

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 5:25-cv-00244-H-BV
	§	
TEXAS TECH UNIVERSITY HEALTH	§	
SCIENCES CENTER, et al.,	§	
Defendants.	§	

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO WITHDRAW
PROPOSED SECOND AMENDED COMPLAINT AND SUBSTITUTE PROPOSED
THIRD AMENDED COMPLAINT (DOC. 32)**

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Use of Generative Artificial Intelligence: Plaintiff used generative artificial intelligence to assist in drafting this reply. Plaintiff has reviewed this reply and is responsible for its content.

The proposed Third Amended Complaint is supported by Defendants' own records.

Those records show that the official who signed Plaintiff's emergency removal had written nine months earlier that Plaintiff's speech was "obviously protected" (TAC ¶134(a)); that TTUHSC's General Counsel conceded the removal was "prompted by" protected speech (TAC ¶108); and that the same signing official had documented, four days before the removal, that the complainant's prior threat allegation against Plaintiff was a career concern she had recharacterized as physical — yet signed the removal anyway (TAC ¶137). These are Defendants' own admissions, from Defendants' own records. Their opposition engages with none of them.

Defendants' opposition contains no futility analysis — it does not identify a single allegation in the proposed Third Amended Complaint that fails to state a claim. What it does contain is a request that this Court deny amendment based on evidence Plaintiff obtained through FERPA — while Defendants' own litigation counsel has simultaneously announced, in writing, that the institution will provide no further FERPA access at all.

Plaintiff Kevin N. Bass respectfully requests that the Court construe his pleadings liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

I. DEFENDANTS' OPPOSITION CONTAINS NO FUTILITY ANALYSIS

Defendants assert futility without performing a futility analysis.

An amendment is futile only when it "would fail to survive a Rule 12(b)(6) motion." *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000)—Defendants' own authority. That standard requires examining the proposed pleading's allegations and demonstrating that no plausible claim exists. Defendants' nine-page Response (Doc. 39) does not do this. It does not identify a single allegation in the TAC's 215 paragraphs. It does not explain why any specific new allegation fails to state a claim. It does not analyze any count. It asserts, in conclusory fashion, that the TAC "merely expand[s] upon the same theories already pleaded" (Doc. 39 at 2) and "simply expand[s] the factual narrative" (Doc. 39 at 5)—without ever examining what the TAC actually says.

This is precisely the type of conclusory argument that the futility standard does not accept. The burden on a futility objection is on the party opposing amendment to show that the proposed pleading would not survive dismissal. See *Stripling*, 234 F.3d at 873. Defendants have not carried that burden. They have not attempted to carry it.

Defendants' supporting authorities confirm the deficiency. They cite *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137 (5th Cir. 1993), for the proposition that leave to amend may be denied where the amendment "would be futile and would serve no purpose other than prolonging the litigation." (Doc. 39 at 5.) But the Fifth Circuit in *Wimm* expressly declined to affirm on futility grounds and instead affirmed denial of leave based on bad faith and dilatory motive—the plaintiffs had known the underlying facts for months but withheld claims as a tactical maneuver after facing summary judgment. *Id.* at 139-40. Here, there is no bad faith, no dilatory motive, and no tactical sequencing. Plaintiff seeks amendment based on records that were within Defendants' exclusive control until January 2026.

Defendants also cite *Goldsmith v. Hood County Jail*, 299 F. App'x 422 (5th Cir. 2008)—an unpublished, non-precedential opinion under 5th Cir. R. 47.5.4—for the proposition that a request to amend is deficient where a plaintiff "failed to explain what facts he would have added." (Doc. 39 at 5.) The predicate condition is absent: the TAC contains 215 paragraphs of specific new allegations, and Plaintiff's motion explains precisely what the TAC adds.

This pattern is not confined to Doc. 39. Defendants' Reply (Doc. 38) repeats the same approach — asserting that "sovereign immunity is not cured by additional factual detail" and that amendment would be "futile" (Doc. 38 at 9) — without engaging with a single argument from Plaintiff's Response (Doc. 33) or its Appendix. Plaintiff addressed sovereign immunity waiver via § 504 and this Court's own holding in *Corbett v. TTUHSC*; qualified immunity under *Hope*, *Taylor*, and *Gonzalez*; ADA/§ 504 deliberate indifference under *Pickett v. Texas Tech University Health Sciences Center*, 37 F.4th 1013 (5th Cir. 2022); and First Amendment retaliation supported by 19 contemporaneous admissions. Doc. 38 addresses none of them.

Defendants have now had three opportunities—Doc. 27, Doc. 38, and Doc. 39—to perform the analysis that futility requires. They have declined each time. Count 6 (ADA/§ 504 retaliation under 42 U.S.C. § 12203) illustrates the point. Across all three filings, Defendants have never engaged with its elements: they have not argued that the accommodation request was not protected activity, that the hearing without accommodations was not an adverse action, or that the three-day timeline does not support causation. They addressed Count 6 only on sovereign immunity grounds. A futility objection that does not address a claim's elements is no objection at all.

The reason for Defendants' silence is apparent: the proposed TAC's allegations, supported by Defendants' own records, state plausible claims that Defendants cannot address on the merits.

The conclusory assertion that "additional amendment cannot alter that analysis" (Doc. 38 at 9) is not a futility showing—it is an admission that Defendants have no answer.

Defendants devote two pages of a Rule 15 opposition to restating their Motion to Dismiss. The question before this Court is whether the TAC states plausible claims — not whether those claims survive immunity defenses on the merits. Nonetheless, Plaintiff briefly responds.

Sovereign immunity does not bar the TAC's claims. Section 504 proceeds under statutory waiver (42 U.S.C. § 2000d-7(a)(1)); Title II under valid abrogation (*United States v. Georgia*, 546 U.S. 151 (2006)); and individual-capacity § 1983 claims are not sovereign immunity claims. This Court has already so held. *Corbett v. TTUHSC*, No. 5:21-CV-281-H, Doc. 60 (Hendrix, J.).

Qualified immunity fares no better. "Government retaliation against a private citizen for exercise of First Amendment rights cannot be objectively reasonable." *Keenan v. Tejada*, 290 F.3d 252, 262 (5th Cir. 2002). Defendants cited *Keenan* for causation (Doc. 27 at 18) but ignored its qualified immunity holding. 290 F.3d at 262. Defendants did not cite *Keenan* again after Plaintiff identified the holding in Doc. 33. Officials who received institutional legal training confirming speech protections — "After our training with General Counsel recently regarding free speech I know there is little we can do when students express opinions" (TAC ¶133) — cannot claim reasonable belief that retaliation was lawful.

Academic deference does not apply. Defendants invoke it for a proceeding their own Exhibit 8 labels "Non-Academic Dismissal" three times. See *Pickett v. TTUHSC*, 37 F.4th 1013 (5th Cir. 2022). Plaintiff raised this contradiction in Doc. 33. Defendants continued invoking academic deference in Doc. 38 without addressing it. The point is conceded.

One final observation. Doc. 38 admonishes Plaintiff to "reach the holdings of cases he cites rather than relying on a misinterpretation by generative AI." (Doc. 38 at 7.) Plaintiff's Response (Doc. 33) correctly cited and applied every authority it relied on. Defendants' own Motion to Dismiss (Doc. 27), by contrast, contained twenty-nine documented errors — including phantom page citations, fabricated exhibit characterizations, and misrepresentations of the Complaint's allegations — catalogued in Plaintiff's Appendix at Tab G. To take one example: Defendants cited "Exhibit 4, at pp. 3-17." Exhibit 4 is a two-page document. If the Court is concerned about the reliability of AI-assisted legal drafting, the comparison favors the party that disclosed its use and produced accurate work.

II. WHAT DEFENDANTS IGNORE

The TAC adds the following categories of evidence, none of which Defendants address:

Admissions of motive and causation.

A. Direct admissions of retaliatory motive. Defendant Williams wrote in February 2023 that Plaintiff's social media speech was "obviously protected" but that the institution needed to "discuss an appropriate response." (TAC ¶134(a).) The same official signed Plaintiff's emergency removal nine months later. On his own Interim Suspension Questionnaire, Williams answered "Yes" to Question 8—whether the case involved "retaliatory harm"—and described that "retaliation" as Plaintiff filing grievances against faculty. (TAC ¶62.) Defendants' opposition does not mention this admission.

B. General Counsel causation admission. In a recorded November 2023 meeting, General Counsel Posey stated: "The outcome of the tweet and the perceived threat of that tweet is the reason he is not allowed on campus right now." (TAC ¶113.) This is an admissible party-

opponent statement under FRE 801(d)(2)(D) establishing that the protected speech caused the adverse action. Defendants' opposition does not mention this admission.

C. The institution's own threat reviewer found no threat. At the hearing, TTUHSC's Threat Assessment reviewer Vince Fell was asked what threat the post expressed. He answered: "Post? None. Nothing." (Doc. 33-1 at Tab A-1.) Combined with Williams's "No" to Question 5 (terroristic threats) and the neuropsychological evaluation finding "not indicative of violence," every person who actually evaluated the tweet's content concluded it was not threatening. Defendants' opposition does not address this testimony.

Structural bias in the hearing process.

D. Hearing Officer financial conflict. The TAC identifies \$393,000+ in outside counsel contracts between Gibson and TTUHSC (TAC ¶147), creating an unconstitutional probability of bias under *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). The same Hearing Officer excluded Plaintiff's neuropsychologist, banned contemporaneous objections, permitted zero defense witnesses against ten institutional witnesses, and added a University witness the morning of the hearing while denying Plaintiff's expert. (TAC ¶¶48-52, 148.) Defendants' opposition does not address the financial conflict or the procedural asymmetry.

E. Campus ban created a witness Catch-22. Doc. 27 characterizes the hearing as adequate because it "lasted roughly 14 hours and involved extensive witness testimony" (Doc. 27 at 8) — without acknowledging that ten witnesses testified for the institution and zero for Plaintiff. Doc. 38 dismisses Plaintiff's "complaints of witness limits" as insufficient to state a due process violation. (Doc. 38 at 4.) But neither filing addresses why Plaintiff had no witnesses: the TAC alleges that TTUHSC's campus-wide ban — enforced by criminal trespass warning and a BOLO flyer instructing personnel to "call 911" — prevented Plaintiff from meeting or contacting

potential defense witnesses. (TAC ¶¶117, 128A.) Defendants created the conditions that prevented witness identification, then characterized the resulting asymmetry as adequate process. Defendants' opposition does not address this.

F. The mental health professional was excluded from the threat determination.

Plaintiff's TTUHSC-assigned ██████████ stated: "I did NOT attend the meeting in which the decision was made." Her associate attended but "only listened to the proceedings" and "did not give any input." (Doc. 33-1 at Tab A-4.) The institution characterized the result as a "Threat Assessment" while excluding the one professional qualified to assess threat — the same professional who later concluded Plaintiff "is not a danger to anyone." (TAC ¶56.) Defendants' opposition does not address this.

G. The hearing structure was reversed morning-of to Plaintiff's prejudice. The

Student Conduct Administrator promised on a recording that Plaintiff's grievances would be heard first because it "provides you the most protection." (Doc. 33-1 at Tab A-4.) The structure was reversed the morning of the hearing, relegating Plaintiff's seven grievances to the final minutes of a 14-hour proceeding — after ten hours of adverse institutional testimony. Defendants' opposition does not address this.

H. Filing a grievance was itself declared a policy violation. In Defendants' own Exhibit 8, investigator Bates wrote: "It is the perception of this reviewer that the actions of [Dr. Bass] in filing a counter grievance to the Title IX complaint of the resident is a violation of TTU System policy." (Doc. 27-8, fn. 6.) The institution's own investigator declared that exercising the right to petition through the grievance process was itself misconduct. Defendants' opposition does not address this.

I. One of the four "independent" complaints was a failed Title IX complaint rerouted to a less protective process. The Title IX Coordinator wrote: "If she does not want to pursue a formal Title IX complaint, my plan is to turn it over to you for conduct adjudication." (TAC ¶102.) The complaint was repackaged as a "professionalism" violation and adjudicated without Title IX's procedural protections. Defendants' opposition does not address this.

J. The charging administrator ghostwrote the appeal decision. On September 7, 2023 — the same day Plaintiff won his SPPCC appeal — Williams circulated a "Draft for appeal decision," ghostwriting the appellate authority's ruling on the very proceedings Williams had administered. (TAC ¶55.) Every level of review was controlled by the officials who initiated the charges. Defendants' opposition does not address this.

Institutional targeting of protected activity.

K. Institutional surveillance dossier. A GSBS administrator compiled a multi-page dossier retroactively assembling Plaintiff's social media screenshots, external complaint letters, academic records, and his Newsweek public health article into a single document spanning 2020 through 2023. (TAC ¶133.) Seven officials who documented awareness of and objections to Plaintiff's protected speech are the same officials who participated in the decision to remove him. (TAC ¶107.) Defendants' opposition does not address the dossier or the overlap.

L. Professionalism coach's private notes. Dr. Erwin privately characterized protected speech as psychological pathology — "intellectual narcissism," "paranoia," "conspiracy theories" — while telling Plaintiff: "I will not abandon you." (TAC ¶39(b).) Her coaching document stated the institutional objective: "Outcome: moderating his behavior, especially his communications with others." (FERPA production, Bass_0132; see TAC ¶39(b).) Defendants' opposition does not address these records.

M. Defendants' own brief misrepresents the speech at issue. The Motion to Dismiss quotes the November 3, 2023 post as: "Each and every one of us is going to be dead someday very, very soon. [...] These other people, too, are going to be dead very, very soon." (Doc. 27 at 3.) The bracketed ellipsis excises the post's core sentence: "why most people put so much stock into what other people think about them is completely beyond me." The full text—a philosophical reflection on the insignificance of social approval in light of mortality—is reproduced verbatim in the TAC at ¶86. Defendants built their Tinker "substantial disruption" argument (Doc. 27 at 17-19) and their characterization of the post as "threatening" (Doc. 27 at 19) on a version of the speech from which the meaning had been removed. The TAC corrects this. Defendants' opposition does not address it.

N. The dismissal was celebrated and rewarded simultaneously. Forbes's January 7, 2024 email — the "one student lighter" broadcast — also announced Wilson's promotion to Assistant Vice Dean. (TAC ¶121.) The official whose adverse evaluations formed the principal basis for the Board's recommendation was promoted in the same communication that celebrated Plaintiff's removal. Forbes then attempted to recall the email. Defendants' opposition does not address this.

Deliberate indifference to disability.

O. Seven-month constructive disability knowledge chain. Five separate indicators of disability were documented between May and December 2023—faculty assessments, Erwin's ██████████ observation, Wilson's "personality thing" recognition—yet no referral, accommodation inquiry, or interactive process was initiated. (TAC ¶¶39(a)-(e).) Defendants' opposition asserts sovereign immunity and qualified immunity "bar" these claims without engaging with the deliberate-indifference standard or the factual chain.

These are not "additional narrative allegations concerning the same disciplinary proceedings" (Doc. 39 at 4). They are contemporaneous institutional admissions that go to the elements of each count: deliberate indifference (Counts 1-2), procedural due process (Count 3), false stigmatizing publication (Count 4), First Amendment retaliation (Count 5), ADA/§ 504 retaliation (Count 6), and unremedied name-clearing denial (Count 7). Defendants' refusal to engage with any of them is itself the strongest evidence that the TAC is not futile.

III. THE "SERIAL AMENDMENT" FRAMING MISREPRESENTS THE PROCEDURAL HISTORY

Defendants characterize Plaintiff's motion as impermissible "serial amendment." (Doc. 39 at 3.) The procedural history does not support that characterization.

Plaintiff filed Doc. 26 (motion for leave to file the SAC) on January 20, 2026. Defendants filed their Motion to Dismiss (Doc. 27) the next day. Plaintiff then conducted FERPA inspections that produced genuinely new evidence—records that were within Defendants' exclusive control and unavailable to Plaintiff until the January 2026 in-person inspection sessions. (TAC ¶¶16-18.) Plaintiff filed Doc. 32 to substitute the TAC incorporating that evidence.

This is one substitution of a proposed amended complaint, not "serial amendments in response to a motion to dismiss." (Doc. 39 at 7.) Rule 15(a)(2) expressly contemplates amendment based on newly available information. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Fifth Circuit's policy is "to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981).

IV. FERPA IS AN INDEPENDENT STATUTORY RIGHT THAT DEFENDANTS HAVE OBSTRUCTED

Defendants argue that Plaintiff is improperly using FERPA inspections "as a substitute for discovery" and "as a basis to continually revise his pleadings." (Doc. 39 at 6.) This argument has no legal basis — and is contradicted by Defendants' own conduct.

A. Defendants Cite No Authority for Their Position

FERPA, 20 U.S.C. § 1232g, grants students an independent federal statutory right to inspect their education records. That right exists regardless of litigation. Plaintiff exercised a right Congress created. Defendants cite no authority — none — for the proposition that information obtained through FERPA inspection cannot support a pleading amendment. There is no such authority because there is no such rule.

Defendants' argument proves too much. Under their theory, a plaintiff who learns through any pre-discovery source — a FOIA response, a public records request, a news report — that an institution's internal records contradict its public narrative would be barred from amending to include that information. That is not the law. The Federal Rules impose no requirement that new factual allegations come exclusively from formal discovery.

B. The Factual Record Shows Obstruction, Not Abuse

Defendants frame Plaintiff as conducting "rolling pre-discovery document review." (Doc. 39 at 7.) The record — documented in the Declaration of Kevin N. Bass filed herewith — shows the opposite: five months of delay, restrictive inspection conditions, 22 referenced-but-unproduced documents, and a refusal to provide the disclosure log required under 34 C.F.R. § 99.32. See Declaration ¶¶ 3-25.

On March 12, 2026, Defendants' litigation counsel made the obstruction explicit. AAG Scott D. Smith denied further FERPA access in writing: "TTUHSC will not schedule additional FERPA inspection sessions outside the litigation process at this time." (Declaration, Ex. S.) He directed Plaintiff to "pursue [records requests] through the discovery process in the litigation" — the same process Defendants seek to foreclose by dismissing this case. He instructed Plaintiff to "not contact TTUHSC employees directly," placing himself as gatekeeper over Plaintiff's federal statutory rights. And he announced that TTUHSC would "pause any processing" of Plaintiff's transcript amendment request "until the litigation is resolved" — an indefinite suspension incompatible with the "reasonable time" required under 34 C.F.R. § 99.20(b).

AAG Smith's letter contains a fatal contradiction. He asserts that TTUHSC has "already provided access to education records consistent with its obligations under applicable law" — and that further requests "should be pursued through the discovery process." Both cannot be true. If FERPA is satisfied, there is nothing to redirect. If records remain, FERPA is not satisfied.

Plaintiff has filed a FERPA complaint with the Department of Education's Student Privacy Policy Office, with four supplemental submissions documenting ongoing obstruction — the most recent identifying AAG Smith's March 12 letter as the institution's written policy to deny further FERPA access, precisely the conduct prohibited by 20 U.S.C. § 1232g(a)(1)(A).

The evidence catalogued in Section II — including admissions of retaliatory motive, a causation concession by General Counsel, and a professionalism coach's private characterization of protected speech as pathology — was obtained during the limited FERPA inspection sessions that Defendants now seek to foreclose.

Defendants' argument reduces to this: Plaintiff should not have been allowed to see his own education records, and having seen them, should not be allowed to plead what they reveal. That position is untenable.

V. CONCLUSION

Defendants' opposition asks this Court to deny leave to amend without examining the proposed amendment. Rule 15(a)(2) requires more. Leave should be "freely given when justice so requires." *Foman*, 371 U.S. at 182. Defendants have not shown futility, bad faith, undue delay, or prejudice. The TAC's 215 paragraphs, supported by contemporaneous institutional records, cure any arguable deficiency and state plausible claims under all seven counts.

Defendants request dismissal with prejudice (Doc. 38 at 9-10) — before discovery, before the Court has ruled on leave to amend, and before Defendants have engaged with a single TAC allegation — based on immunity defenses Plaintiff has rebutted with binding authority, including this Court's own precedent.

In *Stewart v. TTUHSC*, No. 5:23-cv-00007-H (N.D. Tex. 2025), these same Defendants settled constitutional claims before this same Court. During Stewart's pendency, the Board added "which loses legal protection" to the speech suspension standard and required "individualized assessments" for involuntary withdrawal — confirming Defendants knew the framework violated constitutional rights. These policy changes were enacted in August 2023 — while Defendants were simultaneously prosecuting Plaintiff under the prior framework. (TAC ¶75.) This case is far more severe: General Counsel admitted on a recording that speech caused the adverse action; the signing official checked "Yes" to "retaliatory harm"; and a hearing officer with \$393,000+ in institutional contracts presided — banning all defense witnesses while permitting ten for the institution. If Stewart warranted settlement, this case is not futile.

Plaintiff respectfully requests that this Court grant the Motion for Leave (Doc. 32).

Respectfully submitted,

/s/ Kevin N. Bass

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CERTIFICATE OF SERVICE

I certify that on March 23, 2026, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record pursuant to Federal Rule of Civil Procedure 5(b)(2)(E):

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