on consistent factors and do not always convey accurate information?
- Our social and institutional systems create conditions where people with different bodies and gender identities are often homogenized and erased. Those conditions often require such people to incur expenses that others do not. Those conditions often require such people to go through additional processes that others do not. Those additional processes can mean lost wages and expenses that others do not incur.

### *Final thoughts*

People with different chromosomes, reproductive organs, outward appearances, and gender identities have always existed. Many people continue to struggling and suffer for simply being different. These struggles are often the result of other people creating unnecessary barriers that make it difficult to function and thrive. Excluding vulnerable groups from spaces, resources, opportunities, or medical care will not solve the problems we face.

Real needs continue to go unaddressed while valuable resources and time are used to debate the exclusion of people who already lack meaningful inclusion. It is beyond the scope of this paper to adequately address all the issues, needs, and recommendations for this population, which is why an ongoing dialogue and collaborative effort are needed and welcomed.

Increased inclusion and participation in school sports would likely improve mental health and reduce the challenges that face our gender-diverse young people today. Increasing a sense of belonging is a buffer against mental illness. We should reinforce positive mental health by creating identity documents, opportunities, and public spaces that affirm people's sense of self and experience.

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