

**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’ REPLY IN SUPPORT OF DEFENDANTS’ PARTIAL MOTION
TO DISMISS PLAINTIFF’S COMPLAINT PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 12(c)**

TO THE HONORABLE U.S. DISTRICT JUDGE D. GORDON BRYANT, JR.:

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, jointly file this Reply in Support of their Motion to Dismiss Plaintiff’s Complaint Pursuant to Rule 12(c) (“Motion”). Because Plaintiff’s Response (Dkt. 64) fails to overcome any of the arguments and authorities set forth in Defendants’ Motion, this Court should grant Defendants’ Motion and dismiss Plaintiff’s Title II ADA (“ADA”) and substantive due process claims with prejudice.

INTRODUCTION

Plaintiff (“Pickett”) fails to show that she has a constitutionally protected liberty or property interest to support a Due Process Clause violation. Therefore, Plaintiff’s remaining ADA failure-to-accommodate and disability discrimination claims are barred by sovereign immunity. True, there is a waiver of sovereign immunity for certain ADA claims. But under *U.S. v. Georgia*, 546 U.S. 151, 158–59 (2006), a plaintiff must allege a recognized Fourteenth Amendment violation to avail herself of that waiver. Because Plaintiff has not made such an allegation, her ADA claims are barred by sovereign immunity. *Id.*

Plaintiff’s substantive due process claim also fails. The United States Supreme Court and Fifth Circuit have yet to recognize a constitutionally protected liberty or property interest in continuing higher education. Where there is no deprivation of a constitutionally protected right, there can be no substantive due process violation. Plaintiff thus fails to state a claim for a substantive due process claim.

Understanding that her live complaint is lacking, Pickett uses her Response to introduce new causes of action for retaliation, equal protection violations, and negligence. But a Response brief is not an appropriate avenue to bring new claims, so the Court should disregard them.

The Court should likewise disregard Plaintiff’s repeated references to a previous settlement agreement between her and TTU for prior employment. *See* Dkt. 64. The agreement is governed by a confidentiality clause which Plaintiff violated when she described the agreement in her pleadings and filed it with this Court.¹

¹ Plaintiff refers throughout her Response to several ADA claims that were previously dismissed as well as the procedural due process claim. The only pending ADA claims are the failure-to-accommodate with lecture notes and disability discrimination. *See* Dkt. 46 at 16, 26; *see also* Dkt. 35; Dkt. 64.

1. Plaintiff fails to show that she has a constitutionally protected liberty or property interest to support a Due Process Clause violation.

Plaintiff claims that she has a property or liberty interest in receiving federal financial aid, graduating from TTU, and letters of Accommodations. *See* Dkt. 64 at 7, 22, 23, 26. None of these claims are constitutionally protected interests and thus, fail. *See Klingler v. Univ. of S. Miss., USM*, 612 F. App'x 222, 227 (5th Cir. 2015) (footnotes omitted). Notably, Pickett cannot and has not supported these assertions with authority.

Simply receiving federal financial aid is not a constitutionally protected property interest. *See Robinett v. Delgado Cmty. Coll.*, No. CIV A.99-2545, 2000 WL 1720553, at *7 (E.D. La. Nov. 17, 2000), *aff'd*, 273 F.3d 1095 (5th Cir. 2001) (“Accordingly, the Higher Education Act does not create a property right entitled to due process protection in students like [plaintiff] who seek federal financial aid to attend a community college.”).

Neither is graduating from a doctoral program. This Court should not assume, without deciding, that Pickett has a constitutionally protected due process right in higher education. Future earnings, future financial interest, or opportunities are also not recognized interests. *See Nat’l Collegiate Athletic Assn v. Yeo*, 171 S.W.3d 863, 870 (Tex. 2005) (“[Plaintiff’s] claimed interest in future financial opportunities is too speculative for due process protection. There must be an actual legal entitlement.”).

Letters of accommodations are interests, but not constitutionally protected property interests. If Plaintiff is arguing that receiving lecture notes is a constitutionally protected interest, her argument fails for lack of support. *See also Doe v. Bd. of Trs. of Univ. of Ill.*, 429 F. Supp. 2d 930, 933, 939 (N.D. Ill. 2006) (holding that postgraduate students with learning disabilities seeking accommodations exceeds Congress’s power under Section 5; “[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, 134 (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 at the post-secondary level).

With no constitutionally protected liberty or property interest, Pickett’s ADA claims fail.

2. Plaintiff fails to show that Congress validly abrogated sovereign immunity for her ADA claims.

Pickett’s ADA claims are also barred by sovereign immunity. Plaintiff agrees that no court has recognized “a pattern of discrimination against post-secondary students specifically with ADHD.” *See* Dkt. 64 at 26. Nonetheless, Plaintiff asserts that this Court should now rule in her favor. Pickett argues her claims are so “original” that no other court has reviewed a discrimination case of an ADHD student with accommodations. *Id.* at 24. This Court should find that sovereign immunity has not been abrogated for Plaintiff’s ADA claims.

A. Plaintiff fails the second prong of the *Boerne* test (as set out in *Pace*).

Pickett fails to identify authority to support a history and pattern of state unconstitutional action against students with ADHD. Instead, Pickett blanketly asserts that her ADA claims are valid and satisfy the second prong of the *Boerne* test. *See* Dkt. 64 at 26.

Under *Georgia*, Title II only abrogates sovereign immunity where it prohibits conduct that violates the Fourteenth Amendment. 546 U.S. at 159. “Insofar as it prohibits conduct that does not directly violate the Fourteenth Amendment, Title II can abrogate sovereign immunity only where Congress’s abrogation power is ‘nevertheless valid.’” *See* Dkt. 46 at 13, citing *Georgia*, 546 U.S. at 159.

The *Boerne* test in *Pace v. Bogalusa City School Board*, 403 F.3d 272, 277 (5th Cir. 2005),

is used to determine whether a federal statute is a “valid exercise of Congress’s power to enforce Fourteenth Amendment, and consequently, to abrogate states’ Eleventh Amendment immunity.” (citing *Reickenbacker v. Foster*, 274 F.3d 974, 981-83 (5th Cir. 2001)); *see also City of Boerne v. Flores*, 521 U.S. 507 (1997). The *Boerne* test provides that “(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*, 403 F.3d at 277.

Under *Tennessee v. Lane*, 541 U.S. 509, 524 (2004), only fundamental rights violations are a valid abrogation of sovereign immunity for ADA claims. *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). An alleged failure to provide lecture notes is not a fundamental right. So, this Court should find that Pickett fails the second prong of *Boerne* and that her ADA claims are barred by sovereign immunity.

B. Plaintiff fails the third prong of the *Boerne* test (as set out in *Pace*).

Receiving lecture notes as a post-graduate student is not congruent and proportional to the rights and remedies of Title II. *See Pace*, 403 F.3d at 277.

With no support, Plaintiff claims she has a fundamental constitutional right at stake. *See* Dkt. 64 at 24. Education at any level is not a fundamental right under substantive due process, let alone lecture notes. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39, 59 (1973). Pickett reiterates that her case is “unique,” obviating the need for legal authority. *See* Dkt. 64 at 26. Pickett claims that “even though a pattern of discrimination against post-secondary students specifically with ADHD has not been recognized by courts in the past,” it should be now. *Id.* Since the rights and remedies created by Title II are incongruent with receiving lecture notes, Pickett

fails the third *Boerne* prong.

3. Plaintiff fails to state a claim for substantive due process because there is not a constitutionally protected property or liberty interest in continuing higher education.

Pickett failed to support her argument that there is a substantive due process right to continuing higher education. The Fifth Circuit acknowledged that the Magistrate Judge “found no ‘controlling authority that definitively answers the question of whether Pickett possesses a protected substantive . . . due process right” that is implicated here. And he noted that courts have often declined to answer the question after concluding that, even if such a right existed, the plaintiffs had failed to meet the high bar for establishing a violation of that right.” *See* Dkt. 46 at 9.

Plaintiff has not met the heightened bar of establishing a substantive due process right in continuing higher education. This Court should not assume, without deciding, that Plaintiff has a constitutionally protected liberty or property interest in higher public education because neither the Fifth Circuit nor the Supreme Court have recognized this right. *See also Perez v. Tex. A & M Univ. at Corpus Christi*, 589 F. App’x 244, 248 (5th Cir. 2014). Plaintiff’s substantive due process claim should thus be dismissed for failure to state a claim.

4. Plaintiff fails to allege a retaliation, equal protection, or negligence in her Complaint.

Pickett attempts to introduce new causes of action for retaliation, equal protection, and negligence in her Response. This is improper because Plaintiff has not pled these causes of action in her operative Complaint. *See* Dkt. 1.

In Plaintiff’s Response, she claims that Defendants “retaliated” against her for various reasons. *See* Dkt. 64 at 8, 13, 16, 19, 22-27. However, Plaintiff did not allege retaliation in her Original Complaint which was filed on September 23, 2020. *See* Dkt. 1. Similarly, Plaintiff attempts to assert an equal protection claim and negligence in her Response, which she never

alleged. *See* Dkt. 64 at 11, 13, 17, 22, 24, 25, 27; *see also* Dkt. 1. Therefore, this Court should disregard these claims and issue a ruling on Plaintiff's operative Complaint. *See* Dkt. 1.

Should Plaintiff seek leave to amend her Complaint, this Court should deny such a request. Plaintiff filed this case over three years ago, and it would prejudice Defendants at this late stage. Pickett's deposition took place on June 12, 2023. Fact discovery closes on June 23, 2023. Furthermore, Plaintiff was granted leave to amend her Complaint on September 23, 2021, but failed to timely amend within fourteen days. *See* Dkt. 35 at 3; *see also* Dkt. 39 at 2. This Court subsequently granted Plaintiff leave a second time on October 25, 2021, and "admonish[ed] Pickett that should she decline to file a motion to amend within twenty-one days, this case will proceed on the surviving claims in her original Complaint." *See* Dkt. 39 at 6. Plaintiff never timely filed a motion to amend.

This Court should disregard Plaintiff's retaliation, equal protection, and negligence claims and deny Pickett leave to amend at this late stage.

5. The Court should disregard Plaintiff's repeated reference to a confidential settlement agreement with TTU for prior employment.

Pickett repeatedly refers to a confidential settlement agreement that TTU and Pickett entered into regarding Pickett's prior employment with TTU as a nursing instructor. *See* Dkt. 64 at 7, 9, 20, 25, 27. The agreement is governed by a confidentiality clause which Plaintiff violated when she described the agreement in her pleadings and filed it with this Court. Defendants request that the Court disregard Plaintiff's repeated references to the settlement agreement between her and TTU for prior employment.

CONCLUSION & PRAYER

For the foregoing reasons, as well as for all the reasons set forth in Defendants' Motion to Dismiss, 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.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2023, the foregoing *Defendants' Reply in Support of Defendants' Partial Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(c)* was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following counsel of record:

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