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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

From the beginning, the Gloucester County School Board ("School Board") has treated Gavin Grimm ("Grimm") with respect and attempted to accommodate Grimm's gender identity based on Grimm's assertions to school staff. The School Board also enacted a restroom policy that is consistent with Title IX and the Constitution to address the privacy concerns of all students. Grimm's rights were not violated.

During the course of this litigation, Grimm graduated from high school and abandoned any claim for compensatory damages or an injunction based on the restroom policy. Grimm's only claims at this stage are for nominal damages and declaratory relief. It is clear that Grimm seeks nothing more than a judicial stamp of approval, which is not a proper remedy. Grimm's claims are moot and should be dismissed.

Even if Grimm's claims are not moot, the claims he presents are not viable. Instead, Grimm attempts to re-write the statutory and regulatory text of Title IX to prohibit discrimination on the basis of gender identity, rather than on the basis of sex, and seeks protection under the Equal Protection Clause because of his transgender status. Yet, the evidence does not support that Grimm is a male or that it was medically necessary for him to use the boys' restroom at school. The

School Board's policy does not discriminate based on sex stereotypes or even take sex stereotypes into consideration.

The School Board has an interest in protecting the privacy rights of all students, and its policy balances those privacy rights appropriately. The District Court erred in denying the School Board summary judgment and granting summary judgment in favor of Grimm. This Court should reverse the District Court's judgment.

ARGUMENT

I. Grimm's claims for nominal damages only and declaratory relief are moot.

During the course of this litigation, Grimm made a strategic decision to drop any claim he may have had for compensatory damages and instead focus on nominal damages and declaratory relief.[1] Grimm's original Complaint sought "[d]amages in an amount to be determined by the Court." [ECF Doc. 8]. Once the case returned to the District Court after the initial appeal to the Supreme Court of the United States, Grimm filed an Amended Complaint which sought only "[n]ominal damages in an amount determined by the Court." [ECF Doc. 113]. Grimm's Second Amended Complaint, which is the subject of this appeal, also

[1] By foregoing a claim for compensatory damages, Grimm prevented discovery on many issues, including the full nature and extent of his medical history and the causation of any harm he may have suffered as a result of, or irrespective of, the School Board's policy.

appeal, also seeks only "[n]ominal damages in an amount to be determined by the Court." JA 87. Grimm, therefore, has made a conscious decision not to seek compensatory damages.[2]

Grimm contends that his case is not moot as a matter of law, because he still has a claim for nominal damages. The issue before this Court is whether a request for nominal damages only, in conjunction with declaratory relief, saves a claim from mootness. None of the authority cited by Grimm addresses that particular issue.

For example, in Rendelman v. Rouse, 569 F.3d 182 (4th Cir. 2009), the Fourth Circuit did not address the question of whether a claim for nominal damages only could save a claim from mootness. Relying on Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 429 n.4 (4th Cir. 2007), the Court observed that "even if a plaintiff's injunctive relief claim has been mooted, the action is not moot if the plaintiff may be 'entitled to *at least* nominal damages.'" Rendelman, 569 F.3d at 187 (emphasis added). The footnote in Covenant that Rendelman cites shows that "Covenant sought compensatory ***and*** nominal damages." 93 F.3d at 429 n.4 (emphasis added). Thus, these cases stand only for the proposition that a claim is not moot when there is a claim for

[2] With Grimm having graduated from high school in June 2017, Grimm did not seek injunctive relief in his Second Amended Complaint.

compensatory damages and nominal damages pending such that the plaintiff could, at a minimum, recover nominal damages. Id.

Unlike Rendelman, the Eleventh Circuit's decision in Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia, 868 F.3d 1248, 1263 (11th Cir. 2017), cert. denied sub nom. Davenport v. City of Sandy Springs, Ga., 138 S. Ct. 1326 (2018), is directly on point. In Flanigan's, the court held that a city's repeal of an ordinance mooted the plaintiff's claim for declaratory and injunctive relief and that the plaintiff's claim for nominal damages did not, by itself, save an otherwise moot case. Like Grimm, the plaintiff in Flanigan's did not request actual or compensatory damages. Id. at 1263, n11.

In holding that the plaintiff's only remaining claim for nominal damages was moot, the court reasoned,

> At this point in the litigation, the only redress we can offer Appellants is judicial validation, through nominal damages, of an outcome that has already been determined. Perhaps more than most, we have no doubt that these particular Appellants—having waged a years-long battle against the City—would enjoy seeing this Court vindicate their cause as a worthy one. They may truly believe that this purely psychic satisfaction would serve as an effective remedy for their complained-of injuries. However, as in the standing context, absent an accompanying practical effect on the legal rights or responsibilities of the parties before us, we are without jurisdiction to give them that satisfaction.

Id. at 1268.

Grimm nonetheless argues his claim would not be moot under the Flanigan's standard. Attempting to distinguish his case from Flanigan's, Grimm argues his is one in which there was in fact an actual loss but nominal damages is an available remedy. [Brief of Plaintiff-Appellee at 27]. This exact argument was recently made and rejected by the Eleventh Circuit in Uzuegbunam v. Preczewski, 781 F. App'x 824, 832 (11th Cir. 2019) (upholding Flanigan's and finding that a claim for nominal damages only, where there was never a claim for compensatory damages, does not save a claim from mootness).

While Flanigan's contemplates a class of cases in which a claim for nominal damages would be sufficient to maintain a case or controversy, this is not that case. Just as in Flanigan's, the only relief Grimm actually requests, other than declaratory relief, is nominal damages. As a result, there has not been a controversy over compensatory damages since Grimm first amended his complaint after voluntarily dismissing his appeal in the Fourth Circuit. Indeed, Grimm is seeking only nominal damages to avoid discovery related to compensatory damages and really only wanted a declaratory judgment and attorney's fees.

Grimm has graduated from high school and is no longer subject to the School Board's policy. Nonetheless, he seeks a declaration that his rights were violated in the past without any intent to pursue compensatory damages for the period during which he was subject to the School Board's policy. By pursuing a

claim solely for nominal damages and a retroactive declaration that his rights were violated, Grimm's purpose for continuing this litigation is clear. Grimm wants to have this Court vindicate him with a judicial stamp of approval.[3] Such a finding would have no practical effect on either the rights of Grimm when he was a student or the responsibilities the School Board may have had. Accordingly, Grimm's claim is moot and should be dismissed with prejudice.

II. The School Board's policy does not discriminate against Grimm on the basis of sex.

With respect to both the Title IX and Equal Protection claims, Grimm argues that discriminating against a student because of his transgender status constitutes sex discrimination. The only way for this argument to succeed analytically is if Grimm is found to be a boy who was not treated the same as all other boys. Grimm acknowledges this, arguing he is "a boy asking his school to treat him like any other boy." [Brief of Plaintiff-Appellee at 27 (citing G. G. v. Gloucester Cty. Sch. Bd., 853 F.3d 729, 730 (4th Cir. 2017), as amended (Apr. 18, 2017) (Davis, J. concurring)]. The evidence, however, establishes that Grimm is not a boy and that the School Board has not discriminated based on sex stereotypes.

[3] The District Court provided Grimm just that when it awarded him nominal damages in the amount of one dollar along with declaratory relief. JA 1192.

A. Grimm remains biologically and anatomically female.

At conception, a fetus is determined to be either a male (XY) or female (XX). The term "sex" refers to the biological indicators of male and female such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal or external genitalia. JA 1075; 1116. Sex is determined or recognized at birth by external genitalia and internal reproductive organs. JA 548-49, 345-52; 1070-71. Grimm was born a female and remains a female to this day.

Grimm was born with female genitalia and fully functioning female reproductive organs. JA 892-93; 897-98. Grimm was issued a birth certificate listing his sex as female and enrolled in high school as a girl. JA-983-991. Grimm does not have intersex characteristics. JA 892.

Grimm's gender identity does not change Grimm's sex to male. Grimm's own expert testified that (1) choosing gender identity does not cause chromosomal changes in the body and (2) a person's innate sense of belonging to a particular gender does not cause biological changes in the body. JA 1073. Further, it is undisputed that transgender individuals remain biologically men or biologically women. JA 345-51.

Finally, Grimm's chest-reconstruction surgery did not make him a biological and physiological male. Grimm's own expert even testified that Grimm's chest reconstruction surgery did not create any biological changes in Grimm, nor did it

complete gender reassignment. JA 1100-02. Grimm remains anatomically and biologically female.

B. The evidence does not support that Grimm is a male or that he has been diagnosed with gender dysphoria.

By choice, Grimm has not offered medical, mental health, or expert testimony to prove that Grimm is a male or that he has been diagnosed with gender dysphoria.[4] Grimm has not offered medical or expert testimony to prove the severity of the effects of gender dysphoria on Grimm or whether it was medically necessary for Grimm to use the boys' restroom at school to treat his purported gender dysphoria.

The record is devoid of medical evidence related to Grimm's transgender status and purported treatment for gender dysphoria. Grimm also has not designated a mental health expert, treating or retained, to offer testimony that the use of the boys' restroom was a medical necessity for Grimm.[5] JA 172-82. Furthermore, Grimm's expert, Dr. Penn, is not a mental healthcare provider, has

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[4] Grimm provided a letter to school officials written by a clinical psychologist, which indicates Grimm was receiving care for gender dysphoria as of May 26, 2014. JA 123. That letter is hearsay and is at best merely proof that a psychologist wrote a letter about the subjects contained within that letter. During the course of this litigation, Grimm never offered an expert to opine that he is male or has gender dysphoria that required some specific medical or mental health care. Further, Grimm did not seek to prove that it was medically necessary for him to use the boys' restroom. JA 1126-27.

[5] Grimm's expert does not prescribe treatment plans that include social transitioning. JA 1080-81.

never diagnosed anyone with gender dysphoria, and does not express any opinions specific to Grimm. JA 1033-1042.

Grimm's own expert testified that "gender affirming care" or "social transitioning care" is purportedly part of an overall mental health treatment plan to address gender dysphoria. Using the boys' restroom at school is just one component of an overall social transitioning care plan. Thus, even where a transgender student is not permitted to use the restroom consistent with his expressed gender identity, there are other methods of social transition that can be used to help treat gender dysphoria. JA 1092-95.

Additionally, the "standards of care" that Grimm's expert, and "every major medical and mental health professional organization" relies on "to eliminate the clinically significant distress by helping boys who are transgender to live as boys", do not address a transgender student's use of restrooms at school. Neither the WPATH standards of care nor the Endocrine Society guidelines have a standard of care related to the use of restrooms by transgender students at school. JA 1085-90.[6]

Grimm's expert does, however, opine that under these standards of care, the precise treatment for gender dysphoria depends on each person's individualized

[6] Penn also does not know whether the WPATH standards of care were peer reviewed by endocrine professionals, nor does she know who authored the standards of care. JA 1057-58.

need. The medical standards of care differ depending on whether the treatment is for a pre-pubertal child, an adolescent, or an adult. JA 176. Moreover, the standards of care provide that what helps one person alleviate gender dysphoria might be very different from what helps another person. JA 1059-60. The WPATH standards of care that Penn relies on are intended to be a flexible guideline with individualized treatment. JA 1059. Yet, Grimm does not present any expert testimony on what medical treatment Grimm needed.

At best, the use of restrooms consistent with a transgender patient's gender identity is only one component of an overall mental health social transition plan or "gender affirming care" plan to treat gender dysphoria. Gender affirming care, however, can be managed through other methods without requiring school systems to permit transgender students to use the restroom that is inconsistent with their biological sex. If a transgender student is not permitted to use the restroom consistent with his gender identity in school, there are other methods of social transition that can be used to help treat gender dysphoria. JA 345-51; JA 1084-85; 1092-93. Indeed, the School Board and the entire school administration and staff accommodated Grimm in the other aspects of Grimm's social transition, including referring to him by his new name and using male pronouns.

Despite all of the allegations and discovery in this case, Grimm is left with the bare assertion that he is a girl that identifies as a boy. There is not medical,

mental health, or expert testimony in the record to support Grimm's assertion that he is a boy or that it was medically necessary for him to use the boys' restroom at school.

C. The School Board's policy does not discriminate based on sex stereotypes.

The School Board distinguishes boys from girls on the basis of *physiological or anatomical characteristics*. The School Board's policy distinguishes boys and girls based on physical sex characteristics alone, and *not* based on any of the characteristics typically associated with sex stereotyping—such as whether a woman is perceived to be sufficiently "feminine" in the way she dresses or acts. Cf., e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (finding sex stereotyping where female employee not promoted because her employer thought she was too "macho," "overly aggressive [and] unduly harsh" for a woman, and should have walked, talked, dressed, and styled her hair and make-up "more femininely").

The School Board's policy rejects classifying students based on whether they meet *any* stereotypical notion of maleness or femaleness. The School Board's policy does not, for instance, allow only "masculine" boys into the boys' restroom, while requiring more "effeminate" boys to use the girls' restroom. Instead, the policy designates multiple-stall restrooms and locker rooms based on *physiology*, period—regardless of how "masculine" or "feminine" a boy or girl looks, acts,

talks, dresses, or styles their hair. Far from violating Price Waterhouse, the Board's policy is the *opposite* of the kind of sex stereotyping prohibited by that decision. See, e.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) (concluding that Price Waterhouse does not require "employers to allow biological males to use women's restrooms," because "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes").

Under these facts, the School Board's restroom policy does not discriminate based upon sex stereotypes and, in fact, does not take sex stereotypes into consideration. The policy is based on the biological and physiological characteristics of students.

III. The School Board's policy does not violate Title IX.

Grimm concedes that "no one disputes that the ordinary definition of 'sex' in 1972 and today includes the physiological and anatomical characteristics." [Brief of Plaintiff-Appellee at 49]. Grimm, however, claims that "[i]t is impossible to identify the 'ordinary, contemporary, common meaning' in 1972 for how to 'provide separate toilet . . . facilities on the basis of sex' to a transgender student because transgender individuals inherently fail to conform to the 'ordinary' or 'common' expectation that a person's sex-based characteristics will all align in the same direct." [Id.]. In plain English, Grimm admits Title IX does not address the

transgender question and, therefore, presses an interpretation of Title IX that "sex" is determined solely according to "gender identity." Perhaps it is a failure on Congress's part in not addressing whether transgender status is covered under Title IX, but Congress's inaction is not a license for this Court to re-write the statute to Grimm's liking.

As the School Board set out in its Opening Brief, the text, history, and structure of Title IX, and the plain language of its implementing regulation, foreclose the view that "sex" is determined according to "gender identity." The better interpretation—reflected in the School Board's policy—is that 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 the students' gender identity.

Grimm cannot escape that Title IX only prohibits discrimination under an education program or activity "on the basis of sex"– *not* on the basis of "gender" or "gender identity." 20 U.S.C. § 1681(a). Grimm now asserts on brief that this case is not about the definition of "sex," but is about the meaning of "discrimination" in the context of providing separate toilet facilities on the basis of sex. [Brief of Plaintiff-Appellee at 49]. Grimm's attempt to change the meaning of Title IX cannot be read so narrowly.

Grimm's emphasis on the word "discrimination" does not obscure that the only "discrimination" that falls within the statute is discrimination "on the basis of sex." Sex has to be defined in order to determine whether there is discrimination on the "basis of sex." The word "sex" in 2019, no less than in 1972, has a plain, simple, straightforward, and well understood meaning that refers to the anatomical, physiological, and even biological differences between males and females.

Importantly, the record in this case also supports the School Board's position. As set forth above, Grimm's own expert agrees there is a biological, anatomical, and physiological component to determining the sex of an individual. Moreover, the evidence shows that the desired use of a restroom consistent with a transgender individual's gender identity is not because of the transgender individual's "sex." Instead, it is one component of a mental health treatment plan – social transitioning – to address gender dysphoria. It is not an immutable right based on sex.

Further, Grimm has not put forth expert evidence to support his contention that the term "sex" under Title IX should be interpreted differently as a result of his gender identity or a medical treatment plan. Additionally, there is no evidence that individuals with physiological characteristics associated with both sexes are implicated in this case. Grimm testified he does not have intersex characteristics.

Thus, under these circumstances, 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.

IV. The School Board's Policy does not violate the Equal Protection Clause.

The "[Equal Protection] Clause requires that similarly-situated individuals be treated alike." Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). In order to make out a claim under the Equal Protection Clause, Grimm must demonstrate that he has been treated differently from others similarly situated and that the unequal treatment was the result of intentional discrimination. Morrison v. Garraghty, 239 F.3d 648, 652 (4th Cir. 2001); Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002).

A. Grimm cannot prevail, because all students are treated the same under the School Board's Policy.

The School Board's restroom policy does not discriminate. Instead, the 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.

Under the School Board's restroom policy, Grimm was treated like every other student in the Gloucester Schools. 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.

Grimm, therefore, cannot demonstrate either that he was treated differently from others similarly situated or that he was subject to intentional discrimination in violation of the Equal Protection Clause. See Workman v. Mingo County Bd. of Educ., 419 F. App'x 348, 354 (4th Cir. 2011) (no evidence of unequal treatment in application of state mandatory vaccination laws before admission to school); Hanton v. Gilbert, 36 F.3d 4, 8 (4th Cir. 1994) (no evidence that similarly situated males were afforded different treatment).

B. The School Board's Policy is presumptively constitutional under rational basis review.

Grimm's identification as a male does not supersede the legitimate privacy rights the School Board considered in enacting the restroom policy. Accordingly, the School Board stands on its arguments set forth in Section III(D) of its Opening Brief. [Brief of Defendant-Appellant, ECF No. 19, pp. 49-53].

C. Intermediate scrutiny does not apply; however, the School Board's Policy is still constitutional under intermediate scrutiny.

1. Transgender persons are not entitled to heightened scrutiny.

Neither the Supreme Court of the United States nor the Fourth Circuit has recognized transgender status as a suspect classification under the Equal Protection Clause. Other courts have rejected the notion that transgender status is a suspect classification. See, e.g., Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that transsexuals are not a protected class under Title VII); Druley v. Patton, 601 F. App'x 632, 635 (10th Cir. 2015) (declining to recognize transgender as a suspect class); Brown v. Zavaras, 63 F.3d 967, 970-71 (10th Cir. 1995) (declining to recognize transsexuality as a protected class); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) ("transsexuality itself [is] a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII"); Johnston v. Univ. of Pittsburgh of Com. Sys. Of Higher Educ., 97 F. Supp. 3d 657 (W.D. Pa. 2015) (holding that transgender status is not a suspect classification); Jamison v. Davue, No. CIV S-11-2056 WBS, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012) ("Plaintiff is cautioned, however, that transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review."). This Court should not recognize transgender as a

new suspect classification. Indeed, the Supreme Court has admonished lower courts not to create new suspect classifications. See City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

Furthermore, intermediate scrutiny does not apply based on the facts of this case. Unlike laws that differentiate between fathers and mothers, widows and widowers, unwed fathers and unwed mothers, see Sessions v. Morales-Santana, 137 S. Ct. 1678, 1688-89 (2017), separating boys and girls into different restrooms based on their physiology is not sex-based discrimination that is prohibited by the Equal Protection Clause.

The equal protection question surrounds Grimm's sex at birth. Johnston, 97 F. Supp. 3d at 671. The evidence in this case establishes that Grimm's birth sex is female. Grimm's choice of gender identity did not cause chromosomal or biological changes in his body. JA 1073-74. While Grimm had chest reconstruction surgery in June of 2016, this procedure did not create any biological changes in Grimm, but instead, only a physical change. JA 1100. Further, while Grimm asserts that he had a new birth certificate issued during his senior year in high school as a result of this chest procedure, the evidence nevertheless establishes that Grimm is still anatomically and physiologically female. Accordingly, Grimm's equal protection claim should be reviewed under the rational basis standard.

2. The School Board's policy nonetheless passes intermediate scrutiny.

Even if intermediate scrutiny applied, the School Board has an interest in protecting the privacy rights of its students. See, e.g., Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980) ("[i]t does not require a constitutional scholar" to conclude that a strip search invades a student's privacy rights). As recently as January 2016, the Fourth Circuit cited United States v. Virginia, 518 U.S. 515 (1996), approvingly while concluding that physiological differences justified treating men and women differently in some contexts. See Bauer v. Lynch, 812 F.3d 340, 350 (4th Cir. 2016).

As an initial matter, the School Board does not have to wait for another student's constitutional privacy rights to be actually violated before it takes those privacy rights into consideration in enacting a policy to protect all students' privacy rights.

> Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason, for the obverse would be repugnant to notions of human decency and personal integrity.

Kent v. Johnson, 821 F.2d 1220, 1226 (6th Cir. 1987); see also, Doe v. Luzerne Cty., 660 F.3d 169, 176 (3d Cir. 2011) (we are not aware of any court of appeals that has adopted … a requirement that certain anatomical areas of one's body, such as genitalia, must have been exposed for that person to maintain a privacy claim under the Fourteenth Amendment ….").[7]

Regardless, the record is clear that there were legitimate privacy concerns despite Grimm's baseless assertion that the School Board "failed to present *any* evidence" of such concerns. In fact, the privacy interests of other students were implicated almost immediately in this case. Within two day after October 20, 2014 when Grimm began using the boy's restroom, parents of Gloucester students learned that a transgender boy was using the boys' restrooms and complained to the School Board and administration. JA 378. Additionally, a student complained about the lack of privacy in the restroom. JA 159-71; 378. Grimm was also involved in an altercation with a fellow student concerning Grimm's use of the male restroom. JA 870-73; JA 1211. Further, the School Board received 39 emails and several oral communications, mostly from parents of students in Gloucester County, in opposition to a transgender student using the restroom that

[7] Grimm's assertion on brief that defense counsel conceded that Grimm's use of the boys' restroom did not implicate any privacy concerns is not accurate. [Brief of Plaintiff-Appellee at 2]. Indeed, counsel specifically stated that there were legitimate privacy concerns with Grimm's use of the restroom. JA 1161.

was inconsistent with the student's biological sex and expressing concerns about student privacy. JA 159-71.

Finally, Grimm explicitly acknowledged that there were privacy rights and concerns with his use of the boys' restroom. In fact, Grimm sought to protect his privacy rights by making it clear to school administrators that he only wanted to use the boys's restroom if the restroom stall was equipped with a door. The School Board's interests in student privacy satisfy the Equal Protection Clause.

V. Grimm's new birth certificate does not establish a Title IX or Equal Protection claim.

Grimm has created an inaccurate narrative to characterize the School Board's restroom policy.[8] Contrary to Grimm's assertion, the School Board's policy of providing separate restrooms for boys and girls is based on students' physiology and anatomy. The School Board testified that although there is not a set process or procedure, the School Board relies on social norms, binary sexes, and students using the restroom that corresponds to their physiological sex. JA 456-58.

While the School Board accepts a student's birth certificate as evidence of determining a student's physiology when the student enrolls in school, there has never been a conflict between a birth certificate and the student's physiological

[8] To the extent Grimm's claims for declaratory and injunctive relief concerning his school records are not moot, Grimm still only seeks nominal damages.

sex. This case is the only time there has been a conflict between those concepts. JA 456-58. Grimm's attempt to establish a Title IX and Equal Protection claim based on the birth certificate that was issued during Grimm's senior year in high school does not change the evidentiary analysis in this case.

Grimm's principal argument appears to be that the state Circuit Court's order directing the State Registrar to amend Grimm's birth certificate is not subject to collateral attack under Virginia law (citing Hicks v. Mellis, 275 Va. 213, 219-20, 657 S.E.2d 142, 145-146 (2008)) and is entitled to full faith and credit in this Court under 28 U.S.C. § 1738. [ECF Doc. 201, p. 21]. That argument misses the point.

Grimm's amended birth certificate does not change Grimm's physiological and anatomical sex – which remains female. While Grimm had chest reconstruction surgery, it did not create any biological changes in Grimm. Instead, it is only a physical change. JA 1100. There is no evidence in the record to suggest that Grimm has completed "surgical gender reassignment," and to that extent, Grimm remains biologically and anatomically female. JA 1100-02; JA 898. Thus, while Grimm was enrolled in Gloucester High School, the School Board was aware that Grimm remained physiologically and anatomically a female.

In addition, the School Board declined to revise Grimm's official school transcript, because the information that Grimm provided was at odds with the process and procedures outlined by Virginia law and the Virginia Administrative

Code to amend a birth certificate. Additionally, the birth certificate provided was stamped void and not "amended." JA 507-08; 1219.

Grimm also erroneously argues he was not required to request a FERPA hearing. For the reasons set forth in the School Board's Opening Brief, that is simply not the case. Moreover, the School Board offered Grimm the opportunity to submit additional materials and have a hearing on whether his records should be changed. Indeed, Grimm's counsel received a letter stating, "Please feel free to submit additional materials, and, of course, [Grimm] has the right under school policy JO, see page 8 Correction of Education Records, to a hearing to challenge the information believed to be 'inaccurate, misleading or in violation of the student's rights.' I look forward to hearing further from you." Grimm did not request a hearing on the School Board's denial of his request to have his transcript changed, either while he was a student at Gloucester High School or after his graduation in the spring of 2017. JA 983-91.

The decision of an educational agency or institution, after a hearing upholding a refusal to amend a record, is reviewable. See Lewin v. Medical College of Hampton Roads, 931 F. Supp. 443, 444 (E.D. Va. 1996), aff'd, 1997 WL 436168 (4th Cir. 1997). Here, the School Board met FERPA's requirements by informing Grimm of his right to a hearing on the issue. JA 992-93. Grimm has not requested a hearing (or otherwise sought relief under that Act). Therefore, his

school records claim must be dismissed for failure to exhaust an available administrative remedy.

CONCLUSION

For the foregoing reasons, 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.

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Dated: December 9, 2019

/s/ David P. Corrigan
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of December, 2019, I caused this Reply 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.

I further certify that on this 9th day of December, 2019, I caused the required copy of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

/s/ David P. Corrigan
Counsel for Appellant