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Transgender Students in School

David T. Duff

Do We Follow a “Dichotomous” Understanding of Male and Female, or Is Sex More Than Chromosomes and Genitals?

- Translation: does the term “sex” in the law mean a person’s “biological gender” or his or her gender identity.
- Title IX - a 1972 law that bans discrimination “on the basis of sex” in schools that receive federal money.
- 1975 Regulation allows schools to provide separate living facilities, restrooms, locker rooms, and shower facilities “on the basis of sex” so long as the facilities are comparable.
- G.G. v Gloucester County School Board - 4th Circuit’s 2-to-1 panel decision: access to school restrooms is to be based on one’s gender identify not one’s biological gender.
- Best argument to the contrary is in Judge Niemeyer’s dissent at 822 F. 3d p.730-739: no case law support; meaning of statutory term “sex” is not ambiguous so no

deference to DOE's interpretation; majority ignores privacy and safety interests of others.

- 4th Circuit Majority - term "sex" in statute and regulations is ambiguous, so Court must defer to DOE's interpretation of its own regulations unless that interpretation is plainly erroneous.
- DOE's interpretation is consistent with some dictionary definitions at the time of the word sex: e.g., sex is the "sum of the morphological, physiological, and behavioral peculiarities" of a living being. Webster's Third New International Dictionary (1971).
- The Court majority refused to weigh privacy interests or safety concerns, stating that those are fundamentally questions of policy for the DOE not the courts.
- The majority's interpretation of "sex" may not be limited in application to school restrooms; it presumably must apply for purposes of assigning separate living facilities, locker rooms, and shower facilities as well-- but perhaps the privacy and safety concerns would be given greater weight.
- What does Supreme Court's stay of 4th Circuit's decision mean?
- Should districts adopt a specific policy or written position at this time?; take a case-by-case approach?