

Recent Caselaw on Bathroom Privacy & Girls' Sports

In the past month, two important court decisions were handed down regarding school policies protecting privacy in bathroom and locker rooms and protecting fairness and safety in sports.

Bathroom Privacy: First, the Eleventh Circuit Court of Appeals, sitting en banc (meaning it is a ruling by the entire Court of Appeals and not just a three-judge panel) upheld the policy of a Florida school district that maintained separate restrooms based on biological sex. In the 7-4 ruling in *Adams v. St. Johns County Board of Education*, Judge Barbara Lagoa ruled that the policy was not discriminatory, did not violate the Equal Protection Clause, and did not violate Title IX.

- "The bathroom policy clears [intermediate scrutiny under the Equal Protection Clause] because the policy advances the important governmental objective of protecting students' privacy in school bathrooms and does so in a manner substantially related to that objective."
- "The sex-specific privacy interests for all students in the sex-separated bathrooms at [school] attach once the doorways to those bathrooms swing open. The privacy interests are not confined to the individual stalls in those bathrooms."
- "Regardless of Adams's genuinely held belief about gender identity—which is not at issue—Adams's challenge to the bathroom policy revolves around whether Adams, who was 'determined solely by the accident of birth' to be a biological female—is allowed access to bathrooms reserved for those who were determined solely by the accident of birth' to be biologically male. Thus, we are unpersuaded by the dissent's argument that the district court could make any factual finding (that would not constitute clear error) to change an individual's immutable characteristic of biological sex, just as the district court could not make a factual finding to change someone's immutable characteristic of race, national origin, or even age for that matter. Simply put, and contrary to the dissent's claims, this is a case about the constitutionality and legality of separating bathrooms by biological sex because it involves an individual of one sex seeking access to the bathrooms reserved for those of the opposite sex. Adams's gender identity is thus not dispositive for our adjudication of Adams's equal protection claim."
- "[T]he bathroom policy facially classifies based on biological sex—not transgender status or gender identity. Transgender status and gender identity are wholly absent from the bathroom policy's classification. And both sides of the classification—biological males and biological females—include transgender students. To say that the bathroom policy singles out transgender students mischaracterizes how the policy operates."
- "While *Bostock* held that 'discrimination based on homosexuality or transgender status

necessarily entails discrimination based on sex,’ 140 S. Ct. at 1747, that statement is not in question in this appeal. This appeal centers on the converse of that statement—whether discrimination based on biological sex necessarily entails discrimination based on transgender status. It does not—a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status. *See, e.g., Nguyen*, 533 U.S. at 60. Indeed, while the bathroom policy at issue classifies students on the basis of biological sex, it does not facially discriminate on the basis of transgender status. Because the bathroom policy divides students into two groups, both of which include transgender students, there is a ‘lack of identity’ between the policy and transgender status, as the bathroom options are ‘equivalent to th[ose] provided [to] all’ students of the same biological sex.”

- “Title IX prohibits discrimination on the basis of sex, but it expressly permits separating the sexes when it comes to bathrooms and other living facilities. When we read ‘sex’ in Title IX to mean ‘biological sex,’ as we must, the statutory claim resolves itself. Title IX’s implementing regulations explicitly allow schools to ‘provide separate toilet . . . facilities on the basis of [biological] sex.’ 34 C.F.R. § 106.33. The School Board does just that. Because the School Board thus acts in accordance with Title IX’s bathroom-specific regulation, its decision to direct Adams—who was born, and enrolled in the School District as, a female—to use the female bathrooms is consistent with Title IX’s precepts. As such, Adams’s claim under the statute must fail.”

The *Adams* decision is an important ruling because we now have a clear circuit split between the 11th Circuit and the 4th Circuit (the *Gavin Grimm* case). We don’t yet know whether the case will be appealed to the U.S. Supreme Court, but it likely means the Court is going to have to address this issue soon. Pennsylvania schools are not required to follow either one of these cases as they are in a different circuit.

The Third Circuit, where Pennsylvania sits, has not ruled that schools *MUST* open bathrooms and locker rooms to the opposite sex. The Third Circuit does have precedent that *PERMITS* schools to open bathrooms and locker rooms to the opposite sex if they choose to do so. That case, *Doe v. Boyertown*, is different from the 11th or 4th Circuit cases. The Boyertown Area School District did the opposite of the schools above and chose to separate privacy facilities based on gender identity instead of sex. The court denied the request by the students who wanted the court to require the school to return to separating privacy facilities based on sex. But the Third Circuit did not go further or prevent schools from choosing to separate privacy facilities based on sex. The legal issues involved in demanding that a school board *MUST* divide its privacy facilities on the basis of sex are very different from the legal question of whether such a school *MAY* do so. And the Third Circuit Court of Appeals made clear that it was *NOT* answering the later question:

The School District . . . contends that barring transgender students from using privacy facilities that align with their gender identity would, itself, constitute discrimination under a sex-stereotyping theory in violation of Title IX. We need not decide that very different issue here.

Doe v. Boyertown Area Sch. Dist., 893 F.3d 179, 198 (3d Cir. 2018). As such, there are schools in

Pennsylvania that separate facilities on the basis of sex, and other schools that separate on the basis of gender identity. Schools that wish to continue to separate privacy facilities based on sex in Pennsylvania can point to the 11th Circuit case as persuasive authority, just as other schools who wish to allow males in female bathrooms and vice versa will point to the 4th Circuit case for persuasive authority.

Girls' Sports: *B.P.J. v. West Virginia*, a challenge to that state's Save Women's Sports Act, involved a middle school male who identifies as a girl and who wanted to compete on female sports teams. The judge in the case had issued a preliminary injunction against the law in 2021. But after full consideration of the matter, the judge (a Clinton appointee) reversed his prior decision, upheld the West Virginia law, and dismissed the student's challenge. A few select quotes:

- “[A]cting to prevent transgender girls, along with all other biological males, from playing on girls’ sports teams is not unconstitutional if the classification is substantially related to an important government interest.”
- “While sex and gender are related, they are not the same.... It is beyond dispute that, barring some rare genetic mutation not at issue here, a person either has male sex chromosomes or female sex chromosomes.”
- “Whether a person has male or female sex chromosomes determines many of the physical characteristics relevant to athletic performance.... While some females may be able to outperform some males, it is generally accepted that, on average, males outperform females athletically because of inherent physical differences between the sexes. This is not an overbroad generalization, but rather a general principle that realistically reflects the average physical differences between the sexes.”
- “[B]iological males generally outperform females athletically. The state is permitted to legislative sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.”
- “There is no serious debate that Title IX’s endorsement of sex separation in sports refers to biological sex.”
- “[D]espite [plaintiff’s] repeated arguments to the contrary, transgender girls are not excluded from school sports entirely. They are permitted to try out for the boys team, regardless of how they express their gender. I do not find that H.B 3293, which largely mirrors Title IX, violates Title IX.”

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