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COUNSEL FOR APPELLANT

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

AMY PICKETT,
Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER; BARBARA 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,
Defendant.

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**DEFENDANT’S OBJECTIONS TO FINDINGS, CONCLUSIONS AND
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

TO THE HONORABLE JUDGE JAMES WESLEY HENDRIX:

Defendants Texas Tech University Health Sciences Center (TTUHSC), Barbara Cherry, and Michael Evans file these Objections to the Findings, Conclusions, and Recommendation (FCR) of the United States Magistrate Judge, Dkt. 28. Defendants respectfully assert five specific objections to the FCR, and show the Court as follows:

INTRODUCTION

The facts underlying former TTUHSC student and Plaintiff Amy Pickett’s claims are well-recounted in the FCR, and Defendants only highlight certain facts as necessary to assert their objections. Pickett alleges that her qualifying disability, Attention Deficit Hyperactive Disorder (ADHD), was brought to the attention of TTUHSC and accommodated through a Letter of Accommodation (LOA) including “extended time on tests, an alternative, quiet test environment with reduced distractions and note-taking assistance through the provision of copies of the class lecture power point or professor’s lecture notes.” Dkt. 1 ¶ 21. But it was only after noting numerous

deficiencies in Pickett's academic performance unrelated to her claimed disability that she was ultimately dismissed from TTUHSC's Family Nurse Practitioner (FNP) and Doctor of Nursing Practice (DNP) programs. Pickett concedes that she submitted a paper 30 hours late and that she received a 62 on an exam for which she had been given extra time to take, even beyond what her accommodation required. Dkt. 1 ¶¶ 34, 51; Dkt. 28 at pp. 3, 4.

The Complaint alleges claims under the Rehabilitation Act (RA), Title II of the Americans with Disabilities Act (ADA), and claims under 42 U.S.C. § 1983 for the denial of procedural and substantive due process guaranteed by the Fourteenth Amendment to the U.S. Constitution. Dkt. 1 at pp. 13–21. In response, Defendants filed their Motion to Dismiss and Brief in Support of Motion to Dismiss Plaintiff's Original Complaint, arguing that Rule 12(b)(1) bars the Court from exercising subject-matter jurisdiction over some of Pickett's claims and that any remaining causes of action should be dismissed under Rule 12(b)(6) because they fail to state a claim. *See* Dkts. 11, 12. The FCR recommends dismissing the disability harassment claim and the procedural and substantive due process claims against Drs. Evans and Cherry in their individual capacities pursuant to qualified immunity. *See* Dkt. 28 at 35–39. The FCR also recommends dismissing the failure-to-accommodate and disability-discrimination claims based on the start time of the October 2, 2018, exam, and alleged failure to allow a retake or substitute grade. *Id.* at 18, 21. Defendant does not object to these findings. And Defendant does not object to the recommendation not to dismiss claims for prospective injunctive relief against Cherry and Evans in their official capacity for violation of the ADA under *Ex parte Young*. *Id.* at pp.39–41.

Rather, Defendant objects to the FCR to the extent it recommends maintaining: (1) RA claims for failure to accommodate; (2) RA claims for disability discrimination [*id.* at p. 18]; (3) subject-matter jurisdiction over Pickett's Title II claim as to TTUHSC [*id.* at pp. 33–35 & n.21]; (4) Pickett's § 1983 claims against Cherry and Evans in their official capacities after finding no cognizable violation

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of procedural due process, and not addressing Defendants' argument that Pickett fails to plausibly allege a violation of substantive due process [*id.* at p. 39 n.23]; and (5) damages claims against Defendants Evans and Cherry in their official capacities [*id.* at p. 41 n.24].

ARGUMENT

A. Standard of Review.

Federal Rule of Civil Procedure 72(b) requires a district court to review *de novo* the portions of a magistrate judge's recommendation regarding dispositive motions to which the nonmovant has properly objected. Fed. R. Civ. P. 72(b). Based on its review, the district court may "accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*

When considering a motion pursuant to Rule 12(b)(6), the Court must accept specific factual allegations in the pleadings as true. Nonetheless, a plaintiff must plead "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). The "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully" and requires the plaintiff to allege facts "that allow [] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When the court lacks the statutory or constitutional power to adjudicate a case, the case is properly dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).
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(5th Cir. 2001). “Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.” *Id.*

Under a Rule 12(b)(1) jurisdictional challenge, the Court may consider any of the following: “(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Robinson v. TCI/US West Commc’ns Inc.*, 117 F.3d 900, 904 (5th Cir. 1997). “A ‘factual attack,’ . . . challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.” *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980) (citing *Mortensen v. First Federal Savings & Loan Ass’n*, 549 F.2d 884, 891–92 (3d Cir. 1977)).

B. Objection: Pickett has not plausibly alleged a failure-to-accommodate claim under the Rehabilitation Act because her pleadings show she cannot satisfy the sole-causation standard.

Rejecting Pickett’s claims regarding some causes of her dismissal but accepting her claims as plausible for other causes of her dismissal is fundamentally at odds with the sole-causation requirement under the RA. The existence of multiple explanations for poor grades, any of which is not due to the plaintiff’s disability, negates the RA’s sole-cause requirement. *Shah v. Univ. of Tex. Sw. Med. Sch.*, 54 F. Supp. 3d 681, 704–05 (N.D. Tex. 2014) (citing *Maples v. Univ. of Tex. Med. Branch at Galveston*, 524 F. App’x 93, 95 (5th Cir. 2013) (per curiam)). In *Shah*, the district court dismissed a former medical student’s RA claim because it found that the student’s complaint stated multiple causes regarding his dismissal from the academic program because grading was due to animus based on plaintiff’s race, and not a qualifying disability.

Pickett has not stated a claim for failure to accommodate under the RA because the existence of multiple, legitimate causes for her academic dismissal in her Complaint defeats her claim since she cannot establish that her disability was the **sole** cause of her dismissal. Not only does the FCR find

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that Pickett's poor performance on the October 2, 2018, exam was not caused by a failure to accommodate, Dkt. 28 at 18, Pickett's own complaint concedes that she turned in a paper in another course 30 hours late and she did not allege that she had asked for an extension or that any failure to accommodate caused her to turn the paper in 30 hours late, as her Letter of Accommodation (LOA) only allowed her extended time to take tests and not more time to submit paper assignments. Dkt. 1 ¶¶ 21, 34, 51. That the syllabus entitled her to only a one-letter-grade step down for papers submitted a day late is a red herring because her paper was late by more than a day. The Court cannot find that these causes of her performance, which were untethered to disability discrimination, factored into her academic dismissal on the one hand while finding she states a plausible claim for sole cause under the RA on the other hand. *See Shah*, 54 F. Supp. 3d at 704–05. The Court should dismiss Pickett's RA claims for failure to state a claim under Rule 12(b)(6) because the pleadings concede multiple causes of her dismissal unrelated to her disability.

Defendants also object that the FCR takes an overly specific approach by examining each discrete request under a failure-to-accommodate theory rather than examining the question holistically: did TTUSHC engage in an interactive process and fail to offer reasonable accommodations? Inherent in the statutory requirement of Defendants to provide "reasonable accommodation," is that the plaintiff has the burden to show that "the disability and its consequential limitations were known by the entity providing public services." *Windham v. Harris County, Tex.*, 875 F.3d 229, 236 (5th Cir. 2017). Under this approach, a university could satisfy its statutory obligations by providing some reasonable accommodations but not others—which a request-by-request analysis tends to ignore. *See id.*

Defendants *did* offer reasonable accommodations—even more than what was requested. *See* Dkt. 28 at 15 (accommodating later start times and extra time). But even this approach did not satisfy Pickett, and as the FCR acknowledged, Defendants could not provide accommodations when they

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were not aware what the limitations were or how they could accommodate them. *See* Dkt. 28 at p. 16 (citing *Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 315 (5th Cir. 2017)). By parsing each request and finding some proper but others not, the Court would take an approach that is necessarily inconsistent with the RA's sole-cause requirement and heightens the burden for a covered entity to provide accommodations that are beyond the reasonableness baseline. *See Windham*, 875 F.3d at 236; *Shah*, 54 F. Supp. 3d at 704–05.

C. Objection: Pickett has not plausibly alleged a disability-discrimination claim under the Rehabilitation Act because her pleadings show she cannot satisfy the sole-causation standard.

For similar reasons to Defendant's objection regarding the RA failure-to-accommodate claim, Defendants also object to the finding that Pickett states a plausible discrimination claim under the RA. A disability discrimination claim requires the plaintiff to demonstrate that the exclusion from the benefits of the program is solely because of her disability. *Shaikh v. Tex. A&M Univ. Coll. of Med.*, 739 F. App'x 215, 222 (5th Cir. 2018). Although *Shaikh* held that a valid claim could be stated if the disability indirectly caused the exclusion, plaintiffs are still required to show that the disability's effects played some part in the student's exclusion from the program. *See id.* The allegations in Pickett's Complaint do not support the reasonable inference that TTUHSC took adverse actions against her *solely* because of a disability under this standard. Turning in a paper 30 hours late with no explanation of how the disability caused the tardiness is itself a legitimate basis for giving a student a low score. Dkt. 1 ¶¶ 34, 51. And with this unaddressed reason for the low score in mind, no plausible cause of action is alleged under the RA and that claim should be dismissed. *See Windham*, 875 F.3d at 236; *Shah*, 54 F. Supp. 3d at 704–05.

The FCR appears to conflate both causes of action for failure to accommodate and discrimination in its exclusion section and bases its findings as to each on the same set of facts. Dkt. 28 at pp. 19–21. Discrimination under the RA would require that the grader scored the student lower

purely because of the disability, which is admittedly not the case here. *See* Dkt. 1 ¶¶ 34, 51. Further, if TTUHSC erroneously believed Pickett had falsified clinic hours, Pickett's complaint does not plead how this is connected to her disability. Thus, yet another cause of her dismissal is conceded that has no connection to her claimed disability; in total, Pickett's Complaint contains three independent causes of her poor academic performance that make it completely implausible that her dismissal was solely due to her disability: (1) the alleged refusal to allow a retake/regrade of the October 2, 2018, exam she started late, Dkt. 28 at p. 18; (2) turning in her paper 30 hours late, *id.* at p. 20; and (3) an allegedly false accusation regarding failure to complete clinical hours, *id.* *Cf. Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991) ("even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason"). Just one of these independent causes is enough to defeat Pickett's RA claim under the sole-cause standard. With three independent bases for the academic dismissal stated in the Complaint, any result where the RA claim is maintained would not comport with the rules requiring Pickett to plausibly allege facts creating a reasonable inference that her exclusion was solely caused by her disability. *See Iqbal*, 556 U.S. at 678; *Shah*, 54 F. Supp. 3d at 704–05 (citing *Maples*, 524 F. App'x at 95).

D. Objection: The Court does not have subject-matter jurisdiction over Pickett's Title II claims because sovereign immunity is not validly abrogated under the Fifth Circuit's *United States v. Georgia* jurisprudence.

The Court should abstain from exercising jurisdiction over TTUHSC as to Pickett's Title II ADA claim for at least three reasons: (1) Title II is not a valid abrogation of sovereign immunity under binding Fifth Circuit precedent; (2) Pickett did not establish a violation of Title II under *United States v. Georgia*'s first prong; and (3) the abrogation is not "otherwise valid" because disability discrimination in public primary schools does not implicate the same protected interests as disability discrimination

in graduate education. *See* 546 U.S. 151, 159 (2006).¹ Further, in deciding its jurisdiction, the Court should consider the evidence attached to Defendants’ 12(b)(1) motion as a factual attack in its *Georgia* analysis. *See Menchaca*, 613 F.2d at 511 (citing *Mortensen*, 549 F.2d at 891–92 (“A ‘factual attack,’ . . . challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.”); *see also Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (“Subject-matter jurisdiction can never be waived or forfeited.”)).

1. Binding precedent mandates dismissal of the Title II claim for lack of subject-matter jurisdiction.

Footnote 21 of the FCR cites *Reickenbacker v. Foster*—a Fifth Circuit case holding that Title II is not a valid abrogation of sovereign immunity and which remains binding precedent on this Court. Dkt 28 at pp. 33–34 n.21 (citing 274 F.3d 974 (5th Cir. 2001)). The Fifth Circuit recently reiterated this holding in *Block v. Tex. Bd. of Law Examiners* and did not take the opportunity to overrule *Reickenbacker*. 952 F.3d 613, 617 (5th Cir. 2020) (citing 274 F.3d at 983). In the absence of a fundamental right being implicated, this Court is not empowered to disregard this precedent and establish subject-matter jurisdiction. The Texas Supreme Court recently held that a student does not have a protected liberty interest when a graduate education program dismisses the student on academic grounds under the Texas Constitution. *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 907 (Tex. 2021) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972)); *see also Operation Rescue—Nat’l v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 975 S.W.2d 546, 559 (Tex. 1998) (Protections under the Texas Constitution are generally regarded by Texas state courts as coterminous with their federal analogs unless a broader protection is evident from “the text, history, and purposes of” the Texas

¹ Because the FCR finds that Pickett does not allege a direct violation of the Fourteenth Amendment, to satisfy the test in *Georgia* and maintain jurisdiction over Pickett’s Title II claim as to Defendant TTUHSC, the Court must find: (1) Pickett alleged conduct that violates Title II; and (2) if the conduct violates Title II, but not the Fourteenth Amendment, Congress’s abrogation of immunity is “nevertheless valid.” 546 U.S. at 159.

Constitution.).

The FCR recognizes that Pickett does not establish that she has a fundamental right in her continued graduate education. Dkt. 28 at p. 27. Accordingly, no fundamental right is implicated and the Court should dismiss Pickett's Title II claims against TTUHSC for lack of subject-matter jurisdiction. *See Block v. Tex. Bd. of Law Examiners*, 952 F.3d 613, 617 (5th Cir. 2020) (citing *Reickenbacker*, 274 F.3d at 983) (*Reickenbacker* is only overruled to the extent a fundamental right is implicated).

2. Pickett did not establish a violation of Title II under *Georgia*.

The FCR found that Defendants' attachments could not be considered for the purposes of deciding their 12(b)(6) motion, but the Court may, and should, consider these attachments to resolve the question of the Court's subject-matter jurisdiction under Rule 12(b)(1). *See Menchaca*, 613 F.2d at 511; *Gonzalez*, 565 U.S. at 141. 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." 42 U.S.C. §§ 12131(1), 12132. "To establish a claim under [Title II] '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.'" *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)). The third element of a Title II claim is analyzed under the "motivating factor" test. *Pinkerton v. Spellings*, 529 F.3d 513, 516–19 (5th Cir. 2008) (per curiam).

Pickett has not established the subject-matter jurisdiction of this Court under *Georgia* because she has not shown that Defendants violated Title II. Under the first step of the *Georgia* analysis, the

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Court analyzes whether the plaintiff alleges conduct that violates Title II, *Block*, 952 F.3d at 617–18, and since the *Georgia* test is used to ascertain whether sovereign immunity is validly abrogated, subject-matter jurisdiction is implicated under Rule 12(b)(1) and the Court can properly consider evidence attached to the motion. *See Menchaca*, 613 F.2d at 511. The documentary evidence and her Complaint showed that the only accommodation Pickett requested was given to her—extra time on exams. App. 4, Ex. C to Dkt. 1; Dkt. 1 ¶ 21. Because the FCR premised its findings that Pickett plausibly alleged violations of the ADA and RA on her note-taking assistance allegation and the allegation that Dr. Crenshaw did not agree to modify her deadline, accommodations that were not requested nor listed in her LOA, the Court should find that the documentary evidence attached to the motions and responses negates this finding. App. 6, Dkt. 13.1, Ex. 1 to Pl.’s Resp. to Defs.’ Mot. to Dismiss; Dkt. 1 ¶¶ 21, 27, 28. As the FCR states, “TTUHSC cannot be liable for failing to provide accommodations Pickett did not request.” Dkt. 28 at 16 (citing *Jenkins*, 487 F.3d at 315).

And while Pickett might premise her disability discrimination claim on conclusory allegations that certain requirements applied to her were not applied to other non-disabled students, her Complaint does not allege who these students are or that the other students were similarly situated to herself. Dkt. 1 ¶¶ 37; *see Frame v. City of Arlington*, 657 F.3d 215, 231 (5th Cir. 2011) (disability-discrimination claims under Title II are stated when a benefit is conferred upon non-disabled persons but unnecessarily denied to similarly situated persons with disabilities). Pickett admits that her paper deadline for the 6201 course had already been extended and she took an Incomplete in the course—circumstances she does not allege applied to other students—when she submitted the paper 30 hours late. Dkt. 1 ¶¶ 7, 27, 29. Accordingly, no violation of Title II has been plausibly alleged under either the failure-to-accommodate or disability-discrimination theories.

3. Title II is not valid abrogation legislation under *City of Boerne v. Flores*.

The Court must decide whether Title II is valid enforcement legislation under § 5 of the Fourteenth Amendment to the U.S. Constitution in order to find that it has subject-matter jurisdiction over Pickett's claims only if it finds that Pickett carried her burden on the first *Georgia* prong—that Pickett plausibly alleges a violation of Title II. *Block*, 952 F.3d at 617–18. The FCR recommends that, even if TTUHSC has not violated the Fourteenth Amendment directly, the abrogation of immunity under Title II is otherwise valid under the Supreme Court's test in *Boerne*. Dkt. 28 at pp. 28–35. Under this test, courts consider whether the legislation “exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), *superseded by statute as stated in Holt v. Hobbs*, 574 U.S. 352, 357 (2015)). The test requires the Court to examine the precise constitutional right Congress sought to protect by enacting Title II, whether a “history and pattern of constitutional violations” precipitated the remedy enacted, and whether the means adopted are congruent and proportional to the wrong Congress sought to correct. *Id.* at 521.

Title II is not congruent and proportional § 5 legislation when applied to the purported constitutional problem of discriminatory grading based on disability present in graduate education. *See Carten v. Kent St. Univ.*, 282 F.3d 391, 394–95 (6th Cir. 2002) (citing *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001)); *Popovich v. Cuyahoga Cnty. Court of Common Pleas, Domestic Rels. Div.*, 376 F.3d 808, 811 (6th Cir. 2002) (en banc) (Title II is not valid abrogation legislation as to graduate student's disability-discrimination claim); *Garvia v. S.U.N.Y. Health Scis. Cent. of Brooklyn*, 280 F.3d 98, 110, 112 (2d Cir. 2001) (medical student's Title II claim for discriminatory dismissal could not lie under § 5 analysis); *cf. Guttman v. Khalsa*, 669 F.3d 1101, 1119 (10th Cir. 2012) (Title II is not a valid abrogation as to disability discrimination in the realm of professional licensing); *but see Constantine v. Rectors &*

Visitors of George Mason Univ., 411 F.3d 474, 486–90 (4th Cir. 2005) (Title II validly abrogates sovereign
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immunity for law student's disability discrimination claim). *Lane* itself does not mention graduate education—it cites the regrettable and extensive history of discrimination and exclusion suffered by disabled children in primary public school systems. 541 U.S. at 525 & n.12 (citing *Robertson v. Granite City Cmty Unit Sch. Dist. No. 9*, 684 F. Supp. 1002 (S.D. Ill.1988) (elementary-school); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal.1986) (kindergarten); *N.Y. State Assn. for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487, 504 (E.D.N.Y.1979) (segregation); *Mills v. Bd. of Ed. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972) (exclusion from public school system)).

To satisfy *Boerne*'s second prong, *Bowers v. NCAA*, *Toledo v. Sanchez*, *Constantine*, and *Association for Disabled Americans, Inc. v. Fla. Int'l Univ* rely on a history of disability discrimination in primary schools, but applying that history to the context of graduate education both broadens the scope of the constitutional problem in question based on circumstances not before the Court and applies an incongruent history regarding a different issue. *See* 475 F.3d 524, 554 (3d Cir. 2007); 454 F.3d 24, 36–39 (1st Cir. 2006) (citing “a widespread pattern of states unconstitutionally excluding disabled *children* from public education”) (emphasis added); 411 F.3d at 486–90; 405 F.3d 954, 958 (11th Cir. 2005). Children in public primary schools, unlike adults pursuing graduate degrees, undoubtedly have greater constitutional interests at stake than adults pursuing graduate education since children are generally required by law to be present in the school *See Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954) (“In these days, it is doubtful that any *child* may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”) (emphasis added).

Graduate education is more analogous to the professional licensing services analyzed in *Guttman* than it is to a child's mandatory primary education; *Guttman* is also the most recent circuit opinion addressing the *Boerne* question cited in the FCR. Because *Guttman* is more factually analogous

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and more recent, it should be the more persuasive authority on the outcome in this case. *Cf.* 669 F.3d at 1119. And since no pattern or history of disability discrimination in graduate education is demonstrated, Title II is not a valid abrogation of sovereign immunity and the Court should dismiss the Title II claims as to TTUHSC for lack of subject-matter jurisdiction.

E. Objection: Defendants Cherry and Evans, in their official capacities, *do* seek dismissal of the § 1983 claims against them for injunctive relief by arguing Pickett fails to state a claim.

Defendants specified that qualified immunity applies to Cherry and Evans in their individual capacities, but this does not mean Defendants forfeit argument on whether a claim against them in their official capacities should go forward under § 1983. If Pickett fails to state a claim for a violation of procedural or substantive due process, there is no violation of § 1983 to enjoin as to the individual defendants and therefore no claim for prospective injunctive relief under *Ex parte Young*. Defendants argued in pages 13 to 15 (sections 2 and 3) of the Brief in Support that no plausible claim exists as to whether Cherry and Evans violated Pickett's due process rights, and this argument for dismissal applies whether they are sued in their individual *or* official capacities. *See* Dkt. 12 at pp. 13–15. The FCR found on page 37 that Pickett “has not stated a cognizable procedural due process claim.” Dkt. 28 at 37 (citing *Pearson*, 555 U.S. 223, 232 (2009); *Aguirre v. City of San Antonio*, 995 F.3d 395, 406 (5th Cir. 2021)). And the FCR analyzed Pickett's possible liberty and property interests in the context of its *United States v. Georgia* analysis, but did not decide whether the Complaint stated a claim in response to Defendants' arguments on these points. Ultimately, the Court should dismiss the procedural and substantive due process claims for injunctive relief against Cherry and Evans in their official capacities for the reasons stated in Defendant's Brief in Support of dismissal. *See* Dkt. 12 at pp. 13–15. Or, alternatively, the Court should issue an opinion as to why those claims are not subject to dismissal under Rule 12(b)(6).

1. 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.” *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978). This is because educational institutions “should not be weighted down with formalized procedural requirements imposed by actors estranged from the academic environment.” *Davis v. Mann*, 882 F.2d 967, 974 (5th Cir. 1989). Adverse academic actions only require “minimum procedures of notice.” *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). The Constitution does not require a hearing or the right to appeal. *Id.* 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. *See, e.g., Horowitz*, 435 U.S. at 89–90; *Wheeler v. Miller*, 168 F.3d 241, 250 (5th Cir. 1999). As such, the Constitution only requires minimum procedures of notice. *Davis*, 882 at 974. 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. Dkt. 1 ¶ 58. Pickett was aware that she made “C”s in two courses. *Id.* ¶¶ 42, 56. Thus, Pickett was on notice that she could be dismissed from the program. *Shah v. Univ. of Tex. Sw. Med. Sch. (Shah II)*, 129 F. Supp. 3d 480, 500 (N.D. Tex. 2015) (finding a medical school policy was sufficient to put a student on notice that poor academic performance could result in dismissal from the program). Second, after she received the letter informing her that she was being dismissed from the program, Pickett “timely appealed [her] dismissal.” Dkt. 1 at ¶ 63. Third, Pickett spoke with Dr. Cherry who provided her with the path whereby she could maintain enrollment in the School of Nursing, but Pickett did not timely respond with a decision. Dkt. 1 at

¶ 66. 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." *Shah*, 54 F. Supp. 3d at 695 n.15; *Aragona v. Berry*, No. 3:10-CV-1610-G, 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) Pickett's factual allegations, stripped of conclusions confirm that she was afforded more procedural protections than are required by the Constitution.

2. 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." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). Courts that have addressed the issue, almost universally, uphold "the academic decisions of public universities when challenged on substantive due process grounds." *Shah*, 54 F. Supp. 3d at 696 (citing cases). 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." *Ewing*, 474 U.S. at 225. 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.

Without any plausible supporting facts, Pickett concludes that the conduct of Drs. Cherry and Evans was "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." Dkt. 1 at ¶ 99. Her own allegations negate this. Pickett readily concedes that she made "C"s in two courses, was notified that she was being dismissed, filed an appeal, and was given a path to continue perusing her studies. *Id.* ¶¶ 57, 58, 60, 63, 66. 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.” *See Ewing*, 474 U.S. at 228. 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, Pickett does not state a plausible claim for violation of her substantive due process rights.

F. Objection: Claims for damages against Evans and Cherry in their official capacities may not lie under *Ex parte Young*.

The *Ex parte Young* doctrine allows for a limited exception to the States' sovereign immunity under the Eleventh Amendment for claims seeking prospective injunctive relief to remedy an ongoing violation of federal law—it does not allow claims for damages. The FCR finds that it would be “inappropriate” to dismiss Pickett's claims for damages against Cherry and Evans in their official capacities. Dkt. 28 at p. 41 n.24. Lawsuits against state employees in their official capacities are subject to dismissal on sovereign-immunity grounds. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985). The Eleventh Amendment continues to “bar a damages action against a State in federal court” and “[t]his bar remains in effect when State officials are sued for damages in their official capacity.” *Id.* at 169. Suits under *Ex parte Young* “appl[y] only to prospective relief[.]” *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Accordingly, the Court should find that no damages claim may lie against Defendants Evans and Cherry in their official capacities.

CONCLUSION & PRAYER

Defendants pray that the Court sustain the foregoing objections, dismiss Pickett's Rehabilitation Act and 42 U.S.C. § 1983 claims in their totality,² dismiss Pickett's Title II ADA claims

² Because the FCR found that Defendants Evans and Cherry in their official capacities did not make a Rule 12(b)(6) argument regarding claims for prospective injunctive relief under 42 U.S.C. § 1983, Defendants pray in the alternative that the Court address Defendants' arguments in the first instance Civil Action No. 5:20-CV-00232-H-BQ

as to Defendant TTUHSC for lack of subject-matter jurisdiction, find that any remaining claim under *Ex parte Young* is limited to prospective injunctive relief, and grant Defendants any further relief to which they may be justly entitled.

Date: August 13, 2021

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN COWLES
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief for General Litigation Division

/s/ Cory A. Scanlon
CORY A. SCANLON
State Bar No. 24104599
Assistant Attorney General
General Litigation Division
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone (512) 463-2120
Facsimile: (512) 320-0667
cory.scanlon@oag.texas.gov

COUNSEL FOR DEFENDANTS

and issue an opinion as to why Pickett's constitutional claims under § 1983 do not fail to state a plausible claim for relief under Rule 12(b)(6).

APPENDIX

Appendix A

Exhibit C to Def.'s Brief in Support of Mot. to Dismiss Pl.'s Orig. Compl., Dkt. 12.3

Appendix B

Exhibit 1 to Pl.'s Resp. to Def.'s Mot. to Dismiss, Dkt. 13.1

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, a true and correct copy of the foregoing document was served via Certified Mail, Return Receipt Requested as follows:

Amy Pickett
PO Box 543
Buffalo Gap, Texas 79508
apickett1010@yahoo.com
(682) 258-4558

/s/ Cory A. Scanlon
CORY A. SCANLON
Assistant Attorney General