



## ***BACKGROUND***

### ***Students and Parents for Privacy v. United States Department of Education***

#### **What is this case about?**

This case is about whether the federal Department of Education (“DOE”) and Township High School District 211 (“District 211”) can force 14- to 17- year old students to share restrooms and locker rooms with opposite-sex classmates. All the students must use the restroom with the knowledge that someone of the opposite sex is present or could walk in at any time. But it is even worse for the girls. The DOE and District 211 require them to use the locker room with a biologically male student. They must change their clothes for physical education class knowing that a biologically male student is present or could walk in at any time. The fear over undressing in the same rooms as a male causes these girls significant anxiety, stress, and embarrassment, and importantly, it violates their well-established right to privacy.

#### **Who are Students and Parents for Privacy?**

The group Students and Parents for Privacy is the plaintiff in this case. The group represents the interests of 51 families, comprising 136 moms, dads, and their children (both sons and daughters), all of whom object to students being forced to use the restroom, or change clothes, with someone of the opposite sex in the room. The group seeks to protect its student members’ constitutionally protected right to privacy, among other rights, in these intimate settings.

#### **How did this all happen?**

The federal Department of Education recently created a new rule, without following the proper procedure for doing so, that requires schools to let students use facilities according to their perceived gender identity, no matter their biological sex. This represents a radical departure from how our society has always handled privacy rights in restrooms, changing rooms, and the like. To protect student privacy and safety, schools have always had separate restrooms and locker rooms for boys and girls. But the Department of Education’s new rule has made it impossible for schools to continue to provide restroom, locker room, and shower facilities that respect the privacy, safety, and dignity of each biological sex.

The Department of Education enforced this new rule against District 211. The school district had already wrongly chosen to let students use the restrooms corresponding with their perceived gender identity. So biological males were already able to use the girls’ restrooms, and vice versa, creating a tremendous privacy violation. But the school district initially drew the line at locker rooms, refusing to let a biological male student to use the girls’ locker room. Rejecting the school district’s decision, the Department of Education threatened the school district with the loss of \$6 million in federal funding if the district did not let the male student use the girls’ locker room. Rather than taking a principled stand for privacy and student safety, the district caved and entered into a voluntary agreement with DOE that permitted a biologically male student to access the girls’ locker rooms, even though many students and parents implored it not to. The school district apparently valued money more than the girls’ privacy, safety, and mental well-being. And the Department of

Education valued its “gender identity” agenda more than protecting the privacy rights and safety of all students.

### **What is ADF arguing?**

ADF is arguing that the school district’s restroom policy and its locker room agreement with DOE violate the students’ constitutional privacy rights as well as the federal law known as Title IX. ADF is also arguing that DOE’s action—redefining “sex” to including “gender identity” and telling schools that they must let males use the girls’ facilities, and vice versa—is illegal.

- 1. The DOE’s action, demanding schools to let males use girls’ facilities, and vice versa, is unlawful.** The Department of Education’s new rule, that schools must let biological males use the girls’ facilities, and vice versa, is unlawful for at least two reasons. **First**, DOE claims its new rule is required by a federal statute called Title IX, which bars sex discrimination in schools that receive federal money. Since its passage over 40 years ago, the term “sex” in Title IX has always been understood to mean the two biological sexes, male and female. It has never been understood to mean gender identity. Congress also made clear in Title IX and its regulations that schools are allowed to have restrooms and locker rooms that are separated by biological sex. Despite the unambiguous meaning of “sex,” DOE issued a new rule redefining “sex” to include gender identity, and on this basis alone claims that schools must allow males to use girls’ facilities, and vice versa. DOE’s new rule contradicts what the law says and has made it very difficult for schools to continue providing sex-specific facilities, which Title IX expressly allows. By violating the plain meaning of Title IX, DOE is therefore acting without proper authority, and its new rule is unlawful and not binding on schools. **In addition**, a federal law called the Administrative Procedure Act (APA) says what federal agencies, like the Department of Education, must do to create new, legally enforceable regulations. The APA requires the agency to publish its proposed regulation in a book known as *The Federal Register* and let interested people and organizations explain why the regulation would be good or bad. Then, the agency has to evaluate the comments and decide whether it still believes that its proposed new regulation should be enacted. This process is called “notice and comment.” DOE ignored the notice and comment requirements for its new rule. Instead, it simply announced it as if it were a lawful rule. But since DOE did not follow the requirements, its rule is unlawful and not binding on schools.
- 2. The policies violate constitutional privacy rights.** The United States Constitution’s right to privacy prohibits the government (including schools) from forcing students to partially or fully undress, or use the restroom, in the presence of the opposite sex. Court cases across the country have recognized this right to bodily privacy and have stated that, while students’ right to privacy is violated anytime their school forces them to undress, the invasion is greatest when they are forced to do so in front of the opposite sex. The DOE and District 211 are violating this right by mandating that girls must share their locker rooms with a biological male student, and that all students share restrooms with students of the opposite sex.
- 3. The policies violate Title IX.** Title IX guarantees students the right to be free from a sexually hostile environment while at school. But the restroom policy and locker room

agreement have created just such an environment. Courts have already decided that a hostile environment is created when businesses let males into their female employees' restrooms and locker rooms. District 211 students are experiencing anxiety, embarrassment, stress, and a loss of dignity because of DOE and District 211 policies that do the same. Some students are trying to not go to the restroom while at school. The hostile environment created by the restroom policy and locker room agreement violates Title IX.

### **What's at stake?**

Student privacy and safety are at stake. There is a reason we have always had separate restrooms and locker rooms for girls and boys. We reasonably expect privacy when we use the restroom or change our clothes or shower in a locker room. Being forced to share these intimate spaces with members of the opposite sex—even if there are “privacy curtains” or separate stalls—violates that reasonable expectation of privacy. The Department of Education's radical new rule threatens students' privacy, stripping them of the modesty and dignity to which everyone is entitled.

Parental rights are also at stake. The Department of Education's rule substitutes its own judgment for when students should be exposed to the unclothed bodies of the opposite sex—and have their own unclothed bodies exposed to the opposite sex—for the wisdom of parents.

Finally, it also threatens our very freedom as Americans. If our government is powerful enough to command innocent school children to disrobe in the presence of opposite-sex classmates, then there will be little it will not be powerful enough to do. The restroom policy and locker room agreement thus threaten our very liberty to live our lives in accordance with the most basic expectations of common decency, dignity, and privacy in our bodies.