

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

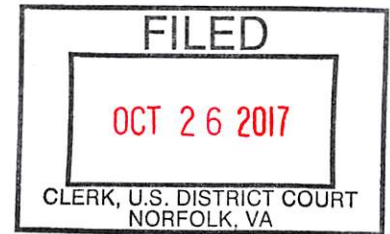
Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

Civil No. 4:15-cv-54



ORDER

Currently pending before this Court is Defendant's Motion to Dismiss the Amended Complaint for Failure to State a Claim, filed pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 118. For the reasons stated herein, the Court defers ruling on the Motion to Dismiss insofar as Defendant argues that Plaintiff has failed to state a claim for relief pursuant to Rule 12(b)(6). Instead, the parties are directed to file supplemental briefing on the question of mootness.

I. BACKGROUND

Plaintiff Gavin Grimm, a transgender male teenager, commenced this action against the Gloucester County School Board in July 2015, alleging that the School Board's policy of assigning students to restrooms based on their biological sex violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In September 2015, another judge of this Court issued a Memorandum Opinion and Order that (1) dismissed Grimm's claim under Title IX for failure to state a claim, and (2) denied his Motion for a Preliminary Injunction based on alleged

violations of Title IX and the Equal Protection Clause. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 753 (E.D. Va. 2015).

An interlocutory appeal of those decisions followed, which led to an appellate review process by the United States Court of Appeals for the Fourth Circuit and the United States Supreme Court that lasted nearly two years. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, slip op. at 5-6 (4th Cir. Aug. 2, 2017). During this time, the district court case was re-assigned to the undersigned. In August 2017, the Fourth Circuit was again presented with the parties' original appeal of the September 2015 Memorandum Opinion and Order. *Id.* at 6.

During the pendency of the appeal, a potential mootness issue arose when Plaintiff graduated high school. On August 2, 2017, the Fourth Circuit issued an Order remanding the case to this Court for a finding on the question of mootness and to develop a factual record on this issue. *Id.* at 6-8. This Court ordered the parties to submit a Joint Position Statement proposing procedures for developing this factual record and conducting proceedings on remand. ECF No. 108.

In their Joint Position Statement, the parties advised that they had filed a stipulation to voluntarily dismiss the Plaintiff's interlocutory appeal regarding the Preliminary Injunction. ECF No. 111. Because of this, they believed that "there will be no need for additional fact-finding to determine whether the motion for preliminary injunction has become moot." *Id.* Instead, parties suggested that this Court grant Plaintiff's Motion to Amend the Complaint and set a schedule allowing Defendant to file a motion to dismiss. ECF Nos. 109, 111.

This Court considered the Joint Position Statement, the record, and the history of the litigation, and granted the Consent Motion, allowing the parties to proceed with briefing in accordance with their proposed schedule. ECF No. 112.

II. ANALYSIS

Regardless of whether a controversy over the need for a preliminary injunction remains, the threshold jurisdictional question of whether Plaintiff's graduation from high school mooted the entire case remains before this Court. *See North Carolina v. Rice*, 404 U.S. 244, 245-46 (1971) ("Mootness is a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions.") (internal citations and quotation marks omitted).

Defendant's recent Motion to Dismiss alludes briefly to the mootness issue. *See* ECF No. 118 at 36. Although not expressly framed as an argument sounding in mootness, Defendant questions whether a justiciable claim remains after Plaintiff's graduation from high school and his concomitant transition from student to alumni status. *Id.* This question implicates whether "an actual controversy" remains among the parties to this case and is, therefore, a question of mootness. *See Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975).

Although Defendant purports to raise the issue under Rule 12(b)(6), generally parties must raise mootness issues by moving to dismiss under Rule 12(b)(1), which permits challenges on the basis of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The Court construes the Motion as one brought pursuant to Rule 12(b)(1) to the extent it raises whether this case presents a justiciable controversy. *See Mims v. Kemp*, 516 F.2d 21, 22 (4th Cir. 1975); *see also KCE Properties, Inc. v. Holy Mackerel, Inc.*, No. 4:16cv42, 2017 WL 376151, at *2 (E.D. Va. 2017). Even if Defendant's Motion to Dismiss did not raise mootness, the Court would raise it *sua sponte* as litigants cannot concede mootness. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Furthermore, Federal Rule of Civil Procedure 12(h)(3) requires this Court to dismiss the action if it "determines at any time that it lacks subject-matter jurisdiction."

Because constitutional mootness is a jurisdictional issue, the Court has a “special obligation” to resolve the question satisfactorily and cannot proceed until it is assured that this case presents a live controversy. *See Bender*, 475 U.S. at 541 (holding that every federal court has a “special obligation” to satisfy itself of its own jurisdiction, even though the parties are prepared to concede it). Accordingly, this Court must first be satisfied that it has jurisdiction over this case by making a determination as to mootness before it is able to proceed to the merits of this case. The Court defers consideration of all other matters pending supplemental briefing in accordance with the directives provided herein.

III. ISSUES FOR SUPPLEMENTAL BRIEFING

Parties shall fully brief the issue of whether either of Plaintiff’s claims are moot, in light of: (1) Plaintiff Gavin Grimm’s graduation from Gloucester High School and status as an alumnus of Gloucester High School, and (2) the Gloucester School Board’s (a) stated school bathroom policy and (b) the functional—that is, *actual*—application/enforcement of the school bathroom policy to non-students (including, but not limited to, alumni).¹ Specifically, the new briefing must address, but is not limited to, the following issues:

- (a) Whether the mootness question presented here implicates constitutional or prudential mootness, or some combination of both doctrines. *See, e.g., S-1 v. Spangler*, 832 F.2d 294, 297 (4th Cir. 1987) (discussing both constitutional and prudential mootness).
- (b) The evidentiary framework applied to Rule 12(b)(1) motions and the burden of proof to establish mootness at this stage in the proceedings.

¹ Counsel shall brief the mootness issues before the Court comprehensively. Arguments from other filings, if any, should not be incorporated by reference.

(c) Whether this case implicates any of the recognized exceptions to the mootness doctrine.

1. Specifically, the parties should consider whether Defendant's representations that the School Board policy no longer applies to Plaintiff (both as a matter of stated policy and as a matter of enforcement) amounts to voluntary cessation, *see, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189–94 (2000);
2. If these representations amount to a voluntary cessation argument, the parties should address whether Defendant's unsworn statements meet its burden to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

(d) Both parties shall summarize and attach evidence that establishes the facts underlying the mootness issue, including, but not limited to, the following:²

1. Whether the Gloucester School Board's bathroom use policy applies to non-students, including, but not limited to, alumni;
2. Whether the policy would be enforced as to non-students, including, but not limited to, alumni;
3. If the policy is enforced as to non-students, how it is enforced;
4. Whether any other policy governs non-students' bathroom use;
5. Whether any informal practice governs non-students' bathroom use;

² Parties are advised that if factual disputes arise as to these questions, the parties must present evidence as to these disputes. *See infra* Section IV for guidance as to additional discovery procedures.

6. Whether non-students' bathroom use is managed through ad hoc decisions. If

so:

- i. Who makes those decisions;
- ii. On what basis the decision-maker resolves the issue;

7. Whether Plaintiff intends to visit Gloucester High School as an alumnus; and

8. Whether, if Plaintiff visits and uses Gloucester High School's bathrooms, what policies, if any, apply to him, and how such policies would be enforced.

IV. BRIEFING PROCEDURES AND SCHEDULE

Defendant shall file its Supplemental Memorandum no later than sixty calendar days after the date of the entry of this Order. Plaintiff shall file its Response no later than twenty-one calendar days after service of the Defendant's Memorandum. Defendant may file a Reply no later than seven calendar days after the service of the Response. Briefs shall not exceed thirty-five pages, excluding exhibits.

Because the mootness inquiry is jurisdictional in nature and applies to the case as a whole, the parties may wish to request limited jurisdictional discovery. *See Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 402–03 (4th Cir. 2003). When considering a jurisdictional issue such as mootness, the trial court is not limited to the pleadings, and “may consider evidence by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment . . . [u]nlike the procedure in a 12(b)(6) motion.” *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (citing *Mims v. Kemp*, 516 F.2d 21, 22 (4th Cir. 1974)). Discovery may be useful to develop the factual record upon which the mootness issue will be resolved. Before undertaking any jurisdictional discovery, the party

seeking to undertake discovery is **ORDERED** to file a motion for jurisdictional discovery no later than fourteen calendar days after the date of the entry of this Order.

V. CONCLUSION

The parties are **ORDERED** to file supplemental briefing on mootness pursuant to the directives herein.

A ruling on Defendant's Motion to Dismiss for Failure to State a Claim (ECF No. 118) is **DEFERRED** pending resolution of the mootness issue.

IT IS SO ORDERED.

October 26, 2017
Norfolk, Virginia



Arenda L. Wright Allen
United States District Judge