

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

GAVIN GRIMM,

Plaintiff,

v.

GLOUCESTER COUNTY
SCHOOL BOARD,

Defendant.

Civil No. 4:15cv54

ORDER

This matter comes before the Court on Plaintiff Gavin Grimm's ("Mr. Grimm") Motion for Leave to File Second Amended Complaint, ECF No. 170. For the reasons stated herein, Mr. Grimm's Motion is **GRANTED**.

Mr. Grimm filed his original Complaint on June 11, 2015 against Defendant Gloucester County School Board ("the Board"). ECF No. 8. Mr. Grimm filed a First Amended Complaint on August 22, 2017 after graduating from Gloucester High School. ECF No. 113. The original Complaint and the First Amended Complaint asserted that the Board violated Mr. Grimm's rights under 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, when it assigned him a restroom based on his biological sex rather than on his gender identity.

The Board filed a motion to dismiss the First Amended Complaint, which this Court denied on May 22, 2018. ECF No. 148. The Board filed an Answer to the First Amended Complaint on July 20, 2018. ECF No. 154.

Mr. Grimm now requests leave to file a Second Amended Complaint, attached as Exhibit A to his Motion. The proposed Second Amended Complaint contains new allegations against the Board.¹ Specifically, Mr. Grimm alleges that the Board continues to discriminate against him “by refusing to update his official school transcript to match the male sex on his birth certificate, despite [Mr. Grimm’s] repeated requests.” ECF No. 170-1, ¶ 12. Mr. Grimm alleges that he is stigmatized and humiliated whenever he is required to provide a high school transcript to a college or potential employer that declares his sex to be different than his gender identity. *Id.*

Federal Rule of Civil Procedure 15(a) provides that leave to amend “shall be freely given when justice so requires.” F.R.C.P. 15(a). “[L]eave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile.” *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc).

The Board opposes Mr. Grimm’s request to file the Second Amended Complaint. The Board does not assert any prejudice or bad faith. Instead, the Board argues that the Second Amended Complaint would be futile because Mr. Grimm’s new allegations do not constitute a violation of Mr. Grimm’s rights under Title IX or the Equal Protection Clause.

The Board first argues that statutes and regulations passed by the Virginia General Assembly govern the amendment of vital records and that “matters of state law are not properly considered under Title IX or the Equal Protection Clause.” ECF No. 171 at 3 (citing Va. Code Ann. § 32.1-269; 12 VAC 5-550-320; 12 VAC 5-550-460). The Board’s argument is unpersuasive. The cited regulations do not support the Board’s position. For example, 12 VAC

¹ The proposed Second Amended Complaint also contains several minor changes and removes requests for injunctive relief that the Court previously dismissed as moot.

5-550-320 states that a certificate of birth is to be amended upon presentation of acceptable evidence, such as a court order that the name or sex on the certificate be changed. Mr. Grimm obtained a court order from the Virginia Circuit Court and used that court order to obtain a birth certificate indicating his gender as male. He presented that birth certificate to the Board in support of his request to change his transcript. According to the regulations, Mr. Grimm presented acceptable evidence for his request. ECF No. 171-1. If the Board decided to treat Mr. Grimm differently than similarly situated students, that could be evidence of a violation of federal law, a fact that is not altered by the Board's citations to Virginia law.

Second, the Board argues that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; 34 C.F.R. Part 99, provides the appropriate framework for relief. FERPA provides parents or students the opportunity to request an amendment to educational records. 34 C.F.R. § 99.20(a). If a request is denied, FERPA grants parents and students the right to be notified of the reasons and the right to a hearing to contest the decision. 34 C.F.R. § 99.20(b)–(c). Finally, FERPA grants parents and students the right 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).

There is no indication that FERPA was intended to be the sole remedy for students contesting information in their vital records. To the contrary, FERPA explicitly provides that "[n]othing in this chapter shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972 . . . or other statutes prohibiting discrimination." 20 U.S.C. § 1221(d). This language makes clear that FERPA does not preclude a suit pursuant to Title IX.

Nor does FERPA displace equal protection claims under 42 U.S.C. § 1983. In *Fitzgerald v. Barnstable Sch. Comm.*, the United States Supreme Court held that Title IX did not preclude

students from bringing equal protection claims under section 1983 because Title IX does not include “an express private means of redress” and “the protections guaranteed by the two sources of law diverge.” 555 U.S. 246, 256 (2009). This line of reasoning applies with even greater force to FERPA, which does not create any private cause of action, expressly or impliedly. *Gonzaga University v. Doe*, 536 U.S. 273, 287 (2002). Moreover, the protection guaranteed by FERPA is that vital records are to be accurate, and the law provides procedural protections to accomplish that end. The protection guaranteed by the Equal Protection Clause, however, is that individuals are to be free from discrimination. In other words, “the protections guaranteed by the two sources of law diverge.”

For these reasons, the proposed Second Amended Complaint would not be futile, and the Board has not asserted any other reason to deny Mr. Grimm’s Motion for Leave. That Motion, ECF No. 170, is **GRANTED**. The Clerk is **DIRECTED** to file the Second Amended Complaint, ECF No. 170-1.

The Clerk is **REQUESTED** to forward a copy of this Order to all counsel of record.

IT IS SO ORDERED.



Arenda L. Wright Allen
United States District Judge


_____, 2019
Norfolk, Virginia