

concerning Gavin's exclusion from school restrooms. To the contrary, Plaintiff expects that the evidence will show that the Board treated the two issues as intertwined: If the Board acknowledged Gavin's court order and updated birth certificate, then the Board might no longer be able to continue excluding Gavin from the restrooms that other boys use. *See, e.g.*, ECF No. 171 at 2 (specifically noting that Gavin first requested that his school records be updated in 2016 "while this case was pending before the United States Supreme Court.").

ARGUMENT

3. In opposing the motion, ECF No. 171 at 4, the Board argues that the proposed amendment would be futile because Gavin's allegations regarding his school records and transcript "sound under state law and [the Family Educational Rights and Privacy Act ('FERPA'), 20 U.S.C. § 1232g], not under Title IX and the Equal Protection [Clause] of the Fourteenth Amendment." The Board's argument is meritless.

4. First, the Board argues that "whether Grimm properly changed his gender designation under Virginia law, and whether Grimm provided adequate evidence of that change of designation to the School Board . . . are matters of state law and not properly considered under Title IX or the Equal Protection Clause of the Fourteenth Amendment." ECF No. 171 at 3. But the Virginia Circuit Court has already spoken. The court issued an order declaring that Gavin's sex is male and directed the Virginia Department of Vital Records to issue Gavin a birth certificate with a male gender marker. The Board nevertheless treated Gavin differently from every other student with a facially valid male birth certificate. The evidence will show that Gloucester County Public Schools has never before disregarded a student's birth certificate or required the student to provide additional evidence to prove their sex to the Board's subjective satisfaction. Gavin has plausibly alleged that this disparate treatment violates Title IX and the Equal Protection Clause.

5. Second, the Board argues that FERPA provides the exclusive remedy for claims related to school records.¹ FERPA does not create individual rights enforceable through a private right of action. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *McCoy v. E. Va. Med. Sch.*, No. 2:11CV494, 2012 WL 662529, at *3 (E.D. Va. Feb. 28, 2012). Even when enforced by the United States Department of Education, the statute merely requires that schools provide a procedural opportunity for students to request that school records be corrected. If a school declines to correct the educational records, the student's only remedy is to "place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both." 34 C.F.R. § 99.21(b)(1)(ii)(2). Without citing any supporting authority, the Board asserts that the opportunity to request a hearing under FERPA (without any substantive protections or judicially enforceable remedy) precludes Gavin from asserting antidiscrimination claims under Title IX or the Equal Protection Clause. *See* ECF No. 171 at 4.

6. The Board is wrong. The statutory text of FERPA itself explicitly states that the statute does not affect Title IX claims: "Nothing in this Chapter shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of

¹ FERPA states, in relevant part, that:

No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

20 U.S.C. § 1232g(b).

1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program.” 20 U.S.C. § 1221(d); *see Bigge v. Dist. Sch. Bd. of Citrus Cty., Fla.*, No. 5:11-CV-210-OC-10TBS, 2011 WL 6002927, at *2 (M.D. Fla. Nov. 28, 2011).

7. Nor does FERPA preclude plaintiffs from bringing equal protection claims pursuant to 42 U.S.C. § 1983. Whether a statute displaces constitutional claims is a question of congressional intent, and courts “should not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim.” *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009) (internal quotation marks omitted). As noted above, Congress made explicitly clear that it did *not* intend for FERPA to be an exclusive remedy for claims related to education records. *See* 20 U.S.C. § 1221(d).

8. FERPA also does not have any of the structural features from which a court could infer congressional intent to displace constitutional claims. In *Fitzgerald*, the Supreme Court held that Title IX does not preclude plaintiffs from bringing equal protection claims for sex discrimination because (a) Title IX does not have a comprehensive remedial schedule with “an express private means of redress,” *id.* at 256, and (b) “the protections guaranteed by the two sources of law diverge,” *id.* Those reasons apply with even greater force to FERPA.

9. FERPA—like Title IX—does not create a comprehensive remedial scheme with an “express, private means of redress.” The Court explained in *Fitzgerald* that “the provision of an *express*, private means of redress in the statute itself is a key consideration in determining congressional intent, and the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not.” *Id.* (internal quotation marks and

brackets omitted) (emphasis in *Fitzgerald*). The only express enforcement mechanism in FERPA and Title IX “is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance.” *Id.* at 256. Even though Title IX has an *implied* private right of action, the Supreme Court held in *Fitzgerald* that it could not infer that Congress intended to preclude constitutional claims without an *explicit* private right of action in the statute. *See id.* Similarly, Congress could not have intended for FERPA to displace equal protection claims because FERPA has no private right of action at all.

10. The protections in FERPA also diverge from the Equal Protection Clause’s protections for sex discrimination. And, as noted above, FERPA does not provide any individual rights that are enforceable through a private right of action. FERPA is not an antidiscrimination statute, and it does impose any substantive obligation on schools to treat students equally. In order to receive federal funding, schools must merely provide a procedural opportunity for students to ask for records to be corrected; FERPA does not require that schools actually make any correction. Because the limited protections under FERPA diverge so dramatically from the substantive protections of the Equal Protection Clause, there is no basis to infer that Congress intended for FERPA to be “the exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights.” *Fitzgerald*, 555 U.S. at 258.

11. For all these reasons, Gavin’s proposed Second Amended Complaint would not be futile. FERPA provides one mechanism for transgender students to request that their school records be amended, but—as the text of FERPA itself makes clear—the limited procedural protections of FERPA do not preclude plaintiffs from bringing substantive claims for discrimination under Title IX or the Equal Protection Clause.

Plaintiff respectfully requests that the Court grant leave to file the Second Amended Complaint.

December 27, 2018

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December 2018, I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the Eastern District of Virginia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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