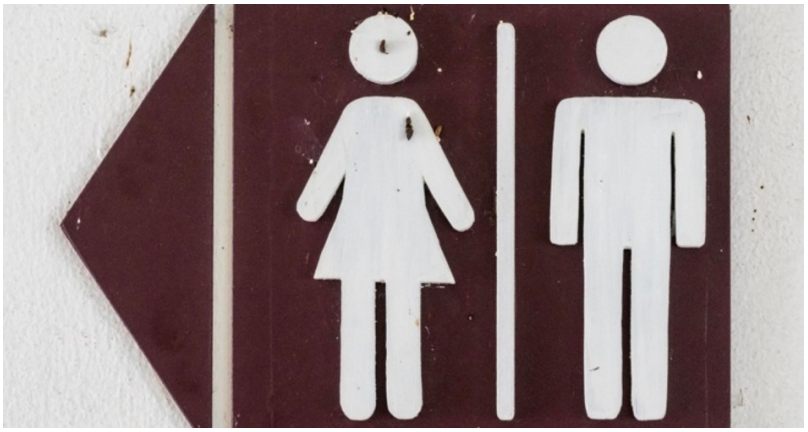
Written by **Warren Mass** on July 15, 2016

School Board in Virginia Asks High Court to Rule on Transgender Restroom Case



The Gloucester County, Virginia, School Board filed an emergency appeal with Supreme Court Chief Justice John Roberts on July 13, asking the High Court to put on hold a lower court decision requiring the district to allow a transgender girl who "identifies" as male to use the boys' restroom when she comes back to school in September.

The student in question, Gavin Grimm, was born female but claims she always "knew" she was a boy. (Her parents apparently enabled her gender identity crisis by allowing her to change her name to a male name.)

"It was literally killing me to lie about who I was," Grimm said in a statement quoted by WTKR News in Norfolk, Virginia last September.

"It is difficult to face another school year of being singled out and treated differently from other students. I am determined to move forward because this case is not just about me, but about all transgender students in Virginia," said Grimm at the beginning of last year's school term.

Grimm's statement was made just after U.S. District Judge Robert Doumar had issued an order upholding Gloucester High School's policy requiring transgender students to use alternative private restroom facilities.

Following that court order, the ACLU became involved in helping Grimm appeal the decision. The 4th Circuit Court of Appeals reversed that decision in April, saying the federal judge who previously rejected Grimm's Title IX discrimination claim ignored a U.S. Department of Education rule that transgender students in public schools must be allowed to use restrooms that correspond with their gender identity. The court reinstated Grimm's Title IX claim and sent it back to the district court for further consideration, reported Fox News and the *Washington Post*.

On May 13, the Obama administration's Departments of Justice and Education sent a "Dear Colleague Letter on Transgender Students" to every public school in the country, and possibly others.

An explanatory note within the letter stated: "This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations."

Some of the "guidelines" (which are really demands backed by the threat of withholding federal funds) contained in the letter are:

> Restrooms and Locker Rooms. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.… A

> school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.

Under a heading reading, "Compliance with Title IX," the letter states:

> As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.… The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations.

An article posted on May 17 on the website of a Washington state group called Citizens Against Common Core ("The Dear Colleague Letter on Transgender Students and Significant Guidance") raised several significant points about our federal government's tendency to govern by means of edict, rather than legislation. Though the writer's arguments are too extensive to quote here, the article is well worth reading. However, the concluding paragraph raises a significant point:

> I do not recall the U.S. Constitution having provisions for the use of significant guidance documents to make law or regulations. Maybe I missed the significant guidance document that created such a provision.

"Title IX" refers to a portion of the United States Education Amendments of 1972. It states (in part) that:

"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."

In 2014 and 2016, non-legal binding guidelines were issued by the U.S. Department of Education stating that transgender students are protected from sex-based discrimination under Title IX.

Between the 4th Circuit Court of Appeals' reinstatement of Grimm's Title IX claim in April, and the Obama administration's "significant guidance" document in May, the Gloucester County School Board decided that the federal bureaucrats and judges had interfered enough in its running of its own schools and filed the emergency appeal with Chief Justice Roberts. This case, like many others where the federal government has interfered in local matters such as education, elections, and law enforcement, is all part of a greater issue. It has been many years since the federal government has respected the language of the Tenth Amendment — which states that all powers not delegated to the federal government by the Constitution, nor prohibited by it to the states, are reserved to the states or the people.

Since the Constitution does not refer to education at all, then this is definitely an area where the states have (or should have) ultimate jurisdiction. In fact, the very existence of the Department of Education should itself be challenged on constitutional grounds.

It may be time for states to start implementing the strategy of nullification in matters related to education, just as states have started doing in other areas. (For example, on March 2 the South Carolina state House of Representatives passed a bill that stops the enforcement of federal firearm regulations at the state border.)

Another good strategy, since the administration's May 13 letter made compliance with the Department of Education's standards regarding "a student's gender identity" as a condition of receiving federal funds, would be for states to no longer accept federal funds. Federal funds always come with strings attached, and this case is a perfect illustration of that point.

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