RECORD NO. 19-1952

In The
United States Court of Appeals
For The Fourth Circuit

GAVIN GRIMM,

Plaintiff – Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS

SUPPLEMENTAL BRIEF OF APPELLANT

David P. Corrigan
Jeremy D. Capps
M. Scott Fisher, Jr.
George A. Somerville
HARMAN CLAYTOR CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, Virginia 23255
(804) 747-5200

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

REGULATION

INTRODUCTION

"The only question before" the Supreme Court in *Bostock* was "whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'" *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686, at *17 (U.S. June 15, 2020). While many believed that *Bostock* would definitively answer the questions presented in this case, it did not. Indeed, *Bostock* specifically did "*not* purport to address bathrooms, locker rooms, or anything else of the kind" under Title VII or any other federal law that prohibits discrimination. 2020 WL 3146686 at *17 (emphasis added).

What is apparent, however, is that the School Board's policy and actions remain lawful under Title IX and the Equal Protection Clause. *Bostock* did not alter the universal understanding of sex as a binary concept; to the contrary, the Court's reasoning depends on it. As a result, the School Board's restroom policy is permissible under Title IX and its implementing regulations. Similarly, the Equal Protection Clause is not violated.

ARGUMENT

I. The School Board did not discriminate against Grimm.

Under Title IX, "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). The enacting regulations, however, state that an educational institution "***may*** provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33 (emphasis added).

The *Bostock* decision is grounded in the premise that "sex" refers "only to biological distinctions between male and female." 2020 WL 3146686, at *4. By analyzing sex in this manner, *Bostock* ultimately validates the School Board's position.

Grimm argues that "discriminating against someone because they are transgender *inherently* constitutes sex discrimination." Brief of Appellee (ECF No. 23) at 45 (emphasis added). But, at its core, Grimm's claims turn on his assertion that he is a male, based on his gender identity, even though Grimm remains anatomically female. Grimm's premise is inconsistent with and contrary to the reasoning behind the *Bostock* decision.

The Supreme Court reasoned that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id*. at *7. It explained:

> When an employer fires an employee because she is … transgender, two causal factors may be in play – *both* the individual's sex *and* something else (the sex … with which the individual identifies).

Id. (italics in original; underlining added). Expounding on this, the Court "agree[d] that homosexuality and transgender status are distinct concepts from sex." *Id.* at *11. In short, *an individual's sex* is "something else" from "the sex … with which the individual identifies." *Id.* at *7.

In that respect, and in each instance and hypothetical, *Bostock* looks to biological sex to determine whether discrimination occurs. The entire reasoning of the *Bostock* decision turns on that understanding; and it is inconsistent with Grimm's argument that he is a male in the eyes of the law.[1]

As set out in the School Board's original briefs, the undisputed evidence in this case establishes that Grimm remains biologically and anatomically female. *See e.g.* ECF No. 19, pp. 8, 12; ECF No. 49, pp. 7-11. Grimm's gender identity does not change Grimm's sex to male. Under *Bostock*, when separating boys and girls on the basis of sex in restrooms and similar facilities, schools may rely on the anatomical and physiological differences between males and females rather than

[1] *See e.g.,* "Gavin Grimm ('Gavin') is a twenty-year-old man who is transgender." ECF No. 23, p. 1; *see also*, *e.g.*, *id*. at p. 9 ("Gavin used the same restrooms as other boys for seven weeks …"), at p. 18 ("Gavin had been barred from using the same restrooms as other boys"), at p. 25 (the School Board violated Title VII "[b]y excluding Gavin from the same restrooms as other boys"), at p. 32 ("Gavin is 'a boy asking his school to treat him just like any other boy'") (citation omitted), 46 ("Prohibiting Gavin from using the same restrooms as other boys was … a Title IX violation").

the students' gender identity, because under Title IX, *it is permissible* to provide separate restrooms on the basis of sex. 34 C.F.R. § 106.33.

The School Board has done just that. It distinguishes boys from girls on the basis of physiological or anatomical characteristics, or as Grimm characterizes it, the student's sex "assigned" at birth. (In *Bostock*, the Supreme Court uses the term "identified at birth.") While other schools may choose a different alternative or enact different policies to address transgender students, Title IX's regulations explicitly state that the School Board "may provide" separate restrooms "based on sex." Therefore, a policy of providing segregated same-sex restrooms and single-stall unisex restrooms for any student to use does not violate Title IX and is permissible under section 106.33. Indeed, as stated in oral argument, the School Board could not prevent Grimm from using the female restroom under *Price Waterhouse*.

Grimm asserts that under the *Bostock* framework, "the key question for the Court to resolve when analyzing a restroom exclusion is whether the exclusion is a "distinction[] or difference[] in treatment that injure[s] protected individuals." ECF No. 81, p. 4. But Grimm is not a protected individual because he is transgender. *Bostock* instructs that it is "sex" that is protected. Grimm's argument fails to account for the Supreme Court's actual reasoning, as discussed above. The Supreme Court explained the point:

> take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains *an otherwise identical employee* who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

2020 WL 3146686 at *7 (emphasis added).

If the School Board had expelled Grimm because he was transgender, but expelled no other students because they are either male or female, then *Bostock* might be more analogous. But here, the record establishes that the School Board sought to accommodate Grimm in his transition, including using Grimm's new name and male pronouns and changing Grimm's name in school records.

Bathrooms, locker rooms, and other traditionally private facilities and spaces are different. With respect to such areas, and with respect to the characteristics that have supported and even required separate facilities from time immemorial, "a transgender person who was identified as a male at birth but who now identifies as a female" is *not* "otherwise identical" to a person "who was identified as female at birth." Grimm's argument, that "the undisputed facts showed that the Board's exclusion of Gavin from the same restroom as other boys singled him out for different treatment", thus rings hollow in the face of *Bostock*'s reasoning.

The record is undisputed that Grimm remains biologically and anatomically female. Whether under Title IX or the Equal Protection Clause, separating boys

and girls into different restrooms based on their physiology is not sex discrimination. Thus, the "key question" is one that the record unambiguously *does not* answer in Grimm's favor.

The School Board's restroom policy was developed to treat all students and situations the same. To protect and respect the privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding physiology of the students. The School Board also provides three single-stall restrooms for any student to use, regardless of his or her physiology. All students have two choices under the policy. Every student can use a restroom associated with their physiology, whether they are boys or girls. If students choose not to use the restroom associated with their physiology, they can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.

II. *Bostock* is limited to the employment setting.

The Supreme Court emphasized in *Bostock* that "[a]n individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'" 2020 WL 3146686 at *6 (quoting *Price Waterhouse v. Hopkins*, 490 U. S. 228, 239 (1989)). It made no similar pronouncements with respect to access to restrooms and other traditionally private facilities.

As noted above, *Bostock* is limited to discrimination in employment under Title VII. The *Bostock* decision does not address the responsibilities of school systems who deal with students, from kindergarten through twelfth grade, and the privacy issues associated with their restroom use.

The Supreme Court took pains to emphasize that point. *See* 2020 WL 3146686 at *17, responding to employers' arguments that the decision "will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" and that "under Title VII itself … sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today." The Court answered those arguments as follows:

> [N]one of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, *we do not purport to address bathrooms, locker rooms, or anything else of the kind*. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." … Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Id. (emphasis added). There are manifest and obvious differences between termination of an adult's employment and access of a child to private restroom facilities in schools. The Court recognized those differences and emphasized that its *Bostock* decision did not resolve the issues presented in this case.

CONCLUSION

For the foregoing reasons, and for the reasons stated at oral argument and in its previous briefs, the School Board respectfully requests that this Court reverse the District Court's Order denying the School Board's motion for summary judgment and granting Grimm's motion for summary judgment and enter judgment in favor of the School Board.

GLOUCESTER COUNTY SCHOOL BOARD

By Counsel

/s/ David P. Corrigan
David P. Corrigan
VSB 26341
Jeremy D. Capps
VSB No. 43909
M. Scott Fisher, Jr.
VSB No. 78485
George A. Somerville
VSB No. 22419
Attorney for Gloucester County School Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 - Fax
dcorrigan@hccw.com
jcapps@hccw.com
sfisher@hccw.com
gsomerville@hccw.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   [X] this brief contains [*1,784*] words.

   [ ] this brief uses a monospaced type and contains [*state the number of*] lines of text.

2. This brief complies with the typeface and type style requirements because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2016*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: June 26, 2020

/s/ David P. Corrigan
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 26th day of June, 2020, I caused this Supplemental Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ David P. Corrigan
Counsel for Appellant