School Law for Administrators

Title IX

U.S. circuit court denies school board's request for another *en banc* hearing regarding transgender student's lawsuit

Citation: *Grimm v. Gloucester County School Board , 976 F.3d 399 (4th cir. 2020)*

The Fourth U.S. Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

OVERVIEW

The Fourth U.S. Court of Appeals has denied a school district's case for rehearing by the full Circuit Court in a case in which the school district was found to have violated a transgender student's Title IX and Fourteenth Amendment rights by refusing to let the students access the girls' restroom during the student's transition from female to male. The case had a complex legal history and was winding its way through the courts when the Trump administration made changes to federal laws that were related to the case. Nonetheless, the Fourth Circuit concluded the district's decision to refuse the student access to the restroom of his choice violated the student's rights and the Fourth Circuit denied the district's petition for a rehearing *en banc*.

Gavin Grimm was a new sophomore at Gloucester High School in Virginia in the 2014-2015 school year. He was born female, but as a sophomore in high school, he began to transition to male. He and his mother informed the school district of this decision. Grimm had permission from school officials to use male bathrooms for about two months without incident. However, complaints from parents and others in the community led to the Gloucester County School Board voting in December to change its policy, banning Grimm from using the boys' bathrooms. Instead, he had the option of using girls' bathrooms or gender-neutral, single-stall bathrooms. Students were supposed to use the bathrooms that coincided with their gender at birth, not necessarily their gender identity, based on the school board's decision.

Grimm suffered with urinary tract problems as he hated to go to the bathroom at school. He also began to have suicidal thoughts. He filed a federal lawsuit against the school board claiming violations of his Fourteenth Amendment equal protection rights and violations of Title IX. He asked for a preliminary injunction so that he could use the boys' bathrooms in the coming school year (2015-2016). However, the lower court dismissed the claim and denied the injunction.

That decision was appealed before the Fourth Circuit, which overturned the lower court's decision. The school board asked the U.S. Supreme Court for a writ of certiorari (to hear the lower court's appeal). The Supreme Court planned to review the Fourth Circuit's decision, but before that could happen, the Trump Administration altered the guidance on Title IX protections for transgender persons. Thus, the Supreme Court sent the case back to the Fourth Circuit. Grimm filed an amended complaint because in 2017 he graduated from high school. The lower court denied the school board's request for dismissal and granted judgment on Grimm's claims of Fourteenth Amendment and Title IX violations. The school board appealed this decision to the Fourth Circuit, asking the court to rehear the case en banc. Multiple entities (states, school districts, organizations) and individual educators filed amici briefs supporting Grimm on this appeal.

The Fourth U.S. Circuit denied the school board's request to hold another hearing en banc (before all the judges) on Grimm's discrimination case. Two of the judges on the Fourth Circuit submitted opinions here. The two agreed not to rehear the case en banc but disagreed on the lower court's decision that favored Grimm.

JUDGE NIEMEYER'S OPINION

Judge Niemeyer agreed with his colleagues that a rehearing was not needed, although he stated, "Under every applicable criterion, this case merits an en banc rehearing." However, he noted there was nothing to indicated the Fourth Circuit, en banc, would change its mind. He suggested that the school board should, instead, try again to file a petition for certiorari in the U.S. Supreme Court.

Niemeyer asserted that the school board's policy was consistent with a 1996 Supreme Court decision that the physical differences between men and women were "enduring" and the two sexes were "not fungible" *(United States v. Virginia)*. Niemeyer also stated that when the lower court granted judgment in favor of Grimm, it did not apply Title IX and its regulations, noting Title IX "allows schools to provide 'separate living facilities for the different sexes.'"

Niemeyer also stated that the equal protection clause of the Fourteenth Amendment only required that "all persons *similarly situated* should be treated alike" *(City of Cleburne v. Cleburn Living Ctr.)*. The judge noted that Grimm was not "similarly situated" like other students because he was born biologically female and identified as a male. The judge, therefore, found that the lower school board had fully complied with Title IX and the Fourteenth Amendment's equal protection clause, and that it also provided safe, private unisex restrooms that Grimm could use. Niemeyer urged the school board to present the matter to the Supreme Court.

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Equal Protection

Aviation student appeals dismissal of federal lawsuit against school district, officials, claiming discrimination based on race

Citation: *Arrington v. Miami Dade County Public School District, 2020 WL6481772 (11th Cir. 2020)*

The Eleventh U.S. Circuit has jurisdiction over Alabama, Florida, and Georgia.

The Eleventh U.S. Circuit Court of Appeals has affirmed a lower court's judgment, dismissing a lawsuit against a school district brought by a student who alleged violations of his civil rights under Section 1983 and Title VI of the Civil Rights Act. The lower court had dismissed the student's claims with prejudice, finding that the student's factual allegations were insufficient to support a viable claim. On appeal however, the Eleventh U.S. Circuit Court agreed.

Michael D. Arrington, who is African American, enrolled full-time as an evening student in the Avionic Technician Program at George T. Baker Aviation School (GTB), which is a public technical college operated under the supervision of the Miami Dade County Public School District. According to Arrington, his time at the school was fraught with problems. He ascribed these problems to the fact that he is African American and was discriminated against.

Arrington, in his legal complaint, explained the problems he experienced that he claimed were related to his race:

a) a financial aid officer withheld information about veterans' benefits from him;
b) his Pell Grant refund checks were delayed or inadequate as compared to his peers who were not African American;
c) he was "deliberately" placed in the wrong course;
d) non-African-American students used a different textbook than he for the same course;
e) he was informed of a discrepancy as to the number of class hours he had completed and alleged the school violated its own policy by not tracking his hours;
f) his keys were stolen from his backpack during a class break;
g) other students "deliberately distracted" him during test-taking, he was shadowed when he went to the bathroom, and the principal refused to act; and
h) when he left GTB the school failed to transfer his transcript to a different college.

Arrington made these claims under Section 1983, the Equal Protection Clause, and Title VI against the Miami Dade Public School District and Superintendent Alberto Carvalho, and Pamela Johnson, area supervisor for the school district and GTB. Also named in the suit were the George T. Baker Aviation School and its principal, Sean Gallagan, and assistant principal, George W. Sands.

Arrington, who represented himself in the lawsuit, amended his complaint three times. After the third amended complaint, the court dismissed the claims with prejudice because Arrington failed to establish a plausible claim for relief. Arrington appealed.

(Continued on Page 3)

Fourteenth Amendment . . . *(Continued from page 1)*

JUDGE WYNN'S OPINION

Judge Wynn also agreed on the decision to deny a rehearing, but he disagreed that the lower court had erred in granting judgment for Grimm. Wynn stated that the schoolboard "violated both Title IX and the Equal Protection Clause by prohibiting Grimm from using the boy's bathrooms at school and also by refusing to amend his school records to accurately reflect his gender."

Wynn found the school board's bathroom policy was not interested in protecting students' privacy in bathrooms, since Grimm had used the boy's bathrooms for about two months before the policy changed with no incidents. The judge asserted that the school 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'" *(Grimm v. Gloucester Cnty. Sch. Bd.)*. Wynn also concluded that the school board "was motivated by an unlawful transphobic motive" *(Id.)*. Therefore, Wynn stated, the school board had violated Grimm's equal protection rights, and the failure to alter his school records to reflect his gender identity was unconstitutional and violated Title IX.

Citing a recent Supreme Court decision in *Bostock v. Clayton County*, Wynn stated that the school board's policy prohibiting Grimm from using boys' restrooms violated Title IX because discrimination against a transgender person is a form of sex discrimination. Wynn noted that Grimm suffered with physical, mental, emotional, and social harm due to a urinary tract infection as a result of avoiding using the bathroom avoidance as well as suicidal thoughts. The discrimination at issue, Wynn said, was 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" *(Grimm)*. Wynn noted that the purpose of the Fourteenth Amendment's promise of equal protection was designed to protect minorities from discrimination. Therefore, the judge concluded that the lower court's judgment in favor of Grimm was correct and agreed with his colleagues in denying a hearing en banc.

—School Law Bulletin,
Vol. 47, No. 22, November 25, 2020, pp. 3-4.

You Be the Judge ~ Would student get preliminary injunction to allow him to repaint parking spot with portrait of President Trump?

THE FACTS

A school district had a tradition of allowing high school seniors to paint their parking spots for a fee of $25.00. The purpose was to encourage "school pride and comradery." A senior in the school paid the fee and painted his parking spot with a picture of President Donald Trump wearing a stars-and-striped bandanna and sunglasses. He had received the required approval from his principal before rendering his painting.

High school seniors had to receive administrative approval for their parking space painting, and it could not contain offensive language, pictures, or symbols, negative or rude language, or the use of another student's name. The student completed his painting in the summer. Shortly thereafter, the superintendent informed the student that it was "too political," and she had it painted over with gray paint.

The student and his parents sought a preliminary injunction against the superintendent in her official capacity and the school board to allow the student to repaint his portrait of President Trump. The student claimed removing the painting violated his right to free speech under the First Amendment. The defendants asked the court to deny the injunction. *(See the answer on page 4.)*

—School Law Bulletin,
Vol. 48, No. 1, January 10, 2021, p. 3.

Equal Protection . . . *(Continued from page 2)*

The Eleventh Circuit affirmed the lower court's rule, dismissing the complaint.

Arrington claimed that the individual defendants were liable as supervisors because they "established a policy or custom of deliberate indifference," which deprived him of his constitutional rights. He also claimed that the supervisor failed to act when their subordinates frequently deprived him of his federal rights. He claimed the supervisors knew he had been unlawfully discriminated against. He also claimed the Miami Dade County School Board was liable. Arrington argued that "[t]here has been an intentionally discriminatory racially hostile environment" that was "sufficiently severe, pervasive and/or persistent so as to injure [him]."

The defendants asked the court to dismiss the complaint. A magistrate judge recommended dismissal after reviewing Arrington's factual allegations and concluding they failed to support a viable claim that would connect the defendants' actions to racial discrimination. Although Arrington objected, the court adopted the magistrate judge's recommendations and dismissed the complaint with prejudice. Arrington appealed.

Under Section 1983, the Equal Protection Clause ensures the "right to be free from intentional discrimination based upon race" *(Williams v. Consol. City of Jacksonville)*. Title VI of the Civil Rights Act also prohibits intentional discrimination based on race, color, or national origin by any entity that receives federal funds. "Title VI's protection extends no further than that already afforded under the Equal Protection Clause of the Fourteenth Amendment" *(Burton v. City of Belle Glade)*. Therefore, the court noted the Equal Protection Clause would apply to Title VI claims as well.

To succeed on his Section 1983 claim against the supervisors for the behavior of their subordinates, Arrington had to establish that the supervisor or Municipality caused the constitutional deprivation *(McDowell v. Brown)*. To establish this claim, Arrington had to show that the supervisor or municipality had a custom or policy that caused the constitutional violation.

The Eleventh Circuit found that the lower court was correct in dismissing Arrington's complaint for failure to state a plausible claim for relief, because he had failed to state an underlying constitutional or statutory violation. "Nor has he shown that any of the name defendants would be liable even if he could establish a constitutional violation."

Arrington repeatedly claimed that a "racial discriminatory education environment" existed in the school. However, his assertions were conclusory, according to the court, and were not factual allegations. "For instance, we need not accept as true Arrington's conclusory assertions that GTB placed him in the wrong course to oust him because of his race or that there was a 'racially hostile environment' at GTB," noted the court.

Arrington failed to plead sufficient facts to provide the reasonable inference that his unfortunate experiences at GTB were because of his race. He claimed he was treated differently than his non-African-American peers in two scenarios: when he claimed that other non-African-American students used a different textbook than he did for the same course; and when he argued that non-African-American students received their Pell Grant refunds before he did.

In the first instance, the court noted, Arrington did not allege that the other students were classmates, and there could have been multiple classes with different books for the same course. It was too speculative to assume Arrington received an inferior, different textbook because of his race. Regarding his Pell Grant check, Arrington alleged that the timing of the checks depended on the number of class hours completed, among other things. The court noted it lacked sufficient information to determine that the delay in getting his checks was related to his race rather than other factors.

Arrington failed to allege that he was mistreated because of an official policy of the school district or GTB, and he failed to show that there was a widespread custom of mistreatment similar to what he experienced. The seemingly unconnected incidents of harassment that he experienced were not "sufficiently widespread so as to put [the defendants] on notice of the need to act" *(Braddy v. Dep't of Labor & Emp't Sec.)*. There was no reason to impose liability on the individual defendants or the school district.

Therefore, the court affirmed the lower court's decision and dismissed the complaint with prejudice.

—School Law Bulletin,
Vol. 47, No. 24, December 25, 2020, pp. 5-6.

You Be the Judge (Answer)

Would student get preliminary injunction to allow him to repaint parking spot with portrait of President Trump?

THE ANSWER

The court granted the injunction allowing the student to repaint his parking spot.

The student argued that the case should be analyzed under the landmark U.S. Supreme Court case, *Tinker v. Des Moines Independent Community School District*, which is used in determining student free speech cases. Under *Tinker*, school officials may not restrict student speech solely on the basis of viewpoint, unless it would materially disrupt the school's educational environment. The student argued he was likely to succeed on the merits of the case, and that this was the only year when he would have the opportunity to paint his parking spot. In addition, he argued that an injunction would promote the public interest in free speech.

The superintendent and the school board argued that the restriction imposed on the student's speech was viewpoint neutral and permissible because of the threat of "material and substantial disruption." The defendants' decision to remove the painting was based on concerns about a contentious upcoming election, and the resulting divisions within the country and the school district itself.

The defendants said they were concerned that the painting was offensive to African-American students and would result in a greater risk of vandalism, destruction of property, and fighting in an area of the school where it was difficult to control. The defendants mentioned other schools were pro-Trump parking spots were vandalized to support their argument.

The student argued that there was no "special tumult" in the district and no history of division at the school. The defendants argued that the school had a previous incident involving a Confederate flag, stoking tensions in another school within the district. Also, the defendants indicated the recent murder of a Black student by a white student had caused controversy in the community. In response to community criticism of the superintendent for removing the painting, the defendants claimed their aim was to protect the student from receiving such negative attention himself.

The court noted that a preliminary injunction was an "extraordinary remedy." The student had to show the following: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatened injury to the movant outweighs the threatened harm to the party sought to be enjoined; and (4) granting the injunctive relief will not disserve the public interest" *(City of Dallas v. Delta Air Lines, Inc.)*.

The court also noted that both the student and the defendants agreed that *Tinker* governed. The court noted that, although there were other Supreme Court cases that addressed student speech, *Tinker* governed pure student expression. The court concluded that the painting of Trump fell into the category of pure political expression by a student. To show that there was a reasonable forecast of material disruption in the school environment, the defendants had to show that the decision was "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany a certain viewpoint" *(Tinker)*.

The court found that the painting was created according to school rules, and without additional facts describing racial or political tensions at the school related to the upcoming election, "there is no evidence to support that the painting of President Trump would, on its own, cause disruption of school activities . . . " The court noted, "undifferentiated fear or apprehensive of disturbance is not enough to overcome the right to freedom of expression" *(Id.)*. The court went on to point out that this painting was different than a symbol such as a Confederate flag, which has an established meaning as a "symbol of racism and intolerance, regardless of whatever other meanings may be associated with it" *(A.M. ex rel. McAllum v. Cash)*.

In conclusion, the court found that the defendants failed to meet the *Tinker* standard by not providing enough evidence that a painting of Trump in a school parking lot would cause a substantial disruption. In reviewing the points that student had to meet to qualify for a preliminary injunction, the court found that he had succeeded. A First Amendment violation constituted an irreparable injury, and money damages would not suffice to address the injury. Next, a finding of unconstitutionality would guarantee that the student would succeed on the merits of his case. As to the balance of hardships, the court found the burden on the student's free speech right out weighted the school's burden of dealing with controversy related to the painting. Finally, granting the preliminary injunction would promote the general public interest in free speech. Therefore, the student successfully met the requirements for a preliminary injunction.

The court, therefore, granted the preliminary injunction and ordered the defendants to allow the student to repaint his spot.

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