

ADAMS EX REL. KASPER V. SCHOOL BOARD OF ST. JOHNS COUNTY:
RESTRICTING TRANSGENDER HIGH SCHOOL STUDENTS' RESTROOM ACCESS
VIOLATES THE FOURTEENTH AMENDMENT AND TITLE IX

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In *Adams ex rel. Kasper v. School Board of St. Johns County*, the United States Court of Appeals for the Eleventh Circuit considered a challenge to a Florida high school's policy prohibiting transgender students from using the bathroom of the gender with which they identify.¹ The plaintiff, a transgender male, challenged the policy under the Fourteenth Amendment's Equal Protection clause and Title IX of the Education Amendments Act of 1972.² The court affirmed the district court's judgment on both grounds, with one judge dissenting.³ Although not specifically decided, the case tees up a potential challenge to sex-separated bathrooms.

The plaintiff, Drew Adams originally enrolled in the school district in the Fourth Grade as a biological female but entered high school while transitioning to live as a male.⁴ The St. Johns County School District ("School District") policies required students to use sex-separated restrooms according to their biological sex but allowed transgender students to use a single-stall "gender-neutral restroom" instead.⁵ The School District relied on students' enrollment records to determine their sex.⁶ Adams used the boys' bathroom for six weeks but was told to follow the policy after two female students complained.⁷ After talking with the school and filing a complaint with the U.S. Department of Education's Office of Civil Rights, Adams filed a lawsuit in federal court against the School Board through his mother, claiming the policy violated his equal protection rights under the Fourteenth Amendment and his rights under Title IX.⁸ The district court granted Adams

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¹ *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1291–92 (11th Cir. 2020).

² *Id.* at 1291. See also U.S. CONST. amend. XIV, § 1; 20 U.S.C. § 1681(a) (1972).

³ *Adams*, 968 F.3d at 1291, 1311.

⁴ *Id.* at 1291–92.

⁵ *Id.* at 1293–94. The policy utilized stated, "Transgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." *Id.* at 1294.

⁶ *Id.* at 1293–94.

⁷ *Id.* at 1293. The court noted that "[t]here were no complaints from boy students who shared bathroom facilities with Adams." *Adams*, 968 F.3d at 1293.

⁸ *Id.* at 1295.

declaratory, injunctive, and monetary relief, which the School Board appealed to the Eleventh Circuit.⁹

The first issue on appeal was whether the School District's policy violated Adams's Fourteenth Amendment Equal Protection rights.¹⁰ The court agreed with Adams that the policy placed a "special burden" on transgender people because of their gender, triggering a heightened standard of review.¹¹ The court applied heightened scrutiny because the School Board, a state actor, was drawing a distinction using sex or gender in crafting its bathroom policy.¹² Under this standard, the gender distinction at issue will fail unless it is "'substantially related to a sufficiently important governmental interest.'"¹³ The School Board characterized its policy as "'broadly 'discriminat[ing] on the basis of sex,'" while Adams described it as "'punish[ing] transgender students and favor[ing] non-transgender students.'"¹⁴ Despite the School Board's contention that sex-separated bathrooms were warranted to protect student privacy, the court concluded that "[t]he School Board . . . demonstrated no substantial relationship" between applying its bathroom policy to Adams and its purported interest in student privacy.¹⁵ The court held that the policy failed to satisfy the important governmental interest of student privacy for three reasons: (1) the School Board "administered [the policy] arbitrarily"; (2) the School Board's privacy concerns about Adams were hypothetical rather than factual; and (3) the policy treated Adams unfavorably simply "because he defies gender stereotypes . . .".¹⁶

The court concluded that the School Board applied its bathroom policy arbitrarily because it "d[id] not succeed in excluding every transgender student from the restroom matching his or her gender identity" and therefore failed to "treat[] all transgender students alike."¹⁷ Because the School Board's policy required a student to use the bathroom of the sex listed on the student's enrollment forms, one who enrolled under his or her transition sex could use that bathroom.¹⁸ Students who enrolled under their birth sex before transitioning, however, could not use the bathroom for their transition sex.¹⁹ The court concluded that because using the sex on students' enrollment

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1296.

¹² *Id.* at 1295–96. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1995).

¹³ *Adams*, 968 F.3d at 1296 (quoting *Cleburne*, 473 U.S. at 441).

¹⁴ *Id.*

¹⁵ *Id.* at 1297.

¹⁶ *Id.*

¹⁷ *Id.* at 1298.

¹⁸ *Id.*

¹⁹ *Adams*, 968 F.3d at 1298.

documents restricted some students but not others, the “designation of a student’s sex on his school enrollment documents is not a ‘legitimate, accurate proxy’ for his” biological sex.²⁰ Because the policy was arbitrary, the court held that the state failed to demonstrate a substantial relationship as required under the Fourteenth Amendment between the policy and the state’s interest in privacy.²¹

The court also disagreed with the School Board’s policy because it rested on hypothesized privacy concerns rather than a “genuine” privacy justification.²² The court rejected the School Board’s concern for keeping the sexes’ physiological differences private because (1) transgender students maintain their privacy carefully, and (2) Adams’s transition treatments changed his appearance so that he no longer presented as a female.²³ Additionally, the School Board had “received no reports of privacy breaches” during the time that Adams used the boys’ restroom and “could not produce any ‘complaints of untoward behavior involving a transgender student’ in the restroom.”²⁴ The School Board also argued that the mere presence of a transgender student in another sex’s bathroom was a privacy violation but conceded that transgender students could currently be using the bathroom of their gender identity without anyone knowing.²⁵ Thus, the court rejected the School Board’s privacy concerns as purely hypothetical and therefore insufficient to satisfy a genuine justification required under heightened scrutiny.²⁶

Finally, the court held that the School Board’s policy violated the Fourteenth Amendment because it relied on improper gender stereotypes by presuming that “every person deemed ‘male’ at birth would act and identify as a ‘boy’ and every person deemed ‘female’ would act and identify as a ‘girl.’”²⁷ The court discussed *Glenn v. Brumby*, where the Eleventh Circuit held that an employer who fired a transgender woman because of his discomfort with her committed unconstitutional gender stereotyping.²⁸ Likewise, the court concluded that the School Board “advance[d] gender stereotypes” by deeming Adams female, “even though he produced legal and medical documentation showing he was male,” violating the Fourteenth

²⁰ *Id.* at 1298–99 (quoting *Craig v. Boren*, 429 U.S. 190, 204 (1976)).

²¹ *Id.* at 1299.

²² *Id.* (quoting *U.S. v. Virginia*, 518 U.S. 515, 533 (1996)).

²³ *Id.* at 1300–01.

²⁴ *Id.* at 1299.

²⁵ *Adams*, 968 F.3d at 1300.

²⁶ *Id.* at 1301.

²⁷ *Id.* at 1301–02. The court states that “[t]o survive heightened scrutiny, a sex classification ‘must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.’” *Id.* (quoting *Virginia*, 518 U.S. at 533).

²⁸ *Id.* at 1302 (citing *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011)).

Amendment.²⁹ In sum, the Eleventh Circuit held the School District's policy violated the Equal Protection clause of the Fourteenth Amendment.

Adams's second claim was that the School District's policy violated Title IX of the Education Amendments Act of 1972 because his exclusion from the boys' bathroom was sex discrimination.³⁰ The court affirmed the district court's judgment in favor of Adams for three reasons: (1) "Title IX protects students from discrimination based on their transgender status"; (2) the School Board harmed Adams by treating him differently "because he was transgender"; and (3) "nothing in Title IX's regulations or any administrative guidance on Title IX excuses the School Board's discriminatory policy."³¹

First, the court held that Title IX's prohibition of sex discrimination in education activities includes discrimination on the basis of transgender status.³² The School Board argued (1) Title IX's provision only covers biological women's discrimination claims and (2) Title VII deals only with workplace discrimination.³³ Yet the court relied on *Bostock v. Clayton County*, which provided that Title VII's prohibition of sex discrimination includes transgender discrimination,³⁴ to support its conclusion that Title IX's prohibition of sex discrimination at school also includes transgender discrimination.³⁵ Second, the court concluded that the evidence before the district court showed the School Board injured Adams by treating him differently.³⁶ The court noted that "[d]iscrimination 'refers to distinctions or differences in treatment that injure protected individuals,'"³⁷ and Title IX's implementing regulations prohibit differential treatment by schools "because of sex."³⁸

With regard to the first prong, differential treatment, the Eleventh Circuit agreed with the district court that the School Board had treated Adams

²⁹ *Id.* at 1303.

³⁰ *Adams*, 968 F.3d at 1304. Title IX mandates that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

³¹ *Adams*, 968 F.3d at 1304. The parties agreed that because the School Board received federal financial assistance they were bound by Title IX, and that restroom use was an "activity" within the meaning of Title IX. *Id.* at 1304 n.7.

³² *Id.* at 1305.

³³ *Id.*

³⁴ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

³⁵ *Adams*, 968 F.3d at 1305. The Eleventh Circuit reasoned that because "the Supreme Court has 'looked to its Title VII interpretations of discrimination in illuminating Title IX'" such an application was appropriate in the present case. *Id.* (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting)).

³⁶ *Id.* at 1306–07.

³⁷ *Id.* at 1306 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006)).

³⁸ *Id.* (citing 34 C.F.R. § 106.31(b)(2), (b)(4) (2020)).

differently as compared to other boys and transgender students.³⁹ Unlike Adams, who was listed as female in his enrollment documents, boys born male were allowed to use the boys' restroom without facing discipline, as were transgender boys listed as male in their enrollment documents.⁴⁰ Likewise, the court concluded the evidence sufficiently supported the second prong, harm.⁴¹ Experts at trial testified that people with gender dysphoria experience significant stress and anxiety, and "forc[ing] transgender people to live" with their birth sex "cause[s] significant harm."⁴² Because both prongs were met, the court concluded the policy violated Title IX's prohibition of sex discrimination.⁴³

Finally, the court rejected the School Board's argument that Title IX's implementing regulations permitting sex-separated bathrooms justified its discriminatory policy on two grounds.⁴⁴ First, Adams did not challenge the school's sex-separated bathroom facilities.⁴⁵ Second, the court "perceive[d] no conflict" between the regulation and Adams's discrimination claim because "the regulation does not mandate how to determine a transgender student's 'sex.'"⁴⁶ Moreover, in response to the School Board's argument that *Bostock* construed "sex" to mean only "biological sex," the court observed that *Bostock* "expressly declined to decide" this issue of interpretation and held only that sex discrimination includes transgender discrimination.⁴⁷ So, too, the Eleventh Circuit decided merely that the School Board discriminated against Adams, albeit without delving into the meaning of "sex."⁴⁸

The School Board also relied on two joint letters from the United States Department of Education and Department of Justice concerning transgender students.⁴⁹ The first instructed schools that transgender discrimination was sex discrimination, but the second letter withdrew the first because it lacked sufficient legal analysis.⁵⁰ The School Board understood the second letter to signify that the federal government agreed with its

³⁹ *Id.* at 1306–07.

⁴⁰ *Adams*, 968 F.3d at 1306–07.

⁴¹ *Id.* at 1307–08 (citing *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (per curiam); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017)).

⁴² *Id.* at 1307.

⁴³ *Id.*

⁴⁴ *Id.* at 1308–10 (citing 34 C.F.R. § 106.33 (2020)).

⁴⁵ *Id.* at 1308.

⁴⁶ *Adams*, 968 F.3d at 1308.

⁴⁷ *Id.* at 1308–09 (citing *Bostock*, 140 S. Ct. at 1739).

⁴⁸ *Id.* at 1309.

⁴⁹ *Id.*

⁵⁰ *Id.*

position that “sex” means “biological sex.”⁵¹ The court disagreed because the second letter “merely withdrew [the first] for lack of sufficient legal explanation” without further analysis of Title IX or its regulations.⁵² Dismissing the School Board’s position that “sex” means “biological sex” as “narrow” and “unworkable,” the court stated that Adams “has confirmed his male sex not just legally and socially, but medically.”⁵³

Thus, the court held that the School Board’s policy violated both the Fourteenth Amendment’s Equal Protection Clause and Title IX’s prohibition of sex discrimination in education.⁵⁴ Chief Judge Pryor dissented, stating that: (1) pursuant to the Fourteenth Amendment, the School District’s policy “fit[] tightly with . . . interests in privacy”; and (2) with regard to the Title IX claim, the majority improperly redefined “sex.”⁵⁵

On the Equal Protection issue, the dissent agreed with the majority that the School Board had a substantial interest in (1) protecting students’ privacy while using the bathroom and (2) avoiding exposing students’ bodies to members of the opposite sex.⁵⁶ The dissent concluded that the policy directly achieved its first interest and “substantially advance[d]” its second interest.⁵⁷ Thus, because “intermediate scrutiny . . . does not ‘require[] that the [policy] under consideration . . . achiev[e] its ultimate objective in every instance,’” the policy satisfied heightened scrutiny.⁵⁸ Additionally, the dissent noted that courts usually defer to school decisions to restrict students’ constitutional rights because “[s]chools have a ‘custodial and tutelary power’ over minor students” that permits greater control than they could exercise over adults.⁵⁹ Thus, the dissent concluded, “[t]he bathroom policy falls squarely within the Board’s authority”⁶⁰

The dissent further critiqued the majority for “misunderstanding both the classification and privacy interests at issue.”⁶¹ According to the dissent, the majority improperly described the policy as dividing transgender students from all other students, when really the categories were “students who can use the boys’ bathroom” and “students who can use the girls’ bathroom.”⁶²

⁵¹ *Id.* at 1309–10.

⁵² *Adams*, 968 F.3d at 1310.

⁵³ *Id.*

⁵⁴ *Id.* at 1310–11.

⁵⁵ *Id.* at 1312, 1320 (Pryor, W., C.J., dissenting).

⁵⁶ *Id.* at 1311–12.

⁵⁷ *Id.* at 1312–13.

⁵⁸ *Adams*, 968 F.3d at 1313 (quoting *Nguyen v. Immigr. & Naturalization Serv.*, 533 U.S. 53, 70 (2001)).

⁵⁹ *Id.* at 1314 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1315.

In this light, the dissent concluded that, “[a]t most, the policy has a disparate impact on transgender students”⁶³ Moreover, a disparate impact does not trigger heightened scrutiny unless motivated by “invidious gender-based discrimination,” requiring proof of intent.⁶⁴ But because “[t]he district court found that the ‘School Board did not have transgender students in mind when it originally’” created its policy of sex-separated bathrooms, the School Board could not have had the requisite intent; awareness of the potential consequences for a protected class is insufficient.⁶⁵ In the dissent’s view, the majority’s reframing of the School Board’s privacy interests and categories of students redefined the logic of heightened scrutiny, rewrote the Supreme Court’s precedents on sex discrimination, and laid the groundwork for a challenge to the existence of sex-separated restrooms.⁶⁶

The dissent found the majority’s analysis of the Title IX claim similarly unconvincing. The dissent rejected the majority’s reading of *Bostock* because the Supreme Court “assum[ed] that sex refers only to biological distinctions between male and female”⁶⁷ To the dissent, the Title IX claim turned on whether “sex” as used in the statute was ambiguous.⁶⁸ Because “‘sex’ has never meant gender identity” and the meaning “does not change when a plaintiff is transgender,” the ordinary meaning of “sex” turning on “reproductive function” (as it did when Congress enacted Title IX) has not changed, either.⁶⁹ Thus, the dissent critiques the majority for “abandon[ing] statutory interpretation in favor of legislating a transgender exception” to the statute and calling it ambiguous because the statute does not contain a specific definition of “sex.”⁷⁰ The dissent also concludes that even if the statute were ambiguous, the majority’s position followed “only if the meaning of ‘sex’ unambiguously did *not* turn on reproductive function” but on some other meaning.⁷¹ Because an ambiguous term cannot unambiguously mean something, the dissent concluded that “Title IX and its regulations expressly allow” the policy.⁷²

The majority’s decision follows the trend of recent cases expanding the meaning of “sex” to include forms of discrimination not previously considered improper. Even though the majority stated expressly that it was

⁶³ *Id.*

⁶⁴ *Adams*, 968 F.3d at 1315.

⁶⁵ *Id.* at 1315–16.

⁶⁶ *Id.* at 1317–19.

⁶⁷ *Id.* at 1320.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1320–21.

⁷⁰ *Adams*, 968 F.3d at 1321.

⁷¹ *Id.* at 1322.

⁷² *Id.* at 1323.

not considering whether sex-separated bathrooms were appropriate,⁷³ a potential follow-up to this case is a suit claiming that maintaining sex-separated bathrooms arbitrarily discriminates against transgender and gender-fluid people and rests on impermissible gender stereotypes. Thus, if other courts follow the majority's reading of *Bostock*, including using decisions interpreting Title VII to interpret Title IX, then it is possible schools at all levels could lose their ability to have sex-separated bathrooms.

⁷³ *Id.* at 1303 (majority opinion) (“We emphasize that the constitutionality of gender-separated bathrooms is not before us.”).