

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

AMY PICKETT,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	
TEXAS TECH UNIVERSITY HEALTH	§	Civil Action No. 5:20-CV-00232-H-BQ
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 Nursing,	§	
<i>Defendants.</i>	§	

**DEFENDANTS’ PARTIAL MOTION TO DISMISS PLAINTIFF’S COMPLAINT
PURSUANT TO RULE 12(c) AND BRIEF IN SUPPORT**

Defendants Texas Tech University Health Sciences Center (“TTUHSC”), 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, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure respectfully show:

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INTRODUCTION

Plaintiff has failed to state a substantive due process claim because she has not implicated a constitutionally protected property or liberty interest. As the Fifth Circuit recently noted, neither the United States Supreme Court nor the Fifth Circuit has recognized a constitutionally protected property interest in continuing secondary education. Plaintiff's failure to plead a protected property interest requires dismissal of her substantive due process claim pursuant to Rule 12(c).

Additionally, the Fifth Circuit's recent opinion addressing Plaintiff's Americans with Disabilities Act ("ADA") Title II claims stated that it was for this Court to decide "in the first instance whether Pickett's claims implicate the Fourteenth Amendment at all." Dkt. 46, at 33. As a result, the Fifth Circuit ended its analysis of Defendants' asserted sovereign immunity from Plaintiff's ADA claims there, without deciding the second or third factors of the *United States v. Georgia*¹ test.

Defendants seek a ruling on this issue now because Plaintiff's ADA Title II claims fail to implicate the Fourteenth Amendment at all. Since Congress's purported abrogation of sovereign immunity for the conduct targeted by Plaintiff's Title II claims is not "nevertheless valid," Plaintiff's ADA claims should be dismissed as barred by sovereign immunity.²

FACTUAL BACKGROUND

I. PLAINTIFF'S COMPLAINT

Plaintiff was a Texas Tech University Health Sciences Center student jointly enrolled in the Doctor of Nursing Practice ("DNP") and Family Nurse Practitioner ("FNP") programs. Plaintiff primarily took online courses. Compl. ¶ 15. Plaintiff has ADHD and obtained Letters of

¹ *United States v. Georgia*, 546 U.S. 151 (2006).

² Neither party has addressed the third *Georgia* factor in briefing to this Court. The magistrate judge did, *sua sponte*, address the third *Georgia* factor in his Report and Recommendation, but Defendants respectfully submit the analysis was flawed.

Accommodation from TTUHSC providing her with extended time on tests, a quiet test environment with reduced distractions, and note-taking assistance through professors providing copies of class lecture power point or lecture notes. Compl. ¶ 21. There was no accommodation approved related to written assignments. Compl. ¶¶ 18, 21. Plaintiff did not seek and did not receive accommodations related to anxiety. Compl. ¶¶ 18, 21.

Plaintiff complains that professors did not provide her with additional time to submit written assignments. Compl. ¶¶ 28, 34, 40. Plaintiff also asserts that on one occasion her extended test time accommodation was not initially provided, but that the problem was immediately rectified when Plaintiff alerted faculty to the issue. Compl. ¶¶ 45-48. At Plaintiff's request, she was also permitted to restart the exam later that morning, and she did not request any additional accommodations prior to taking the exam. Compl. ¶¶ 48-50. Plaintiff also alleges that the professors did not provide her with lecture notes. Compl. ¶ 26.

Michael Evans is the Dean of the School of Nursing, and Dr. Barbara Cherry is the Department Chair for the DNP program. Compl. ¶¶ 3, 4. Dean Evans sent Plaintiff a letter on December 18, 2018, indicating that the DNP Council had recommended that she be dismissed from the DNP program for academic reasons. Compl. ¶ 57. Dean Evans had the ability to reject, modify, or accept this recommendation, and he accepted the recommendation to dismiss Plaintiff from the DNP program. Compl. ¶ 59. However, in Pickett's view, she did not qualify for dismissal under any of the stated criteria. Plaintiff asserts that she did not meet the criteria for an academic dismissal. Compl. ¶ 60.

Plaintiff claims that she filed an appeal from her dismissal but does not provide information regarding the outcome of that appeal beyond that she did not believe TTUHSC responded to her appeal in a timely manner. Compl. ¶ 63. While her appeal was pending, Dr. Cherry offered to

permit Plaintiff to remain in either the DNP or FNP program, but not both at the same time. Compl. ¶ 66. Plaintiff refused this offer and did not respond by the indicated deadlines. Compl. ¶¶ 67-68.

Plaintiff asserts claims for disability discrimination and failure to accommodate claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (TTUHSC and Individual Defendants-Official Capacities); a Section 1983 Procedural Due Process claim (Individual Defendants in Individual and Official Capacities); and a Section 1983 substantive due process claim (Individual Defendants-Individual and Official Capacities).

II. PROCEDURAL HISTORY

This Court previously dismissed Plaintiff's procedural due process claim against Barbara Cherry and Michael Evans, ("Individual Defendants"), in their individual and official capacities, and all of Plaintiff's ADA Title II and Rehab Act failure to accommodate claims except (1) Plaintiff's advisor refusing to move assignment submission deadlines; and (2) professors failing to provide lecture notes. Dkt. 35 at 2; see also Dkt. 28 at 19, 21. This Court also dismissed the Section 1983 claims for monetary damages against the Individual Defendants in their official capacities. Dkt. 35 at 24.

The Fifth Circuit then dismissed Plaintiff's ADA Title II claims for failure-to-accommodate based on her advisor's refusal to modify deadlines for assignment feedback and for professors failing to provide notes against the Individual Defendants. Dkt. 46 at 24-25.

As a result, Plaintiff's only remaining claims are: 1) Rehabilitation Act and ADA Title II failure to accommodate by providing lecture notes and materials against TTUHSC; 2) Rehabilitation Act and ADA Title II disability discrimination claim against TTUHSC and Individual Defendants in their official capacities; and 3) a substantive due process claim for

injunctive relief against the Individual Defendants in their official capacities.³

The Fifth Circuit also held that this Court had not previously considered or decided whether Plaintiff had overcome Defendant’s asserted sovereign immunity from her ADA Title II claims by alleging a constitutionally protected property or liberty interest sufficient to establish a procedural due process or substantive due process claim, but on remand “the district court may consider in the first instance whether Pickett’s claims implicate the Fourteenth Amendment at all.” *Id.* Defendants assert that Plaintiff’s claims do not, and that her substantive due process and ADA Title II claims should therefore be dismissed pursuant to Federal Rule of Civil Procedure 12(c).

ARGUMENT

I. PLAINTIFF’S COMPLAINT.

“After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). “A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6).” *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). A Rule 12(c) motion can be filed after an answer. *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999). It is appropriate to raise sovereign immunity on a 12(c) motion. *See Hicks v. LeBlanc*, 832 F. App’x 836 (5th Cir. 2020).

The standard for Rule 12(c) motions for judgment on the pleadings is identical to the standard for Rule 12(b)(6) motions to dismiss for failure to state a claim. *See Doe*, 528 F.3d at 418. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

³ After this Court and the Fifth Circuit’s rulings on Defendants’ Motion to Dismiss, Plaintiff has no procedural due process claim and the Section 1983 monetary damages against the Individual Defendants in their official capacities is dismissed. However, there is some confusion as to what remains of the substantive due process claim. We submit that the claim against all Defendants should be dismissed for the reasons set forth in this motion.

This involves a two-step inquiry. *See Doe v. Robertson*, 751 F.3d 383, 387 (5th Cir. 2014). First, the court must identify the complaint’s well-pleaded factual content. *See id.* In doing so, the court must set aside “any unsupported legal conclusions,” the truth of which the court “cannot assume.” *Id.* at 388; *see also Ashcroft*, 556 U.S. at 681. Second, the court considers whether the remaining allegations “are sufficient to nudge the [plaintiffs] claim across the ‘plausibility’ threshold.” *Doe*, 751 F.3d at 390 (quoting *Ashcroft*, 556 U.S. at 678). In other words, the Court must consider whether it can reasonably infer from the complaint’s well-pleaded factual content “more than the mere possibility of misconduct.” *Ashcroft*, 556 U.S. at 679. This is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

In deciding the motion, the Court must limit its review to the face of the pleadings, accepting as true all well-pleaded facts and viewing them in the light most favorable to the plaintiff. *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006). However, the Court “will not ‘accept . . . as true conclusory allegations or unwarranted deductions of fact.’” *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 (5th Cir. 2002) (internal quotations omitted). While courts construe liberally pro se pleadings and briefs, “pro se litigants [are held] to the same standards as licensed attorneys and [courts] require them to comply with applicable laws and rules of procedure.” *Chambers v. State*, 261 S.W.3d 755, 757 (Tex. App. 2008), citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978).

II. PLAINTIFF’S CLAIMS FAIL BECAUSE SHE HAS NOT PLED A CONSTITUTIONALLY PROTECTED PROPERTY OR LIBERTY INTEREST.

A. Constitutionally Protected Interest is Required to State Either a Procedural Due Process or a Substantive Due Process Claim.

Plaintiff’s remaining Title II claims and substantive due process claim should be dismissed

because she does not have a constitutionally protected liberty or property interest in continuing her higher education.

The threshold requirement of any substantive or procedural due process claim is the government's deprivation of a liberty or property interest. "Before any substantive or procedural due-process rights attach, however, the citizen must have a liberty or property interest that is entitled to constitutional protection." *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 653 (Tex. 2022).

"The protections of the Due Process Clause, whether procedural or substantive, only apply to deprivations of constitutionally protected property or liberty interests. Therefore, if an individual does not have a constitutionally protected property or liberty interest, he or she cannot be deprived of due process and thus cannot maintain a § 1983 action." *Klingler v. Univ. of S. Miss., USM*, 612 F. App'x 222, 227 (5th Cir. 2015) (footnotes omitted).

i. Plaintiff Fails to Allege a Protected Property Interest to Support a Substantive Due Process Claim.

Plaintiff fails to allege a protected property interest to support a substantive due process claim. "Substantive due process analysis is appropriate only in cases in which the government arbitrarily abuses its power to deprive individuals of constitutionally protected rights," namely a constitutionally protected liberty or property interest. *Simi Inv. Co. v. Harris Cnty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000); *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988). "Substantive due process analysis," the Supreme Court has cautioned, "must begin with a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302 (1993). The alleged liberty interest must be "carefully formulat[ed]" and must be "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 721, 722 (1997). The Supreme Court has "always been reluctant to expand the concept of substantive due process." *Collins v. City of Harker Heights*,

Tex., 503 U.S. 115, 125 (1992). “The reach of substantive due process is limited, [] and it protects against only the most serious of governmental wrongs.” *Moore v. Dallas Indep. Sch. Dist.*, 557 F. Supp. 2d 755, 761 (N.D. Tex. 2008), *aff’d*, 370 F. App’x 455 (5th Cir. 2010) (citation omitted).

“Certainly the constitutional right to ‘substantive’ due process is no greater than the right to procedural due process.” *Hardy v. Univ. Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir. 1985) (quoting *Hardy v. Univ. Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir. 1985)). “While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution and the history of substantive due process counsels caution and restraint in recognizing such rights.” *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 909 (Tex. 2021) (cleaned up); *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring).

The Supreme Court declined to declare that education at any level is a fundamental right under Substantive Due Process, thereby limiting substantive due process for education altogether. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39, 59 (1973). The Court stated that education is “not among the rights afforded explicit protection” under the Constitution and that it could not “find any basis for saying that it is implicitly so protected.” *Id.* at 35. Therefore, Plaintiff’s substantive due process claim should be dismissed as a matter of law.

ii. Plaintiff Also Fails to Allege a Protected Property Interest Under Procedural Due Process to Support her Title II ADA Claims.

Likewise, Plaintiff fails to allege a protected property interest under procedural due process to support her Title II ADA claims. “The Supreme Court has adopted a two-step analysis to examine whether an individual’s procedural due process rights have been violated. The first question ‘asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were

constitutionally sufficient.” *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010) (quoting *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)).

“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). To determine whether a benefit rises to the level of an “entitlement” for purposes of due process, courts examine whether “an independent source such as state law” creates or defines such an entitlement. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (citations omitted). “[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Id.*

B. Neither the United States Supreme Court nor the Fifth Circuit Has Recognized a Constitutionally Protected Property or Liberty Interest in Continuing Higher Education.

Neither the United States Supreme Court nor the Fifth Circuit have recognized a constitutionally protected liberty or property interest in public higher education. *See* Dkt. 46; *see also Perez v. Tex. A & M Univ. at Corpus Christi*, 589 F. App’x 244, 248 (5th Cir. 2014). “To be entitled to the procedural protections of the Fourteenth Amendment, [Plaintiff] must . . . demonstrate that her dismissal from the school deprived her of either a ‘liberty’ or a ‘property’ interest.” *Id.* (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 82 (1978)).

Previously the Fifth Circuit has *assumed*, without deciding, that students have some type of protected interest that must be appropriately safeguarded prior to expulsion. *Eustice v. Tex. A&M Univ.*, No. 4:15-CV-03180, 2016 WL 8710444 (S.D. Tex. Sept. 30, 2016), *citing Shaboon v. Duncan*, 252 F.3d 722, 730 (5th Cir. 2001) (assuming, without deciding, that medical resident had protected interest in her position); *Davis v. Mann*, 882 F.2d 967, 973 (5th Cir. 1989) (assuming

the existence of a liberty or property interest and holding that dental resident received adequate process under Fourteenth Amendment); *Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150, 157 (5th Cir. 1961) (holding that there must be some notice and hearing before student expulsion from state college or university because students had interest in their college education).

The United States Supreme Court and Fifth Circuit have made a point to avoid determining whether a student possesses any property or liberty interest in continued education by his or her enrollment at the university. *See, e.g., Regents of Univ. of Mich.*, 474 U.S. at 222–23; *Smith v. Davis*, 507 F. App'x 359, 363 (5th Cir. 2013) (collecting cases). Instead, those cases have consistently held that the determination need not be reached because the plaintiff had been granted all the process due. *Id.*

“The courts have decided, however, that reputation alone is not a ‘liberty’ or ‘property’ interest sufficient to invoke due process protections.” *Eustice*, at *6, *citing Paul v. Davis*, 424 U.S. 693, 701 (1976). The allegation of injury to reputation does not by itself state a claim under Section 1983. *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). As the United States Supreme Court has observed, “[t]he words ‘liberty’ and ‘property’ as used in the Fourteenth Amendment do not . . . single out reputation . . . for special protection over and above other interests that may be protected by state law.” *Paul*, 424 U.S. at 701. “Rather, there must be a right or status previously recognized and subsequently altered or extinguished by state action...” *Id.* at 710–711.

Given that the United States Supreme Court and Fifth Circuit have never decided if a student has a protected property interest in higher education, this court should turn to state law. “[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Roth*, 408

U.S. at 577. Notably, the Texas Supreme Court recently held that “an academic dismissal from higher education carries insufficient stigma to implicate a protected liberty interest.” *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 903, 904 (Tex. 2021). The court of appeals incorrectly relied on *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995), in finding that plaintiff had a protected liberty interest, to which the Texas Supreme Court declared, “[t]his inquiry misunderstands the nature of the liberty analysis courts have employed in this area, which focuses on whether dismissal from a university interferes with the student’s liberty interest in his or her reputation and employability, not on whether *education* is a protected liberty interest.” *Tex. S. Univ.*, 620 S.W.3d at 905. (emphasis supplied).⁴ The Court continued by stating that “[i]n deciding whether a dismissal from government employment or education amounts to the deprivation of a liberty interest under the due process clause of the U.S. Constitution, the U.S. Supreme Court looks to whether the dismissal imposes a stigma.” *Id.* While not deciding if the student had a protected property interest in higher education, the Texas Supreme Court did note that “our Constitution does not recognize higher education as a fundamental right, [and the student’s] alleged property right does not fall within any substantive protection provided by the due course of law clause. *Id.* at 909. The Court cautioned that “[i]f the people of Texas want a fundamental right to higher education, they can create one by amending our Constitution. It is not our role as judges to adopt such a right for them. As a matter of Texas constitutional law, therefore, we decline to recognize substantive protections for educational rights that emanate implicitly from the due course of law clause.” *Id.* at 910.

⁴ In *Than*, the Texas Supreme Court held that a student has a constitutionally protected liberty interest in his graduate education that must be afforded procedural due process. 901 S.W.2d 926.

Other circuits have similarly held that a student's interest in continuing higher education is not a property interest protected by substantive due process. *See Doe v. Miami Univ.*, 882 F.3d 579, 598–99 (6th Cir. 2018) (noting that “As an initial matter, we note that the Supreme Court never has held that the interest in continued education at a public university constitutes a fundamental property or liberty interest that finds refuge in the substantive protections of the Due Process Clause.”); *see also Mauriello v. Univ. of Med. & Dentistry of N. J.*, 781 F.2d 46, 52 (3d Cir. 1986) (citing *Regents of Univ. of Mich.*, 474 U.S. at 229 (Powell, J., concurring)) (“We share Justice Powell’s doubt about the existence of such a substantive due process right in the circumstances here . . .”).

C. Plaintiff Does Not Have a Constitutionally Protected Liberty or Property Interest in Her Continuing Higher Education to Support Her Title II Claims.

Plaintiff’s Title II ADA claims do not allege a violation of the Fourteenth Amendment, and therefore do not pass muster under the second prong of the *Georgia* test. *See Perez*, 589 F. App’x at 248. Under the *Georgia* test, Title II claims are barred by sovereign immunity unless the plaintiff establishes (1) a violation of Title II and (2) the conduct that violates Title II also violates the Fourteenth Amendment; or (3) if the Title II violation does not directly violate the Fourteenth Amendment, Congress’s abrogation of immunity in the specific factual context is “nevertheless valid.” *Id.* This Court did not decide this prong as part of the prior motion to dismiss, but in line with the Fifth Circuit’s opinion in this case, TTUHSC requests that the Court do so now.

Plaintiff asserts that she has “a constitutionally protected property interest in [her] continued enrollment in [her] education in TTUHSC’s DNP and FNP programs.” Compl. ¶ 98. She also alleges that the amount of money that she has paid for her education strengthens her “claim to the interest.” *Id.* However, as this Court previously pointed out, Pickett has not cited any legal authority to support a “protectable property interest in higher education,” (Dkt. 28 at 26), as

the United States Supreme Court and Fifth Circuit have never recognized continued enrollment in higher education as a liberty or property interest.⁵ Plaintiff has not asserted a viable procedural due process claim, so whether Plaintiff's Title II claims also violate the Fourteenth Amendment rests on substantive due process. This Court should not assume that Plaintiff has any protected liberty or property rights to substantive due process because substantive due process rights are no greater than due process rights. *Hardy*, 759 F.2d at 1235. Since the United States Supreme Court and Fifth Circuit have not recognized such a right, this Court should turn to whether a protected property or liberty interest in higher education is recognized in Texas state law. It is not, since Plaintiff's claims involve an "academic" dismissal rather than a "disciplinary" action. *Tex. S. Univ.*, 620 S.W.3d at 906. "As a matter of Texas constitutional law, therefore, we decline to recognize substantive protections for educational rights that emanate implicitly from the due course of law clause." *Id.* at 910.

As such, Plaintiff's alleged ADA claims fail under *Georgia's* second prong because she does not possess the requisite property or liberty interest to continued enrollment in higher education at TTUHSC, and therefore has not alleged a violation of the Fourteenth Amendment.

III. PLAINTIFF'S TITLE II ADA CLAIMS DO NOT IMPLICATE THE FOURTEENTH AMENDMENT BECAUSE CONGRESS'S PURPORTED ABROGATION OF TTHUHSC'S SOVEREIGN IMMUNITY IS NOT NEVERTHELESS VALID.

Defendants are entitled to sovereign immunity under the third prong of the *Georgia* analysis because Congress's purported abrogation of TTUHSC's sovereign immunity is not nevertheless valid.

A. The Fifth Circuit Applies the *Boerne* Test as Set Out in *Pace*.

⁵ Plaintiff's alleged strengthened "claim to the interest" is similarly unfounded as the United States Supreme Court and Fifth Circuit have never held that spending "significant" amounts of money on a higher education creates a property or liberty interest in the money spent or in continued higher education.

The United States Supreme Court set out a test to determine whether Congress had exceeded its Section 5 enforcement powers in *Boerne v. Flores*, which has been applied in various contexts. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) (holding that Congress exceeded its Section 5 enforcement powers in enacting the Freedom Restoration Act); *see also Tenn. v. Lane*, 541 U.S. 509, 524 (2004) (holding that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment to enforce the Amendment's substantive guarantees.).⁶

The Fifth Circuit, along with other circuits, applies the following *Boerne* test when determining if Congress's abrogation of state sovereign immunity is nevertheless valid: “(1) The statute must contain an unequivocal statement of congressional intent to abrogate; (2) Congress must have identified a history and pattern of unconstitutional action by the states; and (3) the rights and remedies created by the statute must be congruent and proportional to the constitutional violation(s) Congress sought to remedy or prevent.” *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277 (5th Cir. 2005) (citing *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001)). “If these three requirements are satisfied, states are subject to federal jurisdiction in suits under the statute adopted pursuant to § 5, regardless of any absence of consent.” *Id.*

Given that the inquiry involves a broad range of contexts, the United States Supreme Court dictates that the inquiry be made on a “claim-by-claim basis.” *United States v. Georgia*, 546 U.S. 151, 159 (2006), *see also, Toledo v. Sanchez*, 454 F.3d 24, 35 (1st Cir. 2006) (observing that the “history of discrimination and the need for prophylaxis will vary greatly in these different

⁶ While *Lane* applied the *Boerne* test, *Lane* applied the test to a fundamental right of access to the courts. This is quite distinguishable from the case at hand because there is no fundamental right to education or continuing higher education.

contexts.”). “Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one . . .” *Lane*, 541 U.S. at 524, citing *City of Boerne*, 521 U.S. at 530. Therefore, there is no one-size-fits-all in the “nevertheless valid” test, and the Court must make an individual determination for each alleged claim.

The Fifth Circuit has never decided whether *Reickenbacker* was completely overruled by *Lane*; Defendants submit that it is not for Title II claims that do not implicate a fundamental constitutional right such as access to the courts. *See Block v. Tex. Bd. of L. Exam’rs.*, 952 F.3d 613, 617 (5th Cir. 2020); *see also Pace*, 403 F.3d 272.

In *Reickenbacker*, the Fifth Circuit held that Title II of the ADA does not validly abrogate state sovereign immunity because it failed the third prong of the *Boerne* test: Title II’s rights and remedies were not congruent and proportional to the alleged constitutional violation Congress sought to prevent. *Reickenbacker v. Foster*, 274 F.3d at 976, 983 (5th Cir. 2001). The Court emphasized that Title II contained more than “merely a prohibition on unconstitutional discrimination against the disabled,” but imposed affirmative accommodation obligations that far exceed the constitutional boundaries. *Id.* at 983. “Since the accommodation obligation imposed by Title II and § 504 of the Rehabilitation Act far exceeds that imposed by the Constitution, we cannot conclude that they are proportional and congruent to the legislative findings of unconstitutional discrimination against the disabled by the States.” *Id.*

Since the Fifth Circuit’s decision in *Reickenbacker*, the Supreme Court has held that the abrogation of sovereign immunity in Title II of the ADA is a valid exercise of congressional power to the extent that it “applies to the class of cases implicating the fundamental right of access to court,” *Lane*, 541 U.S. at 533–34, and “insofar as Title II creates a private cause of action for damages against the State for conduct that *actually* violates the Fourteenth Amendment.” *Georgia*,

546 U.S. at 159 (emphasis in original). Thus, the extent to which the Eleventh Amendment is abrogated under Title II of the ADA is not coextensive with all conduct actionable under the ADA; state sovereign immunity is abrogated only for conduct that also constitutes a violation of the Constitution. *Id.*

Several federal district courts have recognized that Fifth Circuit’s *Reickenbacker* holding has not been affected by *Lane*. See *Simmang v. Tex. Bd. of L. Exam’rs.*, 346 F. Supp. 2d 874, 883 (W.D. Tex. 2004) (“*Lane* involved a fundamental right, and this case does not. Accordingly, this Court is bound by the decision in *Reickenbacker*.”); see also *Glueck v. Nat’l Conf. of Bar Exam’rs.*, No. SA-17-CV-451-XR, 2017 WL 5147619, at *5 (W.D. Tex. Nov. 3, 2017) (concluding that “it is bound by the decision in *Reickenbacker* that the accommodation obligation imposed by Title II—as far as it relates to non-fundamental rights—exceeds that imposed by the Constitution and is not a valid abrogation of state sovereign immunity”).

The Western District of Texas has emphasized that *Lane*’s holding was “founded squarely on the *source* of the plaintiff’s encroached rights,” which were the First Amendment, Due Process Clause of the Fourteenth Amendment, and the Sixth Amendment, all of which are constitutional and fundamental rights. *Block v. Tex. Bd. of L. Exam’rs.*, No. 1-18-CV-386-LY, 2019 WL 433734, at *3 (W.D. Tex. Feb. 1, 2019), *report and recommendation adopted*, No. 1:18-CV-386-LY, 2019 WL 13254079 (W.D. Tex. Mar. 12, 2019), *aff’d as modified*, 952 F.3d 613 (5th Cir. 2020) holding that plaintiff did not allege conduct that violated Title II because being excused from state admission requirements were not “reasonable accommodations.”). The district court found that the “accommodation obligation imposed by Title II, as it relates to non-fundamental rights, exceeds that imposed by the Constitution and is not a valid abrogation of state sovereign immunity.” *Id.*

Likewise, the Northern District of Texas has held that absent a violation of constitutional rights, Title II does not validly waive a state's sovereign immunity. *See Zaragoza v. Dallas Cnty.*, No. CIV.A. 3:07-CV-1704-, 2009 WL 2030436, at *12 (N.D. Tex. July 13, 2009) ("Plaintiff has not demonstrated any violation of Lynch's constitutional rights. The ADA thus cannot abrogate UTMB's sovereign immunity in this case.").

Because Plaintiff's allegations do not implicate a fundamental constitutional right, this Court should follow *Reickenbacker* and dismiss Plaintiff's claims because she has not demonstrated that Congress's abrogation of state sovereign immunity was valid in the specific context of her asserted claims. Such an approach is further supported by other circuit courts of appeals that have similarly required all three steps of the *Boerne* inquiry in order to analyze the "particular right and class of state action at issue" to determine if sovereign immunity was validly abrogated given the backdrop of the plaintiff's specific, alleged violations of Title II. *See Guttman v. Khalsa*, 669 F.3d 1101, 1117 (10th Cir. 2012) (citing *Toledo v. Sanchez*, 454 F.3d 24, 35 (1st Cir. 2006)); *see also Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 103, 109, 110 (2d Cir. 2001) (applying all three steps and finding that "Title II in its entirety exceeds Congress's authority under § 5" when a medical student was dismissed from a state medical school for "repeated failure to successfully complete the first-year medical school curriculum").⁷

The Tenth Circuit recognized in *Guttman* that "Congress has never specified a longstanding pattern of disability discrimination in professional licensing, much less any irrational discrimination that rose to the level of a constitutional violation" for a medical doctor with a history of depression and post-traumatic stress disorder whose license was restricted as a "qualified

⁷ Other circuits have found that *Lane* resolves the issue of whether Title II is a valid exercise of Section 5 authority, but the Fifth Circuit is not bound by any such decision. *See Klingler v. Dir., Dep't of Revenue, State of Mo.*, 455 F.3d 888, 896 (8th Cir. 2006); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005); *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005).

medical license” and subsequently revoked due to his ongoing mental health problems. *Id.* at 1106–07. The court found that “*Lane* does not conclusively settle the first two prongs of the *City of Boerne* test for all classes of services,” noting that “there is no doubt the particular services at issue here are categorically different from the particular services at issue in *Lane*. With this in mind, we apply the three-part analysis.” *Id.* at 1118.

Like *Guttman* and *Garcia*, this Court should apply all three steps of *Boerne* and hold that Plaintiff’s Title II ADA claims do not abrogate TTUHSC’s sovereign immunity because, in the context of Plaintiff’s disability discrimination—failure to accommodate claims, Title II does not represent a valid exercise of Congressional power under Section 5 of the Fourteenth Amendment.

B. The First Prong of *Boerne* is Satisfied Under *Lane*.

While the first prong of *Boerne* is satisfied, as Title II “seeks to enforce this prohibition on irrational disability discrimination, . . . it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.” *Lane*, 541 U.S. at 522–23. Therefore, caution is required in the analysis so as to avoid sweeping “constitutional” conduct in with unconstitutional conduct under Section 5. *See generally*, *Bowers v. Nat’l Collegiate Athletic Ass’n*, 475 F.3d 524, 551 (3d Cir. 2007). “Although Congressional authority under § 5 is broad, it is not unlimited.” *Id.*

C. Plaintiff’s ADA Claims Fail on the Second Prong off the *Boerne* Test Because There is No History and Pattern of Not Providing Lecture Notes to a Student With ADHD.

For the second prong of *Boerne* to be satisfied, Congress must have identified a history and pattern of unconstitutional action by the states. *See Pace*, 403 F.3d at 277.

Courts have not recognized a history and pattern of not providing lecture notes to a post-graduate student with ADHD as sufficient to justify abrogation of sovereign immunity under

Boerne. Nor have they recognized dismissal of a student with ADHD for poor academic performance as sufficient. As such, Plaintiff’s Title II ADA claims fail on the second prong of the *Boerne* test.⁸ *See also Kohn v. State Bar of Cal.*, 497 F. Supp. 3d 526, 530, 531, 538 (N.D. Cal. 2020) (finding that “plaintiff has cited no authority demonstrating that, insofar as such misconduct violated only Title II, that Congress’s purported abrogation of sovereign immunity is nevertheless valid” when he alleged denial of substantial bar exam accommodations); *see also, Doe v. Bd. of Trs. of Univ. of Ill.*, 429 F. Supp. 2d 930, 933, 939 (N.D. Ill. 2006) (holding that Title II, as applied to a postgraduate student with learning disabilities seeking accommodations, exceeds Congress’s power under Section 5, noting that “[t]he difference in this case is that education, despite its undoubted importance, is not considered by the Supreme Court to be a fundamental constitutional right.”); *see also, Press v. State Univ. of N.Y. at Stony Brook*, 388 F. Supp. 2d 127, 135 (E.D.N.Y. 2005) (holding that the “Court was unwilling to expand the scope of Title II and encroach on the state’s immunity with respect to a non-fundamental right” for accommodations for dyslexia and dysgraphia for post-secondary education).

In *Lane*, the Supreme Court held that Title II, as applied to the fundamental right to access courts, constitutes a valid exercise of Congress’ Section 5 authority. *Lane*, 541 U.S. at 525, 533, 534. *Lane* does not stand for the proposition that not providing lecture notes to a post-graduate student with ADHD is a valid exercise of Congress’ Section 5 authority. While the Court noted that a few district courts had addressed unequal treatment in “public education” of disabled individuals,⁹ its holding was limited to a fundamental right to access the courts. *Lane*, 541 U.S. at

⁸ Defendants respectfully disagree with Judge Garza’s concurrence wherein he proposes that *Lane* “appears to have resolved [the] question” of “whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States against the disabled.” *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 423 (5th Cir. 2004).

⁹ The “public education” cases that the Supreme Court relies on in footnote 12 of *Lane* include: “*E.g., N.Y. State Ass’n for Retarded Child, Inc. v. Carey*, 466 F. Supp. 487, 504 (E.D.N.Y. 1979) (segregation of mentally retarded students with hepatitis); *Mills v. Bd. of Ed. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972) (exclusion of mentally retarded students from public school system). *See also, e.g., Robertson by Robertson v. Granite City*

533–534. The Fifth Circuit has not expanded the holding in *Lane* to encompass non-fundamental rights such as attending graduate school. Because no courts have found a history and pattern of unequal treatment of students with ADHD in graduate school sufficient to justify abrogation of sovereign immunity under *Boerne*, Plaintiff’s ADA claims fail on the second prong of the *Boerne* test.

D. Plaintiff’s Claims Also Fail the Third Prong of *Boerne* Because the Rights and Remedies Created by Title II Are Not Congruent and Proportional to Plaintiff’s Alleged Constitutional Violations.

To meet the third prong of *Boerne*, the “rights and remedies created by the statute must be congruent and proportional to the constitutional violation(s) Congress sought to remedy or prevent.” *Pace*, 403 F.3d at 277.

Unlike in *Lane*, where the Court found the remedy for the “pattern of exclusion and discrimination” for the fundamental right of court access congruent and proportional to “its object of enforcing the right of access to the courts,” 541 U.S. at 531, the opposite is true in this case. Neither the United States Supreme Court nor the Fifth Circuit have found a history and pattern of unconstitutional violations for post-secondary students with ADHD. “While § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent.” *Id.* at 523. Moreover, there is no fundamental constitutional right to graduate education under the United States Constitution or the Texas Constitution. Therefore, the rights and remedies created by Title II are necessarily not congruent and proportional to Plaintiff’s alleged constitutional violations, because she has not

Cnty. Unit Sch. Dist. No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988) (elementary-school student with AIDS excluded from attending regular education classes or participating in extracurricular activities); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986) (kindergarten student with AIDS excluded from class).” 541 at 525, n. 12.

alleged constitutional violations: her claims do not implicate a fundamental constitutional right or a constitutionally protected property or liberty interest.

Because a history and pattern of discrimination against post-secondary students with ADHD is not recognized by courts and Plaintiff's claims do not implicate a fundamental constitutional right or a constitutionally protected property or liberty interest, the congressional purpose for enacting remedies under Title II does not meet the congruence and proportionality test in this instance *See Fields v. Dep't of Pub. Safety*, 911 F. Supp. 2d 373, 382 (M.D. La. 2012) (addressing ADA Title I claims). Plaintiff's claims fail the third prong of *Boerne*, and TTUHSC is entitled to sovereign immunity from Plaintiff's ADA Title II claims.

Additionally, the Fifth Circuit's holding in *Reickenbacker* answers the third prong of *Boerne* in the negative and is still controlling. *See Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 303 (5th Cir. 2005) (Jones, J., dissenting) ("I agree with the majority's dicta that suggests *Lane* is currently of limited application. Moreover, because *Lane* was written very narrowly, I conclude that this court's decision in *Reickenbacker* remains valid in holding that ADA Title II, apart from the *Lane* scenario, does not validly abrogate States' Eleventh Amendment immunity."). Even if a defendant's conduct violates Title II of the ADA, such a claim is barred by sovereign immunity unless it also violates a fundamental right or the Fourteenth Amendment. This is dispositive of Plaintiff's claims: she has not alleged violation of a fundamental right or the Fourteenth Amendment, and TTUHSC's sovereign immunity therefore remains intact.

CONCLUSION

For the foregoing reasons, TTUHSC, Barbara Cherry, and Michael Evans, respectfully request that this Court dismiss in full Plaintiff's ADA Title II claims pursuant to Federal Rule of Civil Procedure 12(c) as barred by sovereign immunity, dismiss Plaintiff's substantive due process

claim for failure to state a claim, and grant Defendants any further relief deemed just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2023, a true and correct copy of this document was electronically filed using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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