

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

AMY PICKETT,

Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER (TTUHSC), *et al.*,

Defendants.

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CIVIL ACTION NO. 5:20-CV-232-H-BQ

**FINDINGS, CONCLUSIONS, AND
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Pro se Plaintiff Amy Pickett alleges that Defendants Texas Tech University Health Sciences Center (TTUHSC), Barbara Cherry, and Michael Evans failed to accommodate her disability and discriminated against her on the basis of her disability in violation of the Rehabilitation Act (RA) and Title II of the Americans with Disability Act (ADA). Pickett also contends Defendants violated her substantive due process rights under 42 U.S.C. § 1983. Defendants seek dismissal of Pickett's ADA and substantive due process claims in accordance with FED. R. CIV. P. 12(c), arguing (1) they are entitled to sovereign immunity on the ADA claims and (2) Pickett has failed to state a claim for violation of her substantive due process rights. ECF No. 58. Defendants also move for summary judgment on Pickett's ADA, RA, and substantive due process claims, arguing Pickett cannot establish the elements of those claims. ECF No. 82.

Although the Court would generally resolve whether a party is entitled to sovereign immunity before reaching the merits of the underlying claim, it cannot do so here. This is because the Court should avoid reaching constitutional questions before considering nonconstitutional grounds. The first step of the sovereign immunity analysis for ADA claims likewise directs the

Court to evaluate whether the state violated Title II. Faced with a motion for summary judgment challenging the viability of Pickett's ADA claims, the undersigned finds it necessary to first address the merits, as required by controlling authority and to avoid prematurely reaching the constitutional question.

Having reviewed the papers and summary judgment evidence, the undersigned recommends that the district judge **GRANT** Defendants' Motion for Summary Judgment. ECF No. 82. Should the district judge adopt this recommendation, the undersigned further recommends the district judge **DENY as moot** Defendants' Motion for Judgment on the Pleadings (ECF No. 58) and **GRANT** Pickett's motion seeking to have her response and attachments sealed. ECF No. 63.¹

I. Background

A. Procedural History

On September 23, 2020, Pickett filed her original Complaint alleging claims under the ADA, Section 504 of the Rehabilitation Act of 1973 (RA), and procedural and substantive due process violations under § 1983. ECF No. 1. Before filing an answer, Defendants moved to dismiss Pickett's claims for lack of subject-matter jurisdiction and failure to state a claim. ECF Nos. 11, 12. The undersigned issued an FCR on the motion (ECF No. 28), and the district judge adopted it in part. ECF No. 35. As relevant here, the district judge concluded that sovereign

¹ The undersigned recognizes that "the working presumption is that judicial records should not be sealed." *Le v. Exeter Fin. Corp.*, 990 F.3d 410, 419 (5th Cir. 2021). In this case, however, many of Pickett's attachments contain confidential information, including personal health records, her social security number, and other sensitive materials. *E.g.*, ECF Nos. 65, 66-7, 69, 71-1. Moreover, the undersigned has not considered and makes no recommendation on Defendants' Rule 12(c) motion and Pickett's response, nor did the undersigned rely on Pickett's attachments in evaluating Defendants' motion for summary judgment. The undersigned therefore finds that under these circumstances, the need to maintain the documents under seal outweighs the public's interest in and access to the records and furthers judicial efficiency, i.e., avoiding an unnecessary parsing of irrelevant records to separate the wheat from the chaff.

immunity did not bar Pickett's viable ADA claims and also "decline[d] to dismiss the Section 1983 claim for violation of substantive due process." *Id.* at 2–3.

Defendants filed an interlocutory appeal arguing that the Court should have dismissed Pickett's ADA claims for lack of subject-matter jurisdiction.² *Pickett*, 37 F.4th at 1019, 1024. The Fifth Circuit disagreed, concluding that Defendants were not entitled to sovereign immunity based on the record as developed. *Id.* at 1019. In reaching this conclusion, the court relied on the three-pronged test set forth in *United States v. Georgia*, 546 U.S. 151, 159 (2006). *Id.* at 1026. It first determined that Pickett had pleaded sufficient facts showing Defendants violated Title II by failing to accommodate Pickett and discriminating against her. *Id.* at 1032–35. As a result, the court advanced to *Georgia*'s second prong, asking "[t]o what extent do Pickett's plausible Title II claims also imply a violation of the Fourteenth Amendment?" *Id.* at 1035.

Pickett argued that Defendants' conduct violated, *inter alia*, her substantive due process rights. *Id.* The court concluded that Defendants could not have made a "genuinely academic decision" to dismiss Pickett from the graduate programs in part based on her disability, "[n]or could it [have been] an exercise of 'professional judgment' to deny a student an accommodation that the institution had already deemed reasonable and necessary." *Id.* at 1036 (citations omitted). As a result, it would have been necessary for the court to decide "whether the Due Process Clause protected [Pickett's] desire to continue her education at" TTUHSC. *Id.* But Defendants did not preserve that issue for appeal, so the Fifth Circuit never reached the question. *Id.*

Thus, the Fifth Circuit "conclude[d] that [this Court] . . . did not err by denying . . . [D]efendants sovereign immunity from Pickett's claims insofar as she pleaded Title II violations."

² Defendants also asserted that the Court should have dismissed Pickett's substantive due process claim for failure to state a claim, but the Fifth Circuit concluded it did not have jurisdiction to hear that challenge. *Pickett v. Tex. Tech Health Scis. Ctr.*, 37 F.4th 1013, 1028 (5th Cir. 2022).

Id. at 1037. The Fifth Circuit noted, however, that this Court could “consider in the first instance whether Pickett’s claims implicate the Fourteenth Amendment at all, provided that . . . [D]efendants still wish to raise that contention.” *Id.*

Post-remand, the following claims remain live: (1) RA and ADA claims for failure to accommodate by failing to provide lecture notes and materials; (2) RA claim for failure to accommodate based on Dr. Crenshaw’s alleged refusal to grant extensions on deadlines for pre-submission feedback and for professors failing to provide notes, as alleged against Defendants Cherry and Evans;³ (3) ADA and RA claims for disability discrimination against TTUHSC and Defendants Cherry and Evans in their official capacities; and (4) a substantive due process claim against Defendants Cherry and Evans in their official capacities.

Defendants have filed a Rule 12(c) motion arguing that they are entitled to sovereign immunity on Pickett’s ADA claims and urging the Court to undertake, for a second time, the *Georgia* analysis. ECF No. 58, at 11 (“This Court did not decide [the second *Georgia*] prong as part of the prior motion to dismiss, but in line with the Fifth Circuit’s opinion . . . , TTUHSC requests that the Court do so now.”). They also seek judgment on the pleadings as to Pickett’s § 1983 substantive due process claim. *Id.* at 1, 20–21. About four months after filing the Rule 12(c) motion, Defendants moved for summary judgment on the merits of Pickett’s ADA, RA, and substantive due process claims.⁴ Defs.’ Br. in Supp. of Mot. for Summ. J. 3–4, ECF No. 82-1 [hereinafter Defs.’ Br.]. The Court first evaluates the order in which the two pending motions should be considered.

³ Defendants assume that these claims are no longer viable (*see* ECF No. 82-1, at 3), but the Fifth Circuit only concluded Pickett had not stated a claim *under the ADA* as to these allegations. *Pickett*, 37 F.4th at 1032–33. Thus, Pickett’s RA claims are technically live. Nevertheless, the undersigned recommends dismissal of these claims for the same reasons as set forth in the Fifth Circuit’s decision. *Id.*

⁴ Defendants did not move to stay the scheduling deadlines after filing their Rule 12(c) motion and before moving for summary judgment.

B. The Court must analyze the merits of Pickett’s ADA claims before addressing the sovereign immunity question.

Ordinarily, courts must first address whether a state entity is entitled to sovereign immunity. *See, e.g., United States v. Tex. Tech Univ.*, 171 F.3d 279, 285–86 & n.9 (5th Cir. 1999) (describing Eleventh Amendment immunity as jurisdictional in nature); *Texas v. Caremark, Inc.*, 584 F.3d 655, 660 & n.2 (5th Cir. 2009) (“[T]he sovereign immunity issue must be resolved before further litigation (including discovery and motions for summary judgment) proceeds, so that the States are not subjected to litigation to which they have not consented.”). But “[t]wo related doctrines” alter that procedure here. *Buchanan v. Maine*, 469 F.3d 158, 172 (1st Cir. 2006). First is the doctrine of constitutional avoidance. “A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988). “Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936).

The second principle comes from the three-part test set forth in *Georgia*, which requires the Court to consider in the first instance whether the state’s conduct violated Title II of the ADA. 546 U.S. at 159 (holding that to determine whether Congress has waived sovereign immunity under the ADA, a court must first determine “which aspects of the State’s alleged conduct violated Title II”); *Block v. Tex. Bd. of Law Exam’rs*, 952 F.3d 613, 617–18 (5th Cir. 2020) (finding that the district court erred by skipping to step three of the *Georgia* analysis because “we do not reach that [step] unless and until it is decided that [plaintiff] has stated a claim under Title II”); *see Pickett*, 37 F.4th at 1026 & n.2 (indicating that courts must address *Georgia*’s prongs in order). “The purpose of this rule is to prevent courts from unnecessarily addressing the constitutional issue

of whether the ADA may validly abrogate sovereign immunity” *Brockman v. Tex. Dep’t of Crim. Just.*, 397 F. App’x 18, 23 (5th Cir. 2010) (per curiam). If a plaintiff fails to establish the state violated the ADA, the inquiry stops. *See Block*, 952 F.3d at 619 (“Because [plaintiff] has alleged no conduct that violates Title II, [defendant] is entitled to Eleventh Amendment immunity.”); *Hale v. King*, 642 F.3d 492, 503 (5th Cir. 2011) (“Exercising judicial restraint, we do not proceed to the other two prongs of the *Georgia* inquiry at this time because such an inquiry, which would include resolution of constitutional issues, is unnecessary unless and until Hale has stated a violation of Title II.”); *Brockman*, 397 F. App’x at 23–24 (stating that the district court “seem[ed] to have violated the order of operations established by *Georgia*” by failing to consider whether there was a Title II violation and because there was not, vacating portions of the lower court’s opinion that addressed abrogation of sovereign immunity).

Based on these two principles, the undersigned must first address Defendants’ Motion for Summary Judgment, which argues that Pickett has not established a Title II violation.⁵ *See, e.g., Wells v. Thaler*, 460 F. App’x 303, 311 & n. 17 (5th Cir. 2012) (per curiam) (explaining that although *Georgia*’s “inquiry is often addressed on motion to dismiss, . . . other courts have considered the record when the inquiry is conducted at the summary judgment stage,” and quoting Justice Stevens’ concurrence in *Georgia*, which noted that the decision “wisely permit[ted] the parties . . . to create a factual record that will inform [the Eleventh Amendment question]” (citation omitted)); *Buchanan*, 469 F.3d at 173 (“[T]he summary judgment record establishes that there is

⁵ The case’s current procedural posture requires this approach, i.e., determining whether Pickett can establish a Title II claim versus whether Congress validly waived Defendants’ sovereign immunity, despite the Court conducting this analysis earlier in the case. When the Court formerly considered the sovereign immunity question, it was in the context of Defendants’ initial 12(b)(1) motion, where the Court found that, taken as true, Pickett’s allegations stated a viable ADA claim. *Pickett*, 37 F.4th at 1033–35. Now, however, there exists a pending Rule 56 motion for summary judgment on the merits, as well as a Rule 12(c) motion raising the same basic points as previously asserted in the original 12(b) motion. These “dueling motions” require resolution of the merits question before proceeding to the constitutional one.

no Title II claim against the State and, as a result, it was error for the district court to reach the Eleventh Amendment issue.”); *Reiss v. Tex. A&M Univ.*, No. 4:21-cv-00263, 2023 WL 5105252, at *6 (S.D. Tex. Aug. 9, 2023) (analyzing plaintiff’s ADA claims on the merits and never reaching defendant’s assertion of sovereign immunity because plaintiff had failed to establish a Title II violation), *R. & R. adopted by* 2023 WL 5488431 (S.D. Tex. Aug. 24, 2023); *Newberger v. La. Dep’t of Wildlife & Fisheries*, No. 11–2996, 2012 WL 3579843, at *3 (E.D. La. Aug. 17, 2012) (declining to “proceed further in the sovereign immunity analysis” after determining that plaintiff had not demonstrated a Title II violation). Only if Pickett has established a Title II violation will the Court consider Defendants’ assertion of sovereign immunity. *Buchanan*, 469 F.3d at 172; *see Wells*, 460 F. App’x at 311 (“[W]e will first consider whether [plaintiff] offers sufficient evidence to create an issue of material fact on his Title II claims.”).

C. Defendants’ Arguments

Defendants move for summary judgment as to all Pickett’s claims. They first argue that Pickett cannot establish a prima facie case of disability discrimination because she has no evidence that Defendants discriminated against her, “let alone, intentional[ly].” Defs.’ Br. 18. According to Defendants, despite TTUHSC’s attempts to help Pickett succeed, she earned “Cs” in two courses (which constitute failing grades) and was dismissed as a result. *Id.* at 18–19. That is, TTUHSC dismissed Pickett for academic reasons—not based on her disability. *Id.* at 20. Despite expressly moving for summary judgment only on the basis that Pickett has not made a prima facie case, Defendants extend their briefing beyond Pickett’s alleged failure to carry her initial burden.⁶

⁶ Defendants identify in their “Statement of the Issues” only Pickett’s inability to make a prima facie case of disability discrimination. Defs.’ Br. 3. The substance of their motion and brief, however, also specifically argues that a legitimate, nondiscriminatory reason existed for Pickett’s removal, and that she has offered no evidence demonstrating pretext. *See, e.g., id.* at 4 (“Plaintiff cannot establish that any action taken by Defendants was a pretext for discrimination. The record conclusively shows that TTUHSC . . . did not discriminate against Plaintiff; rather, Defendants’ decisions were based on legitimate, non-discriminatory factors.”), 13 (Pickett was removed “because she received 2 C’s in the Combined Program.”), 19 (Pickett received a failing grade in Course 6201 because she “had not

Defendants proffer that their “decisions were based on legitimate, non-discriminatory factors” and further contend that Pickett “cannot establish that any action taken by [them] was a pretext for discrimination.” *Id.* at 4; *see also id.* at 15 (subheading titled, “Pickett cannot establish the elements of her ADA and Rehabilitation Act claims” (emphasis omitted)), 20 (stating “Pickett cannot establish that Defendants discriminated against her under the Rehab Act or Title II”).

Defendants also argue that contrary to Pickett’s allegations, TTUHSC accommodated her disability. *Id.* In Defendants’ view, “[t]he summary judgment record clearly establishes that Pickett received all the lecture notes for her courses as all the professors posted all the lecture notes on [online platforms], and they sent them to her via” those same platforms. *Id.* Defendants maintain that Pickett’s primary contention is that she did not receive lecture notes in her preferred format. *Id.* at 21–22. But preferred accommodations, Defendants assert, do not establish a viable claim. *Id.* at 22.

Finally, Defendants allege that Pickett cannot establish the elements of a substantive due process claim. *Id.* Citing their Rule 12(c) motion, they argue that Pickett does not have a constitutionally protected property interest in continuing her post-graduate education. *Id.* And even if she did, Defendants contend TTUHSC dismissed Pickett for failure to meet the required academic standards, which does not amount to a substantial departure from academic norms such that she could establish a claim. *Id.* at 22–23. Defendants therefore urge the Court to grant summary judgment on all Pickett’s claims. *Id.* at 23.

followed the syllabus requirements of incorporating feedback” and ultimately, Pickett was dismissed from the Doctor of Nursing Practice (DNP) combined program because she did not “meet the academic requirements to continue.”). Although typically discussed in the context of a pleading or motion’s caption or heading, the Fifth Circuit has nevertheless “oft stated that ‘[t]he relief sought, that to be granted, or within the power of the Court to grant, should be determined by substance, not a label.’” *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (citation omitted). While the Court would prefer practitioners comply with the local rules, i.e., “under the heading ‘summary,’ state concisely the elements of each claim or defense as to which summary judgment is sought” (N.D. LOC. CIV. R. 56.3(a)(1)), Pickett nonetheless had a full opportunity to respond to the substance of Defendants’ motion and failed to do so.

Pickett did not file a response to Defendants' Motion for Summary Judgment, and the time to do so has passed.

II. Summary Judgment Standard

If the pleadings and evidence show that no genuine issue of material fact exists, the moving party is entitled to summary judgment as a matter of law. FED. R. CIV. P. 56(a). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he substantive law will identify which facts are material." *Id.* The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see Owens v. Circassia Pharms., Inc.*, 33 F.4th 814, 824 (5th Cir. 2022) (explaining that the movant "bears the burden of demonstrating that there is no genuine dispute of material fact"). When the non-movant bears the burden of proving such material facts at trial, movants may satisfy their burden by either affirmatively showing the nonmovant's inability to establish such material facts or "merely demonstrat[ing] an absence of evidentiary support in the record for the non-movant's case." *Wesley v. Gen. Drivers, Warehousemen & Helpers Loc. 745*, 660 F.3d 211, 213 (5th Cir. 2011) (quoting *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 355 (5th Cir. 2010)); *accord Owens*, 33 F.4th at 824. If the movant meets that burden, the non-movant must then "point to 'specific facts showing that there is a genuine [dispute] for trial.'" *Owens*, 33 F.4th at 824 (quoting *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019)).

In considering a summary judgment motion, courts must view all facts and inferences in the light most favorable to the plaintiff and resolve any disputed material facts in her favor. *Anderson*, 477 U.S. at 255; *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005).

Still, “a [plaintiff] cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or ‘only a scintilla of evidence.’” *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)). A plaintiff “must allege facts specifically focusing on the conduct of [the defendant] which caused his injury.” *Wicks v. Miss. State Emp. Servs.*, 41 F.3d 991, 995 (5th Cir. 1995), *overruled on other grounds by Carswell v. Camp*, 37 F.4th 1062, 1066 (5th Cir. 2022).

If a party does not file a response to a motion for summary judgment, the court cannot grant summary judgment by default. *Hibernia Nat’l Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985). But the court may “consider the facts listed in support of the motion as undisputed and grant summary judgment if they show that the movant is entitled to judgment in his favor.” *Jegart v. Roman Cath. Church of Diocese of Houma Thibodaux*, 384 F. App’x 398, 400 (5th Cir. 2010) (per curiam); *see* FED. R. CIV. P. 56(e)(2). “A summary judgment nonmovant who does not respond to the motion is relegated to her unsworn pleadings, which do not constitute summary judgment evidence.” *Bookman v. Shubzda*, 945 F. Supp. 999, 1002 (N.D. Tex. 1996); *accord Larry v. White*, 929 F.2d 206, 211 n.12 (5th Cir. 1991) (“Unsworn pleadings, memoranda, or the like are not, of course, competent summary judgment evidence.”). Nevertheless, the movant “still must establish the absence of a genuine issue of material fact before it can prevail on a summary judgment motion.” *Resol. Tr. Corp. v. Starkey*, 41 F.3d 1018, 1023 (5th Cir. 1995).

III. Factual Evidence Before the Court⁷

In 2016, TTUHSC admitted Pickett into its DNP program, and she began courses in the summer semester. Defs.’ App. 97, 230, ECF No. 82-4. In April 2017, TTUHSC accepted Pickett into the Family Nurse Practitioner (FNP) certificate program as well, and she began courses in the summer semester. *Id.* at 228–29, 230–31. Because Pickett had already obtained a master’s degree, she could not receive financial aid for the FNP classes. *Id.* at 3, 103, 229, 231. As a result, TTUHSC “combine[d] the FNP certificate program courses with the DNP degree program so that . . . Pickett was enrolled in one degree seeking program.” *Id.* at 231; *id.* at 3 (Official transcript reflecting that Pickett was enrolled in the “Doctor of Nursing Practice” program and was also obtaining a “Secondary Certificate,” i.e., a “Post Master’s Certificate” as a “Family Nurse Practitioner.”). This enabled her to “qualif[y] for federal financial aid for all courses since they were part of a degree seeking program.” *Id.* at 231; *see id.* at 229 (Pickett emailed Dr. Cherry in April 2017 and stated that to receive financial aid, she would need “to be enrolled in 2 DNP courses a semester with the exception of Summer, [when] [she] [could] take 1 or 2 DNP courses to be eligible.”).⁸ This “combined” program not only permitted Pickett to receive federal financial aid but also allowed her to “substitute 9 credit hours of FNP certificate courses for DNP courses” and

⁷ As originally noted by this Court and the Fifth Circuit, “accepting [Pickett’s] well-pleaded allegations as true and considering them in the light most favorable to her” “nudge[s] [her] claims of invidious discrimination across the line from conceivable to plausible.” *Pickett*, 37 F.4th at 1031, 1035. In evaluating the pending summary judgment motion, however, the Court must realize the “defendants’ desire to engage in ‘a rigorous factual analysis,’” which was previously “reserved for a later stage of the proceedings” (*id.* at 1035 (citation omitted))—that time is now. While Pickett’s pleadings merely needed to “include facts that allow the court to reasonably infer that [her] disability affected the [dismissal] decision” (*id.* at 1034), to ultimately prevail she must *prove* invidious discrimination. Here, Pickett’s Complaint is not verified (*see* ECF No. 1), and she has filed no response (including contradictory evidence) to Defendants’ summary judgment motion. The undersigned therefore treats Defendants’ facts as undisputed. FED. R. CIV. P. 56(e)(2).

⁸ At the time of these events, Dr. Cherry was an “Associate Dean, Department Chair and Professor at TTUHSC Department of Leadership studies.” Defs.’ App. 230; *see id.* at 48 (Pickett describes Dr. Cherry as being in charge of “the DNP program.”).

“finish the program at least one semester sooner than if [she] did each program separately.” *Id.* at 231.

In May 2017, Pickett first applied for accommodation for her attention deficit hyperactivity disorder (ADHD).⁹ *Id.* at 33–36. Pickett only asked for double “exam testing time.” *Id.* at 35. TTUHSC granted Pickett’s request on September 11, 2017, and provided the following accommodations through a Letter of Accommodation (LOA): (1) “extended time, up to double time on timed examinations”; (2) “[a]lternative test location which provides a quiet environment that reduces distractions”; and (3) “[n]ote-taking assistance, i.e. instructors may give copies of classroom lecture notes, power point presentation, transparencies, overheads used for daily lectures or post notes online.” *Id.* at 37. Her accommodations for ADHD remained the same each semester. *Id.* at 133.

Pickett presented the LOA a few days later, on September 22, to Susan Andersen and Lamicha Hogan, who apparently taught Course 5342. *Id.* at 38. Between Summer 2016 and Spring 2018, Pickett received all “As” in her courses that assigned letter grades, except for one “B.” *Id.* at 4–5. That changed, however, in the Summer of 2018.

A. Pickett receives first failing grade in the Summer 2018 semester.

In the Summer 2018 semester, Pickett took three courses, one of which was DNP Role Transition II (Course 6201). *Id.* at 6, 19. On June 8, 2018, Pickett advised Dr. Jeannette Crenshaw (the course facilitator and Pickett’s advisor) of her need for accommodation by emailing Crenshaw the LOA and asking for an extension to submit her DNP proposal paper for feedback. *Id.* at 85. Pickett apparently sent the LOA in response to Dr. Crenshaw’s requirement that Pickett submit her assignments for Course 6201 “[one] week before the due date.” *Id.* at 84 (stating that during

⁹ Pickett was diagnosed with ADHD in 2009. Defs.’ App. 112–13.

an “advisor-advisee conference call on May 30th,” Dr. Crenshaw and Pickett agreed to “send assignment drafts [one] week before the due date”). Dr. Crenshaw initially consented to the extension because it met their agreement. *Id.* Dr. Crenshaw subsequently told Pickett, however, that after speaking with Karen Ganus in Student Services, “the LOA does not apply to extra time for written assignments.” *Id.*; *see id.* at 37. Drs. Cherry, Cynthia Acton, and Crenshaw collectively “reviewed” Pickett’s LOA sometime during the Summer 2018 semester and likewise “confirmed that the ADA accommodations applied to test-taking only.” *Id.* at 247.

Pickett subsequently “experienced health issues . . . that resulted in her inability to complete all assignments prior to the end of the course.”¹⁰ *Id.* at 56; *see id.* at 118. Ultimately, Pickett elected to take an “Incomplete” grade in Course 6201 for that semester. *Id.* at 56–57, 134–35. Pickett signed a “Grade of Incomplete Form” (Incomplete Form) that set out the requirements for replacing the “I” grade with a letter grade. *Id.* at 56–57. The Incomplete Form provided the new deadlines for the remaining assignments, including that Pickett was to submit her “Final DNP Project Proposal Paper (with advisor feedback incorporated) to grading faculty,” Dr. Acton, no later than September 24, 2018, at 10:00 a.m. *Id.* at 57.

The Final DNP Project Proposal Paper (Paper) was worth 32.5% of her grade. *Id.* at 68. Pickett submitted her Paper thirty hours late. *Id.* at 80–81 (reflecting that Pickett emailed Drs. Acton and Cherry her Paper on September 25, 2018, at 4:37 p.m.). At first, Dr. Acton assigned the Paper a “0” because in Drs. Cherry and Acton’s view, the Incomplete Form controlled and did not contain a provision for late assignments—i.e., the grade was all or nothing. *Id.* at 80. Because

¹⁰ These health issues were separate from the condition for which she sought accommodation—ADHD. *See* Defs.’ App. 112, 118–19. Pickett was simultaneously enrolled as a full-time student and working full-time as an instructor with TTUHSC. *See* Defs.’ App. 45, 93–95, 130. She took leave from her job under the Family and Medical Leave Act (FMLA) due to these health issues. *Id.* at 26–32. Pickett does not “recall” considering taking time off from school “due to the pressures at home,” including her children and “financial income.” *Id.* at 119.

the Final Paper constituted 32.5% of her grade, and Pickett received a “0,” her grade of “I (incomplete)” was changed to a “C” on October 3, 2018. *Id.* at 74–75. A “C” constitutes a failing grade in the DNP program. *Id.* at 243.

Pickett appealed the grade in accordance with TTUHSC policy. *Id.* at 74–75. Associate Dean Melinda Mitchell Jones reviewed Pickett’s appeal. *Id.* at 86. She determined that there appeared to be a “good faith” disagreement between the parties as to the document that controlled the grading criteria. *Id.* “It was the understanding of the faculty that the [Incomplete Form] . . . would supplant the course syllabus” for Course 6201. *Id.* Pickett, however, believed “that the terms of [the] course syllabus were still in effect with exception of the specific due dates for the assignments,” as stated in the Incomplete Form. *Id.* Because of this misunderstanding, Associate Dean Jones granted Pickett’s appeal, concluding the syllabus terms would apply. *Id.* She directed faculty to change Pickett’s grade back to an “I” “and to [re]grade and return [the Paper] to [Pickett] as soon as possible.” *Id.* Associate Dean Jones reminded Pickett that because her assignment “was 30 hours and 37 minutes late,” her score would begin “with a two letter grade deduction per the guidelines laid out in the syllabus.” *Id.*; *see id.* at 66 (Course 6201 Summer 2018 syllabus providing that “[a] total of one letter grade will be deducted per day for late assignments,” i.e., “79% for assignments 24-48 hours late.”).

Dr. Acton regraded Pickett’s Paper and once again assigned a “0,” this time citing Pickett’s failure to incorporate feedback. *Id.* at 76 (advising Pickett that “incorporation of advisor feedback is a requirement of th[e] assignment, [and] [Dr. Acton] found Dr. Crenshaw’s [(Pickett’s advisor)] most significant comments/suggestions missing in [the] [P]aper,” resulting in an automatic zero). Dr. Acton returned Pickett’s Paper with “comments [that] further delineat[ed] . . . the

comments/suggestions by Dr. Crenshaw (and Dr. Cherry) [she] should have found in the paper.”

Id.

The assignment guidelines state that “to successfully complete” the Paper, students should, *among other things*, “[i]ncorporate advisor feedback to create a final version.” *Id.* at 222. Another document, dated May 4, 2018, states that the DNP Proposal should “[i]ncorporate[] DNP Project advisor and DNP Project expert(s) feedback.” *Id.* at 214. The guidelines do not state the level of feedback incorporation required, nor is there a grading rubric.¹¹ *Id.* at 222; *see also id.* at 214–16.

In response, Pickett emailed her advisor Dr. Crenshaw and asked that “another faculty grade” her Paper. *Id.* at 77. Dr. Crenshaw confirmed Pickett’s request and stated that according to the “Policy for a Written Assignment Earning a Failing Grade,” which she attached to the email, she would “serve as the second evaluator” because she was also the course facilitator. *Id.*; *see id.* at 63 (Course 6201 Syllabus, dated May 4, 2018, providing that Dr. Crenshaw was the “Course Facilitator and Faculty” and Dr. Acton was “Faculty” for the course.). That policy, TTUHSC School of Nursing Policy 40.631, provides that a student “may request another faculty member to conduct a second, independent, blinded evaluation of the assignment.”¹² *Id.* at 78. The review is to be conducted by “a faculty currently teaching the course, or who has recently taught in the course and is familiar with the assignments.” *Id.*; *see id.* at 141 (averring that Drs. Crenshaw and Acton taught Course 6201 in Summer 2018).

Dr. Crenshaw assigned Pickett’s Paper a 59%. *Id.* at 220–24. She arrived at this grade based on a “two letter grade deduction for inadequate or incorrect incorporation of advisor feedback,” as well as an additional “two letter grade deduction for” the Paper being late. *Id.* at

¹¹ Several documents reference the “DNP Project Guidelines,” dated May 7, 2018. *See, e.g.*, Defs.’ App. 70, 214, 215, 216, 222, 224. Defendants did not provide a copy of this document. Thus, the Court cannot determine whether this document contained further detail about the Paper requirements or included a grading rubric.

¹² *See infra* note 15 concerning “blinded evaluation” criteria.

220. Dr. Crenshaw detailed eight examples of Pickett's failure to incorporate feedback; one of those examples noted that Pickett had not included Dr. Cherry's feedback. *Id.*

Since Dr. Acton and Dr. Crenshaw assigned different grades to Pickett's Paper, they met to "review and discuss the scores and reconcile the assignment grade" as directed by Policy 40.631. *Id.* at 78; *see id.* at 79. After meeting, Drs. Acton and Crenshaw "reached consensus" and assigned a grade of 29.5%, which was in accordance with the policy. *Id.* at 79; *see id.* at 78 ("[T]he two evaluators . . . will review and discuss the scores and reconcile the assignment grade. If the two faculty graders cannot reach a consensus grade, the average of the two scores will be used as the assignment grade.").

This grade caused Pickett to obtain a final grade of "C" in Course 6201. *See id.* at 6, 19. The "I" grade was changed to a "C," in accordance with the Incomplete Form, in November 2018. *Id.* at 56–57, 135. Although Pickett completed the assignments and earned the grade in the Fall 2018 semester, Pickett's transcript reflects a grade of "C" in Course 6201 for the Summer 2018 term—the semester she originally enrolled in the course. *Id.* at 6, 19.

B. Pickett is accused of misreporting practicum hours.

In August 2018, Dr. Patricia Yoder-Wise questioned Pickett's reported practicum hours because they did not add up to the required amount. *Id.* at 59. This discrepancy resulted in an academic misconduct hearing on September 17, 2018. *Id.* at 60. Pickett received a "Letter of Warning" that "encouraged [her] to clarify with faculty any requirements for future clinical logs." *Id.* The letter also stated that "[i]f there is a lack of clarity with the instructions in the syllabus, [Pickett should] contact . . . faculty to request clarity." *Id.*

C. Pickett received lecture notes via online platforms.

Pickett conceded in her deposition that she was able to “retrieve” the lecture notes through online platforms. *Id.* at 131. Nevertheless, she points to three times when she did not receive the lecture notes in her preferred format. *Id.* at 131–33; *see, e.g., id.* at 132–33 (stating that although she obtained lecture notes in PDF format, she wanted her professor to send “the PowerPoint presentation itself”), 134 (asserting that a “PowerPoint presentation and a pdf . . . are two separate” things). On one of the three occasions, in Summer 2018, she “actually really needed the PowerPoint itself” because it “was interactive.” *Id.* at 126–27. Dr. Moore apparently never sent the PowerPoint to Pickett, though Dr. Moore believed the PDF format to be “the only form that [she] ha[d]” because she had not given the presentation. *Id.* at 58, 126–28; *see id.* at 129 (stating that she provided the LOA to Dr. Moore).

D. Pickett receives a second failing grade in the Fall 2018 semester.

Pickett enrolled in, among other classes, Primary Health Care I (Course 5440) in the Fall 2018. *Id.* at 6, 19, 135. Pickett had “difficulty focusing” while taking exams for the class. *Id.* at 136. Initially, Pickett’s first exam in the course was not set-up with the double time required by her LOA. *See id.* at 123, 140, 143. TTUHSC staff remedied the issue, however, and Pickett took that exam with the extended time. *Id.* at 123, 143. But she apparently scored poorly. *Id.* at 144–45. According to Pickett, she suffered anxiety during subsequent exams due to the incident with the first exam, which impacted her exam scores. *Id.*

Pickett received a grade of “C” in Course 5440. *Id.* at 6, 19, 135. Pickett attributes her grade to “[p]oor test grades” and/or “poor test performance.” *Id.* at 135–36. This course is not listed in the TTUHSC School of Nursing Academic Catalog for the “Post-Master’s DNP Full Time

Degree Plan.” *Id.* at 245–46; *see also id.* at 138 (Pickett testified that Course 5440 was not “under the DNP criteria to graduate.”).

On December 18, 2018, Pickett received an academic letter of dismissal signed by Dr. Evans, Dean of TTUHSC School of Nursing. *Id.* at 61, 121.¹³ The letter stated “that the Post-Master Doctor of Nursing Practice (PM-DNP) Council ha[d] received the grade reports of students enrolled in the School of Nursing PM-DNP Program.” *Id.* at 61. The letter advised Pickett that “[d]ismissal from TTUHSC School of Nursing PM-DNP Program will result from the following circumstances:”

- Students earning a “C” or lower in two or more DNP courses in one semester
- Students earning a “C” or lower in the same DNP course twice
- Students earning a “C” or lower in a second DNP course even though one DNP course has been retaken and a satisfactory grade of “B” or better has been obtained
- Cumulative semester or cumulative GPA less than 2.0 for two consecutive semesters

Id. According to the letter, “the Council recommend[ed] that [Pickett] be dismissed from the” DNP program because she “failed to meet one or more of the stated standards.” *Id.* The letter does not state which of the provisions Pickett failed to meet. *Id.* But Dr. Cherry attests that “Pickett was dismissed from the School of Nursing DNP program because she had two failing grades in the Fall semester 2018 and she failed to meet expected standards for a DNP student.” *Id.* at 231. This representation—two “Cs” in one semester—is consistent with Pickett’s understanding of the basis for her dismissal. *See id.* at 137.

¹³ This letter is dated January 7, 2019. Defs.’ App. 61. But Pickett first received the letter on December 18. *Id.* at 121.

After Pickett received the dismissal letter, Dr. Cherry offered Pickett an opportunity to continue in the DNP program or the FNP program, but not both. *Id.* at 109. Pickett did not respond by the deadline set by Dr. Cherry, so the offer was revoked. *Id.* at 72–73. Pickett appealed the impending dismissal, and retained legal counsel sometime in December 2018. *Id.* at 111, 138. Dr. Karla Chapman, Associate Dean of the School of Nursing, “made two attempts to contact Ms. Pickett to schedule [the appeal] hearing.” *Id.* at 226; *see id.* at 139. “Ms. Margret Duran, Assistant Vice President of Student Services, . . . also made several attempts to contact Ms. Pickett in order to begin [an] investigation of Ms. Pickett’s allegation of ADA discrimination against the [School of Nursing].” *Id.* at 226. Initially, Pickett did not respond to either school official. *Id.* She then spoke with Dr. Chapman and advised that she no longer wished to pursue the appeal (*id.* at 139, 225), apparently because Dr. Cherry was going to preside over the hearing. *Id.* at 139–40. Pickett’s attorney confirmed that Pickett “declin[ed] the offer . . . given to her from Dr. Chapman concerning the appeal.” *Id.* at 225. At some point during this process, Pickett “lost access to courses and email.” *Id.* at 139. Pickett was academically dismissed from TTUHSC. *Id.* at 61, 73, 109.

IV. Discussion

A. Defendants are entitled to summary judgment on Pickett’s ADA and RA claims.

The Fifth Circuit has recognized that “[j]urisprudence interpreting either [the ADA or RA] is applicable to both.” *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000). This is because “the rights and remedies afforded plaintiffs under Title II of the ADA are almost entirely duplicative of those provided under § 504 of the Rehabilitation Act.” *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005).

“A claim for failure to accommodate under the ADA [or RA] has the following elements: (1) the plaintiff is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered institution; and (3) the covered institution failed to make reasonable accommodations for such known limitations.”¹⁴ *Choi v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 633 F. App’x 214, 215 (5th Cir. 2015) (per curiam). As to the discrimination claim, to establish a prima facie case for exclusion from an educational program under either the ADA or RA, a plaintiff must establish that she was: “(1) an individual with a disability; (2) otherwise qualified for the program; and (3) excluded from, denied the benefits of, or otherwise subjected to discrimination under the program” on the basis of her disability. *Shaikh v. Tex. A&M Univ. Coll. of Med.*, 739 F. App’x 215, 219 (5th Cir. 2018) (per curiam) (citation and internal quotation marks omitted); see *Maples v. Univ. of Tex. Med. Branch at Galveston*, 901 F. Supp. 2d 874, 879 & n.3 (S.D. Tex. 2012), *aff’d*, 524 F. App’x 93 (5th Cir. 2013).

The ADA and RA differ with respect to establishing the third element. Under the ADA, a plaintiff must show that her disability was a motivating factor in the exclusion. *Pinkerton v. Spellings*, 529 F.3d 513, 516–19 (5th Cir. 2008) (per curiam). In contrast, the RA requires a plaintiff to allege that she was discriminated against *solely* on the basis of her disability. 29 U.S.C. § 794(a).

¹⁴ Although Title II and the RA do not codify an express failure-to-accommodate theory, the Fifth Circuit has adopted the standard used in Title I cases. See *Windham v. Harris Cnty.*, 875 F.3d 229, 235 (5th Cir. 2017) (explaining that Fifth Circuit case law “recognize[s] that a public entity’s failure reasonably to accommodate the known limitations of persons with disabilities can also constitute disability discrimination under Title II” and citing cases in support); *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 380 (5th Cir. 2016) (explaining that in evaluating an RA claim, “[d]iscrimination includes a failure to make reasonable accommodations”); *Aragona v. Berry*, No. 3:10–CV–1610–G, 2012 WL 467069, at *10 (N.D. Tex. Feb. 14, 2012) (“Under both Title II and the RA, discrimination by a public entity includes failing to make reasonable modifications or accommodations to the disabled individual, so that (s)he can participate in the programs or activities provided by the public entity.”).

1. Disability Discrimination Claims

Pickett did not produce any direct evidence of discrimination. “When a plaintiff lacks direct evidence to support her disability-discrimination claim, the Court applies the Fifth Circuit’s ‘modified *McDonnell Douglas*’ approach in conducting its summary-judgment analysis.” *Cheatham v. Farmers Ins. Grp.*, No. 4:11–CV–638–Y, 2013 WL 961494, at *3 (N.D. Tex. Mar. 13, 2013) (citation omitted). “Under the first step of this framework, the plaintiff must establish a *prima-facie* case of disability discrimination.” *Id.*; see *Melton v. Dall. Area Rapid Transit*, 391 F.3d 669, 671 (5th Cir. 2004) (“A plaintiff must first establish a *prima facie* case of discrimination before relief under the ADA can be considered.”); *Block*, 952 F.3d at 618 (discussing elements of a *prima facie* case in relation to plaintiff’s ADA claim against Texas Board of Law Examiners). If the plaintiff makes out a *prima facie* case, the defendant must then “articulate a legitimate non-discriminatory reason for its adverse” action. *Id.* Finally, the burden shifts back to the plaintiff to establish that a genuine issue of material fact remains as to whether the defendant’s proffered reason for the adverse action is pretextual. *Id.*; see *Power v. Univ. of N.D. Sch. of L.*, 954 F.3d 1047, 1052–53 (8th Cir. 2020) (discussing burden shifting framework).

Defendants initially contend that Pickett cannot “make a *prima facie* case of disability discrimination under either the [RA] . . . or ADA” as to the third element, i.e., the “record is devoid of any evidence demonstrating discrimination, let alone, intentional discrimination by Defendants.” Defs.’ Br. 3–4, 18. An individual experiences discrimination by reason of her disability when “(1) there is a ‘causal connection’ between [her] disability and the discriminatory action; and (2) [her] disability was” a motivating factor in the discrimination. *Shaikh*, 739 F. App’x at 222 (quoting *Sedor v. Frank*, 42 F.3d 741, 746 (2d Cir. 1994)); see *Maples*, 901 F. Supp. 2d at 879. “The causal connection between the individual’s disability and the discriminatory action

‘need not be direct’ in order to satisfy the ‘[motivating factor]’ requirement: it is sufficient that the disability caused the individual to do or not do something, which, in turn, caused the discriminatory action.” *Shaikh*, 739 F. App’x at 222 (quoting *Sedor*, 42 F.3d at 746).

The evidence reflects a series of events that ended in Pickett’s dismissal from TTUHSC. First, Drs. Cherry, Acton, and Crenshaw learned of Pickett’s ADA accommodations in the Summer 2018 semester. Defs.’ App. 247. In September and October 2018, Dr. Acton then assigned Pickett’s Paper a 0% two times for two reasons: the first, because she turned it in late; the second, because she did not incorporate feedback. Defs.’ App. 138. Course 6201’s syllabus does not reflect that failure to incorporate feedback automatically results in a zero, nor does it state how much feedback the student needs to incorporate. *See id.* at 214–16, 222. This “subjectiveness,” according to Pickett, stemmed from “disability discrimination” but Pickett points to no specific evidence in support. *Id.* at 142–43; *see id.* at 47, 140–41. Because of this 0%, and the subsequent averaging of Dr. Acton’s and Dr. Crenshaw’s scores (which was provided for by TTUHSC policy), Pickett received a “C” in Course 6201.¹⁵ *Id.* at 6, 19, 77–79.

In August 2018, Dr. Yoder-Wise questioned Pickett’s reporting of practicum hours (*id.* at 59), an allegation a disciplinary board ultimately concluded did not provide grounds for dismissal. *Id.* at 60. There is no evidence, however, that Dr. Yoder-Wise knew of Pickett’s disability. Pickett also did not receive an “interactive” PowerPoint one time, but there is no evidence that this caused Pickett to obtain a failing grade or suffer harm, and she received a PDF copy of the presentation. *Id.* at 6, 19 (reflecting that Pickett earned a “B” in Dr. Moore’s class, Diagnostic Methods); *see*

¹⁵ Policy 40.631 provides that the student may request another person “to conduct a second, independent, blinded evaluation of the assignment.” Defs.’ App. 78. This procedure involves the second evaluator using “an unmarked copy of the assignment and unmarked set of grading criteria identical to the criteria used for the original grade.” *Id.* There is no evidence that this “blind” procedure was not followed, and likewise, no evidence that a “blinded” evaluation meant someone who was either unfamiliar with Pickett or who did not know the identity of the Paper’s author. *See id.*

also id. at 58 (reflecting that Dr. Moore did not believe she had a copy of the PowerPoint itself), 128 (Pickett testified that the presentation was given by someone other than Dr. Moore, though she was there during the presentation.). And finally, Pickett acknowledges that her poor test performance led her to obtain a second “C,” this one in Course 5440, in the Fall 2018 semester. *Id.* at 135–36.

Ultimately, TTUHSC dismissed Pickett from the DNP combined program. *Id.* at 61. The “Post-Master Doctor of Nursing Practice (PM-DNP) Council” (Council) made that recommendation based on her alleged receipt of two “Cs” in one semester. *Id.* at 61, 231. The dismissal, however, *may* have been a deviation from policy. Pickett’s transcript does not reflect that she earned two “Cs” in one semester. *Id.* at 6, 19. The “C” she received in Course 6201 was credited toward the Summer 2018 semester. *Id.* And the second “C,” earned in Course 5440, was credited in the Fall 2018 semester. *Id.* What is more, the dismissal provisions state that dismissal is justified when the two “Cs” are earned in “DNP courses.” *Id.* at 61, 244. According to the DNP Academic Catalog, Course 5440 is not required to graduate from the DNP program. *Id.* at 244–46. Pickett was apparently taking that course to complete requirements for her FNP certificate. *Id.* at 138. Still, Pickett actually completed the coursework for Course 6201 in the Fall 2018 semester (*see id.* at 56–57, 76–81), and “Pickett was enrolled in one degree seeking program”—i.e., “the Combined DNP degree with FNP certificate courses.” *Id.* at 231.

Missing from this evidence, however, is *any* indication that these individuals acted by reason of Pickett’s disability. Defendants’ possible deviation from policy when dismissing Pickett, standing alone, does not provide the necessary causal link. The Council recommended Pickett’s dismissal—a recommendation Dr. Evans apparently adopted. *See* Defs.’ App. 61. But neither party cites any summary judgment evidence demonstrating that either the Council or Dr. Evans

knew of Pickett's disability or were motivated by it in their decision making.¹⁶ Thus, Pickett has shown nothing more than a mere deviation from policy, which does not establish a discrimination claim. *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 560 n.16 (5th Cir. 1998) (“[T]he ADA ‘cannot protect . . . [plaintiffs] from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated.’” (citation omitted)); *Armendariz v. Angelo State Univ.*, No. 5:08-CV-217-C, 2009 WL 10705283, at *6 (N.D. Tex. Nov. 4, 2009) (holding plaintiff “failed to establish the fourth element of his prima facie case of [age] discrimination” where he offered no summary judgment evidence suggesting defendants discriminated due to his protected status); see *McMichael v. Transocean Offshore Deepwater Drilling, Inc.*, 934 F.3d 447, 460 (5th Cir. 2019) (providing that “an employer’s ‘disregard of its own hiring system does not of itself conclusively establish that improper discrimination occurred or that a nondiscriminatory explanation for an action is pretextual,’” and a plaintiff “must connect a departure from or misapplication of procedure to a discriminatory motive”).

Turning to the other evidence, it shows, at best, attenuated timing between individuals learning of Pickett's disability and their actions. For example, Pickett received a “C” in Course 6201 within a few months of Drs. Acton, Crenshaw, and Cherry learning of Pickett's disability. See Defs.’ App. 76, 78–80, 85, 247.¹⁷ Similarly, Dr. Cherry gave Pickett a choice to remain in the DNP or the FNP program, but not both, after Dr. Evans issued the dismissal letter and about five to six months after Cherry learned of Pickett's disability. *Id.* at 109. At some point, Pickett “lost

¹⁶ Nor have the parties directed the Court to evidence showing that Pickett's disability caused her to obtain the two “Cs.” See *Shaikh*, 739 F. App'x at 222.

¹⁷ Dr. Crenshaw served as the second grader of Pickett's Paper in accordance with Policy 40.631. Defs.’ App. 78. Neither party cites to any evidence showing that Crenshaw's grading was impermissible or that she was motivated by Pickett's disability in assigning the 59%. To the contrary, Pickett testified that she would have accepted the 59% because she “would still [have] pass[ed] the course.” *Id.* at 138. It appears then, that Pickett's true disagreement is with Dr. Acton's score and the fact that the two scores were averaged. But there is no evidence this reconciliation or averaging constituted a policy deviation. *Id.* at 78.

access to courses and email.” *Id.* at 139. Dr. Cherry also apparently intended to preside over the hearing related to Pickett’s appeal of her dismissal. *Id.* at 139–40. Pickett did not, however, elect to attend that appeal hearing and instead sued Defendants. *Id.* at 110, 139–40, 225. Whether the events following issuance of the dismissal letter constituted policy deviations is unclear because neither party provided *any* relevant summary judgment evidence.

Construed in Pickett’s favor, this timing might establish a causal connection between Pickett’s disability and the discriminatory action. *See Shaikh*, 739 F. App’x at 222. But other than the timing, there is no other evidence showing that Drs. Acton, Crenshaw, and Cherry, or TTUHSC, acted by reason of Pickett’s disability.

The undersigned therefore concludes Pickett has not made out a *prima facie* case as to her ADA and RA disability discrimination claims.¹⁸ *See, e.g., id.* (providing that a plaintiff must show, *inter alia*, that her disability motivated the discriminatory action); *Reiss*, 2023 WL 5105252, at *7–8 (recommending grant of summary judgment on plaintiff’s ADA and RA claims, where the evidence did “not evince a discriminatory motive on [university’s] part,” thus requiring court to defer to professor’s professional judgment that plaintiff’s performance “merited a failing grade”); *Sweeney v. Tex. State Univ.*, No. 1:14-CV-910-DAE, 2016 WL 4368380, at *4 (W.D. Tex. Aug. 15, 2016) (determining that professor’s “alleged offense at [plaintiff’s] disability” did not support conclusion that professor was motivated by plaintiff’s disability, where evidence showed plaintiff did not respond to professor’s questions on project); *Shurb v. Univ. of Tex. Health Sci. Ctr. at Hous.–Sch. of Med.*, 63 F. Supp. 3d 700, 708 (S.D. Tex. 2014) (concluding plaintiff had not

¹⁸ When evaluating her Title II discrimination claim at the *pleading* stage, the Fifth Circuit stated that it was “not obvious that [TTUHSC] dismissed [Pickett] for nondiscriminatory reasons” and listed Pickett’s allegations that supported the conclusion. *Pickett*, 37 F.4th at 1034. Pickett has failed to submit any evidence showing Dr. Yoder-Wise—the professor who accused her of falsifying practicum hours—knew of her disability or that her Paper was graded based on criteria that did not apply to other students. *See id.* Similarly, Pickett has failed to establish that Drs. Acton and Crenshaw’s regrading of her Paper deviated from policy or that professors “repeatedly failed to give her lecture notes that she was entitled to.” *Id.*; *see infra* Section IV.A.2.

established a disability discrimination claim under the ADA or RA because he did “not identify any evidence establishing that his disability was a motivating factor in the [u]niversity’s decision to remove him from its medical school program” but was instead dismissed “consistent with [the university’s] performance requirements and . . . only after numerous attempts to reasonably accommodate the plaintiff’s disability”).

Even assuming, however, that Pickett has established a *prima facie* case, Defendants have submitted legitimate, nondiscriminatory reasons for their actions. In addition to the already identified academic performance deficiencies and her “fail[ure] to meet the academic requirements to continue in the” DNP combined program, Pickett also did not comply with syllabus criteria requiring incorporation of feedback into her Paper. *See, e.g.*, Defs.’ Br. 19. The burden, therefore, shifts back to Pickett to demonstrate that these reasons were pretextual. Pickett has not met her burden.

First, Pickett’s failure to respond to Defendants’ summary judgment motion renders their legitimate, nondiscriminatory reasons un rebutted. That is, Pickett has not met her burden of showing there is a genuine issue of material fact that Defendants’ stated reasons were pretextual. *See, e.g., Baney v. Mukasey*, No. 3:06-CV-2064-L, 2008 WL 2673753, at *7 (N.D. Tex. June 30, 2008) (determining that summary judgment on plaintiff’s Title VII claim was appropriate in part because plaintiff did not respond to the motion and thus had not carried his burden showing pretext); *Baptiste v. Specialty Prods. & Insulation*, No. H-04-3044, 2005 WL 3359419, at *4 (S.D. Tex. Dec. 9, 2005) (granting summary judgment on plaintiff’s Title VII employment discrimination claim after he failed to respond to the motion for summary judgment and therefore did not “meet his burden to raise a fact issue that” his termination was pretext).

Second, the Court is not required to sift through the record, nor has it done so, to find whether there is evidence of pretext. *See Bookman*, 945 F. Supp. at 1002. But examining the available summary judgment evidence, the undersigned concludes it shows, at best, a series of unconnected events as related to Pickett's disability. The relatively close timing between Drs. Cherry, Acton, and Crenshaw learning of Pickett's disability and Dr. Acton assigning Pickett a 0% on her Paper may support an inference of discrimination as to Dr. Acton.¹⁹ But the evidence does not show that the reason for this 0%—Pickett's failure to incorporate feedback—was pretextual. *See, e.g.*, Defs.' App. 220 (Dr. Crenshaw detailed eight examples of Pickett's failure to incorporate feedback). Moreover, as discussed above, neither party has cited any evidence showing that the Council or Dr. Evans (those ultimately responsible for Pickett's dismissal) knew of Pickett's disability, much less that they deviated from policy by reason of Pickett's disability. Because Pickett has not met her burden of demonstrating that Defendants' actions were pretextual *and* that discrimination was the real reason for their actions, Defendants are entitled to summary judgment.²⁰ *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (“[A] reason

¹⁹ As previously discussed, the first “zero” received by Pickett from Dr. Acton was due to Pickett submitting the paper over 30 hours late. Pickett appealed the grade and Associate Dean Melinda Mitchell Jones determined there appeared to be a “good faith” disagreement between the parties as to the document that controlled the grading criteria. Defs.' App. 86. As a result, Associate Dean Jones granted Pickett's appeal, directing faculty to change Pickett's grade back to an “I” “and to [re]grade and return [the Paper] to [Pickett] as soon as possible.” *Id.* Other than this “good faith” difference in interpreting the grading criteria, there is no evidence in the summary judgment record as to Dr. Acton's basis or motivation for applying the standard she did, nor is there any evidence her stated reason was false or that improper discriminatory animus motivated it.

²⁰ In addition to receiving two “Cs” in one semester, Defendants also suggest that Pickett was dismissed based on the following: (1) “Students earning a ‘C’ or lower in a second DNP course even though one DNP course has been retaken and a satisfactory grade of ‘B’ or better has been obtained” (Defs.' Br. 13 (quoting Defs.' App. 61, 231, 244)); or (2) she failed to maintain a 3.0 GPA, as required. *Id.* at 18. But while Defendants reference the relevant policy or program provisions for these criteria, they do not cite any summary judgment evidence supporting the proposition that TTUHSC relied upon either specific ground in dismissing Pickett from the program. Defs.' App. 61 (Pickett's dismissal letter listing the reasons a student *may* be dismissed from the program), 231 (Dr. Cherry's affidavit listing same), 244 (TTUHSC School of Nursing Academic Catalog listing same). Because Defendants have not met their burden of production as to these reasons, the undersigned has not considered them. *See Kirkwood v. Inca Metal Prods. Corp.*, No. 3:04-CV-0226-D, 2008 WL 245941, at *6–7 (N.D. Tex. Jan. 30, 2008) (“A defendant fails to meet the production burden when it does not ‘introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action.’ . . . The burden of production requires more than an assertion, it requires evidence.” (emphasis and citations omitted)); *see also Black v. Pan Am. Lab'ys, L.L.C.*, 646 F.3d 254, 259

cannot be proved to be a pretext *for discrimination* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.” (internal quotation marks and citation omitted)); *Power*, 954 F.3d at 1054–55 (affirming district court’s conclusion that there was no evidence that law school rejected plaintiff’s application for discriminatory reasons, where evidence did not show proffered reasons for rejection were pretextual); *Wilson v. L&B Realty Advisors, LLP*, No. 3:20-CV-2059-G, 2022 WL 102564, at *15 (N.D. Tex. Jan. 11, 2022) (granting summary judgment on plaintiff’s age discrimination claim where plaintiff established only a mere a policy deviation, which was insufficient “to prove pretext”); *Oldenburg v. Univ. of Tex. at Austin*, No. 1:18-CV-968-LY, 2020 WL 3415879, at *6 (W.D. Tex. June 22, 2020) (recommending dismissal of plaintiff’s age discrimination claim where plaintiff failed to show “that any departure by [defendant] from its hiring guidelines was a pretext for discrimination”), *R. & R. adopted by* 2020 WL 13610379 (W.D. Tex. July 8, 2020), *aff’d*, 860 F. App’x 922 (5th Cir. 2021).

In sum, the undersigned concludes that (1) Pickett has not made a prima facie case of disability discrimination, and (2) even if she has, Defendants articulated a legitimate, nondiscriminatory reason for her dismissal, and Pickett has not met her burden to show that Defendants’ proffered reasons were pretext for discrimination on the basis of her disability. The undersigned therefore recommends that the district judge grant summary judgment on Pickett’s disability discrimination claims under the ADA and RA.²¹

(5th Cir. 2011) (“The employer’s burden is one of production, not persuasion, and does not involve a credibility assessment.”). Nevertheless, the summary judgment record, as constructed, demonstrates Defendants’ entitlement to judgment.

²¹ Pickett’s failure to establish an ADA claim necessarily means that she cannot meet the RA’s more stringent standard—that her disability was “the *only* cause of the . . . conduct’ that ‘trigger[ed]’ the discriminatory action.” *Shaikh*, 739 F. App’x at 222 (quoting *Sedor*, 42 F.3d at 746). The undersigned further observes that in her deposition testimony and interrogatory responses, Pickett herself submits at least one additional explanation for Defendants’ purported decision. She claims that Defendants acted in retaliation based on an employment dispute. Defs.’ App. 48–49, 110, 138. Pickett also submitted her Paper thirty hours late for Course 6201 and concedes that she performed poorly on tests in Course 5440. *Id.* at 6, 19, 80–81, 135–36. Thus, even assuming Pickett’s disability is a factor in Defendants’ decision making, it is not the *only* cause of the alleged discrimination. *See, e.g., Wren v. Midwestern*

2. *Failure to Accommodate Claims*

Pickett's failure to accommodate claim is based on her allegation that her professors did not provide her lecture notes as required by her LOAs. The evidence reflects that Pickett was generally able to access all lecture notes through online platforms. Defs.' App. 131. On two occasions, Pickett did not receive her preferred *format* for the notes—the PowerPoint slides in native format—but she did receive copies in PDF. *Id.* at 131–33. On the third, Pickett similarly obtained a PDF copy of the presentation but did not receive the PowerPoint—the only time she “actually really needed the PowerPoint itself” because it “was interactive.” *Id.* at 58, 126–27. But there is no evidence that the lack of the interactive PowerPoint caused Pickett to obtain a failing grade. *Id.* at 6, 19 (reflecting that Pickett earned a “B” in Dr. Moore’s class, Diagnostic Methods); *see also id.* at 58 (showing that Dr. Moore did not believe she had a copy of the PowerPoint itself), 128 (Pickett testified that the presentation was given by someone other than Dr. Moore, though she was there during the presentation.).

The record is devoid of evidence showing that Defendants failed to accommodate Pickett. TTUHSC issued Pickett LOAs with her requested accommodation—double exam time—and also provided note taking assistance, despite the fact that Pickett did not request this accommodation. *Id.* at 35, 37, 133. The LOA stated that Pickett was to receive “[n]ote-taking assistance, i.e. instructors may give copies of classroom lecture notes, power point presentation, transparencies, overheads used for daily lectures or post notes online.” *Id.* at 37. Pickett does not dispute that she received “copies of [the] . . . power point presentation[s]” and was able to access notes via online

State Univ., No. 7:18-cv-00060-O-BP, 2019 WL 3099408, at *10 (N.D. Tex. June 25, 2019) (recommending dismissal of plaintiff’s RA claim because she “allege[d] multiple reasons, other than her disability, that could have caused [defendant] to administratively withdraw her from the FNP”), *R. & R. adopted by* 2019 WL 3081849 (N.D. Tex. July 15, 2019); *Sadik v. Univ. of Hous.*, No. H-03-4296, 2005 WL 1828588, at *8 (S.D. Tex. Aug. 1, 2005) (granting summary judgment on plaintiff’s RA claim because he “failed to marshal any evidence demonstrating that he was subjected to discrimination of any kind solely because of his disability”).

platforms. *Id.* at 131–33; *see id.* at 58 (acknowledging that she received the PDF file of the radiology presentation in Dr. Moore’s class). That is, Pickett received “[n]ote-taking assistance.” *Id.* at 37. Pickett merely avers that she did not always receive the presentations *in her preferred format*. *Id.* at 121, 131–33.

“It is axiomatic that a claim for failure to accommodate does not lie where the accommodation received is the accommodation the plaintiff requested.” *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 188 (2d Cir. 2015). And while the ADA establishes a right to reasonable accommodation, it does not require defendant to provide plaintiff’s “preferred accommodation.” *E.E.O.C. v. Agro Distrib., LLC*, 555 F.3d 462, 471 (5th Cir. 2009). Pickett’s non-receipt of lecture notes in her preferred format does not demonstrate that TTUHSC failed to reasonably accommodate Pickett, particularly where there is no evidence that TTUHSC required the notes to be provided in a particular format. Defs.’ App. 37 (stating that Pickett was to receive “[n]ote-taking assistance”); *see, e.g., Sweeney v. Tex. State Univ.*, No. 1:14-CV-910-DAE, 2016 WL 4368380, at *3 (W.D. Tex. Aug. 15, 2016) (stating that the ADA does not support “a cause of action to remedy [plaintiff’s] failure to appropriately utilize the accommodations provided to him or to request further accommodations”); *Shurb*, 63 F. Supp. 3d at 708 (granting summary judgment on plaintiff’s ADA claim in part because record showed that “[u]niversity’s removal of the plaintiff was consistent with its performance requirements and was made only after numerous attempts to reasonably accommodate the plaintiff’s disability”); *Maples*, 901 F. Supp. 2d at 882 (observing that evidence reflected university’s “commitment to accommodating [plaintiff’s] disabilities,” where “almost immediately after [plaintiff] requested extra time and a distraction-free environment for exams, [university] provided her with such”). The undersigned therefore recommends dismissal of Pickett’s failure-to-accommodate claims under the ADA and RA.

B. Defendants are entitled to summary judgment on Pickett's § 1983 substantive due process claim.

Defendants move for summary judgment on Pickett's substantive due process claim, arguing first that she "does not have a constitutionally protected property or liberty interest in her continued post-graduate education." Defs.' Br. 22 (citing their motion for judgment on the pleadings). But even if Pickett did possess such a right, Defendants maintain the evidence shows Pickett "was dismissed from the Combined Program for failure to meet the required standards." *Id.* The undersigned concludes Pickett does not have a protected interest and therefore recommends entry of summary judgment on her claim.²²

There can be no procedural or substantive due process violation unless the government deprives the plaintiff of a protected interest. *See Klingler v. Univ. of S. Miss., USM*, 612 F. App'x 222, 227 (5th Cir. 2015) (per curiam) ("The protections of the Due Process Clause, whether procedural or substantive, only apply to deprivations of constitutionally protected property or liberty interests."); *Simi Inv. Co. v. Harris Cnty.*, 236 F.3d 240, 249–50 (5th Cir. 2000) ("A violation of substantive due process, for example, occurs only when the government deprives someone of liberty or property;" thus, a plaintiff "must first establish that [she] held a constitutionally protected property right to which the Fourteenth Amendment's due process protection applies." (citation omitted)); *Underwood v. Jeffcoat*, No. 99-40034, 1999 WL 1067547, at *3 (5th Cir. Oct. 13, 1999) ("It is axiomatic that the protections of the Due Process clause do not attach unless state procedures threaten a protected liberty or property interest."). Pickett alleges she has a protected property interest in continuing her education at TTUHSC and/or her purported payment of "significant" sums to complete her education. Compl. 18–19.

²² Whether Pickett's § 1983 substantive due process claim is dismissed under Rule 56 or Rule 12(c), the basis for the dismissal is the same: her claim fails as a matter of law.

Property interests are derived not from the United States Constitution but “from independent sources such as state statutes, local ordinances, existing rules, contractual provisions, or mutually explicit understandings.” *Blackburn v. City of Marshall*, 42 F.3d 925, 936–37 (5th Cir. 1995); *accord Simi Inv.*, 236 F.3d at 250 (“The nature of the property interest . . . must be determined by Texas law.”); *see also Wigginton v. Jones*, 964 F.3d 329, 336 n.6 (5th Cir. 2020) (The Fifth Circuit “has held that substantive due process rights can be derived from state law, and are therefore treated in the same manner as rights that give rise to a procedural due process claim.”). “While the underlying property interest may be created by state law, ‘*federal constitutional law* determines whether that interest rises to the level’ of a constitutionally protected interest.” *Klingler*, 612 F. App’x at 227 (quoting *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756–57 (2005). “Resolution of the federal issue begins, however, with a determination of what it is that state law provides.” *Id.* (quoting *Gonzales*, 545 U.S. at 757).

“A constitutionally protected [property] right must be a vested right, which is ‘something more than a mere expectancy based upon an anticipated continuance of an existing law.’” *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015) (citation omitted); *see Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“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.”).

Distilled to its essence, Pickett asserts that she has a property interest in continuing graduate education because, in her view, she met the academic requirements, or would have met them but for the alleged Title II violations. *See* Compl. 18–19. She also claims she paid “significant” sums in tuition, bolstering her property interest. *See id.* at 19. But “Texas has not recognized a property interest in graduate higher education.” *Plummer v. Univ. of Hous.*, 860 F.3d 767, 773 n.6 (5th Cir.

2017) (citing *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930 n.1 (Tex. 1995)); see also *Tex. S. Univ. v. Villareal*, 620 S.W.3d 899, 909 (Tex. 2021) (observing that the Texas “Constitution does not recognize higher education as a fundamental right” and therefore Texas’s due course of law clause cannot provide any substantive protection). Such a right is neither enshrined statutorily nor within the Texas Constitution. And Pickett has not pointed to nor alleged a contractual right.

Moreover, neither the Fifth Circuit nor the Supreme Court has held that “students have a liberty or property interest in public higher education.”²³ *Perez v. Tex. A&M Univ. at Corpus Christi*, 589 F. App’x 244, 248 (5th Cir. 2014) (per curiam); see *Pickett*, 37 F.4th at 1035 (observing that the Supreme Court has never decided whether plaintiffs have a protected property interest in continuing education, though the Fifth Circuit, like the Supreme Court, has “assumed without deciding that” such a right exists); *Barnes v. Symeonides*, No. 94-30314, 1995 WL 10518, at *2 (5th Cir. Jan. 3, 1995) (“Education-particularly post-graduate or professional education-is not a right afforded either explicit or implicit protection under the Constitution.”). The undersigned further observes that the Supreme Court has held that there is generally no fundamental right to public education protected by the Constitution. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

Pickett may have unilaterally expected to continue her education, but without showing a state statutorily or constitutionally protected interest, she can have no property right in continued higher education. Cf. *James v. Cleveland Sch. Dist.*, 45 F.4th 860, 865 (5th Cir. 2022) (“By

²³ Where, however, “a state establishes and maintains a public school system ‘and has required its children to attend,’ the ‘State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest, which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.’” *Doherty v. Nellis*, No. 5:14-CV-155-A, 2015 WL 329221, at *8 (N.D. Tex. Jan. 23, 2015) (citing *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

establishing a *compulsory* school system, a state creates a property interest in ‘entitlement to a public education . . . protected by the Due Process Clause.’” (emphasis added) (quoting *Goss*, 419 U.S. at 574)); *Hasanaj v. Detroit Pub. Schs. Cmty. Dist.*, 35 F.4th 437, 447–52 (6th Cir. 2022) (rejecting plaintiff’s contention that he had protected property interests in continued employment as a teacher and in the government complying with their evaluation statute, where plaintiff did not meet requirements for tenure under state law and expectation in government following state law procedures did not amount to property right); *Hiers v. Bd. of Regents of the Univ. of N. Tex. Sys.*, No. 4:20-CV-321-SDJ, 2022 WL 748502, at *22 (E.D. Tex. Mar. 11, 2022) (reasoning instructor who was an at-will employee did not have protected interest in continued employment based on university’s policy manual, as Texas law provides that such materials “do not, without more, create contractual rights in employees or otherwise modify at-will employment”); *Alston v. Pa. State Univ.*, No. 1:14-CV-2480, 2015 WL 9660019, at *5 (M.D. Pa. June 9, 2015) (recommending dismissal of plaintiff’s substantive due process claim because he had failed to demonstrate that he had a protected property interest in obtaining financial aid or a professional degree), *R. & R. adopted by* 2016 WL 74795 (M.D. Pa. Jan. 7, 2016), *aff’d*, 685 F. App’x 158 (3d Cir. 2017); *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 335–36 (E.D. Va. 2005) (dismissing plaintiff’s procedural and substantive due process claims, where plaintiff had not established that “a state created property interest in continued enrollment at a public education institution exists in Virginia”). This is particularly true where Pickett does not contend she was wholly denied access to public higher education but was instead, not able to continue her chosen field at TTUHSC. *See Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 26 (5th Cir. 1997) (finding no denial of access to public education where student was transferred from one school program to another with stricter discipline).

Pickett's allegation that she paid "significant amounts of money" to enroll in the FNP and DNP programs (Compl. 19), without more, also does not constitute a protected property interest. Absent evidence demonstrating the existence of a contract with TTUHSC, e.g., the terms of the parties' agreement, whether she complied with such terms during the relevant period, etc., Pickett has failed to establish a constitutionally protected property interest. *See, e.g., Malhotra v. Univ. of Ill. at Urbana-Champaign*, 77 F.4th 532, 537 (7th Cir. 2023) (holding plaintiff had not pleaded sufficient facts establishing he possessed a protected property interest in continued university enrollment simply "because he 'paid tuition,'" explaining that plaintiff "needed to allege facts that plausibly suggested the existence of an express or implied contract"); *Doe v. Va. Polytechnic Inst. & State Univ.*, 617 F. Supp. 3d 412, 424–25, 428–29 (W.D. Va. 2022) (rejecting graduate student's contention "that because he paid tuition for the 2019-2020 academic year, met the university's academic and conduct standards, and abided by its policies, he had a reasonable expectation" of continued enrollment, "but for the student conduct matter that made the basis of his lawsuit").

Having concluded that Pickett does not have a protected property interest, Pickett cannot establish a § 1983 substantive due process claim. *See, e.g., James*, 45 F.4th at 867 ("Under [Fifth Circuit] precedent, this lack of a property interest dooms her substantive due process claim by definition."). Defendants are therefore entitled to judgment on Pickett's claim.

V. Recommendation

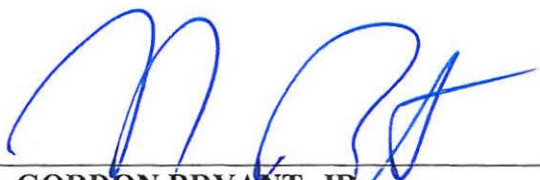
For the foregoing reasons, the undersigned recommends that the United States District Judge **GRANT** Defendants' Motion for Summary Judgment and dismiss all of Pickett's remaining claims with prejudice. ECF No. 82. Should the district judge adopt this recommendation, the undersigned further recommends the district judge **DENY as moot** Defendants' Motion for

Judgment on the Pleadings (ECF No. 58) and **GRANT** Pickett's motion asking to seal her response and attachments. ECF No. 63.

VI. Right to Object

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within fourteen days after being served with a copy. *See* 28 U.S.C. § 636(b)(1) (2016); FED. R. CIV. P. 72(b). To be specific, an objection must identify the specific finding, conclusion, or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's Findings, Conclusions, and Recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

Dated: January 2, 2024.



D. GORDON BRYANT, JR.
UNITED STATES MAGISTRATE JUDGE