IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

SKYLER MUSGROVE,	*	
Plaintiff,	*	
vs.	*	
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, JERE MOREHEAD, KARIN ELLIOTT, and BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC.,	*	CASE NO. 3:18-CV-80 (CDL)
Defendants.	*	

O R D E R

Plaintiff, an employee of the Board of Regents of the University System of Georgia (the "Board"), suffers from gender dysphoria. He was born with the physical characteristics of a female, but he feels like he is a male. This disconnect between his "anatomical sex" and his "brain sex" causes him significant emotional distress. To treat this condition, he sought medical treatment, including breast reduction surgery. He plans to undergo additional medically necessary treatments for this condition in the future.[1]

[1] Plaintiff, as well as others who suffer from gender dysphoria, prefer to be gender-classified according to their brain sex, which is what they believe their sex to be. In this Order, the Court uses Plaintiff's preferred pronoun ("he") which corresponds with Plaintiff's brain sex.

The Board offers a health benefit plan to all of its employees, including Plaintiff, that is administered by Blue Cross Blue Shield Healthcare Plan of Georgia ("Blue Cross"). The Board contracted with Blue Cross to provide the plan and administer it. That plan includes the following exclusion: "Sex Change – Services or supplies for a sex change and/or the reversal of a sex change," and "Sex Change Drugs – Drugs for sex change surgery." Compl. ¶ 44, ECF No. 1; *id.* Ex. B, The Consumer Choice HSA Healthcare Plan 53, 98 (Jan. 2017), ECF No. 1-2 [hereinafter "Plan"]. Based on this exclusion, Blue Cross on behalf of the Board denied Plaintiff's claim for breast reduction surgery. Plaintiff contends that the denial of his claim and the exclusion of coverage for other medically necessary treatments for his gender dysphoria amount to unlawful disability and sex/gender discrimination.

Plaintiff asserts claims against Blue Cross and the Board pursuant to the following statutes: Titles I, II, and III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; § 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Rehabilitation Act"); Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*; Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a; and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Plaintiff also asserts constitutional claims against the Board

pursuant to 42 U.S.C. § 1983.[2] Blue Cross moved to dismiss all of Plaintiff's claims against it (ECF No. 24). The Board moved to dismiss only Plaintiff's ADA and Title IX claims against it (ECF No. 37). For the reasons explained in the remainder of this Order, the Court grants the motions of Blue Cross (ECF No. 24) and the Board (ECF No. 37). Accordingly, the claims that remain pending are Plaintiff's Title VII claim against the Board, Plaintiff's Rehabilitation Act claim against the Board, and Plaintiff's § 1983 claims against the Board for prospective injunctive relief based on violations of the Fourteenth Amendment Equal Protection Clause.

MOTION TO DISMISS STANDARD

"To survive a motion to dismiss" under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must include sufficient factual allegations "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In other words, the factual allegations must "raise a reasonable expectation that discovery

[2] Plaintiff also named certain members of the Board as defendants in their official capacities. Those claims are deemed to be claims against the Board. As to Plaintiff's official capacity claim against Jere Morehead, the President of the University of Georgia, Plaintiff has abandoned that claim having failed to even respond to the motion to dismiss it.

will reveal evidence of" the plaintiff's claims. *Id.* at 556. But "Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because 'it strikes a savvy judge that actual proof of those facts is improbable.'" *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 556).

FACTUAL ALLEGATIONS

Plaintiff alleges the following facts in support of his claims, which the Court accepts as true for purposes of the pending motions:

Plaintiff alleges that he is transgender. He defines a transgender person as someone whose external sex characteristics do not match the person's "brain sex," or the "innate, internal sense of being male or female[] that all people have." Compl. ¶ 31. Transgender persons may suffer from "gender dysphoria." *Id.* ¶ 34. According to Plaintiff, "the critical element of [gender dysphoria] is the presence of clinically significant distress that results from such an incongruence." *Id.* According to Plaintiff's allegations, the standard treatment for gender dysphoria includes gender reassignment surgery and "living openly as one's affirmed sex." *Id.* ¶ 29.

Plaintiff alleges that he was diagnosed with gender dysphoria in 2009. *Id.* ¶ 27. His brain sex is male, but his external sex is female. He began working for the Board at the University of

Georgia in 2013. *Id.* ¶ 28. The Board made him a full-time employee eligible for benefits in September 2015. *Id.* Plaintiff contends that he asked human resources personnel which benefits package would cover treatments for gender dysphoria, and was informed that all the plans excluded such treatments. *Id.* ¶ 40. Plaintiff selected the "University System of Georgia Consumer Choice HSA Healthcare Plan." He contributes $75.12 per month for health benefits. *Id.* ¶ 43. Plaintiff's plan documents explain that Blue Cross "was chosen to administer this Plan" and that Blue Cross "provides administrative claims payment services only and does not assume any financial risk or obligation with respect to claims." Plan 85. The plan is "self-insured," Compl. Ex. F., Letter from Blue Cross to S. Musgrove (Apr. 24, 2018), ECF No. 1-6 ["Appeal Letter"], and Plaintiff alleges that the Board is "the body responsible for determining coverage," Compl. ¶ 55.

Plaintiff had a long-standing, debilitating discomfort with his typically female chest. *Id.* ¶ 46. He alleges that breast surgery was medically necessary to treat this gender dysphoria related condition. He located a surgeon to perform the surgery; the surgeon applied for preauthorization with Blue Cross. *Id.* ¶¶ 48-49. Blue Cross declined to preauthorize coverage because of the sex change exclusion in Plaintiff's plan. *Id.* ¶ 49.

Notwithstanding this denial of coverage, Plaintiff had the breast surgery a month later. He submitted the claim to Blue

Cross, and Blue Cross on behalf of the Board denied it based on the exclusion. *Id.* ¶ 50; *see also id.* Ex. E, Explanation of Benefits 4 (Oct. 10, 2017), ECF No. 1-5 (explaining that claim is not a covered expense). Plaintiff appealed the denial, and Blue Cross upheld the coverage decision. Compl. ¶ 51; *see also* Appeal Letter. Blue Cross explained that because the Board's plan "is a self-insured account," it had a "fiduciary responsibility to administer their contract benefits" and "no flexibility in overriding the benefits" the Board chose for its employees. Appeal Letter 1. Plaintiff then brought this action against Blue Cross and the Board.

DISCUSSION

Blue Cross seeks dismissal of all Plaintiff's claims. The Board only seeks dismissal of his ADA and Title IX claims. The Court addresses these motions in turn.

I. Claims Against Blue Cross

Plaintiff asserts the following claims against Blue Cross: (1) employer disability discrimination pursuant to ADA Title I; (2) public accommodation disability discrimination pursuant to ADA Title III; (3) federal program disability discrimination pursuant to the Rehabilitation Act; and (4) sex discrimination pursuant to Title VII.

A. Constitutional Standing

Because Blue Cross maintains that the Court does not have subject matter jurisdiction over Plaintiff's claims against it due to lack of constitutional standing, the Court must address this issue first. To satisfy the constitutional restriction of federal courts' jurisdiction to "cases" and "controversies," "a plaintiff must demonstrate constitutional standing." *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302 (2017). "To do so, the plaintiff must show an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and 'that is likely to be redressed by a favorable judicial decision.'" *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). "The party invoking federal jurisdiction bears the burden of proving standing." *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (quoting *Bischoff v. Osceola Cty., Fla.*, 222 F.3d 874, 878 (11th Cir. 2000)).

Blue Cross does not dispute Plaintiff satisfied the "injury in fact" requirement. Instead, Blue Cross argues that Plaintiff's injury is not fairly traceable to it. "The causation element of Article III standing requires 'a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Here, Plaintiff's injury stems from the denial of his claim pursuant to the exclusion. Plaintiff alleges that Blue Cross, as an agent of the Board and as his "employer" for purposes of the ADA and Title VII, offered a policy that contained an unlawfully discriminatory transgender exclusion; that Blue Cross made the determination that his medical condition was excluded under that discriminatory exclusion; and that Blue Cross in conjunction with the Board thus denied him coverage for medically necessary treatment that would otherwise be covered but for the unlawful discrimination. Blue Cross points to plan documents that show that the Board chose the terms of the plan, including the exclusion in question, that the Board was in complete control of plan coverage, and that Blue Cross had no discretion in disregarding the plain language of the exclusion. Although some of Plaintiff's allegations appear to be in conflict with some provisions in the plan documents, the Court finds that he has alleged sufficient facts to overcome Blue Cross's argument that his injury is traceable solely to the conduct of the Board for standing purposes.

Blue Cross also argues that Plaintiff cannot satisfy the redressability element of constitutional standing. "The element of redressability requires that 'it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Hollywood Mobile Estates*, 641 F.3d at 1266 (quoting *Lujan*, 504 U.S. at 561). Plaintiff alleges that Blue

Cross and the Board acted jointly in the alleged discriminatory conduct. While a favorable decision against the Board alone may provide complete redressability for Plaintiff, the Court is unconvinced that a favorable decision against Blue Cross too would not provide redress for purposes of evaluating constitutional standing.

Although the Court finds that Plaintiff has constitutional standing to pursue his claims against Blue Cross, the Court ultimately concludes that he has failed to state any claims against Blue Cross upon which relief may be granted. Accordingly, all of Plaintiff's claims against Blue Cross must be dismissed pursuant to Rule 12(b)(6) as explained in the following discussion.

B. Public Accommodation Disability Discrimination ADA Title III Claim

Plaintiff contends Blue Cross discriminated against him in violation of Title III of the ADA. Title III prohibits disability discrimination in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The Court is skeptical as to whether Title III of the ADA applies to insurance plans, but even if it theoretically applies to some plans that are available to the public, the Blue Cross plan at issue here was not available to the

public. It was only available to employees of the Board. Accordingly, Title III of the ADA does not apply. *See Morgan v. Joint Admin. Bd., Retirement Plan of the Pillsbury Co. & Am. Fed'n of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001) (finding that benefits plan negotiated between employer and employee was not public accommodation). Plaintiff's Title III claim is therefore dismissed.

C. Federal Program Disability Discrimination Rehabilitation Act Claim

The Rehabilitation Act provides that no disabled person shall be "subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Plaintiff makes the conclusory allegation in his Complaint that "Defendants" are engaged in "programs or activities that receive federal financial assistance and are therefore subject to Section 504." Compl. ¶ 121. Though one could perhaps take judicial notice that the *Board* operates programs that receive federal financial assistance, there is no factual allegation from which one could plausibly conclude that *Blue Cross* receives federal financial assistance for purposes of the Rehabilitation Act. The Court rejects Plaintiff's argument that the Court should infer that Blue Cross receives such assistance simply because it is the provider of the Board's health benefits plan or because it participates in the public healthcare marketplace under the Affordable Care Act.

Plaintiff has not stated a plausible Rehabilitation Act claim against Blue Cross, and that claim is dismissed.

D. Disability and Sex Discrimination Claims Pursuant to ADA Title I and Title VII

Title I of the ADA and Title VII prohibit "employers" from engaging in certain discrimination against their employees. *See* 42 U.S.C. § 12112(a) (prohibiting disability discrimination by "covered entities"); 42 U.S.C. § 12111(2) (defining "covered entity" under ADA in part as "an employer"); 42 U.S.C. § 2000e-2(a) (prohibiting gender discrimination by "employers"). Both statutes define "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such person." 42 U.S.C. § 12111(5)(A); 42 U.S.C. § 2000e(b). Plaintiff contends that he was an employee of Blue Cross for ADA and Title VII purposes.

It is clear that Blue Cross would not be considered Plaintiff's employer in the traditional sense. It did not have any authority to hire or fire him; it did not supervise his work; he did not report to anyone at Blue Cross; he had no authority or opportunity to influence Blue Cross; neither Blue Cross nor Plaintiff intended for him to be an employee of Blue Cross; and he did not share in any of the profits, losses, or liabilities of Blue Cross. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449-50 (2003) (citing EEOC guidelines for determining

whether individual is employee). There is simply no allegation that would support any plausible conclusion that Blue Cross exercised any degree of employment-related control over Plaintiff to make it his employer for statutory purposes.

Plaintiff nevertheless argues that Title VII and Title I of the ADA apply here because the definition of "employer" includes any "agent" of the employer. Plaintiff misinterprets that language in light of the existing case law. That language means that an employer can be liable for discriminatory conduct of its agents. It does not mean that an agent becomes an employer based on its agency relationship with the plaintiff's actual employer. For example, the Board could potentially be responsible under these statutes for Blue Cross's discriminatory conduct toward Plaintiff; but Blue Cross cannot be liable under the statutes for its own discriminatory conduct. The Eleventh Circuit has explained this in the context of determining whether Title VII or the ADA impose liability on individuals. *See Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (per curiam) ("The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act."); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996) (explaining that the "agent" language in the ADA was intended to ensure *respondeat superior* liability for the employer, not impose liability on an individual agent). The reasoning is equally applicable here. It

is well-established in this Circuit that an agent of the employer is not covered by Title VII or Title I of the ADA unless it exercises sufficient control over the employment relationship to be deemed an employer. The inclusion of agents in the definition of employer does not change this principle. Otherwise, if a supervisor engaged in discriminatory conduct against an employee, Plaintiff could sue the supervisor individually, which he cannot do. Instead, the "agent" language means an employer can be sued under Title VII for its agent's discriminatory conduct, not that an "agent" can be sued for discriminating on behalf of an employer.

Because Blue Cross was not Plaintiff's employer for purposes of Title VII or Title I of the ADA, those claims must be dismissed.

II. Plaintiff's Claims Against the Board

The Board only seeks to dismiss Plaintiff's ADA claims based on Eleventh Amendment immunity and his Title IX claim based on preemption. As explained below, the Court grants the Board's motion on these grounds.

A. ADA Disability Discrimination Claims and the Eleventh Amendment

It is well-established that Congress did not validly abrogate Eleventh Amendment immunity when it enacted Title I of the ADA. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). Thus, in the employment context, states are immune from suits seeking money damages by employees alleging disability

discrimination. *Id.* The Court can conceive of no reason why a state would likewise not be protected by the Eleventh Amendment from Title II ADA damage claims asserted by its employees claiming that the state's employee health insurance benefits plan discriminates against employees based on the employee's disability. And counsel for Plaintiff has directed the Court to no binding authority holding that Congress validly abrogated Eleventh Amendment immunity for Title II claims by state employees related to their employment benefits.[3] To conclude that these circumstances are sufficiently distinguishable from *Garrett* to warrant subjecting the state to monetary damages under the ADA would indeed require plowing new ground—a task the Court finds imprudent to pursue alone.

Making new law is always enticing, but being first is less important than being right. Neither *Tennessee v. Lane*, 541 U.S. 509 (2004), nor any other precedent of which the Court is aware provides reassurance that the Court's march into the unknown would be affirmed. And *Garrett* strongly suggests that it would not. Finding that the rationale of *Garrett* applies to Plaintiff's

[3] The Court of course acknowledges precedent holding that Congress validly abrogated Eleventh Amendment immunity for Title II claims arising from the denial of the fundamental right of public access to the courts. *See Tennessee v. Lane*, 541 U.S. 509 (2004). But disability discrimination that denies a member of the general public the fundamental right of access to the courts is different than the claim presented here by a state employee who believes that benefits to which he is entitled have been denied in a discriminatory manner because of his disability.

employment-based claims against the Board arising under Titles I and II of the ADA, the Court dismisses those claims based on Eleventh Amendment immunity.

B. Title IX Claim

Title IX provides that no person 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." 20 U.S.C. § 1681(a). Plaintiff alleges that the Board violated this provision and discriminated against him in employment by adopting the discriminatory exclusion. Compl. ¶¶ 147-155. The Board argues that this claim is preempted by Title VII.

Neither the Supreme Court nor the Eleventh Circuit has addressed whether Title VII preempts a Title IX employment discrimination claim. District courts in this circuit have uniformly held that it does. *See, e.g., Gibson v. Hickman*, 2 F. Supp. 2d 1481, 1483-84 (M.D. Ga. 1998); *Hazel v. Sch. Bd. of Dade Cty., Fla.*, 7 F. Supp. 2d 1349, 1353-54 (S.D. Fla. 1998); *Schultz v. Bd. of Trs. of Univ. of W. Fla.*, No. 3:06cv442-RS-MD, 2007 WL 1490714, at *2-3 (N.D. Fla. May 21, 2007). Other circuits are split on the issue. *See Lakoski v. James*, 66 F.3d 751, 755 (5th Cir. 1995) ("We are persuaded that Congress intended Title VII to exclude a damage remedy under Title IX for individuals alleging employment discrimination."); *Waid v. Merrill Area Pub. Schs.*, 91

F.3d 857, 861-62 (7th Cir. 1996) (finding that Title VII preempted plaintiff's claims for equitable relief under § 1983 or Title IX and provided the "only way by which [plaintiff] could obtain make-whole relief"), *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009). *But see Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 559-563 (3d Cir. 2017) (concluding that Title VII did not preempt medical resident's Title IX claim based on same conduct); *Preston v. Commonwealth of Va. ex. rel. New River Cmty. Coll.*, 31 F.3d 203, 206-07 (4th Cir. 1994) (stating that Title IX's implied private right of action "extends to employment discrimination on the basis of gender by educational institutions receiving federal funds" and applying Title VII substantive standards without discussing preemption); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896-99 (1st Cir. 1988) (applying Title VII analysis to plaintiff's Title IX discrimination and sexual harassment claims without addressing whether Title VII preempted those claims).

The Court finds the Fifth Circuit's reasoning in *Lakoski* persuasive. As the *Lakoski* court observed, Title VII represents "a carefully balanced remedial scheme for redressing employment discrimination," even at federally funded education institutions. *Lakoski*, 66 F.3d at 754. And permitting "an implied private right of action for damages under Title IX for employment discrimination" would disrupt this scheme. *Id.*; *see also id.* at 756-57 (explaining

that legislative history suggested that "Congress did not intend Title IX to create a mechanism by which individuals could circumvent the pre-existing Title VII remedies"). The *Lakoski* court also noted that "other circuit courts have acknowledged that the prohibitions of discrimination on the basis of sex in Title IX and Title VII are the same." *Id.* at 757 (citing *Preston*, 31 F.3d at 206 and *Lipsett*, 864 F.2d at 897). Based on this "compelling evidence," this Court agrees with the Fifth Circuit that "individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert Title IX [claims]." *Id.* at 758; *see also Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976) (explaining that Title VII provided exclusive mechanism for federal employee to challenge lack of promotion and affirming district court's dismissal of plaintiff's other claims when Title VII claim was untimely); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979) (concluding that Title VII preempted discrimination claim under civil rights conspiracy statute). Accordingly, the Board's motion to dismiss on this ground is granted.[4]

[4] Plaintiff does not allege or argue that he is part of a specific federally funded educational program under Title IX. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 536-37 (1982) (explaining that Title IX's protections are "program-specific" and noting that "Congress failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds").

CONCLUSION

As explained above, Blue Cross's motion to dismiss (ECF No. 24) and the Board's partial motion to dismiss (ECF No. 37) are granted. The claims that remain pending are Plaintiff's Title VII claim against the Board for damages and equitable relief, his Rehabilitation Act claim against the Board, and his § 1983 claims against the Board for prospective injunctive relief based upon violations of the Fourteenth Amendment Equal Protection Clause.

The parties shall submit a joint proposed scheduling and discovery order pursuant to the Court's Rules 16/26 Order (ECF No. 38) within 21 days of today's Order.[5]

IT IS SO ORDERED, this 14th day of February, 2019.

S/Clay D. Land
CLAY D. LAND
CHIEF U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA

[5] Plaintiff requested leave to amend his Complaint. The Court concludes that none of the bases for dismissal relied upon in this Order could be cured by amendment. Therefore, amendment would be futile, and Plaintiff's request for leave to amend is denied. Blue Cross also requested leave to file a surreply to Plaintiff's supplemental brief. Because the Court grants Blue Cross's motion to dismiss, its motion for leave to file a surreply (ECF No. 54) is denied as moot.