

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

GAVIN GRIMM,

Plaintiff,

v.

Case No. 4:15-cv-54

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

**BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE
TO FILE SECOND AMENDED COMPLAINT**

Gloucester County School Board (“the School Board”), by counsel, does not consent to the Motion for Leave to File Second Amended Complaint filed by Plaintiff Gavin Grimm (“Grimm”) for the following reasons:

I. Introduction

Grimm has moved this Court for leave to file a Second Amended Complaint. This proposed pleading now alleges that the School Board violated Grimm’s rights under Title IX, 20 U.S.C. § 1681 et seq., and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because the School Board has not changed the gender designation on Grimm’s transcript. In doing so, Grimm seeks to recover under a new set of factual allegations that differ from the facts relevant to this litigation’s central issue — whether or not the School Board’s resolution related to restroom use violated Grimm’s Title IX and Equal Protection rights. Grimm’s new factual allegations, however, do not establish a violation of Grimm’s rights under either of these provisions. This Court should deny Grimm’s Motion for Leave to Amend.

II. Factual Background

Grimm filed suit in June 2015 alleging the School Board violated his rights under Title IX and the Equal Protection Clause, because it adopted a resolution requiring students to use restroom facilities consistent with their biological sex or one of three single-stall restrooms. As this Court is aware, for over three years the parties have litigated the validity of Grimm's Title IX and Equal Protection Clause claims relating to this resolution in this Court, the Fourth Circuit, and the Supreme Court.

In December of 2016, while this case was pending before the United States Supreme Court, Grimm requested that the School Board change the gender designation on his transcript from female to male. The School Board, by counsel, denied Grimm's request in a letter to Grimm's counsel dated January 18, 2017. See Letter, attached as Ex. A. In that letter, the School Board informed Grimm that he had a right to a hearing related to the School Board's decision pursuant to School Board policy JO.

Grimm, however, did not request a hearing on the School Board's denial of his request to have his transcript changed, either while he was a student at Gloucester High School or after his graduation in the spring of 2017. Grimm now moves this Court to grant him leave to file a Second Amended Complaint, which alleges that the School Board violated his rights by declining his request to change the gender designation on his transcript. This Court should deny Grimm's Motion, because the School Board's decision does not constitute a violation of Grimm's rights under Title IX or the Equal Protection Clause.

III. Law and Argument

The School Board acknowledges that amendments under Fed. R. Civ. P 15 "shall be freely given when justice so requires" and that "leave 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.” Johnston v. Oroweat Foods Co., 785 F.2d 503, 509 (4th Cir. 1986). In this case, the allegations that the School Board denied Grimm’s request to amend his transcript do not constitute a violation of Title IX or the United States Constitution.

The School Board is required to include a student’s gender on the secondary school transcript. 8VAC20-160-30. The Virginia General Assembly has passed statutes and regulations regarding the manner in which an individual may change his or her vital records, including records related to a person’s gender. See, e.g., Va. Code Ann. § 32.1-269; 12 VAC 5-550-320; 12 VAC 5-550-460. As such, the new claims — 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 are not properly considered under Title IX or the Equal Protection Clause of the Fourteenth Amendment.

Further, the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g; 34 CFR Part 99, provides a procedure by which a student may request an amendment to his school records. Under 34 C.F.R. § 99.20(a), “[i]f a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.” Id. Then, “[t]he educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.” 34 C.F.R. § 99.20(b). “If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.” 34 C.F.R. § 99.20(c). Finally, “[i]f, as a result of

the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of 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).

FERPA provides the framework by which a student may request an amendment to that student’s education records; however, Grimm has not sought the administrative relief provided under that statute. Indeed, the *ACLU Guide for Transgender and Gender Nonconforming Students* supports the use of this framework. See, Ex. B. Further, it must be noted the School Board met the requirements set forth in FERPA by informing Grimm of his right to a hearing on the issue.

Grimm’s claims, if any, related to the School Board’s denial of his request to change his transcript sound under state law and FERPA, not under Title IX and the Equal Protection of the Fourteenth Amendment. For these reasons, this Court should deny Grimm’s Motion for Leave to Amend.

IV. Conclusion

For the foregoing reasons, the Gloucester County School Board, by counsel, respectfully requests that this Court deny Grimm’s Motion for Leave to File Second Amended Complaint.

**GLOUCESTER COUNTY SCHOOL
BOARD**

By Counsel

/s/
David P. Corrigan (VSB No. 26341)
Jeremy D. Capps (VSB No. 43909)
Douglas E. Pittman (VSB No. 87915)
Attorneys for Gloucester County School Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 - Fax
dcorrigan@hccw.com
jcapps@hccw.com
dpittman@hccw.com

CERTIFICATE

I hereby certify that on the 21st day of December, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Joshua A. Block, Esq.
VSB No. NYSB 4370573
American Civil Liberties Union
125 Broad Street
18th Floor
New York, NY 10004
212-549-2627 - Phone
212-549-2593 - DD
212-549-2650 - Fax
jblock@aclu.org

Leslie Cooper, Esq.
VSB No. NYSB 2759835
American Civil Liberties Union Foundation
125 Broad Street
18th Floor
New York, NY 10004
212-549-2500 - Phone
212-549-2584 - DD
212-549-2650 - Fax
lcooper@aclu.org

Clare P. Wuerker, Esq.
VSB No. 79236
United States Attorney's Office
101 West Main Street
Suite 8000
Norfolk, VA 23510
757-441-6361 - Phone
757-441-6689 - Fax
Clare.Wuerker@usdoj.gov

Victoria Lill, Esq.
VSB No. DCBN1008599
United States Department of Justice
950 Pennsylvania Ave., N.W.
Educational Opportunities Section, PHB
Washington, DC 20530
202-514-4092 - Phone
202-307-6083 - DD
202-514-8337 - Fax
victoria.lill@usdoj.gov

Eden B. Heilman, Esq.
ACLU
701 E. Franklin Street
Suite 1412
Richmond, VA 23219
804-523-2152 - Phone
804-649-2733 - Fax
eheilman@acluva.org

Nicole Tortoriello, Esq.
ACLU
701 E. Franklin Street
Suite 1412
Richmond, VA 23219
804-726-6013 - DD
804-649-2733 - Fax
ntortoriello@acluva.org

/s/

David P. Corrigan (VSB No. 26341)
Jeremy D. Capps (VSB No. 43909)
Douglas E. Pittman (VSB No. 87915)
Attorneys for Gloucester County School Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 - Fax
dcorrigan@hccw.com
jcapps@hccw.com
dpittman@hccw.com