



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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Schools Must Open Bathrooms and Change Student Records for Transgender Students

In a case drawing national attention, on August 9, 2019, a federal trial court in Newport News, Virginia ruled that the Gloucester County School Board's policy of requiring former student Gavin Grimm to use the bathroom designated for students assigned his birth gender or a neutral, staff bathroom, violated his rights under the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments of 1972. The Court declared that the Board's refusal to update Grimm's official student transcript to reflect a "male" designation violates his rights. It awarded Grimm nominal damages in the amount of one dollar and his attorneys' fees, and issued a permanent injunction requiring the Board to update his student records.

The Court's ruling is the latest chapter in a case that has already been to the United States Supreme Court once. Initially, the same Court held that the Board's policy was constitutional, relying on 1970's-era regulations from the United States Department of Education. While Grimm's appeal of that ruling was pending, the Obama administration's Office for Civil Rights issued guidance that transgender students are permitted to select which bathroom facilities to access. A panel of the United States Court of Appeals for the Fourth Circuit relied on that guidance and reversed the trial court, holding the Board's policy unconstitutional. The Board appealed the Fourth Circuit's decision.

While that appeal was pending, the Trump administration's Office for Civil Rights rescinded the Obama administration's guidance on which the Fourth Circuit relied. The United States Supreme Court remanded the case in light of the change. On remand, the United States District Court for the Eastern District of Virginia's August 9, 2019 ruling recites significant background regarding Grimm's personal history, including his experiences at Gloucester County High School. Grimm originally enrolled as a freshman with a female birth certificate. In the spring of his freshman year, Grimm revealed to his parents that he was transgender and later received therapy for gender dysphoria – a condition experienced by some transgender people that inflicts significant stress because their gender identity differs from the sex assigned to them at birth. Grimm legally changed his first name to Gavin and began using male pronouns to describe himself.

Prior to his sophomore year, Grimm met with the school's guidance counselor and requested that he be treated as a boy at school. He agreed to use the restroom in the school nurse's office, but soon found it to be stigmatizing and too remote from his classes. The school principal then allowed Grimm to use the male restrooms, which he did for seven weeks without incident or complaint. Later, the division administration and the Board received complaints from adults

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in the community. In response to these, the Board in December 2014 adopted a policy requiring students to use restroom and locker room facilities corresponding to their "biological genders," and that students with gender identity issues would be provided an alternative appropriate facility. In his lawsuit, Grimm alleged the neutral facilities were located too far from his classes; they stigmatized and isolated him; and he avoided using them – which resulted in his medical issues. Grimm later underwent chest-reconstruction surgery. In 2016 the Gloucester County Circuit Court entered an order declaring Grimm's sex to be male and directing the Virginia Department of Health to issue him a birth certificate listing his sex as male, which it issued. The Board has declined to amend Gavin's student records. He graduated high school in June 2017.

In May 2018, on remand, the trial Court denied the Board's motion to dismiss. It joined a federal trial court in Maryland in concluding that under Title IX "discrimination on the basis of transgender status constitutes gender stereotyping because 'by definition, transgender persons do not conform to gender stereotypes.'" In its recent August 2019 ruling granting Grimm's motion for summary judgment, the Court again rejected the Board's argument in defense of its restroom policy: that the plain language of Title IX and its implementing regulation define sex as a binary term encompassing the physiological distinction between men and women. The Court relied on its analysis from the motion to dismiss stage and cited to three recent decisions from other jurisdictions that agreed with its reasoning, explaining that the Board relied on the term "biological gender," which is not medically accepted. The Court explained that many aspects of biology – not simply "the primary genitals and sex characteristics" as advanced by the Board – determine a person's sex, including hormones, genes, and chromosomes. The Court held that the Board's policy was based on unlawful stereotypes. "In sum, there is no question that the Board's policy discriminates against transgender students on the basis of their gender

nonconformity. Under the policy, all students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go."

The Court also held that Grimm was the only student with a male birth certificate who was not permitted to use the male bathroom and not to have a male transcript. The Court held that he was discriminated against on the basis of his transgender status and suffered emotional and physical harm, including urinary tract infections and suicidal thoughts. Regarding his student records, the Court observed that Grimm has to provide other educational institutions or employers a document that negates his male identity and marks him different from other males.

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Poignantly, the Court rejected the Board's argument that its policy was necessary to protect the privacy interests of other students. The Court pointed to Grimm's seven weeks' of using the male restroom without incident or complaint. It emphasized that the Board's argument ignores the manner in which transgender students use the bathroom (e.g., by entering a stall and closing the door). The Court recognized teachers' and administrators' "solemn obligation to guard the well-being of the children in their charge" and quoted Nelson Mandela: "history will judge us by the difference we make in the everyday lives of children." In closing, it wrote: "[h]owever well-intended some external challenges may have been and however sincere worries were about possible unknown consequences arising from a new school restroom protocol, the perpetuation of harm to a child stemming from unconstitutional conduct cannot be allowed to stand."

The Board has appealed this ruling. Administrators are encouraged to work closely with their respective school board counsel as transgender student jurisprudence evolves.