

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

RAJIN PATEL,

Plaintiff,

v.

TEXAS TECH UNIVERSITY; DUANE JONES, individually and in his official capacity as adjunct professor; WILLIAM PASEWARK, individually and in his official capacity as TTU Rawls College of Business Associate Dean of Graduate Programs and Research; ROBERT RICKETTS, individually and in his official capacity as Area Coordinator in Accounting; and BRITTANY TODD, individually and in her official capacity as Associate Director of the Office of Student Conduct;

Defendants.

Civil Action No.: 5:17-CV-174-C

(JURY REQUESTED)

**PLAINTIFF'S BRIEF IN SUPPORT OF OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS**

TO THE HONORABLE JUDGE SAMUEL RAY CUMMINGS:

COMES NOW, RAJIN PATEL ("Plaintiff" or "Patel"), by and through his attorney of record, Jason J. Bach, Esq., of The Bach Law Group, PLLC, and files this brief in support of the Opposition (the "Opposition") to Defendants' Motion to Dismiss (the "Motion") filed by Defendants Texas Tech University ("TTU"), and Duane Jones, William Pasewark, Robert Ricketts, and Brittany Todd (collectively, the "Individual Defendants" and, together with TTU, the "Defendants"). In support of the Opposition, Mr. Patel respectfully represents as follows:

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I. INTRODUCTION

Mr. Patel filed a Complaint initiating the above-captioned case against TTU and others based on Defendants' violation of his substantive due process rights and right to equal protection under the Fourteenth Amendment of the United States Constitution during the 2016-2017 academic term at TTU. Mr. Patel alleges that TTU failed to exercise professional judgment in concluding that he plagiarized and, moreover, that expulsion was a highly inappropriate sanction based upon the circumstances of his situation. Rather, Mr. Patel claims that Defendants' actions and effect are patently arbitrary and in violation of his rights. He further alleges that Defendant TTU discriminated against him without any rational reason compared to his similarly situated peers. Moreover, TTU arbitrarily and capriciously ignored its own institutional and contractual guarantees, constituting an egregious breach of its contract with Mr. Patel.

Defendants' Motion falsely claims that Defendants are shielded by various immunities. While TTU does have sovereign immunity, it is only immune from monetary damages, not injunctive relief. Plaintiff's drafted the Complaint carefully to ensure that monetary damages were not being sought against any Defendant who could claim sovereign immunity. Only injunctive relief is being sought from those Defendants, and monetary damages are being sought only against the Individual Defendants in their individual capacities. Moreover, the Individual Defendants in their individual capacities are not entitled to qualified immunity because their conduct violated Plaintiff's clearly established constitutional rights of which a reasonable person would have known. Contrary to Defendants' assertions in the Motion, Mr. Patel's claims are properly pleaded, and the Motion should be denied in its entirety.

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II. FACTUAL BACKGROUND

For the sake of efficiency, Plaintiff incorporates the facts section from his Motion for Preliminary Injunction [Docket No. 3] by reference as if fully set forth herein. Plaintiff's Motion for Preliminary Injunction, § II, pp. 2-8.

III. LEGAL STANDARD

Federal Rule of Civil Procedure (“FCRP”) 12(b)(6) permits a complaint to be dismissed for failure to state a claim upon which relief can be granted. *E.E.O.C. v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007). To state a claim that withstands such dismissal, the complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The United States Supreme Court interpreted that language to impose two easy-to-clear hurdles. *Concentra Health*, at 776. First, the complaint must describe the claim in sufficient detail to give the defendant “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Second, its allegations must suggest “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Guidry v. American Public Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007). A claim meets the plausibility test “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct” above a “speculative level.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

In reviewing a Rule 12(b)(6) motion, a court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm*

Mut. Auto. Ins. Co., 509 F.3d 673, 675 (5th. Cir. 2007). In ruling on such a motion, the court cannot look beyond the pleadings. *Id.* But when making this inquiry, a court must construe the complaint liberally, in favor of the plaintiff “and assume the truth of all pleaded facts.” *Oliver v. Scott*, 276 F.3d 736, 740 (5th Cir. 2002).

IV. LEGAL ANALYSIS

A. **Sovereign Immunity Does Not Shield TTU and the Individual Defendants in Their Official Capacities from Plaintiff’s Claims.**

1. **The § 1983 claims against Defendant TTU and the Individual Defendants in their official capacities are not barred.**

The Motion falsely states that Plaintiff’s claims against Defendant TTU and the Individual Defendants in their official capacities are barred by sovereign immunity. Plaintiff concedes that TTU and the Individual Defendants acting in their official capacities are entitled to sovereign immunity from *monetary damages*. However, federal courts have authority to order “state officials to conform their future conduct to the requirements of federal law” under the dictates of *Ex parte Young*, 209 U.S. 123 (1908). *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Here, Mr. Patel’s Complaint only seeks injunctive relief from Defendant TTU and the Individual Defendants in their official capacities. Complaint, p. 19 ¶ 66; p. 23 ¶ 85; p. 26 ¶ 98. The injunctive relief requested is for TTU and the Individual Defendants in their official capacities to conform their conduct to the law and reinstate Mr. Patel as an active student, thus conforming to the *Ex parte Young* doctrine. Monetary damages are only being sought against the Individual Defendants in their individual capacities so sovereign immunity does not apply. Complaint, p. 21 ¶ 75; p. 23 ¶ 86-87. Consequently, Plaintiff’s § 1983 claims against Defendant TTU and the Individual Defendants in their official capacities are not barred. Accordingly, the Court should deny the Motion and allow the § 1983 claims to proceed.

2. The breach of contract claim against Defendant TTU is not barred.

Defendant TTU falsely claims the doctrine of immunity bars this Court's jurisdiction to adjudicate Mr. Patel's well-pleaded breach of contract claim against the institution. Motion, p. 8, ¶ 15. Governmental immunity for contractual claims is waived only to the extent specifically provided by statute. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). In Texas, "a local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter." Tex. Local Gov. Code § 271.152. A "contract subject to this subchapter" means "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." Tex. Local Gov. Code § 271.151.

While sovereign immunity does shield Defendant TTU from tort liability under the Texas Tort Claims Act, this Court has proper jurisdiction for a breach of contract claim because Defendant TTU waived governmental immunity by entering into an express and implied contract with Mr. Patel in connection with rights explicitly guaranteed by TTU pursuant to TTU's Student Handbook, Employee Handbook, and the Student Code of Conduct. Tex. Local Gov. Code § 271.152. TTU breached this express and implied contract by discriminating against Mr. Patel, denying him treatment equal to that of similarly situated students, denying him a fair investigation or trial, and ultimately dismissing him without sufficient evidence of plagiarism. Complaint, ¶ 93-95.

Unlike the non-contractual nature of an employee handbook, Texas state law jurisprudence explicitly holds a “school’s catalog constitutes a written contract between the educational institution and the patron, where entrance is had under its terms.” *Univ. of Tex. Health Sci. Ctr. at Houston v. Babb*, 646 S.W.2d 502, 506 (1982); *see also Burnett v. Coll. of the Mainland*, 994 F. Supp. 2d 823, 829 (S.D. Tex. 2014). Accordingly, there was a written contract between TTU and Mr. Patel, and Defendant TTU should not prevail on a dismissal due to sovereign immunity. Moreover, sovereign immunity does not apply here because Mr. Patel is only seeking injunctive relief in his breach of contract claim and not monetary damages. Because Mr. Patel has properly pleaded facts sufficient to establish all elements of a breach of contract claim for injunctive relief, and TTU does not have sovereign immunity with respect to such claim, the Court must deny the Motion and allow this claim to proceed.

B. Plaintiff’s Claims Against the Individual Defendants are Well-Pleaded.

1. The Individual Defendants are not entitled to qualified immunity as their actions violated Plaintiff’s clearly established Constitutional rights.

Qualified immunity, an affirmative defense, protects government officials in their personal capacity performing discretionary functions not only from suit, but from “liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Thus, a court examines whether the “officer’s conduct violated a constitutional right,” as well as “whether the right was clearly established” at the time of the conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

A right is clearly established when “the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violated that right.” *Werneck v. Garcia*, 591 F.2d 386, 392 (5th Cir. 2009) (citations omitted); *see also Freeman v. Gore*, 483 F.3d

404, 411 (5th Cir. 2007) (the court applies an objective standard “based on the viewpoint of a reasonable official in light of the information available to the defendant and the law that was clearly established at the time of defendant's actions.”). “The ‘clearly established’ standard does not mean that official's conduct is protected by qualified immunity unless ‘the very action in question has previously been held unlawful.’” *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). “Where no controlling authority specifically prohibits a defendant’s conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established.” *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (cert. denied, 132 S.Ct. 2740 (2012)). Officials who act reasonably but mistakenly are entitled to qualified immunity; the defense protects all government employees except for “the plainly incompetent or those who knowingly violate the law.” *Anderson*, 483 U.S. at 641; *Malley v. Briggs*, 475 U.S. 335, 341 (1986). “[A] defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant’s circumstances would have then known that the defendant’s conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.” *Thompson v. Upshur County, Texas*, 245 F.3d 447, 457 (5th Cir. 2001). The officer is “entitled to qualified immunity if his or her conduct was objectively reasonable in light of the legal rules that were clearly established at the time of his or her actions,” even if the conduct violated the plaintiff’s constitutional right. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc).

Mr. Patel has clearly alleged that the Individual Defendants, as TTU officials, knew that he was entitled to equal access to all benefits and privileges of a public higher education and that he has a protectable property and liberty interest in his continuing education at TTU. *See University of Texas Med. School v. Than*, 901 S.W.2d 926, 930 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 (1972)); *see also Goss v. Lopez*, 419 U.S. 565, 574-75 (1975); *Dixon v.*

Alabama State Bd. of Educ., 294 F.2d 150, 157 (1961). Due to the plethora of published case law on this issue, Mr. Patel's constitutional right to due process in his education has been clearly established.

Moreover, the facts alleged in this case show the Individual Defendants conduct violated Mr. Patel's constitutional rights. These Defendants knew that their objectively unreasonable investigation and Final Investigation Report would be used against Mr. Patel by TTU and could result in his dismissal from TTU. Defendant Jones knew that falsely accusing Mr. Patel of plagiarism in retaliation for exposing Jones' inequitable testing conditions was a violation of Mr. Patel's right to a continuing education and a violation of his right to be free from false and damaging statements to his good name, reputation, honor, and integrity in an academic setting, which resulted in the denial of Mr. Patel's protected property and liberty interests in his continuing graduate education.

Defendant Todd knew that conspiring with the other Individual Defendants to have Mr. Patel removed from TTU based upon a biased Final Investigation Report was a violation of his constitutional rights to his continuing education. Defendant Jones knew that failing Mr. Patel for plagiarism without any evidence, but because Defendant Jones wanted him to fail was arbitrary and capricious and constitutes a procedural and substantive due process violation. Defendant Todd knew that refusing to include any of Mr. Patel's exculpatory evidence in the Final Investigation Report and then neglecting to instruct the panel that they could find him innocent was a violation of his due process rights. Complaint, at ¶ 69.

Accordingly, the substantive due process claims against the Individual Defendants are adequately pleaded, and they are not entitled to qualified immunity. Thus, the Court should deny the Motion and allow these claims to proceed.

2. Plaintiff has established a substantive due process violation.

Mr. Patel has a strong substantive due process claim that Defendant TTU's actions against him were arbitrary and capricious in light of the manner in which the school handled its investigation of the charges levied against him, the panel hearing, and the sanctions they imposed upon him given his entire academic tenure and cumulative conduct history. The substantive component of the due process clause bars certain arbitrary government actions, "even if their implementation is fair." *Pham v. Univ. of Louisiana at Monroe*, 194 F.Supp.3d 534, 544 (W.D. La. 2016) (citing *Dismukes v. Hackathorn*, 802 F.Supp. 1442, 1447 (N.D. Miss. 1992)). To state a substantive due process claim, a plaintiff must show that the government's deprivation of a property interest was arbitrary or not reasonably related to a legitimate governmental interest. *Williams v. Texas Tech University Health Sciences Center*, 6 F.3d 290, 294 (5th Cir. 1993) (citing *Brennan v. Steward*, 834 F.2d 1248, 1256 (5th Cir. 1988), *Mawle v. Texas A&M University Kingsville*, No. CIV.CC-08-64, 2010 WL 1782214, at *10 (S.D. Tex. Apr. 30, 2010)). Whether a decision is arbitrary or not reasonable turns on **how the decision was made**, not on whether the decision makers came to the correct decision. *Mawle v. Texas A&M University Kingsville*, No. CIV.CC-08-64, 2010 WL 1782214, at *10 (S.D. Tex. Apr. 30, 2010). Moreover, it is relevant whether the sanction was appropriate in relation to the alleged wrong. *Id.*, at *9.

In pleading a substantive due process claim in the academic context, a plaintiff must plead that he possesses a valid property interest in his education and must assert enough facts to allege the decision to take away that property interest "is beyond the pale of reasoned academic decision-making when viewed against the background of the student's entire career at the University." *Seals v. Mississippi*, 998 F.Supp.2d 509, 523 (N.D. Miss. 2014) (quoting *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985)). Thus, in order to allege

a substantive due process claim for a plagiarism dismissal, Mr. Patel should be able to plead that Defendants did not exercise professional judgment in concluding that he had plagiarized *or* that Defendants failed to exercise professional judgment in deciding expulsion was an appropriate sanction when viewed against his academic tenure and cumulative conduct history at TTU, which was exemplary. *Mawle*, at *9; *Seals*, at 523.

Factors that a court looks to in deciding whether a university used judgment “beyond the pale of reasoned academic decision-making” include: (a) whether the university handled a claimant’s case differently than other students’ cases; (b) whether the university’s decision was not careful and deliberate; and/or (3) whether decision makers are “motivated by bad faith or ill will unrelated to academic performance.” *Eiland v. Wolf*, 764 S.W.2d 827, 833 (Tex. App. 1989); *see also Wilkenfield v. Powell*, 577 F.Supp. 579, 583 (W.D. Tex. 1983); *Schuler v. Univ. of Minn.*, 788 F.2d 510, 516 (8th Cir. 1986). A dismissal based on these factors may be found unconstitutional and in violation of a student’s substantive due process rights. *Alcorn v. Vaksman*, 877 S.W.2d 390, 397 (Tex. App. 1994); *Ewing*, 474 U.S. at 225 (stressing the difference between good faith and bad faith dismissals). All three are relevant here. Mr. Patel has met his burden of raising questions that go to the merits of his substantive due process claim that warrant a more deliberate investigation by this Court, both as to the guilty decision and the sanctions imposed. Accordingly, the Court should deny the Motion and allow these claims to proceed.

a. Defendants did not exercise careful or deliberate professional judgment in rendering a guilty verdict against Plaintiff.

An inquiry on how Mr. Patel’s guilty decision came to fruition demonstrates several of Defendants’ actions were beyond the pale of reasoned academic decision making, especially in light of Mr. Patel’s academic career and cumulative conduct history at TTU. Defendant TTU handled Mr. Patel’s case far differently than other students accused of plagiarism, Defendant Jones

was motivated by bad faith, and Defendant Todd's management of the investigation and panel hearing was anything but careful and deliberate. Conversely, Mr. Patel was an excellent student, and there is no record of any wrongdoing prior to the unsubstantiated charges in December, 2016. Complaint, ¶ 14.

Mr. Patel has consistently and unequivocally averred that he did not use any materials during the exam and did not cheat. *Id.*, ¶¶ 21, 25. There is nothing – no computer record, no classmate or proctor testimony, no video from an in-room camera – showing Mr. Patel copy-and-pasting or retyping an answer into the blackboard space while he looked at the opened answer on a computer screen or on a paper. *Id.*, ¶ 45. Indeed, Defendant Jones himself was proctoring the test site and saw no discrepancies in the exam process that day. *Id.*, ¶ 22. Yet, Defendant Jones decided to advance charges against Mr. Patel while two similarly-accused students had academic misconduct allegations against them dropped. *Id.*, ¶ 28. Moreover, at least one witness, C.C. C.C. , has come forward declaring that she and other students in a different exam session were allowed to use open book, open notes, and the internet during the exam, all without penalty. *Id.* Defendants treated Mr. Patel dissimilarly.

Not only was Mr. Patel's prosecution handled differently than other students' cases, but Mr. Patel has raised a plausible inference that Defendant Jones actually was motivated by *ill will* in deciding to press misconduct charges against him. Mr. Patel pleaded that Defendant Jones patently fouled up the administration of his own testing rules early on by letting some students use open book, open notes and internet but denied the same testing conditions to later test takers, including Mr. Patel. Complaint, ¶¶ 28, 44. Further, Mr. Patel pleaded that he was one of the first students to make TTU administration aware of Defendant Jones' exam session inequities. *Id.*, ¶ 25. Defendant Jones' misstep made the entire BLAW final examination subject to viable grade

appeals by any one of the hundred students in the class, potentially causing massive administrative headaches, and Jones was furious that Mr. Patel continued to discuss the issue. Complaint, ¶¶ 26-28. In fact, Defendant Jones' decision to press charges against Mr. Patel came mere hours *after* Mr. Patel discussed Defendant Jones' inequitable test administration with his department chair. *Id.*, ¶ 26. Defendant Jones still expressed anger about the situation months later and further demonstrated his hostility and clear animus towards Mr. Patel in emails to Defendant Todd once other student witnesses came forward. *Id.*, ¶¶ 43-44.

Once Defendant Jones' complaint was wrongfully initiated against Mr. Patel, the only "careful and deliberate" assessment TTU made into Jones' allegations of cheating was to analyze Mr. Patel's exam with the Turnitin software, the efficacy of which TTU has called into question in the past, and for which Mr. Patel has identified as suspect because Defendant Todd's input was inaccurate. Complaint, ¶¶ 36-38. Other than her erroneous analysis via Turnitin, Todd's supposed "neutral and impartial" investigation was anything but. After altering the complaint submitted by Defendant Jones, she opened her first conversation with Mr. Patel by making accusing and conclusory statements regarding his "cheating." *Id.*, ¶¶ 31-32. She followed up that conversation with a second conversation during which she called Mr. Patel a liar in front of his mother and screamed at him promising he would be expelled. *Id.*, ¶ 34. After that meeting, Mr. Patel scrambled for facts to include in Defendant Todd's "Final Investigation Report" report in the scant two days she proscribed. Defendant Jones refused to consider or include his exculpatory evidence at all for consideration by his hearing panel. *Id.*, ¶¶ 34-36, 39-41. Defendant Todd then led a panel hearing of members she hand-picked and that she "scripted" herself and told the wary panelists they "must choose" between the charges levied against Mr. Patel when a faculty panelist suggested that the charges were inappropriate. *Id.*, ¶¶ 46-47. After her direction and refusal to

appropriately advise the panel that they could find Mr. Patel innocent, the panelists found Mr. Patel guilty *even though* they confirmed there was *no actual direct evidence of wrongdoing*. *Id.*, ¶¶ 45-48.

The hearing panel could only act on the circumstantial evidence with which they were presented and the script they were given by Defendant Todd. What Defendant Todd provided for their consideration was anything but neutral and impartial and ensured that the outcome was arbitrary, capricious, and well beyond the pale of reasoned academic decision-making in conducting a biased investigation and directing the panel that they must choose one of the charges she listed. Defendants did not exercise careful and deliberate professional judgment in coming to the decision that Mr. Patel plagiarized because TTU actors refused to allow the hearing panelists to see the full picture. This is a violation of Mr. Patel's substantive due process rights. Accordingly, the Court should deny the Motion and allow these claims to proceed.

b. Defendants did not exercise careful and deliberate professional judgment in sanctioning Plaintiff.

Not only was Mr. Patel's "guilty" verdict a violation of his substantive due process rights, but so was Defendants' decision to expel him and further mandate that he "admit" plagiarism in order to keep taking baccalaureate classes thereby holding hostage his degree, his academic record and his professional career. Mr. Patel was an exceptional student throughout his tenure at TTU and, indeed, even in the BLAW class attaining a 97.7% test average and a 96% quiz average going into the final examination. *Id.*, ¶¶ 14, 18, 21-22. As he pleaded in his Complaint, he did well on the BLAW exam by studying the textbook, notes, and textbook review questions, and was lucky that the test bank-based final exam used several questions that mimicked the textbook and review questions he studied. *See id.*, ¶¶ 19, 21, 25. Mr. Patel had no record with the Office of Student Conduct until the baseless allegations levied against him by Defendant Jones. *Id.*, ¶ 14. Mr. Patel

had never been accused of any wrongdoing, much less found guilty, during his entire tenure at TTU. *Id.* Nonetheless, Defendants decided to inflict the ultimate sanction of expulsion from the Master's program, even though the TTU Sanctions for Academic Dishonesty policy did not justify such a penalty and even though the Director of the Office of Student Conduct has gone on record saying, "First time [academic dishonesty] offenders receive a deferred suspension" and that first-time offenders are generally punished the same unless there are extreme exceptions. *See id.*, ¶ 16 (citing Hannah Hipp, "Academic Dishonesty Growing Problem For Colleges" *The Daily Toreador*).¹

In fact, TTU's Handbook says, as Mr. Patel has pleaded, "[A]ny sanctions will be **proportionate** to the severity of the violation and to the cumulative conduct history of the student." Complaint, ¶ 15. Since his expulsion from the Master's program, no one from TTU has cited any "extreme exception" or any exception whatsoever to justify why Mr. Patel's first-time offense was punished by expulsion, especially considering his entire academic tenure and cumulative conduct history, which is exemplary. *Id.*, ¶ 49.

Warranting further consideration by the Court is Defendant TTU's sanction that Mr. Patel must pay a penalty, admit to plagiarism, and take a plagiarism class in order to complete his undergraduate degree. *Id.*, ¶ 49. There seems to be no legitimate reason to compel Mr. Patel to falsely admit to plagiarism except to whitewash TTU's own actions in violation of Mr. Patel's rights. If, in fact, Mr. Patel had admitted wrongdoing, TTU could have used it against him in this case. If anything, TTU's imposition on Mr. Patel's baccalaureate degree constitutes not only irrational treatment but is motivated by ill will and self-service. Mr. Patel's expulsion and other sanctions are disproportionate to the severity of the alleged violations and to his cumulative

¹ http://www.dailytoreador.com/lavida/academic-dishonesty-growing-problem-for-colleges/article_c50d2d8c-a03e-11e3-acbf-0017a43b2370.html

conduct history and are, therefore, in violation of TTU's stated policies and procedures. TTU's actions were both arbitrary and capricious, and the Defendants did not exercise careful and deliberate professional judgment in sanctioning Mr. Patel thereby vindicating him. Because he has also pleaded the existence of a right to his education through his contract with Defendant TTU (Complaint, ¶ 57), Mr. Patel has presented a *prima facie* case. Thus, the Court should deny the instant Motion and allow these claims to proceed.

C. Plaintiff Sufficiently Pleaded a Claim Against Defendants for Violations of the Equal Protection Clause.

Jurisprudence recognizes a “successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,” because “[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1075, 145 L.Ed.2d 1060 (2000) (citations omitted). In considering who is similarly situated, comparators must be *prima facie* identical in all factors relevant to the case. *Lindquist v. City of Pasadena Texas*, 669 F.3d 225, 233–34 (5th Cir. 2012). This requires a court to make a case specific analysis, as “what is relevant in one case might not be relevant in another” and depends “substantially on the facts and context of the case.” *Id.*

Here, the context involves disciplinary action taken against a student for one count of plagiarism and one count of use unauthorized material. As to the count of unauthorized material, Mr. Patel is similarly situated to at least two other students at TTU. He, along with two other students, Preston and Travis, faced academic misconduct charges stemming from their completion

of the BLAW final examination on December 12, 2016. Complaint, ¶¶ 25, 79. All three were alleged to have used unauthorized materials to aid their exam completion, and all three met with Defendant Pasewark on December 20, 2016, before Defendant Jones filed any official complaints. At the meeting with Pasewark, all three discussed Defendant Jones' defective examination processes, including the fact that some students were permitted to use resources while others were not, and all three attempted to halt any investigations or charges from materializing. *Id.*, ¶¶ 25, 26. In all three of their cases, there were no witnesses or other evidence to any wrongdoing; the witness who accused Preston and Travis of wrongdoing supposedly retracted the statement while no one claimed to have witnessed Mr. Patel's alleged wrongdoing. *Id.*, ¶¶ 28, 45, 79.

Indeed, even test proctor Defendant Jones reported seeing no discrepancies in the testing process that day, while sitting four feet away from Mr. Patel with his computer screen in Defendant Jones' line of sight, and there is no recorded evidence that Mr. Patel used unauthorized materials during the exam session. *Id.*, ¶¶ 22, 40, 45. Despite the lack of witnesses, however, and unlike Preston, Travis, or indeed any other students who were alleged to have or even admitted to having used unauthorized material on their exams, Mr. Patel alone *still* faced allegations, and was eventually convicted, of academic misconduct, and is further facing long-term career-altering sanctions as a result. *Id.*, ¶¶ 52-53, 79-80. He has no idea why and has pleaded in the Complaint that TTU has never offered a reason why the charge for use of unauthorized materials was pursued against him and not against others, seeing as none of the cases had any evidence or witnesses. *Id.*, ¶¶ 30, 40. Mr. Patel has presented a *prima facie* case for violation of his equal protection rights, and, thus, his request for an injunction should be granted.

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Further, as explained above, the Complaint does not seek monetary damages from Defendant TTU or the Individual Defendants in their official capacities so sovereign immunity does not shield them from Plaintiff's equal protection claim.

D. Plaintiff Sufficiently Pleaded a Claim Against Defendants for Injunctive Relief.

The *Ex parte Young* doctrine established over a century ago creates an exception to Eleventh Amendment immunity given to state actors acting in their official capacities for suits seeking prospective relief. *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 179 L.Ed.2d 675 (2011); *Nelson v. University of Texas at Dallas*, 535 F.3d 318, 321 (5th Cir. 2008). The exception covers only suits "brought against individual persons in their official capacities as agents of the state and the relief sought must be declaratory or injunctive in nature and prospective in effect." *Saltz v. Tenn. Dept. of Emp't Sec.*, 976 F.2d 966, 968 (5th Cir. 1992); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 482 (5th Cir. 2008), *petition for cert. filed*, 76 U.S.L.W. 3611 (U.S. May 5, 2008) (No. 07-1387).

The Motion falsely claims that the Complaint lacks sufficient specificity for the Court to determine whether the injunctive relief sought falls within the *Ex parte Young* exception to Eleventh Amendment immunity. In fact, the Complaint specifically seeks injunctive relief against Defendant TTU and the Individual Defendants in their official capacities in the First Cause of Action ("...Mr. Patel is entitled to injunctive relief...") (Complaint, p. 19 ¶ 66), Third Cause of Action ("...[Mr. Patel] is entitled to injunctive relief...") (Complaint, p. 23 ¶ 85), and the Fourth Cause of Action ("...Mr. Patel demands injunctive relief...") (Complaint, p. 26 ¶ 98). Each of those causes of actions begins with a statement indicating which Defendants the claim is against and whether in their official or individual capacities. Thus, the Court can readily determine that Mr. Patel's claims for injunctive relief are valid. Accordingly, the Court should deny the Motion.

E. Plaintiff Has Not Stated a Claim for Compensatory Damages Against Defendant TTU or the Individual Defendants in their Official Capacities.

As stated, *supra*, Plaintiff is not suing TTU or the Individual Defendants in their official capacities for monetary damages. Plaintiff concedes that he cannot sue the State of Texas, its agencies, or agents under § 1983 for monetary damages, and he has not done so. Accordingly, the Court should deny the Motion.

V. REQUEST FOR LEAVE TO AMEND THE COMPLAINT SHOULD THE COURT BE INCLINED TO GRANT ANY PORTION OF THE MOTION

In the event this Court is inclined to grant any portion of the Motion, Mr. Patel requests leave to amend his Complaint. Leave to amend “shall be freely given when justice so requires.” Fed. R. Civ. Pro. 15(a). While FRCP 15 places leave to amend within the sound discretion of the trial court, a court must remain guided by the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities. *See Conley v. Gibson*, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Additionally, Rule 15(a) provides that leave to amend shall be freely given when justice so requires. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981). Therefore, leave to amend should not be denied without a substantial reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Leave to amend should be freely granted “if it appears at all possible that the plaintiff can correct the defect. 3 Moore, Federal Practice, § 15.10 at 838 (2d ed. 1948). In the event that this Court were to find any of Mr. Patel’s causes of action insufficient, leave to amend is respectfully requested.

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VI. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Plaintiff Rajin Patel respectfully requests that this Honorable Court sustain this Opposition and deny Defendant's Motion to Dismiss in its entirety.

DATED this 13th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2017, a true and correct copy of the foregoing pleading was served upon each party to this action via the Court's electronic case filing system, as follows:

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By: /s/ Jason J. Bach
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