

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

GAVIN GRIMM,)	
)	
Plaintiff,)	
)	
v.)	Civil Case No. 4:15-cv-54-AWA-DEM
)	
GLOUCESTER COUNTY SCHOOL)	
BOARD,)	
)	
Defendant.)	
)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF MOTION TO FILE EXHIBITS
ATTACHED TO REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT UNDER SEAL**

Pursuant to Local Civil Rule 5(C), and the parties’ Agreed Confidentiality Protective Order, ECF No. 85, Plaintiff Gavin Grimm (“Gavin”) respectfully submits the following Memorandum in Support of Plaintiff’s Motion to File Exhibits Attached to Reply Memorandum in Further Support of Plaintiff’s Motion for Summary Judgment Under Seal.

**I. NON-CONFIDENTIAL DESCRIPTION OF MATERIALS SOUGHT TO BE
FILED UNDER SEAL**

Exhibits B, C, D, and E (the “Sealed Exhibits”) attached to Medley-Warsoff Declaration 4/16/19 are documents containing Gavin’s confidential medical records produced by him in discovery and designated “CONFIDENTIAL” under the Agreed Confidentiality Protective Order, ECF No. 85, entered in this case. As explained in Plaintiff’s Reply Memorandum of Law in Further Support of Summary Judgment, Gavin testified that he was diagnosed with gender dysphoria and that he received hormone therapy and chest-reconstruction surgery for that condition, but Defendants contend that Gavin’s testimony regarding these facts is inadmissible hearsay. Gavin therefore submits redacted copies of his medical records for the sole purpose of responding to

Defendant's hearsay objection. Although these documents have been redacted to remove sensitive information that is not relevant to this case, the redacted versions of the documents still reveal highly sensitive and personal information.

Exhibits B and C are accompanied by business-records certification pursuant to Federal Rule of Evidence 902(11) confirming that the redacted copies of the records are true copies of the originals. Exhibit D is redacted copies of Gavin's medical records from his endocrinologist. Exhibit E is a business-records certification for unredacted versions of the same documents. At trial, Plaintiff will lay a foundation establishing that the redacted copies of Gavin's endocrinology records all correspond to the unredacted copies that have been certified as business records.

II. GOVERNING CASE LAW

The First Amendment provides for public access to judicial proceedings, but that right of public access is not unlimited. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004). "[T]he trial court has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests." *In re The Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984); *see also Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (explaining that to seal documents, the court must find "that the denial [of access] serves an important governmental interest and that there is no less restrictive way to serve that governmental interest"). "There can be no question that . . . medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (2d Cir. 1980).

In *Ashcroft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000), the Fourth Circuit sets out what the district court must do prior to sealing court records: (1) the Court must provide public

notice of the request to seal and allow interested parties a reasonable opportunity to object; (2) the Court must consider less drastic alternatives to sealing the documents; and (3) the Court must articulate specific reasons and factual findings supporting its decision to seal. *Id.* (citing *In re The Knight Pub. Co.*, 743 F.2d 231, 235-36 (4th Cir. 1984)).

III. STATEMENT OF WHY SEALING IS NECESSARY

Under the Agreed Confidentiality Protective Order entered by the Court, the parties stipulated that information, documents, or other things marked or designated “Confidential” would only be provided to the Court, the parties, counsel, and certain third-parties under limited circumstances. *See* ECF No. 85. In making this designation, the parties specifically referenced “medical and health information protected by the Health Insurance Portability and Accountability Act” (“HIPAA”) as documents or information which “may create a reasonable risk of identity theft, invasion of privacy, or may otherwise cause substantial harm to the designating party’s legitimate privacy interests if publicly disclosed. . . .” ECF No 85, ¶ 1. The Fourth Circuit has recognized that similar protective orders, including a provision allowing documents to be filed under seal, are an appropriate means of protecting litigants’ privacy interests in their sensitive medical information. *See Mezu v. Morgan State Univ.*, 495 F. App’x 286, 289 (4th Cir. 2012).

Courts within the Fourth Circuit have routinely granted motions to seal litigants’ medical records, recognizing that the privacy interests connected to those records outweighs any competing public interest. *See Mays v. Smith*, No. 5:18-CT-3186-FL, 2019 WL 958401, at *1 (E.D.N.C. Feb. 27, 2019); *Moore v. Washington Hosp. Ctr.*, No. CIV.A. DKC 11-3742, 2012 WL 2915165, at *7 (D. Md. July 16, 2012); *Langley v. Director, Dept. of Corr.*, No. 2:09cv436, 2010 WL 2483876, at *2 (E.D.Va. May 28, 2010). Similarly, the Local Rules of this Court provide that “[i]n all actions for benefits under the Social Security Act, the government shall file the administrative record under

seal in paper form, the Court having found that such administrative records are by nature confidential and that applicants' privacy interests outweigh any public interest in disclosure." Local Civil Rule 7(C)(1).

In this case, Gavin's medical records are being filed for the sole purpose of responding to Defendant's hearsay objections. There is no public interest in seeing the underlying medical records, and the harm to Gavin's privacy interests that would be caused by the public filing of his medical records would far outweigh the public's right to access that information.

Under Local Rule 5(C), if the Defendant objects to this Motion to Seal, it must file an objection with the Clerk within seven (7) days after the filing of this Motion, and if no objection is filed in a timely manner, the Court may treat the Motion as uncontested.

IV. PERIOD OF TIME FOR WHICH MATERIAL OUGHT TO BE SEALED

Plaintiff respectfully requests that the Sealed Exhibits be maintained under seal permanently.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Motion to File Exhibits Attached to Reply Memorandum in Further Support of Plaintiff's Motion for Summary Judgment Under Seal and enter the Proposed Order submitted therewith, thereby sealing Exhibits B, C, D, and E filed with Plaintiff's Reply Memorandum in Further Support of Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF VIRGINIA, INC.

/s/ Eden B. Heilman

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Dated: April 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April 2019, I filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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