

Case Brief: *Grimm v. Gloucester County School Board**

INTRODUCTION

In *Grimm v. Gloucester County School Board*,¹ the Fourth Circuit was tasked with deciding whether a school violated the Equal Protection Clause and Title IX when it excluded a student from using the boys bathroom and refused to amend his school records.² *Grimm* is the result of a long battle in the courts and a number of changed administrative policies, which can be primarily attributed to a change in president and agency guidance. The Fourth Circuit found in favor of Gavin Grimm, a transgender student, under an Obama-era policy governing Title IX protections for transgender students.³ But the election of Donald Trump removed such protections.⁴ This forced a pending hearing before the U.S. Supreme Court to be vacated, and the case was remanded for reconsideration “in light of the shift in agency perspective.”⁵ On remand, due to recent case law, including the Supreme Court decision in *Bostock v. Clayton County*,⁶ the Fourth Circuit ruled again in favor of the student.⁷ The Fourth Circuit found that the Equal Protection Clause and Title IX protect transgender students from school bathroom policies that prohibit them from affirming their gender.⁸ *Grimm* is an example of why we need fixed policies and legislation protecting transgender students from the rapid changes of administrative law and the whims of a prejudiced president.⁹

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1. 972 F.3d 586 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021).

2. *Id.* at 593.

3. *See id.* at 601–02.

4. *See id.* at 602.

5. *Id.*

6. 140 S. Ct. 1731 (2020).

7. *Grimm*, 972 F.3d at 616 (extending the Title VII rationale from *Bostock* and stating “we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him ‘on the basis of sex’”).

8. *Id.* at 619–20. The majority responded to the question of whether equal protection and Title IX can protect transgender students from bathroom policies that prohibit them from affirming their gender by stating that it “join[ed] a growing consensus of courts in holding that the answer is resoundingly yes,” a victory for trans students across North Carolina, South Carolina, and Virginia. *Id.* at 593.

9. *See, e.g.,* Sam Williamson, Note, G.G. ex rel. *Grimm v. Gloucester County School Board: Broadening Title IX’s Protections for Transgender Students*, 76 MD. L. REV. 1102, 1115–17 (2017) (arguing deference to administrative agencies as the flaw when the Fourth Circuit first heard *Grimm*); *see also* Rachel Slepoy, *Bostock’s Inclusive Queer Frame*, 107 VA. L. REV. ONLINE 67, 82–83 (2021) (discussing the power and impact of the *Bostock* decision and applying that importance to *Grimm*).

FACTS OF THE CASE

For seven weeks, Gavin Grimm used the boy's restroom at his high school without incident.¹⁰ But when parents in the community and individuals from other states began complaining, the Gloucester County School Board ("Board") proposed a change in policy at the Board's public meeting in November 2014.¹¹ The proposed policy provided that Gloucester County Public Schools should "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."¹² The Board did not inform Grimm or his family that his bathroom usage would be up for debate at the meeting, and the Board passed the proposed policy in December 2014.¹³

Grimm sued the Board in 2015, at the end of his sophomore year of high school, alleging that the Board's bathroom policy impermissibly discriminated against him in violation of both Title IX¹⁴ and the Equal Protection Clause of the Fourteenth Amendment.¹⁵ The district court held that an implementing regulation of Title IX¹⁶ "clearly allows the School Board to limit bathroom

10. *Grimm*, 972 F.3d at 598. The court begins the majority opinion with a long explanation of their "fact-based understanding of what it means to be transgender, along with the implications of gendered-bathroom usage for transgender students." *Id.* at 594. To be explicitly clear, being transgender is not a choice and is not a psychiatric condition. Throughout this Case Brief, I refer to Gavin Grimm using his gender pronouns, just as the Fourth Circuit did, in order to affirm Gavin and other trans youth. The legal community has a lot of progress to make related to these topics. For more information about proper use of gender pronouns, see *Exploring Gender Identity and Gender Expression*, LGBTQ CTR., UNC-CHAPEL HILL, <https://lgbtq.unc.edu/resources/exploring-identities/transgender> [<https://perma.cc/FMB4-BNLN>]; *Gender Pronouns Resource Guide*, DUKE UNIV. CTR. SEXUAL & GENDER DIVERSITY, <https://studentaffairs.duke.edu/csgd/training-resources/gender-pronouns> [<https://perma.cc/BD3D-TELN>].

11. *Grimm*, 972 F.3d at 598–99.

12. *Id.* at 599. The Board and school system often equate gender and sex, but it is important to note that gender is a spectrum, which the policy fails to acknowledge. For more information about gender identity, and how gender is different from sex, see generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (Routledge ed., 2006) (critiquing the construction of sex and gender in society and proposing gender expression as separate from biological sex); *Understanding Gender*, GENDER SPECTRUM, <https://www.genderspectrum.org/articles/understanding-gender> [<https://perma.cc/V3GM-YSYB>].

13. *Grimm*, 972 F.3d at 599–600. This Case Brief does not include the unacceptable and nasty language that was included as example comments in the Fourth Circuit's opinion. Repeating these negative comments is unnecessary and unwarranted.

14. 20 U.S.C. § 1681(a).

15. *Grimm*, 972 F.3d at 601; see also U.S. CONST. amend. XIV.

16. Title IX was enacted in 1972, and the implementing regulations were enacted shortly thereafter. See 34 C.F.R. § 106.1 (noting the effective date of the implementing regulations was July 21, 1975). These regulations govern the prohibition of discrimination on the basis of sex in education or activities receiving federal financial assistance, see *id.* § 106.1, the issue at hand in *Grimm*. See *Grimm*, 973 F.3d at 618–19.

access ‘on the basis of sex,’ including birth or biological sex.”¹⁷ Grimm appealed, and the Fourth Circuit reversed.¹⁸ The Board petitioned the Supreme Court, which granted their petition for writ of certiorari, vacated the Fourth Circuit decision, and remanded the case for reconsideration in light of the shift in agency perspective.¹⁹

The shift in agency perspective coincided with the change in presidential administration from President Obama to President Trump. Under President Obama, the Department of Education (“DOE”) issued an opinion letter requiring that schools receiving federal funds allow transgender students to use facilities consistent with their gender identity.²⁰ Grimm relied on this interpretation of Title IX and so did the Fourth Circuit when it first heard the case.²¹ However, in 2017, the Trump administration, via the Department of Justice and DOE, issued their own opinion letter wherein they specifically withdrew from the policies announced under the Obama administration.²² The Trump DOE’s letter explicitly referenced the *Grimm* line of cases to support their contention that the Obama-era interpretation of Title IX caused “significant litigation regarding school restrooms and locker rooms.”²³ The district court then had to reconsider the case, this time without agency guidance materials, and instead with respect to the state and local school district’s educational policies.²⁴

17. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736, 746 (E.D. Va. 2015), *rev’d in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017); *see* 34 C.F.R. § 106.33.

18. *See G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016).

19. *See Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

20. Letter from Russlynn Ali, Assistant Sec’y for Civ. Rts., Off. for Civ. Rts., U.S. Dep’t of Educ., to Colleagues (Apr. 4, 2011) (rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/8Q7H-V72A>].

21. *See G.G. ex rel. Grimm*, 822 F.3d at 715.

22. *See* Letter from Sandra Battle, Acting Assistant Sec’y for Civ. Rts., U.S. Dep’t of Educ., and T.E. Wheeler, II, Acting Assistant Att’y Gen. for Civ. Rts., U.S. Dep’t of Just., to Colleagues (Feb. 22, 2017) [hereinafter Letter Rescinding Guidance on Transgender Students], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/BRM2-AZT6>]; *see also* Ian S. Thompson, *Trans Students Deserve Better, President Trump*, ACLU (Feb. 13, 2017, 4:15 PM), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/trans-students-deserve-better-president-trump> [<https://perma.cc/HWT3-MBGV>] (“President Donald Trump’s Justice Department—now headed off by Jeff Sessions—announced it would drop a challenge to a nationwide injunction against guidance issued last year by the U.S. Departments of Education and Justice on the rights of transgender students under Title IX, a federal civil rights law that prohibits sex discrimination in education.”); Marka B. Fleming & Gwendolyn McFadden-Wade, *The Legal Implications under Federal Law when States Enact Biology-Based Transgender Bathroom Laws for Students and Employees*, 29 HASTINGS WOMEN’S L.J. 157, 191 (2018) (“The joint letter from the Trump administration specifically withdrew the Department of Education’s January 7, 2015, letter and the joint letter from the Department of Education and the Department of Justice dated May 13, 2016.”).

23. *See* Letter Rescinding Guidance on Transgender Students, *supra* note 22.

24. *Id.*

By the time this case reached the lower courts again, Grimm had graduated from high school, underwent chest reconstruction surgery, legally changed his sex to male under Virginia law, and received a new birth certificate from the Department of Health listing his sex as male.²⁵ Grimm amended his complaint to reflect the passage of time, and on remand, the district court granted Grimm's motion for summary judgment on both the Title IX claim and his equal protection claim.²⁶ This summary of the procedural history sets the scene for understanding and embracing the importance of the Fourth Circuit's holding.

LEGAL ISSUES AND OUTCOME

Grimm is a critically important case decided by the Fourth Circuit, not only because its procedural history distinguishes it from others dealing with similar issues, but because it held the Board's application of its restroom policy against Grimm violated Title IX.²⁷ In arriving at this holding, the court relied on the *Bostock* decision for its Title IX analysis.²⁸

Bostock v. Clayton County is a case about "whether an employer can fire someone simply for being homosexual or transgender."²⁹ In that case, in several separate instances, "[a]n employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."³⁰ One plaintiff in *Bostock*, Aimee Stephens, was a trans woman who was fired after informing her employer that she planned to live and work as a woman.³¹ The Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex."³² The Court noted, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."³³

The *Grimm* court cited *Bostock* as a guide for evaluating "claims under Title IX," and relied on it throughout the opinion to support its holding that "a bathroom policy precluding Grimm from using the boys restrooms

25. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 602 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

26. *Id.* at 603.

27. *See id.* at 619.

28. *Id.* at 616; *see also Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

29. *Bostock*, 140 S. Ct. at 1737.

30. *Id.*

31. *Id.* at 1738.

32. *Id.* at 1741.

33. *Id.* For example, "when an employer fires an employee because she identifies and dresses as a woman but was assigned a male sex at birth but would not fire an employee for identifying and dressing as a woman if she were assigned a female sex at birth, he is treating the employee differently because of her sex assigned at birth." David D. Cole, *Defending Liberty in the Trump Era: Reflections from the Front*, 100 B.U. L. REV. 2413, 2426 (2020).

discriminated against him ‘on the basis of sex.’”³⁴ The court noted that *Bostock* does not explicitly answer the sex-separated restroom question, but in the Title IX context, discrimination means “treating that individual worse than others who are similarly situated.”³⁵ The court reasoned

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.³⁶

The court affirmed that Grimm “consistently and persistently identified as male,” and the Board, by relying on its own “invented” classification of “biological gender,”³⁷ denied Grimm access to the boys restroom, even after he gave the school his new birth certificate.³⁸ The Board’s application of its restroom policy against Grimm violated Title IX.³⁹

The Fourth Circuit pointedly criticized the Board, stating that the solution was clear: “allow Grimm to use the boys restrooms, as he had been doing without incident.”⁴⁰ Instead of doing so, 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.”⁴¹ The Fourth Circuit emphasized that “[t]he 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.”⁴²

In his concurrence, Judge Wynn wrote separately to emphasize that the Board’s policy provided no consistent basis for assigning transgender students to a particular bathroom and to point out that it produced the very privacy

34. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

35. *Id.* at 618; *see also Bostock*, 140 S. Ct. at 1740, 1753.

36. *Grimm*, 972 F.3d at 618.

37. The difference between gender and sex may not be readily apparent to all, so discussing the distinction between the two is important. Gender identity is “your internal knowledge of your own gender—for example, your knowledge that you’re a man, a woman, or another gender.” *Frequently Asked Questions About Transgender People*, NAT’L CTR. TRANSGENDER EQUAL. (July 19, 2016), https://www.transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf [<https://perma.cc/HSU7-UAKE>]. Sex, under a plain-meaning interpretation, is understood to comprise only biological facts. For more on the use of “sex” in the law, see Maayan Sudai, *Toward a Functional Analysis of “Sex” in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 421, 460–61 (2019). While I do not advocate for a strict reading of either concept, I do argue there is no such thing as biological gender because of the sex-gender distinction. Gender is a social contract, and thus sex and gender should not be equated.

38. *Grimm*, 972 F.3d at 619.

39. *Id.*

40. *Id.*

41. *Id.* at 620.

42. *Id.*

harms it purportedly sought to avoid.⁴³ Judge Wynn’s concurrence highlighted just how troubling the result was, writing, “children who simply wish to be treated as equals at one of the most fraught developmental moments in their lives” are instead labeled “as unfit for equal participation in our society.”⁴⁴ He called out the unequal treatment enabled by the Board’s policy, writing that it discriminates against transgender students out of a plain fear of those who are “othered” and marginalized in our society due only to their being different.⁴⁵ In highlighting how plainly harmful the Board’s policy was to Grimm and student’s like him, Wynn’s concurrence was critically important.

POTENTIAL IMPACT

The Fourth Circuit strikingly explained that discrimination against transgender students is barred under Title IX and that neither the Fourth Circuit nor the law allows for such discrimination. This case is not only an incredible victory for Gavin Grimm, after *years* in court, but it is also a victory for advocates of LGBTQ+ rights. *Grimm* represents momentum in the courts to recognize that trans youth are protected under federal law and denying transgender individuals access based on “biological sex” is unacceptable.

Grimm is already being cited by other lower courts, across various circuits, to overturn discriminatory policies.⁴⁶ Further, the case is being cited by now-President Biden’s administration to reject Trump-era discrimination against transgender persons.⁴⁷ In a recent executive order, President Biden explicitly extended the *Bostock* holding to Title IX in order to prohibit discrimination on the basis of sexual orientation and gender identity.⁴⁸ President Biden’s order states it “is the policy of my [a]dministration to prevent and combat

43. *Id.* at 621–22 (Wynn, J., concurring).

44. *Id.* at 621.

45. *Id.*

46. *See* *Monegain v. Va. DMV*, 491 F. Supp. 3d 117, 142 (E.D. Va. Sept. 30, 2020) (“[T]he Fourth Circuit agreed 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 also* *Doe v. Univ. of Scranton*, No. 19-CV-01486, 2020 WL 5993766 (M.D. Pa. Oct. 9, 2020) (detailing peer-on-peer harassment where the court cited *Grimm* to support extending the Supreme Court’s reasoning in *Bostock* to discrimination claims based on sexual orientation brought under Title IX, in the absence of express Third Circuit precedent to the contrary); *Whitman-Walker Clinic, Inc. v. U.S. Dep’t Health & Hum Servs.*, 485 F. Supp. 3d 1 (D.D.C. Sept. 2, 2020) (extending *Bostock* to Title IX, citing *Grimm*, and holding that a state agency should repeal a rule that discriminated on the basis of gender identity or sex stereotyping in medical coverage and treatment).

47. *See* Amanda L. Shelby, Sean R. Somermeyer & Sara L. Lewenstein, *Executive Order and Courts Clarify Supreme Court Bostock Decision Applies to Title IX, Too*, XI NAT’L L. REV. 299 (Jan. 27, 2021), <https://www.natlawreview.com/article/executive-order-and-courts-clarify-supreme-court-bostock-decision-applies-to-title> [<https://perma.cc/34T7-2CDX>].

48. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

discrimination on the basis of gender identity . . . and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity.”⁴⁹

This rapid shift is encouraging, but *Grimm* should be a lesson to both administrative agencies and legislative bodies. *Grimm*’s case went through every level of the federal courts over the course a five-year period, and was considered by the district court five times, the Fourth Circuit three times, and the Supreme Court once, with a second writ for certiorari denied on June 28, 2021.⁵⁰ While the Fourth Circuit’s most recent ruling promotes justice and equality, there is still work to do. If protections for transgender individuals can come and go with each new president, there is a very real danger that there will be many more cases like *Grimm* which could take half a decade to resolve.

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49. *Id.* Note that courts often look to Title VII for guidance when interpreting Title IX claims. *See, e.g.,* *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.”).

50. *See* *Gloucester Cnty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878 (2021).

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