believe" the person posed a threat to self or others; in addition, the policy stated the threat does not have to be imminent. The Eighth Circuit stated the policy was not facially unconstitutional because "reason to believe" was commonly used to mean probable cause. Additionally, it stated the policy's language that the threat does not have to be imminent does not make the policy unconstitutional. The Eighth Circuit added that Ms. Graham had not shown a history of the City's officers committing unreasonable seizures to demonstrate that the need for additional training was "plain." Due to the confusion in case law regarding the appropriate standard to justify a mental health seizure, the Eighth Circuit stated that policy makers could not have exhibited a deliberate indifference to constitutional rights that were not clearly established.

Discussion

The officers did not contend that they had probable cause to arrest Ms. Graham after they entered her home, and the appeals court was "dubious" that the officers could support this contention. On the basis of the available facts, however, the officers had reasonable belief that there was a mental health emergency and they were acting in good faith. Due to the ambiguity in the existing case law regarding the legal standard for mental health seizures, the appeals court ruled that the officers had not violated a clearly established constitutional right and therefore the officers were granted various immunities.

This case is important as it now establishes probable cause as the standard for emergency mental health seizures in the Eighth Circuit. The appeals court stated that the greater the intrusion on a citizen, the greater the justification required to deem that intrusion reasonable. The Eighth Circuit indicated that being detained for a mental health evaluation is no less intrusive than a criminal arrest. The Eighth Circuit concluded that probable cause that a person poses an emergent danger to self or others "can tip the scales" of the Fourth Amendment's reasonableness balance test in favor of the government's interest to seize that person.

This ruling placed the Eighth Circuit in alignment with the majority of circuit courts that had already established probable cause as the standard for emergency mental health seizures and provided much needed clarity on the subject of a legal standard for emergency mental health seizures in the Eighth Circuit.

Public School Policies for Transgender Students

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School Boards Engage in Discrimination When Their Policies Restrict Transgender Students on the Basis of Sex

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Key words: transgender; bathroom policy; transcripts; discrimination; schools

In *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the Fourth Circuit Court of Appeals considered whether the school board was in violation of the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 (a) (1986)) when it instituted policies restricting a transgender person's access to bathrooms on the basis of "biological sex" and refused to change his gender on school transcripts.

Facts of the Case

Gavin Grimm was identified as female at birth, but growing up, he always knew he was a boy. He preferred boys' clothing, related to male characters, and felt joy when others identified him as male. In September 2013, he began attending Gloucester High School, a public high school in Gloucester County, Virginia. He was enrolled as a female.

In April 2014, he disclosed to his mother that he was transgender. At the end of his freshman year, Mr. 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, Mr. Grimm entered sophomore year living fully as male, and used the boys' bathrooms for weeks without incident. Once word spread, however, parents railed against the Gloucester County School Board (the Board), who responded by adopting a policy under which students could only use restrooms matching their "biological gender."

Additionally, the Board voted to build single-stall restrooms as "alternatives" for students with "gender identity issues" and approved updates to the existing restrooms to improve general privacy for all students. The single-stall bathrooms were far from Mr. Grimm's classes, causing him to be late for class. He described being excluded from the boys' bathroom as "alienating" and "humiliating," and that using the single-stall restroom made him feel "stigmatized and isolated." Mr. Grimm practiced bathroom avoidance, leading to urinary tract infections, and he was hospitalized for suicidal thoughts.

Mr. Grimm continued his transition, including hormone therapy and chest reconstruction surgery. He had his sex legally changed by the Gloucester County Circuit Court, and received a new birth certificate from the Department of Health, listing his sex as male. When he provided the school with his new documentation, however, the Board refused to amend school records to identify his gender as male.

In 2015, Mr. Grimm unsuccessfully sued the Board, alleging the Board's bathroom policy violated the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972. The district court dismissed Mr. Grimm's claims; upon his appeal, the appellate court reversed. Due to a change in a Guidance issued by the Department of Justice regarding transgender students, the Supreme Court of Virginia vacated the appeals court decision and remanded for reconsideration in light of the shift in agency perspective.

Upon graduating high school, Mr. Grimm filed an amended complaint, incorporating recent factual developments regarding his gender transition. He also added a claim that the Board's refusal to update his gender on his school transcripts was also in violation of Title IX and the Equal Protection Clause. The new complaint did not seek compensatory damages or injunctive relief, only nominal damages and declaratory relief. The Board filed a motion to dismiss for failure to state a claim, which was denied on the basis that transgender discrimination claims are actionable on the basis of a gender-stereotyping theory.

In 2019, the district court granted Mr. Grimm summary judgment on both claims. The Board appealed on the following grounds: Mr. Grimm's claims pertaining to the restroom policy were moot, and that Mr. Grimm's lawsuit regarding his school records was premature, as he had not exhausted his administrative remedies available under the Family Educational Rights and Privacy Act of 1974 (FERPA).

Ruling and Reasoning

The Fourth Circuit rejected both grounds of the Board's appeal. The Board contended that the court did not have jurisdiction over the matter because Mr. Grimm's claims were moot since he did not seek injunctive or compensatory relief. The court held that even if a plaintiff's injunctive claim has been mooted, the case is not moot, as long as the parties have a concrete interest in the litigation outcome. This is true even when the claim is for nominal damages, as is common in cases concerning civil rights.

The court also rejected the argument that Mr. Grimm was required to exhaust his administrative remedies. The court noted that, unlike the Prison Litigation Reform Act of 1995 (42 U.S.C. § 1997e (2013)), which first demands "proper exhaustion" through administrative review before pursuing judicial relief, FERPA does not contain this explicit exhaustion requirement. Further, the court noted that exhaustion is not required "when the gravamen of the suit is disability discrimination in violation of other federal laws" (*Grimm*, 606).

The court then turned to the merits of Mr. Grimm's claims. To the claim that the restroom policy violated equal protection, as applied to him, the appeals court noted, echoing the district court's opinion, that this policy does not withstand heightened scrutiny. The court held that the policy merited heightened scrutiny because the bathroom policy rests on sex-based classifications and because transgender people constitute at least a "quasi-suspect" class. The court explained a sex-based classification is only "quasi-suspect" because, although a person's sex frequently bears no relation to their ability to perform or contribute to society, the U.S. Supreme

Court has previously recognized in *United States v. Virginia*, 518 U.S. 515 (1996), that inherent differences between the biological sexes might provide appropriate justification for distinctions. This is opposed to a race-based classification, which is "clearly suspect."

The court further elaborated that in determining whether transgender persons constitute a quasi-suspect class, four factors were considered: historical discrimination; a defining characteristic of the class that bears a relation to its ability to perform or contribute to society; whether the class may be defined as a discrete group by obvious, immutable, or distinguishing characteristics; and whether the class is a minority lacking political power. The court found each factor satisfied for transgender persons.

The court noted that, to survive heightened scrutiny, the Board's policy must be related substantially to a legitimate governmental interest. The court held the Board's policy as applied to Mr. Grimm did not substantially relate to protecting student privacy because Mr. Grimm used the boys' restroom for seven weeks without incident, and with the installation of privacy enhancements in the bathrooms, no other privacy concerns remained.

To the claim that failure to amend his school records violated Mr. Grimm's equal protection rights, the court found the Board's decision was not substantially related to its important interest in maintaining accurate records (as claimed by the Board) because Mr. Grimm's legal gender in the state of Virginia is male.

The court also affirmed the district court's holding that the Board's bathroom policy and refusal to amend his school records were violations of Title IX. Because the school was federally funded, the court only needed to determine whether the Board discriminated against Mr. Grimm, and if this discrimination caused him harm, in violation of Title IX.

The court noted, "It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" (*Grimm*, p 616, citing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)). The court held that Mr. Grimm suffered legally cognizable harm from this discrimination. The court noted that, in addition to the stigma of being forced to use a separate restroom, the physical locations of the alternative restrooms were inconvenient, adding to the harm caused. Thus, the court affirmed the lower court's holding.

The court found the Board's refusal to update Mr. Grimm's school records was also in violation of Title IX, holding that the policy discriminated on the basis of sex and harmed Mr. Grimm because, when he applies to universities, he will be asked for a transcript with a sex marker that is incorrect and does not match his other documentation, which would be worse treatment than that received by other similarly situated students.

Discussion

Historically, the field of psychiatry has pathologized variations in human sexuality and gender. Homosexuality was a diagnosable condition listed in the Diagnostic and Statistical Manual (DSM) until 1973, and transgenderism (diagnosed as Gender Identity Disorder) was removed from the DSM only in 2012. The World Health Organization declassified transgenderism as a mental illness only as recently as 2018. With the de-pathologizing of transgenderism, a wealth of litigation throughout the country has been aimed at ending the discrimination that transgender persons encounter.

While being transgender implies no impairment, mental health disparities persist. For example, compared with the general population, transgender persons are three times more likely to be given a diagnosis of a mental health disorder, and nine times more likely to attempt suicide. Being subjected to prejudice and discrimination exacerbates these negative health outcomes.

Mr. Grimm's suit, along with similar cases throughout the United States, marks the slow march toward equality. More recently, the U.S. Supreme Court decided not to hear a case challenging an Oregon school district's policy that allows transgender students use of bathrooms aligning with their gender identities (Andrew Chung, *U.S. Supreme Court Rejects Challenge to Transgender Student Accommodations*, Reuters U.S. Legal News, December 7, 2020. Available from: https://www.reuters.com/article/usa-court-transgender/u-s-supreme-court-rejects-challenge-to-transgender-student-accommodations-idUSKBN28H2A2. Accessed December 21, 2020). This reflects the

trend toward affirmation of the rights of transgender persons from the highest quarters.

Defining the Scope of Duty to Warn Readily Identifiable Individuals

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Pennsylvania Supreme Court Considers Neighbors to Be Identifiable Victims under Duty to Warn

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Key words: duty to warn; homicidal; identifiable; foreseeable

In *Maas v. UPMC Presbyterian Shadyside*, 234 A.3d 427 (Pa. 2020) the Supreme Court of Pennsylvania examined the scope of the state's duty to warn in a case where a patient killed a victim in his 40-unit apartment building after making statements about wanting to kill a "neighbor." In a trial over wrongful death, the patient's health care providers moved for summary judgment arguing that they did not have a duty to warn under Pennsylvania common law because the patient did not identify a "readily identifiable" victim. The Pennsylvania Supreme Court affirmed the lower courts' decisions not to grant it, because his threat toward a "neighbor" was specific enough to constitute a "readily identifiable" victim.

Facts of the Case

In 2008, after moving from a personal care home to an apartment building, Terrance Andrews, a patient at University of Pittsburgh Medical Center (UPMC) Western Psychiatric Institute & Clinic (WPIC), repeatedly told outpatient and emergency room providers that he was experiencing homicidal ideation, suicidal ideation, and hallucinations. The exact targets of his homicidal ideation varied, including his neighbor and others. He was hospitalized multiple times, but the symptoms persisted.

On May 9, 2008, Mr. Andrews presented to the WPIC emergency room expressing homicidal ideation toward his "neighbor" but was discharged after a discussion with his outpatient case worker. The following day, he was voluntarily hospitalized for three days. A few days later, he was discharged from the WPIC emergency room after expressing ideation "to kill the next-door neighbor and everyone" (*Maas*, p 429). On May 25, 2008, he presented to the WPIC emergency room reporting suicidal ideation, homicidal ideation, and voices. He was discharged after his caseworker made a plan to deliver medications to his apartment and transfer him to a personal care home within 36 hours.

On May 29, 2008, Mr. Andrews killed Laura Maas, a 19-year-old culinary arts student, living on the same floor of his apartment building. He told officers: "Take me to jail. I did it" and "I told [a psychiatrist] to put me in Western Psych . . . I told people I was going to kill someone" (*Maas*, p 430). Mr. Andrews was convicted of murder and sentenced to life in prison.

The victim's mother filed a wrongful death and survival action against defendants at UPMC alleging that Mr. Andrews' providers had a duty to warn residents of his apartment building, specifically his floor, of his threats. The UPMC defendants moved for summary judgment, arguing that mental health care providers in Pennsylvania have a duty to warn only under limited circumstances under *Emerich v. Philadelphia Ctr. for Human Dev.*, 720 A.2d 1032 (Pa. 1998). According to *Emerich*, a patient must communicate a "specific and immediate threat" toward a "readily identifiable" victim. UPMC argued that Mr. Andrews' "amorphous, nonimmediate" threats against an unidentifiable "neighbor" or "neighbors" did not create a duty to warn (*Maas*, p 430). The trial court denied summary judgment, and the Pennsylvania Supreme Court affirmed.

Ruling and Reasoning

The Pennsylvania Supreme Court concluded the lower court did not err in denying the appellants' motion for summary judgment and said that the current record supports a finding that the victim was