

The Impact of the *G.G. v. Gloucester County School Board*

The *Gloucester* decision, which involved a female student (represented by the ACLU) who sought access to male restrooms at a public high school, is obviously a disappointment. For the first time ever, a court determined that in Title IX, the term “sex” no longer refers to the biological differences between males and females. Rather, it refers to an individual’s subjective feelings of their “gender identity.” This ruling is wrong, and it flies in the face of the plain language of Title IX and its regulations, the legislative history of Title IX (where the sponsor explicitly rejected the idea that Title IX would allow men into women’s dorms and locker rooms), and every other court decision in the country.

Importantly, there have been at least 5 other federal and state court decisions, including two decisions from the 9th Circuit Court of Appeals, that have rejected the argument that Title IX requires a person to be allowed to use private facilities based on “gender identity” rather than biological sex. The *Gloucester* decision is an outlier, and one that is ripe for reversal.

We have seen these types of battles before, specifically over the abortion pill mandate. Several appellate courts ruled that for-profit businesses (like Conestoga Wood and Hobby Lobby) and non-profits (like Geneva College and Little Sisters of the Poor) must participate in the provision of abortifacients in violation their religious beliefs. But other courts ruled for the non-profits and businesses. Eventually, the issue made its way to the Supreme Court, where freedom and common sense prevailed for the businesses (and likely will for the non-profits).

What if these non-profits and businesses had given up after the first negative court of appeals decision? What if they had caved to the demands of a federal administration determined to trample on long-established constitutional rights?

We must continue to fight for the right to privacy of our students, of victims of sexual abuse, and of all men and women in our country. We will certainly have setbacks, but they should not deter our efforts to enact good laws and local policies that protect the fundamental right to privacy. And know that ADF stands with you to defend these laws and policies all the way to the Supreme Court.

Q & A about the *Gloucester* Decision

Q. What did the Fourth Circuit Court of Appeals decide?

The court’s decision focused on whether Title IX, which bans sex discrimination at all public schools and colleges that receive federal funding, also bans discrimination based on “gender identity.” For the past 2 years, the U.S. Department of Education has taken the radical position that the term “sex” no longer means a person’s

biological sex but rather refers to an individual's subjective belief of his/her gender identity. The court found that because Title IX is "silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms," the Department of Education's re-interpretation should be given controlling deference. In other words, the Fourth Circuit jettisoned the traditional meaning of "sex" in Title IX and substituted "gender identity."

Q. What did the Fourth Circuit Court of Appeals NOT decide?

Despite being asked to do so by G.G., the court declined to order the Gloucester School District to allow G.G. to use the male restroom. Rather, the court sent the case back to the lower court to hear additional evidence and determine whether the school must allow G.G. to use the male restrooms.

Thus, neither the Gloucester School District, nor any other school in Virginia or the Fourth Circuit (which includes West Virginia, Maryland, North Carolina, and South Carolina) is currently required by the court's decision to allow students to use the restrooms, locker rooms, or showers of the opposite sex.

Q. Does the decision undermine students' right to privacy?

No. The Fourth Circuit recognized that there is a constitutional right to bodily privacy, stating that "an individual has a legitimate and important interest in bodily privacy." But the court ultimately did not address whether other students' right to bodily privacy outweighs G.G.'s desire to use a restroom of the opposite sex because there was "no constitutional challenge to the regulation or agency interpretation" in the *Gloucester* case.

Q. Does the decision set national precedent?

No. In fact, five other federal and state court, including the Ninth Circuit Court of Appeals, have all ruled that Title IX's ban on sex discrimination does not include "gender identity" or require schools to allow students to use restrooms, locker rooms, and showers of the opposite biological sex:

- *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (holding that "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination").
- *Kastl v. Maricopa County Community College District*, 325 F. App'x 492 (9th Cir. 2009) (rejecting the Title IX claims of a male student/employee at a community college who sought to access the restrooms of the opposite sex

because the college “banned Kastl from using the women’s restroom *for safety reasons*” and “Kastl did not put forward sufficient evidence demonstrating that [the college] was motivated by Kastl’s [biological sex]”).

- *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994) (“We think that it is clear that Title IX and its regulations do not require gender-integrated classes in prisons. Institutions may have separate toilet, shower and locker room facilities. And institutions may ‘provide separate housing on the basis of sex.’”).
- *Doe v. Clark Cty. Sch. Dist.*, 2008 WL 4372872 (D. Nev. Sept. 17, 2008) (dismissing a transgender student’s Title IX complaint for lack of standing, but noting that Title IX does not require letting students use the restroom that corresponds with their gender identity).
- *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185 (Mo. Ct. App. 2015) (dismissing transgender student’s Title IX and state law claims and noting that the trial court below ruled that the female student has “no existing, clear, unconditional legal right which allows [her] to access restrooms or locker rooms consistent with [her male] gender identity.”

Simply put, the Fourth Circuit’s decision is an outlier, and it is ripe for reversal.

Q. Does the court decision’s mean that schools, colleges, and states with policies or laws that require students to use the restroom and locker room based on their biological sex will lose federal funding?

No. In the 40 year history of Title IX, no school, college or state has ever lost their federal funding. Additionally, if the Department of Education threatens a school’s funding, that school is entitled to a hearing before an administrative law judge and review by a federal court. If a school fights and ultimately loses, the school is still given 30 days to comply and keep their funding.

The loss of federal funding is, thus, an extremely remote possibility for at least two reasons. First, as discussed above, Title IX does not require a school to open its restrooms to students of the opposite sex. So, as the majority of federal and state courts have held, the Department of Education’s basis for threatening schools with loss of funding is meritless. Second, schools continue receiving their federal funding even while they take a principled stand and fight for their students’ rights in court. Indeed, the *Gloucester* lawsuit has been going on since June 2015, and the school district continues to receive all federal funding to which it is entitled. Given this, schools and states have nothing to lose and everything to gain from defending laws and policies that protect all students’ interests in this delicate area.

Q. What does the Fourth Circuit's decision mean for North Carolina privacy's law (HB2) and efforts by other states to pass similar laws?

While the court decided that the U.S. Department of Education's radical re-interpretation of Title IX should be given deference, it did not determine whether Gloucester's policy, North Carolina's law, or any other privacy protection laws or policies, actually violate Title IX or the Constitution. As discussed above, several other courts have rejected the Department of Education's interpretation of Title IX.

Importantly, the court declined to address whether this interpretation of Title IX would violate the constitutional right to bodily privacy, thus leaving the door open for a constitutional challenge against the Department of Education's interpretation, especially as it would apply to situations where individuals routinely see each other in various states of undress (locker rooms, showers, etc.).

There are other strong arguments that could be used in successfully defending privacy laws and policies like North Carolina's, including questioning the Department of Education's authority to re-interpret Title IX in a manner that is inconsistent with the plain language and intent of Congress.

Thus, given the narrow holding in *Gloucester* and the strong precedent and legal arguments that justify bodily privacy laws and policies, states and educational entities should continue to confidently adopt laws and policies that protect this fundamental right.