

No. 15-2056

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

G.G., by his next friend and mother, DEIRDRE GRIMM

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee,

**REPLY IN FURTHER SUPPORT OF
MOTION FOR EXPEDITED BRIEFING AND ARGUMENT**

Plaintiff-Appellant G.G. (“Gavin”), by his next friend and mother, Deirdre Grimm, respectfully submits this reply in further support of its motion to expedite supplemental briefing and schedule oral argument for this Court’s May 2017 sitting to facilitate a ruling before Gavin graduates high school on June 10, 2017.

ARGUMENT

1. Respondent-Appellee, the Gloucester County School Board (the “Board”) asks this Court to effectively hold the case in limbo for six months in the hopes that the Department of Education will adopt a new interpretation of 34 C.F.R. § 106.33. *See* Mot. Opp. 7. But a new interpretation issued by the

Department could not affect this case because agencies do not receive deference when they flip-flop from one position to another. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 719 (4th Cir. 2016), *vacated and remanded*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017). The Court will thus have to interpret the regulation without deference regardless of whether the Department issues a new interpretation.

2. Although the Board describes Plaintiff-Appellant's proposed schedule as "unreasonably expedited," Mot. Opp. 8, the Court could order supplemental briefing based on a schedule that closely hews to Federal Rule of Appellate Procedure 28(f), which allows 30 days for response briefs, 7 days for amicus briefs, and 14 days for reply briefs. If the Court issued a briefing order today, supplemental briefs could be due on April 13 (30 days from now), amicus briefs could be due on April 20 (7 days after the supplemental briefs), and replies could be due on April 27 (14 days after the supplemental briefs). In contrast, the Board's proposed schedule would not require supplemental briefs until May 1 (48 days from now), would not require amicus briefs until June 1 (31 days after supplemental briefs), and would not require response briefs until July 3 (63 days after supplemental briefs).

3. Expedited briefing is especially appropriate because this is an appeal from a denial of a motion for preliminary injunction, which was first filed almost two years ago. “The purpose of a preliminary injunction is merely to preserve the relative position of the parties,” and “haste . . . is often necessary if those positions are to be preserved.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). When this Court issued its previous decision, the concurring opinion noted that “[w]hen the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us.” *G.G.*, 822 F.3d at 729 (Davis, J., concurring). The concurring opinion asked the district court to “turn its attention to this matter with the urgency the case poses” because “the appropriateness and necessity of such prompt action is plain.” *Id.*

4. With Gavin’s impending graduation, the necessity of prompt action is plainer still. Expedited briefing will provide Gavin with his only chance to use the same restrooms as other students before graduating high school, and his only chance to use the same restrooms at his own graduation. “Everyone knows that in our society and in our culture high school graduation is one of life’s most significant occasions.” *Lee v. Weisman*, 505 U.S. 577, 595 (1992). Gavin’s motion for a preliminary injunction before graduation should be considered on the merits instead of being denied by default through procedural delays.

5. Finally, as noted in Plaintiff-Appellant's motion, the Board continues to exclude Gavin from using the restrooms even though he has a court order and birth certificate from the Commonwealth of Virginia stating that he is male. In claiming the authority to disregard those legal documents and continuing to block Gavin from using the boys' restrooms, the Board has staked out an extreme position that goes beyond even *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 663 (W.D. Pa. 2015) (upholding policy that required students to provide a court order or new birth certificate to change sex on school records and use facilities consistent with their gender identity), and *Carcaño v. McCrory*, No. 1:16CV236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016) (considering statute defining "biological sex" as the sex "stated on a person's birth certificate."). Gavin is overwhelmingly likely to prevail on his claims that the Board's extreme policy violates Title IX and the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests that the Court grant his motion to expedite supplemental briefing and schedule oral argument for this Court's May 2017 sitting to facilitate a ruling before he graduates on June 10, 2017.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.
Gail Deady (VSB No. 82035)
Rebecca K. Glenberg (of counsel)
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
gdeady@acluva.org
rglenberg@aclu-il.org

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

/s/

Joshua A. Block
Leslie Cooper
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
jblock@aclu.org
lcooper@aclu.org

Counsel for Plaintiff-Appellant

Dated: March 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2017, I filed the foregoing motion with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

/s/

Gail M. Deady (VSB No. 82035)
American Civil Liberties Union
Foundation of Virginia, Inc.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
gdeady@acluva.org
Counsel for Plaintiff-Appellant