

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

AMY PICKETT,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	
TEXAS TECH UNIVERSITY HEALTH	§	
SCIENCES CENTER; BARBARA	§	Civil Action No. 5:20-CV-00232-H-BQ
CHERRY, individually and in her official	§	
capacity as Department Chair of Leadership	§	
Studies; and MICHAEL EVANS,	§	
individually and in his official capacity as	§	
Dean of School of Nursing,	§	
<i>Defendants.</i>	§	

**TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER,
BARBARA CHERRY, & MICHAEL EVANS'S
BRIEF IN SUPPORT OF MOTION TO DISMISS
PLAINTIFF'S ORIGINAL COMPLAINT**

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
Introduction	1
Relevant Background	2
A. <i>The Beginning</i> : Pickett enrolls in the DNP Program.....	2
B. <i>The Middle</i> : Pickett makes “C”s in two graduate courses.	3
C. <i>The End</i> : Pickett is dismissed because she fails to meet academic standards.....	5
Standard of review	6
Arguments & Authorities.....	7
1. Pickett’s ADA and RA discrimination claims are not plausible.	7
a. Defendants offered reasonable accommodations for Plaintiff’s alleged disability, thereby satisfying their legal obligations under the ADA and RA.	8
b. Poor academic performance is a legitimate, non-discriminatory basis to assign grades or dismiss someone from an academic program; the factual allegations do not create the reasonable inference that Defendants were motivated by Plaintiff’s alleged disability.....	10
c. Disability harassment is not a legally cognizable claim.	12
2. Pickett fails to state a procedural due process claim because she received all the process the Constitution requires and more.	13
3. Pickett fails to state a claim for substantive due process because her dismissal was not a substantial departure from academic norms.	14
4. Defendants Evans and Cherry in their individual capacities are entitled to qualified immunity from Pickett’s procedural and substantive due process claims. ...	15
5. This Court should dismiss any claims against the Individual Defendants based on qualified immunity. Pickett’s claims should be dismissed because they are barred by sovereign immunity and her claims against Drs. Cherry and Evans are actually against TTUHSC.....	16
a. TTUHSC retains sovereign immunity.	17
b. Pickett’s § 1983 claims for monetary relief are barred by sovereign immunity.	18
c. Claims against Drs. Cherry and Evans in their official capacity should be dismissed.	18
Prayer	19
Certificate of Service	20

TABLE OF AUTHORITIES

Federal Cases

<i>Aguilar v. Texas Dep’t of Criminal Justice</i> , 160 F.3d 1052 (5th Cir. 1998)	18
<i>Aragona v. Berry</i> , 2012 U.S. Dist. LEXIS 18443, 2012 WL 467069 (N.D. Tex. Feb. 14, 2012)	14
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	6, 10
<i>Barrera-Montenegro v. U.S. & Drug Enf’t Admin.</i> , 74 F.3d 657 (5th Cir. 1996)	16
<i>Bd. of Curators of Univ. of Mo. v. Horowitz</i> , 435 U.S. 78 (1978)	13
<i>Block v. Texas Bd. of Law Examiners</i> , 952 F.3d 613 (5th Cir. 2020)	16
<i>Burch v. Coca-Cola Co.</i> , 119 F.3d 305 (5th Cir. 1997)	10
<i>Campbell v. Lamar Inst. of Tech.</i> , 842 F.3d 375 (5th Cir. 2016)	12
<i>Campbell v. Lamar Inst. of Tech.</i> , No. 1:14-CV-399, 2015 WL 12942498 (E.D. Tex. Aug. 13, 2015)	12
<i>Collins v. Morgan Stanley Dean Witter</i> , 224 F.3d 496 (5th Cir. 2000)	6
<i>Davis v. Mann</i> , 882 F.2d 967 (5th Cir. 1989)	13
<i>Delano-Pyle v. Victoria Cty</i> , 302 F.3d 567 (5th Cir. 2002)	7, 8, 12
<i>Delouise v. Iberville Par. Sch. Bd.</i> , 8 F. Supp. 3d 789 (M.D. La. 2014)	19
<i>Derischebourg v. Clark</i> , No. 15-1712, 2016 WL 98617 (E.D. La. Jan. 8, 2016)	18

<i>Dorsey v. Portfolio Equities, Inc.</i> , 540 F.3d 333 (5th Cir. 2008)	6
<i>Dottin v. Tex. Dep’t of Criminal Justice</i> , 627 F. App’x 397 (5th Cir. 2015)	18
<i>E.E.O.C. v. Agro Distrib., LLC</i> , 555 F.3d 462 (5th Cir. 2009)	8
<i>Ekmark v. Matthews</i> , 524 F. App’x 62 (5th Cir. 2013)	13
<i>Falcone v. Univ. Minn.</i> , 388 F.3d 656 (8th Cir. 2004)	11
<i>Garza v. City of Donna</i> , 7:16-cv-558, 2017 WL 2861456 (S.D. Tex. July 5, 2017)	12
<i>Hale v. King</i> , 642 F.3d 492 (5th Cir. 2011)	17
<i>Halpern v. Wake Forest Univ. Health Sciences</i> , 669 F.3d 454 (4th Cir. 2012)	7
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	15
<i>J.D. v. Georgetown Indep. Sch. Dist.</i> , A-1-CA-717 LY, 2011 U.S. Dist. LEXIS 79335 (W.D. Tex. July 21, 2011)	18, 19
<i>Jenkins v. Bd. of Educ. of Houston Indep. Sch. Dist.</i> , 937 F. Supp. 608 (S.D. Tex. 1996)	18
<i>Kemp v. Holder</i> , 610 F.3d 231 (5th Cir. 2010)	7
<i>Kovacic v. Villarreal</i> , 628 F.3d 209 (5th Cir. 2010)	16
<i>Lehmann v. Hill Cty.</i> , No. 09-086, 2009 U.S. Dist. LEXIS 136409, 2009 WL 10669158 (W.D. Tex. June 24, 2009)	18

<i>Lowe v. Texas Tech University</i> , 540 S.W.2d 297 (Tex. 1976).....	17
<i>Maples v. Univ. of Tex. Med. Branch at Galveston</i> , 901 F. Supp. 2d 874 (S.D. Tex. 2012).....	7, 8
<i>McGregor v. La. State Univ. Bd. of Supervisors</i> , 3 F.3d 850 (5th Cir. 1993)	9
<i>MDPhysicians & Assoc., Inc. v. State Bd. of Ins.</i> , 957 F.2d 178 (5th Cir. 1992).....	16
<i>Moore v. Dall. Indep. Sch. Dist.</i> , 557 F. Supp. 2d 755 (N.D. Tex. 2008).....	14, 16
<i>Mullenix v. Luna</i> , 577 U.S. 7 (2015)	15
<i>NiGen Biotech, L.L.C. v. Paxton</i> , 804 F.3d 389 (5th Cir. 2015)	18
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984)	17, 18
<i>Petroplex Int’l, LLC v. St. James Par.</i> , No. 15-140, 2015 WL 6134097 (E.D. La. Oct. 19, 2015)	18
<i>Pinkerton v. Spellings</i> , 529 F.3d 513 (5th Cir. 2008)	8
<i>Plotkin v. IP Axxess Inc.</i> , 407 F.3d 690 (5th Cir. 2005).....	6
<i>Ramming v. United States</i> , 281 F.3d 158 (5th Cir. 2001).....	6
<i>Regents of Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978).....	10
<i>Regents of Univ. of Mich. v. Ewing</i> , 474 U.S. 214 (1985)	14, 15
<i>Reichle v. Howards</i> , 566 U.S. 658 (2012).....	16

<i>Shah v. Univ. of Tex. Sw. Med. Sch.</i> , 54 F. Supp. 3d 681 (N.D. Tex. 2014)	13, 14
<i>Siefken v. Village of Arlington Hgts.</i> , 65 F.3d 664 (7th Cir. 1995).....	10
<i>Soledad v. U.S. Dep’t of Treasury</i> , 304 F.3d 500 (5th Cir. 2002)	8
<i>Southeastern Community College v. Davis</i> , 442 U.S. 397 (1979)	9
<i>Stevenson v. Hous. Auth. of the City of Austin</i> , No. 09-083, 2009 WL 10669236 (W.D. Tex. Apr. 27, 2009)	19
<i>United States v. Georgia</i> , 546 U.S. 151 (2006).....	17, 18
Federal Statutes	
28 C.F.R. § 35.130(b)(7)-(8)	8
29 U.S.C. § 794(a)	7, 8
42 U.S.C. § 12131(1)	7
42 U.S.C. § 12132	7
Federal Rules	
Fed. R. Civ. P. 12(b)(1)	6
Fed. R. Civ. P. 12(b)(6)	6
Texas Cases	
<i>Jackson v. Tex. S. Univ. — Thurgood Marshall Sch. of Law</i> , 231 S.W.3d 437 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).....	14

INTRODUCTION

Pickett, a former graduate student in Texas Tech University Health Sciences Center's (TTUHSC) Doctor of Nursing Practice (DNP) Program sues TTUHSC and Drs. Cherry and Evans in their official capacity under the American with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA) for disability discrimination. She also brings an action for Due Process violations against Drs. Cherry and Evans in both their individual and official capacity. Defendants ask this Honorable Court to dismiss Pickett's Complaint because she fails to state a claim for several reasons.

First, Pickett's ADA and RA claims are not plausible. The facts allegations do not support the requisite legal conclusion that TTUHSC or Drs. Cherry and Evans fell short of their obligations to offer a reasonable accommodation for a disability upon request or engaged in disability discrimination. Consequently, Pickett's ADA and RA claims should be dismissed.

Second, the face of Pickett's complaint negates a procedural due process claim as she concedes that she was notified of her dismissal, she appealed the dismissal, and then was given a path to continue in the program. Pickett's procedural due process claim should be dismissed.

Third, Pickett fails to allege a substantive due process claim because the actions of Drs. Cherry and Evans are well within the realms of accepted academic norms. These claims should be dismissed.

Fourth, Pickett cannot overcome Drs. Cherry and Evans's qualified immunity because she does not allege a violation of clearly established rights.

Finally, sovereign immunity bars Pickett's ADA claim and constitutional claims against TTUHSC and the official capacity defendants. For these reasons and those discussed below, Pickett's claims should be dismissed.

RELEVANT BACKGROUND

A. *THE BEGINNING: PICKETT ENROLLS IN THE DNP PROGRAM.*

TTUHSC offers a variety of tracks for completing the DNP Program.¹ One such track is to pursue a DNP and tack on a Family Nurse Practitioner Post-Master's Certificate (FNP).² If a student chooses to enroll in both programs simultaneously a new DNP degree plan is created.³ That is what happened here.

Pickett was a graduate student in TTUHSC School of Nursing's DNP Program.⁴ She enrolled in the DNP Program in Summer 2016 and then in 2017 decided to obtain her FNP certificate at the same time.⁵ When Pickett added the FNP certificate on to her DNP Program, the DNP degree plan was modified to include the FNP certificate.⁶ In May 2017, Pickett requested double-time on tests as an accommodation for ADHD.⁷ TTUHSC provided that accommodation.⁸ Her Letter of Accommodation also provided an alternative test location and note taking

¹ Exhibit A at pgs. 114-122, 2017-2018 TTUHSC School of Nursing Academic Catalogue, *available at* <https://www.ttuhschool.edu/nursing/documents/catalog/catalog2017-2018-1.pdf> (last visited January 22, 2021); Exhibit B at pgs. 33-34, 2017-2018 TTUHSC School of Nursing Academic Student Handbook, *available at* <https://www.ttuhschool.edu/nursing/documents/handbook/handbook2017-2018.pdf>. Defendants request the Court take judicial notice of Exhibits A & B. Further, the structure of the DNP Program, degree plans, grading policies, and academic dismissal criteria are central to Pickett's allegations and referenced by the complaint. *See* Dkt. 1 generally.

² Exhibit A at pgs. 114-15.

³ Exhibit A at pg. 122.

⁴ Dkt. 1 at ¶ 1.

⁵ Dkt. 1 at ¶ 16.

⁶ *See* Exhibit A at pgs. 114-15; Exhibit B at pgs. 33-34, 37; *see also* Dkt 1 at ¶ 16.

⁷ Exhibit C, Declaration of Tamara Mancini, Amy Pickett's 2017 Disability Services for Students Application for Services. The accommodation request is central to and referenced by the complaint. *See* Dkt. 1 at ¶ 18.

⁸ Dkt. 1 at ¶ 24.

assistance.⁹ Until Summer 2018, there were no indications that Pickett was having any difficulties in her courses.¹⁰

B. THE MIDDLE: PICKETT MAKES “C”S IN TWO GRADUATE COURSES.

The crux of Pickett’s discrimination complaint centers around two classes: (1) 6201 DNP Role Transition II course (6201)¹¹; and (2) 5440 Primary Healthcare I course (5440)¹². Pickett concludes that she was discriminated against and not given her requested accommodations in these classes.¹³ Her pleaded facts negate this.

Pickett turns in her 6201 paper late: Taught by Professor Cindy Acton, 6201 is an online course where students develop a DNP Project Proposal based on a topic or phenomenon of interest.¹⁴ All course material is located online in “modules.”¹⁵ A major component of the final grade is submission of a final paper.¹⁶ Students are required to incorporate feedback from their professors and advisors into their final paper.¹⁷ The course syllabus warns students that a letter grade is deducted for each day the paper is late.¹⁸

Pickett was unable to complete this course during the Summer of 2018 for medical reasons.¹⁹ She requested more time to complete the course and was able to take an Incomplete for the semester to give her more time to complete a paper.²⁰ Her paper deadline was extended to

⁹ Dkt. 1 at ¶ 24.

¹⁰ Dkt. 1 at ¶ 24.

¹¹ Exhibit A at pg. 133.

¹² Exhibit A at pg. 130.

¹³ Dkt. 1 at ¶ 75.

¹⁴ Exhibit A at pg. 133; Exhibit D, Declaration of Jeff Watson Summer, Summer 6201 DNP Roles Transition II Course Syllabus. The syllabus is central to and referenced by the complaint. *See* Dkt. 1 at ¶ 34.

¹⁵ Exhibit D at pgs. 3-4.

¹⁶ Exhibit D at pg. 3.

¹⁷ Exhibit D at pg. 6.

¹⁸ Exhibit D at pg. 4.

¹⁹ Dkt. 1 at ¶ 33.

²⁰ Dkt. 1 at ¶ 33.

September 2018.²¹ But despite this extension, Pickett still missed the deadline by two days, in part because of stress from her other classes and technical difficulties.²² Pickett was given a zero and failed the class.²³ She appealed the grade and TTUHSC granted her appeal.²⁴ Because her paper was late, the highest-grade Pickett could receive was a 79.²⁵ Again, Pickett received a zero because the paper did not meet expectations and again, she asked for a re-grade.²⁶ The course facilitator, Dr. Crenshaw, re-graded the paper.²⁷ Pickett ultimately received a 59 because the paper was late, and she did not incorporate feedback that Dr. Crenshaw had given her.²⁸ The two re-grades were averaged.²⁹ In the end, Pickett made a “C” in the course.³⁰

Pickett scores low on all 5440 exams: Taught by Professors Thal and Miller, 5440 is an online and clinical course that focuses on clinical reason and decision making.³¹ Course material is located online in “modules.”³² During the first exam in the 5440 course, Pickett noticed that she had not been given the double testing time accommodation for her ADHD.³³ She then contacted her professors and the ADA coordinator.³⁴ She was told that Dr. Miller would speak with IT and she

²¹ Dkt. 1 at ¶ 33.

²² Dkt. 1 at ¶ 34.

²³ Dkt. 1 at ¶ 35.

²⁴ Dkt. 1 at ¶ 36.

²⁵ Dkt. 1 at ¶ 34.

²⁶ Dkt. 1 at ¶¶ 37-38.

²⁷ Dkt. 1 at ¶ 39.

²⁸ Dkt. 1 at ¶ 39.

²⁹ Dkt. 1 at ¶ 40.

³⁰ Dkt. 1 at ¶ 42.

³¹ Exhibit A at pg. 130; Dkt. 1 at ¶ 46.

³² Exhibit B at pg. 22.

³³ Dkt. 1 at ¶ 45.

³⁴ Dkt. 1 at ¶¶ 46-47.

could restart the test at 10:00 am.³⁵ Pickett requested additional time to restart the exam.³⁶ She was then allowed to restart the test at 10:30.³⁷ Pickett did not make any additional requests.³⁸

Pickett scored a 62 on the exam.³⁹ After she failed the exam, she requested that she be allowed to retake it.⁴⁰ This request was denied.⁴¹ Pickett then requested an “extra opportunity” to replace her first exam score with her comprehensive exam score.⁴² That requests was also denied.⁴³ Pickett performed poorly on her second, third, and comprehensive exams.⁴⁴ She made a “C” in 5440.⁴⁵ Pickett did not appeal her final grade in 5440.

C. *THE END: PICKETT IS DISMISSED BECAUSE SHE FAILS TO MEET ACADEMIC STANDARDS.*

The school catalogue and handbook states that DNP students will be academically dismissed from the DNP program if “[s]tudents earning a ‘C’ or lower in a second DNP course even though one DNP course has been retaken and a satisfactory grade of ‘B’ or better has been obtained.”⁴⁶ Pickett was notified by Dr. Evans, the Dean, that she was being dismissed from the DNP Program because she made two “C”s in two DNP courses.⁴⁷ Pickett appealed the dismissal.⁴⁸ While the appeal was pending, Pickett spoke with Dr. Cherry, the Department Chair,

³⁵ Dkt. 1 at ¶ 48.

³⁶ Dkt. 1 at ¶ 48.

³⁷ Dkt. 1 at ¶ 49.

³⁸ Dkt. 1 at ¶ 50.

³⁹ Dkt. 1 at ¶ 51.

⁴⁰ Dkt. 1 at ¶ 52.

⁴¹ Dkt. 1 at ¶ 52.

⁴² Dkt. 1 at ¶ 53.

⁴³ Dkt. 1 at ¶ 53.

⁴⁴ Dkt. 1 at ¶¶ 54;56.

⁴⁵ Dkt. 1 at ¶ 60.

⁴⁶ Exhibit A at pg. 122 (“[f]ailing to meet expected standards in any program may result in academic dismissal.”); Exhibit B at pgs. 21-22.

⁴⁷ Dkt. 1 at ¶ 58.

⁴⁸ Dkt. 1 at ¶ 63.

who offered her a solution.⁴⁹ She could pursue either the DNP degree or FNP certificate, but not both.⁵⁰ Pickett did not timely respond and as such the academic dismissal stood.⁵¹

STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) hinges on whether the plaintiff pled a “plausible” (as opposed to just a “possible”) claim for relief—*i.e.* whether the plaintiff pled “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁵² “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” cannot overcome a motion to dismiss for failure to state a claim.⁵³ While courts must accept all factual allegations as true, they “do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.”⁵⁴ On such a motion, the court can rely on: (1) the complaint; (2) the complaint’s attachments; (3) documents that were referenced in the complaint and central to the plaintiff’s claim; and (4) matters on which a court may take judicial notice.⁵⁵ Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction.⁵⁶ “The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction.”⁵⁷ “Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.”⁵⁸

⁴⁹ Dkt. 1 at ¶ 66.

⁵⁰ Dkt. 1 at ¶ 66.

⁵¹ Dkt. 1 at ¶ 68.

⁵² *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁵³ *Id.*

⁵⁴ *Plotkin v. IP Axxess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005); *see also Iqbal*, 556 U.S. at 679.

⁵⁵ *See, e.g., Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000).

⁵⁶ Fed. R. Civ. P. 12(b)(1).

⁵⁷ *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

⁵⁸ *Id.*

ARGUMENTS & AUTHORITIES

1. Pickett's ADA and RA discrimination claims are not plausible.

The ADA and RA both prohibit discrimination against qualified individuals with disabilities; they employ many of the same legal standards and offer the same remedies.⁵⁹ Title II of the ADA prohibits discrimination on the basis of disability by any “public entity,” defined as a state or local government, any “department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁶⁰ Similarly, the RA provides that a qualified individual with a disability will not “be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁶¹

“To establish a claim under either statute ‘in the context of a student excluded from an educational program,’ a plaintiff must prove that: ‘(1) she has a disability; (2) she is otherwise qualified to participate in the defendant’s program; and (3) she was excluded from the program on the basis of [her] disability.’”⁶² The only difference between the ADA and RA in the application of these elements concerns the final requirement. The standard in Title II of the ADA more broadly prohibits exclusion “by reason of [a] disability.”⁶³ Under Section 504 of the RA, “[n]o otherwise qualified individual with a disability . . . shall, *solely* by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

⁵⁹ *Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010) (per curiam) (citing *Delano-Pyle v. Victoria Cty*, 302 F.3d 567, 574 (5th Cir. 2002)).

⁶⁰ 42 U.S.C. §§ 12131(1), 12132.

⁶¹ 29 U.S.C. § 794(a).

⁶² *Maples v. Univ. of Tex. Med. Branch at Galveston*, 901 F. Supp. 2d 874, 879 (S.D. Tex. 2012), aff’d, 524 Fed. App’x 93 (5th Cir. 2013) (per curiam) (unpublished) (quoting *Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454, 461 (4th Cir. 2012)).

⁶³ Compare 42 U.S.C. § 12132, with 29 U.S.C. § 794(a).

program or activity receiving Federal financial assistance.”⁶⁴ Thus, ADA establishes a “motivating factor” test, while the RA establishes a “sole cause” test for causation.⁶⁵ To recover monetary damages, a plaintiff must prove that the discrimination was intentional.⁶⁶

Here, assuming *arguendo* that Pickett sufficiently plead the first and second element, she cannot meet the third element: that she was discriminated against by reason of her disability. Pickett does not present any facts that any actions taken against her were because of her alleged disability. Instead, Complaint demonstrates that she was given the reasonable accommodations she requested, and then some. And Pickett’s poor performance was a legitimate, non-discriminatory basis for her academic dismissal. Therefore, Pickett has failed to state a viable claim under both the ADA and RA.

a. Defendants offered reasonable accommodations for Plaintiff’s alleged disability, thereby satisfying their legal obligations under the ADA and RA.

As an alternative to the standard elements of disability discrimination, a plaintiff may plead a failure to accommodate claim. While there is a right to reasonable accommodation, it does not however, mandate that the plaintiff be given her preferred accommodation.⁶⁷ Under no circumstances is a university required to provide accommodations that would “fundamentally alter the nature of the service, program, or activity” and need not alter eligibility criteria that are “shown to be necessary for the provision of the service, program, or activity being offered.”⁶⁸ Federal law “does not mandate that an educational institution ‘lower or [] effect substantial

⁶⁴ 29 U.S.C. § 794(a) (emphasis added).

⁶⁵ *Pinkerton v. Spellings*, 529 F.3d 513, 516-19 (5th Cir. 2008) (per curiam); *see also Soledad v. U.S. Dep’t of Treasury*, 304 F.3d 500, 503-04 (5th Cir. 2002).

⁶⁶ *Delano-Pyle*, 302 F.3d at 574.

⁶⁷ *E.E.O.C. v. Agro Distrib., LLC*, 555 F.3d 462, 471 (5th Cir. 2009).

⁶⁸ 28 C.F.R. § 35.130(b)(7)-(8); *see also Maples*, 901 F. Supp. 2d at 883.

modifications of standards to accommodate a handicapped person,' assuming such standards are reasonable."⁶⁹ Absent evidence of discriminatory intent or disparate impact, reasonable deference must be accorded to an educational institution's academic decisions.⁷⁰ Pickett's conclusory allegations fail to support a failure to accommodate claim because TTUHSC provided Pickett reasonable accommodations and then some. As such, this claim must be dismissed.

On the outset, the only accommodation Pickett allegedly requested from the ADA office was double-time exams.⁷¹ In her Letter of Accommodation, TTUHSC gave her double-time and a testing environment free from distractions and note-taking assistance.⁷²

Second, Pickett alleges that TTUHSC failed to accommodate her because she was not allowed to adjust the submission deadline for the draft of her paper in the 6201 class.⁷³ But TTUHSC did accommodate her.⁷⁴ She was allowed to receive an "Incomplete" in the course, which adjusted the submission deadline to the following semester.⁷⁵ From the face of her complaint, she admits that she was given the accommodation she requested.

Third, in her 5440 class, Pickett claims she was not given double-time to take the first exam.⁷⁶ But Pickett was given the extended time on the test that she requested after she already started the exam, and Defendants also allowed her to restart the test at 10:30 am.⁷⁷ Pickett requested

⁶⁹ *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 858 (5th Cir. 1993) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979)), cert. denied, 510 U.S. 1131 (1994).

⁷⁰ *McGregor*, 3 F.3d at 859 (internal citations omitted).

⁷¹ Exhibit C, ("I have setbacks with taking exams...Doubling the exam testing time would be beneficial in helping me be successful.").

⁷² Dkt. 1 at ¶ 21.

⁷³ Dkt. 1 at ¶ 27.

⁷⁴ Dkt. 1 at ¶ 29.

⁷⁵ Dkt. 1 at ¶ 7.

⁷⁶ Dkt. 1 at ¶ 45.

⁷⁷ Dkt. 1 at ¶ 50.

to be able to retake the exam that she failed.⁷⁸ The exam that she started, stopped, and restarted with double-time.⁷⁹ Pickett's request to retake an exam she had already taken would fundamentally alter the nature of the course because it would be unfair to other students to alter the course policy. What is more, a second chance or plea for grace is not an accommodation contemplated by the ADA or RA.⁸⁰ As such, Pickett fails to identify what additional accommodations she needed or how the accommodations afforded to her were not reasonable.

One more point. With respect to all of Pickett's failure to accommodate claims, there are no factual allegations connecting either Drs. Cherry or Evans with any alleged failures. Indeed, the Complaint is void of any facts to support a notion that Drs. Cherry and Evans had a role in providing accommodations to Pickett. Pickett failed to state a claim against Drs. Cherry and Evans.

Pickett makes vague, unsupported, and conclusory allegations that are insufficient to state a claim for relief or survive a motion to dismiss.⁸¹ Besides, her grievances are negated by her own Complaint. They must be dismissed.

b. Poor academic performance is a legitimate, non-discriminatory basis to assign grades or dismiss someone from an academic program; the factual allegations do not create the reasonable inference that Defendants were motivated by Plaintiff's alleged disability.

TTUHSC's legitimate non-discriminatory reasons for Pickett's dismissal should be viewed in light of the TTUHSC's well-recognized province concerning academic matters.⁸² Other Circuit Courts have specifically held that the courts should "not invade a university's province

⁷⁸ Dkt. 1 at ¶ 52.

⁷⁹ Dkt. 1 at ¶¶ 45, 48, 49, 50.

⁸⁰ *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 n.14 (5th Cir. 1997) (citing *Siefken v. Village of Arlington Hgts.*, 65 F.3d 664, 666 (7th Cir. 1995)).

⁸¹ *See Iqbal*, 556 U.S. at 678.

⁸² *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

concerning academic matters in the absence of compelling evidence that the academic policy is a pretext for [disability] discrimination.”⁸³ Pickett’s discrimination complaint centers around two issues: 1) A failing grade because she turned in a paper late and didn’t meet the assigned criteria and 2) her dismissal from the program. Both of the allegations are insufficient to state a claim for disability discrimination.

Pickett admits that she turned in her paper for the 6201 class 30 hours late in part due to the “additional demands of [her] fall 2018 courses” and “technical difficulties.”⁸⁴ Because her paper was two days late, the highest grade Pickett could receive was a 79.⁸⁵ She also acknowledges that she received a low grade because her paper was late, and she didn’t incorporate feedback from her advisor and course facilitator.⁸⁶ Pickett has not alleged facts that create the reasonable inference that TTUHSC treated her more adversely than other students because of ADHD. For example, she does not allege that students without ADHD who turned in their papers two days late were treated better than her. There is nothing in the factual allegations that suggest that TTUHSC treated her worse than her peers *because of* her alleged disability.

Pickett also claims that she was discriminated against when she was dismissed from the program and her email access was cut off. But these bare conclusions alone do not make her claims plausible. Again, the factual allegations do not create the reasonable inference that TTUHSC dismissed her from the program *because* she had ADHD, rather than based on her poor academic performance.

⁸³ *Falcone v. Univ. Minn.*, 388 F.3d 656, 659 (8th Cir. 2004) (internal citations omitted) (holding that no rational fact-finder could conclude that the former medical student was dismissed solely because of his learning disabilities).

⁸⁴ Dkt. 1 at ¶ 34.

⁸⁵ Exhibit D at pg. 4.

⁸⁶ Dkt. 1 at ¶¶ 37; 39.

Lastly, “[a] plaintiff asserting a private cause of action for violations of the ADA or the [RA] may only recover compensatory damages upon a showing of intentional discrimination.”⁸⁷ Pickett has certainly not plead any facts that would plausibly demonstrate intentional discrimination by Defendants or that she was purposefully singled out from other students in any way.⁸⁸ Accordingly, Pickett is not entitled to compensatory damages as a matter of law.

Pickett’s Complaint is void of *plausible* facts showing that the low grades she received, and her subsequent dismissal, were motivated by her alleged disability—much less meet the RA’s “sole cause” requirement. What is more, there are no plausible allegations that students without ADHD were treated differently. These claims must be dismissed.

c. Disability harassment is not a legally cognizable claim.

Pickett appears to assert a claim for disability-based harassment by Defendants.⁸⁹ The Fifth Circuit has held that no “legally cognizable” claim exists for disability-based educational harassment of students.⁹⁰ Any disability-based educational harassment claim should be dismissed.

⁸⁷ *Delano-Pyle*, 302 F.3d at 574.

⁸⁸ *See Garza v. City of Donna*, 7:16-cv-558, 2017 WL 2861456, at *7 (S.D. Tex. July 5, 2017) (holding plaintiffs had failed to plead facts showing intentional discrimination where plaintiffs merely alleged that defendant did not treat inmates well, without alleging that defendant treated plaintiff any differently from other inmates).

⁸⁹ Dkt. 1 at ¶ 75(c) and (f).

⁹⁰ *Campbell v. Lamar Inst. of Tech.*, No. 1:14-CV-399, 2015 WL 12942498, at *6 (E.D. Tex. Aug. 13, 2015), *aff’d*, 842 F.3d 375 (5th Cir. 2016) (“Mr. Campbell alleges that ‘Defendants . . . engaged in direct discrimination by ambushing [him], insulting, bullying, and harassing him because of his disability.’ . . . This court has not found any opinion in which the Fifth Circuit has recognized ADA- based claims for disability-based educational harassment of students by instructors Since no cause of action exists, these claims are dismissed.”); *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 382 n.5 (5th Cir. 2016) (“Campbell also asserts novel theories of disability discrimination: ‘constructive dismissal’ from an educational institution and ‘educational harassment.’ The district court correctly dismissed these claims as not legally cognizable.”).

2. Pickett fails to state a procedural due process claim because she received all the process the Constitution requires and more.

When a student challenges an adverse academic action, due process requires “far less stringent procedural requirements.”⁹¹ This is because educational institutions “should not be weighted down with formalized procedural requirements imposed by actors estranged from the academic environment.”⁹² Adverse academic actions only require “minimum procedures of notice.”⁹³ The Constitution does not require a hearing or the right to appeal.⁹⁴ Here, stripping aside the conclusory arguments, the factual contentions do not create a reasonable inference that Pickett received insufficient process.

It is undisputed that Pickett’s dismissal was academic.⁹⁵ As such, the Constitution only requires minimum procedures of notice.⁹⁶ Pickett got that and more.

First, the TTUHSC policy clearly states academic dismissal from the DNP program will result from earning “C”s or lower in a two DNP courses.⁹⁷ Pickett was aware that she made “C”s in two courses.⁹⁸ Thus, Pickett was on notice that she could be dismissed from the program.⁹⁹ Second, after she received the letter informing her that she was being dismissed from the program, Pickett “timely appealed [her] dismissal.”¹⁰⁰ Third, Pickett spoke with Dr. Cherry who provided

⁹¹ *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978).

⁹² *Davis v. Mann*, 882 F.2d 967, 974 (5th Cir. 1989).

⁹³ *See Ekmark v. Matthews*, 524 F. App’x 62, 64 (5th Cir. 2013) (citing *Horowitz*, 435 U.S. at 90); *Shah*, 54 F. Supp. 3d at 692 (due process does not require a student’s right to appeal dismissal based on poor academic performance).

⁹⁴ *Id.*

⁹⁵ *See e.g. Horowitz*, 435 U.S. at 89–90; *Wheeler v. Miller*, 168 F.3d 241, 250 (5th Cir. 1999).

⁹⁶ *Davis*, 882 at 974.

⁹⁷ Exhibit A at pg. 122 (“[f]ailing to meet expected standards in any program may result in academic dismissal.”); Exhibit B at pgs. 21–22.

⁹⁸ Dkt. 1 at ¶¶ 42, 56.

⁹⁹ *Shah II* at 500 (finding a medical school policy was sufficient to put a student on notice that poor academic performance could result in dismissal from the program).

¹⁰⁰ Dkt. 1 at ¶ 63.

her with the path whereby she could maintain enrollment in the School of Nursing, but Pickett did not timely respond with a decision.¹⁰¹ Finally, to the extent that Pickett alleges defendants failed to comply with TTUHSC's policies and procedures set forth in the student handbook "[a] student does not have any due process rights to the procedures established by a state entity's rules or regulations."¹⁰² Pickett's factual allegations, stripped of conclusions confirm that she was afforded more procedural protections than are required by the Constitution.

3. Pickett fails to state a claim for substantive due process because her dismissal was not a substantial departure from academic norms.

"When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."¹⁰³ Courts that have addressed the issue, almost universally, uphold "the academic decisions of public universities when challenged on substantive due process grounds."¹⁰⁴ "The reach of substantive due process is limited, however, and it protects against only the most serious of governmental wrongs."¹⁰⁵ Courts may not override an adverse academic decision "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."¹⁰⁶ Assuming *arguendo* Pickett identified a substantive due process right at all—which she did not—stripped of conclusions, the factual allegations fall short of this extremely high standard.

¹⁰¹ Dkt. 1 at ¶ 66.

¹⁰² *Shah v. Univ. of Tex. Sw. Med. Sch.*, 54 F. Supp. 3d 681, 695 n.15 (N.D. Tex. 2014); *Aragona v. Berry*, 2012 U.S. Dist. LEXIS 18443, 2012 WL 467069, at *6 (N.D. Tex. Feb. 14, 2012) (citing *Jackson v. Tex. S. Univ. — Thurgood Marshall Sch. of Law*, 231 S.W.3d 437, 439-40 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)).

¹⁰³ *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

¹⁰⁴ *Shah*, 54 F. Supp. 3d at 696 (citing cases).

¹⁰⁵ *Moore v. Dall. Indep. Sch. Dist.*, 557 F. Supp. 2d 755, 761 (N.D. Tex. 2008) (citation omitted).

¹⁰⁶ *Ewing*, 474 U.S. at 225.

Without any plausible supporting facts, Pickett concludes that the conduct of Drs. Cherry and Evans were such a “substantial departure from accepted academic norms as to demonstrate that they did not actually exercise professional judgment when stripping [her] of that protected property interest.”¹⁰⁷ Her own allegations negate this. Pickett readily concedes that she made “C”s in two courses, was notified that she was being dismissed, she then filed an appeal, and was given a path to continue perusing her studies.¹⁰⁸ The actions of Drs. Cherry and Evans are “not beyond the pale of reasoned academic decision or reasoned academic decision-making when viewed against [Pickett’s] entire career at the University.”¹⁰⁹ This is because Pickett’s dismissal was caused by her own academic shortcomings. Pickett’s bare allegations do not raise the inference that the conduct of Drs. Cherry and Evans was a substantial departure from accepted academic norms. As such, her claim must be dismissed.

4. Defendants Evans and Cherry in their individual capacities are entitled to qualified immunity from Pickett’s procedural and substantive due process claims.

Pickett’s claims against Drs. Cherry and Evans are further barred by qualified immunity. Qualified immunity “shields government officials from liability when they are acting within their discretionary authority and their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known.”¹¹⁰ “Put simply, qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’”¹¹¹

¹⁰⁷ Dkt. 1 at ¶ 99.

¹⁰⁸ Dkt. 1 at ¶¶ 57, 58, 60, 63, 66.

¹⁰⁹ *Ewing*, 474 U.S. at 228.

¹¹⁰ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹¹¹ *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

Once a state official has asserted qualified immunity, the burden shifts to the plaintiff to show that qualified immunity does not apply.¹¹²

Drs. Cherry and Evans are entitled to qualified immunity because, as stated above, Pickett has not demonstrated that they violated any of her clearly established rights. Indeed, Pickett pleads only conclusory statements that are insufficient to overcome qualified immunity or to state a claim generally.¹¹³ Nor does Pickett identify the actions that Drs. Cherry and Evans allegedly took that could have violated her clearly established rights. And in response to this Motion, Plaintiff will not be able to point to precedent placing it beyond doubt that the Individual Defendants' objectively reasonable actions violated any clearly established constitutional right.¹¹⁴

5. This Court should dismiss any claims against the Individual Defendants based on qualified immunity.¹¹⁵ Pickett's claims should be dismissed because they are barred by sovereign immunity and her claims against Drs. Cherry and Evans are actually against TTUHSC.

Sovereign immunity from suit deprives this Court of subject-matter jurisdiction and is properly raised in a Federal Rule Civil Procedure 12(b)(1) motion to dismiss.¹¹⁶ In addition to relying on the items addressed above, on a Rule 12(b)(1) motion, the court can also weigh the evidence and resolve disputed facts to ensure it has power over the case.¹¹⁷

¹¹² *Kovacik v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010).

¹¹³ Pickett only mentions Dr. Evans in ¶¶ 57, 59, and 85 in her Complaint. She only mentions Dr. Cherry in ¶¶ 66-68, 87, and 107 in her Complaint.

¹¹⁴ *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

¹¹⁵ If this Court were to decline dismissal, a Rule 7 reply would be appropriate.

¹¹⁶ See, e.g., *Block v. Texas Bd. of Law Examiners*, 952 F.3d 613, 616-17 (5th Cir. 2020); *Moore v. Bryant*, 853 F.3d 245, 248-49 (5th Cir. 2017).

¹¹⁷ *Barrera-Montenegro v. U.S. & Drug Enf't Admin.*, 74 F.3d 657, 659 (5th Cir. 1996); *MDPhysicians & Assoc., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992).

a. TTUHSC retains sovereign immunity.

In the alternative to Defendants' motion to dismiss for failure to state a claim, any claims brought under the ADA should be dismissed against TTUHSC because it has sovereign immunity. The Eleventh Amendment deprives a federal court of jurisdiction to hear a suit against the State of Texas or its officials, regardless of the relief sought, unless sovereign immunity is expressly waived.¹¹⁸ It is undisputed that TTUHSC is a general agency of the State of Texas and enjoys the protection of sovereign immunity.¹¹⁹

Although the ADA contains a clear expression of congressional intent to abrogate state sovereign immunity, in order to determine whether Title II validly abrogates state sovereign immunity, courts apply a three-part inquiry detailed in *United States v. Georgia*.¹²⁰

First, a court must determine "which aspects of the State's alleged conduct violated Title II."¹²¹ This is where Pickett's lawsuit stops.¹²² Here to state a prima facie case under Title II of the ADA, Pickett must have plausibly alleged that she was discriminated against because of her disability.¹²³ But even if the Court were inclined to reach the second step of *Georgia*,¹²⁴ to what extent the conduct of TTUHSC violated the Fourteenth Amendment, Pickett failed to state a viable due process claim.

As discussed in detail above, stripped of conclusions and mere recitations of the elements of her claims, Pickett failed to state a claim under Title II of the ADA and she has not pled any

¹¹⁸ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

¹¹⁹ *Lowe v. Texas Tech University*, 540 S.W.2d 297 (Tex. 1976).

¹²⁰ *United States v. Georgia*, 546 U.S. 151, 156 (2006).

¹²¹ *Georgia*, 546 U.S. at 159.

¹²² *See Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011) (analyzing whether Title II of the ADA was violated and declining to address the remaining Georgia steps).

¹²³ *Id.* at 499.

¹²⁴ *Georgia*, 546 U.S. at 159.

violation of the Fourteenth Amendment to the U.S. Constitution.¹²⁵ Thus, her ADA Title II claims do not abrogate TTUHSC's sovereign immunity.

b. Pickett's § 1983 claims for monetary relief are barred by sovereign immunity.

To the extent Pickett seeks monetary relief against Defendants Drs. Cherry and Dr. Evans in their official capacities, it is well settled that sovereign immunity bars these claims,¹²⁶ so they must be dismissed.

c. Claims against Drs. Cherry and Evans in their official capacity should be dismissed.

Pickett sued Drs. Cherry and Evans in their official capacities. "A suit against an individual in his official capacity represents a method of pleading against an entity."¹²⁷ Official-capacity suits are nothing more than a "way of pleading an action against an entity of which an officer is an agent."¹²⁸

¹²⁵ *Dottin v. Tex. Dep't of Criminal Justice*, 627 F. App'x 397, 398 (5th Cir. 2015) ("Dottin has not alleged a valid discrimination claim under Title II. Nor has she shown how TDCJ's conduct implicates the Fourteenth Amendment's protections. See *United States v. Georgia*, 546 U.S. 151, 159 (2006) (stating that, when deciding whether Title II of the ADA abrogates a state's sovereign immunity, a court should consider whether the State's alleged conduct violated Title II, and whether the alleged misconduct also amounts to a violation of the Fourteenth Amendment). Thus, Dottin has not alleged a retaliation claim sufficient to overcome the sovereign immunity of the State of Texas.").

¹²⁶ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (Eleventh Amendment bars state law claims brought in federal court); *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 393 (5th Cir. 2015); *Aguilar v. Texas Dep't of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998).

¹²⁷ *Lehmann v. Hill Cty.*, No. 09-086, 2009 U.S. Dist. LEXIS 136409, 2009 WL 10669158, at *1 (W.D. Tex. June 24, 2009)("[W]hen a suit is brought against an entity and an individual in his official capacity, it is proper to dismiss the suit against the individual in his official capacity, leaving the entity as a defendant."); See, e.g., *J.D. v. Georgetown Indep. Sch. Dist.*, A-1-CA-717 LY, 2011 U.S. Dist. LEXIS 79335, at *9-10 (W.D. Tex. July 21, 2011) (dismissing Section 504 claims brought against school board president in his official capacity as redundant of suit against school board).

¹²⁸ *Id.*; see also *Derischebourg v. Clark*, No. 15-1712, 2016 WL 98617, at *8 (E.D. La. Jan. 8, 2016); *Petroplex Int'l, LLC v. St. James Par.*, No. 15-140, 2015 WL 6134097, at *9 (E.D. La. Oct. 19, 2015). This rule applies in the context of ADA claims as well as claims under the Rehabilitation Act. *Jenkins v. Bd. of Educ. of Houston Indep. Sch. Dist.*, 937 F. Supp. 608, 613 (S.D. Tex. 1996) (dismissing the plaintiff's official capacity claims

All allegations of Drs. Cherry and Evans's conduct in connection with Pickett's ADA and RA claims took place while they were employees of TTUHSC and were functioning in their official capacities for TTUHSC. Because an official capacity suit against the TTUHSC Defendants is essentially a suit against TTUHSC, and TTUHSC has been named as a defendant in this matter, Pickett cannot maintain official capacity claims against the TTUHSC Defendants under any theories asserted.¹²⁹

PRAYER

For all the reasons stated above, Defendants TTUHSC, Dr. Cherry and Dr. Evans respectfully request this Court dismiss Pickett's lawsuit for failure to state a claim.

Respectfully submitted,

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against employees of the school district under the ADA where the school district was already a defendant); *Stevenson v. Hous. Auth. of the City of Austin*, No. 09-083, 2009 WL 10669236, at *2 (W.D. Tex. Apr. 27, 2009); *Delouise v. Iberville Par. Sch. Bd.*, 8 F. Supp. 3d 789, 807 (M.D. La. 2014) (citing *J.D. v. Georgetown Indep. Sch. Dist.*, No. 10-717, 2011 WL 2971284, at *4 (W.D. Tex. July 21, 2011)).

¹²⁹ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served electronically through the Court's Electronic Case File Notification on this the 22nd day of January 2021, to:

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