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LAW CENTER

The Impact of *Grimm v. Gloucester County School Board* On Virginia School Boards

QUESTION PRESENTED

What is the impact of the Fourth Circuit Court of Appeal's August 2020 decision in *Grimm v. Gloucester County School Board*¹ on Virginia School Boards relative to "transgender" policies?

SHORT ANSWER

In *Grimm v. Gloucester County School Board*, a divided 2-1 panel of the Fourth Circuit held that the school board had to allow a female high school student who identified as "transgender" to use the boy's school bathroom, reasoning that preventing the student from doing so in that case would amount to impermissible "sex discrimination" in violation of Title IX of the Education Amendments of 1972 and the Equal Protection clause of the 14th Amendment. While the Fourth Circuit's opinions are binding on Virginia, the holding in *Grimm* should be viewed as narrow in scope, particularly in light of several key factors relied upon by the Court. These factors and how they are likely vary widely from school to school are discussed below.

Consider some of the key facts² that led to the outcome in *Grimm*: **1)** The case considered a high school setting, not elementary or middle school; **2)** The student's parents were at all times aware of and involved in their child's decision to identify as the opposite sex; **3)** The student had an official medical diagnosis of "gender dysphoria" by a licensed psychologist; **4)** The school received a formal letter from the child's doctor; **5)** The student had undergone hormone injections and "gender reassignment surgery"; **6)** The student looked and sounded more like someone of the opposite sex, including having a deeper voice and facial hair; **7)** The student actively went by a different, typically-male name and male pronouns; **8)** The student's gender identity was both "persistent and consistent"; **9)** The student's driver's license was changed to indicate a different "sex"; **10)** The student obtained an official court order and a new Birth Certificate reflecting a "change" in sex, which the parents then presented to the school; **11)** The court only addressed bathroom use, not locker rooms, overnight trips, or sports teams; **12)** Only one student had ever complained about the use of bathrooms by a member of the opposite sex; **13)** The case involved a female using male facilities, not males using female facilities; **14)** No incidents had occurred that violated student privacy or safety as a result of the opposite-sex bathroom use; and **15)** The school had taken significant steps to retrofit its bathrooms to better address student privacy and safety concerns.

¹ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (2020).

² See Appendix below for a more detailed and comprehensive list of these key factors.

While it is impossible to say which of these factors was indispensable to the Court's decision, or whether the Court simply considered them in their totality, what is apparent is that facts and circumstances that are markedly different from those posed in *Grimm* could certainly warrant – and even demand – a different conclusion for individual school districts.³ Moreover, it is important to point out what *Grimm* did *not* address, and therefore what issues school boards cannot rely upon *Grimm* to decide for them: 1) Students' use of locker rooms, overnight sleeping arrangements, or athletic teams; 2) Parents' rights to be notified if their child or another child has begun to identify as a different gender at school; or 3) Teachers' and students' rights and obligations in speaking words or taking actions inconsistent with biology and/or conscience.

Hence, while *Grimm* should be a part of every school board's individualized analysis for handling “transgender” issues, it must be viewed as limited in scope to its particular facts and key legal rationales. When determining the appropriate policies involving transgender-identifying students, each school district must weigh its own unique facts and circumstances, which may be significantly distinct from those present in *Grimm*, while also taking into account the full spectrum of authoritative case law, including those cases which address parental rights, student privacy, equal protection, and religious exercise.

Among the legal points of emphasis in *Grimm*, the Court made much of the fact that, according to the record in the case, there had been no known violations of any student's privacy or safety in school bathrooms. The Court went so far as to describe the School Board's concerns over students' safety as “fantastical fears and unfounded prejudices,” merely “hypothetical,” and “based upon sheer conjecture and abstraction.” *With that premise*, the Court held that the School Board's exclusion of a “transgender” student from opposite-sex bathrooms was not justified under the “intermediate review” standard for judging sex discrimination because, according to the Court, the Board's policy was not “substantially related to its important interest in protecting students' privacy.”

But as we all now know, a lot has happened since the Fourth Circuit made such claims. There have been high profile sexual assaults in high school bathrooms in Virginia public schools, most notably in Loudoun County. School board concerns over student safety in bathrooms from allowing use by opposite-sex children are not only well founded, but compelling. These developments seriously call into question the continued validity of *Grimm* for any school board under such significantly different facts and circumstances, particularly because the Court stressed this point so emphatically as a basis for its holding.⁴ Indeed, the impact of the *Grimm* holding has arguably been rendered *obsolete* in light of the egregious safety violations that have become widely known since the case was decided.

³ A recent opinion from the Virginia Attorney General highlighted that *Grimm* involved an “as-applied” challenge—focusing specifically on how a board's policy applied under the unique facts of a particular student's case—as opposed to a broader challenge to the school board's policy in general. Va. Att'y Gen. Op. 23-042, at 9, <https://www.oag.state.va.us/files/Opinions/2023/23-042-Youngkin-issued.pdf>.

⁴ Underscoring this validity concern, the Eleventh Circuit recently held—in contrast to *Grimm*—that the 14th Amendment and Title IX do not require a school district to permit a biological female to use restrooms designated for the opposite sex. *Adams v. St. Johns County Board of Education*, 57 F. 4th 791 (11th Cir. 2022).

Similarly, the Court emphasized that the complaints about a student using opposite-sex bathrooms had been coming from *adults*, not from fellow students. The Court noted that only one student had personally complained to the Principal, and stressed that that student had done so *before* significant restroom privacy improvements were made by the school. By the Court’s reasoning, a school board may be well justified in enforcing sex-segregated bathrooms if numerous students report privacy and safety concerns.

Furthermore, as the recounting of some of the key facts demonstrates, Grimm was not just any self-identified “transgender” student. Far different than the vast majority of the situations schools are now routinely facing, Gavin Grimm was a minor who went to *drastic* lengths to embrace and promote her new “gender identity,” including *permanently* altering her physical body, changing her appearance, her social status, and even her *legal* status in order to present herself to the world as the opposite sex. She had a recognized medical diagnosis from a licensed psychologist. And significantly, all of her actions were undertaken with the full knowledge and blessing of her parents – every step of the way.

All of that presents a scenario vastly different than the situation that many, if not all, schools are now facing; namely, a growing number of students simply claiming – without more – to be the opposite sex or one of an endless list of pseudo-genders, seeking to use sex-segregated facilities indiscriminately, without individualized assessments, without any real accountability or oversight, and without regard for student complaints or known safety threats. Given the exceptional facts in *Grimm*, when contrasted with most other situations involving student claims of transgenderism, *Grimm* simply cannot stand for the proposition that *any* child must be allowed to use *any* bathroom (or locker room) at *any* time he or she wishes while in school, simply by claiming – that day – in some sense to be “transgender,” “non-binary,” “gender-fluid,” or something other than their biological sex. School boards should be well justified in establishing more concrete parameters concerning bathroom and locker room usage in the pursuit of order, privacy, safety, dignity, and parental involvement.

In light of the limiting facts and circumstances of the *Grimm* case, the Governor’s 2023 [“Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools”](#) are in full alignment with what *Grimm* would require of any school. Regardless of how one interprets or applies *Grimm*, however, the 2023 Model Policies expressly acknowledge that federal law in some instances could require schools to permit transgender students to share otherwise sex-segregated facilities. Therefore, it will be up to school boards to determine when such access would be federally required. If a school board faces a situation with facts and circumstances substantially similar to those in *Grimm*, then perhaps access to opposite-sex bathrooms would be warranted for similarly-situated students. But while assessing this potential, school boards remain under a legal duty per Va. Code § 22.1-23.3 to adopt policies that are consistent with the 2023 Model Policies.

****This resource is for general, informational purposes only and is not a substitute for tailored legal advice. This resource was published on August 24, 2023, so any subsequent court cases must be taken into account.**

Appendix – Key Relevant Facts in *Grimm*

- 1) **High School.** *Grimm* addressed bathroom use by an opposite-sex student in a high school setting, not elementary or middle schools, where children are arguably more vulnerable.
- 2) **Parental Knowledge and Involvement.** The student’s parent was fully aware of the student’s “transgender” identification and involved in the process from the very beginning.
- 3) **Official Medical Diagnosis.** The student was actually diagnosed with “gender dysphoria” by a licensed psychologist with experience working with minors.
- 4) **Formal Letter from Doctor to School.** The doctor that diagnosed the student prepared a treatment documentation letter that was given to the child’s school.
- 5) **Hormone Injections and “Gender Reassignment Surgery”.** Actual medical treatments were being undertaken by the student, initially through regular hormone injections. Then, prior to the student’s senior year, the student underwent chest reconstruction surgery (a double mastectomy). The Gloucester County Circuit Court found this to be a type of “gender reassignment surgery.”
- 6) **Student Appeared and Sounded Like the Opposite Sex.** Hormone therapy deepened the student’s voice, increased growth of facial hair, and gave the student a more masculine appearance. This was far more than just a claim to be the opposite sex/gender. Drastic measures were taken to change the child’s physical attributes.
- 7) **Actively Went By a Different Name.** The student had decided to be consistently called by a different name typically associated with the opposite sex.
- 8) **Self-Described By Opposite-Sex Pronouns.** The student only used opposite-sex pronouns to describe herself to others.
- 9) **Gender Identity Was “Persistent and Consistent”.** The Court emphasized that the student’s gender identity was both “persistent and consistent.” That is very different than a student who changes frequently or intermittently, or who may have just recently declared a new gender identity.
- 10) **Changed Driver’s License.** Prior to the student’s junior year, the Virginia Department of Motor Vehicles issued Grimm a state identification card reflecting a different sex-designation.

- 11) **Official Court Order and New Birth Certificate.** The County Circuit Court issued an order declaring that Grimm is “now functioning fully as a male” and directed the Virginia Department of Health to issue Grimm a new birth certificate designating her as “male.”
- 12) **Parents Presented School With New Birth Certificate and Requested Records Change.** The student’s parent provided the high school with the student’s new birth certificate and asked that the school records be updated to reflect the student’s gender as “male.”
- 13) **Only Addresses Bathroom Use, Not Locker Rooms.** The student was given permission to complete her physical education courses online and never needed to use the locker rooms at school. The case in no way addressed the issue of locker rooms, overnight lodging accommodations, or sports teams.
- 14) **The School Flip-flopped on Bathroom Use.** The school initially voluntarily agreed to allow the student to use the opposite-sex bathroom for seven weeks, but later rescinded that permission, demonstrating some inconsistency.
- 15) **Students Hadn’t Complained.** During the time the student had been using the opposite-sex bathrooms, there had only been one student who personally complained to the Principal, and that student did so before significant restroom privacy improvements had been made.
- 16) **Female in Male Facilities.** The case involved a female using male private facilities, not males using female private facilities. Boys and girls can often think and react differently about members of the opposite sex inhabiting private spaces.
- 17) **No Incidents Had Occurred.** No incidents involving the invasion of privacy or safety occurred to any students during the time the Board allowed the student to use the opposite sex bathroom. For that reason, the Court emphasized that the Board’s fears and concerns were not justified because they were nothing but “fantastical fears and unfounded prejudices,” merely “hypothetical,” and “based upon sheer conjecture and abstraction.”
- 18) **Student Always Used Closed-Door Stalls.** The Court emphasized that the school’s privacy concerns were not warranted because “transgender” students simply go into a bathroom stall and close the door. However, this would not be applicable if, for example, a female uses a urinal, nor would it not take into account legitimate concerns for privacy before and after using the stall, or in instances where students can see or gain access under or over the stalls.

- 19) **Schools Had Retrofitted Bathrooms to Address Privacy and Safety Concerns.** The School Board had approved a series of updates to the school's restrooms to improve general privacy for all students, including the addition or expansion of partitions between urinals in male restrooms, the addition of privacy strips to the doors of stalls in all restrooms, and the construction of three single-stall unisex restrooms available to all students.
- 20) **Student Practiced Harmful “Restroom Avoidance”.** The Court noted: “As commonly occurs for transgender students prohibited from using the restroom matching their gender identity, Grimm practiced restroom avoidance. This caused Grimm to suffer from recurring urinary tract infections[.]” Presumably, then, if other students are practicing “restroom avoidance” out of fear or apprehension of students of the opposite sex using their bathrooms, they may be experiencing equally concerning harms.
- 21) **Gavin Grimm was the Only “Transgender” Student in the School District.** Significantly, Gavin Grimm’s situation was unique to her. No other students in the school district claimed to be “transgender,” so no other factual scenarios were considered as a part of the Court’s holding.