No. 20- _____

# In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER,
*v.*
GAVIN GRIMM

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Although Title IX prohibits schools from discriminating "on the basis of sex," 20 U.S.C. §1681(a), it expressly permits them to provide separate living facilities, including restrooms, for the different sexes. 20 U.S.C. §1686; 34 C.F.R. §106.33. This protracted case began when Gavin Grimm, a biological female who self-identifies as male, challenged the local school board's decision to require him to use either a unisex restroom or a restroom assigned to members of his biological sex, i.e., girls.

Four years ago, this Court granted certiorari in this case after the Fourth Circuit deferred to an unpublished letter from the Department of Education, asserting that Title IX requires schools to treat students consistent with their gender identities rather than their biological sex. After a new Administration withdrew that letter, the Court vacated and remanded. The district court and the Fourth Circuit then held that both Title IX and the Fourteenth Amendment's Equal Protection Clause forbid schools from denying transgender students access to the restrooms assigned to the opposite biological sex. Following yet another election, the current Administration has announced it intends to enforce that position nationwide.

The question presented is:

Does Title IX or the Equal Protection Clause require schools to let transgender students use multi-user restrooms designated for the opposite biological sex, even when single-user restrooms are available for all students regardless of gender identity?

## PARTIES TO THE PROCEEDING

Petitioner Gloucester County School Board was Defendant-Appellant in the court of appeals in No. 19-1952.

Respondent Gavin Grimm was Plaintiff-Appellee in the court of appeals in No. 19-1952.

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## INTRODUCTION

For school officials, as for parents, the question of how best to respond to a teenager who identifies with the opposite biological sex is often excruciatingly difficult. On the one hand, the teenager deserves and needs everyone's compassion. On the other hand, allowing the teenager to use multi-user restrooms, locker rooms and shower facilities reserved for the opposite sex raises what this Court has acknowledged to be serious concerns about bodily privacy—for the teenager and others.

Depending on their facilities and resources, some school officials reasonably find ways to accommodate the teenager's desire to use facilities based on gender identity rather than sex. Others, exercising their best judgment as to the needs of all their students, lawfully decide to reserve boy's and girl's facilities to the respective biological sexes—often, as in this case, providing additional options such as single-user facilities available to all students.

Unfortunately, the Fourth Circuit—recently joined by the incoming Administration—has interpreted this Court's decision in *Bostock* v. *Clayton County*, 140 S.Ct. 1731 (2020), as imposing a one-size-fits-all solution to this vexing problem: According to them, even schools that lack sufficient facilities or resources to ensure the bodily privacy of all their students are *still* required by Title IX and the Fourteenth Amendment to allow biologically male teenagers into multi-user girl's restrooms, locker rooms and showers, and vice versa. That means the Board's policy of separating existing multi-user

restrooms by physiological sex while also providing single-user restrooms for all students is prohibited.

Neither Title IX nor the Equal Protection Clause mandates such a sweeping rule, and only this Court can reverse decisions adopting it in a growing number of circuits, supported now by the incoming Administration. This case also gives the Court an ideal, timely vehicle with which to make that decision: The Court has already granted review of the Title IX issue in this very case before the prior Administration reversed its predecessor's erroneous interpretation of that statute. Resolution of the Title IX issue—along with the closely related Fourteenth Amendment issue—has become even more pressing given the new Administration's insistence that Title IX must be applied in a manner contrary to its express terms.

## OPINIONS BELOW

This petition seeks review of the Fourth Circuit's recent decision in *Grimm* v. *Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). Pet.12a-80a. The district court's decision is reported at 400 F. Supp. 3d 444 (E.D. Va. 2019). Pet.119a-155a.

## JURISDICTION

The Fourth Circuit denied the Board's petition for rehearing en banc on September 22, 2020. Pet.4a. The Board timely filed this petition for a writ of certiorari on February 19, 2021. See 28 U.S.C. §2101(c). This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), provides in part:

> No person in the United States 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[.]

Section 907 of Title IX, 20 U.S.C. §1686, provides:

> Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

The Department of Education's implementing regulation, 34 C.F.R. §106.33, provides:

> A recipient 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.

The Fourteenth Amendment provides in part:

> §1 No State shall *** deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

Section 901 of Title IX provides that "[n]o person in the United States 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). But in section 907, Congress carved a narrow exception to that general prohibition on sex discrimination: Covered institutions may still "maintain[] separate living facilities for the different sexes." *Id.* §1686. Senator Birch Bayh, Title IX's principal sponsor, explained that this exception was necessary because there are "instances where personal privacy must be preserved." 118 Cong. Rec. 5807 (1972).

1. Consistent with that observation, the Department of Education has long interpreted "living facilities" to include "toilet, locker room, and shower facilities" as long as "facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. §106.33. On its face, this regulation recognizes the binary nature of sex. Because sex, rather than gender identity, is the subject of both the statute's exemption and the regulation implementing it, a bathroom policy that treats biological women who self-identify as male the same as other biological women cannot violate Title IX. In other words, members of the same sex are treated equally, and comparably to the treatment of members of the opposite sex, regardless of their gender identity.

In the equal-protection context, this Court has also recognized that "[p]hysical differences between men

and women *** are enduring." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). Thus, while the Equal Protection Clause forbids any "official action that closes a door or denies opportunity to women (or to men)" because of their sex, *id.* at 532, official actions grounded in a proper understanding of the enduring biological differences between men and women are entirely permissible.

Accordingly, for decades schools have structured their facilities and programs around the idea that certain spaces would "undoubtedly" be "necessary to afford members of each sex privacy from the other sex in living arrangements." *Id.* at 550 n.19. Such spaces include restrooms, locker rooms and showers.

2. Respondent Gavin Grimm commenced this action when he[1] was a high-school student at Gloucester High School. Pet.19a. Grimm is biologically female, meaning that he was born anatomically and physiologically female, and his original birth certificate listed him as a girl. Pet.19a-20a. He lived as a girl until high school, and even enrolled in high school as a girl, but asserts that "at a very young age, [Grimm] did not feel like a girl." Pet.228a. In July 2014, between Grimm's freshman and sophomore years, Grimm changed his first name to a boy's name and began referring to himself with male pronouns. Pet.31a. He also started hormone treatment but had not undergone surgical alterations to his female sex organs. Pet.35a, 37a.

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[1] Out of respect for Grimm's choice of pronouns, and without conceding any of the legal issues, this Petition will use the masculine pronouns "he" and "him" when referring to Grimm.

In August 2014, before the start of Grimm's sophomore year, he and his mother met with the guidance counselor to discuss Grimm's situation. Pet.121a. School officials were supportive of Grimm and promised a welcoming environment. Pet.171a. School records were changed to reflect Grimm's new name, and the guidance counselor helped Grimm e-mail his teachers asking them to address him using his male name and male pronouns. Pet.231a. As Grimm admits, teachers and staff honored those requests. Pet.209a.

At that time, neither Grimm nor school officials thought he should start using the boys' restrooms, locker rooms, or shower facilities. *Ibid.* Instead, Grimm and his mother suggested that he use a separate single-user restroom in the nurse's office rather than the boys' restroom, and the school agreed. *Ibid.* Grimm claims he accepted this arrangement because he was "unsure how other students would react to [his] transition." *Ibid.* But four weeks into the school year, Grimm changed his mind and sought permission to use the multi-user boys' restrooms. Pet.31a. The principal initially granted Grimm's request. Pet.31a-32a.

Soon after Grimm started using the boys' restrooms, the Board began receiving objections from parents and students concerned about the privacy implications of allowing biological girls into boys' restrooms, and vice versa. Pet.32a. The Board held public meetings on the issue, and citizens on both sides expressed their views in thoughtful and respectful terms. Pet.32a-33a. Eventually, the Board adopted a resolution recognizing that "some students

question their gender identities," and encouraged "such students to seek support, advice, and guidance from parents, professionals and other trusted adults." Pet.231a-232a. The resolution further stated that the Board "seeks to provide a safe learning environment for all students and to protect the privacy of all students." Accordingly, the Board concluded that the use of its multi-user boy's and girl's "restroom and locker room facilities" would be "limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility." Pet.232a.

Before the Board adopted this resolution, the high school announced it was installing three single-stall unisex restrooms throughout the building. Pet.35a. These unisex restrooms would be open to all students who, for whatever reason, desire greater privacy. *Ibid.* These restrooms opened shortly after the Board adopted the resolution. Pet.101a (Niemeyer, J., dissenting). Grimm, however, refused to use the unisex restrooms. Pet.102a.

3. Grimm filed suit against the Board in 2015 alleging that its resolution of this difficult issue violated Title IX and the Equal Protection Clause. Pet.127a. On June 29, 2015, the United States filed a "statement of interest" that also accused the Board of violating Title IX. Pet.234a. That statement did not cite 34 C.F.R. §106.33 or explain how the Board's policy could be unlawful under the regulation's text.

Without ruling on Grimm's equal-protection claim, the district court dismissed Grimm's Title IX claim. It held that 34 C.F.R. §106.33, the regulation allowing comparable separate restrooms and other facilities "on

the basis of sex," included *both* gender identity and biological sex. Pet.240a-243a. But even under this broad reading of "sex," according to the district court, it would remain permissible under §106.33 to separate restrooms by biological sex. Pet.242a. The district court noted that §106.33 would forbid the Board's policy only if "sex" refers *solely* to distinctions based on gender identity, and excludes those based on biological sex. Such a reading, the court held, would effectively nullify Title IX's exemption. *Ibid.*

Grimm then appealed to the Fourth Circuit, which reversed the district court's dismissal. That court held that §106.33 was "ambiguous" about "whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms." Pet.182a-183a. It then deferred to the United States' interpretation of Title IX—promulgated in a Department of Education policy letter—which held that Title IX prohibits discrimination on the basis of gender identity. Pet.183a.

Judge Niemeyer dissented from the panel decision. He explained that "Title IX and its implementing regulations are not ambiguous" in allowing separate restrooms and other facilities on the basis of "sex." Pet.208a. Those provisions "employ[] the term 'sex' as was generally understood at the time of enactment," as referring to "the *physiological* distinctions between males and females, particularly with respect to their reproductive functions." Pet.219a. Judge Niemeyer also explained that the Department of Education letter conflated "sex" in Title IX with "gender identity" and would produce "unworkable and illogical result[s]," which would undermine the privacy and

safety concerns that motivated the allowance of sex-separated facilities in the first place. Pet.207a, 222a.

The Board moved for rehearing en banc, which the panel denied. Pet.159a. Judge Niemeyer dissented but declined to call for an en banc poll, stating that "the momentous nature of the issue deserves an open road to the Supreme Court." Pet.161a.

Taking that invitation, the Board sought review in this Court, which granted the Board's petition. In its order, the Court agreed to decide whether the then-Administration's interpretation of Title IX and 34 C.F.R.§106.33 should be given effect, with or without agency deference. Before the Court could rule on the merits of that question, however, the newly elected Administration withdrew the Department's guidance letter, and the Court vacated the Fourth Circuit's decision. Pet.156a.

4. On remand, the Fourth Circuit dismissed the case on Grimm's motion, and he filed an amended complaint in the district court and, eventually, a second amended complaint. Pet.40a-41a. The district court eventually granted summary judgment to Grimm on both the Title IX and the Equal Protection issues. It also awarded Grimm nominal damages and attorney's fees under 42 U.S.C. §1988. Pet.154a-155a.[2]

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[2] Citing both Title IX and the Equal Protection Clause, the district court also entered a permanent injunction that required the Board to update Grimm's records. Pet.154a-155a. Although the board has complied with the injunction, it has not waived its challenge to it. Moreover, the question presented here is inexorably tied to the Fourth Circuit's holding on the records issue. See Pet.69aa ("easily" concluding that the records claim

The Fourth Circuit ultimately affirmed the district court, agreeing that the Board's restroom policy violated the Equal Protection Clause and Title IX. Purporting to follow this Court's decision in *Bostock,* the panel said it had "little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex'" in violation of Title IX—not because of his female biological sex, but because of his transgender status. Pet.71a. To the panel, the same logic that made it "impossible to discriminate against a person for being *** transgender without discriminating against that individual based on sex" in the Title VII context applied equally in the Title IX context. Pet.72a (quoting *Bostock*, 140 S.Ct. at 1741).

As the Board would later explain in seeking rehearing, the panel missed the point. The question was not whether the Board's restroom policy treated students differently on the basis of sex by requiring biological boys to use the boys' room and biological girls to use the girls' room. It unquestionably did. The question was whether Section 907 of Title IX nevertheless *permits* such sex-based distinctions. See Petition for Rehearing at 8-10 (Sept. 9, 2020). And the panel, despite recognizing that "creating sex-separated restrooms in and of itself" is not prohibited, nevertheless held that the Board violated Title IX by "rely[ing] on its own discriminatory notions of what 'sex' means." Pet.76a. Thus, to the panel, the Board's interpretation of sex allowed the "implementing

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violated the Equal Protection Clause because the restroom policy had as well), 78a (applying the "same [Title IX] framework" to the records claim).

regulation [to] override the statutory prohibition against *discrimination* on the basis of sex." Pet.76a (emphasis in original).

The panel then relegated to a footnote its analysis of Section 907, which it deemed "the more generic Title IX provision allowing for sex-separated living facilities." Pet. 76a n.16. The panel held that this "broad statement that sex-separated living facilities are not unlawful" did not mean that "schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities." Pet.76a n.16. And of course, the panel thought that treating transgender boys—i.e., biological females—as girls for purposes of the Board's restroom policy was arbitrary. *Ibid.*

The panel also affirmed the district court's holding that the Board's bathroom policy violated the Equal Protection Clause. It first held that the restroom policy was subject to intermediate scrutiny because it was sex-based and because transgender people constitute a quasi-suspect class. Pet.51a. It then held that the Board's restroom policy failed to satisfy intermediate scrutiny. Pet.65a-69a. Even though Grimm was unquestionably a biological female, the panel claimed that the "bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms." Pet.66a. And on that basis, the panel reasoned, "the Board's policy was not substantially related to its purported goal." *Ibid.* That ruling, of course, would apply to all sex-separated bathroom policies and would render Title IX's express exception unconstitutional as well.

Judge Niemeyer again dissented, noting that "all individuals possess a privacy interest when using restrooms or other spaces in which they remove clothes and engage in personal hygiene," an interest that is "heightened when persons of the opposite sex are present." Pet.116a (Niemeyer, J., dissenting). Thus, "a public school may, consistent with the Equal Protection Clause, establish one set of restrooms for its male students and another set for its female students." Pet.115a. Judge Niemeyer then faulted the majority for failing to "address why" under its theory, "it is permissible for schools to provide separate restrooms to their male and female students to begin with." Pet.117a. "Such consideration would have demonstrated that it was not 'bias' for a school to have concluded that, in assigning a student to either the male or female restrooms, the student's biological sex was relevant." *Ibid.*

The Board once more sought en banc review, and once more, Judge Niemeyer concurred in the denial. He again urged that "the more efficient course for the School Board" would be to "file a petition for certiorari in the Supreme Court with the hope that the Court will again be interested in granting it" because the "issues in this case certainly merit its doing so." Pet.4a-5a.

5. Since the Fourth Circuit's decision, the new Administration has adopted the lower court's view of *Bostock*. It has issued an executive order stating that "laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972 *** along with [its] *** implementing regulations—prohibit discrimination on the basis of gender

identity," unless the laws "contain sufficient indications to the contrary."[3] The new Administration has further made clear that it does *not* consider Section 907's exception for "living facilities" to be a sufficient "indication to the contrary." "Children," according to the Executive Order, "should be able to learn without worrying about whether they will be denied access to the restroom [or] the locker room[.]"[4] And, like the Fourth Circuit, the new Administration purports to root its decision in the Equal Protection Clause.[5]

In short, in the months between the Fourth Circuit's decision and this petition, the Fourth Circuit's understanding of Title IX, the Equal Protection Clause and *Bostock* has become the nationwide policy of the United States.[6]

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[3] The White House, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (Jan 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.

[4] *Ibid.*

[5] *Ibid.*

[6] The Department of Education has 100 days to decide how to "fully implement" the policy. *Ibid.* At the time of this filing, the Department has not formally determined how the policy relates to 20 U.S.C. §1686 or 34 C.F.R. §106.33. But the Executive Order leaves no room for doubt on the outcome.

## REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three reasons. First, the Court has already recognized—in this very case—the importance of resolving whether Title IX and 34 C.F.R. §106.33 allow schools to separate restrooms and other living facilities on the basis of sex rather than gender identity. Last time that question was before the Court, the negative answer came from the Department of Education. This time, it comes from *both* the Fourth Circuit and a new President with a different view than his predecessor's. But the interpretation's genesis does not diminish the question's importance to the millions of students whose privacy rights are at risk, or to the legions of schools deprived of the freedom to make common-sense distinctions on the basis of sex whenever doing so would involve a transgender student. Second, the Fourth Circuit's Equal Protection analysis is equally wrong and promises even more sweeping consequences than its Title IX analysis. Third, just as it was when this Court granted review in 2016, this case remains an excellent vehicle for resolving the Title IX and equal-protection issues. And, if the new Administration seeks to participate in this case and again claims deference for its interpretation of Title IX, this case remains an equally good vehicle for resolving that issue as well.

## I. The Title IX Issue Warrants Review.

Neither Title IX nor its implementing regulations address questions of *gender* distinct from "sex," and hence do not *require* schools to allow students to pick and choose among permissibly sex-separated restrooms, lockers, or showers based on their individually preferred gender identities. The Fourth Circuit's contrary holding—like the nationwide rule announced in the new Executive Order—is foreclosed by the statute's text, structure, and history, and disserves the privacy interests of millions of students. For these reasons, the Title IX aspect of the question presented warrants this Court's review.

### A. This Court has already recognized that the Title IX issue warrants review.

The clearest reason for the Court to grant review is that it already did so in this very case. When this Court first agreed to hear this case in 2016, the question focused in part on the reasonableness of an agency's interpretation of the term "sex" in Title IX and its implementing regulation, 34 C.F.R. §106.33, which makes clear that schools may separate restrooms by sex. The agency's interpretation provided that, "[u]nder Title IX, a [school receiving federal funding] must generally treat transgender students consistent with their gender identity." Pet.178a; see *Gloucester County. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S.Ct. 369 (2016) (No. 16-273) (*Gloucester I*). The Board's first petition asked whether—with or without agency deference—the interpretation should stand. Petition for Certiorari at i, *Gloucester I*; see also Pet.39a-40a. The Court summarily vacated the Fourth Circuit's earlier

decision after the then-incoming Administration withdrew that interpretation, leaving unresolved this "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

The Fourth Circuit has since independently reached the same conclusion as the earlier Administration, as has the new Administration. Pet.79a-80a. But the agency's interpretation was as wrong in 2016 as the Fourth Circuit's and the new Administration's interpretation is now. And, perhaps influenced by this Court's previous grant of certiorari, both Judge Wynn and Judge Niemeyer recognized that the Title IX question presented here is very important. See Pet.9a (Wynn, J., concurring in the denial of rehearing en banc) ("[T]he question presented by this case is no doubt one of *substantial importance*.") (emphasis added); Pet.5a (Niemeyer, J., concurring in the denial of rehearing en banc) ("The issues in this case certainly merit" Supreme Court review.).

To the millions of children and thousands of schools who will be affected and governed by that interpretation, moreover, the question's importance does not turn on who interpreted the statute in the first instance. See *Bostock*, 140 S.Ct. at 1778-1779 (Alito, J., dissenting) (recognizing that this issue is a "matter of concern to many people"). For them, the title IX question presented demands this Court's review now, just as it did in 2016.

### B. The Fourth Circuit failed to properly apply the plain meaning and history of Title IX and 34 C.F.R. §106.33.

The Fourth Circuit's interpretations of Title IX and 34 C.F.R. §106.33 are also flatly wrong.

1. Nothing in Title IX's text or structure supports the Fourth Circuit's holding that schools violate Title IX when they decline to allow a transgender student like Grimm, who is a biological female, to use the living facilities assigned to biological males, or vice-versa. To the contrary, Section 907 and 34 C.F.R. §106.33 unambiguously allow for such treatment.

Indeed, *Bostock* itself makes clear that proper statutory interpretation depends on the "ordinary public meaning of [a statute's] terms at the time of its enactment." *Bostock,* 140 S.Ct. at 1738 (majority opinion); *accord id.* at 1827 (Kavanaugh, J., dissenting) (emphasizing the "extraordinary importance of hewing to the ordinary meaning of a phrase"); *id.* at 1772 (Alito, J., dissenting) (italics in original) ("[O]ur job is to ascertain and apply the '*ordinary* meaning' of the statute."). Grimm does not, and could not, dispute that the plain language of Section 907 allows for restrooms separated by biological sex. Pet.115a (Niemeyer, J., dissenting). That provision's plain text expressly permits sex-separated "living facilities," 20 U.S.C. §1686, which longstanding regulations have sensibly interpreted to include "toilet, locker room, and shower facilities" 34 C.F.R. §106.33.

Moreover, when Title IX was enacted, "sex" did not mean "gender identity." Instead, it looked to a person's

biology, "particularly with respect to their reproductive functions." Pet.108a (Niemeyer, J., dissenting) (collecting dictionary definitions); accord *Adams ex rel. Kasper* v. *Sch. Bd. Of St. Johns County*, 968 F.3d 1286, 1320 (11th Cir. 2020) (Pryor, J., dissenting). Then, as now, the word "sex" was "unambiguously" a biological classification. *Adams*, 968 F.3d at 1320 (Pryor, J., dissenting); see also Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (explaining that "sex" and "sexual" as "widely used by clinicians from various disciplines" "refer to the biological indicators of male and female (understood in the context of reproductive capacity)").

The majority opinion in *Bostock* recognized this very point when it refused to adopt the position of the plaintiff there that Title VII prohibits discrimination on the basis of gender identity directly. See *Bostock,* 140 S.Ct. at 1740-1741, 1743. Instead, the Court ruled that because, as a *practical* matter, one generally cannot discriminate in employment on the basis of transgender status without *also* discriminating on the basis of biological sex—that is, judging whether the person behaves in accordance with societal norms governing members of that biological sex, or departs from those norms—discrimination on the basis of transgender status can fall within Title VII's scope. *Bostock*, 140 S.Ct. at 1740-1741.

But, of course, that opinion and reasoning necessarily recognize that the "sex" of the transgender person is *contrary* to their gender identity and that they are being discriminated against because their behavior does not conform to the norms applicable to

their sex. That is, discrimination against a transgender man is discrimination on the basis of the person's sex being female, and vice versa for a transgender woman. But that reasoning strongly supports the legality under Section 907 of assigning access to "living facilities" like restrooms on the basis of biological sex *rather than* gender identity. That is, even though discrimination on the basis of transgender status can also constitute discrimination on the basis of sex, there is no such discrimination here based on whether behavior conforms to various norms. Instead, under the Board's policy, "sex" remains binary and grounded in biology, with no discrimination based on non-compliance with sex-based norms. In short, the Fourth Circuit's decision rests on a fundamental misreading of *Bostock*.

2. Here the Board exercised its legal right under Section 907 to provide separate toilet facilities on the basis of biological sex. But the Fourth Circuit held that it had nevertheless violated the statute. To the majority, the issue was not with sex-separated restrooms—it admitted, as did Grimm, that Title IX allowed those. Pet.76a. Instead, the panel held that the school board violated Title IX because it "treated [Grimm] worse than students with whom he was similarly situated" by not allowing him to use the same restroom as "other boys." Pet.75a-76a. But this "similarly situated" standard is absent from the text of the statute, and begs the question in any event: Grimm is not "similarly situated" to "other boys." Other boys are biologically male; Grimm is not. Though he "no doubt identifies as male and also has taken the first steps to transition his body, at all times relevant to the events in this case, he remained

anatomically different from males." Pet.116a (Niemeyer, J., dissenting).

The Fourth Circuit's reading collapses Title IX's entire framework. Whereas Congress allowed sex-separated restrooms (based on biological sex), the Fourth Circuit now forbids them whenever there is a transgender student involved, and possibly in other situations as well.[7] And it does so based solely on that student's own self-determined gender identity, not on the student's objective physiology. That holding frustrates Congress' will as expressed through enacted legislation.

3. To get there, the Fourth Circuit purported to rely heavily on *Bostock*. *Bostock*, the Fourth Circuit held, removed any question that the Board's restroom policy "discriminated against [Grimm] 'on the basis of sex.'" Pet.71a. But key differences in the statutory texts and contexts of Title VII and Title IX make *Bostock* inapposite here. *Adams*, 968 F.3d at 1320 (Pryor, J., dissenting). In *Bostock*, a transgender employee sued her employer "under Title VII alleging unlawful discrimination on the basis of sex" after her employer fired her "because of [her] transgender status." 140 S.Ct. at 1738. Title VII makes it "unlawful *** for an employer to *** discharge *any* individual *** because of such individual's *** sex." 42 U.S.C. §2000e-2(a)(1) (emphasis added). This prohibition is

[7] Some students, for example, claim to have "an experience of gender that is not simply male or female." See National Center for Transgender Equality, *Understanding Non-Binary People: How to Be Respectful and Supportive* (Oct. 5, 2018), https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive.

nearly categorical, particularly as the issue arose in that case. But cf. *id.* §2000e-2(e) (making an exception when sex is a bona fide occupational qualification).[8]

However, in part because of the presence of Section 907, Title IX is a "vastly different statute" from Title VII. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). While it too contains a "broadly written general prohibition on discrimination," one of its "*specific, narrow exceptions*" is directly at issue here. *Ibid.* (emphasis added). Undoubtedly aware of this, *Bostock* expressly and appropriately limited its reach to the issue before it and declined to opine on how it would apply to "other laws," including those "address[ing] bathrooms, locker rooms, or anything else of the kind." 140 S.Ct. at 1753. Thus, *Bostock*'s holding that "it is impossible to discriminate against a person for being *** transgender without discriminating against that individual based on sex," *id.* at 1741, cannot coherently be read to disallow the very "discrimination" expressly *permitted* by Section 907—sex-separated living facilities. Requiring biological males and biological females to use facilities that conform to their biology indeed discriminates (permissibly) on the basis of sex. But it does not discriminate by enforcing gendered stereotypes upon members of either sex, as was the case in *Bostock*: Under the Board's rule, students must simply follow their biological makeup rather than their gender identities, and cisgender women are treated

[8] *Bostock* did not consider or decide whether this exception would prohibit an employer from precluding a biological male identifying as female from jobs where being female is a bona fide occupational qualification.

identically to transgender men—both according to their *sex*, not their gender.

Thus, even assuming this Court would adopt *Bostock*'s understanding of sex in the Title IX context, Congress's decision to allow for sex-separated living facilities, as expressed in Section 907, should have prevented the Fourth Circuit from imposing Title IX liability on the Board here.

4. The Board's policy, moreover, uses a permissible sex-based classification founded on the same biological distinctions between the male and female sexes that justify separate restrooms in the first place. The policy does not discriminate on the basis of transgender status. It could only do so by looking at both the biological sex and the gender identity of a student and then determining whether any incongruity exists between the two. See Pet.56a. Instead, the sole characteristic the policy looks at is "sex" as used in Title IX—the biological distinction between male and female. Pet.118a (Niemeyer, J., dissenting). The policy does not look at gender identity, and the plain language of Title IX and 34 C.F.R. §106.33 does not require it to do so. The policy *does* make distinctions on the basis of sex by providing separate restrooms for males and females. But this is a permissible differentiation under both Section 907's "living facilities" provision and its implementing regulation, 34 C.F.R. §106.33.

That is no doubt why Judge Niemeyer opined in dissent that the majority's holding imposing liability on the Board when it acted according to the plain text of Section 907 was "an outcome-driven enterprise prompted by feelings of sympathy and personal views

of the best policy" that fell short of "simply construing the law." Pet.98a-99a. (Niemeyer, J., dissenting). Whether or not that accurately describes the majority's motives, this Court should grant certiorari to give Title IX an interpretation consistent with the text of Section 907, which expressly allows schools to "maintain[] separate living facilities" including restrooms, "for the different sexes." 20 U.S.C. §1686.

### C. The rule adopted below affects millions of students and thousands of schools throughout the Nation.

A handful of lower courts interpreting Title IX incorrectly—now joined by a presidential order—make clear that the time for this Court to address this issue is now. See *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns County*, 968 F.3d 1286 (11th Cir. 2020).[9]

1. Most immediately, the decision below—like the decisions of circuit courts around the country—undermines the ability of the more than 400 school districts in the Fourth Circuit to seek reasonable accommodations to protect and balance the privacy and other interests of their students, including their transgender students, by adopting and enforcing bathroom, locker room, and shower policies and procedures sensitive to those varied interests and to

[9] Collectively, these decisions govern more than 24,000 public schools and affect the experiences of roughly 14 million public school children. Pet. 262a-263a. And of course, when fully implemented, the new Executive Order will govern public schools and schoolchildren throughout the Nation.

any school's particular situations regarding space, student mix, and other local concerns.

Neither local school districts nor the schools they govern should be deprived of that centuries-old ability to choose for themselves how to address their local concerns and needs. With their roots running back to the Massachusetts Bay Colony in the 1700s, school boards are a time-honored facet of American self-government.[10] Although public education has evolved dramatically since then, school boards are one of America's "last grassroots governing bodies that touch us all," and they are one of the principal ways in which parents can shape their children's education.[11] School boards cannot fulfil this vital role if they are unable to tailor their policies to the diverse needs of their students.

Yet the decision below—like the new Executive Order—*forbids* schools from making "adjustments" to accommodate the "physiological differences between [biological] male and female individuals" whenever a transgender student is involved. *United States* v. *Virginia*, 518 U.S. 515, 551 n.19 (1996). Even without an express exemption for living facilities, this would be a remarkable exercise of federal authority at the

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[10] See Lila N. Carol et al., *School Boards: Strengthening Grass Roots Leadership* 14 (1986), https://files.eric.ed.gov/fulltext/ED280182.pdf; Deborah Land, *Local School Boards Under Review: Their Role and Effectiveness in Relation to Students' Academic Achievement* 2 (2002), https://files.eric.ed.gov/fulltext/ED462512.pdf.

[11] See Jacqueline P. Danzberger et al., *School Boards: The Forgotten Players on the Education Team*, 69 Phi Delta Kappan 53, 53 (1987).

expense of local governments. That the words Congress enacted—including the exception in Section 907—do not mandate such a result only increases the harm. See Pet.97a (Niemeyer, J., dissenting) ("Gloucester High School followed [Title IX and its regulations] precisely[.]"). The Board's decision is but one of many ways that schools or school boards, depending on their resources and existing facilities, could legitimately accommodate their transgender students while striving to be sensitive to the legitimate privacy concerns of all their students.

Moreover, by prohibiting local school boards from tailoring policies—especially policies affecting students' most personal privacy concerns—to the diverse needs of their students, the Fourth Circuit seriously undermined the federal system. The Fourth Circuit's erroneous interpretation of Title IX and its implementing regulations has preemptively wrested this important and complicated social debate from its proper venue—the democratic process of local government. In so doing, the decision below subjects local school boards to liability for creating a restroom policy that a plain reading of Title IX allows. And it does so by enthroning a judicial philosophy that seems driven, not by the statute, but by "personal views of the best policy" that are neither universally shared nor specifically enshrined in the law or the Constitution. Pet.99a (Niemeyer, J., dissenting).

The Board itself was not without sympathy or understanding for Grimm when it promulgated its policy. Grimm's request posed a difficult problem. And given its limited resources and the configuration of its existing facilities, the Board sought to show both

Grimm and its other students compassion by formulating a policy that respected everyone's needs. Title IX allows it and other school boards to take into account the concerns—including privacy concerns—of all their students. This Court should grant the petition and restore to local school boards the flexibility that Title IX expressly provides.

2. In addition to its degradation of federalism, the decision below—like the new Executive Order—undermines the privacy interests of millions of students.

As many courts have recognized, students have a "significant privacy interest in their unclothed bodies." *Beard* v. *Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005). Because students are "extremely self-conscious about their bodies," *Cornfield by Lewis* v. *Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993), that interest protects—at a minimum—the right to "avoid the unwanted exposure of one's body especially one's 'private parts.'" *Thomas ex rel. Thomas* v. *Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), vacated on other grounds *sub nom. Thomas* v. *Roberts*, 536 U.S. 953 (2002). For these students, the question presented raises a significant "question of modesty" that provides an independent reason for granting the petition. *Bostock,* 140 S.Ct. at 1779 (Alito, J., dissenting); see also *id.* (discussing additional psychological risks to students who have previously experienced sexual abuse).

Judge Wynn waved off such concerns with an *ad hominem* attack: Concerns about privacy and related harms, he opined, are grounded in nothing more than

a "harmful and false stereotype about transgender individuals." Pet. 92a (Wynn, J., concurring). According to him, that stereotype says that "students (usually male) will pretend to be transgender in order to gain access to the bathrooms of the opposite sex—thus jeopardizing student safety." *Ibid.*

But that is not—and was not—the basis for the Board's policy. As Judge Niemeyer correctly recognized, for many, there is harm simply in being in the presence of people of the other sex in public spaces where a person often disrobes, such as public restrooms, showers, and locker rooms. Pet.110a-111a (Niemeyer, J., dissenting). By exempting living facilities from the general prohibition of sex discrimination in Title IX, Congress acted to eliminate that harm, as well as to protect the privacy and modesty interests of vulnerable students.

In short, the decision below seriously undermines the privacy interests of millions of students. Similar decisions in the Seventh and Eleventh Circuits, and the new Administration's executive order, all suffer from the same defect—thus extending this harm to student privacy nationwide. To restore the ability of schools to consider local circumstances and protect the privacy interests of the nation's students, the petition should be granted. And this Court should clarify that schools providing living facilities based on the biological sexes—not the gender identities—of their students do not violate Title IX.

## II. The Equal-Protection Issue Warrants Review.

The Fourth Circuit also incorrectly held that the Board's restroom policy violated the Equal Protection Clause of the Fourteenth Amendment. Like the Title IX issue, the equal-protection issue is a question of national importance that should be resolved expeditiously.

### A. The Fourth Circuit's analysis flouts this Court's precedents.

The Fourth Circuit held that the Board's restroom policy was subject to—and failed—heightened scrutiny under the Equal Protection Clause because (1) it rests on sex-based classifications—which of course would render Title IX's carve-out for living facilities unconstitutional—and (2) transgender people constitute a quasi-suspect class. Pet.51a, 65a-69a. Under either theory, the Fourth Circuit misapplied this Court's precedent.

1. The Equal Protection Clause promises the "equal protection of the laws." U.S. Const. Amend. XIV, §1. And this Court has interpreted the Clause as requiring state and local governments to treat "all persons similarly situated" alike. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But it has never interpreted the Clause to require that *differently* situated individuals be treated alike. The provision "simply keeps governmental decisionmakers from treating differently persons who are in all *relevant* respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) (emphasis added).

In addressing how the Equal Protection Clause addresses distinctions between men and women, this Court "has long grounded its sex-discrimination jurisprudence in reproductive biology," not gender identity. *Adams*, 968 F.3d at 1318 (Pryor, J., dissenting) (collecting cases). Thus, the Court has expressly recognized the "enduring" "[p]hysical differences between men and women" and the fact that the "*two* sexes are not fungible." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (emphasis added). Indeed, because of these physical and biological differences, "the sexes are *not* similarly situated in certain circumstances." *Michael M.* v. *Superior Ct. of Sonoma County*, 450 U.S. 464, 469 (1981) (plurality opinion) (emphasis added).

Further, it is precisely because "sex" is "an immutable characteristic determined solely by the accident of birth" that the Equal Protection Clause forbids some—though not all—distinctions on that basis. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Thus, a State is "not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." *Parham* v. *Hughes*, 441 U.S. 347, 354 (1979). But if the physical or biological differences between men and women are relevant to the State's interests, then sex is not a "proscribed classification." *United States* v. *Virginia*, 518 U.S. at 533.

Under this Court's precedent, moreover, one distinction between the sexes that the Equal Protection Clause allows is the designation of spaces

"necessary to afford members of each sex privacy from the other sex in living arrangements." *Id.* at 550 n.19. Indeed, in the same opinion in which this Court held that the Virginia Military Institute could not reserve its "unique educational opportunities" to men, *id.* at 519, it recognized that admitting women to VMI would "undoubtedly *require* alterations" to ensure such privacy, *id.* at 550 n.19 (emphasis added).

The differences this Court recognized in *United States* v. *Virginia* still endure and remain present in the person of Gavin Grimm. Though he "identifies as male," he was "born a biological female." Pet.6a (Niemeyer, J., concurring). Thus, "his circumstances are different from the circumstances of students who were born as biological males." *Ibid.* Under this Court's precedents, treating differently situated persons differently does not violate the Equal Protection Clause. *Cleburne*, 473 U.S. at 439, 442.

2. The Fourth Circuit's equal-protection analysis ignored these principles and, in so doing, violated this Court's teachings about the proper methodology for assessing sex-based classifications. It is undisputed that the Board's restroom policy classifies based on sex, *not* gender identity. But even apart from the lack of gender-identity discrimination, the Fourth Circuit erroneously determined that "transgender people constitute at least a quasi-suspect class" and applied intermediate scrutiny based partly on that classification. Pet.51a. This classification was wrong, as transgender people are not a "discrete group" characterized by "obvious, immutable, or distinguishing characteristics." Pet.60a. To the contrary, "some people develop a gender identity early

in childhood, others may identify with one gender at one time and then another gender later on."[12] The very existence of gender fluidity undermines any claim that gender identity is sufficiently obvious, immutable, or distinguishable to make transgender people a suspect class. *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987).

The decision below thus illustrates Judge Pryor's recent observation that an error at the classification stage can "infect[]" the rest of a "constitutional inquiry." *Adams*, 968 F.3d at 1316 (Pryor, J., dissenting). The Fourth Circuit's erroneous decision to make transgender individuals a quasi-suspect class led it to ask the wrong question and to shift the burden regarding exceptions to a plainly permissible general policy onto the school rather than onto the person seeking the exception. As Judge Pryor observed, "the relevant question is whether excluding students of one sex from the bathroom of the other sex substantially *advances* the schools' privacy objectives." *Ibid.* (emphasis added). There can be no doubt that dividing students according to biological sex does just that.

3. In fact, no one is denied the equal protection of the laws when the government provides separate restroom facilities on the basis of sex, as Congress expressly allowed in Section 907. The biological differences between the sexes allow government officials to separate men and women in such intimate spaces. The Board did nothing more than that.

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[12] Sabra L. Katz-Wise, *Gender fluidity: What it means and why support matters*, Harvard Health Blog (Dec. 3, 2020), https://www.health.harvard.edu/blog/gender-fluidity-what-it-means-and-why-support-matters-2020120321544.

It follows that the Board acted consistently with the Equal Protection Clause. In cases alleging sex-based discrimination or discrimination against any quasi-suspect class, the government must show that a government action "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States* v. *Virginia*, 518 U.S. at 524. The Board's policy satisfies that requirement: Its objective was "to provide a safe learning environment for all students and to protect the privacy of all students[.]" Pet.101a (Niemeyer, J., dissenting). This Court has already recognized the need to "afford members of each sex privacy from the other sex" in intimate settings, *United States* v. *Virginia*, 518 U.S. at 550 n.19. Public schools, then, have an important interest in "protect[ing] bodily privacy concerns that arise from the anatomical differences between the two sexes." Pet.116a (Niemeyer, J., dissenting). As Judge Pryor explained, a bathroom policy like the Board's serves the important objectives of "protecting the interests of children in [(1)] using the bathroom away from the opposite sex and in [(2)] shielding their bodies from exposure to the opposite sex." *Adams*, 968 F.3d at 1312 (Pryor, J., dissenting). As he concluded, "[b]y requiring students to use the bathroom away from the opposite sex, the policy directly protects the first interest and eliminates one of the most likely opportunities for a violation of the second interest. In short, it easily satisfies intermediate scrutiny[.]" *Ibid.* The Board's policy further served this objective by making unisex restrooms available to all its students.

4. Compounding the errors in its equal-protection analysis, the Fourth Circuit held that the Board's

bathroom policy was tainted by "'a bare *** desire to harm a politically unpopular group.'" Pet.50a (quoting *Cleburne*, 473 U.S. at 446-447), and was "'marked by misconception and prejudice' against Grimm." Pet.70a (quoting *Tuan Anh Nguyen* v. *I.N.S.*, 533 U.S. 53, 73 (2001)).

The Fourth Circuit's unsubstantiated attacks on the Board's motives are both unfair and unbecoming of the judicial office. The Board did not arbitrarily "discriminate" against Grimm with prejudice or a desire to harm him. Instead, the Board, sensitive to Grimm's concerns, carefully weighed the choices before it and created a reasonable plan for addressing *all* of its students' needs. Depending on their resources and the configuration of their existing facilities, other school boards might reasonably come out another way—the Equal Protection Clause allows such play in the joints. But the existence of other possible solutions does not make the Board's plan unconstitutional, much less bigoted—any more than this Court's own recognition of the same privacy interests in *United States* v. *Virginia*, 518 U.S. at 550 n.19, was unconstitutional or bigoted.

In sum, because transgender individuals are biologically and meaningfully different from cisgender individuals who share the same gender identity, the Equal Protection Clause does not mandate that they be treated the same. The Fourth Circuit's contrary holding contravenes this Court's settled equal-protection jurisprudence, and should be overturned.

### B. The Fourth Circuit's equal-protection ruling has even more far-reaching consequences than its Title IX ruling.

Because it threatens to strike down lawful bathroom policies throughout the Fourth Circuit, the Fourth Circuit's equal-protection holding implicates each issue listed in Section I.C. above. But, as a constitutional ruling, it goes further still, threatening *every* law that distinguishes between men and women because of immutable, biological differences.

Indeed, without this Court's review, and in light of the recent Executive Order, every federal, state and local law based on differences between the sexes—including Title IX's living facilities exception itself—will be subject to (and likely fail) heightened scrutiny. If left to stand, then, the Fourth Circuit's decision "is virtually certain to have far-reaching consequences" beyond school restroom policies. *Bostock v. Clayton County*, 140 S.Ct. 1731, 1778 (2020) (Alito, J., dissenting). As Justice Alito noted, "[o]ver 100 federal statutes prohibit discrimination because of sex." *Ibid.* Accordingly, every law based on differences between the sexes will be vulnerable to equal-protection challenges brought by transgender individuals if this Court allows the Fourth Circuit's equal-protection analysis to stand. *Ibid.*

Although the proper level of scrutiny that this Court applies to classifications based on sex is long settled, the proper level of scrutiny for classifications of gender identity is not. Regardless whether courts equate gender-identity classifications with sex-based classifications or whether gender identity is itself a suspect class, the lower courts desperately need this

Court's guidance on how to address equal- protection claims raised by transgender individuals. Until then, the "entire Federal Judiciary will be mired for years in disputes" challenging otherwise constitutional sex-based classifications in both state and federal law when applied to transgender individuals. *Bostock*, 140 S.Ct. at 1783 (Alito, J., dissenting). The Court should grant review now to clear up that persistent confusion, and thereby avoid unnecessary civic strife in public education and the many other public and private programs affected by the Fourth Circuit's analysis.

## III. This Case Remains An Excellent Vehicle.

The Title IX and equal-protection issues presented here are issues of national importance that this Court should quickly resolve. And this case—even with its protracted history—remains the perfect vehicle.

First, both aspects of the question presented were squarely pressed below, resulting in a lengthy analysis of each issue from both the Fourth Circuit and the district court. Moreover, the majority opinion below prompted a detailed dissent from Judge Niemeyer, allowing the parties' contrasting interpretations of Title IX and the Equal Protection Clause to be fully elucidated and examined.

Second, this case lacks any jurisdictional or threshold issues that would prevent the Court from answering the question presented. Grimm's graduation does not impede this Court's review: He was awarded damages and attorney's fees for prevailing on the merits below. See *Buckhannon Bd. and Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 608-09 (2001)

("[S]o long as the plaintiff has a cause of action for damages" beyond a "claim for equitable relief," a case remains live.); 42 U.S.C. §1988(b).[13]

Third, the controversy between the parties is not over what occurred—everyone agrees the Board required Grimm to use the girl's restroom or a private unisex restroom—but rather whether those actions violated either Title IX or the Equal Protection Clause.

Finally, because it was the Fourth Circuit, not the Department of Education, that interpreted Title IX and 34 C.F.R. §106.33 here, on this record the Court can perform its own *de novo* review of the question presented, unhindered by the *Auer* deference question that was at issue when this Court first agreed to hear the case in 2016. Of course, if the new Administration decides to participate in this case and again claims *Auer* deference for its interpretation of Title IX, the Court can still grant the petition and add an appropriate deference-related question for the parties to address.[14] All concerned—including the thousands

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[13] As previously explained (*supra* note 2), the Board also remains under an injunction to list Grimm's sex as male on his school records. Further, Grimm argued in his 2017 merits brief that he will "remain subject to the [bathroom] policy for purposes of any alumni activities or attendance at school events." Respondent's Br. 11 n.8, *Gloucester County School Bd.* v. *G.G.* (No. 16-273).

[14] The proper scope of *Auer* deference was one of the questions on which certiorari was granted, and which was briefed on the merits, when this case was previously before the Court. See Petition for Writ of Certiorari at i, *Gloucester County School Bd.* v. *G.G.* (No. 16-273); *Gloucester County School Bd.* v. *G.G.*, 137 S.Ct. 369 (2016). Given the short, 100-day window that the

of schools and school boards that must wrestle with the questions presented here—will benefit from a timely and definitive resolution of those questions.

## CONCLUSION

The overriding issue in this case is whether federal law—either Title IX or the Equal Protection Clause—mandates only one answer to the difficult question of how a school should respond to transgender students seeking to be treated consistent with their gender identities, while accommodating the compelling bodily privacy interests of their cisgender classmates. Because both laws permit school boards to reach different answers to that question, the decision below was wrong. And because this is a pressing federal question of nationwide importance, the Court should grant the petition and resolve the question quickly. Only then will enforcement agencies and school boards across the Nation know exactly how much discretion federal law gives them in this wrenchingly difficult area of education policy.

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President has given the Department of Education to implement the new Administration's views concerning gender-identity discrimination, it is highly doubtful the Department could complete the notice-and-comment rulemaking that would be required for it to claim *Chevron* deference here. But if it did so, the Court could add a question on *Chevron* deference as well.

Respectfully submitted.

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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**No. 19-1952**

**(4:15-cv-00054-AWA-RJK)**

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GAVIN GRIMM,

Plaintiff - Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellant.

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NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.; INTERACT: ADVOCATES FOR INTERSEX YOUTH; FAIRFAX COUNTY SCHOOL BOARD; ALEXANDRIA CITY SCHOOL BOARD; ARLINGTON SCHOOL BOARD; FALLS CHURCH CITY SCHOOL BOARD; TREVOR PROJECT; NATIONAL PARENT TEACHER ASSOCIATION; GLSEN; AMERICAN SCHOOL COUNSELOR ASSOCIATION; NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS; PFLAG, INC.; TRANS YOUTH EQUALITY FOUNDATION; GENDER SPECTRUM; GENDER DIVERSITY; CAMPAIGN FOR SOUTHERN EQUALITY; HE SHE ZE AND WE; SIDE BY SIDE; GENDER BENDERS; AMERICAN

ACADEMY OF PEDIATRICS; AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY; AMERICAN ACADEMY OF PHYSICIAN ASSISTANTS; AMERICAN COLLEGE OF PHYSICIANS; AMERICAN MEDICAL ASSOCIATION; AMERICAN MEDICAL STUDENTS ASSOCIATION; AMERICAN MEDICAL WOMEN'S ASSOCIATION; AMERICAN NURSES ASSOCIATION; AMERICAN PSYCHIATRIC ASSOCIATION; AMERICAN PUBLIC HEALTH ASSOCIATION; ASSOCIATION OF MEDICAL SCHOOL PEDIATRIC DEPARTMENT CHAIRS; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; LBGT PA CAUCUS; PEDIATRIC ENDOCRINE SOCIETY; SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE; SOCIETY FOR PHYSICIAN ASSISTANTS IN PEDIATRICS; WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; LEAH FREGULIA; ADELITA GRIJALVA; DAVID VANNASDALL, Ed.D.; LOS ANGELES UNIFIED SCHOOL DISTRICT; JUDY CHIASSON, Ph. D.; MONICA GARCIA; WENDY RANCK-BUHR, Ph. D.; SAN DIEGO UNIFIED SCHOOL DISTRICT; ELDRIDGE GREER, Ph. D.; GREGORY R. MEECE; FRANKLIN NEWTON, Ed.D.; DIANA K. BRUCE; DANIEL F. GOHL; DENISE PALAZZO; JEREMY MAJESKI; KAREN CARNEY; SARAH SHIRK; BETH BAZER, Ed.D.; PAULA INSLEY MILLER, Ed.D.; THOMAS WEBER; THOMAS A. ABERLI, Ed.D.; HOWARD COLTER; MATTHEW HANEY; KEN KUNIN; ROBERT A. MOTLEY; CATHERINE FROM; ROGER BOURGEOIS; CYNDY TAYMORE; LIZBETH DESELM; DYLAN PAULY; DELOIS

COOKE SPRYSZAK; CRAIG MCCALLA; MARY DORAN; WASHOE COUNTY SCHOOL DISTRICT; JAMES C. MORSE, SR., Ed.D.; THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD; THOMAS SMITH, Ed.D.; CRAIG VAUGHN; ARTHUR DIBENEDETTO; LAS CRUCES PUBLIC SCHOOLS; WENDI MILLER-TOMLINSON, M.D., Ph.D.; JOHN O'REILLY; HEIDI CARTER; ANTHONY GATTO; ERIC DOSS; PEYTON CHAPMAN; ZIAD W. MUNSON, Ph. D.; RACHEL SANTA, Ed.D.; KELLIE M. HARGIS, Ed.D.; LINDSEY POLLOCK, Ed.D.; BRIAN SCHAFFER; THE WASHINGTON CENTRAL UNIFIED UNION SCHOOL DISTRICT; WILL BAKER; LISA LOVE; SHERIE HOHS; SHERRI CYRA; LAURA H. LOVE, Ed.D.; JILL GURTNER; MONICA SCHOMMER; BRYAN DAVIS, Ph. D.; PARU SHAH, Ph. D.; TIM KENNEY; STATE OF NEW YORK; STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; DISTRICT OF COLUMBIA,

Amici Supporting Appellee.

ORDER

The petition for rehearing en banc filed by the appellant was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc. Judge Niemeyer and Judge Wynn submitted statements concurring in the denial of rehearing en banc. These statements are attached to this order.

Entered at the direction of Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

NIEMEYER, Circuit Judge, concurring in the denial of rehearing en banc:

Under every applicable criterion, this case merits an en banc rehearing. Yet, I concur in denying the Gloucester County School Board's motion for such rehearing. Earlier in these proceedings, this court ruled against the School Board, and the Supreme Court granted its petition for a writ of certiorari, ultimately vacating our opinion on procedural grounds. There is no reason to conclude that this court, even though en banc, will change its mind—now expressed in two opinions. It would, I believe, be the more efficient course for the School Board again to file

a petition for certiorari in the Supreme Court with the hope that the Court will again be interested in granting it. The issues in this case certainly merit its doing so.

Gavin Grimm, a transgender male, commenced this action against the School Board in 2015 while he was a student attending Gloucester High School in Virginia to require the school to permit him to use its male restrooms. The High School provided male restrooms and female restrooms and, under school policy, "limited [those restrooms] to the corresponding biological genders." It also provided unisex restrooms and made them available to everyone, with the particular goal of accommodating transgender students. In doing so, it recognized that all individuals possess a privacy interest in using restrooms or other spaces in which they remove clothes and engage in personal hygiene and that this privacy interest is only heightened when persons of the opposite sex are present. The School Board's policy was thus consistent with the Supreme Court's observation that the "[p]hysical differences between men and women" are "enduring" and render "the two sexes . . . not fungible," and its recognition, in ordering an all-male college to admit females, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 533, 550 n.19 (1996) (cleaned up).

In his complaint, Grimm nonetheless contended that the School Board's policy discriminated against him "based on his gender," in violation of the Equal Protection Clause of the Fourteenth Amendment, and

"on the basis of sex," in violation of Title IX. Grimm has acknowledged that the School Board can, consistent with Title IX and the Equal Protection Clause, establish one set of restrooms for its male students and another set for its female students. But he sought injunctive relief requiring the High School "to allow [him] to use the boys' restrooms at school."

The district court granted summary judgment to Grimm, holding that the School Board violated Grimm's statutory and constitutional rights by not allowing him to use the male restrooms, and this court has now affirmed the district court. In doing so, however, it failed to apply Title IX and its regulations, as well as established principles under the Equal Protection Clause. While Title IX prohibits discrimination "on the basis of sex" in the provision of educational benefits, 20 U.S.C. § 1681(a), it expressly allows schools to provide "separate living facilities for the different sexes," *id.* § 1686, including "toilet, locker room, and shower facilities," 34 C.F.R. § 106.33. And the Equal Protection Clause requires only that "all persons *similarly situated* should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added). The Clause thus "simply keeps governmental decisionmakers from treating differently persons *who are in all relevant respects alike*." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). But Grimm is not similarly situated to the students using the High School's male restrooms. Grimm was born a biological female and identifies as male, and thus his circumstances are different from the circumstances of students who were born as biological males. Moreover, such anatomical differences are at the root of why restrooms are

generally separated on the basis of sex. There is also no evidence in the record that Grimm was treated any differently from any other transgender student, nor does he make such a claim.

In stepping past these applicable legal principles, this court's opinion simply advances policy preferences, which, of course, are for Congress to define, not our court.

For the reasons given in my dissenting opinion, I conclude that the School Board fully complied with the requirements of Title IX and the Equal Protection Clause in offering its students male and female restrooms, separating them on the basis of sex, and also providing safe and private unisex restrooms that Grimm, along with all other students, could use.

At this point, though, the Gloucester County School Board should again present this matter to the Supreme Court, with the hope that the effort will again bear fruit.

WYNN, Circuit Judge, concurring in the denial of rehearing en banc:

I join my good colleague Judge Niemeyer in the wise decision to concur in the denial of an en banc rehearing.

The School Board's petition for rehearing is without merit. Though the question presented by this case is no doubt one of substantial importance, the panel opinion aligns with other circuits' authority. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020); *Whitaker by Whitaker*

*v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *see also Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (rejecting cisgender students' privacy-related challenges to sharing bathrooms with transgender students of the opposite sex-assigned-at-birth); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (same). As stated in Judge Floyd's thorough majority opinion, the School Board violated both Title IX and the Equal Protection Clause by prohibiting Grimm from using the boys' bathrooms at school and also by refusing to amend his school records to accurately reflect his gender.

Thus, the district court correctly granted summary judgment to Grimm as to his Equal Protection claim. The Supreme Court has held that a state action violates the Equal Protection Clause when it creates "arbitrary or irrational" distinctions between similarly situated classes of people out of "a bare . . . desire to harm a politically unpopular group." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985) (alteration in original) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Yet this is precisely what the Board has done here by first creating and then repeatedly altering the challenged bathroom policy for the sole purpose of prohibiting one transgender student who identified and physically presented himself as male from affirming his gender by using the boys' bathroom at school. Under our Equal Protection jurisprudence, heightened scrutiny must be applied to Grimm's claim. This is because the bathroom policy, which determines which bathroom a student must use based on the sex listed on that student's birth certificate, necessarily rests on sex-

based classifications; and also because transgender people meet all of the traditional indicia of "suspectness" and thus constitute at least a quasi-suspect class. *See Grimm v. Gloucester Cnty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *14–18 (4th Cir.), *as amended* (Aug. 28, 2020).

Under heightened scrutiny, the Board's policy is not substantially related to its important interest in protecting students' privacy in school bathrooms. *Id.* at *18. The positive experiences shared by school districts nationwide that have allowed transgender students to use the bathrooms matching their gender identities, as well as Grimm's prior use of the boys' bathrooms for seven weeks without incident, demonstrate that the Board's privacy-related concerns are based on unfounded and irrational fears—similar to those used to justify the racial segregation of public bathrooms in the past. *Id.* at *19; *id.* at *30 (Wynn, J., concurring). If anything, the enforcement of the Board's bathroom policy would actually cause the very privacy violations that it allegedly seeks to prevent: if individuals like Grimm, who physically appears as male in every way but his genitals, were to use the girls' bathrooms, female students would suffer "a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students." *Id.* at *28 (Wynn, J., concurring). Moreover, the events leading to the adoption of the challenged policy evince that the Board was motivated by an unlawful transphobic motive. *Id.* at *20 (majority opinion). For these reasons, the Board's policy violated Grimm's Equal Protection rights. And likewise, the Board's refusal to update Grimm's school records to accurately reflect his gender is not substantially related to its

important interest in maintaining accurate records, and thus is unconstitutional. *Id.*

The Board's bathroom policy and its refusal to update Grimm's records also violated Title IX. *See id.* at *21. After the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), holding that discrimination against a transgender person is necessarily a form of sex-based discrimination, there is no question that the Board's policy prohibiting Grimm from using the boys' bathrooms discriminated against him on the basis of sex. *Grimm*, 2020 WL 5034430, at *21. In the Title IX context, unlawful discrimination means treating an individual worse than other similarly situated persons. *Bostock*, 140 S. Ct. at 1740 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006)). "Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender. Unlike the other boys, he had to use either the girls restroom or a single-stall option. In that sense, he was treated worse than similarly situated students." *Grimm*, 2020 WL 5034430, at *23. This discrimination caused significant physical, mental, emotional, and social harm to Grimm, who developed painful urinary tract infections as a result of bathroom avoidance and also suffered from suicidal thoughts. *Id.* at *22. Therefore, the Board's bathroom policy clearly violated Title IX, as did its refusal to update Grimm's school records. *Id.* at *24.

Notably, Grimm's Title IX claim did not challenge the Board's maintenance of separate bathrooms for boys and girls. Instead, the unlawful discrimination at

issue here is the "separation of transgender students from their cisgender counterparts through a policy that ensures that transgender students may use *neither* male nor female bathrooms due to the incongruence between their gender identity and their sex-assigned-at-birth." *Id.* at *29 (Wynn, J., concurring) (emphasis in original). This type of segregation creates harmful stigma, just as the racial segregation of restrooms and schools imposed a badge of inferiority on Black children. *Id.*; *see also Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954).

The rights guaranteed by our Constitution enshrine this country's most fundamental values and inviolable principles designed to protect individuals and minorities against majoritarian politics. This is especially true of the Fourteenth Amendment's promise of equal protection of the laws, which was adopted with the specific purpose of protecting minorities from majoritarian discrimination. The district court below delivered on this promise by holding that under our laws, the Board unlawfully discriminated against Grimm. That decision was correct, as this Court has held. Therefore, I join my colleagues Judge Niemeyer and Judge Floyd in denying rehearing en banc.

**PUBLISHED**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 19-1952

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GAVIN GRIMM,

Plaintiff – Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellant.

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NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.; INTERACT: ADVOCATES FOR INTERSEX YOUTH; FAIRFAX COUNTY SCHOOL BOARD; ALEXANDRIA CITY SCHOOL BOARD; ARLINGTON SCHOOL BOARD; FALLS CHURCH CITY SCHOOL BOARD; TREVOR PROJECT; NATIONAL PARENT TEACHER ASSOCIATION; GLSEN; AMERICAN SCHOOL COUNSELOR ASSOCIATION; NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS; PFLAG, INC.; TRANS YOUTH EQUALITY FOUNDATION; GENDER SPECTRUM; GENDER DIVERSITY; CAMPAIGN FOR SOUTHERN EQUALITY; HE SHE ZE AND WE; SIDE BY SIDE; GENDER BENDERS; AMERICAN ACADEMY OF PEDIATRICS; AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY; AMERICAN ACADEMY OF

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DISTRICT OF SOUTH ORANGE AND MAPLEWOOD; THOMAS SMITH, Ed.D.; CRAIG VAUGHN; ARTHUR DIBENEDETTO; LAS CRUCES PUBLIC SCHOOLS; WENDI MILLER-TOMLINSON, M.D., Ph.D.; JOHN O'REILLY; HEIDI CARTER; ANTHONY GATTO; ERIC DOSS; PEYTON CHAPMAN; ZIAD W. MUNSON, Ph. D.; RACHEL SANTA, Ed.D.; KELLIE M. HARGIS, Ed.D.; LINDSEY POLLOCK, Ed.D.; BRIAN SCHAFFER; THE WASHINGTON CENTRAL UNIFIED UNION SCHOOL DISTRICT; WILL BAKER; LISA LOVE; SHERIE HOHS; SHERRI CYRA; LAURA H. LOVE, Ed.D.; JILL GURTNER; MONICA SCHOMMER; BRYAN DAVIS, Ph. D.; PARU SHAH, Ph. D.; TIM KENNEY; STATE OF NEW YORK; STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; DISTRICT OF COLUMBIA,

Amici Supporting Appellee.

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Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda

L. Wright Allen, District Judge. (4:15-cv-00054-AWA-RJK)

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Argued: May 26, 2020 Decided: August 26, 2020

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Before NIEMEYER, WYNN, and FLOYD, Circuit Judges.

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Affirmed by published opinion. Judge Floyd wrote the majority opinion, in which Judge Wynn joined. Judge Wynn wrote a concurring opinion. Judge Niemeyer wrote a dissenting opinion.

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**ARGUED:** David Patrick Corrigan, HARMAN CLAYTON CORRIGAN & WELLMAN, Richmond, Virginia, for Appellant. Joshua A. Block, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellee. **ON BRIEF:** Jeremy D. Capps, M. Scott Fisher, Jr., George A. Somerville, HARMAN CLAYTOR CORRIGAN & WELLMAN, Richmond, Virginia, for Appellant. Eden B. Heilman, Jennifer Safstrom, Nicole Tortoriello, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC., Richmond, Virginia; Leslie Cooper, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellee. Sherrilyn A. Ifill, President and Director- Counsel, Janai S. Nelson, Samual Spital, Jin Hee Lee, Kevin E. Jason, New York, New York, Christopher Kemmitt, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., Washington, D.C.; Suzanne B. Goldberg,

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Island. Thomas J. Donovan, Jr., Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VERMONT, Montpelier, Vermont, for Amicus State of Vermont. Mark R. Herring, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Amicus Commonwealth of Virginia. Karl A. Racine, Attorney General, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA, Washington, D.C., for Amicus District of Columbia.

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FLOYD, Circuit Judge:

At the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender. We join a growing consensus of courts in holding that the answer is resoundingly yes.

Now a twenty-year-old college student, Plaintiff-Appellee Gavin Grimm has spent the past five years litigating against the Gloucester County School Board's refusal to allow him as a transgender male to use the boys restrooms at Gloucester County High School. Grimm's birth-assigned sex, or so-called "biological sex," is female, but his gender identity is male. Beginning at the end of his freshman year, Grimm changed his first name to Gavin and expressed his male identity in all aspects of his life. After conversations with a school counselor and the high school principal, Gavin entered his sophomore year living fully as a boy. At first, the school allowed him to use the boys bathrooms. But once word got out, the

Gloucester County School Board (the "Board") faced intense backlash from parents, and ultimately adopted a policy under which students could only use restrooms matching their "biological gender."

The Board built single-stall restrooms as an "alternative" for students with "gender identity issues." Grimm suffered from stigma, from urinary tract infections from bathroom avoidance, and from suicidal thoughts that led to hospitalization. Nevertheless, he persevered in his transition; he underwent chest reconstruction surgery, received a state-court order stating that he is male, and amended his birth certificate to accurately reflect his gender. But when he provided the school with his new documentation, the Board refused to amend his school records.

Grimm first sued in 2015, alleging that, as applied to exclude him from the boys bathrooms, the Board's policy violated the Equal Protection Clause of the Fourteenth Amendment and constituted discrimination on the basis of sex, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). Since then, Grimm amended his complaint to add that the Board's refusal to amend his school records similarly violates both equal protection and Title IX. In 2019, after five winding years of litigation, the district court finally granted Grimm summary judgment on both claims. It awarded Grimm nominal damages, declaratory relief, attorney's fees, and injunctive relief from the Board's refusal to correct his school records. The Board timely appealed. Agreeing with the district court's considered opinion, we affirm.

## I. Background

A.

To be sure, many of us carry heavy baggage into any discussion of gender and sex. With the help of our amici and Grimm's expert, we start by unloading that baggage and developing a fact-based understanding of what it means to be transgender, along with the implications of gendered-bathroom usage for transgender students.

Given a binary option between "Women" and "Men," most people do not have to think twice about which bathroom to use. That is because most people are cisgender, meaning that their gender identity—or their "deeply felt, inherent sense" of their gender—aligns with their sex-assigned-at-birth. *See* Br. of Amici Curiae Med., Pub. Health, & Mental Health Orgs. in Supp. of Pl.-Appellee 4–5 (hereinafter "Br. of Medical Amici") (primarily relying on Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832 (2015)).[1] But there have always

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[1] Amici curiae party to this brief include the following seventeen leading medical, public health, and mental health organizations: American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Academy of PAs, American College of Physicians, American Medical Association, American Medical Students Association, American Medical Women's Association, American Nurses Association, American Psychiatric Association, American Public Health Association, Association of Medical School Pediatric Department Chairs, GLMA: Health Professionals Advancing LGBTQ Equality, LBGT PA Caucus, Pediatric Endocrine Society, Society for Adolescent Health and Medicine, Society for Physician

Continued …

been people who "consistently, persistently, and insistently" express a gender that, on a binary, we would think of as opposite to their assigned sex. *See id.* at 8; *see also* J.A. 174–75 (Dr. Penn Expert Report & Decl. at 3–4).

Such people are transgender, and they represent approximately 0.6% of the United States adult population, or 1.4 million adults. *See* Br. of Medical Amici 5. Just like being cisgender, being transgender is natural and is not a choice. *See id.* at 7.

Being transgender is also not a psychiatric condition, and "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *See id.* at 6 (quoting Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (2012)); *see also* Br. of Amicus Curiae the Trevor Project in Supp. of Pl.-Appellee 4 (hereinafter "Br. of Trevor Project") (explaining that the World Health Organization also declassified being transgender as a mental illness). However, transgender people face major mental health disparities: they are up to three times more likely to report or be diagnosed with a mental health disorder as the general population, Am. Med. Ass'n & GLMA: Health Professionals Advancing LGBTQ Equality, *Issue Brief: Transgender Individuals' Access to Public Facilities* 2 (2018), and nearly *nine times* more likely to attempt suicide than the general population, *see* Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the*

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Assistants in Pediatrics, and World Professional Association for Transgender Health.

*2015 U.S. Transgender Survey* 114 (Dec. 2016) (hereinafter "USTS Report").

Moreover, many transgender people are clinically diagnosed with gender dysphoria, "a condition that is characterized by debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex." Br. of Medical Amici 9; *see also Edmo v. Corizon, Inc.*, 935 F.3d 757, 768–69 (9th Cir. 2019). Gender dysphoria is defined in the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders. "[T]o be diagnosed with gender dysphoria, the incongruence [between gender identity and assigned sex] must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning." *See* J.A. 175 (Dr. Penn Expert Report & Decl. at 4); *see also* Br. of Medical Amici 9 (citing Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451–53 (5th ed. 2013) (hereinafter "DSM-5")). Incongruence between gender identity and assigned sex must be manifested by at least two of the following markers:

(1) "[a] marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics";

(2) "[a] strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender";

(3) "[a] strong desire for the primary and/or secondary sex characteristics of the other gender";

(4) "[a] strong desire to be of the other gender";

(5) "[a] strong desire to be treated as the other gender"; or

(6) "[a] strong conviction that one has the typical feelings and reactions of the other gender."

*See* DSM-5 at 452 (J.A. 1117).

Puberty is a particularly difficult time for transgender children, who "often experience intensified gender dysphoria and worsening mental health" as their bodies diverge further from their gender identity. Br. of Medical Amici 10. Left untreated, gender dysphoria can cause, among other things, depression, substance use, self-mutilation, other self-harm, and suicide. *Id.* at 11. Being subjected to prejudice and discrimination exacerbates these negative health outcomes. *Id.* at 11.

For many years, mental health practitioners attempted to convert transgender people's gender identity to conform with their sex assigned at birth, which did not alleviate dysphoria, but rather caused shame and psychological pain. *Id.* at 11–12. Fortunately, we now have modern accepted treatment protocols for gender dysphoria. Developed by the World Professional Association for Transgender Health (WPATH), the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th Version 2012) (hereinafter

"WPATH Standards of Care") represent the consensus approach of the medical and mental health community, Br. of Medical Amici 13, and have been recognized by various courts, including this one, as the authoritative standards of care, *see De'lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013); *see also Edmo*, 935 F.3d at 769; *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1294 (N.D. Fla. 2018), *vacated sub nom. Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257 (11th Cir. 2020).[2] "There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups." *Edmo*, 935 F.3d at 769 (quoting *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103, 1125 (D. Idaho 2018)).[3]

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[2] To be sure, some courts have held in the Eighth Amendment deliberate-indifference context that there remains medical disagreement as to the necessity of sex reassignment surgery (SRS), which the WPATH Standards of Care include as a treatment necessary for some patients. *See Gibson v. Collier*, 920 F.3d 212, 219–20 (5th Cir. 2019); *Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014) (discussing one expert's dismissal of the WPATH Standards of Care as they pertain to SRS, and later holding that prison officials were not deliberately indifferent when presented with "two alternative treatment plans" by "competent professionals"). *But see Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1017 (W.D. Wis. 2019) (explaining that the record in *Kosilek* was developed in 2006, "at which time medical experts disagreed" as to the necessity of SRS for Kosilek, and that the Fifth Circuit in *Gibson* was not presented with new record evidence, but rather relied on the same 2006 evidentiary record in *Kosilek*). We need not offer an opinion one way or the other.

[3] That did not prevent the Board from finding an expert, Dr. Quentin Van Meter, who disagrees with the WPATH Continued …

The WPATH Standards of Care outline appropriate treatments for persons with gender dysphoria, including "[c]hanges in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity)," hormone treatment therapy, sex reassignment surgery, "[s]urgery to change primary and/or secondary sex characteristics," and psychotherapy "for purposes such as exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; or promoting resilience." *See* J.A. 200–01 (WPATH Standards of Care 9–10). "The number and type of interventions applied and the order in which these take place may differ from person to person," J.A. 200 (WPATH Standards of Care 9), and special considerations are taken before adolescents are provided with physical transition treatments such as

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Standards of Care, and who treats transgender youth by encouraging them to live in accordance with their sex assigned at birth. It goes without saying that one can always find a doctor who disagrees with mainstream medical professional organizations on a particular issue. Aspects of Dr. Van Meter's report blatantly contradict the views of Grimm's expert, as well as the American Academy of Pediatrics and our other medical amici. On appeal, however, the Board relies on Dr. Van Meter's testimony only for its assertion that Grimm remained biologically female. *See* Opening Br. 12, 27, 46. The Board does not assert that Dr. Van Meter's report creates any genuine factual questions that would impact our legal analysis below. Therefore, we need not consider the remainder of his assertions, and may rely on the overwhelming evidence regarding the accepted standards of care.

hormone therapy, J.A. 209–212 (WPATH Standards of Care 18–21).

There is no question that there are students in our K-12 schools who are transgender. For many of us, gender identity is established between the ages of three and four years old. Br. of Medical Amici 7. Thus, some transgender students enter the K-12 school system as their gender; others, like Grimm, begin to live their gender when they are older. By the time youth are teenagers, approximately 0.7% identify as transgender. That means that there are about 150,000 transgender teens in the United States. That is not to suggest that people are either cisgender or transgender, and that everyone identifies as a binary gender of male or female. Of course, there are other gender-expansive youth who may identify as nonbinary, youth born intersex who do or do not identify with their sex-assigned-at-birth, and others whose identities belie gender norms. *See generally PFLAG, PFLAG National Glossary of Terms* (July 2019), http://pflag.org/glossary (explaining that "transgender" is "also used as an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expression"). But today's question is limited to how school bathroom policies implicate the rights of transgender students who "consistently, persistently, and insistently" express a binary gender.

Transgender students face unique challenges in the school setting. In the largest nationwide study of transgender discrimination, the 2015 U.S. Transgender Survey (USTS), 77% of respondents who were known or perceived as transgender in their K-12

schools reported harassment by students, teachers, or staff. Br. of Amici Curiae Sch. Adm'rs from Twenty-Nine States & D.C. in Supp. of Pl.-Appellee 6 (hereinafter "Br. of School Administrator Amici") (citing USTS Report at 132–35). For such students who were known or perceived to be transgender:

- 54% reported verbal harassment;
- 52% reported that they were not allowed to dress in a way expressing their gender;
- 24% reported being physically attacked because people thought they were transgender;
- 20% believed they were disciplined more harshly because teachers or staff thought they were transgender;
- 13% reported being sexually assaulted because people thought they were transgender; and
- 17% reported having left a school due to severe mistreatment.

USTS Report at 11. Unsurprisingly, then, harassment of transgender students is also correlated with academic success: students who experienced greater harassment had significantly lower grade point averages. Br. of School Administrator Amici 11. And harassment at school is similarly correlated with mental health outcomes for transgender students. The opposite is also true, though: transgender students have better mental health outcomes when their gender identity is affirmed. *See* Br. of Trevor Project 8.

Using the school restrooms matching their gender identity is one way that transgender students can affirm their gender and socially transition, but restroom policies vary. In one survey, 58% of transgender youth reported being discouraged from using the bathroom that corresponds with their gender. *See id.* When being forced to use a special restroom or one that does not align with their gender, more than 40% of transgender students fast, dehydrate, or find ways not to use the restroom. Br. of Amici Curiae the Nat'l PTA, GLSEN, Am. Sch. Counselor Ass'n, and Nat'l Assoc. of Sch. Psychologists in Support of Pl.-Appellee 5 (hereinafter "Br. of Education Association Amici") (citing Joseph Kosciw et al., GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 14 (2018)). Such restroom avoidance frequently leads to medical problems. *See id.* at 16 (citing Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 74–75 (2013)). To respond to the needs of transgender students, school districts across the country have implemented policies that allow transgender students to use the restroom matching their gender identity, and they have done so without incident. *See generally* Br. of School Administrator Amici; Br. of Education Association Amici; Br. of Fairfax Cty. Sch. Bd. & Other Va. Sch. Bds. as Amici Curiae in Support of Appellee and in Favor of Affirmance (hereinafter "Br. of Virginia School Board Amici").

B.

With that essential grounding, we turn to the facts of this case. In so doing, we recount the district court's factual findings, adding only undisputed facts from the record when helpful to our analysis.

When Gavin Grimm was born, he was identified as female, and his sex so indicated on his birth certificate. But Grimm always knew that he was a boy. For example, when given the choice, he would opt to wear boys' clothing. He recounts how uncomfortable he was when made to wear a dress to a sibling's wedding. Grimm also related to male characters, and he felt joy whenever he was "mis"-identified as a male—whether by an adult lining children up in "boy-girl" fashion, or by a good friend who recognized that Grimm was male. At the time, though, Grimm did not have the language to describe himself as transgender.

In September 2013, Grimm began attending Gloucester High School, a public high school in Gloucester County, Virginia. He was enrolled as a female.

In April 2014, during Grimm's freshman year, he disclosed to his mother that he was transgender. At Grimm's request, he began therapy the following month with Dr. Lisa Griffin, Ph.D., a psychologist with experience counseling transgender youth. Dr. Griffin diagnosed Grimm with gender dysphoria. Dr. Griffin then prepared a treatment documentation letter stating that Grimm had gender dysphoria, that he should present as a male in his daily life, that he should be considered and treated as a male, and that he should be allowed to use restrooms consistent with

that identity. Dr. Griffin also referred Grimm to an endocrinologist for hormone treatment.

By the end of his freshman year, Grimm was out to his whole family, had changed his first name to Gavin, and was expressing his male identity in all aspects of his life. He used male pronouns to describe himself. He even used men's restrooms when in public, with no incidents or questions asked.

In August 2014, before the beginning of Grimm's sophomore year, Grimm and his mother met with a school guidance counselor, Tiffany Durr, to discuss his transition. They gave Durr a copy of Dr. Griffin's treatment documentation letter and requested that Grimm be treated as a boy at school. At the time, the student bathrooms were all multi-stalled and single-sex—i.e., boys and girls bathrooms. Those bathrooms were located throughout the school. The only other options were apparently a restroom located in the nurse's office, and the faculty restrooms. Grimm agreed to use the restroom in the nurse's office. But once school started, he "soon found it stigmatizing to use a separate restroom" and "began to feel anxiety and shame surrounding [his] travel to the nurse's office." J.A. 113 (Gavin Grimm Decl. at ¶ 29). He also realized that using the restroom in the nurse's office caused him to be late to class because of its location in the school.

After a few weeks of using the nurse's office, Grimm met with Durr again and asked for permission to use the boys restrooms. Durr asked the high school principal, Principal Collins, who spoke with the Superintendent, Dr. Clemons. The Superintendent deferred to Principal Collins's judgment, and Principal

Collins allowed Grimm to use the male restrooms. At that time, the Board was not yet involved. Grimm was given permission to complete his physical education courses online and never needed to use the locker rooms at school.

For seven weeks, Grimm used the boys restrooms at Gloucester County High School without incident. Despite that smooth transition, adults in the community caught wind of the arrangement and began to complain. Superintendent Clemons, Principal Collins, and Board members began receiving numerous complaints via email and phone not only from adults within that school district but also from adults in neighboring communities and even other states. Only one student personally complained to Principal Collins, and that student did so before the restroom privacy improvements discussed below.

Following these complaints, Board member Carla Hook, who had expressed her opposition to having a transgender male in the boys bathrooms, proposed the following policy at the Board's public meeting on November 11, 2014:

> Whereas the [Gloucester County Public Schools (GCPS)] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A. 775. Neither the Board nor the school informed either Grimm or his family that Grimm's bathroom usage would be up for debate at that Board meeting. Rather, news of the topic for the meeting spread on Facebook, and Grimm's mother found out from a friend the day before. Grimm and his parents attended the meeting, at which twenty-four other community members spoke.

Although some community members supported creating a separate restroom for Grimm, by and large, they vehemently opposed allowing Grimm to use the boys restrooms. Two common themes arose: (1) that the "majority" must be protected from such minority intrusion, *see, e.g.*, *School Board Meeting*, Gloucester County School Board (Nov. 11, 2014), at 14:48–15:20 (hereinafter, "November Meeting"), http://gloucester.granicus.com/player/clip/1065?view_id=10 ("It is a disruption. . . . [W]e have more to consider than just the rights of one student. . . . what about the rights of other students, the majority of the students at Gloucester High School."), *cited by* Opening Br. 11 n.2; *id.* at 18:57–19:06 ("While we have an obligation to provide minority rights, we still are a majority rule country . . . ."), and (2) that allowing transgender students to use the bathroom matching their gender identity would open the door to predatory

behavior, particularly by male students pretending to be transgender in order to use the girls bathroom, *see, e.g.*, *id.* at 14:27–14:39 ("When we have a situation with a young man that says they want to identify themselves as a young lady and they go in . . . the ladies' room with ill intent, where does it end?"); *id.* at 20:57–21:02 ("A young man can come up and say, 'I'm a girl, I need to use the ladies' rooms now.' And they'd be lying through their teeth.").

The Board was set to vote on the proposed policy at that very meeting but voted 4-3 to delay the vote. Come the next meeting, held on December 9, 2014, the comment period was even uglier. One person called Grimm a "freak" and likened him to a dog, asking: "must we use tax dollars to install fire hydrants where you can publicly relieve yourselves?" *School Board Meeting*, Gloucester County School Board (Dec. 9, 2014), at 1:22:54–1:23:34, http://gloucester.granicus.com/player/clip/1090?view_id=10, *cited by* Opening Br. 11 n.3. Another likened Grimm to a "European" asking for a "bidet." *Id.* at 1:40:45–1:40:48. More than one person talked about Grimm's gender identity as a choice. *See id.* at 1:13:58–1:14:09 ("Is it morally right for us to kneel or bow to the very few who demand that they receive a special identification to meet needs of their own perceived body functions?"); *id.* at 1:18:48–1:19:49 (woman discussing her "former" lesbianism as an "addiction" from which "Jesus Christ set [her] free"). And more than one citizen stated that they would vote out the Board members if they allowed Grimm to use the boys restroom. *See id.* at 42:21–42:32, 50:53–50:56, 1:18:00–1:18:05.

At both meetings, Grimm and his parents spoke out against the proposed policy. Grimm explained in part how "alienating" and "humiliating" it had been to use the nurse's office, and that it "took a lot of time away from [his] education." November Meeting at 24:36–24:58. He also explained that he was currently using the men's public restrooms in Gloucester County without "any sort of confrontation of any kind." *Id.* at 25:05–25:26.

The Board passed the proposed policy on December 9, 2014 by a 6-1 vote. The following day, Principal Collins sent a letter to Grimm explaining that he was no longer allowed to use the boys bathrooms, effective immediately, and that his further use of those bathrooms would result in disciplinary consequences.

As a corollary to the policy, the Board approved a series of updates to the school's restrooms to improve general privacy for all students. The updates included 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.

At the same time that the bathroom policy was going into place in December 2014, Grimm began hormone therapy. Hormone therapy "deepened [his] voice, increased [his] growth of facial hair, and [gave him] a more masculine appearance." J.A. 120 (Gavin Grimm Decl. ¶ 60). But until the single-stall bathrooms were completed, Grimm's only option was to use the girls bathrooms or the restroom in the nurse's office. Grimm recalls an incident when he stayed after school for an event, realized the nurse's

office was locked, and broke down in tears because there was no restroom he could use comfortably. A librarian witnessed this and drove him home. In a similar vein, and even after the single-user restrooms had been built, Grimm could not use those restrooms when at football games. He recounts a friend having to drive him to a hardware store to use the restroom; on another occasion, his mother had to come pick him up early.

The single-stall restrooms were completed on December 16, 2014, one week after the Board enacted the policy. Once completed, however, they were located far from classes that Grimm attended. A map of the school confirms that no single-user restrooms were located in Hall D, where Grimm attended most classes.

Moreover, the single-stall restrooms made Grimm feel "stigmatized and isolated." J.A. 117 (Gavin Grimm Decl. ¶ 47). He never saw any other student use these restrooms. J.A. 117 (Gavin Grimm Decl. ¶ 48). Principal Collins testified at his deposition that he never saw a student use the single-user restrooms, but that he assumed that they were used because they were cleaned daily.

As commonly occurs for transgender students prohibited from using the restroom matching their gender identity, *see supra* Part I.A, Grimm practiced restroom avoidance. This caused Grimm to suffer from recurring urinary tract infections, for which his mother kept medication "always stocked at home." J.A. 133 (Deirdre Grimm Decl. ¶ 26).

During his junior year, Grimm was hospitalized for suicidal ideation resulting from being in an environment where he felt "unsafe, anxious, and disrespected." J.A. 119 (Gavin Grimm Decl. ¶ 54). In a moment of affirmation, the hospital admitted him to the boys ward. The situation at Gloucester County High School had proved untenable for him, and he sought other schooling options. Grimm spent his junior year in a Gloucester County High School program in a separate building. But that program was cancelled, and he had to return to the same restroom situation for his senior year. Having collected credits in the prior program, he spent as little time at the high school as possible during his senior year.

At the same time, Grimm's gender transition progressed. In June 2015, before his junior year, the Virginia Department of Motor Vehicles issued Grimm state identification reflecting that he was male. In June 2016, Grimm underwent chest reconstruction surgery (a double mastectomy).[4] The Gloucester County Circuit Court found this to be a type of "gender reassignment surgery," and on September 9, 2016, it issued an order declaring that Grimm is "now functioning fully as a male" and directing the Virginia Department of Health to issue him a birth certificate accordingly. Grimm's new birth certificate was issued on October 27, 2016.

Shortly thereafter, Grimm and his mother provided Gloucester County High School with his new

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[4] The parties agree that Grimm could not have undergone gender confirmation surgery of the genitalia until he was at least eighteen years old.

birth certificate and asked that his school records be updated to reflect his gender as male. The decision of whether to amend Grimm's records accordingly, though, lay with the Board. In January 2017, through legal counsel, the Board informed Grimm in a letter that it declined to update his records. The Board did not provide a reason, but did inform Grimm of his right to a hearing, which Grimm did not request.

As part of this litigation, the Board's 30(b)(6) witness, Troy Andersen, testified that the Board refused to update Grimm's records because, in its view, Grimm's amended birth certificate was not issued in accordance with Virginia law and because it was marked "void." Grimm submitted a declaration from State Registrar and Director of the Division of Vital Records Janet Rainey, who administers Virginia's vital records. Rainey affirmed the validity of Grimm's birth certificate, stating: "On October 27, 2016, I issued a birth certificate to Gavin Elliot Grimm. The birth certificate states his sex as male." J.A. 982 (Decl. of Janet M. Rainey).

Grimm graduated high school on June 10, 2017. He now attends community college in California and intends to transfer to a four-year university. To do so, he will need to provide his high school transcript, which still identifies him as female.

## II. Procedural History

The procedural history of this case is winding and has outlasted Grimm's high school career, shaping both the claims and relief sought. Grimm first sued the Board on June 11, 2015, at the end of his sophomore year. Grimm alleged that the Board's

restroom policy impermissibly discriminated against him in violation of both Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. As relief, he sought compensatory damages and an injunction allowing him to use the boys restrooms. Although the Board's policy similarly applies to locker room facilities, Grimm did not need to use the locker rooms and never challenged that aspect of the policy. Because he only challenges his exclusion from the boys restrooms, we refer to the policy as the "bathroom" or "restroom" policy throughout.

The Board filed a motion to dismiss Grimm's claims. In the first ruling in Grimm's case, the district court denied Grimm's motion for a preliminary injunction and dismissed his Title IX claim, holding that it would not defer to a Guidance Document issued by the Department of Education's Office for Civil Rights (OCR), which, at that time, directed in part that "[u]nder Title IX, a recipient must generally treat transgender students consistent with their gender identity . . . ." *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 746 (E.D. Va. 2015). The district court held that an implementing regulation of Title IX, 34 C.F.R. § 106.33, "clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth of biological sex." *Id.*

Grimm filed an interlocutory appeal, and this Court reversed, holding that the Guidance Document was entitled to deference. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016). However, after that decision, the Department

of Education and Department of Justice withdrew its prior Guidance Document, issuing a new one. Accordingly, the Supreme Court, which had granted the Board's petition for writ of certiorari and had scheduled oral arguments, summarily vacated this Court's decision and remanded for reconsideration in light of the shift in agency perspective. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

Having graduated from high school, Grimm then filed an amended complaint, which was assigned to a different district court judge. The amended complaint did not seek compensatory damages—only nominal damages and declaratory relief.[5] It also adjusted Grimm's Title IX claim in time to extend throughout his time at Gloucester County High School. Finally, it incorporated more recent factual developments, including that Grimm underwent chest reconstruction surgery, had his sex legally changed under Virginia law by the Gloucester County Circuit Court, and received a new birth certificate from the Department of Health, listing his sex as male. The Board once again filed a motion to dismiss for failure to state a claim. In an opinion that would build the basis for summary judgment, the district court denied the Board's motion to dismiss. As to Grimm's Title IX claim, the district court held that "claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory," and that Grimm had sufficiently pleaded sex

[5] Initially, the amended complaint retained Grimm's request for a permanent injunction, but Grimm voluntarily dismissed that request.

discrimination that harmed him. *See Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 746–47 (E.D. Va. 2018) (quoting *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018)). As to his equal protection claim, the district court held that heightened scrutiny applied both because "transgender individuals constitute at least a quasi-suspect class," and because Grimm pleaded a sex-stereotyping claim. *Id.* at 749–50. And the policy could not withstand heightened scrutiny, the district court reasoned, because it was not substantially related to the government's interest in protecting the privacy of other students. *See id.* at 751 (explaining that Grimm used the boys bathroom without incident until adults complained, that transgender students are not more likely than others to peep, and that pre-pubescent and post-pubescent children share bathrooms without issue). Students enjoyed the added privacy of partitions installed in the boys bathroom, and if any students felt that the partitions were insufficient, *they* could use the single-stalled bathrooms. *See id.* But to tell Grimm alone that he could not use the multi-stalled boys bathrooms "singled out and stigmatized" him. *Id.*

After this win, Grimm filed a second amended complaint, adding a claim that the Board's refusal to update his gender on his school transcripts violates Title IX and equal protection. Grimm and the School Board then filed cross-motions for summary judgment. Again, the district court ruled in Grimm's favor, granting him summary judgment on both his Title IX and equal protection claims.

Grimm filed various exhibits in support of his motion, including medical treatment records and letters documenting his treatment. The district court rejected the Board's Motion to Strike these exhibits, holding that the authoring doctors were not being treated as expert witnesses, and that they were business records falling within a hearsay exception. The district court did grant the Board's Motion to Strike as to one piece of evidence, however. In February 2019, the Board had considered a new policy "that would allow transgender students to use restrooms consistent with their gender identity if certain criteria were met." *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 455–56 (E.D. Va. 2019). The district court found that this policy was inadmissible because it was considered as a part of settlement negotiations. *Id.*

On the merits, and applying its prior Title IX holding as further supported by additional intervening caselaw, the district court granted Grimm's Motion for Summary Judgment on the Title IX claim. In doing so, it rejected the Board's contention that Grimm failed to prove harm, *see infra* Section V, because Grimm's declaration under oath explained that going to the bathroom was like a "walk of shame," and because he suffered urinary tract infections from trying to avoid the bathroom and was even hospitalized for suicidal thoughts. *See id.* at 458. This was enough to prove that he was harmed; he did not need expert testimony. *See id.*

The district court also granted Grimm's Motion for Summary Judgment on his equal protection claim, again finding more intervening support for its prior

holding. The Board had presented a witness by deposition, Troy Andersen, who testified that using the toilet or urinal implicates students' privacy concerns. However, "[w]hen asked why the expanded stalls and urinal dividers could not fully address those situations, Mr. Andersen responded that he 'was sure' the policy also protected privacy interests in other ways, but that he "[couldn't] think of any other off the top of [his] head.'" *See id.* at 461 (alterations in original). Therefore, the district court found that the Board's privacy argument was "based upon sheer conjecture and abstraction.'" *See id.* (quoting *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017)).

Regarding Grimm's school records, the Board had argued that Grimm's amended birth certificate did not comply with Virginia law. But according to the district court, any question of compliance was "dispelled by the Declaration of Janet M. Rainey," the State Registrar and Director of the Division of Vital Records, who issued Grimm's amended birth certificate. *See id.* at 458. The court went on to declare that the Board's "continued recalcitrance" to fix his school records violated both Title IX and equal protection, and it issued a permanent injunction ordering the Board to correct Grimm's school records. *Id.*

In addition to declaratory relief, the district court awarded nominal damages to Grimm in the amount of one dollar for the Board's Title IX and equal protection violations, as well as attorney's fees. The Board timely appealed.

## III. The Board's Threshold Challenges to Grimm's Claims

At the outset, we reject the Board's two threshold challenges to Grimm's claims on appeal: (1) that his claims pertaining to the restroom policy are moot, and (2) that his claims pertaining to his school records must be administratively exhausted.

### A. Mootness of Challenge to Restroom Policy

First, the Board contends that we lack jurisdiction over Grimm's challenges to the restroom policy because those claims are mooted by his own amendments to the complaint, which removed his request for injunctive relief and compensatory damages. As characterized by the Board, by only seeking nominal damages and declaratory relief as to the restroom policy, "Grimm seeks nothing more than a judicial stamp of approval, which is not a proper remedy." Reply Br. 1. Finding a live controversy, we reject this argument.

Our jurisdiction is restricted by Article III of the Constitution to "Cases" and "Controversies." *See Chafin v. Chafin*, 568 U.S. 165, 171 (2013). A case becomes moot and jurisdiction is lost if, at any time during federal judicial proceedings, "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *See id.* at 172 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). But the bar for maintaining a legally cognizable claim is not high: "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *See id.* (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*,

567 U.S. 298, 307 (2012)). Naturally, then, plausible claims for damages defeat mootness challenges. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019) ("If there is any chance of money changing hands, [the] suit remains live."); *see also* 13C Charles Alan Wright et al., Federal Practice and Procedure § 3533.3 (3d ed. April 2020 Update) (hereinafter "Wright & Miller").

That is true even when the claim is for nominal damages. *See* Wright & Miller § 3533.3, n.47 (collecting cases); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1536 (2020) (Alito, J., dissenting) (same). Under this Circuit's precedent, "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 v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009) (quoting *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007)). And the implications are particularly important in the civil rights context, because such rights are often vindicated through nominal damages. *See N.Y. State Rifle & Pistol Ass'n, Inc.*, 140 S. Ct. at 1535 (Alito, J., dissenting) (citing *Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion)); *see also Riverside*, 477 U.S. at 574 (plurality opinion) ("Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.").[6]

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[6] Additionally, winning nominal damages under 42 U.S.C. § 1983 allows for a recovery of attorney's fees under 42 U.S.C. Continued …

Nevertheless, the Board analogizes to an Eleventh Circuit en banc decision, *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs*, 868 F.3d 1248, 1263 (11th Cir. 2017). But *Flanigan's Enterprises* is unpersuasive because it is not on point.

In *Flanigan's Enterprises*, the Eleventh Circuit held that the plaintiff-appellants' request for declaratory and injunctive relief from a city ordinance became moot when the City repealed that ordinance "unambiguously and unanimously, in open session," with "persuasive reasons for doing so." 868 F.3d at 1263. The City had "expressly, repeatedly, and publicly disavowed any intent to reenact [the challenged] provision," which it had "*never* enforced in the first place." *Id.* (emphasis added). The Eleventh Circuit then turned to the appellants' "lone" remaining request, nominal damages. It explained that, in some situations, nominal damages have a "practical effect" or are the "appropriate remedy"; in others, nominal damages "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." *Id.* at 1264. *Flanigan's Enterprises* was "squarely of that last variety," the court said, because the appellants had "already won." *Id.*

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§ 1988, thereby allowing plaintiffs with insufficient funds to hire an attorney at market rate, and with little prospect of a great recovery, to be matched with a civil rights attorney. *See generally Riverside*, 477 U.S. at 576–80 (plurality opinion) (discussing the importance of the § 1988 framework for vindicating civil rights). Holding that claims for nominal damages are moot would undermine this framework by discouraging attorneys from taking cases such as Grimm's.

*Flanigan's Enterprises* is distinct at every turn. Whereas the ordinance at issue in that case had never been enforced, and had been publicly retracted, here the Board unquestionably applied its policy against Grimm. To this day, the Board and Grimm "vigorously contest" the legality of the bathroom policy as applied to Grimm. *See Chafin*, 133 S. Ct. at 1024 (holding that a case was not moot when the parties continued to "vigorously contest the question of where their daughter w[ould] be raised"). Unlike the Eleventh Circuit in *Flanigan's Enterprise*, we are presented with a "live controversy," *Hall v. Beals*, 396 U.S. 45, 48 (1969), that is "likely to be redressed by a favorable judicial decision," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). As seen by this drawn-out litigation, it will only be redressed by a favorable judicial decision.

B. Administrative Exhaustion of School Records Decision

Second, the Board asserts that Grimm was required to exhaust his administrative remedies by requesting a hearing after he learned of the Board's final decision. "Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Reiter v. Cooper*, 507 U.S. 258, 269 (1993). The Board is correct that the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, under which Grimm requested that his records be amended, provides for a hearing. *See* 34 C.F.R. § 99.20(c) ("If the educational agency or institution

decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21."). When read together with broader agency principles, the Board believes that FERPA's regulatory hearing provision demands exhaustion.

In sharp contrast to a statute like the Prison Litigation Reform Act of 1995 (PLRA), which demands "proper exhaustion," *see Woodford v. Ngo*, 548 U.S. 81, 93 (2006), the FERPA says nothing about exhausting administrative remedies. *Cf.* PLRA, 42 U.S.C. § 1997e(a) ("No action shall be brought . . . until such administrative remedies as are available are exhausted."). Facing Congressional silence, rather than an express exhaustion provision, "sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded on other grounds by statute*, 42 U.S.C. § 1997e(a).

Even when considering a different education statute with an *explicit* exhaustion requirement, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(l), the Supreme Court held that its exhaustion requirement is not implicated when the gravamen of the suit is disability discrimination in violation of other federal laws, rather than a more direct violation of the IDEA itself. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017). And here, the "gravamen" of Grimm's suit is discrimination, rather than technical violations of the FERPA. *See Fry*, 137 S. Ct. at 755.[7] Grimm is not complaining that the

[7] The Board cites one case that, in its view, suggests that FERPA has an exhaustion requirement. But that case holds only

Continued …

Board failed to follow the FERPA, but rather that it acted in a discriminatory manner when it refused to amend his records.

We may ask ourselves what benefit a hearing could have provided Grimm, when the Board continues to deny his request in the face of both a court order stating that his sex is male and a declaration from the State Registrar affirming the validity of his new birth certificate. If the FERPA ever *implicitly* demands such complete exhaustion, it does not do so in a discrimination case such as this one.

## IV. Grimm's Equal Protection Claim

Holding that Grimm's challenges to the bathroom policy are not moot, and that he need not have strictly exhausted his administrative remedies as to his school records, we turn to the merits of his claims, beginning with his constitutional claim that both the restroom policy and the failure to amend his school records violated equal protection, as applied to him.

We address the Board's two challenged actions in turn. In doing so, we review the district court's grant of summary judgment to Grimm de novo. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). Summary judgment is only appropriate when there is "no genuine dispute as to any material fact" and "the

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that the student must at least provide the school with documentation of a gender change before suing. *See Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 663 (W.D. Pa. 2015) (rejecting transgender student's claims arising out of the school's failure to amend his records because the student had not presented a court order or birth certificate, and never followed through).

movant is entitled to judgment as a matter of law." *Ret. Comm. of DAK Ams. LLC v. Brewer*, 867 F.3d 471, 479 (4th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)).

A. The Board's Restroom Policy

To analyze Grimm's as-applied constitutional challenge to the Board's restroom policy, we must begin with the equal protection framework. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause protects us not just from state-imposed classifications, but also from "intentional and arbitrary discrimination." *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (quoting *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441, 445 (1923)); *see also* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Miami L. Rev. 9 (2003) (explaining that the Equal Protection Clause contains both anticlassification and antisubordination principles). Put another way, state action is unconstitutional when it creates "arbitrary or irrational" distinctions between classes of people out of "a bare . . . desire to harm a politically unpopular group." *Cleburne*, 473 U.S. at 446–47 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also United States v. Virginia*, 518 U.S. 515, 534 (1996) (sex-based classifications "may not be used, as they once were, to create or perpetuate the legal,

social, and economic inferiority of women" (citation omitted)).

When considering an equal protection claim, we first determine what level of scrutiny applies; then, we ask whether the law or policy at issue survives such scrutiny. For the reasons that follow, we conclude that heightened scrutiny applies to Grimm's claim because the bathroom policy rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class. Therefore, to withstand judicial scrutiny, the Board's bathroom policy must be "substantially related to a sufficiently important governmental interest." *See Cleburne*, 473 U.S. at 441. Because we hold that the Board's policy as applied to Grimm is not substantially related to the important objective of protecting student privacy, we affirm summary judgment to Grimm.

1.

In determining what level of scrutiny applies to a plaintiff's equal protection claim, we look to the basis of the distinction between the classes of persons. *See generally United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Representing two ends of the scrutiny spectrum, most classifications are generally benign and are upheld so long as they are "rationally related to a legitimate state interest," *Cleburne*, 473 U.S. at 440, whereas race-based classifications are "inherently suspect" and must be "strictly scrutinized," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223–24 (1995) (internal quotation mark omitted).

Sex is somewhere in the middle, constituting a quasi-suspect class. Sex[8] is only *quasi*-suspect because, although it "frequently bears no relation to the ability to perform or contribute to society,'" *Cleburne*, 473 U.S. at 440–41 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)), the Supreme Court has recognized "inherent differences" between the biological sexes that might provide appropriate justification for distinctions, *see Virginia*, 518 U.S. at 534 (citing, as examples of appropriate sex-based distinctions, "compensat[ing] women for particular economic disabilities" and "promot[ing] equal employment opportunity" (internal quotation marks omitted)); *see also Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001) (holding that less burdensome citizenship application requirements for the child of a citizen mother than that of a citizen father withstands intermediate scrutiny, in part because "[t]o fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it").

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[8] We acknowledge that the Supreme Court has, in certain equal protection cases, used both the terms "gender" and "sex" interchangeably. *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Virginia*, 518 U.S. at 515. Therefore, Grimm has preserved an argument that transgender individuals necessarily fall under this line of cases based on gender discrimination. Because we need not reach this question in order to resolve Grimm's appeal, we treat this line of cases on perhaps its narrower terms—that is, as referring to classifications based on biological sex.

Because sex-based classifications are quasi-suspect, they are subject to a form of heightened scrutiny. *Cleburne*, 473 U.S. at 440–41. Specifically, they are subject to intermediate scrutiny, meaning that they "fail[] unless [they are] substantially related to a sufficiently important governmental interest." *See id.* at 441. To survive intermediate scrutiny, the state must provide an "exceedingly persuasive justification" for its classification. *See Virginia*, 518 U.S. at 534.

a.

On its face, the Board's policy creates sex-based classifications for restrooms. It states that the school district will "provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders." J.A. 775. The only logical reading is that "corresponding biological genders" refers back to "male and female." And, although the Board did not define "biological gender," it has defended its policy by taking the position that it will rely on the sex marker on the student's birth certificate. We agree with the Seventh and now Eleventh Circuits that when a "School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate," the policy necessarily rests on a sex classification. *See Whitaker*, 858 F.3d at 1051 (applying heightened scrutiny to a transgender student's equal protection claim regarding a bathroom policy); *see also Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 2020 WL 4561817, at *5 (11th Cir. Aug. 7, 2020) (same). As in *Whitaker*, such a policy "cannot be stated without referencing sex."

*See id.*; *accord M.A.B.*, 286 F. Supp. 3d at 719. On that ground alone, heightened scrutiny should apply.

Moreover, and as the district court held, "Grimm was subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated by the Policy." *Grimm*, 302 F. Supp. 3d at 750. Many courts, including the Seventh and Eleventh Circuits, have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes. *See, e.g.*, *Whitaker*, 858 F.3d at 1051 (holding that the School District's bathroom policy "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently"); *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) ("Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes."); *Smith v. City of Salem*, 378 F.3d 566, 573–75; 578 (6th Cir. 2004) (applying a sex-stereotyping theory, albeit without mentioning a level of scrutiny, and holding that the transgender plaintiff stated a sex discrimination claim in violation of equal protection); *M.A.B.*, 286 F. Supp. 3d at 719 (holding that a school locker room policy was subject to heightened scrutiny because it "classifie[d] [the plaintiff] differently on the basis of his transgender status, and, as a result, subject[ed] him to sex stereotyping"); *see also Doe 1 v. Trump*, 275 F. Supp. 3d 167, 210 (D.D.C. 2017) (military bans on

transgender persons subject to heightened scrutiny because they "punish individuals for failing to adhere to gender stereotypes"), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (adopting *Doe 1* rationale); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (holding that discrimination on the basis of transgender status is subject to intermediate scrutiny in part under sex-stereotyping theory).[9] In so holding, these courts have recognized a central tenet of equal protection in sex discrimination cases: that states "must not rely on overbroad generalizations" regarding the sexes. *See Virginia*, 518 U.S. at 533; *see also Miss. Univ. for Women*, 458 U.S. at 724–25 ("Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females.").

For each of these independent reasons, we hold that the Board's policy constitutes sex-based discrimination as to Grimm and is subject to intermediate scrutiny. And although the Board raises

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[9] As relied on by the Board, one 2015 district court case goes the other way, *Johnston*, 97 F. Supp. 3d at 671, but the same district court later chose not to follow that decision, *see Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 287 (W.D. Pa. 2017) ("Johnston also acutely recognized that cases involving transgender status implicate a fast-changing and rapidly-evolving set of issues that must be considered in their own factual contexts. To be sure, Johnston's prognostication of that reality was profoundly accurate." (citation omitted)).

two related counterarguments in an effort to convince us otherwise, we reject them both.

First, the Board contends that all students are treated the same, regardless of sex, because the policy applies to everyone equally. *See* Reply Br. 16 (noting that any student may use a "private, single-stall restroom," and "[n]o student is permitted to use the restroom of the opposite sex"). But that is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race. No one would suppose that also providing a "race neutral" bathroom option would have solved the deeply stigmatizing and discriminatory nature of racial segregation; so too here. Rather, the Board said what it meant: "students with gender identity issues shall be provided an alternative appropriate private facility." J.A. 775. The single-stall restrooms were created *for* "students with gender identity issues." And by "students," the Board apparently meant Grimm, as, per its own deposition witness, it "only ha[d] a sample size of one." J.A. 458. The Board suggests that this purpose insulates its policy from intermediate scrutiny, because it shows that the policy "relies solely on transgender status." *See* Opening Br. 46. But again, how does the Board determine transgender status, if not by looking to what it calls "biological gender"?

Second, the Board contends that even if the policy necessarily involves sex-based discrimination, it cannot violate equal protection because Grimm is not similarly situated to cisgender boys. Instead, it asks us to compare Grimm's treatment under the policy to the treatment of students it would consider to be

"biological" girls, because Grimm's "choice of gender identity did not cause biological changes in his body, and Grimm remain[ed] biologically female." Opening Br. 46. But embedded in the Board's framing is its own bias: it believes that Grimm's gender identity is a choice, and it privileges sex-assigned-at-birth over Grimm's medically confirmed, persistent and consistent gender identity. The policy itself "recognizes that some students question their gender identities," and states that such students have "gender identity issues." J.A. 775. Grimm, however, did not question his gender identity at all; he knew he was a boy. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1317 (M.D. Fla. 2018) ("There is no evidence to suggest that [the transgender plaintiff's] identity as a boy is any less consistent, persistent and insistent than any other boy."). The overwhelming thrust of everything in the record—from Grimm's declaration, to his treatment letter, to the amicus briefs—is that Grimm was similarly situated to other boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth. Adopting the Board's framing of Grimm's equal protection claim here would only vindicate the Board's own misconceptions, which themselves reflect "stereotypic notions." *See Miss. Univ. for Women*, 458 U.S. at 725 ("Care must be taken in ascertaining whether the [state's] objective itself reflects archaic and stereotypic notions.").[10]

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[10] Our dissenting colleague's opinion reveals why this is so. To avoid a conclusion that Grimm was similarly situated to other boys, the dissent fails to "meaningfully reckon with what it

Continued …

b.

Alternatively, and as held by the district court in this case, we conclude that heightened scrutiny applies because transgender people constitute at least a quasi-suspect class.

Although the Seventh Circuit declined to reach the question of whether heightened scrutiny applies to transgender persons in *Whitaker*, many district courts, including the district court here, have analyzed the relevant factors for determining suspect class status and held that transgender people are at least a quasi-suspect class. *See Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (holding that transgender people constitute a quasi-suspect class); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (same); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (same); *M.A.B.*, 286 F. Supp. 3d at 718–19 (same); *Norsworthy*, 87 F. Supp. 3d at 1119 (same); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) (same); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951–53 (W.D. Wis. 2018) (explaining in a ruling on a preliminary injunction why heightened scrutiny would likely apply to transgender

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means for [Grimm] to be a transgender boy." *See Adams*, 2020 WL 4561817, at *2 n.2; *see also* Dissenting Op. at 93–94. We have been presented with a strong record documenting the modern medical understanding of what it means to be transgender, and considering that evidence is definitively the role of this Court.

persons).[11] As articulated by one district court, "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people." *Flack*, 328 F. Supp. 3d at 953. Moreover, the Ninth Circuit recently joined the many district courts in holding that transgender people constitute a quasi-suspect class. *See Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (affirming the district court's reasoning as to why transgender people are a quasi-suspect class). Only one court of appeals decision holding otherwise remains good law, but it reluctantly followed a since-overruled Ninth Circuit opinion. *See Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (noting that "[r]ecent research concluding that sexual identity may be biological suggests reevaluation of [*Holloway v. Arthur Andersen & Co.* 566 F.2d 659 (9th Cir. 1977),]" but following it regardless because the plaintiff's allegations were "too conclusory to allow proper analysis").

Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class. We consider four factors to determine whether a group of people constitutes a suspect or quasi-suspect class. First, we consider whether the class has historically been subject to discrimination. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Second, we determine if the class has a defining characteristic

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[11] The Eleventh Circuit was not presented with this question in *Adams* because the parties agreed that heightened scrutiny applied to the plaintiff's claim based on that Circuit's precedent in *Glenn*, 663 F.3d at 1319. *See Adams*, 2020 WL 4561817, at *4.

that bears a relation to its ability to perform or contribute to society. *Cleburne*, 473 U.S. at 440–41. Third, we look to whether the class may be defined as a discrete group by obvious, immutable, or distinguishing characteristics. *Bowen*, 483 U.S. at 602. And fourth, we consider whether the class is a minority lacking political power. *Id.* Each factor is readily satisfied here.

First, take historical discrimination. Discrimination against transgender people takes many forms. Like the district court, we provide but a few examples to illustrate the broader picture. *See Grimm*, 302 F. Supp. 3d at 749 ("[T]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." (collecting cases)). As explained in the Brief of the Medical Amici, being transgender was pathologized for many years. As recently as the DSM-3 and DSM-4, one could receive a diagnosis of "transsexualism" or "gender identity disorder," "indicat[ing] that the clinical problem was the discordant gender identity." *See* John W. Barnhill, *Introduction*, *in DSM-5 Clinical Cases* 237–38 (John W. Barnhill ed., 2014). Whereas "homosexuality" was removed from the DSM in 1973, "gender identity disorder" was not removed until the DSM-5 was published in 2013. *See* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 509–10, 517 (2016). What is more, even though being transgender was marked as a mental illness, coverage for transgender persons was excluded from the

Americans with Disabilities Act of 1990 (ADA) after a floor debate in which two senators referred to these diagnoses as "sexual behavior disorders." *See* Barry et al., *supra*, at 510; *see also* 42 U.S.C. § 12211(b)(1). The following year, Congress added an identical exclusion to the Rehabilitation Act of 1973, "stripping transgender people of civil rights protections they had enjoyed for nearly twenty years." Barry et al., *supra*, at 556; *see also* H.R. Rep. No. 102-973, at 158 (1992).

The transgender community also suffers from high rates of employment discrimination, economic instability, and homelessness. According to the National Transgender Discrimination Survey (NTDS),[12] people who are transgender are twice as likely as the general population to have experienced unemployment. When employed, 97% of NTDS respondents reported experiencing some form of mistreatment at work, or "hiding their gender transition to avoid such treatment." Barry et al., *supra*, at 552. NTDS respondents were "four times more likely than the general population to have a household income of less than $10,000 per year," and two and a half times more likely to have experienced homelessness. *Id.*

That is not all. Transgender people frequently experience harassment in places such as schools (78%), medical settings (28%), and retail stores (37%),

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[12] The NTDS is a major national survey on transgender discrimination. Along with its successor, the USTS, the NTDS has been relied upon by many amici to this case, as well as other courts. *See, e.g.*, *Whitaker*, 858 F.3d at 1051 (citing to the NTDS); *M.A.B.*, 286 F. Supp. 3d at 720 (citing to both the NTDS and the USTS); *Adkins*, 143 F. Supp. 3d at 139 (relying on the NTDS).

and they also experience physical assault in places such as schools (35%) and places of public accommodation (8%). *See id.* at 553. Indeed, transgender people are more likely to be the victim of violent crimes. *Id.* So, in 2009, Congress expanded federal protections against hate crimes to include crimes based on gender identity. *Id.* at 555. In so doing, the House Judiciary Committee recognized the "extreme bias against gender nonconformity" and the "particularly violent" crimes perpetrated against transgender persons. *See id.*

Of course, current measures and policies continue to target transgender persons for differential treatment. Without opining on the *legality* of such measures, we note that policies precluding transgender persons from military service, even after the repeal of "Don't Ask, Don't Tell," *see* Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States* 1 (2014), have recently been re-implemented as to most transgender service members. And this year, the Governor of Idaho signed into law a bill that would ban transgender individuals from changing the gender marker on their birth certificates, as Virginia law allowed Grimm to do. Further still, the Department of Health and Human Services recently issued a final rule redefining "sex discrimination" for purposes of Section 1557 of the Affordable Care Act to encompass only biological sex, and not gender identity. The list surely goes on.

Next, we turn to the second factor—whether the class has a defining characteristic that "bears [a] relation to ability to perform or contribute to society.'" *Cleburne*, 473 U.S. at 440–41 (quoting *Frontiero*, 441

U.S. at 677). Being transgender bears no such relation. Seventeen of our foremost medical, mental health, and public health organizations agree that being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *See* Br. of Medical Amici 6 (quoting Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* 1 (2012)). Although some transgender individuals experience gender dysphoria, and that could cause some level of impairment, not all transgender persons have gender dysphoria, and gender dysphoria is treatable. *See id.* "Importantly, 'transgender' and 'impairment' are not synonymous." Barry et al., *supra*, at 558.

That leaves the third and fourth factors. As to the third factor, transgender people constitute a discrete group with immutable characteristics: Recall that gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice. Rather, it is as natural and immutable as being cisgender. Br. of Medical Amici 7. But unlike being cisgender, being transgender marks the group for different treatment.

Fourth and finally, transgender people constitute a minority lacking political power. Comprising approximately 0.6% of the adult population in the United States, transgender individuals are certainly a minority. Even considering the low percentage of the population that is transgender, transgender persons are underrepresented in every branch of government. It was not until 2010 that the first openly transgender judges took their place on their states' benches, *see*

*First Two Openly Transgender Judges in the U.S. Appointed Last Month*, Women's Law Project (Dec. 7, 2010), https://www.womenslawproject.org/2010/12/07/first-two-openly-transgender-judges-in-the-u-s-appointed-last-month/, and we know of no openly transgender federal judges. There is a similar dearth of openly transgender persons serving in the executive and legislative branches. In 2017, nine openly transgender individuals were elected to office—more than doubling the total number of transgender individuals in *any* elected office across the country. *See* Brooke Sopelsa, *Meet 2017's Newly Elected Transgender Officials*, NBC News (Dec. 28, 2017, 9:06 AM EST), https://www.nbcnews.com/feature/nbc-out/meet-2017-s-newly-elected-transgender-officials-n832826; *see also* Logan S. Casey, *Transgender Candidates*, https://www.loganscasey.com/trans-candidates-project. And the examples of discrimination cited under the first factor affirm what we intuitively know: Transgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process.

The Board does not, and truly cannot, contend that transgender people do not constitute a quasi-suspect class under these four factors. Instead, it counsels judicial modesty, suggesting that we are admonished not to name new suspect classes. *See Cleburne*, 473 U.S. at 441–42 ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and

to what extent those interests should be pursued."); *see also Johnston*, 97 F. Supp. 3d at 668–69. But no hard-and-fast rule prevents this Court from concluding that a quasi-suspect class exits, nor have *Cleburne*'s dicta prevented many other courts from so concluding.

For the foregoing reasons, we hold that the Board's restroom policy constitutes sex-based discrimination and, independently, that transgender persons constitute a quasi-suspect class.

2.

Whether because the policy constitutes sex-based discrimination or because transgender persons are a quasi-suspect class, we apply heightened scrutiny to hold that the Board's policy is not substantially related to its important interest in protecting students' privacy.[13]

No one questions that students have a privacy interest in their body when they go to the bathroom. But the Board ignores the reality of how a transgender child uses the bathroom: "by entering a stall and closing the door." *Whitaker*, 858 F.3d at 1052; *see also Adams*, 318 F. Supp. 3d at 1296, 1314 ("When he goes into a restroom, [the transgender student] enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves."). Grimm used the boys restrooms for *seven weeks* without incident. When the community became aware that he was doing

[13] Grimm argues on appeal that he wins even under rational basis review. In light of our holding above, we need not analyze his claim under that level of review.

so, privacy in the boys restrooms actually increased, because the Board installed privacy strips and screens between the urinals. Given these additional precautions, the Board's Rule 30(b)(6) deposition witness could not identify any other privacy concern. The Board does not present any evidence that a transgender student, let alone Grimm, is likely to be a peeping tom, rather than minding their own business like any other student. Put another way, the record demonstrates that bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms. Therefore, the Board's policy was not substantially related to its purported goal.

The insubstantiality of the Board's fears has been borne out in school districts across the country, including other school districts in Virginia. Nearly half of Virginia's public-school students attend schools prohibiting discrimination or harassment based on gender identity. *See* Br. of Virginia School Board Amici 4. Although community members espoused similar fears at school board meetings before the anti-discrimination measures, none of those fears have materialized. *Id.* at 17–19. Those Virginia school boards have had no difficulty implementing trans-inclusive bathroom policies and explain that they "have seen none of the negative consequences predicted by opponents of such policies." *Id.* at 5.

The same can be said across the country. *See* Br. of School Administrator Amici 18–24 (explaining that in amici's states, the concerns raised by the Board have not materialized). One school administrator in Kentucky, who was previously against allowing

transgender students to use the bathroom corresponding to their gender, explained that his experience with shifting the policy demonstrated that all the concerns were "philosophical." *Id.* at 17. In these administrators' experiences, "showing respect for each student's gender identity supports the dignity and worth of all students by affording them equal opportunities to participate and learn." *Id.* at 32. And the National PTA, GLSEN, American School Counselor Association, and National Association of School Psychologists similarly assure us that the experiences of schools and school districts across the country "put the lie to supposed legitimate justifications for restroom discrimination: preventing students who pretend to be transgender from obtaining access to opposite-gender restrooms and protecting privacy." Br. of Education Association Amici 6.

We thus agree with the district court's apt conclusion that "the Board's privacy argument 'is based upon sheer conjecture and abstraction.'" *Grimm*, 400 F. Supp. 3d at 461 (quoting *Whitaker*, 858 F.3d at 1052). The Board cites to no incident, either in Gloucester County or elsewhere. It ignores the growing number of school districts across the country who are successfully allowing transgender students such as Grimm to use the bathroom matching their gender identity, without incident. And it ignores its own seven-week experience with doing the same in Gloucester County High School. Notably, both the Third and Ninth Circuits have now rejected privacy-related challenges brought by cisgender students to the shared use of restrooms with transgender students of the opposite biological sex. *See Parents for Privacy*

*v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018). And before this opinion was filed, the Eleventh Circuit, applying heightened scrutiny to a transgender student's equal protection challenge to his high school's bathroom policy, similarly held that application of the policy did not withstand such scrutiny due, in part, to the hypothetical nature of the asserted privacy concerns. *See Adams*, 2020 WL 4561817, at *4–5, 7.

Moreover, we conclude that the Board's policy is "marked by misconception and prejudice" against Grimm. *See Tuan Anh Nguyen*, 533 U.S. at 73. The Board's proposed policy was concocted amidst a flurry of emails from apparently concerned community members and adopted in the context of two heated Board meetings filled with vitriolic, off-the-cuff comments, such as referring to Grimm as a "freak." Parents threatened to vote out the Board members if they allowed Grimm to continue to use the boys restrooms. One would be hard-pressed to look at the record and think that the Board sought to understand Grimm's transgender status or his medical need to socially transition, as identified by his treating physician. Rather, in a moment when he was finally able to affirm his gender, the Board treated Grimm as "questioning" his identity and lumped his in with what it considered to be "gender identity issues."

By relying on so-called "biological gender," the Board successfully excluded Grimm from the boys restrooms. But it did not create a policy that it could apply to other students, such as students who had fully transitioned but had not yet changed their sex on

their birth certificate. As demonstrated by the record and amici such as interACT, the Board's policy is not readily applicable to other students who, for whatever reason, do not have genitalia that match the binary sex listed on their birth certificate—let alone that matches their gender identity. *See* Br. for Amicus Curiae interACT: Advocates for Intersex Youth in Supp. of Pl.-Appellee 20–23. Instead, the Board reacted to what it considered a problem, Grimm's presence, by isolating him from his peers.

### B. The Board's Failure to Amend Grimm's School Records

Having held that the Board's bathroom policy violated Grimm's equal protection rights, we easily conclude that the Board's continued refusal to update his school records similarly violates those rights.[14] Unlike students whose gender matches their sex-assigned-at-birth, Grimm is unable to obtain a transcript indicating that he is male. The Board's decision is not substantially related to its important interest in maintaining accurate records because Grimm's legal gender in the state of Virginia is male, not female.

The Board's only rebuttal is that Grimm did not provide a lawfully obtained amended birth certificate.

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[14] The dissent does not address Grimm's school records, presumably because it would hold that Grimm is not similarly situated to other boys—full stop. Yet Virginia recognized Grimm as male and *amended his birth certificate*. Although preserving sex-assigned-at-birth separated restrooms may rouse more sentiment, the less-contentious school records issue sheds light on why application of such a restroom policy to transgender students is problematic.

Recall that Grimm received a state-court order changing his gender to "male," and he then presented the school with his amended birth certificate. The Board complains that the copy said "VOID," that it did not say the word "amended," and that the Gloucester County Circuit Court granted Grimm's motion to change his sex to male based on chest reconstruction surgery. As found by the district court, however: "It is obvious from the face of the amended birth certificate that the photocopy presented to the Board was marked 'void' because it was a copy of a document printed on security paper, not because it was fabricated." *Grimm*, 400 F. Supp. 3d at 458 n.6. Moreover, while the Board may disagree with the Gloucester County Circuit Court's order granting Grimm's motion to change his sex to male because it believes that chest reconstruction does not classify as gender reassignment surgery under Virginia law, we must give full faith and credit to that state court's order, which cannot be collaterally attacked in this appeal. *See* 28 U.S.C. § 1738. And in the face of the declaration of State Registrar and Director of the Division of Vital Records assuring that she issued Grimm a valid amended birth certificate, we grow weary of the Board's repeated arguments that it received anything less than an official document.

* * *

For the foregoing reasons, we affirm the district court's grant of summary judgment to Grimm on his equal protection claim.

## V. Grimm's Title IX Claim

We next address Grimm's claim that the Board's restroom policy and refusal to amend his school records also violated Title IX. Title IX provides that "[n]o 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). To grant summary judgment to Grimm on his Title IX claim, we must find (1) that he was excluded from participation in an education program "on the basis of sex"; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused him harm. *See Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994). There is no question that the Board received federal funding or that restrooms are part of the education program. At issue in this case is whether the Board acted "on the basis of sex," and if so, whether that was unlawful discrimination that harmed Grimm.

### A. The Board's Restroom Policy

We first address the restroom policy. After the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on the basis of sex." Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *cf. Fitzgerald v. Barnstable*

*Sch. Comm.*, 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citation omitted)). In *Bostock*, the Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex." As the Supreme Court noted, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions. *See id.* at 1741–42. As explained above in the equal protection discussion, the Board could not exclude Grimm from the boys bathrooms without referencing his "biological gender" under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions. Therefore, the Board's policy excluded Grimm from the boys restrooms "on the basis of sex."[15]

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[15] We pause to note another theory under which Grimm may have been discriminated "on the basis of sex." In *Price Waterhouse v. Hopkins*, the Supreme Court held that sex stereotyping constitutes discrimination on the basis of gender for purposes of Title VII. *See* 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."). Various circuits Continued …

We similarly have no difficulty holding that Grimm was harmed. As the district court found:

> In his Declaration, Mr. Grimm described under oath feeling stigmatized and isolated by having to use separate restroom facilities. His walk to the restroom felt like a "walk of shame." He avoided using the restroom as much as possible and developed painful urinary tract infections that distracted him from his class work. This stress "was unbearable" and the resulting suicidal thoughts he suffered led to his hospitalization at Virginia Commonwealth University Medical Center Critical Care Hospital.

*Grimm*, 400 F. Supp. 3d at 458 (citations omitted). Grimm also "broke down sobbing" when a restroom was unavailable after school, and he could not attend football games without worrying about where he would use the restroom. *See id.* at 459.

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have applied *Price Waterhouse* to Title VII gender stereotyping claims in the LGBTQ+ context, although we have not. Most notably, in *Hively v. Ivy Tech Community College*, the Seventh Circuit applied the logic of *Price Waterhouse* and held in an en banc opinion that a lesbian woman who was fired could state a Title VII gender-stereotyping claim. *See* 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc). The district court similarly relied on *Price Waterhouse* below. *Grimm*, 302 F. Supp. at 750. For the reasons discussed above in the equal protection section of our opinion, we agree that the policy punished Grimm for not conforming to his sex-assigned-at-birth. But having had the benefit of *Bostock*'s guidance, we need not address whether Grimm's treatment was also "on the basis of sex" for purposes of Title IX under a *Price Waterhouse* sex-stereotyping theory.

The Board does not provide evidence contradicting Grimm's or his mother's declarations. Rather, it has quibbled with the amount of harm Grimm felt, asserting below, for example, that he needed a medical expert to prove urinary tract infections. But in a nominal damages case, Grimm's harm need not be precisely calculated. For summary judgment purposes, it matters only that there is no genuine issue of material fact as to whether the bathroom policy harmed Grimm. There is no question that Grimm suffered legally cognizable harm for at least two reasons.

First, on a practical level, the physical locations of the alternative restrooms were inconvenient and caused Grimm harm. The nurse's room was far from his classes, as were the three single-user restrooms. The distance caused him to be late for class or away from class for longer than students and teachers perceived as normal. And when he attended after-school events, he had to be driven away just to use the restroom.

Second, in a country with a history of racial segregation, we know that "[s]egregation not only makes for physical inconveniences, but it does something spiritually to an individual." Martin Luther King, Jr., "Some Things We Must Do," Address Delivered at the Second Annual Institute on Nonviolence and Social Change at Holt Street Baptist Church (Dec. 5, 1957); *see also* Br. of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Supp. of Pl.-Appellee 7 (outlining the harms and erroneous rationales of racial segregation). The stigma of being forced to use a separate restroom is likewise sufficient

to constitute harm under Title IX, as it "invite[s] more scrutiny and attention" from other students, "very publicly brand[ing] all transgender students with a scarlet 'T'." *Boyertown*, 897 F.3d at 530 (quoting *Whitaker*, 858 F.3d at 1045); *see also id.* (rejecting the suggestion that transgender students be offered single-stall restrooms, rather than be allowed to use the regular restrooms matching their gender identity). Even Grimm's high school principal "understood [Grimm's] perception" that the policy sent the following message: Gavin was not welcome. J.A. 405–06. Although the principal assumed some students may have used that restroom, Grimm never saw anyone else use the restrooms created for students with "gender identity issues." The resulting emotional and dignitary harm to Grimm is legally cognizable under Title IX. *See Adams*, 2020 WL 4561817, at *13, 16 (holding that a transgender student's "psychological and dignitary harm" caused by a school bathroom policy was legally cognizable under Title IX).

Having determined that Grimm was harmed, we finally turn to the heart of the Title IX question in this case: whether the policy unlawfully discriminated against Grimm. *Bostock* expressly does not answer this "sex-separated restroom" question. 140 S. Ct. at 1753. In the Title IX context, discrimination "mean[s] treating that individual worse than others who are similarly situated." *Id.* at 1740 (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)). In light of our equal protection discussion above, this should sound familiar: Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding

with his gender. Unlike the other boys, he had to use either the girls restroom or a single-stall option. In that sense, he was treated worse than similarly situated students.

Nevertheless, the Board emphasizes a Department of Education implementing regulation, 34 C.F.R. § 106.33, which interprets Title IX to allow for "separate toilet, locker room, and shower facilities on the basis of sex," so long as they are "comparable" to each other. But Grimm does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity. *See also Adams*, 2020 WL 4561817, at *14 (holding that § 106.33 did not preclude a transgender student's Title IX claim, because he was not challenging sex-separated restrooms, but "simply seeking access to the boys' restroom as a transgender boy."). And the implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex. All it suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what "sex" means.[16]

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[16] So too for the more generic Title IX provision allowing for sex-separated living facilities. *See* 20 U.S.C. § 1686 (Title IX shall not "be construed to prohibit any educational institution" to which it applies "from maintaining separate living facilities for the different sexes."). Again, this is a broad statement that sex-separated living facilities are not unlawful—not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities. In any event, because

Continued …

*See Adams*, 2020 WL 4561817, at *15 (holding that "nothing in *Bostock* or the language of § 106.33 justifie[d] the School Board's discrimination" against a male transgender student seeking access to the boys restrooms).[17]

As explained above, Grimm consistently and persistently identified as male. He had been clinically diagnosed with gender dysphoria, and his treatment provider identified using the boys restrooms as part of the appropriate treatment. Rather than contend with Grimm's serious medical need, the Board relied on its own invented classification, "biological gender," for which it turned to the sex on his birth certificate. And even when Grimm provided the school with his

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34 C.F.R. § 106.33 is more specific to bathrooms, it is where the parties have focused their attention.

[17] The dissent suggests that Grimm should have challenged Title IX as unconstitutional, because Grimm's use of the boys restrooms would somehow upend sex-separated restrooms in schools. *See* Dissenting Op. at 90. But Grimm does not think that sex-separated restrooms are unconstitutional, and neither do we. The dissent's feared loss of sex-separated restrooms has not been borne out in any of the many school districts that allow transgender students to use the sex-separated restroom matching their gender identity. So it cannot be the physical loss of sex-separated restrooms that the dissent laments, but some emotional, intangible loss wrought by the mere presence of transgender persons. This type of argument calls to mind recent arguments against gay marriage, to the effect that allowing gay people to marry would "harm marriage as an institution." *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015). With no "foundation for the conclusion" that such "harmful outcomes" would occur, *see id.*, we similarly reject this institutional-harm type argument.

amended birth certificate, the Board *still* denied him access to the boys restrooms.

For these reasons, we hold that the Board's application of its restroom policy against Grimm violated Title IX.[18]

### B. The Board's Failure to Amend Grimm's School Records

Applying the same framework to the Board's refusal to update Grimm's school records, we hold that it too violated Title IX. Again, the Board based its decision not to update Grimm's school records on his sex—specifically, his sex as listed on his original birth certificate, and as it presupposed him to be. This decision harmed Grimm because when he applies to four-year universities, he will be asked for a transcript with a sex marker that is incorrect and does not match his other documentation. And this discrimination is

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[18] Noting that Title IX was passed under the Spending Clause, the Board also asserts that, if ambiguous, we must construe Title IX to allow application of its bathroom policy to Grimm in order to give the Board fair notice. *See generally Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But *Bostock* forecloses that "on the basis of sex" is ambiguous as to discrimination against transgender persons, and notes that Title VII "has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them." *See Bostock*, 140 S. Ct. at 1753 ("Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time."). So too Title IX. And the Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination. We reject the Board's *Pennhurst* argument.

unlawful because it treats him worse than other similarly situated students, whose records reflect their correct sex.

Accordingly, we affirm the district court's grant of summary judgment on Grimm's Title IX claim, and the relief granted, in full.

## VI. Conclusion

Grimm's four years of high school were shaped by his fight to use the restroom that matched his consistent and persistent gender identity. In the face of adults who misgendered him and called him names, he spoke with conviction at two Board meetings. The solution was apparent: allow Grimm to use the boys restrooms, as he had been doing without incident. But instead, the Board implemented a policy that treated Grimm as "questioning" his identity and having "issues," and it sent him to special bathrooms that might as well have said "Gavin" on the sign. It did so while increasing privacy in the boys bathrooms, after which its own deposition witness could not cite a remaining privacy concern. We are left without doubt that the Board acted to protect cisgender boys from Gavin's mere presence—a special kind of discrimination against a child that he will no doubt carry with him for life.

The Board did so despite advances in the medical community's understanding of the nature of being transgender and the importance of gender affirmation. It did so after a major nationwide survey, the NTDS, put stark numbers to the harmful discrimination faced by transgender people in many aspects of their lives, including in school.

It also did so while schools across Virginia and across the country were successfully implementing trans-inclusive bathroom policies, again, without incident. Those schools' experiences, as outlined in three amicus briefs, demonstrate that hypothetical fears such as the "predator myth" were merely that—hypothetical. Perhaps unsurprisingly, those schools also discovered that their biggest opponents were not students, but adults. *See* Br. of School Administrator *Amici* 10–11. One administrator noted:

> As to the students, I am most impressed. They are very understanding and accepting of their classmates. It feels like the adult community is struggling with it more.

*Id.* at 10. As another explained, "Young people are pretty savvy and comfortable, and can understand and empathize with someone who just wants to use the bathroom." *Id.*

The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. *Compare Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *and Bowers v. Hardwick*, 478 U.S. 186 (1986), *with Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955), *and Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.

It is time to move forward. The district court's judgment is

*AFFIRMED.*

WYNN, Circuit Judge, concurring:

I fully concur in Judge Floyd's opinion and write separately to emphasize several particularly troublesome aspects of the Board's policy. In particular, the Board's classification on the basis of "biological gender"—defined in this appeal as the sex marker on a student's birth certificate—is arbitrary and provides no consistent reason to assign transgender students to bathrooms on a binary male/female basis. Rather, the Board's use of "biological gender" to classify students has the effect of shunting individuals like Grimm—who *may not* use the boys' bathrooms because of their "biological gender," and who *cannot* use the girls' bathrooms because of their gender identity—to a third category of bathroom altogether: the "alternative appropriate private facilit[ies]" established in the policy for "students with gender identity issues."

That is indistinguishable from the sort of separate-but-equal treatment that is anathema under our jurisprudence. No less than the recent historical practice of segregating Black and white restrooms, schools, and other public accommodations, the unequal treatment enabled by the Board's policy produces a vicious and ineradicable stigma. The result is to deeply and indelibly scar the most vulnerable among us—children who simply wish to be treated as equals at one of the most fraught developmental moments in their lives—by labeling them as unfit for equal participation in our society. And for what gain? The Board has persisted in offering hypothetical and pretextual concerns that have failed to manifest, either in this case or in myriad others like it across our

nation. I am left to conclude that the policy instead discriminates against transgender students out of a bare dislike or fear of those "others" who are all too often marginalized in our society for the mere fact that they are different. As such, the policy grossly offends the Constitution's basic guarantee of equal protection under the law.

I.

A.

First, the Board's policy provides no consistent basis for assigning transgender students—who often possess a mix of male and female physical characteristics—to a particular bathroom. The policy, which was drafted by a Board member without consulting medical professionals, purports to classify students based on their "biological gender." J.A. 775. As the district court noted, this term has no standard meaning (to say nothing of widespread acceptance) in the medical field. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444, 457 (E.D. Va. 2019) (citing Wylie C. Hembree et al., *Endocrine Treatment of Gender-dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11), J. CLIN. ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017)). Rather, "biological gender," on its face, conflates two medical concepts: a person's biological sex (a set of physical traits) and gender (a deeply held sense of self). *Id.*

Given that the Board seemingly created the concept of "biological gender" *sua sponte*, it comes as no surprise that it has struggled to define the term in a way that provides any consistent reason to assign a

given transgender student to a male or female restroom. Broadly, the Board claims that "biological gender" is defined solely in terms of physiological characteristics.[1]

That suggests that the Board can identify some set of physical characteristics that fully identify someone as "male" or "female"—and thus neatly partition transgender students into those two categories. Yet the Board has offered no set of physical characteristics determinative of its "biological gender" classification in the five-year pendency of this case.

Nor could it, given that transgender individuals often defy binary categorization on the basis of physical characteristics alone. For instance, although Grimm was born physically female and had female genitals during his time at Gloucester High, he also had physical features commonly associated with the male sex: he lacked breasts (due to his chest reconstruction surgery); had facial hair, a deepened voice, and a more masculine appearance (due to hormone therapy); and presented as male through his haircut. The Board conveniently ignores all these facts, other than to claim that Grimm's chest reconstruction surgery "did not create any biological changes in Grimm, but instead, only a physical change." Opening Br. at 46.

Rather than address this reality, the Board has instead narrowed its definition of "biological gender"

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[1] I note that the Board's use of the term "gender" in "biological gender," along with the policy's reference to students with "gender identity issues," suggests that Grimm's gender identity played a part in the Board's bathroom designation, despite the Board's protestations to the contrary. J.A. 775.

to refer to the sex marker on a student's birth certificate—which, unless updated during a transgender individual's transition, merely tells the Board what physical sex characteristics a person was born with. But, as this case shows, a person's birth sex is not dispositive of their actual physiology.

Moreover, by focusing on an individual's birth certificate, the Board ensures the policy lacks a basic consistency: it fails to treat *even transgender* students alike. Specifically, the policy targets transgender students whose birth certificates do not match their outward physical characteristics while ignoring those transgender students whose birth certificates are consistent with their outward physiology.

Consider a student physically identical to Grimm in every respect—that is, a student who appeared outwardly male, but who had female genitals. If, unlike Grimm, this hypothetical student had obtained a birth certificate identifying him as male prior to enrolling at Gloucester High, then that student *would* have been able to use the boys' restrooms under the Board's current interpretation of its own policy. It is arbitrary that this hypothetical transgender student would not be subject to the policy, whereas Grimm would. *See Adams By & Through Kasper v. Sch. Bd. of St. Johns Cnty.*, No. 18-13592, 2020 WL 4561817, at *5 (11th Cir. Aug. 7, 2020) ("To pass muster under the Fourteenth Amendment, a governmental gender classification must 'be reasonable, not arbitrary.'" (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quotation marks omitted)).

Such a student would, of course, have female genitals. But genital characteristics are immaterial if,

as the Board claims, it is solely concerned with the sex marker on a student's birth certificate. However, the record shows that the Board was *not* only concerned with birth certificates below.

Apparently taking issue with the fact that Grimm's genitals did not match his birth certificate, the Board attempted to extend its sex-assigned-at-birth definition of "biological gender" in its summary judgment briefing at the district court. The Board claimed that if a student were using the restroom associated with the sex listed on their birth certificate, but the school learned that the student had some as-yet-unspecified set of anatomical characteristics of the opposite sex, it would require the student to switch bathrooms on the basis of those physiological differences.

The Board wisely abandoned that argument on appeal, given its inability to specify what set of physiological characteristics suffices to push an individual across its imagined line of demarcation between male and female classifications. But its shifting definitions of "biological gender" suggest that the policy is ends-driven and motivated more by discomfort with the presence of someone who appeared as a boy (but nonetheless had female genitals) using the boys' bathroom than concerns for a person's designation at birth.

B.

That suggestion is bolstered by another disturbing inconsistency in the policy: it produces the very privacy harms it purportedly seeks to avoid. Despite appearing wholly male except for his genitals, Grimm

could have used the girls' restroom under the policy. Female students would thus have found themselves in a private situation in front of someone with the physiology of the opposite biological sex—the exact harm to male students posited by the Board and my dissenting colleague, Judge Niemeyer. *See* Niemeyer Dis. Op. at 88-89, 93.

Specifically, the Board claims the policy protects the privacy interests of students who do not wish to be exposed to, or in a state of undress in front of, those with physical characteristics of the opposite sex. That is undoubtedly a long-recognized and important government interest, as Judge Niemeyer points out. Niemeyer Dis. Op. at 88-89. But, as Judge Floyd notes, the Board can identify no instance of such harms to the privacy interests of its students—a result consistent with the experiences of numerous school boards nationwide. Maj. Op. at 46-48.

That is unsurprising because, as a matter of common sense, any individual's appropriate use of a public bathroom does not involve exposure to nudity—an observation that is particularly true given the privacy enhancements installed in the bathrooms at Gloucester High. *See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017) ("Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall.").

Judge Niemeyer in dissent suggests that the "*mere presence*" of someone with female genitals in a male bathroom would create an untenable intrusion on

male privacy interests. Niemeyer Dis. Op. at 89. That assertion is debatable at the least, in the context of both male and female bathrooms. And it echoes the sort of discomfort historically used to justify exclusion of Black, gay, and lesbian individuals from equal participation in our society, as discussed *infra*. But it is ultimately beside the point, because the Board identified only three scenarios of concern in which boys would have felt unduly exposed to Grimm: when they used the stalls, when they used the urinals, and when they opened their pants to tuck in their shirts. The Board has identified no instances where such exposure occurred.

Crucially, even if were we to accept the Board's contention that the alleged infringements on student bodily privacy were in fact present, then the policy would, on balance, harm student privacy interests more than it helped them. Unlike his clothed genitals, Grimm's male characteristics—no breasts, masculine features and voice timbre, facial hair, and a male haircut—would have been readily apparent to any person using the girls' restroom. Put simply, Grimm's entire outward physical appearance was male. As such, there can be no dispute that had he used the girls' restroom, female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students. The Board's stated privacy interests thus cannot be said to be an "exceedingly persuasive" justification of the policy. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Further, if the Board's concern were truly that individuals might be exposed to those with differing

physiology, it would presumably have policies in place to address differences between pre-pubescent and post-pubescent students, as well as intersex individuals who possess some mix of male and female physical sex characteristics and who comprise a greater fraction of the population than transgender individuals. *See Whitaker*, 858 F.3d at 1052-53; Br. for Amicus Curiae interACT: Advocates for Intersex Youth in Supp. of Pl.-Appellee 5 (noting that 2% of all children born worldwide have variations in sex organs, chromosomes, and hormones that do not fit within binary anatomical gender classifications); Maj. Op. at 7 (noting that .6% of the United States adult population is transgender). That the Board's policy does not address those circumstances further suggests that its privacy justification is a post-hoc rationalization based on mere hypotheticals. *Virginia*, 518 U.S. at 533.

C.

One final note. Under the Board's policy, Grimm should have been able to use the boys' restroom if he had provided an updated birth certificate listing him as male. Of course, *he did just that*. But the Board baldly refused to apply its own policy, instead assembling a variety of post-hoc administrative justifications for its noncompliance—justifications that were ultimately meritless. *See* Maj. Op. at 30-31.

II.

The above problems notwithstanding, the Board audaciously invites us to ignore the policy's poorly formulated, arbitrary character, claiming that "[e]very 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." Opening Br. at 44. But that choice is no choice at all because, its above-described physiological misunderstandings and omissions aside, the Board completely misses the reality of what it means to be a transgender boy.

As Judge Floyd thoroughly notes, historical experience and decades of scientific inquiry have established that transgender individuals have an innate conception of themselves as belonging to one gender. Maj. Op. at 7-14. A transgender person's awareness of themselves as male or female is no less foundational to their essential personhood and sense of self than it is for those born with female genitals to identify as female, or for those born with male genitals to identify as male. History demonstrates that this self-conception is unshakeable indeed. Transgender individuals have persisted despite the significant harms that arose from living in societies that did not recognize them: cultural marginalization and disregard at best, and horrific oppression and lethal violence at worst.

So, despite the Board's contention that there is no problem because Grimm could have used the girls' bathrooms or the single-stall bathrooms, we must take a careful and practical look at the options he realistically faced. Grimm was of course barred from the boys' restrooms because of his Board-defined "biological gender." And despite the Board's assurances, he effectively could not use the girls' restrooms. His gender identity has always been male.

*He could no more easily use the girls' restrooms than a cisgender boy*.[2] The Board pointedly ignores this basic fact.

So, Grimm was effectively left with one option: the single-stall restrooms. But he did not use those restrooms at all because doing so "made [him] feel even more stigmatized and isolated than using the nurse's office" to which he had been previously relegated. Gavin Grimm Decl. ¶ 47. Specifically, "everyone knew that they were installed for [him] in particular, so that other boys would not have to share the same restroom as [him]." *Id.* Indeed, the Board does not controvert Grimm's assertion that no other students used the single-stall restrooms.

This problem is all too familiar. Forced segregation of restrooms and schools along racial lines—a blight on this country's history—occurred well within living memory. *See* Br. of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Supp. of Pl.-Appellee 7-8 (hereinafter "Br. of NAACP") (describing various laws passed to segregate restroom facilities and schools on the basis of race). Such segregation was infamously justified on the ground that no harm could inhere if separate but equal facilities were provided to African American schoolchildren. We now know that to be untrue: it is axiomatic that discriminating against students on the basis of race "generates a feeling of inferiority as to their status in the community that

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[2] Grimm had, of course, used girls' restrooms before his transition. But that fact says nothing about the harm he suffered from doing so. Grimm suffered from gender dysphoria as a result of living as a girl (including use of girls' bathrooms) despite identifying as a boy.

may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 494 (1954).

I see little distinction between the message sent to Black children denied equal treatment in education under the doctrine of "separate but equal" and transgender children relegated to the "alternative appropriate private facilit[ies]" provided for by the Board's policy. The import is the same: "the affirmation that the very being of a people is inferior." Martin Luther King, Jr., "The Other America," Remarks Given at Stanford University (Apr. 14, 1967) (transcript available at https://www.rev.com/blog/transcripts/the-other-america-speech-transcript-martin-luther-king-jr); *see also Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3rd Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) (holding that a policy forcing transgender students to use separate single-user facilities "would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school").

Judge Niemeyer in dissent notes that Title IX and equal protection permit separate but equal accommodations in schools on a male/female basis. Niemeyer Dis. Op. at 93-94. But that observation says nothing about what happened in this case: separation of transgender students from their cisgender counterparts through a policy that ensures that transgender students may use *neither* male nor female bathrooms due to the incongruence between their gender identity and their sex-assigned-at-birth. That

segregation generates harmful stigma, which was exacerbated in this case by the fact that the facilities were separate, but not even equal—there were no single-stall restrooms at football games, and the single-stall restrooms in the school building were located much farther from Grimm's classes than the boys' and girls' restrooms.

Moreover, it is important to note that the harm arising from the policy's message—that transgender students like Grimm should exist only at the margins of society, even when it comes to basic necessities like bathrooms—although foreign to the experiences of many, is not hypothetical. Nor does the policy merely engender discomfort or embarrassment for transgender students. Instead, the pain is overwhelming, unceasing, and existential. In an experience all too common for transgender individuals (particularly children), early in his junior year at Gloucester High, Grimm was hospitalized for suicidal thoughts resulting from being in an environment of "unbearable" stress where "every single day, five days a week" he felt "unsafe, anxious, and disrespected." Gavin Grimm Decl. ¶ 54.

Furthermore, putting aside the specific harm to Grimm, the Board's policy perpetuates a harmful and false stereotype about transgender individuals; namely, the "transgender predator" myth, which claims that students (usually male) will pretend to be transgender in order to gain access to the bathrooms of the opposite sex—thus jeopardizing student safety. Indeed, the policy expresses concern that the presence of transgender students in school bathrooms endangers students. Although not relied upon by the

Board on appeal, one of the policy's stated purposes is to "provide a safe learning environment for all students." J.A. 775.

The "transgender predator" myth echoes similar arguments used to justify segregation along racial lines. In the 1950s, segregationists spread false rumors that Black women would spread venereal diseases to toilet seats, and that Black men would sexually prey upon white women if public swimming pools were integrated. *See* Br. of NAACP 13-14, 16-17. Although history eventually proved the lie of such claims, the injustice was severe.

Even more recently, privacy concerns similar to those championed by the Board were invoked by opponents of gay and lesbian equality. These opponents argued that such individuals, especially gay men, must not be allowed to come into contact with young children or adolescents. They justified such claims by pointing either to a supposed uncontrollable, predatory sexual attraction among gay men toward children, or to an insidious desire to convert young people to an immoral (which is to say, non-heterosexual) lifestyle. *See id.* at 21-22 (citing *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as . . . scoutmasters for their children [or] as teachers in their children's schools[.]")).

The "transgender predator" myth—although often couched in the language of ensuring student privacy and safety—is no less odious, no less unfounded, and no less harmful than these race-based or sexual-orientation-based scare tactics. As one of our sister

Circuits noted during the era of racial segregation: "[t]he law can never afford to bend in this direction again. The Constitution of the United States recognizes that every individual . . . is considered equal before the law. As long as this principle is viable, full equality of educational opportunity must prevail over theoretical sociological and genetical arguments which attempt to persuade to the contrary." *Haney v. Cnty. Bd. of Educ. of Sevier Cnty.*, 410 F.2d 920, 926 (8th Cir. 1969).

III.

In sum, the picture that emerges from this case is damning.

The Board drafted a policy so arbitrary that it cannot provide consistent treatment among the very individuals it discriminates against. In so doing, the Board pursued shifting and ends-driven definitions of "biological gender" that guaranteed a particular outcome: that one student would be unable to use the boys' restroom. The policy bears an eerie similarity to stigmatic discrimination in the separate-but-equal context—which produces deeply corrosive, irreversible harm across a human life. Against that injury to Grimm, the Board offers a set of purported privacy injuries that *have not occurred*, while ignoring concomitant greater harms that would have resulted were Grimm to have followed the policy and used female school restrooms. And most tellingly, when Grimm attempted to comply with the policy by submitting an updated birth certificate, the Board resorted to procedural roadblocks.

In light of this history, I have little difficulty concluding that the Board's policy is orthogonal to its stated justifications. Far from ensuring student privacy, it has been applied to marginalize and demean Grimm for the mere fact that he, like other transgender individuals, is different from most. Even worse, it did so to a child at school.

Common experience teaches that high school is a challenging environment, in which every child perceives significant pressure to belong within their peer group while also defining their own personal identity and sense of self. Even the most trivial differences from others may take on outsized significance to an adolescent. How harrowing it must be for transgender individuals like Grimm to navigate that fraught setting while facing an unceasing daily reminder that they are not wanted, and that circumstances for which they are blameless render them members of a second class.

Of course, deriding those who are different—whether due to discomfort or dislike—is not new. But the Constitution's guarantee of equal protection prohibits the law from countenancing such discrimination. "The Constitution cannot control such [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (holding that policies enacted with "a bare . . . desire to harm a politically unpopular group" cannot be upheld under equal protection (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

For that reason, I disagree with Judge Niemeyer's assertion that the panel majority attempts to "effect policy rather than simply apply law." Niemeyer Dis. Op. at 95. That argument is meritless because "[t]he Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). Ensuring the Constitution's mandate of equal protection is satisfied for marginalized and minority groups, separate from the "vicissitudes of political controversy," is one of our most vital and solemn duties. *Id.* at 2606 (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

Discrimination like that faced by Grimm has reared its ugly head throughout American history. Yet, for most Americans, time has rendered it an embarrassment to the legacies of the individuals inflicting it. With that observation, I join in the thorough and well-reasoned opinion of my colleague, Judge Floyd.

NIEMEYER, Circuit Judge, dissenting:

Gavin Grimm, a transgender male, commenced this action in 2015 while a student attending Gloucester High School in Gloucester, Virginia, to require the school to permit him to use the male restrooms. The High School provided male restrooms and female restrooms and, under school policy, "limited [those restrooms] to the corresponding biological genders." It also provided unisex restrooms and made them available to everyone, with the particular goal of accommodating transgender students. In his complaint, Grimm contended that the High School's policy discriminated against him "based on his gender," in violation of the Equal Protection Clause of the Fourteenth Amendment, and "on the basis of sex," in violation of Title IX. He sought among other things injunctive relief requiring the High School "to allow [him] to use the boys' restrooms at school." After graduating from the High School, Grimm filed a second amended complaint, seeking only declaratory relief and nominal damages.

Contrary to Grimm's claim, Title IX and its regulations explicitly authorize the policy followed by the High School. While the law prohibits discrimination on the basis of sex in the provision of educational benefits, it allows schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, including "toilet, locker room, and shower facilities," 34 C.F.R. § 106.33. Gloucester High School followed these provisions precisely, going yet further by providing unisex restrooms for those not wishing to use the restrooms designated on the basis of sex. Moreover, in complying with Title IX, which

Grimm has not challenged as unconstitutional, the High School did not deliberately discriminate against him in violation of the Equal Protection Clause of the Fourteenth Amendment. To the contrary, the High School's classifications for restroom usage — which accord with longstanding and widespread practice — were appropriately justified by the needs of individual privacy, as has been recognized by law. At bottom, Gloucester High School reasonably provided separate restrooms for its male and female students and accommodated transgender students by also providing unisex restrooms that any student could use. The law requires no more of it.

The majority opinion, pursuing the public policy that it deems best, rules that separating restrooms on the basis of biological sex is discriminatory. In doing so, it overlooks altogether and therefore does not address the reasons for such separation. Rather, it blithely orders that the High School allow both transgender males and biological males to use the same restrooms, thus abolishing any separation of restrooms on the basis of biological sex. Indeed, its ruling that male includes transgender males and likewise that female includes transgender females renders on a larger scale any separation on the basis of sex nonsensical. In effect, the majority opinion does no more than express disagreement with Title IX and its underlying policies, which is not, of course, the role of courts tasked with deciding cases and controversies.

I cast no doubt on the genuineness of Gavin Grimm's circumstances, and I empathize with his adverse experiences. But judicial reasoning must not become an outcome-driven enterprise prompted by

feelings of sympathy and personal views of the best policy. The judiciary's role is simply to construe the law. And the law, both statutory and constitutional, prohibits discrimination only with respect to those who are *similarly* situated. Here, Grimm was born a biological female and identifies as a male, and therefore his circumstances are different from the circumstances of students who were born as biological males. For purposes of restroom usage, he was not similarly situated to students who were born as biological males.

Accordingly, I would conclude that Grimm's complaint failed to state a claim on which relief can be granted.

I

At birth, Grimm was identified as female, and there was concededly no ambiguity about his sex. Thus, when it came time to enroll him in the Gloucester County School System, Grimm's parents indicated that he was female.

Beginning at an early age, however, Grimm "saw [himself] as a boy" and "did not want to be perceived as feminine in any way." At around the age of 12, he started presenting himself as a boy. He got a traditional male haircut, wore clothing exclusively from the boys' section of stores, and eventually began using a compression garment to flatten his developing breasts. Around the time of his 15th birthday, in the spring of 2014, Grimm came out to his parents as a transgender boy and, at his request, began therapy with a psychologist. His psychologist diagnosed him with "gender dysphoria," a condition of clinically

significant distress experienced by some transgender people resulting from the incongruence between the gender with which they identify and their sex as identified at birth. Soon thereafter, Grimm obtained a court order legally changing his name from the female name he was given at birth to Gavin Elliot Grimm.

In advance of his 10th grade year, Grimm and his mother met with a guidance counselor at the High School to explain that Grimm was transgender and intended, as part of his treatment for gender dysphoria, to socially transition at school. Both Grimm and his mother found the school counselor to be supportive. The High School changed its records to reflect Grimm's new name, and Grimm and the school counselor agreed that Grimm would send an email to his teachers explaining that he was to be addressed by his new male name and referred to by male pronouns. Grimm chose to continue completing his physical education classes through an online program so he did not need to use the school's locker rooms. And with respect to restrooms, he and the school counselor agreed that he could use a private restroom in the nurse's office.

As the school year began, however, Grimm found that using the separate restroom was stigmatizing as well as inconvenient, causing him at times to be late for classes. After a few weeks, he expressed his concerns to the Principal and asked for permission to use the male restrooms instead. The Principal gave Grimm permission to do so. But within a few days, school officials began receiving complaints from parents, and a student met with the Principal to express his concerns. These members of the school

community felt strongly that allowing a student with female anatomical features to use the male restrooms would infringe on the privacy interests of the male students.

In response to this input from the community, the Gloucester County School Board conducted public meetings, after which it adopted the following policy:

> Whereas the [Gloucester County Public Schools ("GCPS")] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Following adoption of the policy, the Principal advised Grimm that he was no longer permitted to use the High School's male restrooms. And about a week later, the school completed construction of three single-stall, unisex restrooms that were made available to all students.

Grimm felt stigmatized by the new policy and chose not to use the new unisex restrooms. He also felt uncomfortable using the female restrooms. As a result, he tried to avoid the use of restrooms at school, and when he could not avoid doing so, he used the restroom in the nurse's office. Nonetheless, he felt that by doing so, he called attention to his transgender status, making him uncomfortable.

At the end of Grimm's 11th grade year, when he was 17 years old, Grimm underwent a chest reconstruction surgery as part of his treatment for gender dysphoria. He also continued hormone therapy, which he had begun more than a year earlier and which deepened his voice, caused him to grow facial hair, and gave him a more masculine appearance overall.

Near the start of his 12th grade year in 2016, the Gloucester County Circuit Court granted Grimm's petition for an order directing the State Registrar to amend his birth certificate. Pursuant to that order, the Registrar issued a birth certificate to Grimm that listed his sex as male. Thereafter, Grimm requested that the High School change the gender listed on his school records to conform to his new birth certificate. Pursuant to the advice of counsel, the School Board advised Grimm that it had decided not to change the official school records. Grimm graduated from the High School in June 2017.

* * *

In June 2015, at the end of his 10th grade year, Grimm commenced this action against the Gloucester County School Board, alleging that the School Board's

policy of assigning students to male and female restrooms based on their biological sex rather than their gender identity violated his rights under the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. Among other things, he sought a preliminary and permanent injunction requiring the School Board to allow him to use the male restrooms at the school.

The district court granted the School Board's motion to dismiss Grimm's Title IX claim for failure to state a claim, relying primarily on a regulation implementing the statute that expressly permits schools to provide "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. The court also denied Grimm's motion for a preliminary injunction.

On appeal from the denial of the injunction, we reversed the district court's order and remanded the case. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016). We reasoned that the Title IX regulation permitting schools to provide separate restrooms and other similar facilities for male and female students was ambiguous with respect to "how a school should determine whether a transgender individual is a male or female for the purpose of access to [these] sex-segregated" facilities. *Id.* at 720. We then relied on a guidance document issued by the U.S. Department of Education stating that schools were generally required to "treat transgender students consistent with their gender identity," *id.* at 718, and concluded that the interpretation was "entitled to *Auer* deference and . . .

controlling weight," *id.* at 723. In addition, we vacated the district court's order denying a preliminary injunction, concluding that the court had used the wrong evidentiary standard in evaluating Grimm's motion. *Id.* at 724–26.

The School Board filed a petition for a writ of certiorari in the Supreme Court, as well as a motion for a stay of our judgment. During the same period, the district court, based on our analysis, granted Grimm's motion for a preliminary injunction. The Supreme Court, however, stayed the district court's preliminary injunction, *see* 136 S. Ct. 2442 (Aug. 3, 2016), and it subsequently granted the School Board's certiorari petition, *see* 137 S. Ct. 369 (Oct. 28, 2016).

While the case was pending before the Supreme Court, a new Administration rescinded the previously issued guidance document regarding transgender students, which prompted the Supreme Court to vacate our April 2016 decision and to remand the case to us for further consideration. *See* 137 S. Ct. 1239 (Mar. 6, 2017). We, in turn, granted an unopposed motion to vacate the district court's preliminary injunction. *See* 853 F.3d 729 (4th Cir. 2017).

After Grimm graduated from high school, he withdrew his request for a preliminary injunction and filed an amended complaint that continued to challenge the legality of the School Board's restroom policy as applied to transgender students, seeking a permanent injunction, declaratory relief, and nominal damages. But after the district court requested supplemental briefing regarding mootness in light of Grimm's graduation, Grimm agreed to dismiss his requests for prospective relief. He argued, however,

that his graduation did not moot his challenge to the legality of the School Board's restroom policy because he was seeking only a retrospective remedy in the form of nominal damages and declaratory relief. The district court agreed.

Thereafter, in a memorandum opinion and order dated May 22, 2018, the district court denied the School Board's motion to dismiss Grimm's amended complaint for failure to state a claim, concluding that Grimm had plausibly alleged that, by excluding him from the set of restrooms that corresponded to his gender identity, the School Board had subjected him to discrimination on the basis of sex, in violation of Title IX, and had also discriminated against him in violation of the Equal Protection Clause. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018).

Roughly nine months later, the district court granted Grimm's motion to file a second amended complaint, which, for the first time, alleged that the School Board's decision not to change the gender listed on Grimm's school records from female to male also constituted a violation of Title IX and the Equal Protection Clause.

After completing discovery, the parties filed cross-motions for summary judgment. By order dated August 9, 2019, the district court granted Grimm's motion and denied the School Board's motion. *See Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019). For relief, the court (1) entered a declaratory judgment "that the Board's policy violated Mr. Grimm's rights under the Fourteenth Amendment . . . and Title IX . . . on the day the policy

was first issued and throughout the remainder of his time as a student at Gloucester High School;" (2) entered a declaratory judgment "that the Board's refusal to update Mr. Grimm's official school transcript to conform to the 'male' designation on his birth certificate violated and continues to violate his rights under the Fourteenth Amendment . . . and Title IX"; (3) awarded Grimm nominal damages "in the amount of one dollar"; (4) entered a permanent injunction "requiring the Board to update Mr. Grimm's official school records to conform to the male designation on his updated birth certificate"; and (5) awarded Grimm "reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988."

From the district court's order, the School Board filed this appeal.

II

At the heart of his claim, Grimm contends that in denying him, as a transgender male, permission to use the male restrooms because those restrooms were designated for biologically male students, Gloucester High School discriminated against him "on the basis of sex," in violation of Title IX and the Equal Protection Clause. This claim does not challenge the High School's provision of separate restrooms but rather asserts that treating transgender males differently than biological males in permitting access to those restrooms constitutes illegal discrimination. This argument thus rests on the proposition that transgender males and biological males are similarly situated with respect to using male restrooms.

The School Board, however, determined that the physical differences between transgender males and biological males were material with respect to the use of restrooms and locker rooms, and accordingly it provided unisex restrooms in addition to its male and female restrooms to accommodate transgender persons such as Grimm. In having done so, the School Board maintains that it complied fully with Title IX and its implementing regulations, which, while prohibiting discrimination on the basis of sex in any education program or activity, nonetheless expressly allow educational institutions receiving federal assistance to provide separate restrooms for the different sexes.

I agree with the School Board's position. Any requirement that schools treat male, female, and transgender students differently from the way the High School treated them would be a matter for Congress to address. But, until then, the High School comported with what both Title IX and the Equal Protection Clause require. I begin with Title IX.

## III

Title IX provides that "[n]o person in the United States 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). But the statute contains several exceptions to its nondiscrimination provision, one of which specifies that "[n]otwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution

receiving funds under this Act, *from maintaining separate living facilities for the different sexes*." *Id.* § 1686 (emphasis added). And the applicable regulations give further detail, permitting schools to provide "separate housing on the basis of sex," as long as the housing is "[p]roportionate" and "[c]omparable," 34 C.F.R. § 106.32(b), and "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities "provided for students of one sex shall be comparable to such facilities provided for students of the other sex," *id.* § 106.33. We must therefore determine what it means to provide separate toilet, locker room, and shower facilities *on the basis of sex* in a situation where a student's gender identity diverges from the sex manifested by the student's biological characteristics.

As several sources make clear, the term "sex" in this context must be understood as referring to the traditional biological indicators that distinguish a male from a female, not the person's internal sense of being male or female, or their outward presentation of that internally felt sense.

Title IX was enacted in 1972, and its implementing regulations were promulgated shortly thereafter. And during that period of time, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females —particularly with respect to their reproductive functions. *See, e.g.*, *The Random House College Dictionary* 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural,

functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . ."). Indeed, even today, the word "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g.*, *Webster's New World College Dictionary* 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures").

Given this uniformity in dictionary definitions, it is no surprise that, in the context of interpreting Title VII's nondiscrimination provision enacted in 1964, the

Supreme Court's recent decision in *Bostock v. Clayton County* relied on this same understanding of the word "sex." To be sure, the *Bostock* Court determined that its resolution of the parties' dispute did not require it to determine definitely the meaning of the term. *See Bostock*, 140 S. Ct. 1731, 1739 (2020). But its analysis proceeded on the assumption that, in 1964, the term sex "referr[ed] only to biological distinctions between male and female" and did not include "norms concerning gender identity." *Id.*

Moreover, that the word "sex" in Title IX refers to biological characteristics, not gender identity, becomes all the more plain when one considers the privacy concerns that explain why, in the first place, Title IX and its regulations allow schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex." *See* 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33. To state the obvious, what bathroom, locker room, shower, and living facilities all have in common is that they are places where people are, at some point, in a state of partial or complete undress to engage in matters of highly personal hygiene. An individual has a legitimate and important interest in bodily privacy that is implicated when his or her nude or partially nude body is exposed to others. And this privacy interest is significantly heightened when persons of the opposite biological sex are present, as courts have long recognized. *See, e.g.*, *Doe v. Luzerne Cty.*, 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the

opposite sex"); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating"). Moreover, these privacy interests are broader than *the risks of actual* bodily exposure. *They include the intrusion created by mere presence.* In short, we want to be alone—to have our privacy—when we "shit, shower, shave, shampoo, and shine."

In light of the privacy interests that arise from the physical differences between the sexes, it has been commonplace and universally accepted—across societies and throughout history—to separate on the basis of sex those public restrooms, locker rooms, and shower facilities that are designed to be used by multiple people at a time. Indeed, both the Supreme Court and our court have previously indicated that it is this type of physiological privacy concern that has led to the establishment of such sex-separated facilities. *See United States v. Virginia*, 518 U.S. 515,

533, 550 n.19 (1996) (recognizing that "[p]hysical differences between men and women" are "enduring" and render "the two sexes . . . not fungible" and acknowledging, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex" (cleaned up)); *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns").

In short, the physical differences between males and females and the resulting need for privacy is what the exceptions in Title IX are all about.

The issue in this case arises from the fact that Grimm is a transgender male who was born a biological female. Thus, we must determine in this context what it means to provide him separate toilet, locker room, and shower facilities on the basis of sex. Grimm does not challenge the constitutionality of Title IX or the legitimacy of its regulations, nor does he challenge the statute's underlying policy interests. He argues simply that because he identifies as male, he must be allowed to use the male restrooms and that denying him that permission discriminates against him on the basis of his sex.

Grimm's argument, however, is facially untenable. While he accepts the fact that Title IX authorizes the separation of restrooms—indeed, he seeks to use the male restrooms so separated from female restrooms—the implementation of his position would allow him to use restrooms contrary to the basis for separation. Gloucester High School maintains male restrooms,

female restrooms, unisex restrooms, and under its policy, Grimm would be entitled to use either the female or the unisex restrooms. But requiring the school to allow him, a biological female who identifies as male, to use the male restroom compromises the separation as explicitly authorized by Title IX.

Seeking to overcome this logical barrier, the majority maintains that the School Board applied "its own discriminatory notions of what 'sex' means." *Ante* at 56. But the School Board did no such thing. In implementing its policy, it relied on the commonly accepted definition of the word "sex" as referring to the anatomical and physiological differences between males and females and concluded that, for purposes of access to its sex-separated facilities, Grimm's sex remained female during the time he was a student at Gloucester High School.

Not to be persuaded, the majority further states that the regulation permitting schools to provide separate toilets on the basis of sex "cannot override the statutory prohibition against *discrimination* on the basis of sex." *Ante* at 56. But strikingly, this overlooks the fact that Congress expressly provided *in the statute* that nothing in its prohibition against discrimination "shall be construed to prohibit" schools "from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The majority's oversight can only be taken as a way to reach conclusions on how schools *should* treat transgender students, rather than a determination of what the statute requires of them.

In short, Gloucester High School did not deny Grimm suitable restrooms. It created three new

unisex restrooms that allowed him, as well as the other students, the privacy protected by separating bathrooms on the basis of sex.

IV

Grimm also contends that, even if the School Board did not discriminate against him on the basis of sex in violation of Title IX, it discriminated against him in violation of the Equal Protection Clause of the Fourteenth Amendment. He does so without arguing that Title IX violates the Equal Protection Clause in allowing educational institutions to separate restrooms on the basis of sex.

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. As long recognized by the Supreme Court, the Clause is "essentially a direction that all persons *similarly situated* should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added). In this manner, the provision "simply keeps governmental decisionmakers from treating differently persons *who are in all relevant respects alike*." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). As such, a plaintiff asserting a violation of the Equal Protection Clause must "demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (noting that the Equal Protection Clause "secure[s] every person within the

State's jurisdiction against intentional and arbitrary discrimination" (cleaned up)).

In general, a state-created classification will be "presumed to be valid and will be sustained if [it] is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. The Supreme Court has recognized, however, that legislative classifications based on sex "call for a heightened standard of review." *Id.* Thus, when state actors treat people differently on the basis of sex, they must show "that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (cleaned up). "The justification must be genuine," and it may not "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* Nonetheless, "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001).

Here, Grimm appears to acknowledge that a public school may, consistent with the Equal Protection Clause, establish one set of restrooms for its male students and another set for its female students, as long as the two sets of facilities are comparable—a "separate but equal" arrangement that would obviously be unconstitutional if the factor used to assign students to restrooms was instead race. And the reason it is constitutional for a school to provide separate restrooms for its male and female students—but not, for example, to its Black and White

students—is because there are biological differences between the two sexes that are relevant with respect to restroom use in a way that a person's skin color is demonstrably not. As noted above, all individuals possess a privacy interest when using restrooms or other spaces in which they remove clothes and engage in personal hygiene, and this privacy interest is heightened when persons of the opposite sex are present. Indeed, this privacy interest is heightened yet further when children use communal restrooms and similar spaces, because children, as the School Board notes, "are still developing, both emotionally and physically."

It is thus plain that a public school may lawfully establish, consistent with the Constitution, separate restrooms for its male and female students in order to protect bodily privacy concerns that arise from the anatomical differences between the two sexes. In light of this rationale, Grimm cannot claim that he was discriminated against when he was denied access to the male restrooms because he was not, in fact, similarly situated to the biologically male students who used those restrooms. While he no doubt identifies as male and also has taken the first steps to transition his body, at all times relevant to the events in this case, he remained anatomically different from males. Because such anatomical differences are at the root of why communal restrooms are generally separated on the basis of sex, I conclude that by adopting a policy pursuant to which Grimm was not permitted to use male student restrooms, the School Board did not "treat[] differently persons who are in all *relevant* respects alike," *Nordlinger*, 505 U.S. at 10 (emphasis added), and therefore did not violate the

Equal Protection Clause. And there is no claim or evidence in the record that Grimm was treated differently from any other transgender student.

In reaching the opposite conclusion, the majority imputes to the School Board an illegal bias based *solely* on the decision it made to separate restrooms. It reasons that "[t]he overwhelming thrust of everything in the record . . . is that Grimm was similarly situated to other boys" with respect to the use of restroom facilities, and it further asserts that, by "privileg[ing] sex-assigned-at-birth over Grimm's medically confirmed, persistent and consistent gender identify," the School Board revealed "its own bias." *Ante* at 38–39. But in employing such an analysis, the majority fails to address why it is permissible for schools to provide separate restrooms to their male and female students to begin with. Such consideration would have demonstrated that it was not "bias" for a school to have concluded that, in assigning a student to either the male or female restrooms, the student's biological sex was relevant.

At bottom, I conclude that the School Board, in denying Grimm the use of male restrooms, did not violate the Equal Protection Clause.

* * *

The majority opinion devotes over 20 pages to its discussion of Grimm's transgender status, both at a physical and psychological level. Yet, the mere fact that it felt necessary to do so reveals its effort to effect policy rather than simply apply law.

I readily accept the facts of Grimm's sex status and gender identity and his felt need to be treated with

dignity. Affording all persons the respect owed to them by virtue of their humanity is a core value underlying our civil society. At the same time, our role as a court is limited. We are commissioned to apply the law and must leave it to Congress to determine policy. In this instance, the School Board offered its students male and female restrooms, legitimately separating them on the basis of sex. It also provided safe and private unisex restrooms that Grimm, along with all other students, could use. These offerings fully complied with both Title IX and the Equal Protection Clause.

Accordingly, I would reverse and remand with instructions to dismiss Grimm's complaint.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v. Civil No. 4:15cv54

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

ORDER

Pending before the Court are a Motion to Strike Exhibits (ECF No. 213) and Cross-Motions for Summary Judgment filed by Plaintiff Gavin Grimm (ECF No. 184) and Defendant Gloucester County School Board ("the Board") (ECF No 191). For the following reasons, the Board's Motion to Strike is **GRANTED IN PART** and **DENIED IN PART**, Mr. Grimm's Motion for Summary Judgment is **GRANTED**, and the Board's Motion for Summary Judgment is **DENIED**.

## I. FACTUAL BACKGROUND

Gavin Grimm is a twenty-year-old man who attended Gloucester High School, a public high school in Gloucester County, Virginia, from September 2013 until his graduation in June 2017. *See* Gavin Grimm Decl. ¶¶ 3, 5, ECF No. 186. When Mr. Grimm was born, hospital staff identified him as female. *Id.* ¶ 7. Despite this designation, Mr. Grimm has always

"related to male characters" and "ha[s] always known that [he is] a boy." *Id.* ¶ 6.

When Mr. Grimm enrolled in the Gloucester County School System, he was listed as a girl. He began his freshman year in 2013 at Gloucester High School with a female birth certificate. Andersen Decl., ECF No. 196-6.

In April 2014, Mr. Grimm disclosed to his parents that he was transgender. Gavin Grimm Decl. ¶ 20; Deirdre Grimm Decl. ¶ 7, ECF No. 187. According to Dr. Melinda Penn, M.D.,[1] "gender identity" refers to "a person's innate sense of belonging to a particular gender." Penn Expert Rep. and Decl. ¶ 17, ECF No. 192-3. She opines that people's gender identity usually matches the sex consistent with their external genitalia possessed at birth, but that transgender individuals have a gender identity different from the one assigned to them at birth. *Id.* ¶¶ 18–19.

At Mr. Grimm's request, he began therapy in May 2014 with Dr. Lisa Griffin, Ph.D., a psychologist with experience counseling transgender youth. Gavin Grimm Decl. ¶ 24. Dr. Griffin diagnosed Mr. Grimm with gender dysphoria. *Id.* Dr. Griffin prepared a treatment documentation letter stating that

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[1] Mr. Grimm retained Dr. Penn to "provide expert testimony on the applicable standards of care and treatment guidelines for transgender youth." ECF No. 214-2 at 1. Dr. Penn is a pediatric endocrinologist with the Children's Hospital of the King's Daughters in Norfolk, Virginia, holds a medical degree from Eastern Virginia Medical School, and is board certified in pediatric endocrinology by the American Board of Pediatrics. ECF No. 192-3 ¶¶ 3-4. One of her specialties is transgender health. *Id.*

Mr. Grimm has gender dysphoria, that he should present as a male in his daily life, that he should be considered and treated as a male, and that he should be allowed to use restrooms consistent with that identity. ECF No. 186-1 at 1.

The American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders ("DSM V") defines "gender dysphoria" as a condition experienced by some transgender people that inflicts clinically significant stress because their gender identity differs from the sex assigned to them at birth. Penn Expert Rep. and Decl. ¶ 21. Dr. Penn's report explains that "to be diagnosed with gender dysphoria, the incongruence [between gender identity and assigned sex] must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.*

During the course of his treatment for gender dysphoria, Mr. Grimm changed his first name legally to Gavin and began using male pronouns to describe himself. Gavin Grimm Decl. ¶¶ 23, 25. He also began using men's restrooms in public venues. *Id.* ¶¶ 37, 38. Dr. Griffin referred Mr. Grimm to an endocrinologist for hormone treatment around this time. *Id.* ¶ 24.

In August 2014, before the beginning of Mr. Grimm's sophomore year, Mr. Grimm and his mother met with Ms. Tiffany Durr, a school guidance counselor. *Id.* ¶¶ 26–27. They gave Ms. Durr a copy of Dr. Griffin's treatment documentation letter and requested that Mr. Grimm be treated as a boy at school. *Id.* Mr. Grimm and Ms. Durr agreed that

Mr. Grimm would use the restroom in the nurse's office. *Id.* ¶ 29.

Mr. Grimm "soon found it stigmatizing to use a separate restroom," however, and "began to feel anxiety and shame surrounding [his] travel to the nurse's office." *Id.* He also found that the distance to this bathroom caused him to be late to class. *Id.*

After a few weeks of using the restroom in the nurse's office, Mr. Grimm met with Ms. Durr and sought permission to use the school's male restrooms. *Id.* ¶ 33; Durr Dep. 23:6–17, ECF No. 192-11. Ms. Durr relayed Mr. Grimm's request to Principal Nate Collins. Durr Dep. 24:1–17. Principal Collins spoke with Superintendent Walter Clemons, who offered to support Principal Collins' ultimate decision. Collins Dep. 49:7–50:1, ECF No. 192-9; Clemons Dep. 24:4–20, ECF No. 192-10. Principal Collins allowed Mr. Grimm to use the male restrooms. Collins Dep. 50:22–51:13.

Mr. Grimm used the male restrooms at Gloucester High School for seven weeks. Gavin Grimm Decl. ¶ 36. During this time, there were no incidents in the restrooms involving Mr. Grimm and other students. *Id.* Mr. Grimm was given permission to complete his physical education courses online and never needed to use the locker rooms at school. Gavin Grimm Dep. 96:14–97:9.

Subsequently, however, Dr. Clemons, Principal Collins, and Board members began receiving complaints from adult members of the community who had learned that a transgender boy was using male restrooms at the high school. *See* Collins Dep. 66:1–22;

Clemons Dep. 32:16–33:6; Def.'s Response to First Set of Interrogatories ¶ 1, ECF No. 192-1. Some members of the community demanded that the transgender student be barred from the male restrooms. *Id.* One student personally complained to Principal Collins. ECF No. 192-1 ¶ 1.

Following these complaints, Board member Carla Hook proposed the following policy at the Board's public meeting on November 11, 2014:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Hook Nov. 9, 2014 Email, ECF No. 192-21.

Mr. Grimm and his parents spoke against the proposed policy at the November 11, 2014 meeting. Gavin Grimm Decl. ¶ 40. The Board voted 4-3 to defer a decision regarding the policy until the next Board meeting on December 9, 2014. Recorded Minutes of the Board, Nov. 11, 2014 at 4, ECF No. 192-37.

The Board passed the proposed policy on December 9, 2014 by a 6-1 vote. Recorded Minutes of the Board, Dec. 9, 2014, at 3, ECF No. 192-23. The Board also announced that it would construct single-stall, unisex restrooms for all students to use. *Id.* The following day, Principal Collins told Mr. Grimm that his further use of the male restrooms at Gloucester High School would result in disciplinary consequences. Collins Dec. 10, 2014 Memo to Deirdre and David Grimm, ECF No. 192-24; Gavin Grimm Decl. ¶ 44.

In December 2014, Mr. Grimm began hormone therapy. This "deepened [his] voice, increased [his] growth of facial hair, and [gave him] a more masculine appearance." Gavin Grimm Decl. ¶ 60.

Single-user restrooms had not yet been constructed when the Board enacted the policy. Gavin Grimm Decl. ¶ 46. Mr. Grimm has recounted an incident when he stayed after school for an event, realized the nurse's office was locked, and broke down in tears because there was no restroom he could use comfortably. *Id.* A librarian witnessed this and drove him home. *Id.*

Mr. Grimm also declared that when the single-user restrooms were built, they were located far from classes that he attended. *Id.* ¶ 49. A map of the school confirms that no single-user restrooms were located in Hall D, where Mr. Grimm attended most classes. ECF Nos. 192-28, 192-29. There was also no single-user restroom at the school's stadium, limiting Mr. Grimm's ability to attend events there. Gavin Grimm Decl. ¶ 52.

The single-stall restrooms made Mr. Grimm feel "stigmatized and isolated." *Id.* ¶ 47. He never saw any other student use these restrooms. *Id.* ¶ 48. Principal Collins testified at his deposition that he never saw a student use the single-user restrooms, but that he assumed that they were used because they were cleaned daily. Collins Dep. 132:7–20.

Mr. Grimm avoided using restrooms at school and later developed urinary tract infections. Gavin Grimm Decl. ¶¶ 51–52. This caused him to become distracted and uncomfortable in class. *Id.* Mr. Grimm's mother kept medication for urinary tract infections "always stocked at home." Deirdre Grimm Decl. ¶ 26.

In June 2015, the Virginia Department of Motor Vehicles issued Mr. Grimm a state identification card identifying him as male. Gavin Grimm Decl. ¶ 61; ECF No. 41-2.

During his junior year of high school, Mr. Grimm was admitted to the boys' ward at the hospital at Virginia Commonwealth University "because he was having thoughts of suicide." Deirdre Grimm Decl. ¶ 24.

In June 2016, Mr. Grimm underwent chest-reconstruction surgery. Grimm Decl. ¶ 62.

On September 9, 2016, the Gloucester County Circuit Court issued an order declaring Mr. Grimm's sex to be male and directing the Virginia Department of Health to issue him a birth certificate listing his sex as male. *Id.* ¶ 63; ECF No. 41-3. The order referred to Mr. Grimm's chest reconstruction surgery as "gender reassignment surgery" and concluded that Mr. Grimm is "now functioning fully as a male." ECF No. 41-3.

On October 27, 2016, the Virginia Department of Health issued a birth certificate listing Mr. Grimm's sex as male. Gavin Grimm Decl. ¶ 64; ECF No. 41-4. After receiving an updated birth certificate, Mr. Grimm and his mother provided Gloucester High School with a photocopy of it and asked that his school records be updated. Gavin Grimm Decl. ¶ 66. The school has declined to correct Mr. Grimm's transcript, which still reflects his sex as female. ECF No. 41-5.

Troy Andersen, the Board's 30(b)(6) witness,[2] testified that the Board has declined to update Mr. Grimm's transcripts because it believes that the amended birth certificate does not accord with Virginia law and because the photocopy presented was marked "void." Andersen Dep. 65:8–66:1, ECF No. 192-13.

On January 18, 2017, the Board informed Mr. Grimm that he had a right to a hearing related to the Board's decision not to amend his official transcript and educational records. ECF No. 171-1. Mr. Grimm did not request a hearing.

Mr. Grimm graduated high school on June 10, 2017. Gavin Grimm Decl. ¶ 57. He is now attending Berkeley City College in California and intends to transfer to a four-year college. *Id.* ¶ 69.

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[2] Under Federal Rule of Civil Procedure 30(b)(6), if an organization is named as a deponent in a civil matter, the organization must designate one or more persons who consent to testify on its behalf. The Board designated Troy Andersen, a Board member, to testify on its behalf.

## II. PROCEDURAL BACKGROUND

Mr. Grimm commenced this action against the Board on June 11, 2015, at the end of his sophomore school year, alleging that the Board's policy of assigning students to restrooms based on their biological sex violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. ECF No. 1. This Court considered the Board's motion to dismiss Mr. Grimm's Amended Complaint. On May 22, 2018, this Court denied the motion to dismiss. ECF No. 148.

In doing so, this Court held that a plaintiff's claim of discrimination on the basis of transgender status constitutes a viable claim of sex discrimination under Title IX. *Id.* at 13–21. Specifically, this Court relied on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that Title VII of the Civil Rights Act of 1964 bars discrimination not only based on a person's gender, but also based on whether the person conforms to stereotypes associated with the person's gender.[3] This Court joined the District of 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.'" *M.A.B.*

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[3] Courts may, and frequently do, look to case law interpreting Title VII for guidance in evaluating a claim brought under Title IX. *See, e.g.*, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.* ("*Grimm I*"), 822 F.3d 709, 718 (4th Cir. 2016), *vacated and remanded*, 853 F.3d 729 (Apr. 17, 2017) (citing *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007)).

*v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018) (quoting *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 787–88 (D. Md. 2014)).[4]

This Court also held that state action that discriminates against transgender individuals is subject to intermediate scrutiny under the Constitution's Equal Protection Clause for two reasons. ECF No. 148 at 25–28. First, transgender individuals constitute at least a quasi-suspect class. *See M.A.B.*, 286 F. Supp. 3d at 718–20. Second, discrimination based on sex stereotypes constitutes a sex-based classification of a type subject to intermediate scrutiny. *Id.* at 718–19.

On February 15, 2019, this Court permitted Mr. Grimm to file a Second Amended Complaint. This filing added a claim that the Board continues to discriminate against Mr. Grimm in violation of Title IX and the Equal Protection Clause by refusing to update his official school transcripts to reflect his sex as male. ECF No. 177.

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[4] The First, Sixth, Ninth, and Eleventh Circuits have all relied on *Price Waterhouse* in holding that claims of discrimination based on transgender status constitute per se sex discrimination under Title VII or other civil rights laws. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574-75 (6th Cir. 2018) *cert. granted* 139 S. Ct. 1599 (2019) (Title VII); *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (Title VII and Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004) (Title VII and Equal Protection Clause); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000) (Gender Motivated Violence Act).

The parties filed motions for summary judgment. ECF Nos. 184, 191. The Board has also moved to strike certain exhibits relied upon by Mr. Grimm. ECF No. 213. On July 23, 2019, this Court heard argument on these pending motions. ECF No. 228. The motions are now ripe for consideration.

## II. LEGAL STANDARDS

Rule 56 of the Federal Rules of Civil Procedure permits a party to move for summary judgment and directs a court to grant such motion "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party "seeking summary judgment always bears the initial responsibility of informing the [court] of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quotations omitted). Subsequently, the burden shifts to the non-moving party to present specific facts demonstrating that a genuine dispute of material fact exists for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."). For the evidence to present a "genuine" dispute of material fact, it must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When

deciding a motion for summary judgment, courts must view the facts, and inferences to be drawn from the facts, in the light most favorable to the non-moving party. *Id.* at 255.

> [A] party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c).

When ruling on a summary judgment motion, "a court may also give credence to other facts supporting the movant, regardless of their source, if such facts are not challenged by the non-moving party because a failure to challenge proffered facts may render such facts 'admitted.'" *XVP Sports, LLC v. Bangs*, No. 2:11cv379, 2012 WL 4329258, at *4 (E.D. Va. Sept. 17, 2012).

As specified in Local Civil Rule 56(B), "the Court may assume that facts identified by the moving party in its listing of [undisputed] material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." E.D. Va. Loc. Civ. R. 56(B).

The applicable standards for resolving the challenges raised by the Board's Motion to Strike are addressed where needed below.

## IV. ANALYSIS

### A. Motion to Strike Exhibits

In his Reply in support of his Motion for Summary Judgment, Mr. Grimm submitted the following records: (1) a treatment documentation letter written by Dr. Griffin on May 26, 2014; (2) a hormone documentation letter written by Dr. Griffin on May 26, 2014; (3) a "To Whom It May Concern" letter written by Dr. Griffin on July 1, 2014; (4) a "To Whom It May Concern" letter written by Dr. Eva Abel, Psy.D.; (5) treatment records prepared by Dr. Hope Sherie, M.D. FACS; (6) a "To Whom It May Concern" letter written by Dr. Sherie on June 21, 2016; and (7) treatment records from VCU Medical Center.

The Board has filed a Motion to Strike Exhibits submitted by Mr. Grimm in support of his Motion for Summary Judgment. ECF No. 213. The Board seeks to strike four categories of exhibits: (1) the medical records kept by Dr. Penn, Dr. Griffin, and Dr. Sherie that are referred to above; (2) the "To Whom It May Concern" letters; (3) policy statements and amicus briefs relied upon by Mr. Grimm; and (4) references to a public hearing that was held in February 2019. These challenges are addressed in turn.

#### 1. Medical Business Records

The Board argues that Mr. Grimm's submission of medical records from Dr. Penn, Dr. Griffin, and Dr. Sherie constitute expert testimony and that these

records must be stricken because Mr. Grimm did not disclose these experts under Federal Rule of Civil Procedure 26. Federal Rule of Civil Procedure 26 provides that a party must disclose, without awaiting a discovery request, any witness it may use to present evidence under Federal Rule of Evidence 702, 703, or 705 governing expert testimony. Fed. R. Civ. P. 26(a)(2)(A). When a party does not comply with Rule 26(a), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37.

Mr. Grimm is not presenting these exhibits as expert opinion testimony and they are not governed by Rules 702, 703, or 705. Mr. Grimm has established that he is using these records only to demonstrate the fact that Mr. Grimm was diagnosed with gender dysphoria and received treatment pursuant to that diagnosis. ECF No. 216 at 1–6. The Court is not asked to determine whether that diagnosis was medically sound. Nor is the Court asked to determine whether it was medically necessary for Mr. Grimm to use the restrooms consistent with his gender identity. Mr. Grimm does not seek such a ruling and reiterated this at oral argument. Draft Tr. at 11–12.

To support its request to strike, the Board cited cases that excluded documents that differ from the evidence submitted in this case. *See* ECF No. 214 at 6–7. In these decisions, the courts excluded expert reports that were not timely disclosed. *See, e.g.*, *United States ex rel. Lutz, et al. v. Berkeley Heartlab, Inc., et al.*, No. 9:11-CV-1593-RMG, 2017 WL 5957738, at *1

(D.S.C. Dec. 1, 2017) (excluding expert reports opining that certain laboratory tests were medically necessary).

By contrast, Mr. Grimm has submitted documents prepared contemporaneously to his treatment that detail the factual background attendant to his diagnosis and treatment. These documents are permissible. *Morris v. Bland*, 666 F. App'x 233, 239 (4th Cir. 2016) (holding that physicians testifying as fact witnesses may "discuss their examination of [a patient] and their diagnoses or findings," but may not offer expert opinions as to proximate cause).

These records also qualify as hearsay exceptions as defined in Federal Rule of Evidence 803(6). Under Federal Rule of Evidence 803(6), records of an act, event, condition, opinion, or diagnosis are excluded from the bar against hearsay if:

> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
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> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
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> (C) making the record was a regular practice of that activity;
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> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with [certain rules or statutes];
>
> and

> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

Medical records are quintessentially business records, and Mr. Grimm has identified adequate custodians for each record presented. For these reasons, the Court denies the Board's Motion to Strike Mr. Grimm's medical documentation.

**2. "To Whom It May Concern" Letters**

The Board also seeks to strike the "To Whom It May Concern" letters on the basis of hearsay. The Board asserts that such letters "are not the type of records regularly kept in the course of a medical practice . . . ." ECF No. 214 at 7–8. The Board also argues that the letters are untrustworthy because they are addressed to unknown recipients. *Id.* at 8.

The Board offers no support for its assertion that these letters are not the type of records kept regularly in the course of the medical practice. The fact that three different doctors prepared these types of letters contemporaneously with their treatment of Mr. Grimm suggests otherwise.[5]

Regarding trustworthiness, Rule 803(6) makes clear that the burden of showing untrustworthiness

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[5] The Court also notes that the World Professional Association for Transgender Health acknowledges that the role of a health professional working with transgender youth encompasses providing referral letters for hormone therapy and includes advocacy on behalf of their patients at school. WPATH Standards of Care at 13, 31–32, ECF No. 192-5.

falls on the opponent of the records. The Board cites *Garrett v. City of Tupelo*, No. 1:16-cv-197, 2018 WL 2994808 (N.D. Miss. June 14, 2018) to assert that letters addressed to unknown recipients are untrustworthy. However, *Garrett* did not turn on the identity of the recipient of information, but instead turned on the identity of the source of such information. *Id.* at *4 (recognizing that documents may be untrustworthy when information comes from the patient, not the doctor, or when the "*source* of the information is unknown") (emphasis added). The Board has not met its burden of showing that these documents are untrustworthy. Accordingly, the Court declines to strike the "To Whom It May Concern" letters provided by Dr. Griffin, Dr. Abel, and Dr. Sherie.

**3. Policy Statements and Amicus Briefs**

The Board seeks to strike evidence submitted by Mr. Grimm that include: (1) the World Professional Association for Transgender Health Standards of Care, (2) amicus briefs from a variety of organizations, including the American Academy of Pediatrics, the National Parent Teacher Association, and school administrators from thirty-three states and the District of Columbia; and (3) other documents reflecting the views of the American Psychological Association and National Association of School Psychologists, Gender Spectrum, and the National Association of Secondary School Principals. *See* ECF No. 214 at 9–13.

The Board does not dispute that the statements presented in these documents reflect the views of these organizations. Instead, the Board argues that

Mr. Grimm cannot use these documents to prove the truth of the matters asserted. Mr. Grimm responds that he is using these documents only as evidence of these organizations' views. Given that there is no dispute regarding the propriety of the intended use of these documents, the Court need not strike them. The Court has considered these documents as evidence of the views of the organizations that prepared them, and not as substantive evidence of the accuracy of such views.

**4. Public Hearing References**

On February 19, 2019, the Board announced that it was considering a new policy that would allow transgender students to use restrooms consistent with their gender identity if certain criteria were met. Feb. 3, 2019 Press Release, ECF No. 192-35. The proposed policy arose out of settlement negotiations between the parties. Shayna Medley-Warsoff Decl. ¶ 53, ECF No. 192. The policy was ultimately rejected.

The Board argues that the Court should strike any evidence related to the February 2019 hearing under Federal Rule of Evidence 408, which prohibits the use of evidence related to compromise negotiations. At the summary judgment hearing, counsel for Mr. Grimm stated that the Court need not consider the statements made at the February 2019 hearing. Draft Tr. at 11. Accordingly, the Court has not considered evidence related to that hearing and **GRANTS** the Board's Motion to Strike any evidence related to it.

## B. Gavin Grimm's Motion for Summary Judgment

### 1. Title IX

Title IX provides that 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 educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31. To obtain relief for claims alleging a violation of Title IX, a plaintiff must demonstrate that (1) he or she was excluded from participation in an education program because of his or her sex; (2) the educational institution was receiving federal financial assistance at the time of his or her exclusion; and (3) the improper discrimination caused the plaintiff harm. *Grimm I*, 822 F.3d at 718 (citing *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). The Board does not dispute that it receives federal financial assistance. ECF No. 154 ¶ 91. Accordingly, only the first and third elements are disputed.

#### (a) Gavin Grimm was excluded from participation in an education program on the basis of sex.

In its May 22, 2018 Order, this Court concluded that claims of discrimination on the basis of transgender status are *per se* actionable under a gender stereotyping theory. ECF No. 148 at 20. The Board argues that this decision was made in error and that "the plain language of Title IX and its implementing regulation, 34 C.F.R. § 106.33," define sex as a binary term encompassing the physiological

distinctions between men and women. ECF No. 200 at 27–28.

The Board presents no intervening case law that compels reconsideration of this decision. To the contrary, every court to consider the issue since May 22, 2018 has agreed with the analysis relied upon by this Court. *See Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) (stating that a policy forcing transgender students to use separate facilities "would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school"); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018) (holding that "the meaning of 'sex' in Title IX includes 'gender identity' for purposes of its application to transgender students" and that the transgender student proved a Title IX violation where a school board denied him from using male restrooms, causing him harm) *appeal docketed*, No. 18-13592 (11th Cir. Aug. 24, 2018); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018) ("Forcing transgender students to use facilities inconsistent with their gender identity would undoubtedly harm those students and prevent them from equally accessing educational opportunities and resources. Such a . . . District policy would punish transgender students for their gender noncomformity and constitute a form of sex-stereotyping.") *appeal docketed*, 18-35708 (9th Cir. Aug. 23, 2018). This Court believes that this reasoning is sound and correct and declines to revisit its prior holding.

In sum, there is no question that the Board's policy discriminates against transgender students on the basis of their gender noncomformity. 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 Board responds that its policy treats all students equally on the basis of physiological or anatomical characteristics, and that these characteristics should not be considered sex stereotypes under *Price Waterhouse*. This argument is unpersuasive.

The Board's policy relies on the term "biological gender." *See* ECF No. 192-21. As this Court recognized previously, biological gender is not a medically accepted term. *See* ECF No. 148 at 14–15 (explaining that "sex" refers to biological attributes such as genes, chromosomes, genitalia, and secondary sex characteristics, and "gender" refers to the "'internal, deeply held sense' of being a man or woman") (citing Wylie C. Hembree *et al.*, *Endocrine Treatment of Gender-dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11), J. CLIN. ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017)). The policy's use of an ambiguous term obscures the basis for excluding transgender students from restrooms that they believe are appropriate and safe for them.

Moreover, the Board has inadequately explained the physiological and anatomical characteristics it relies upon to enforce its policy. For example,

Mr. Grimm has had chest reconstruction surgery. The Gloucester County Circuit Court referred to Mr. Grimm's chest reconstruction surgery as "gender reassignment surgery," relying on that surgery in part in determining that Mr. Grimm is a male. However, this surgery is insufficient under the Board's policy. At the summary judgment hearing, counsel for the Board argued that an individual must have "the primary genitals and sex characteristic of a particular gender." Draft Tr. at 26. "Primary genitals" may be sufficiently clear, but "sex characteristic" is troublingly ambiguous. Many aspects of biology determine a person's sex, including genitalia, *and also* including hormones, genes, chromosomes, and other factors that comprise a person's biological makeup. The policy at issue uses some of these factors to define sex and ignores others. In determining the physical characteristics that define male and female and the characteristics that are disregarded, the Board has crafted a policy that is based on stereotypes about gender. *See Brumby*, 663 F.3d at 1316 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."); *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (stating that protections from sex discrimination are not limited to discrimination based on "myths and purely habitual assumptions," but also extend to discrimination based on generalizations that are "unquestionably true").

Additionally, Mr. Grimm has both a valid court order and a state-issued birth certificate identifying him as male. All other students with male birth certificates at Gloucester High School are permitted to use male restrooms. Mr. Grimm was the only student with a male birth certificate excluded from the male restrooms. This constitutes discriminatory treatment by the Board.

Furthermore, the Board has refused to update Mr. Grimm's transcripts and education documents, despite his amended birth certificate. The Board argues that his amended birth certificate does not comply with Virginia law and questions its authenticity. Such questions have been dispelled by the Declaration of Janet M. Rainey. ECF No. 195. Ms. Rainey is the State Registrar and Director of the Division of Vital Records and administers Virginia's system of vital records in accordance with Virginia law. She issued Gavin Grimm an amended birth certificate on October 27, 2016 that identifies him as male. *Id.* Regardless of prior concerns about the amended birth certificate's authenticity,[6] the Board's continued recalcitrance in the face of Ms. Rainey's Declaration and the court order from the Gloucester County Circuit Court is egregious. It is also

[6] It is obvious from the face of the amended birth certificate that the photocopy presented to the Board was marked "void" because it was a copy of a document printed on security paper, not because it was fabricated. *See* ECF No. 184-6 (a copy of Mr. Grimm's birth certificate, stating that it the original is printed on security paper and is void without a watermark). In any event, given Ms. Rainey's Declaration, the Board rationalizes its continuing denial of Mr. Grimm's amended birth certificate on specious grounds: that a photocopy was marked void.

discriminatory. Other students in the Gloucester County School system with male birth certificates also have male transcripts. Undeniably, the Board discriminates against Mr. Grimm in violation of Title IX in refusing to afford him the same dignity.

The Board also argues that Mr. Grimm has not proven that his use of male restrooms was medically necessary. However, the questions presented in this case do not require a finding that Mr. Grimm's use of a male restroom was medically necessary. The Board treated Mr. Grimm differently than other students on the basis of sex and, as established below, he suffered some measure of harm from that treatment. The existence of other methods of social transition for transgender individuals is, for the purposes of resolving the questions presented, irrelevant.

The Court concludes that the Board has discriminated against Gavin Grimm on the basis of his transgender status in violation of Title IX. The Court must next determine whether the improper discrimination caused Mr. Grimm harm.

**(b) The Board's policy harmed Gavin Grimm.**

In his Declaration, Mr. Grimm described under oath feeling stigmatized and isolated by having to use separate restroom facilities. Gavin Grimm Decl. ¶ 47. His walk to the restroom felt like a "walk of shame." *Id.* ¶ 50. He avoided using the restroom as much as possible and developed painful urinary tract infections that distracted him from his class work. *Id.* ¶ 51. This stress "was unbearable" and the resulting suicidal thoughts he suffered led to his hospitalization at

Virginia Commonwealth University Medical Center Critical Care Hospital. *Id.* ¶ 54.

Despite this evidence, the Board contends that Mr. Grimm has suffered no harm. ECF No. 200 at 29–30. The Board has discounted Mr. Grimm's testimony that separate restroom facilities caused him mental distress because he has not identified an expert to testify that he suffered such distress.[7] *Id.* Similarly, the Board argues that Mr. Grimm cannot prove that he suffered from painful urinary tract infections because he presented no supporting medical evidence. *Id.*

The Board's argument that Mr. Grimm's testimony regarding his harm is inadequate because it is not bolstered by expert testimony is untenable.[8] The Board's argument has no basis in law. *See Adams*, 318 F. Supp. 3d at 1316 (relying on a transgender student's own testimony to conclude that the student suffered harm in the form of stigma and humiliation).

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[7] The Board "disputes" Mr. Grimm's statements regarding his harm suffered because the Board labels his Declaration as "self-serving." Dismissing a party's testimony as self-serving while failing to present contradicting evidence is plainly insufficient to establish a genuine dispute of material fact.

[8] At the hearing, the Court read portions of Mr. Grimm's declaration into the record regarding the humiliation and stigma he suffered as a result of the Board's policy. The Court asked defense counsel whether that testimony could support a finding of harm, warranting at least an award of nominal damages. Counsel responded that "I think the answer is yes. . . . I don't think we can say there [are] no nominal damages here." Draft Tr. at 26.

The Board's assertion that Mr. Grimm has suffered no harm as a result of its policy is strikingly unconvincing. Mr. Grimm broke down sobbing at school because there was no restroom he could access comfortably. After one breakdown, Mr. Grimm was hospitalized with suicidal thoughts. He avoided after-school activities such as football games. He experienced pain and discomfort as a result of avoiding restrooms while at school.[9] Further expert testimony is unnecessary to conclude that the Board's policy harmed Mr. Grimm during his high school years.

There is also sufficient evidence to conclude that the Board continues to harm Mr. Grimm by refusing to update his school records to reflect his male identity. Whenever Mr. Grimm has to provide a copy of his transcript to another entity, such as a new school or employer, he must "show them a document that negates [his] male identity and marks him different from other boys." Gavin Grimm Decl. ¶ 69. The Board continues to harm Mr. Grimm every time he is asked to furnish his records. This harm compels at least an award of injunctive relief and nominal damages.

Mr. Grimm has established (1) that he was excluded from the restrooms at Gloucester High School on the basis of gender stereotypes; (2) the educational institution received federal financial

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[9] Medical documentation confirming that his discomfort was caused by urinary tract infections is irrelevant for the purposes presented here. There is sufficient evidence that Mr. Grimm suffered pain of some measure, for which he requests only injunctive relief and nominal damages.

assistance at the time of his exclusion; and (3) improper discrimination caused him harm. For these reasons, summary judgment is **GRANTED** in favor of Mr. Grimm regarding his claim asserting a violation of Title IX (Count Two).

**2. Equal Protection Clause**

Mr. Grimm also alleges that the Board's actions violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const, amend. XIV § 1. The Equal Protection Clause "is essentially a directive that all persons similarly situated should be treated alike." *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432,439(1985)).

In its May 22, 2018 ruling, this Court held that intermediate scrutiny must be applied in analyzing claims of discrimination against transgender individuals. ECF No. 148 at 24. Although the Board seeks reconsideration of this holding, it presents no authorities that compel a different result.[10] Other courts that have considered this issue since May 2018 have agreed that heightened scrutiny applies. *See, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1200–02 (9th

[10] Instead, the Board's citations include out-of-circuit cases from the 1980s and 1990s, cases that interpret Title VII instead of the Equal Protection Clause, and cases that pertain to sexual orientation, not gender identity. The Board's citations are unpersuasive.

Cir. 2019) (holding that intermediate scrutiny applies to alleged discrimination against transgender individuals in the military); *Adams by & through Kasper*, 318 F. Supp. 3d at 1296, 1312–13 (applying intermediate scrutiny and noting that "federal courts around the country have recognized the right of transgender students to use the bathroom matching their gender identity"). In light of these rulings, this Court rejects defense counsel's argument that it is "step[ping] out on its own." *See* ECF No. 200 at 32.

When applying intermediate scrutiny to a sex-based classification, the Board bears the burden of demonstrating that its proffered justification for its use of the classification is "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The Board is required to demonstrate that the classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 524.

In response, the Board asserts an interest in protecting the privacy rights of students, specifically privacy interests that students have in protecting their unclothed bodies.[11] ECF No. 200 at 33. There is little doubt that students have a privacy right in avoiding exposure of their unclothed bodies.

Defendant makes no showing, however, that the challenged policy is "substantially related" to

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[11] The Board cites a case involving strip searches of students. *See* ECF No. 200 at 33 (citing *Doe v. Renfrew*, 631 F.2d 91, 92–93 (7th Cir. 1980)). Those situations are starkly distinct from transgender students seeking to use a restroom.

protecting student privacy. First, it is undisputed that the Board received no complaints regarding any encounter with Mr. Grimm in a restroom. Andersen Dep. 13:20–14:5. The fact that Mr. Grimm used male restrooms for seven weeks without incident is evidence suggesting that the Board's privacy concerns are unwarranted. *Cf. Whitaker*, 858 F.3d at 1052 (noting that the school district's privacy argument was undermined by the fact that a transgender boy used male restrooms for six months without incident).

The Board's privacy argument also ignores the practical realities of how transgender individuals use a restroom. *See Grimm I*, 822 F.3d at 723 n. 10 (expressing doubt that "G.G.'s use . . . or for that matter any individual's appropriate use of a restroom" would involve the types of intrusions present in other cases where privacy abuses were found); *Whitaker*, 858 F.3d at 1052 (holding that a similar policy "ignores the practical reality of how [the plaintiff], as a transgender boy, uses the bathroom: by entering a stall and closing the door"); *Adams*, 318 F. Supp. 3d at 1296, 1314 ("When he goes into a restroom, [the transgender student] enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves.").

At the summary judgment hearing, defense counsel conceded that there is no privacy concern for other students when a transgender student walks into a stall and shuts the door. Draft Tr. at 38. However, the Board's 30(b)(6) witness, Troy Andersen, testified that privacy concerns are implicated when students use the urinal, use the toilet, or open their pants to tuck in their shirts. Andersen Dep. 30:10–20. When

asked why the expanded stalls and urinal dividers could not fully address those situations, Mr. Andersen responded that he "was sure" the policy also protected privacy interests in other ways, but that he "[couldn't] think of any other off the top of [his] head." *Id.* This Court is compelled to conclude that the Board's privacy argument "is based upon sheer conjecture and abstraction." *See Whitaker*, 858 F.3d at 1052.

Even if there were a plausible risk of exposure to nudity, transgender individuals often undergo a variety of procedures and treatments that result in anatomical and physiological changes, such as puberty blockers and hormone therapy. Such treatments can result in transgender girls developing breasts or transgender boys developing facial hair. If exposure to nudity were a real concern, forcing such a transgender girl to use the male restrooms could likely expose boys to viewing physical characteristics of the opposite sex. From this perspective, the Board's privacy concerns fail to support the policy it implemented.

When asked why transgender students present a greater risk of invasion of privacy to students than the risk from someone of the same physiological sex, Mr. Andersen answered "I would say that it just goes back to [bathroom] use relying on the social norms of binary sexes." Andersen Dep. 31:4–10. However, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases" for discrimination. *Cleburne Living Ctr.*, 473 U.S. at 448. The Board has failed to meet its burden to provide an "exceedingly persuasive justification" for its policy. Accordingly, its policy must

be found unconstitutional under the Equal Protection Clause.

Moreover, the Board's continued refusal to update Mr. Grimm's school records implicates no privacy concerns. The Board has put forward no justification for refusing to correct these records other than alleged concerns about his amended birth certificate's compliance with law and authenticity. These unsubstantiated doubts are easily dispelled by Janet Rainey's Declaration.

For these reasons, summary judgment must be **GRANTED** in favor of Gavin Grimm on his claim for a violation of the Equal Protection Clause (Count One).

### 3. Mr. Grimm's request for a permanent injunction

Mr. Grimm seeks an injunction requiring the Board to update his school records to reflect his male identity. To obtain a permanent injunction, a plaintiff must show: "(1) irreparable injury, (2) remedies at law are inadequate to compensate for that injury, (3) the balance of hardships between the plaintiff and defendant warrants a remedy, and (4) an injunction would not disserve the public interest." *Raub v. Campbell*, 785 F.3d 876, 885 (4th Cir. 2015) (internal quotations omitted). "[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotations omitted).

The Court has already determined that Mr. Grimm has suffered injury that is ongoing and thus cannot be compensated by mere monetary damages. The balance

of hardships also weighs in Mr. Grimm's favor. The Board has not identified any difficulty in altering Mr. Grimm's records. Nor has it identified any other governmental interest in refusing to update Mr. Grimm's records other than those already addressed in this Order. By contrast, Mr. Grimm suffers great hardship when he presents school records that negate his male identity. Finally, an injunction would serve the public's interest in upholding constitutional rights. *See Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (internal quotations omitted). For these reasons, a permanent injunction requiring the Board to update Mr. Grimm's school records is warranted.

### C. Gloucester County School Board's Motion for Summary Judgment

The Board also moves for summary judgment. ECF No. 195. The Board first argues that Title DCs prohibition of discrimination "on the basis of sex" does not encompass the Board's policy and that the definition of sex in the statute and its implementing regulation do not account for gender identity. ECF No. 196 at 10–30. The Court rejected this argument on May 22, 2018 and it reaffirms that holding today.[12]

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[12] Much of the Board's Summary Judgment Motion is an attempt to relitigate this Court's prior holdings. For example, the Board argues that if "sex" were equated with "gender identity," Title IX and its regulations would be invalid for lack of clear notice. ECF No. 196 at 29–30 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). This Court found this exact argument "unavailing." ECF No. 148 at 20 n. 11.

Regarding the Equal Protection Clause, the Board argues that its policy should not be subjected to heightened scrutiny but should be subjected to a lower level of scrutiny: rational basis review.[13] *Id.* at 32–37. The Board argues that its policy survives such review. *Id.* The Court again rejects this argument. The Board also reasserts that its policy survives intermediate scrutiny for the same reasons advanced in opposition to Mr. Grimm's Motion for Summary Judgment, as addressed above. Those arguments remain unavailing. Accordingly, the Gloucester County School Board's Motion for Summary Judgment, ECF No. 195, is **DENIED**.

## V. CONCLUSION

Parents, teachers and administrators share "a solemn obligation to guard the well-being of the children in their charge." *Adams*, 318 F. Supp. 3d at 1296.

> As recent events from around the country have tragically demonstrated, this is a very challenging job. Recognizing the difficulty of this task and that local school boards, answerable to the citizens of their community, are best situated to set school policy, federal courts are reluctant to interfere. Nevertheless, the federal court also has a solemn obligation: to uphold the Constitution and laws of the United States. That is why federal courts around the country have recognized the right of

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[13] Under rational basis review, a court analyzes whether a law is "rationally related to a legitimate governmental interest." *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

> transgender students to use the bathroom matching their gender identity.

*Id.*

Nelson Mandela said that "[h]istory will judge us by the difference we make in the everyday lives of children." One need only trace the arduous journey that this litigation has followed since its inception over four years ago to understand that passion and conviction have infused the arguments and appeals along the way.[14] The Board undertook the unenviable

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[14] A cursory collection of salient events docketed in this matter include the following: the initial Complaint, June 11, 2015; a Motion to Dismiss Complaint argued, July 27, 2015, and partially granted; Order denying Plaintiffs Motion for Preliminary Injunction, September 4, 2015; Order denying an injunction appealed to the United States Court of Appeals for the Fourth Circuit, September 8,2015; the Memorandum Opinion granting dismissal and denying motion for injunction, September 17, 2015; the Fourth Circuit's partial reversal of dismissal Order, April 19, 2016; the Order permitting Plaintiffs use of male restrooms at Gloucester County High School, June 23, 2016; Defendant's appeal of the June 23, 2016 Order, June 27, 2016; the Order denying a stay pending appeal, July 6, 2016; the United States Supreme Court's stay of the injunction pending resolution of an anticipated petition for writ of certiorari, August 3, 2016; the Fourth Circuit vacating the preliminary injunction, April 7, 2017; reassignment of the case to the undersigned, June 6, 2017; an Amended Complaint, August 22, 2017; a Motion to Dismiss Amended Complaint, September 22, 2017; supplemental briefing ordered, October 26, 2017; an Amended Motion to Dismiss, January 5, 2018; an Order denying the Amended Motion to Dismiss, May 22, 2018; Order granting a Motion for Leave to take Interlocutory Appeal, June 5, 2018; a Second Amended Complaint, February 15, 2019; cross-motions for summary judgment, March 26,2019; Defendant's Motion to Exclude and Strike Exhibits, April 30,2019; and oral argument on cross-

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responsibility of trying to honor expressions of concern advanced by its constituency as it navigated the challenges presented by issues that barely could have been imagined or anticipated a generation ago. This Court acknowledges the many expressions of concern arising from genuine love for our children and the fierce instinct to protect and raise our children safely in a society that is growing ever more complex. There can be no doubt that all involved in this case have the best interests of the students at heart.[15]

At the same time, the Court acknowledges that for seven weeks, the student body at Gloucester High School accommodated Mr. Grimm without incident as he—assisted by compassionate school and medical representatives—took new paths in his everyday life. This Court is compelled to acknowledge too that some of the external challenges seeking to reroute these new paths inflicted grief, pain, and suicidal thoughts on a child.

However well-intentioned some external challenges may have been and however sincere worries were about possible unknown consequences arising from a new school restroom protocol, the

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motions for summary judgment and on the Motion to Strike, July 23, 2019.

[15] "When confronted with something affecting our children that is new, outside of our experience, and contrary to gender norms we thought we understood, it is natural that parents want to protect their children. But the evidence is that [the plaintiff] poses no threat to the privacy or safety of any of his fellow students. Rather, [the plaintiff] is just like every other student . . . , a teenager coming of age in a complicated, uncertain and changing world." *Adams*, 318 F. Supp. 3d at 1297.

perpetuation of harm to a child stemming from unconstitutional conduct cannot be allowed to stand. These acknowledgements are made in the hopes of making a positive difference to Mr. Grimm and to the everyday lives of our children who rely upon us to protect them compassionately and in ways that more perfectly respect the dignity of every person.

Therefore, the Board's Motion to Strike, ECF No. 213, is **GRANTED IN PART** and **DENIED IN PART**. Gavin Grimm's Motion for Summary Judgment, ECF No. 184, is **GRANTED**. The Board's Motion for Summary Judgment, ECF No. 191, is **DENIED**.

The Court **ORDERS** the following relief:

- The Court **DECLARES** that the Board's policy violated Mr. Grimm's rights under the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments of 1972, on the day the policy was first issued and throughout the remainder of his time as a student at Gloucester High School;
- The Court **DECLARES** that the Board's refusal to update Mr. Grimm's official school transcript to conform to the "male" designation on his birth certificate violated and continues to violate his rights under the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments of 1972;
- Nominal damages are awarded to Mr. Grimm in the amount of one dollar;
- The Court issues a permanent injunction requiring the Board to update Mr. Grimm's

official school records to conform to the male designation on his updated birth certificate and to provide legitimate copies of such records to Mr. Grimm within ten days of the date of this Order;

- The Board shall pay Mr. Grimm's reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

The Clerk is **REQUESTED** to forward a copy of this Order to all parties and counsel of record.

**IT IS SO ORDERED.**

/s/

Arenda L. Wright Allen

United States District Judge

August 9th, 2019

Norfolk, Virginia

SUPREME COURT OF THE UNITED STATES

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G.G., By His Next Friend and Mother, Deirdre GRIMM.

**No. 16-273.**

March 6, 2017.

Case below, 822 F.3d 709.

Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.

PUBLISHED

FILED: May 31, 2016

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 15-2056

(4:15-cv-0054-RGD-DEM)

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G. G., by his next friend and mother, Deirdre Grimm,

Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee.

---

JUDY CHIASSON, Ph.D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin;

SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine;

STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph.D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee.

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ORDER

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Appellee's petition for rehearing en banc and filings relating to the petition were circulated to the full court.

No judge having requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc, the petition is denied.

Judge Niemeyer wrote an opinion dissenting from the denial of the petition for rehearing.

Entered at the direction of Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

NIEMEYER, Circuit Judge, dissenting from the denial of the petition for rehearing:

Bodily privacy is historically one of the most basic elements of human dignity and individual freedom. And forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom. Have we not universally condemned as inhumane such forced exposure throughout history as it occurred in various contexts, such as in prisons? And do parents not universally find it offensive to think of having their children's bodies exposed to persons of the opposite biological sex?

Somehow, all of this is lost in the current Administration's service of the politically correct acceptance of gender identification as the meaning of "sex"—indeed, even when the statutory text of Title IX provides no basis for the position. The Department of Education and the Justice Department, in a circular maneuver, now rely on the majority's opinion to mandate application of their position across the country, while the majority's opinion had relied solely on the Department of Education's earlier unprecedented position. The majority and the Administration—novelly and without congressional authorization—conclude that despite Congress's unambiguous authorization in Title IX to provide for the separation of restrooms, showers, locker rooms, and dorms on the basis of sex, *see* 20 U.S.C. § 1686; 34

C.F.R. §§ 106.32, 106.33, they can override these provisions by redefining sex to mean how any given person identifies himself or herself at any given time, thereby, of necessity, denying all affected persons the dignity and freedom of bodily privacy. Virtually every civilization's norms on this issue stand in protest.

These longstanding norms are not a protest against persons who identify with a gender different from their biological sex. To the contrary, schools and the courts must, with care, seek to understand their condition and address it in permissible ways that are as helpful as possible in the circumstances. But that is not to say that, to do so, we must bring down all protections of bodily privacy that are inherent in individual human dignity and freedom. Nor must we reject separation-of-powers principles designed to safeguard Congress's policymaking role and the States' traditional powers.

While I could call for a poll of the court in an effort to require counsel to reargue their positions before an en banc court, the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application. And the facts of this case, in particular, are especially "clean," such as to enable the Court to address the issue without the distraction of subservient issues. For this reason only and not because the issue is not sufficiently weighty for our en banc court, I am not requesting a poll on the petition for rehearing en banc. I do, however, vote to grant panel rehearing, which I recognize can only be symbolic in view of the majority's approach, which deferred to the Administration's novel position with a

questionable application of *Auer v. Robbins*, 519 U.S. 452 (1997). Time is of the essence, and I can only urge the parties to seek Supreme Court review.

**PUBLISHED**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 15-2056

---

G. G., by his next friend and mother, Deirdre Grimm,

Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee.

---

JUDY CHIASSON, Ph.D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV

ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE

WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph.D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee.

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Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Robert G. Doumar, Senior District Judge. (4:15-cv-00054-RGD-DEM)

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Argued: January 27, 2016 Decided: April 19, 2016

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Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

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Reversed in part, vacated in part, and remanded by published opinion. Judge Floyd wrote the opinion, in which Senior Judge Davis joined. Senior Judge Davis wrote a separate concurring opinion. Judge Niemeyer

wrote a separate opinion concurring in part and dissenting in part.

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**ARGUED:** Joshua A. Block, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellant. David Patrick Corrigan, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee. **ON BRIEF:** Rebecca K. Glenberg, Gail Deady, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC., Richmond, Virginia; Leslie Cooper, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellant. Jeremy D. Capps, M. Scott Fisher, Jr., HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee. Cynthia Cook Robertson, Washington, D.C., Narumi Ito, Amy L. Pierce, Los Angeles, California, Alexander P. Hardiman, Shawn P. Thomas, New York, New York, Richard M. Segal, Nathaniel R. Smith, PILLSBURY WINTHROP SHAW PITTMAN LLP, San Diego, California; Tara L. Borelli, Atlanta, Georgia, Kyle A. Palazzolo, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Chicago, Illinois; Alison Pennington, TRANSGENDER LAW CENTER, Oakland, California, for Amici School Administrators Judy Chiasson, David Vannasdall, Diana K. Bruce, Denise Palazzo, Jeremy Majeski, Thomas A. Aberli, Robert Bourgeois, Mary Doran, Valeria Silva, Rudy Rudolph, John O'Reilly, Lisa Love, Dylan Pauly, and Sherie Hohs. Suzanne B. Goldberg, Sexuality and Gender Law Clinic, COLUMBIA LAW SCHOOL, New York, New York; Erin E. Buzuvis, WESTERN NEW ENGLAND

UNIVERSITY SCHOOL OF LAW, Springfield, Massachusetts, for Amici The National Women's Law Center, Legal Momentum, The Association of Title IX Administrators, Equal Rights Advocates, Gender Justice, The Women's Law Project, Legal Voice, Legal Aid Society-Employment Law Center, Southwest Women's Law Center, and California Women's Law Center. Jennifer Levi, GAY & LESBIAN ADVOCATES & DEFENDERS, Boston, Massachusetts; Thomas M. Hefferon, Washington, D.C., Mary K. Dulka, New York, New York, Christine Dieter, Jaime A. Santos, GOODWIN PROCTER LLP, Boston, Massachusetts; Shannon Minter, Asaf Orr, NATIONAL CENTER FOR LESBIAN RIGHTS, San Francisco, California, for Amici The World Professional Association for Transgender Health, Pediatric Endocrine Society, Child and Adolescent Gender Center Clinic at UCSF Benioff Children's Hospital, Center for Transyouth Health and Development at Children's Hospital Los Angeles, Gender & Sex Development Program at Ann & Robert H. Lurie Children's Hospital of Chicago, Fan Free Clinic, Whitman-Walker Clinic, Inc., GLMA: Health Professionals Advancing LGBT Equality, Transgender Law & Policy Institute, Michelle Forcier, M.D. and Norman Spack, M.D. David Dinielli, Rick Mula, SOUTHERN POVERTY LAW CENTER, Montgomery, Alabama, for Amici Gender Benders, Gay, Lesbian & Straight Education Network, Gay-Straight Alliance Network, iNSIDEoUT, Evie Priestman, ROSMY, Time Out Youth, and We Are Family. James Cole, Jr., General Counsel, Francisco Lopez, Vanessa Santos, Michelle Tucker, Attorneys, Office of the General Counsel, UNITED STATES

DEPARTMENT OF EDUCATION, Washington, D.C.; Gregory B. Friel, Deputy Assistant Attorney General, Diana K. Flynn, Sharon M. McGowan, Christine A. Monta, Attorneys, Civil Rights Division, Appellate Section, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States of America. Alan Wilson, Attorney General, Robert D. Cook, Solicitor General, James Emory Smith, Jr., Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Amicus State of South Carolina; Mark Brnovich, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ARIZONA, Phoenix, Arizona, for Amicus State of Arizona; Jim Hood, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MISSISSIPPI, Jackson, Mississippi, for Amicus State of Mississippi; Patrick Morrisey, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Amicus State of West Virginia; Amicus Paul R. LePage, Governor, State of Maine, Augusta, Maine; Robert C. Stephens, Jr., Jonathan R. Harris, COUNSEL FOR THE GOVERNOR OF NORTH CAROLINA, Raleigh, North Carolina, for Amicus Patrick L. Mccrory, Governor of North Carolina. Mary E. McAlister, Lynchburg, Virginia, Mathew D. Staver, Anita L. Staver, Horatio G. Mihet, LIBERTY COUNSEL, Orlando, Florida, for Amici Liberty Center for Child Protection and Judith Reisman, PhD. Jeremy D. Tedesco, Scottsdale, Arizona, Jordan Lorence, Washington, D.C., David A. Cortman, J. Matthew Sharp, Rory T. Gray, ALLIANCE DEFENDING FREEDOM, Lawrenceville, Georgia, for Amici The Family

Foundation of Virginia, John Walsh, Lorraine Walsh, Mark Frechette, Jon Lynsky, Bradly Friedlin, Lisa Terry, Lee Terry, Donald Caulder, Wendy Caulder, Kim Ward, Alice May, Jim Rutan, Issac Rutan, Doretha Guju, Rodney Autry, James Larsen, David Thornton, Kathy Thornton, Joshua Cuba, Claudia Clifton, Ilona Gambill, and Tim Byrd. Lawrence J. Joseph, Washington, D.C., for Amicus Eagle Forum Education and Legal Defense Fund.

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FLOYD, Circuit Judge:

G.G., a transgender boy, seeks to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom. G.G. alleges that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution. The district court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.'s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity. Title IX provides: "[n]o 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 Department of Education's (the Department) regulations implementing Title IX permit the provision of "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 for students of the other sex." 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." J.A. 55. Because this case comes to us after dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts below are generally as stated in G.G.'s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called "biological sex," is female, but G.G.'s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an

incongruence between a person's gender identity and the person's birth-assigned sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery.[1]

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom.[2] G.G. used this restroom without incident for about seven weeks. G.G.'s use of the boys' restroom, however, excited the interest of others in the community, some of whom contacted the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys' restroom.

Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled "Discussion of Use of Restrooms/Locker Room Facilities." J.A. 15. Hook proposed the following

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[1] The World Professional Association for Transgender Health (WPATH) has established Standards of Care for individuals with gender dysphoria. J.A. 37. These Standards of Care are accepted as authoritative by organizations such as the American Medical Association and the American Psychological Association. *Id.* The WPATH Standards of Care do not permit sex reassignment surgery for persons who are under the legal age of majority. J.A. 38.

[2] G.G. does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case.

resolution (hereinafter the "transgender restroom policy" or "the policy"):

> Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A. 15–16; 58.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens' Comment Period, a majority of whom supported Hook's proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to him as a "young lady." J.A. 16. Others claimed that permitting G.G. to use the boys' restroom would violate the privacy of other students and would lead to sexual assault in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing

dresses in order to gain access to the girls' restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens' Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a "girl" or "young lady." J.A. 18. One speaker called G.G. a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* Following this second comment period, the Board voted 6-1 to adopt the proposed policy, thereby barring G.G. from using the boys' restroom at school.

G.G. alleges that he cannot use the girls' restroom because women and girls in those facilities "react[] negatively because they perceive[] G.G. to be a boy." *Id.* Further, using the girls' restroom would "cause severe psychological distress" to G.G. and would be incompatible with his treatment for gender dysphoria. J.A. 19. As a corollary to the policy, the Board announced a series of updates to the school's restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students. G.G. alleges that he cannot use these new unisex restrooms because they "make him feel even more stigmatized . . . . Being required to use the separate

restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as 'different.'" *Id.* G.G. further alleges that, because of this stigma and exclusion, his social transition is undermined and he experiences "severe and persistent emotional and social harms." *Id.* G.G. avoids using the restroom while at school and has, as a result of this avoidance, developed multiple urinary tract infections.

B.

G.G. sued the Board on June 11, 2015. G.G. seeks an injunction allowing him to use the boys' restroom and brings underlying claims that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution. On July 27, 2015, the district court held a hearing on G.G.'s motion for a preliminary injunction and on the Board's motion to dismiss G.G.'s lawsuit. At the hearing, the district court orally dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. The district court followed its ruling from the bench with a written order dated September 4, 2015 denying the injunction and a second written order dated September 17, 2015 dismissing G.G.'s Title IX claim and expanding on its rationale for denying the injunction.

In its September 17, 2015 order, the district court reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The district court observed that the regulations

implementing Title IX specifically allow schools to provide separate restrooms on the basis of sex. The district court concluded that G.G.'s sex was female and that requiring him to use the female restroom facilities did not impermissibly discriminate against him on the basis of sex in violation of Title IX. With respect to G.G.'s request for an injunction, the district court found that G.G. had not made the required showing that the balance of equities was in his favor. The district court found that requiring G.G. to use the unisex restrooms during the pendency of this lawsuit was not unduly burdensome and would result in less hardship than requiring other students made uncomfortable by G.G.'s presence in the boys' restroom to themselves use the unisex restrooms.

This appeal followed. G.G. asks us to reverse the district court's dismissal of his Title IX claim, grant the injunction he seeks, and, because of comments made by the district judge during the motion hearing, to assign the case to a different district judge on remand. The Board, on the other hand, asks us to affirm the district court's rulings and also asks us to dismiss G.G.'s equal protection claim—on which the district court has yet to rule—as without merit. The United States, as it did below, has filed an *amicus* brief supporting G.G.'s Title IX claim in order to defend the government's interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.

II.

We turn first to the district court's dismissal of G.G.'s Title IX claim.[3] We review *de novo* the district court's grant of a motion to dismiss. *Cruz v. Maypa*, 773 F.3d 138, 143 (4th Cir. 2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and quotations omitted).

As noted earlier, Title IX provides: "[n]o 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). To allege a violation of Title IX, G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm.[4] *See Preston v. Virginia ex rel. New*

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[3] We decline the Board's invitation to preemptively dismiss G.G.'s equal protection claim before it has been fully considered by the district court. "[W]e are a court of review, not of first view." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) (citation and quotation marks omitted). We will not proceed to the merits of G.G.'s equal protection claim on appeal without the benefit of the district court's prior consideration.

[4] The Board suggests that a restroom may not be educational in nature and thus is not an educational program covered by Title IX. Appellee's Br. 35 (quoting *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 682 (W.D. Pa. 2015)). The Department's Continued …

*River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979)). We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007).

Not all distinctions on the basis of sex are impermissible under Title IX. For example, Title IX permits the provision of separate living facilities on the basis of sex: "nothing contained [in Title IX] shall be construed to prohibit any educational institution

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regulation pertaining to "Education programs or activities" provides:

> Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;
>
> . . .
>
> (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b). We have little difficulty concluding that access to a restroom at a school, under this regulation, can be considered either an "aid, benefit, or service" or a "right, privilege, advantage, or opportunity," which, when offered by a recipient institution, falls within the meaning of "educational program" as used in Title IX and defined by the Department's implementing regulations.

receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department's regulations implementing Title IX permit the provision of "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. The Department recently delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) wrote: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."[5] J.A. 55.

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[5] The opinion letter cites to OCR's December 2014 "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities." This document, denoted a "significant guidance document" per Office of Management and Budget regulations, states: "All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) *available at* http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

The dissent suggests that we ignore the part of OCR's opinion letter in which the agency "also encourages schools to offer the

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A.

G.G., and the United States as amicus curiae, ask us to give the Department's interpretation of its own regulation controlling weight pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Id.* at 461. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, "reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. An interpretation may not be the result of the agency's fair and considered judgment, and will not be accorded *Auer* deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a *post hoc* rationalization. *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citations omitted).

The district court declined to afford deference to the Department's interpretation of 34 C.F.R. § 106.33. The district court found the regulation to be unambiguous because "[i]t clearly allows the School

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use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities," as the Board did here. Post at 66. However, because G.G. does want to use shared sex-segregated facilities, the agency's suggestion regarding students who do not want to use such shared sex-segregated facilities is immaterial to the resolution of G.G.'s claim. Nothing in today's opinion restricts any school's ability to provide individual-user facilities.

Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2015 WL 5560190, at *8 (E.D. Va. Sept. 17, 2015). The district court also found, alternatively, that the interpretation advanced by the Department was clearly erroneous and inconsistent with the regulation. The district court reasoned that, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone. *Id.*

The United States contends that the regulation clarifies statutory ambiguity by making clear that schools may provide separate restrooms for boys and girls "without running afoul of Title IX." Br. for the United States as Amicus Curiae 24–25 (hereinafter "U.S. Br."). However, the Department also considers § 106.33 itself to be ambiguous as to transgender students because "the regulation is silent on what the phrases 'students of one sex' and 'students of the other sex' mean in the context of transgender students." *Id.* at 25. The United States contends that the interpretation contained in OCR's January 7, 2015 letter resolves the ambiguity in § 106.33 as that regulation applies to transgender individuals.

B.

We will not accord an agency's interpretation of an unambiguous regulation *Auer* deference. Thus, our analysis begins with a determination of whether 34 C.F.R. § 106.33 contains an ambiguity. Section 106.33 permits schools to 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.

"[D]etermining whether a regulation or statute is ambiguous presents a legal question, which we determine de novo." *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004). We determine ambiguity by analyzing the language under the three-part framework set forth in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole. *Id.* at 341.

First, we have little difficulty concluding that the language itself—"of one sex" and "of the other sex"—refers to male and female students. Second, in the specific context of § 106.33, the plain meaning of the regulatory language is best stated by the United States: "the mere act of providing separate restroom facilities for males and females does not violate Title IX . . . ." U.S. Br. 22 n.8. Third, the language "of one sex" and "of the other sex" appears repeatedly in the broader context of 34 C.F.R. § 106 Subpart D, titled "Discrimination on the Basis of Sex in Education Programs or Activities Prohibited."[6] This repeated

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[6] For example, § 106.32(b)(2) provides that "[h]ousing provided . . . to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: proportionate in quantity . . . and [c]omparable in quality and cost to the student"; § 106.37(a)(3) provides that an institution generally cannot "[a]pply any rule . . . concerning eligibility [for financial assistance] which treats persons of one sex differently from persons of the other sex with regard to marital or parental

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formulation indicates two sexes ("one sex" and "the other sex"), and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female. Read plainly then, § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students. By implication, the regulation also permits schools to exclude males from the female facilities and vice-versa.

Our inquiry is not ended, however, by this straightforward conclusion. Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity. *Cf. Dickenson-Russell Coal Co. v. Sec'y of Labor*, 747 F.3d 251, 258 (4th Cir. 2014) (refusing to afford *Auer* deference where the language of the regulation at issue was "not susceptible to more than one plausible reading" (citation and quotation marks omitted)). It is not clear to us how the regulation would apply in a number of situations—even under the

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status"; and § 106.41(b) provides that "where [an institution] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex . . . members of the excluded sex must be allowed to try-out for the team offered . . . ."

Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity.

C.

Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department's interpretation is entitled to *Auer* deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Auer*, 519 U.S. at 461. "Our review of the agency's interpretation in this context is therefore highly deferential." *Dickenson-Russell Coal*, 747 F.3d at 257 (citation and quotation marks omitted). "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). An agency's view need only be reasonable to warrant deference. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) ("[I]t is axiomatic that the [agency's] interpretation need not be the best or most natural one by grammatical or other standards. Rather, the [agency's] view need be only reasonable to warrant deference.").

Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980. 45 Fed. Reg. 30802, 30955 (May 9, 1980). Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished . . . ." *American College Dictionary* 1109 (1970). The second defines "sex" as:

> the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness . . . .

*Webster's Third New International Dictionary* 2081 (1971).

Although these definitions suggest that the word "sex" was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally

descriptive.[7] The dictionaries, therefore, used qualifiers such as reference to the "*sum* of" various factors, "*typical* dichotomous occurrence," and "*typically* manifested as maleness and femaleness." Section 106.33 assumes a student population composed of individuals of what has traditionally been understood as the usual "dichotomous occurrence" of male and female where the various indicators of sex all point in the same direction. It sheds little light on how exactly to determine the "character of being either male or female" where those indicators diverge. We conclude that the Department's interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation. The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older dictionary, "the morphological, physiological, and behavioral peculiarities"—included in the term "sex."

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[7] Modern definitions of "sex" also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender." *Black's Law Dictionary* 1583 (10th ed. 2014). The American Heritage Dictionary includes in the definition of "sex" "[o]ne's identity as either female or male." *American Heritage Dictionary* 1605 (5th ed. 2011).

D.

Finally, we consider whether the Department's interpretation of § 106.33 is the result of the agency's fair and considered judgment. Even a valid interpretation will not be accorded *Auer* deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a *post hoc* rationalization. *Christopher*, 132 S. Ct. at 2166 (citations omitted).

Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, "novelty alone is no reason to refuse deference" and does not render the current interpretation inconsistent with prior agency practice. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011). As the United States explains, the issue in this case "did not arise until recently," *see id.*, because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students' access to restroom facilities. The Department contends that "[i]t is to those 'newfound' policies that [the Department's] interpretation of the regulation responds." U.S. Br. 29. We see no reason to doubt this explanation. *See Talk Am., Inc.*, 131 S. Ct. at 2264.

Nor is the interpretation merely a convenient litigating position. The Department has consistently enforced this position since 2014. *See* J.A. 55 n.5 & n.6 (providing examples of OCR enforcement actions to secure transgender students access to restrooms congruent with their gender identities). Finally, this

interpretation cannot properly be considered a *post hoc* rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.[8] U.S. Br. 17 n.5 & n.6 (citing publications by the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management). None of the *Christopher* grounds for withholding *Auer* deference are present in this case.

E.

We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling

[8] We disagree with the dissent's suggestion that the result we reach today renders the enforcement of separate restroom facilities impossible because it "would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity." Post at 65. Accepting the Board's position would equally require the school to assume "biological sex" based on "appearances, social expectations, or explicit declarations of [biological sex]." Certainly, no one is suggesting mandatory verification of the "correct" genitalia before admittance to a restroom. The Department's vision of sex-segregated restrooms which takes account of gender identity presents no greater "impossibility of enforcement" problem than does the Board's "biological gender" vision of sex-segregated restrooms.

weight in this case.[9] We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim.

F.

In many respects, we are in agreement with the dissent. We agree that "sex" should be construed uniformly throughout Title IX and its implementing regulations. We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex. We agree that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts" are not involuntarily exposed.[10] Post at 56. It is not apparent

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[9] The Board urges us to reach a contrary conclusion regarding the validity of the Department's interpretation, citing *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 657 (W.D. Pa. 2015). Although we recognize that the *Johnston* court confronted a case similar in most material facts to the one before us, that court did not consider the Department's interpretation of § 106.33. Because the *Johnston* court did not grapple with the questions of administrative law implicated here, we find the Title IX analysis in *Johnston* to be unpersuasive.

[10] We doubt that G.G.'s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent. For example, G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present in *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (involving the videotaping of students dressing and undressing in school locker rooms), *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) (involving the indiscriminate strip searching of twenty male and five female students), or *Supelveda v. Ramirez*, 967

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to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations.

The Supreme Court commands the use of particular analytical frameworks when courts review the actions of the executive agencies. G.G. claims that he is entitled to use the boys' restroom pursuant to the Department's interpretation of its regulations implementing Title IX. We have carefully followed the Supreme Court's guidance in *Chevron*, *Auer*, and *Christopher* and have determined that the interpretation contained in the OCR letter is to be accorded controlling weight. In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns[11]— fundamentally

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F.2d 1413, 1416 (9th Cir. 1992) (involving a male parole officer forcibly entering a bathroom stall with a female parolee to supervise the provision of a urine sample).

[11] The dissent accepts the Board's invocation of amorphous safety concerns as a reason for refusing deference to the Department's interpretation. We note that the record is devoid of any evidence tending to show that G.G.'s use of the boys' restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature of the safety concerns it has—whether it fears that it cannot ensure G.G.'s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom. We are unconvinced of the existence of danger caused by "sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." Post at 58. The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent's formulation, present a safety risk Continued …

questions of policy—is a task committed to the agency, not to the courts.

The Supreme Court's admonition in *Chevron* points to the balance courts must strike:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984). Not only may a subsequent administration choose to implement a different policy, but Congress may also, of course, revise Title IX explicitly to prohibit or authorize the course charted here by the Department regarding the

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because of the "sexual responses prompted" by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.

use of restrooms by transgender students. To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our *Auer* analysis complete, we leave policy formulation to the political branches.

III.

G.G. also asks us to reverse the district court's denial of the preliminary injunction he sought which would have allowed him to use the boys' restroom during the pendency of this lawsuit. "To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citation omitted). We review a district court's denial of a preliminary injunction for abuse of discretion. *Id.* at 235. "A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir. 2006) (citation and quotations omitted). "We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter *de novo*." *Id.* (citation omitted). Instead, "we reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (citations and quotations omitted).

The district court analyzed G.G.'s request only with reference to the third factor—the balance of

hardships—and found that the balance of hardships did not weigh in G.G.'s favor. G.G. submitted two declarations in support of his complaint, one from G.G. himself and one from a medical expert, Dr. Randi Ettner, to explain what harms G.G. will suffer as a result of his exclusion from the boys' restroom. The district court refused to consider this evidence because it was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions." *G.G.*, 2015 WL 5560190, at *11.

The district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: "The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence." *Id.* at *9. Preliminary injunctions, however, are governed by less strict rules of evidence:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

*Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976) (taking as true the "well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction"); *compare* Fed. R. Civ. P. 56 (requiring

affidavits supporting summary judgment to be "made on personal knowledge, [and to] set out facts that would be admissible in evidence), *with* Fed R. Civ. P. 65 (providing no such requirement in the preliminary injunction context). Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial.

Additionally, the district court completely excluded some of G.G.'s proffered evidence on hearsay grounds. The seven of our sister circuits to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to "weight, not preclusion" and have permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010); *see also Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) ("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." (citation and internal quotations omitted)); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise

inadmissible evidence, including hearsay evidence."); *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986); *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). We see no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.

Because the district court evaluated G.G.'s proffered evidence against a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, the district court was "guided by erroneous legal principles." We therefore conclude that the district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered evidence. We vacate the district court's denial of G.G.'s motion for a preliminary injunction and remand the case to the district court for consideration of G.G.'s evidence in light of the evidentiary standards set forth herein.

## IV.

Finally, G.G. requests that we reassign this case to a different district judge on remand. G.G. does not explicitly claim that the district judge is biased. Absent such a claim, reassignment is only appropriate in "unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a

different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." *United States v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir. 1991) (citation and internal quotation marks omitted). In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Id.* (citation omitted).

G.G. argues that both the first and second *Guglielmi* factors are satisfied. He contends that the district court has pre-existing views which it would be unwilling to put aside in the face of contrary evidence about medical science generally and about "gender and sexuality in particular." Appellant's Br. 53. For example, the court accepted the Board's concern by noting:

> There are only two instincts—two. Everything else is acquired—everything. That is, the brain only has two instincts. One is called self-preservation, and the other is procreation. And procreation is the highest instinct in individuals who are in the latter part of their teenage years. All of that is accepted by all medical science, as far as I can determine in reading information.

J.A. 85–86.

The district court also expressed skepticism that medical science supported the proposition that one could develop a urinary tract infection from withholding urine for too long. J.A. 111–12. The district court characterized gender dysphoria as a "mental disorder" and resisted several attempts by counsel for G.G. to clarify that it only becomes a disorder when left untreated. *See* J.A. 88–91; 101–02. The district court also seemed to reject G.G.'s representation of what it meant to be transgender, repeatedly noting that G.G. "wants" to be a boy and not a girl, but that "he is biologically a female." J.A. 103–04; *see also* J.A. 104 ("It's his mind. It's not physical that causes that, it's what he believes."). The district court's memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.

Reassignment is an unusual step at this early stage of litigation. Although the district court did express opinions about medical facts and skepticism of G.G.'s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence. Further, although the district court has a distinct way of proceeding in court, the hearing record and the district court's written order in the case do not raise in our minds a question about the fundamental fairness of the proceedings, however idiosyncratic. The conduct of the district judge does not at this point satisfy the *Guglielmi* standard. We deny G.G.'s request for reassignment to a different district judge on remand.

V.

For the foregoing reasons, the judgment of the district court is

*REVERSED IN PART, VACATED IN PART, AND REMANDED.*

DAVIS, Senior Circuit Judge, concurring:

I concur in Judge Floyd's fine opinion. I write separately, however, to note that while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, *this Court* would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.

I.

In order to obtain a preliminary injunction, G.G. must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of an injunction, (3) the balance of hardships tips in his favor, and (4) the requested injunction is in the public interest. *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). The record before us establishes that G.G. has done so.

A.

G.G. alleges that by singling him out for different treatment because he is transgender, the Board's restroom policy discriminates against him "on the basis of sex" in violation of Title IX. In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination "on the basis of sex" in the context of analogous statutes and our holding here that the Department's interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim. *See Price Waterhouse v.*

*Hopkins*, 490 U.S. 228, 250–51 (1989); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

B.

In support of his claim of irreparable harm, G.G. submitted an affidavit to the district court describing the psychological distress he experiences when he is forced to use the single-stall restrooms or the restroom in the nurse's office. *See* J.A. 32–33. His affidavit also indicates that he has "repeatedly developed painful urinary tract infections" as a result of holding his urine in order to avoid using the restroom at school. *Id.*

An expert declaration by Dr. Randi Ettner, a psychologist specializing in working with children and adolescents with gender dysphoria, provides further support for G.G.'s claim of irreparable harm. In her affidavit, Dr. Ettner indicates that treating a transgender boy as male in some situations but not in others is "inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child" and explains why access to a restroom appropriate to one's gender identity is important for transgender youth. J.A. 39. With respect to G.G. in particular, Dr. Ettner states that in her professional opinion, the Board's restroom policy "is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm." J.A. 41. In particular, Dr. Ettner opines that

> [a]s a result of the School Board's restroom policy, . . . G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his 'otherness,' undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

J.A. 42.

The Board offers nothing to contradict any of the assertions concerning irreparable harm in G.G.'s or Dr. Ettner's affidavits. Instead, its arguments focus on what is purportedly lacking from G.G.'s presentation in support of his claim of irreparable harm, such as "evidence that [his feelings of dysphoria, anxiety, and distress] would be lessened by using the boy[s'] restroom," evidence from his treating psychologist, medical evidence, and an opinion from Dr. Ettner "differentiating between the distress that G.G. may suffer by not using the boy[s'] bathroom during the course of this litigation and the distress that he has apparently been living with since age 12." Br. Appellee 42–43. As to the alleged deficiency concerning Dr. Ettner's opinion, the Board's argument is belied by Dr. Ettner's affidavit itself, which, as quoted above, provides her opinion about the psychological harm that G.G. is experiencing "[a]s a result of the School Board's restroom policy." J.A. 42. With respect to the other purported inadequacies, the absence of such evidence does nothing to undermine the

uncontroverted statements concerning the daily psychological harm G.G. experiences as a result of the Board's policy or Dr. Ettner's unchallenged opinion concerning the significant long-term consequences of that harm. Moreover, the Board offers no argument to counter G.G.'s averment that he has repeatedly contracted a urinary tract infection as a result of holding his urine to avoid using the restroom at school.

The uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past. G.G. has thus demonstrated that he will suffer irreparable harm in the absence of an injunction.

C.

Turning to the balance of the hardships, G.G. has shown that he will suffer irreparable harm without the requested injunction. On the other end of the scale, the Board contends that other students' constitutional right to privacy will be imperiled by G.G.'s presence in the boys' restroom.

As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent. Moreover, students' unintentional exposure of their genitals to others using the restroom has already been largely, if not entirely, remedied by the alterations to the school's restrooms already undertaken by the Board. To the extent that a student simply objects to

using the restroom in the presence of a transgender student even where there is no possibility that either student's genitals will be exposed, all students have access to the single-stall restrooms. For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students. The minimal or non-existent hardship to other students of using the single-stall restrooms if they object to G.G.'s presence in the communal restroom thus does not tip the scale in the Board's favor. The balance of hardships weighs heavily toward G.G.

D.

Finally, consideration of the public interest in granting or denying the preliminary injunction favors G.G. Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.'s rights under Title IX for the pendency of this case. Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest. *Cf. Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (citation omitted) (observing that upholding constitutional rights is in the public interest).

The Board contends that the public interest lies in allowing this issue to be determined by the legislature, citing pending legislation before Congress addressing the issue before the Court. But, as discussed above, the weight of authority establishes that

discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court. The existence of proposed legislation that, if passed, would address the question before us does not justify forcing G.G. to suffer irreparable harm when he has demonstrated that he is likely to succeed on the merits of his claims under current federal law.

II.

Based on the evidence presented to the district court, G.G. has satisfied all four prongs of the preliminary injunction inquiry. When the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) (expressly observing that appellate courts have the power to vacate a denial of a preliminary injunction and direct entry of an injunction); *Eisenberg ex rel. Eisenberg v. Montgomery Cty. Pub. Schs.*, 197 F.3d 123, 134 (4th Cir. 1999) (directing entry of injunction "because the record clearly establishes the plaintiff's right to an injunction and [an evidentiary] hearing would not have altered the result").

Nevertheless, it is right and proper that we defer to the district court in this instance. It is to be hoped that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have

suffered the psychological harm the injunction sought to prevent for an entire school year.

With these additional observations, I concur fully in Judge Floyd's thoughtful and thorough opinion for the panel.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the court's opinion. With respect to whether G.G. stated a claim under Title IX and whether the district court abused its discretion in denying G.G's motion for a preliminary injunction, I would affirm the ruling of the district court dismissing G.G.'s Title IX claim and denying his motion for a preliminary injunction. I therefore dissent from the majority's decision on those issues.

G.G., a transgender boy who is 16, challenges as discriminatory, under the Equal Protection Clause and Title IX of the Education Amendments of 1972, his high school's policy for assigning students to restrooms and locker rooms based on biological sex. The school's policy provides: (1) that the girls' restrooms and locker rooms are designated for use by students who are biologically female; (2) that the boys' restrooms and locker rooms are designated for use by students who are biologically male; and (3) that all students, regardless of their sex, are authorized to use the school's three single-stall unisex restrooms, which the school created to accommodate transgender students. Under this policy, G.G., who is biologically female but who identifies as male, is authorized to use the girls' restrooms and locker rooms and the unisex restrooms. He contends, however, that the policy discriminates against him because it denies him, as one who identifies as male, the use of the boys' restrooms, and he seeks an injunction compelling the high school to allow him to use the boys' restrooms.

The district court dismissed G.G.'s Title IX claim, explaining that the school complied with Title IX and

its regulations, which permit schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex," so long as the facilities are "comparable." 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33.

Strikingly, the majority now reverses the district court's ruling, without any supporting case law, and concludes that when Title IX and its regulations provide for separate living facilities, restrooms, locker rooms, and shower facilities on the basis of sex, the statute's and regulations' use of the term "sex" means a person's gender identity, not the person's biological status as male or female. To accomplish its goal, the majority relies entirely on a 2015 letter sent by the Department of Education's Office for Civil Rights to G.G., in which the Office for Civil Rights stated, "When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally *must treat transgender students consistent with their gender identity*." (Emphasis added). Accepting that new definition of the statutory term "sex," the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex. Rather, it must now allow a biological male student who identifies as female to use the girls' restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys' restrooms and locker rooms. This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes. And,

unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls' restrooms because of the "severe psychological distress" it would inflict on him and because female students had "reacted negatively" to his presence in girls' restrooms. Surely biological males who identify as females would encounter similar reactions in the girls' restroom, just as students physically exposed to students of the opposite biological sex would be likely to experience psychological distress. As a result, schools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The recent Office for Civil Rights letter, moreover, which is *not* law but which is the only authority on which the majority relies, states more than the majority acknowledges. In the sentence following the sentence on which the majority relies, the letter states that, to accommodate transgender students, schools are encouraged "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX's regulations]." This appears to approve the course that G.G.'s school followed when it created unisex restrooms in addition to the boys' and girls' restrooms it already had.

Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, provided that the facilities are "proportionate" and "comparable," 34 C.F.R. § 106.32(b), and to provide "separate toilet, locker room, and shower facilities on the basis of sex," again provided that the facilities are "comparable," 34 C.F.R. § 106.33. Because the school's policy that G.G. challenges in this action comports with Title IX and its regulations, I would affirm the district court's dismissal of G.G.'s Title IX claim.

I

The relevant facts are not in dispute. G.G. is a 16 year-old who attends Gloucester High School in Gloucester County, Virginia. He is biologically female, but "did not feel like a girl" from an early age. Still, he enrolled at Gloucester High School for his freshman year as a female.

During his freshman year, however, G.G. told his parents that he considered himself to be transgender, and shortly thereafter, at his request, he began therapy with a psychologist, who diagnosed him with gender dysphoria, a condition of distress brought about by the incongruence of one's biological sex and gender identity.

In August 2014, before beginning his sophomore year, G.G. and his mother met with the principal and guidance counselor at Gloucester High School to discuss his need, as part of his treatment, to socially transition at school. The school accommodated all of

his requests. Officials changed school records to reflect G.G.'s new male name; the guidance counselor supported G.G.'s sending an email to teachers explaining that he was to be addressed using his new name and to be referred to using male pronouns; G.G. was permitted to fulfill his physical education requirement through a home-bound program, as he preferred not to use the school's locker rooms; and the school allowed G.G. to use a restroom in the nurse's office "because [he] was unsure how other students would react to [his] transition." G.G. was grateful for the school's "welcoming environment." As he stated, "no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling [him] by [his] legal name or referring to [him] using male pronouns." And he was "pleased to discover that [his] teachers and the vast majority of [his] peers respected the fact that [he is] a boy."

As the school year began, however, G.G. found it "stigmatizing" to continue using the nurse's restroom, and he requested to use the boys' restrooms. The principal also accommodated this request. But the very next day, the School Board began receiving "numerous complaints from parents and students about [G.G.'s] use of the boys' restrooms." The School Board thus faced a dilemma. It recognized G.G.'s feelings, as he expressed them, that "[u]sing the girls' restroom[s] [was] not possible" because of the "severe psychological distress" it would inflict on him and because female students had previously "reacted negatively" to his presence in the girls' restrooms. It now also had to recognize that boys had similar feelings caused by G.G.'s use of the boys' restrooms, although G.G. stated that he continued using the boys'

restrooms for some seven weeks without personally receiving complaints from fellow students.

The Gloucester County School Board considered the problem and, after two public meetings, adopted a compromise policy, as follows:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Gloucester High School promptly implemented the policy and created three single-stall unisex restrooms for use by all students, regardless of their biological sex or gender identity.

In December 2014, G.G. sought an opinion letter about his situation from the U.S. Department of Education's Office for Civil Rights, and on January 15, 2015, the Office responded, stating, as relevant here:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms,

> locker rooms, shower facilities, housing, athletic teams, and single-sex classes under circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. [The Office for Civil Rights] also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

G.G. commenced this action in June 2015, alleging that the Gloucester County School Board's policy was discriminatory, in violation of the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* He sought declaratory relief, injunctive relief, and damages. With his complaint, G.G. also filed a motion for a preliminary injunction "requiring the School Board to allow [him] to use the boys' restrooms at school."

The district court dismissed G.G.'s Title IX claim because Title IX's implementing regulations permit schools to provide separate restrooms "on the basis of sex." The court also denied G.G.'s motion for a preliminary injunction. As to the Equal Protection claim, the court has not yet ruled on whether G.G. failed to state a claim, but, at the hearing on the motion for a preliminary injunction, it indicated that it "will hear evidence" and "get a date set" for trial to better assess the claim.

From the district court's order denying G.G.'s motion for a preliminary injunction, G.G. filed this

appeal, in which he also challenges the district court's Title IX ruling as inextricably intertwined with the district court's denial of the motion for a preliminary injunction.

II

G.G. recognizes that persons who are born biologically female "typically" identify psychologically as female, and likewise, that persons who are born biologically male "typically" identify as male. Because G.G. was born biologically female but identifies as male, he characterizes himself as a transgender male. He contends that because he is transgender, the School Board singled him out for "different and unequal treatment," "discriminat[ing] against him based on sex [by denying him use of the boys' restrooms], in violation of Title IX." He argues, "discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account." He concludes that the School Board's policy addressing restrooms and locker rooms thus illegally fails to include transgender persons on the basis of their gender identity. In particular, he concludes that he is "prevent[ed] . . . from using the same restrooms as other students and relegat[ed] . . . to separate, single-stall facilities."

As noted, the School Board's policy designates the use of restrooms and locker rooms based on the student's biological sex—biological females are assigned to the girls' restrooms and unisex restrooms; biological males are assigned to the boys' restrooms and unisex restrooms. G.G. is thus assigned to the

girls' restrooms and the unisex restrooms, but is denied the use of the boys' restrooms. He asserts, however, that because neither he nor the girls would accept his use of the girls' restroom, he is relegated to the unisex restrooms, which is stigmatizing.

The School Board contends that it is treating all students the same way, as it explains:

> The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and 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 biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students 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.

While G.G. has pending a claim under the Equal Protection Clause (on which the district court has not

yet ruled), only his preliminary injunction challenge and Title IX claim are before us at this time.

Title IX provides:

> No person in the United States 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) (emphasis added). The Act, however, provides, "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities *for the different sexes*." *Id.* § 1686 (emphasis added); see also 34 C.F.R. § 106.32(b) (permitting schools to provide "separate housing *on the basis of sex*" as long as the housing is "proportionate" and "comparable" (emphasis added)). Similarly, implementing Regulation 106.33 provides for particular separate facilities, as follows:

> A recipient 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). Thus, although Title IX and its regulations provide generally that a school receiving federal funds may not discriminate on the basis of sex, they also specify that a school does not violate the Act by providing, on the basis of sex,

separate living facilities, restrooms, locker rooms, and shower facilities.

While G.G. only challenges the definition and application of the term "sex" with respect to separate restrooms, acceptance of his argument would necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on "sex," a term that must be construed uniformly throughout Title IX and its implementing regulations. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted)); *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir. 2013) ("Canons of construction . . . require that, to the extent possible, identical terms or phrases used in different parts of the same statute be interpreted as having the same meaning. This presumption of consistent usage . . . ensure[s] that the statutory scheme is coherent and consistent" (alterations in original) (internal quotation marks and citations omitted)); *see also Kentuckians for Commonwealth Inc. v. Riverburgh*, 317 F.3d 425, 440 (4th Cir. 2003) ("[B]ecause a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well" (quoting John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 627 n.78 (1996))).

Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. *See, e.g.*, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *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"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1989) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special

sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating").

Moreover, we have explained that separating restrooms based on "acknowledged differences" between the biological sexes serves to protect this important privacy interest. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"). Indeed, the Supreme Court recognized, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). Such privacy was and remains necessary because of the inherent "[p]hysical differences between men and women," which, as the Supreme Court explained, are "enduring" and render "the two sexes . . . not fungible," *id.* at 533 (distinguishing sex from race and national origin), not because of "one's sense of oneself as belonging to a particular gender," as G.G. and the government as amicus contend.

Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could

arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex. Indeed, the School Board cited these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote *the privacy and safety* of minor children, pursuant to its "responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. [That the school has this responsibility] is particularly true in an environment where children are still developing, both emotionally and physically."

The need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term "sex" were to encompass only a person's gender identity. Indeed, separation on this basis would function nonsensically. A biological male identifying as female could hardly live in a girls' dorm or shower in a girls' shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower. G.G.'s answer, of course, is that he is not challenging the separation, on the basis of sex, of living facilities, locker rooms, and shower facilities, but only of restrooms, where the risks to privacy and safety are far reduced. This effort to limit the scope of the issue apparently sways the majority, as it cabins its entire discussion to "restroom access by transgender individuals." *Ante* at 26. But this effort to restrict the effect of G.G.'s argument hardly matters when the term "sex" would have to be applied uniformly throughout the statute and regulations, as noted

above and, indeed, as agreed to by the majority. *See ante* at 26.

The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility "on the basis of sex" employs the term "sex" as was generally understood at the time of enactment. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (explaining that courts should not defer to an agency's interpretation of its own regulation if an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent *at the time of the regulation's promulgation*" (emphasis added) (internal quotation marks and citation omitted)); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (discussing dictionary definitions of the regulation's "critical phrase" to help determine whether the agency's interpretation was "plainly erroneous or inconsistent with the regulation" (internal quotation marks and citation omitted)). Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions. *See, e.g.*, *The Random House College Dictionary* 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and

behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . ."). Indeed, although the contemporaneous meaning controls our analysis, it is notable that, *even today*, the term "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g.*, *Webster's New World College Dictionary* 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures"). Any new definition of sex that excludes reference to physiological differences, as the majority now

attempts to introduce, is simply an unsupported reach to rationalize a desired outcome.

Thus, when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.

Despite the fact that the majority offers no case to support the definition of "sex" as advanced by G.G. and supported by the government as amicus, the majority nonetheless accepts that the meaning of the term "sex" in Title IX and its regulations refers to a person's "gender identity" simply to accommodate G.G.'s wish to use the boys' restrooms. But, it is not immediately apparent whether G.G., the government, and the majority contend that the term "sex" as used in Title IX and its regulations refers (1) to *both* biological sex *and* gender identity; (2) to *either* biological sex *or* gender identity; or (3) to *only* "gender identity." In his brief, G.G. seems to take the position that the term "sex" *at least* includes a reference to gender identity. This is the position taken in his complaint when he alleges, "Under Title IX, discrimination 'on the basis of sex' encompasses both discrimination based on biological differences between men and women and discrimination based on gender nonconformity." The government seems to be taking the same position, contending that the term "sex" "encompasses both sex—that is, the biological differences between men and women—*and* gender [identity]." (Emphasis in original). The majority, however, seems to suggest that the term "sex" refers only to gender identity, as it relies solely on the statement in the Office for Civil Rights' letter of January 7, 2015, which said, "When a

school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally must treat transgender students consistent with *their gender identity*." (Emphasis added). But, regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable.

If the term "sex" as used in the statute and regulations refers to *both* biological sex *and* gender identity, then, while the School Board's policy is in compliance with respect to most students, whose biological sex aligns with their gender identity, for students whose biological sex and gender identity do not align, no restroom or locker room separation could ever be accomplished consistent with the regulation because a transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria. Given that G.G. and the government do not challenge schools' ability to separate restrooms and locker rooms for male and female students, surely they cannot be advocating an interpretation that places schools in an impossible position. Moreover, such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms, a position that G.G. does not advocate.

If the position of G.G., the government, and the majority is that the term "sex" means *either* biological sex *or* gender identity, then the School Board's policy is in compliance because it segregates the facilities on

the basis of biological sex, a satisfactory component of the disjunctive.

Therefore, when asserting that G.G. must be allowed to use the boys' restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that "sex" as used in Title IX and its regulations means *only* gender identity. But this construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex. Biological males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align. With such mixed use of separate facilities, no purpose would be gained by designating a *separate* use "on the basis of sex," and privacy concerns would be left unaddressed.

Moreover, enforcement of any separation would be virtually impossible. Basing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical:

> Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom.

Yet, by interpreting Title IX and the regulations as "requiring schools to treat students consistent with their gender identity," and by disallowing schools from treating students based on their biological sex, the government's position would have precisely the effect the government finds to be at odds with common sense.

Finally, in arguing that he should not be assigned to the girls' restrooms, G.G. states that "it makes no sense to place a transgender boy in the girls' restroom in the name of protecting student privacy" because "girls objected to his presence in the girls' restrooms because they perceived him as male." But the same argument applies to his use of the boys' restrooms, where boys felt uncomfortable because they perceived him as female. In any scenario based on gender identity, moreover, there would be no accommodation for the recognized need for physiological privacy.

In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex" if "sex" means gender identity.

The Office for Civil Rights letter, on which the majority exclusively relies, hardly provides an answer. In one sentence it states that schools "generally must treat transgender students consistent with their gender identity," whatever that means, and in the next sentence, it encourages schools to provide "gender-neutral, individual-user facilities to any student who does not want to use shared sex-

segregated facilities." While the first sentence might be impossible to enforce without destroying all privacy-serving separation, the second sentence encourages schools, such as Gloucester High School, to provide unisex single-stall restrooms for any students who are uncomfortable with sex-separated facilities, as the school in fact provided.

As it stands, Title IX and its implementing regulations authorize schools to separate, *on the basis of sex*, living facilities, restrooms, locker rooms, and shower facilities, which must allow for separation on the basis of biological sex. Gloucester High School thus clearly complied with the statute and regulations. But, as it did so, it was nonetheless sensitive to G.G.'s gender transition, accommodating virtually every wish that he had. Indeed, he initially requested and was granted the use of the nurse's restroom. And, after both girls and boys objected to his using the girls' and boys' restrooms, the school provided individual unisex restrooms, as encouraged by the letter from the Office for Civil Rights. Thus, while Gloucester High School made a good-faith effort to accommodate G.G. and help him in his transition, balancing its concern for him with its responsibilities to all students, it still acted legally in maintaining a policy that provided all students with physiological privacy and safety in restrooms and locker rooms.

Because the Gloucester County School Board did not violate Title IX and Regulation 106.33 in adopting the policy for separate restrooms and locker rooms, I would affirm the district court's decision dismissing G.G.'s Title IX claim and therefore dissent.

I also dissent from the majority's decision to vacate the district court's denial of G.G.'s motion for a preliminary injunction. As the Supreme Court has consistently explained, "[a] preliminary injunction is an extraordinary remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," and "'[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy.'" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22–24 (2008) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Given the facts that the district court fully and fairly summarized in its opinion, including the hardships expressed both by G.G. and by other students, I cannot conclude that we can "form a definite and firm conviction that the court below committed a clear error of judgment," *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir. 2006) (quotation marks and citation omitted), particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated.

As noted, however, I concur in Part IV of the court's opinion.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**NEWPORT NEWS DIVISION**

**FILED**
September 17, 2015
Clerk, US District Court
Norfolk, VA

G.G., by his next friend and mother,
DEIRDRE GRIMM,

Plaintiff

v. CIVIL NO. 4:15cv54

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

**MEMORANDUM OPINION**

This matter is before the Court on Plaintiff G.G.'s challenge to a recent resolution (the "Resolution") passed by the Gloucester County School Board (the "School Board) on December 9, 2014. This Resolution addresses the restroom and locker room policy for all students in Gloucester County Public Schools. Specifically, G.G. brings claims under both the Equal Protection Clause of the Fourteenth Amendment (the "Equal Protection Clause") and Title IX of the Education Amendments of 1972 ("Title IX"), seeking to contest the School Board's restroom policy under the Resolution.

On June 11, 2015, G.G. filed a Motion for Preliminary Injunction, ECF No. 11, and on July 7, 2015, the School Board filed a Motion to Dismiss, ECF No. 31. On July 27, 2015, the parties appeared before the Court and argued their respective positions as to both motions. ECF No. 47. At that hearing, the Court took both motions under advisement. From the bench, the Court **GRANTED** the Motion to Dismiss as to Count II, G.G.'s claim under Title IX. On September 4, 2015, the Court **DENIED** the Motion for Preliminary Injunction. ECF No. 53. This opinion memorializes the reasons for these orders.

## I. FACTUAL AND PROCEDURAL HISTORY

The following summary is taken from the factual allegations contained in Plaintiff's Complaint, which, for purposes of ruling on the Motion to Dismiss as to Count II, the Court accepts as true. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com. Inc.*, 591 F.3d 250. 253 (4th Cir. 2009).

This case arises from a student's challenge to a recent restroom policy passed by the School Board. Plaintiff G.G. was born in Gloucester County on [**redacted**], 1999 and designated female.[1] Compl. ¶¶ 12, 14. However, at a very young age, G.G. did not feel like a girl. *Id.* at 16. Before age six, Plaintiff "refused to wear girl clothes." *Id.* ¶ 17. Starting at approximately age twelve, "G.G acknowledged his

[1] For the sake of brevity occasionally in this opinion the term "birth sex" may be used to describe the sex assigned to individuals at their birth. "Natal female" will be used to describe the gender assigned to G.G. at birth.

male gender identity to himself."[2] *Id.* ¶ 18. In 2013–14, during G.G.'s freshman year of high school, most of his friends were aware that he identified as male. *Id.* ¶¶ 18–19. Furthermore, away from home and school, G.G. presented himself as a male. *Id.* ¶ 19.

During G.G.'s freshman year of high school, which began in September 2013, he experienced severe depression and anxiety related to the stress of concealing his gender identity from his family. *Id.* ¶ 20. This is the reason he alleges that he did not attend school during the spring semester of his freshman year, from January 2014 to June 2014, and instead took classes through a home-bound program. *Id.* In April 2014, G.G. first informed his parents that he is transgender, that is, he believed that he was a man.[3] *Id.* ¶ 21. Sometime after informing his parents that he is transgender in April 2014, G.G., at his own request, began to see a psychologist, who subsequently

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[2] The American Psychiatric Association ("APA") defines "gender identity" as "an individual's identification as male, female, or, occasionally, some category other than male or female." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("DSM"). The DSM is "a classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders." *Id.* at xli. Although the DSM was included in G.G.'s briefs, it was not alleged in the Complaint and will consequently not be considered for the purpose of the Motion to Dismiss. However, the Court finds it instructive for definitional purposes.

[3] The APA defines "transgender" as "the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender." *Id.*

diagnosed him with Gender Dysphoria.[4] *Id.* ¶ 21. As part of G.G.'s treatment, his psychologist recommended that G.G. begin living in accordance with his male gender identity in all respects. *Id.* ¶ 23. The psychologist provided G.G. with a "Treatment Documentation Letter" that confirmed that "he was receiving treatment for Gender Dysphoria and that, as part of that treatment, he should be treated as a boy in all respects, including with respect to his use of the restroom." *Id.* The psychologist also recommended that G.G. "see an endocrinologist and begin hormone treatment." *Id.* ¶ 26.

Subsequently, G.G. sought to implement his psychologist's recommendation. *Id.* ¶ 25. In July 2014, G.G. petitioned the Circuit Court of Gloucester County to change his legal name to his present masculine name and, the court granted his petition. *Id.* At his own request, G.G.'s new name is used for all purposes, and his friends and family refer to him using male pronouns. *Id.* Additionally, when out in public, G.G. uses the boys' restroom. *Id.*

G.G. also sought to implement his lifestyle transition at school. In August 2014, G.G. and his mother notified officials at Gloucester High School that G.G. is transgender and that he had changed his name. *Id.* ¶ 27. Consequently, officials changed school records to reflect G.G.'s new masculine name. *Id.* Furthermore, before the beginning of the 2014–15 school year, G.G. and his mother met with the school

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[4] The APA defines "gender dysphoria" as "the distress that may accompany the incongruence between one's experienced and expressed gender and one's assigned gender." *Id.*

principal and guidance counselor to discuss his social transition. *Id.* ¶ 28. The school representatives allowed G.G. to email teachers and inform them that he preferred to be addressed using his new name and male pronouns. *Id.* Being unsure how students would react to his transition, G.G. initially agreed to use a separate bathroom in the nurse's office. *Id.* ¶ 30. G.G. was also permitted to continue his physical education requirement through his home school program. *Id.* ¶ 29. Consequently, G.G. "has not and does not intend to use a locker room at school." *Id.*

However, after 2014–15 school year began, G.G. found it stigmatizing to use a separate restroom. *Id.* ¶ 31. G.G. requested to use the male restroom. *Id.* On or around October 20, 2014, the school principal agreed to G.G.'s request. *Id.* ¶ 32. For the next seven weeks, G.G. used the boys' restroom. *Id.*

Some members of the community disapproved of G.G.'s use of the men's bathroom when they learned of it. *Id.* ¶ 33. Some of these individuals contacted members of the School Board and asked that G.G. be prohibited from using the men's restroom. *Id.* Shortly before the School Board's meeting on November 11, 2014, one of its members added an item to the agenda, titled "Discussion of Use of Restrooms/Locker Room Facilities," along with a proposed resolution. *Id.* ¶ 34. This proposed resolution stated as follows:

> Whereas the [Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the [Gloucester County Public Schools] encourages such students to seek

> support, advice, and guidance from parents, professionals and other trusted adults, and
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> Whereas the [Gloucester County Public Schools] seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the [Gloucester County Public Schools] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

*Id.* ¶ 34. At the meeting, a majority of the twenty-seven people who spoke were in favor of the proposal. *Id.* ¶ 37. Some proponents argued that transgender students' use of the restrooms would violate the privacy of other students and might "lead to sexual assault in the bathrooms." *Id.* It was suggested that a non-transgender boy could come to the school in a dress and demand to use the girls' restroom. *Id.* G.G. addressed the group and spoke against the proposed resolution and thus identified himself to the entire community. *Id.* ¶ 38. At the end of the meeting, the School Board voted 4-3 to defer a vote on the policy until its meeting on December 9, 2014. *Id.* ¶ 39.

On December 3, 2014, the School Board issued a news release stating that regardless of the outcome, it intended to take measures to increase privacy for all students using school restrooms, including "expanding partitions between urinals in male restrooms";

"adding privacy strips to the doors of stalls in all restrooms"; and "designat[ing] single-stall, unisex restrooms, similar to what's in many other public spaces." *Id.* ¶ 41. On December 9, 2014, the School Board held a meeting to vote on the proposed resolution. *Id.* Before the vote was conducted, a Citizens' Comments Period was held to allow a discussion on the proposed resolution. *Id.* Again, a majority of the speakers supported the resolution. *Id.* ¶ 42. Speakers again raised concerns about the privacy of other students. *Id.* After thirty-seven people spoke during the Citizens' Comment Period, the School Board voted 6-1 to pass the Resolution. *Id.* ¶ 43.

On December 10, 2015, the day after the School Board passed the Resolution, the school principal informed G.G. that he could no longer use the boys' restroom and would be disciplined if he did. *Id.* ¶ 45.

Since the adoption of the restroom policy, certain physical improvements have been made to the school restrooms at Gloucester High School. The school has installed three unisex single-stall restrooms. *Id.* ¶ 47. The school has also raised the doors and walls around the bathroom stalls so that students cannot see into an adjoining stall. *Id.* Additionally, partitions were installed between the urinals in the boys' restrooms. *Id.*

Sometime after the actions of the School Board, G.G. began receiving hormone treatment in December 2014. *Id.* ¶ 26. These treatments have deepened his voice, increased the growth of his facial hair, and given him a more masculine appearance. *Id.*

It is alleged that "[u]sing the girls' restroom is not possible for G.G." *Id.* ¶ 46. G.G. alleges that prior to his treatment for Gender Dysphoria, girls and women who encountered G.G. in female restrooms would react negatively because of his masculine appearance; that in eighth and ninth grade, the period from September 2012 to June 2014, girls at school would ask him to leave the female restroom; and that use of the girls' restroom would also cause G.G. "severe psychological stress" and would be "incompatible with his medically necessary treatment for Gender Dysphoria." *Id.*

G.G. further alleges that he refuses to use the separate single-stall restrooms installed by the school because the use of them would stigmatize and isolate him; that the use of these restrooms would serve as a reminder that the school views him as "different"; and that the school community knows that the restrooms were installed for him. *Id.*

From these alleged facts, on June 11, 2015, G.G. brought the present challenge to the School Board's restroom policy under the Equal Protection Clause and Title IX. ECF No. 8. On that same day, G.G. filed the instant Motion for Preliminary Injunction, requesting that the Court issue an injunction allowing G.G. to use the boys' bathroom at Gloucester High School until this case is decided at trial. ECF No. 11. On June 29, 2015, the United States ("the Government"), through the Department of Justice, filed a Statement of Interest, asserting that the School Board's bathroom policy violated Title IX. ECF No. 28. The School Board filed an Opposition to the Motion for Preliminary Injunction on July 7, 2015, ECF No. 30,

along with a Motion to Dismiss, ECF No. 31. On July 27, 2015, the parties appeared before the Court and argued their respective positions as to both motions. ECF No. 47. At that hearing, the Court took both motions under advisement. From the bench, the Court granted the Motion to Dismiss as to Count II, G.G.'s claim under Title IX. On September 4, 2015, the Court denied the Motion for Preliminary Injunction. ECF No. 53. This opinion memorializes the reasons for these orders.

## II. MOTION TO DISMISS

### A. STANDARD OF REVIEW

The function of a motion to dismiss under Rule 12(b)(6) is to test "the sufficiency of a complaint." *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013). "[I]mportantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). "To survive such a motion, the complaint must allege facts sufficient 'to raise a right to relief above the speculative level' and 'state a claim to relief that is plausible on its face.'" *Haley*, 738 F.3d at 116. When reviewing the legal sufficiency of a complaint, the Court must accept "all well-pleaded allegations in the plaintiffs complaint as true" and draw "all reasonable factual inferences from those facts in the plaintiffs favor." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Legal conclusions, on the other hand, are not entitled to the assumption of truth if they are not supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, a motion to dismiss should be granted only in "very limited

circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989).

B. COUNT II - TITLE IX

G.G. also alleges that the School Board's bathroom policy violates Title IX. Under Title IX, "[n]o person in the United States 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 . . . ." 20 U.S.C. § 1681(a). "Under Title IX, a prima facie case is established by a plaintiff showing (1) that [he or] she was excluded from participation in (or denied the benefits of, or subjected to discrimination in) an educational program; (2) that the program receives federal assistance; and (3) that the exclusion was on the basis of sex." *Manolov v. Borough of Manhattan Comm. Coll.*, 952 F. Supp. 2d 522, 532 (S.D.N.Y. 2013) (quoting *Murray v. N.Y. Univ. Coll. of Dentistry*, No. 93 Civ. 8771, 1994 WL 533411, at *5 (S.D.N.Y. Sept. 29, 1994)); *Bougher v. Univ. of Pittsburgh*, 713 F. Supp. 139, 143–44 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989)).

The School Board Resolution expressly differentiates between students who have a gender identity congruent with their birth sex and those who do not. Compl. ¶ 34. G.G. alleges that this exclusion from the boys' bathroom based on his gender identity constitutes sex discrimination under Title IX. Compl. ¶¶ 64, 65.

**1. Arguments**

The parties contest whether discrimination based on gender identity is barred under Title IX. To support their respective contentions, both parties cite to cases

interpreting Title VII, upon which courts have routinely relied in determining the breadth of Title IX. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

The School Board argues that sex discrimination does not include discrimination based on gender identity. For support, the School Board cites *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, --- F. Supp. 3d ----, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015). In *Johnston*, the Western District of Pennsylvania found that a policy separating the bathrooms by birth sex at the University of Pittsburgh did not violate Title IX because sex discrimination does not include discrimination against transgender individuals. 2015 WL 1497753, at *12–19. The School Board asserts that *Johnston* establishes that Title IX does not incorporate discrimination based on gender or transgender status.

In response, G.G. maintains that sex discrimination includes discrimination based on gender. G.G. cites to a number of Title VII cases in which courts have found sex discrimination to include gender discrimination. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004); *Finkle v. Howard Cnty., Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *see also Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("'[S]ex' under Title VII encompasses both sex—

that is, the biological differences between men and women—and gender.").

In addition, G.G. contends that the cases *Johnston* cited to support its proposition, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and, *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982), *cert. denied*, 471 U.S. 1017 (1985),[5] are no longer good law. In both *Ulane* and *Sommers*, the courts refused to extend sex discrimination to include discrimination against transgender individuals or those with nonconforming gender types. However, G.G. asserts that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), overruled these cases. In *Price Waterhouse*, the Supreme Court considered a Title VII claim based on allegations that an employee at *Price Waterhouse* was denied partnership because she was considered "macho" and "overcompensated for being a woman." 490 U.S. at 235. She had been advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Court found that such comments were indicative of gender stereotyping, which Title VII prohibited as sex discrimination. The Court explained that

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[5] The more recent case *Johnston* cites is a Tenth Circuit case, in which the court avoided deciding the issue. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) ("This court need not decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex' and we need not decide whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex.").

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

*Id.* at 251 (quoting *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Accordingly, the Court found that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be" has acted on the basis of sex. *Id.* at 251.

Other courts have found that *Price Waterhouse* overruled the cases cited in *Johnston*. "[S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that 'the approach in . . . *Sommers*, and *Ulane* . . . has been eviscerated' by *Price Waterhouse*'s holding." *Glenn*, 663 F.3d at 1318 n.5 (quoting *City of Salem*, 378 F.3d at 573)); *see also Schwenk*, 204 F.3d at 1201 ("The initial judicial approach taken in cases such as *Hollowav* has been overruled by the logic and language of *Price Waterhouse*."); *Lopez*, 542 F. Supp. 2d at 660. Based on *Price Waterhouse* and its progeny, G.G. claims that discrimination against transgender individuals or other nonconforming gender types is now prohibited as a form of sex discrimination. Accordingly, G.G. asserts that the Resolution's differentiation between students who have a gender identity congruent with their birth sex,

and those who do not, amounts to sex discrimination under Title IX.

**2. Analysis**

Although the primary contention between the parties is whether gender discrimination fits within the definition of sex discrimination under Title IX, G.G.'s claim does not rest on this distinction. Rather, the Court concludes that G.G.'s Title IX claim is precluded by Department of Education regulations. As noted above, Title IX provides that "[n]o person in the United States 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. However, this prohibition on sex-based decision making is not without exceptions. Among the exceptions listed in Title IX is a provision stating that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Although the statute does not expressly state that educational institutions may maintain separate bathrooms for the different sexes, Department of Education regulations stipulate:

> A recipient 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. This regulation (hereinafter, "Section 106.33") expressly allows schools to provide

separate bathroom facilities based upon sex, so long as the bathrooms are comparable. When Congress delegates authority to any agency to "elucidate a specific provision of the statute by regulation, any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). The Department of Education's regulation is not "arbitrary, capricious, or manifestly contrary to the statute."[6] Rather, Section 106.33 seems to effectuate Title IX's provision allowing separate living facilities based on sex.[7] Therefore, Section 106.33 is given controlling weight.

In light of Section 106.33, G.G. fails to state a valid claim under Title IX. G.G. alleges that the School Board violated Title IX by preventing him from using the boys' restrooms despite the fact that his gender identity is male. Compl. ¶¶ 64, 65. According to G.G., the School Board's determination was based on the belief that Plaintiff is biologically female, not

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[6] It is significant that neither party raised, nor even hinted at raising, a challenge to the validity of Section 106.33 under Title IX.

[7] The term "living facilities" in 20 U.S.C. § 1686 is ambiguous, and legislative history of Title IX does not provide clear guidance as to its meaning. This term could be narrowly interpreted to mean living quarters, such as dormitories, or it could be broadly interpreted to include other facilities, such as bathrooms. *See Implementing Title IX: The New Regulations*, 124 U. Pa. L. Rev. 806, 811 (1976). Because the Department of Education's inclusion of bathrooms within "living facilities" is reasonable, the Court defers to its interpretation. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

biologically male.[8] *Id.* ¶ 65. However, Section 106.33 specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable. Therefore, the School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex.

In fact, the only way to square G.G.'s allegations with Section 106.33 is to interpret the use of the term "sex" in Section 106.33 to mean only "gender identity." Under this interpretation, Section 106.33 would permit the use of separate bathrooms on the basis of gender identity and not on the basis of birth or biological sex. However, under any fair reading, "sex" in Section 106.33 clearly includes biological sex. Because the School Board's policy of providing separate bathrooms on the basis of biological sex is permissible under the regulation, the Court need not decide whether "sex" in the Section 106.33 also includes "gender identity."

Instead, the Court need only decide whether the School Board's bathroom policy satisfies Section 106.33. Section 106.33 states that sex-segregated bathrooms are permissible unless such facilities are

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[8] The Court is sensitive to the fact the G.G. disapproves of the School Board's term "biological gender." *See* Compl. ¶ 66 (placing biological in dismissive quotation marks). G.G. may also take issue with the Court's phrase biological sex. The Court is guided in its usage by the APA "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" from 2011, which the School Board submitted with its Brief in Opposition to Motion for Preliminary Injunction. Ex. 3, ECF No. 30. The APA defines "sex" as "a person's biological status," and identifies "a number of indicators of biological sex." *Id.*

not comparable. G.G. fails to allege that the bathrooms to which he is allowed access by the School Board—the girls' restrooms and the single-stall restrooms—are incomparable to those provided for individuals who are biologically male. In fact, none of the allegations in the Complaint even mention or imply that the facilities in the bathrooms are not comparable. Consequently, G.G. fails to state a claim under Title IX.

Nonetheless, despite Section 106.33, the Government urges the Court to defer to the Department of Education's interpretation of Title IX, which maintains that a policy that segregates bathrooms based on biological sex and without regard for students' gender identities violates Title IX. In support of its position, the Government attaches a letter (the "Letter"), dated January 7, 2015, issued by the Department of Education, through the Office for Civil Rights, apparently clarifying its stance on the treatment of transgender students with regard to sex-segregated restrooms. Statement of Interest 9, ECF No. 28; *id.* Ex. B, at 2, ECF No. 28-2. In the Letter, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights, writes:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school must

> treat transgender students consistent with their gender identity.

*Id.* at 9–10, Ex. B, at 2. The Letter cites a Department of Education significant guidance document (the "Guidance Document") published in 2014 in support of this interpretation. According to the Guidance Document:

> Under Title IX, a recipient must generally treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.

*See* Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* 25 (Dec. 1, 2014). Despite the fact that Section 106.33 has been in effect since 1975,[9] the Department of Education does not cite any documents published before 2014 to support the interpretation it now adopts.

The Department of Education's interpretation does not stand up to scrutiny. Unlike regulations, interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines "do not warrant *Chevron*-style deference" with regard to statutes. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Therefore, the interpretations in the

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[9] Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and adopted by the Department of Education upon its establishment in 1980. 45 Fed. Reg. 30802, 30955 (May, 9, 1980) (codified at 34 C.F.R. §§ 106.1–.71).

Letter and the Guidance Document cannot supplant Section 106.33. Nonetheless, these documents can inform the meaning of Section 106.33. An agency's interpretation of its own regulation, even one contained in an opinion letter or a guidance document, is given controlling weight if (1) the regulation is ambiguous and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. *Id.* at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("[The agency's] interpretation of [its own regulation] is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.").

Upon review, the Department of Education's interpretation should not be given controlling weight. To begin with, Section 106.33 is not ambiguous. It clearly allows the School Board to limit bathroom access "on the basis of sex," including birth or biological sex. Furthermore, the Department of Education's interpretation of Section 106.33 is plainly erroneous and inconsistent with the regulation. Even under the most liberal reading, "on the basis of sex" in Section 106.33 means both "on the basis of gender" and "on the basis of biological sex." It does not mean "only on the basis of gender." Indeed, the Government itself states that "under *Price Waterhouse*, 'sex' . . . encompasses both sex—that is, the biological differences between men and women—*and* gender." Statement of Interest 6–7, ECF No. 28. Thus, at most, Section 106.33 allows the separation of bathroom facilities on the basis of gender. It does not, however, require that sex-segregated bathrooms be separated on the basis of gender, rather than on the basis of birth

or biological sex. Gender discrimination did not suddenly supplant sex discrimination as a result of *Price Waterhouse*; it supplemented it.

To defer to the Department of Education's newfound interpretation would be nothing less than to allow the Department of Education to "create *de facto* a new regulation" through the use of a mere letter and guidance document. *See Christensen*, 529 U.S. at 588. If the Department of Education wishes to amend its regulations, it is of course entitled to do so. However, it must go through notice and comment rulemaking, as required by the Administrative Procedure Act. *See* 5 U.S.C. § 553. It will not be permitted to disinterpret its own regulations for the purposes of litigation. As the Court noted throughout the hearing, it is concerned about the implications of such rulings. Mot. to Dismiss & Prelim. Inj. Hr'g at Tr. 65:23–66:19; 73:6–74:7. Allowing the Department of Education's Letter to control here would set a precedent that agencies could avoid the process of formal rulemaking by announcing regulations through simple question and answer publications. Such a precedent would be dangerous and could open the door to allow further attempts to circumvent the rule of law—further degrading our well-designed system of checks and balances.

In light of Section 106.33, the Court cannot find that the School Board's bathroom policy violates Title IX.

## III. MOTION FOR PRELIMINARY INJUNCTION

The Motion for Preliminary Injunction is entirely different. The complaint is no longer the deciding

factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence. G.G. has sought a preliminary injunction. This Motion requests that the Court issue an injunction allowing G.G. to resume using the boys' restrooms at Gloucester High School until there is a final judgment on the merits.[10] ECF No. 11. In support of his motion for a preliminary injunction, G.G. has submitted two declarations: one from G.G. and another from an expert in the field of Gender Dysphoria. Decl. of G.G, ECF No. 9 ("G.G. Decl."); The Expert Declaration of Randi Ettner, Ph.D, ECF No. 10 ("Ettner Decl."). The School Board contests the injunction and attaches single a declaration to its Opposition to the Motion for Preliminary Injunction from Troy Andersen, a member of the School Board and the 2014–15 Gloucester Point District Representative for the Gloucester County School Board. Decl. of Troy Andersen, ECF No. 30-1 ("Andersen Decl."). On July 27, 2015, the parties appeared before the Court to argue this Motion, and both parties were given the opportunity to introduce evidence supporting their respective positions. ECF No. 47. At the hearing, neither G.G. nor the School Board introduced additional evidence for support. *Id.*

As the Court has granted the School Board's motion to dismiss as to Count II, G.G.'s claim under Title IX, it need not discuss reasons for denying the

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[10] G.G. claims that he does not intend to use the locker room at school. Mem. in Supp. of Mot. for Prelim. Inj., 8 n.2, ECF No. 18 ("Prelim. Inj."). However, the requested injunction allowing him to use the male restrooms would apply to the male restroom in the locker room.

Motion for Preliminary Injunction on this Count. While the Court has not yet ruled on whether G.G. has stated a claim under the Equal Protection Clause, the Court finds that, even if he has stated a claim, G.G. has not submitted enough evidence to establish that the balance of hardships weigh in his favor. Accordingly, the issuance of a preliminary injunction is not warranted.

**A. STANDARD OF REVIEW**

"The grant of preliminary injunctions [is] . . . an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in the limited circumstances' which clearly demand it." *Direx Israel. Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1992) (quoting *Instant Air Freight Co. v. C.F. Air Freight. Inc.*, 882 F.2d 797, 800 (3d Cir. 1989)). A plaintiff must overcome the "uphill battle" of satisfying each of the four factors necessary to obtain a preliminary injunction. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) (stating that the four factors must be "satisfied as articulated"), *vacated on other grounds*, 559 U.S. 1089 (2010). To obtain a preliminary injunction, "[p]laintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). The failure to make a clear showing of any one of these four factors requires the Court to

deny the preliminary injunction."[11] *Real Truth About Obama, Inc.*, 575 F.3d at 346.

A plaintiff seeking a preliminary injunction does not benefit from the presumption that the facts contained in the complaint are true. A plaintiff must introduce evidence in support of a Motion for Preliminary Injunction. While oral testimony is not strictly necessary, this Court has never granted a Preliminary Injunction without first hearing oral testimony. Declarations are frequently drafted by lawyers, and the evidence presented within them is not subject to the rigors of cross examination. A plaintiff relying solely on such weak evidence is unlikely to make the clear showing required for the issuance of a preliminary injunction. Additionally, this Court will not consider evidence that would be inadmissible at trial, such as hearsay, that is contained within affidavits.

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[11] The parties dispute whether the injunction sought is mandatory or prohibitory in nature. "Whereas mandatory injunctions alter the status quo, prohibitory injunctions 'aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.'" *League of Women Voters of N.C.*, 769 F.3d at 236 (quoting *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013)). There is a heightened standard for mandatory injunctions. *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) ("Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances."). Because the Court finds that G.G. fails to show that a preliminary injunction is warranted even if the injunction sought is prohibitory, the Court does not decide the issue.

### B. Arguments of the Parties and Facts in Evidence

G.G. characterizes the question of competing hardships as "not a close question." Mem. in Supp. of Mot. for Prelim. Inj., 40, ECF No. 18 ("Prelim. Inj."). He argues that this Court must weigh "the severe, documented, and scientifically supported harms" that the restroom policy continues to inflict upon G.G, who has been diagnosed with Gender Dysphoria, against the "School Board's unfounded speculation about harms that might occur to others at some future date." *Id.* The School Board by contrast implores this Court to consider the safety and privacy interests of all its students. Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. It emphasizes that while litigation is ongoing, G.G. may use the "girls' restroom, the three single-stall restrooms, or the restroom in the nurse's office." *Id.*

#### 1. Facts and Arguments Concerning the Hardship to G.G.

G.G. relies on two declarations to establish the hardships he would suffer should this Court deny his Motion for Preliminary Injunction. ECF Nos. 9, 10. G.G.'s Declaration largely repeats the material in his complaint. Compare ECF Nos. 8 and 9. The Court recounts only those assertions that concern the effect that G.G.'s Gender Dysphoria has had on his schooling. G.G. alleges other harms he has suffered, such as being humiliated and forced to speak at the School Board hearing, G.G. Decl. ¶ 23, but these harms are not relevant to the issuance of an injunction allowing G.G. to use the male restroom during this litigation. Here the declaration of G.G. is a recital of

the allegations in the complaint and is replete with inadmissible evidence including thoughts of others, hearsay, and suppositions. The Court recounts these allegations before analyzing their credibility.

G.G. claims that during his freshman year, which began in September 2013, he "experienced severe depression and anxiety related to his untreated Gender Dysphoria." *Id.* ¶ 9. The depression and anxiety were so severe that G.G. did not attend school during the spring semester which began in January 2014. *Id.* There is nothing to corroborate that his "untreated Gender Dysphoria" was the reason for his absence. In April of 2014, weeks before his fifteenth birthday, G.G. first informed his parents that he is transgender. *Id.* ¶ 10. After his parents learned of his gender identity, G.G. began "therapy with a psychologist who had experience with working with transgender patients." *Id.* He claims that this psychologist diagnosed him with Gender Dysphoria and recommended that he begin to live as a boy in all respects, including in his use of the restroom. *Id.* ¶ 11. There is no report or declaration from this psychologist. In August 2014, G.G. and his mother informed officials at Gloucester High School of his gender identity. *Id.* ¶ 15. At the start of the school year, G.G. agreed to use a separate restroom in the nurse's office. *Id.* ¶ 19. G.G. then determined that it "was not necessary to continue to use the nurse's restroom." *Id.* He claims that he "found it stigmatizing to use a separate restroom." *Id.*

On December 9, 2014, the School Board adopted the restroom policy. *Id.* ¶ 22. With the new transgender restroom policy, G.G. feels like he has

been "stripped of [his] privacy and dignity." *Id.* ¶ 23. He is unwilling to use the girls' restroom because, he claims, girls and women object to his presence there. *Id.* ¶ 25. Additionally, use of the girls' restroom would be incompatible with his treatment for Gender Dysphoria. *Id.* He claims that the new unisex restrooms are not located near his classes and that only one of these restrooms is located near where the single-sex restrooms are located. *Id.* ¶ 26. He refuses to use these restrooms because "they make him feel even more stigmatized and isolated than when [he] use[d] the restroom in the nurse's office." *Id.* ¶ 27. He claims that everyone knows that the restrooms were installed for him. *Id.* Because G.G. refuses to use any of the restrooms permitted for his use, he has held his urine and developed urinary tract infections. *Id.* ¶ 28.

The Expert Declaration of Randi Ettner, Ph.D, adds little to these factual claims. Ettner is not the psychologist who analyzed G.G. after he first told his parents he was transgender; rather, he was retained by G.G.'s counsel in preparation for this litigation. *See* Ettner Decl. ¶¶ 1, 7, 9. Ettner met G.G. once before preparing his report. *Id.* ¶ 7. The bulk of his declaration describes the diagnosis and treatment of Gender Dysphoria. It defines Gender Dysphoria as the feeling of incongruence between one's gender identity and the sex assigned one at birth. *Id.* ¶ 11–12. It notes that Gender Dysphoria is "codified in the Diagnostic and Statistical [M]anual of Mental Disorders (DSM-V) (American Psychiatric Association) and the International Classifications of Diseases-10 (World Health Organization)." *Id.* ¶ 12. It describes the studies that have looked at transgender youth who could not use restrooms corresponding to their gender

identity. *Id.* ¶¶ 18–27. However, beyond confirming that G.G. has a "*severe* degree of Gender Dysphoria," *id.* ¶ 29, there are no facts particular to G.G. in the report. *See id.* ¶¶ 28–30.

The School Board, supported by the declaration of Troy Andersen, emphasizes that any student may use the three unisex restrooms that were installed and open for use by December 16, 2014. Andersen Decl. ¶ 7; Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. Any student may also use the restroom in the nurse's office. Andersen Decl. ¶ 7. Moreover, the School Board contends that G.G. may use the female restrooms and locker rooms, Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30, and G.G. has made no showing that he is not permitted to use them.

**2. Facts and Arguments Concerning Student Privacy**

The School Board contends that granting the preliminary injunction and allowing G.G. to use the male restroom would endanger the safety and privacy of other students. Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. G.G. argues in response, without any independent factual support, that his presence in the male restroom would not infringe upon the privacy rights of his fellow students. He claims that the student body itself is comfortable with his presence in the restroom because during the seven weeks in which he used the male restroom, he "never encountered any problems from other students." G.G. Decl. ¶ 20. The Andersen Declaration describes a different reaction to G.G.'s use of the male restroom. Andersen Decl. ¶ 4. According to Andersen, the School Board "began receiving numerous complaints from parents and

students" the day after G.G. was granted permission to use the boys' bathroom. *Id.*

G.G. also contends that the improvements that the School Board made to the restrooms alleviated any concerns that parents or students may have had about "nudity involving students of different sexes." Prelim. Inj. at 33. His complaint describes these improvements, which include raising the doors and walls around the bathroom stalls so that students cannot see into an adjoining stall, and adding three unisex, single-stall restrooms. Compl. ¶¶ 47, 52. The School Board disputes the extent to which the improvements have increased privacy and claims that the restrooms, "and specifically the urinals," are "not completely private," although it also does not submit any evidence in support of this contention. Br. in Opp'n to Mot. for Prelim. Inj., 18 n.17, ECF No. 30.

Finally, G.G. argues that any student uncomfortable with his presence in the male restrooms may use the new unisex restrooms. Prelim. Inj. at 35, 39.

**C. ANALYSIS**

G.G.'s Motion for Preliminary Injunction asks this Court to allow him, a natal female, to use the male restroom at Gloucester High School. Mot. for Prelim. Inj., ECF No. 11. Restrooms and locker rooms are designed differently because of the biological differences between the sexes. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("differences between the genders demand a facility for each gender that is different"). Male restrooms, for instance, contain urinals, while female restrooms do not. Men tend to

prefer urinals because of the convenience. Furthermore, society demands that male and female restrooms be separate because of privacy concerns. *Id.*; *see also Virginia v. United States*, 518 U.S. 515, 550 n.16 (1996) ("[admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements"). The Court must consider G.G.'s claims of stigma and distress against the privacy interests of the other students protected by separate restrooms.

In protecting the privacy of the other students, the School Board is protecting a constitutional right. The Fourth Circuit has recognized that prisoners have a constitutional right to bodily privacy. *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981). Although the Fourth Circuit has never held that the right to bodily privacy applies to all individuals, it would be perverse to suppose that prisoners, who forfeit so many privacy rights, nevertheless gained a constitutional right to bodily privacy. In recognizing the right of prisoners to bodily privacy the court spoke in universal terms: "Most people . . . have a special sense of privacy in their own genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating." *Id.*

Several circuits have recognized the right to bodily privacy outside the context of prisoner litigation. *Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011) (holding that bodily exposure may meet "the lofty constitutional standard" and constitute a violation of one's reasonable expectation of privacy); *Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir.

2008) (holding that a student's "constitutionally protected right to privacy encompasses the right not to be videotaped while dressing and undressing in school athletic locker rooms"); *Poe v. Leonard*. 282 F.3d 123, 138–39 (2d Cir. 2002) ("there is a right to privacy in one's unclothed or partially unclothed body"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). In these circuits, violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. *See Doe*, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); *Brannum*, 516 F.3d at 494 ("the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *York*, 324 F.2d at 455 (highlighting that the exposed plaintiff was female and the viewing defendant male); *Poe*, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different genders of defendant and plaintiff in *York*).

Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system. The students are almost all minors, and public school education is a protective environment. Furthermore, the School Board is tasked with providing safe and appropriate facilities for these students. *Linnon v. Commonwealth*, 752 S.E.2d 822, 826 (Va. 2014) (finding that "school administrators have a responsibility 'to supervise and ensure that students could have an education in an atmosphere conducive to learning, free of disruption,

and threat to person.'" (quoting *Burns v. Gagnon*, 727 S.E.2d 634, 643 (Va. 2012)).

G.G.'s unsupported claims, which are mostly inadmissible hearsay, fail to show that his presence in the male restroom would not infringe upon the privacy of other students. G.G.'s claim that he "never encountered any problems from other students," G.G. Decl. ¶ 20, is directly contradicted by the Andersen Declaration. Andersen Decl. ¶ 4. Moreover, even if the Court accepted G.G.'s self-serving assertion, it would still not find that there was no discomfort among the students. It would not be surprising if students, rather than confronting G.G. himself, expressed their discomfort to their parents who then went to the School Board.

G.G. further contends that the improvements that the School Board made to the restrooms minimize any privacy concerns. Prelim. Inj. at 33. However, G.G. does not introduce any evidence that would help the Court understand the extent of the improvements. He fails to recognize that no amount of improvements to the urinals can make them completely private because people sometimes turn while closing their pants. He does not submit any evidence that would show that other students would be comfortable with his presence in the male restroom because of the improvements. Finally, he fails to recognize that the School Board's interests go beyond preventing most exposures of genitalia. The mere presence of a member of the opposite sex in the restroom may embarrass many students and be felt a violation of their privacy. Accordingly, the privacy concerns of the School Board

do not diminish in proportion to the size of the stall doors.

G.G.'s argument that other students may use the unisex restrooms if they are uncomfortable with his presence in the male restroom unintentionally reveals the hardship that the injunction he seeks would impose on other students. It does not occur to G.G. that other students may experience feelings of exclusion when they can no longer use the restrooms they were accustomed to using because they feel that G.G.'s presence in the male restroom violates their privacy. He would have any number of students use the unisex restrooms rather than use them himself while this Court resolves his novel constitutional challenge.

G.G.'s dismissal of the School Board's privacy concerns only makes sense if assumes that there are fewer or no privacy concerns when a student shares a restroom with another student of different birth sex but the same gender identity. If there were no privacy concerns in this situation, there would be no hardship if G.G. used the male restroom while this litigation proceeds. Of course, this litigation is proof that not everyone—certainly not the Gloucester County School Board—shares in this belief. The Court gives great weight to the concerns of the School Board—which represents the students and parents in the community—on the question of the privacy concerns of students, especially at this early stage of litigation and in the complete absence of credible evidence to the contrary.

Against the School Board's strong interest in protecting student privacy, the Court must consider

G.G.'s largely unsubstantiated claims of hardship. G.G. acknowledges that he may use the unisex restrooms or the nurse's restroom. His declaration fails to articulate the specific harms that would occur to him if he uses those restrooms while this litigation proceeds; it simply says that using these restrooms would cause him distress and make him feel stigmatized. It is telling to the Court that his declaration mirrors his complaint, a sign that it was drafted by his lawyers and not by him. G.G. attempts to support his claims of distress by describing the diagnosis of the first psychologist who saw him, but these allegations are hearsay and will not be considered.

Similarly, G.G. makes several claims about the thoughts and feelings of other students for which he has not submitted any admissible evidence or corroboration. He has nothing to substantiate his claims that other students view the unisex restrooms as designed solely for him. Nor has he submitted a layout of the school that would confirm his claim that the unisex restrooms are inconvenient for him to use.

The declaration of Dr. Ettner is almost completely devoid of facts specific to G.G. Dr. Ettner is not the psychologist who allegedly first diagnosed G.G. with Gender Dysphoria. Rather, he has been retained for this litigation. Having met G.G. only once, he has little to say about the harm that would occur to G.G. specifically if G.G. is not allowed to use the male restrooms during this litigation.

G.G. has been given an option of using a restroom in addition to the female restroom that corresponds to his biological sex. He has not described his hardship

in concrete terms and has supported his claims with nothing more than his own declaration and that of a psychologist who met him only once, for the purpose of litigation and not for treatment. The School Board seeks to protect an interest in bodily privacy that the Fourth Circuit has recognized as a constitutional right while G.G. seeks to overturn a long tradition of segregating bathrooms based on biological differences between the sexes. Because G.G. has failed to show that the balance of hardships weighs in his favor, an injunction is not warranted while the Court considers this claim.

Having found that G.G. has not shown that the balance of the hardships are in his favor, the Court does not need to consider the other showings required for a preliminary injunction. However, the Court notes that just as G.G. has failed to provide adequate proof of the hardship that would occur if the injunction is not granted, he has also failed to make a clear showing of irreparable injury.

## IV. CONCLUSION

For the foregoing reasons, the Court **GRANTED** the Motion to Dismiss as to Count II, Plaintiff's claim under Title IX, and **DENIED** the Plaintiffs Motion for a Preliminary Injunction. The Clerk is **DIRECTED** to forward a copy of this Opinion to all Counsel of Record.

**IT IS SO ORDERED.**

/s/ Robert G. Doumar

Robert G. Doumar

Senior United States District Judge

Newport News, VA

September 17, 2015

**TABLE 1**
**PUBLIC-SCHOOL DATA[1]**

| States by Circuit | # of Districts | # of Schools | # of Students |
|---|---|---|---|
| **Fourth Circuit** | | | |
| Maryland | 24 | 1,424 | 886,221 |
| Virginia | 130 | 2,134 | 1,287,026 |
| West Virginia | 55 | 739 | 273,855 |
| North Carolina | 115 | 2,624 | 1,550,062 |
| South Carolina | 84 | 1,252 | 771,250 |
| **Seventh Circuit** | | | |
| Indiana | 294 | 1,921 | 1,049,547 |
| Illinois | 854 | 4,173 | 2,026,718 |
| Wisconsin | 421 | 2,256 | 864,432 |

[1] The data included here was gleaned from Thomas D. Snyder et al., Digest of Education Statistics 2018, at 74-75 t.203.20, 120 t.214.30, 134 t.216.70 (54th ed. 2019), https://nces.ed.gov/pubs2020/2020009.pdf.

| **Eleventh Circuit** | | | |
|---|---|---|---|
| Alabama | 134 | 1,513 | 744,930 |
| Georgia | 180 | 2,300 | 1,764,346 |
| Florida | 67 | 4,178 | 2,816,791 |
| **Total** | 2,358 | 24,514 | 14,035,178 |