No. 15-2056

# In the United States Court of Appeals for the Fourth Circuit

GAVIN GRIMM,

*Plaintiff – Appellant*,

*v.*

GLOUCESTER COUNTY SCHOOL BOARD,

*Defendant – Appellee.*

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On Appeal from the United States District Court
For the Eastern District of Virginia
No. 4:15-cv-00054-RGD-DEM

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## SUPPLEMENTAL REPLY BRIEF OF GLOUCESTER COUNTY SCHOOL BOARD

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Regulation**



**Rule**



**Other Authorities**

## INTRODUCTION

Gavin Grimm's supplemental brief confirms the two central arguments made by the Gloucester County School Board ("Board") in its own supplemental brief. First, Grimm's impending graduation will moot this appeal, which should therefore be dismissed. Second, if the Court reaches the merits, the Board's restroom and locker room policy is permitted by the plain text of the Title IX regulation allowing "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. Indeed, as Grimm's brief implicitly concedes, Grimm Supp. Br. at 33–34, the prior panel "conclude[d]" that the regulation "permits … the Board's reading." *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016). It is therefore impossible to avoid the conclusion that the Board's policy is lawful under Title IX, especially now that the sole basis for the panel's prior decision—the federal guidance equating "sex" with "gender identity"—has been rescinded.

The Court should either dismiss Grimm's appeal or affirm the district court's decision dismissing Grimm's Title IX claim.

## ARGUMENT

### I. Grimm's Supplemental Brief Confirms That This Appeal Will Become Moot When Grimm Graduates.

The Board's supplemental brief showed that when Grimm graduates on June 10, 2017, the question of Grimm's bathroom access as a student will become moot. Supp. Br. at 18–20. Courts have routinely dismissed Title IX injunctive relief claims as moot when plaintiffs graduate. *See, e.g.*, *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (collecting cases). The burden is therefore on Grimm to identify some other justiciable issue that will remain live. Supp. Br. at 19. Grimm's supplemental brief anticipates the Board's concern, but only underscores the incipient jurisdictional defect. This Court should therefore dismiss the appeal as moot.

The *sole* basis Grimm offers for jurisdiction post-graduation is that the Board's policy might apply to Grimm as an alumnus. Grimm Supp. Br. at 19.[1] That theory has multiple flaws.

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[1] Grimm, correctly, does not contend that jurisdiction can be predicated on the availability of nominal damages under Title IX. *Compare* Grimm Supp. Br. at 20–21, *with* Supp. Br. at 19–20. The district court dismissed only Grimm's Title IX claim, not Grimm's Equal Protection claim, *see* JA154, and did not enter a Rule 54(b) final judgment as to Title IX. Its dismissal of the Title IX claim was thus not a "final

*First*, because Grimm has not pled how the Board's policy will affect Grimm as an alumnus, Grimm lacks standing to seek relief in that capacity. To confer standing, threatened future injuries "must be *certainly impending*," and not merely "allegations of *possible* future injury[.]" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quotes and alteration omitted). But Grimm has not alleged any particular intention to return to school after graduation: Whether and when Grimm plans ever to attend "alumni events," "homecoming or prom as a guest," or "football games and other community events" is speculative. Grimm Supp. Br. at 19. These "'some day' intentions" "without … even any specification of when the some day will be" do not

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decision" appealable under 28 U.S.C. § 1291; *Robinson v. Parke-Davis & Co.*, 685 F.2d 912, 913 (4th Cir. 1982) (per curiam). This Court's jurisdiction to review dismissal of Grimm's Title IX claim is therefore pendent on its jurisdiction to review denial of Grimm's preliminary injunction motion. *See* 28 U.S.C. § 1292(a)(1); Grimm Supp. Br. at 20–21. Grimm's claim for nominal damages under Title IX does not independently support jurisdiction. *See Roberson v. Mullin*s, 29 F.3d 132, 136 (4th Cir. 1994) (pendent jurisdiction applies only "[w]hen we properly have jurisdiction" over another order).

establish a justiciable claim. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992).[2]

*Second*, because it is not evident that the Board's policy even applies to alumni—it is directed at "students," and says nothing about alumni, *see* JA15–16—Grimm's claims regarding future alumni events are unripe. *See, e.g.*, *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013) (ripeness turns on "fitness" of issues for adjudication and "hardship" to parties from withholding adjudication). The question whether the Board's policy applies to alumni is unfit for adjudication because it "'rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Furthermore, given that Grimm has not even pled any plan to *attend* alumni events, there is no obvious hardship in reserving adjudication until the policy's application at alumni events becomes relevant. *Id.* at 271 (observing that

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[2] That distinguishes *Ross v. City University of New York*, where the plaintiff *had* alleged "far more than the vague 'some day' intentions to return" to school after graduation. 211 F. Supp. 3d 518, 524 (E.D.N.Y. 2016); Grimm Supp. Br. at 19.

an issue was "not time-sensitive, and thus a holding that the claim is not ripe will not present an immediate threat to the plaintiffs").

*Third*, even if Grimm had standing and a ripe claim regarding alumni events, as an alumnus Grimm would lack a claim for injunctive relief under Title IX. Title IX prohibits discrimination in "any education program or activity." 20 U.S.C. § 1681. As an alumnus, however, Grimm will no longer be a participant in Gloucester County "education program[s] or activit[ies]," but simply a member of the public. Grimm has cited no authority holding that Title IX applies to *non*-students in *post*-graduation programs and activities, or gives them a claim against schools they once attended. The only cases Grimm cites arose not under Title IX, but the Americans With Disabilities Act and other statutes that apply generally to programs and activities occurring on school property, not just educational ones provided to students. *See* Grimm Supp. Br. at 19 (citing *Denmeade v. King*, No. 00-CV-0407E(F), 2002 WL 31018148, at *4 (W.D.N.Y. Aug. 1, 2002), and *Ross*, 211 F. Supp. 3d 518).[3]

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[3] One of Grimm's cases distinguishes, on that ground, a Title IX case finding mootness post-graduation. *See Denmeade*, 2002 WL 31018148, at *4 (distinguishing non-justiciable case because "the inaccessibility of the campus gives the plaintiffs—as students or alumni—a personal stake in this action") (footnote omitted).

Grimm attempts to avoid these jurisdictional flaws by citing cases where a "defendant claim[s] that its voluntary compliance moots a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000); Grimm Supp. Br. at 20 n.14. But that analogy is false; the mootness here comes not from any change in the Board's policy, but from Grimm's change in status from student to alumnus—one who may or may not return for any particular alumni events, who in any case would likely not be subject to the Board's policy, and who would not have any Title IX recourse anyway.

## II. The Board's Restroom And Locker Room Policy Is Plainly Permitted By Title IX And Section 106.33.

The Board's supplemental brief showed that its policy—which designates multiple-user restrooms and locker rooms by biological sex and not gender identity—is valid under Title IX and its implementing regulation, 34 C.F.R. § 106.33. Supp. Br. at 21–23. First, that regulation permits a policy like the Board's by allowing schools to provide "separate toilet, locker room, and shower facilities on the basis of sex," if those facilities are "comparable" for "students of one sex" and "students of *the* other sex." 34 C.F.R. § 106.33 (emphasis added). Second, Grimm's

proposed re-interpretation of Title IX—making sex turn on gender identity—violates Title IX's text, history, and structure. Supp. Br. at 21–32, 38–45. Grimm's view finds no support in any Title IX-era (or modern) dictionary, *id.* at 24–26, and would subvert Title IX's structure, which allows separation of "the different sexes," 20 U.S.C. § 1686, in settings such as living facilities, restrooms, locker rooms, showers, and athletic teams.[4]

Grimm's supplemental brief fails to rebut any of these points.

### A. As Grimm concedes, the prior panel already found that Section 106.33 permits the Board's policy.

Grimm all but concedes that the key Title IX regulation, Section 106.33, permits the Board's policy. As Grimm's brief acknowledges when it finally addresses that regulation—after 32 pages—it concedes that the prior panel found Section 106.33 "'susceptible to more than one plausible reading'" regarding how to determine a transgender person's sex. Supp. Br. at 33–34 (quoting *G.G.*, 822 F.3d at 720). And one of those "plausible reading[s]" actually validates the *Board's* policy: "[T]he regulation,"

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[4] The Board also argued that Grimm's interpretation would invalidate Title IX under the Spending Clause and should be rejected as a matter of constitutional avoidance. Supp. Br. at 45–47. Grimm's supplemental brief does not address this issue and so neither does the Board's reply.

explained the panel, "*permits both the Board's reading … and the Department's interpretation*[.]" 822 F.3d 720 (emphasis added). Now that the Department's interpretation has been rescinded (and deference to it is no longer an issue), the outcome is plain: Because Section 106.33 "permits … the Board's reading," the Board's policy must be valid under Title IX. *Id.*

Grimm vainly attempts to avoid this result. *First*, while acknowledging the panel's conclusion that the regulation was "ambiguous … in the broader *regulatory* context," Grimm now claims the "ambiguity disappears when the regulation is read … within the broader *statutory* context." Grimm Supp. Br. at 34. That makes no sense: The term the panel found ambiguous—"sex"—appears in both the regulation and the statute, and, as the panel noted, that term "should be construed uniformly throughout Title IX and its implementing regulations." *G.G.*, 822 F.3d at 723. If the regulation "permits" the Board's reading of "sex," Title IX's use of the same term cannot forbid it.

Furthermore, Grimm's reading of the statute means that the regulation *unambiguously* requires equating a "transgender boy" with a "boy" under Title IX. *See* Grimm Supp. Br. at 35 (arguing "[t]he only way

to provide sex-separated restrooms … is to allow boys and girls who are transgender to use the same restrooms that other boys and girls use"). But this radical interpretation contradicts every prior resolution of the interpretive question before the Court. It contradicts the prior panel's conclusion that the regulation is susceptible to "more than one plausible reading" regarding transgender persons. *G.G.*, 822 F.3d at 720. It contradicts the United States' previous view, which "consider[ed] § 106.33 to be ambiguous as to transgender students[.]" *Id.* at 719. It even contradicts Grimm's own prior position before this Court.[5] Grimm's newfound insistence that the regulation is "unambiguous" when applied to transgender students cannot be taken seriously.

*Second*, Grimm concedes the regulation "permits differential treatment on the basis of sex," but claims that treatment is allowed only if it "does not subject anyone to unequal discrimination in violation of the statute." Grimm Supp. Br. at 35. That also makes no sense: If the regulation permits the Board to provide sex-separated restrooms based

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[5] Grimm Opening Br. at 35 (Doc. 15) (stating "plain text of 34 C.F.R. § 106.33 … does not resolve—or even address—whether schools may exclude transgender students from the restrooms consistent with their gender identity").

on its reading of "sex," then Title IX cannot simultaneously condemn the Board's policy as "sex" discrimination. Again, "sex" cannot mean one thing in the regulation and another in the statute.

*Third*, Grimm claims the regulation requires schools to provide "access to 'comparable' restrooms for all students." *Id.* at 36. But Grimm misstates Section 106.33, which requires only that separate facilities "for *students of one sex* shall be comparable … for *students of the other sex*," 34 C.F.R. § 106.33 (emphasis added). Grimm has never alleged that the facilities for males are not "comparable" to those for females. The fact that the Board has gone beyond what the regulation allows by providing *additional* single-user restrooms hardly means the Board has engaged in sex discrimination or failed to provide "comparable" facilities. Indeed, under Grimm's reading of Title IX, the Board would apparently have to provide at least *three* comparable sets of restrooms and locker rooms: one for biological males, one for biological females, and another for transgender students. Title IX requires no such thing.

In short, as the prior panel correctly concluded, Section 106.33 by its terms permits the Board's restroom and locker room policy, and so the Board's policy does not violate Title IX.

### B. Grimm is incorrect that Title IX requires treating "transgender boys and girls" exactly like other boys and girls for purposes of restroom and locker room access.

Grimm's supplemental brief makes no attempt to show that gender identity should determine sex for Title IX purposes, even though this was previously one of Grimm's central theories. *See, e.g.*, Grimm Mem. in Supp. Mot. for Prelim. Inj. at 17 n.13 (Dist. Ct. Doc. 18) (claiming "no distinction between an individual's gender identity and his or her 'biological' sex or gender"). Indeed, the idea that sex turns on gender identity was also central to the now-rescinded guidance documents. *See G.G.*, 822 F.3d at 721 (noting "[t]he Department's interpretation … that … sex as male or female is to be generally determined by reference to the student's gender identity"). Instead of that position, Grimm's supplemental brief defends the broader position that Title IX requires a "boy who is transgender" to be treated the same as other boys—and a "girl who is transgender" the same as other girls—for purposes of accessing sex-separated restrooms and locker rooms. *See, e.g.*, Grimm Supp. Br. at 7, 34 (arguing that Section 106.33 does not authorize excluding "boys and girls who are transgender from the restrooms that other boys and girls use"). This broader theory has even less support in

Title IX's text, history, and structure than the argument equating sex with gender identity.

To assess Grimm's theory, one must flesh out what the term "transgender" means, based on Grimm's own authorities.[6] According to DSM-V, "*[t]ransgender* refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender." DSM-V at 451; *see also* JA28–29 (Grimm Decl.); JA11 (Compl.). Transgender persons sometimes experience "gender dysphoria," meaning distress caused by divergence between gender identity and birth sex. DSM-V at 451; JA36–37 (Ettner Decl.). According to Grimm's sources, gender dysphoric persons may identify with the sex opposite their birth sex, DSM-V at 453; or they may "desire to be of an alternative gender," *id.*; or they may be *gender fluid* ("having different gender identities at different times"), *agendered* ("having no gender identity"), or *gender expansive* ("a wider, more flexible range of gender

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[6] *See, e.g.*, Grimm Supp. Br. at 3–4 & n. 2 (citing Am. Psychiatric Ass'n ("APA"), Diagnostic & Statistical Manual of Mental Disorders (5th ed. 2013) ("DSM-V")); *id.* at 6 n. 5 (citing Am. Psychological Ass'n ("APsyA") & Nat'l Ass'n Sch. Psychologists ("NASP"), *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015)); JA9, 11–14 (Complaint); JA28–30 (Grimm Decl.); JA36–42 (Decl. of Randi Ettner, Ph.D.).

identity and/or expression than typically associated with the binary gender system"). APA, *What is Gender Dysphoria?*, available at https://goo.gl/ymR8Nl. Grimm's sources also explain that gender dysphoria in children generally does not persist into adolescence or adulthood—*i.e.*, for roughly 98% to 70% of males and 88% to 50% of females. DSM-V at 455; *see also* APA, *What Is Gender Dysphoria?* ("For many children the feelings [associated with gender dysphoria] do not continue into adolescence and adulthood.") (at "Treatment" tab).

Some transgender persons are advised by doctors to "transition" so that their appearance, physiology, and social behavior match their gender identity. JA38 (Ettner Decl.). A transition may include using hormone blockers to prevent onset of puberty and cross-sex hormones to create the appearance of being a different sex; genital surgery; dressing and grooming like the opposite sex; adopting a name and pronouns characteristic of another sex (or no sex); and using restrooms and other facilities designated for the opposite sex. *See id.*

Having specified what Grimm means by "transgender," the issue is whether Grimm is correct that "transgender boys" must be treated as equivalent to "other boys" (and "transgender girls" equivalent to "other

girls") for purposes of Title IX's prohibition on "sex" discrimination and Section 106.33's allowance of sex-separated facilities. The answer is no.

*First*, as already demonstrated, all evidence shows that the Title IX term "sex" is a binary concept referring to the physiological differences between males and females, and no evidence suggests the term turned on gender identity. Supp. Br. at 23–38. That same evidence shows, even more strongly, that Title IX's prohibition on "sex" discrimination does not require equating "boys" with "transgender boys" or "girls" with "transgender girls." That is, no evidence shows that a "boy" for Title IX purposes must include someone born female but whose gender dysphoria led her to masculinize her appearance or physiology. This conclusion is reinforced by the fact that transgender persons may identify as *neither* male nor female, may shift between the two, may identify as having *no* sex, and usually desist from gender dysphoria after childhood. *See supra*. In short, Grimm points to no evidence showing that the Title IX term "sex" encompasses the multi-faceted and fluid concept of "transgender."

Grimm's medical sources also confirm that "sex" and "transgender" are distinct. For instance, the DSM-V defines "sex" as referring to "the biological indicators of male and female (understood in the context of

reproductive capacity)," and *contrasts* it with "gender identity," which "refers to an individual's identification as male, female, or occasionally, some category other than male or female." DSM-V at 451; *see* Grimm Supp. Br. at 3 n.2 (citing DSM-V). Similarly the NASP defines "sex" as "refer[ring] to a person's biological characteristics, including chromosomes, hormones, and anatomy," in contrast to "transgender," which means "having a gender identity that *differs from* culturally determined gender roles *and biological sex*." NASP Position Statement, *Safe Schools for Transgender and Gender Diverse Students* 6 (emphasis added), available at https://goo.gl/V5MuEz; *see* Grimm Supp. Br. at 6 n.5 (citing NASP). Thus, even the medical sources on which Grimm relies distinguish "biological sex" from "transgender."

*Second*, Grimm claims that equating "boys and girls who are transgender" with "other boys and girls" (respectively) is "*entirely consistent* with the ordinary definition of 'sex,' both at the time the regulations was [sic] enacted and today." Grimm Supp. Br. at 37 (emphasis added). Grimm offers no support for that dramatic claim.

Instead, Grimm purports to rely on the prior panel, which supposedly "observed" that the "plain meaning of sex in 1972 extended

beyond physical characteristics such as anatomy or chromosomes," and included "both physical differences and cultural ones," *id.* at 37–38. But the panel did not say that: It simply quoted two 1970s-era definitions of "sex" referring to the "anatomical and physiological differences" between males and females and to "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction." *G.G.*, 822 F.3d at 721 (quoting *American College Dictionary* 1109 (1970) and *Webster's Third New International Dictionary* 2081 (1971)). It found on that basis that the term "sex" was ambiguous as applied to transgender persons, and thus deferred to the Department's now-rescinded guidance documents, *G.G.*, 822 F.3d at 722–23, but it hardly held that the "plain meaning" of the term includes "cultural" differences. Grimm Supp. Br. at 38.

Grimm points to only one other definition—from the online Oxford English Dictionary—to claim that the "plain meaning" of "sex" includes "cultural" differences between men and women. Grimm Supp. Br. at 38 (quoting OED Online, Oxford Univ. Press, "sex, n., 4a"). But Grimm refers to a subpart of one definition of "sex"—which merely considers the term as "a social or cultural phenomenon"—while disregarding another

definition that "sex" is "[e]ither of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions." OED Online, sex, n, 1a. In any event, even assuming that "sex" has social and cultural aspects, that does not mean the term as used in Title IX hinges on gender identity or the fluid "transgender" concept. Cherry-picking definitions is no way to interpret text. *See, e.g.*, *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 227–28 (1994).

*Third*, Grimm argues that, even if "sex" were "solely based on physiology or anatomy," this would not determine the appropriate Title IX restrooms for transgender persons, because—given methods such as hormone therapy—"[m]any … have physiological and anatomical characteristics associated with their identity, not the sex identified for them at birth." Grimm Supp. Br. at 38. But that is irrelevant. Grimm's claims have never depended on external physical appearances, nor on whether someone has undergone a sex change—which in any event Grimm concedes would be inappropriate for minors. *See* JA38 (Ettner Decl.). But even if such considerations were relevant, there is no evidence suggesting that Title IX's use of the term "sex" plausibly includes persons

of one birth sex who, given their gender dysphoria, have altered their appearance or physiology. In sum, to read into Title IX some definitive answer to the question of which "sex" a "transgender" person should be considered for purposes of sex-separated facilities—even assuming a single answer is possible—would be to legislate a version of Title IX that does not exist.

### C. Grimm ignores the myriad administrative problems inherent in reading "sex" to encompass "gender identity" or "transgender status."

The Board's supplemental brief also highlighted the web of serious problems that would result from reading "sex" in Title IX to turn on "gender identity": (1) eliminating schools' ability to separate students of different physiological sexes in restrooms, locker rooms, and showers—a privacy measure contemplated by Title IX, Supp. Br. at 39–40; (2) eliminating schools' ability to provide sex-separated athletic teams—also contemplated by Title IX, *id.* at 40–42; (3) requiring discrimination in *favor* of transgender persons, who could elect to use either facilities designated for their birth sex or gender identity, *id.* at 42; (4) unfairly disregarding the privacy of students distressed at being in intimate settings with students of the opposite physiological sex, *id.* at 42–43;

(5) exposing schools to potential hostile environment or harassment claims, *id.* at 43–44; (6) forcing schools to evaluate students' sex according to masculine or feminine appearance, which is classic sex-stereotyping, *id.* at 44; and (7) rendering Title IX invalid under the Spending Clause, *id.* at 45–47.

Grimm's two-fold response is that any claimed administrative difficulties are contradicted, first, by the "actual experiences" of school administrators "across the country," and second, by the "reality" that some institutions already "recognize boys who are transgender as boys and recognize girls who are transgender as girls." Grimm Supp. Br. at 40–41. These responses fail to address the problems the Board raised.

For example, the School Administrators' *amicus* brief on which Grimm relies, *id.* at 40, is from a self-selected group of administrators with a vested interest in defending their own transgender policies. *See* Br. of School Admins. (Doc. 155). Yet even these administrators admit that because of "'weight, personal comfort, body image, social anxiety, or other reasons,'" some non-transgender students feel compelled to use alternative facilities when transgender students are present. *Id.* at 22–24. They also admit to evaluating claims of transgender status based on

students' consistent conformity to the stereotypes of their asserted gender identity—for example, by "wear[ing] female attire'" and "present[ing] as female to all of [one's] friends and teachers[.]" *Id.* at 20–21. In other words, these "successful" policies admittedly result in two of the harmful consequences identified by the Board, namely privacy violations and sex stereotyping. Supp. Br. at 42–44.

Grimm's claims about the policies of various institutions—such as the Girl and Boy Scouts, the U.S. military, and the NCAA—are misleading. *See* Grimm Supp. Br. at 41 & nn. 24–29. Contrary to Grimm's suggestion, those policies do *not* simply "recognize boys who are transgender as boys and … girls who are transgender as girls." *Id.* at 41. For instance, the Girl Scouts' policy handles placement of transgender youth "on a case-by-case basis"; considers "camping" arrangements "individually" through "special accommodations"; and promises only that someone who "lives culturally as a girl" will be "serve[d] … in a setting that is both emotionally and physically safe." *See* Girl Scouts, *Frequently Asked Questions: Social Issues*, available at https://goo.gl/364fXI (cited at Grimm Supp. Br. at 41 n.24). The Girl Scouts' policy guarantees *nothing*

about restroom, changing room, or shower access; it does not even mention the issue.[7]

The NCAA policy is even more carefully drawn. Supp. Br. at 41 n.14. While seeking to accommodate transgender athletes, the NCAA restricts male-to-female transgender individuals from competing on female teams "until completing one calendar year of testosterone suppression treatment." Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* 13 (2011), available at https://goo.gl/V2Oxb2. The NCAA's policy thus *contradicts* Grimm's blanket policy by treating only certain transgender females as equivalent to other females.[8]

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[7] The Boy Scouts say only that they will "accept and register youth in the Cub and Boy Scout programs based on the gender identity indicated on the application." *See* Boy Scouts of America, *BSA Addresses Gender Identity* (Jan. 30, 2017), available at https://goo.gl/WxNoGY.

[8] Similarly, the policies of the U.S. military and the Virginia High School League ("VHSL") (both cited by Grimm) do not simply treat "transgender boys and girls" as other boys and girls. The military treats transgender persons according to their "preferred gender" only following "a diagnosis from a military medical provider indicating that gender transition is medically necessary," and only when the transition is "complete." *See* Dep't of Def. Instruction No 1300.28: In-Service Transition for Transgender Service Members at 3–4 (June 30, 2016), available at https://goo.gl/p9xsaB. The VHSL allows waivers for transgender students only under certain circumstances, for instance where "hormonal therapy … has been administered in a verifiable manner and for a sufficient length of time to minimize gender-related advantages." Va. High Sch. League, Criteria for VHSL Transgender Rule Appeals, available at https://goo.gl/fgQe2l.

The fact that the very organizations on which Grimm relies reject Grimm's one-size-fits-all policy is devastating to Grimm's argument. Each of these organizations has a nuanced policy responsive to its own specific circumstances—just as the Board does. None of those varied policies suggests some magic bullet that will solve every issue raised by transgender persons. And none of those policies remotely suggests that Title IX *dictates* any particular approach to this novel and complex area, which is the core of Grimm's argument.

Grimm thus has no answer to the concerns identified in the Board's supplemental brief. Grimm's position would make it impossible for schools to continue to separate students by "sex" in any setting. And if—as the School Administrators' brief suggests—schools would evaluate transgender students' claims based on outward conformity to inward gender, sex stereotyping is virtually inevitable. Any interpretation of Title IX that would put administrators in that precarious position should be rejected.

### D. Grimm ignores the privacy concerns caused by reading "sex" in Title IX as encompassing "gender identity" or "transgender status."

Grimm blithely dismisses other students' privacy concerns with the *ipse dixit* that Grimm's "use of the boys' restroom does not infringe on anyone else's privacy rights." Grimm Supp. Br. at 44. Indeed, Grimm's unconcern applies "even in the context of locker rooms" since, according to Grimm, "[i]n many schools, students … change [clothes] without fully undressing." *Id.* at 45 n.32. All this would come as a surprise to Justice Ginsburg, who wrote in *United States v. Virginia* that admitting women to a previously all-male military school "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements[.]" 518 U.S. 515, 550 n.19 (1996). And it would also surprise many members of this Circuit, which has noted "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).

People legitimately form privacy expectations in public restrooms, locker rooms, or showers not based on whether people might be partially or fully undressed in those facilities, or whether bathroom stalls have

"privacy strips," but at the doors marked "M" and "W." That is why Title IX regulations have long allowed certain separate "facilities" on the basis of "sex," 34 C.F.R. § 106.33, a policy choice that Grimm does not purport to contest. If there is to be a different policy—one that recalibrates people's privacy expectations in intimate facilities—it should come from Congress, or at least from an agency's rulemaking. It should not come from courts under the guise of "interpreting" Title IX in a way that would subvert the expectations of its framers. As this Court has already concluded, "the weighing of privacy interests or safety concerns—fundamentally questions of policy—is a task committed to the agency," or to Congress, "not to the courts." *G.G.*, 822 F.3d at 723–24.

### E. The Board's policy does not engage in "transgender status" discrimination or in "sex stereotyping."

Relying on out-of-circuit precedent, Grimm asks this Court to recognize a Title IX claim for "transgender status" discrimination. Grimm Supp. Br. at 21–22. Relatedly, Grimm argues that the Board's policy is "sex stereotyping" under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Id.* at 23. Grimm is mistaken.

Grimm's cases do not recognize a claim for "transgender status" discrimination.[9] Instead, those cases—arising largely under Title VII—involve adverse action (such as firing) taken *because* a transgender person's appearance does not conform to birth sex. *See, e.g.*, *Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780, 781, 789 (D. Md. 2014) (Title VII claim based on allegations that male-to-female transgender was not hired due to masculine appearance). In those situations, some courts have recognized a sex stereotyping claim. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (recognizing Title VII claim when male-to-female transgender was allegedly fired for "conduct and mannerisms … [that] did not conform with his employer's and co-workers' sex stereotypes of how a man should look and behave").

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[9] *See, e.g.*, *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (observing that "transsexuality itself … [is] a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII"); *see also, e.g.*, *Johnston v. Univ. of Pittsburgh Univ. of the Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (observing that "nearly every federal court that has considered the question in the Title VII context has found that transgendered individuals are not a protected class under Title VII"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (joining "vast majority of federal courts … and conclud[ing] that discrimination against a transsexual based on that person's status as a transsexual is not discrimination because of sex under Title VII").

Whether or not those decisions are correct, they have no application here. Most obviously, the Board's policy distinguishes students based on *biological sex*—not "transgender status" or masculine or feminine appearance. The Board's policy is thus the *opposite* of sex stereotyping. Supp. Br. at 36–38. The Tenth Circuit agrees, explaining that the "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224.[10] Furthermore, far from taking adverse action against persons based on gender-nonconforming appearance, the Board's policy merely separates students based on biological sex—as has been allowed by Title IX for nearly half a century. *See, e.g.*, *Johnston*, 97 F. Supp. 3d at 672–82, 678 (rejecting transgender plaintiff's Title IX claim against sex-separated restrooms and "find[ing] particularly compelling that the regulations

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[10] The Seventh Circuit recently became the first to recognize a sex stereotyping claim against sex-separated school restrooms, on the theory that establishing such restrooms "punishes [a transgender] individual for his or her gender non-conformance." *Whitaker v. Kenosha Unified Sch. Dist.*, __ F.3d __, 2017 WL 2331751 at *11 (7th Cir. May 30, 2017). But that is wrong, as explained in *Etsitty*, 502 F.3d at 1224, and *Johnston*, 97 F.Supp.3d at 679–82. To dismiss as a "stereotype" the physiological distinctions between men and women—especially in places like restrooms, locker rooms, and showers—pushes the sex-stereotyping theory into incoherence. *See, e.g.*, *Johnston*, 97 F. Supp. 3d at 681 (requiring someone to use restroom of his or her biological sex does not allege discrimination based on "preconceived notions of gender stereotypes").

implementing Title IX explicitly permit … separate toilet, locker room, and shower facilities on the basis of sex").

## III. Grimm Is Not Entitled To A Preliminary Injunction.

Grimm lastly argues that this Court should direct entry of a preliminary injunction. To obtain a preliminary injunction, "the plaintiff must establish '[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009) (alterations in original) (citation omitted). "[A]ll four requirements must be satisfied." *Id.* Grimm has not met that standard.

*First*, Grimm cannot demonstrate likelihood of success. As to Title IX, as shown *supra*, the Board was plainly permitted by law to determine Grimm's sex based on birth and physiology, and nothing compelled the Board to rely on Grimm's gender identity or transgender status. Grimm's new birth certificate—contrary to the assertion that it makes likelihood of success "overwhelming," Grimm Supp. Br. at 48—has no relevance here under the governing Title IX standards. Supp. Br. at 11 n.5, 21 n.7.

Even if it did, Grimm's own claims have never depended on a birth certificate, and Grimm "may not now raise an entirely new theory in this court" supporting a preliminary injunction motion. *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1144 (3d Cir. 1977); *see also Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (considering newly raised arguments "only in very limited circumstances").

Grimm also asserts likelihood of success on the Equal Protection claim, Grimm Supp. Br. at 48–50, but the Board has already shown in its brief as appellee why that claim has no merit. *See* Doc. 47 at 12–30. The Board's policy does not classify Grimm based on transgender status; it impartially separates individuals based on physiological criteria, as the Equal Protection Clause unequivocally allows. *Virginia*, 518 U.S. at 533, 550 n.19; *Nguyen v. INS*, 533 U.S. 53, 63, 68, 73 (2001).

Nor would Grimm prevail if the policy did effect such a classification. It is not evident that transgender individuals form a "quasi-suspect" class subject to heightened scrutiny, as Grimm asserts. Grimm Supp. Br. at 48–49. Rather, Grimm's own expert describes transgender persons as a diverse group with different needs and characteristics, whose treatment requires individualized medical

attention. JA38 (Ettner Decl.). The Supreme Court has declined to treat such groups as protected classes. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985); *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *see also Etsitty*, 502 F.3d at 1222 (holding transgender individuals are not a protected class under Title VII). Even assuming heightened scrutiny, the Board's policy need only be "substantially related to a legitimate state interest," *Cleburne Living Ctr.*, 473 U.S. at 441 (quotes omitted)—a standard it satisfies because of "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns." *Faulkner*, 10 F.3d at 232; *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981); *see also Johnston*, 97 F. Supp. 3d at 669 (dismissing transgender student's Equal Protection claim on that ground). At any rate, the district court has never addressed Grimm's Equal Protection claim and so the better course is for the district court to address it first on remand in the context of the Board's still-pending motion to dismiss.

*Second*, Grimm has not established likelihood of irreparable harm in the absence of a preliminary injunction. As explained in Part I, Grimm's request for a preliminary injunction will be moot when Grimm graduates. Given that Grimm's alleged potential injuries are too

uncertain even to be justiciable, they are insufficient as a matter of law to support the required "clear showing that [Grimm] is likely to be irreparably harmed absent preliminary relief." *Real Truth About Obama*, 575 F.3d at 347.

Because Grimm has not established likelihood of either success on the merits or irreparable injury, the other two preliminary injunction factors—balance of the equities and the public interest—are beside the point. Suffice to say that until challenged by a plaintiff with justiciable claims, the public interest and equities call for allowing local governmental bodies to maintain their policies without interference.

## CONCLUSION

The district court's decision dismissing Grimm's Title IX claim should be affirmed or the appeal dismissed as moot.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because the brief contains **6,212** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14-point Century Schoolbook font.

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Dated: June 2, 2017