

The Supreme Court Will Now Enter the Battle Over Gender and Bathrooms

Why do we make our restrooms and locker rooms private? Each of us performs a variety of necessary life functions in front of strangers every day.

We eat in public restaurants, we work in public offices, and as anyone who ever has been stranded in an airport can attest, we even sleep in public. There is no shame or embarrassment in doing such activities in front of complete strangers.

Yet when it comes to activities that involve a measure of undressing, we realize that most people are not comfortable doing them in public—and especially not in the presence of members of the opposite sex.

So as a society, we set apart designated areas—restrooms, locker rooms, showers, changing rooms—for individuals to perform these intimate activities. In other words, private facilities exist because privacy matters.

But according to the federal government and LGBT activists, the primary function of private facilities is not privacy; it is affirmation of a person's gender identity.

And now the U.S. Supreme Court will hear a related case out of Virginia.

In December 2014, the Gloucester County School Board made what should have been an uncontroversial decision. In response to a request to use the boys' restrooms from a female high school student who asserts that she is male, the school board adopted a policy stating that the girls' and boys' restrooms can be used only by students of the designated sex.

The school board concurrently made several single-stall, unisex restrooms available for anyone, including the self-described transgender student who was uncomfortable using the communal facilities at Gloucester High School.

The board otherwise allowed the student, Gavin Grimm, to live as a male, dress like a male, and use a male name and pronouns. And by offering accommodations, the school district guaranteed that Grimm would be afforded privacy—whether Grimm chose to use the single-stall facilities or the female communal restrooms with others of the female sex.

But Grimm, 17, rejected this solution. Relying upon guidance from the U.S. Department of Education, which for several years quietly had pushed the idea that schools must treat a student consistent with his or her gender identity, Grimm sued the school district.

The suit argues that under federal Title IX and its regulations, the school must affirm Grimm's male gender identity by allowing use of the boys' restrooms.

The lawsuit received immediate support from the Education and Justice departments, which ultimately issued the now infamous "Dear Colleague" letter in May 2016. In it, the departments threatened to strip federal funding from any school that does not use its locker rooms, showers, restrooms and even overnight accommodation on school trips to affirm a student's gender identity.

The Gloucester school board courageously stood against the full might of the federal government, recognizing that complying with Grimm's demands would violate the constitutional privacy rights of other students, to whom the board owed a duty of care.

While the school board won in lower court, the 4th Circuit Court of Appeals reversed the decision and found that the government's re-interpretation of Title IX and its regulations

should be given deference.

Under this re-interpretation, a law that allows schools to maintain separate locker rooms and restrooms on the basis of sex becomes one that orders schools to open up these facilities to anyone who asserts he or she is of the designated sex.

The school board immediately asked the Supreme Court to review the case.

On Friday, the high court accepted the case, and the implications of its eventual ruling likely will be historic and affect millions of schoolchildren across the country.

Two aspects of the case are noteworthy. First, the Supreme Court previously issued a stay, allowing the school board to maintain its policy that protects student privacy in communal facilities. The stay, which remains in effect, recognizes that there would be irreparable harm if students were suddenly forced to share locker rooms and restrooms with the opposite sex.

Second, the court declined to take up the issue of whether “Auer deference”—the legal doctrine relied upon by the federal government to claim that its nonbinding guidance interpreting Title IX have the force of law—should be overturned. Instead, the court will examine whether the interpretation itself is consistent with Title IX and should be given deference.

As a result, the privacy implications of the federal government’s lawless actions are likely to play a prominent role in the case.

And it is clear that the federal government’s interpretation of Title IX has no foothold in the law, whether one looks to the text of Title IX and its regulations (which authorize schools and colleges to maintain separate dorms, locker rooms, and restrooms on the basis of sex); the law’s legislative

history (where concerns over privacy and safety were addressed by allowing sex-specific facilities); or subsequent court decisions interpreting the law (the overwhelming majority of which reject the claim that Title IX extends to gender identity or requires schools to affirm a student's self-perceived gender).

Indeed, when you research the purpose of Title IX, it is apparent that Congress sought to affirm the equality of women by guaranteeing them equal access to educational opportunities.

One's sex is irrelevant in the classroom or science lab. Yet by recognizing that sex-specific facilities are permissible when privacy is needed, Congress communicated that women are not disaffirmed as being equal to men nor denied equal educational opportunities by the commonsense recognition of biological differences and the need for privacy that those differences necessitate.

The same is true in the Gloucester County case. The school board has shown incredible compassion and accommodation to Gavin Grimm. Yet Grimm and the federal government are not seeking privacy or equal educational opportunities; Grimm is receiving both. Instead, they are demanding affirmation of Grimm's decision to identify as a male.

But locker rooms and restrooms are not for affirmation; they are for privacy. And schools should remain free to put the privacy of their students above political agendas. {eo}

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