

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

SCHYLER Z. GRODMAN, M.D.,
Plaintiff

v.

TEXAS TECH UNIVERSITY
HEALTH SCIENCES CENTER
Defendant

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Civil Action No. 5:23-cv-00210-H

**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION FOR
LEAVE TO FILE FIRST AMENDED COMPLAINT**

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy Attorney General for Litigation

JAMES LLOYD
Deputy Attorney General for Civil Litigation

KIMBERLY GDULA
Chief, General Litigation Division

JOSEPH D. KEENEY
Attorney-In-Charge
Texas Bar No. 24092616
Assistant Attorney General
Office of the Attorney General
General Litigation Division -019
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4090
Facsimile: (512) 320-0667
Joseph.Keeney@oag.texas.gov

ATTORNEYS FOR DEFENDANTS

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TO THE HONORABLE JAMES WESLEY HENDRIX:

Defendant Texas Tech University Health Sciences Center (“Defendant” or “TTUHSC”), by and through its undersigned attorney, file this Response in Opposition to Plaintiff’s Motion for Leave to File First Amended Complaint and in support thereof, respectfully shows the Court as follows:

I. INTRODUCTION AND PROCEDURAL HISTORY

On September 7, 2023, Plaintiff filed his Original Complaint, bringing disability discrimination claims under the Americans with Disabilities Act (“ADA”) and Texas Commission on Human Rights Act (“TCHRA”), as well as a disability retaliation claim under the Rehabilitation Act. (ECF No. 1). On October 4, 2023, TTUHSC filed a Partial Motion to Dismiss all claims except the retaliation claim under the Rehabilitation Act. (ECF No. 5). In response, Plaintiff filed an untimely Amended Complaint on November 22, 2023, which the Court struck on November 29, 2023. (ECF No. 13). Plaintiff then filed his Motion for Leave to File First Amended Complaint on December 4, 2023. (ECF No. 14).

Plaintiff’s Motion for Leave should not be granted because his proposed amendment would be futile. Plaintiff’s disability discrimination, failure to accommodate, and due process allegations fail to state claims upon which relief could be granted.¹ Further, the Court would lack jurisdiction over any due process claim against TTUHSC.

II. ISSUES IN DISPUTE AND STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 15(a)(2) a “court should freely give leave [to amend pleadings] when justice so requires.” Fed. R. Civ. P. 15(a)(2). But a “court need not grant a futile

¹ TTUHSC did not address the retaliation claim under the Rehabilitation Act in its Partial Motion to Dismiss, and thus, for now, reserves its arguments regarding the viability of that claim. (ECF No. 5).

motion to amend.” *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016) (citation omitted). “An amendment is considered futile if ‘the amended complaint would fail to state a claim upon which relief could be granted.’” *SGK Properties, L.L.C. v. U.S. Bank Nat’l Ass’n for Lehman Bros. Small Balance Commercial Mortg. Pass-Through Certificates, Series 2007-3*, 881 F.3d 933, 944-45 (5th Cir.), *cert. denied sub nom.* 139 S. Ct. 274 (2018) (quotation omitted). Amendment would also be futile if the court would lack jurisdiction over the claims. *See Wiggins v. La. State Univ.-Health Care Servs. Div.*, 710 F. App’x 625, 627 (5th Cir. 2017) (per curiam) (affirming denial of leave to amend complaint when the court concluded it would lack subject matter jurisdiction over any potential amendments).

To state a claim upon which relief can be granted, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The complaint must set forth enough facts to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). A claim is factually plausible when the factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Conclusory allegations, unwarranted factual inferences, or legal conclusions” are not accepted as true. *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005) (citing *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)). When reviewing whether a complaint fails to state a claim, “[t]he court’s review is limited to the complaint, any documents attached to the complaint, and any documents attached to a motion to dismiss that are central to the claim and referenced by the complaint.” *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010); *see also Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010).

III. ARGUMENT AND AUTHORITIES

A. Plaintiff's proposed Amended Complaint fails to state a disability discrimination claim upon which relief can be granted.

The Rehabilitation Act states that “[n]o otherwise qualified individual with a disability in the United States, as defined in § 705(20) of this title, shall, *solely by reason of* her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination....” *Soledad v. U.S. Dep’t of Treasury*, 304 F.3d 500, 504 (5th Cir. 2002) (emphasis in original). Thus, the proper question to be asked in a Rehabilitation Act claim is whether the discrimination took place “solely because of” the disability.” *Id.* In a reasonable accommodation case, the ADA and Rehabilitation Act are virtually indistinguishable. However, in the context of intentional discrimination, the Rehabilitation Act’s *sole* cause standard is higher than the ADA’s motivating factor standard. *Pinkerton v. Spellings*, 529 F.3d 513, 516-19 (5th Cir. 2008); *see also Kurth v. Gonzales*, 472 F. Supp. 2d 874, 879 (E.D. Tex. 2007) (“Unlike Title VII cases and ADA claims where plaintiffs can recover based on ‘mixed motives,’ the Rehabilitation Act requires that the discrimination be based *solely* on an employee’s disability.”).

Under *Soledad*, Plaintiff has not stated a claim upon which relief can be granted. Plaintiff’s proposed Amended Complaint clearly demonstrates that TTUHSC recommended Plaintiff for dismissal for *four* reasons:

1. Performance that presents a serious compromise to acceptable standards of patient care despite repeated counseling and close mentoring concerning patient care and management.
2. Unprofessional conduct towards your patients and colleagues despite repeated attempts to assist you to improve your interpersonal and communication skills.
3. Failure to progress to the expected level of competency as a third-year pediatric resident with serious deficiencies in multiple, ACGME defined, competencies.
4. Failure to follow the Probation Objectives outlined in your probation letter that has jeopardized patient welfare.

(ECF No. 14-1, Ex. M). Thus, even if Plaintiff could demonstrate his disability played any role at all, Plaintiff cannot show that his disability was the *sole* cause of his termination. These four reasons make that conclusion unreachable.

Plaintiff's termination followed repeated misconduct in the workplace, entirely separate from any considerations of his disability. (ECF No. 14-1, Ex. J, K, M). TTUHSC and its faculty provided Plaintiff numerous opportunities to rectify these issues, including warnings, observation periods, a probationary phase, and specific directives to address the concerns raised. *Id.* Unfortunately, Plaintiff did not exhibit the necessary improvements and demonstrated multiple incidences of unsafe patient practice. *Id.* TTUHSC diligently provided chances for remediation, offering guidance on areas requiring enhancement, such as interpersonal communication, professional conduct, and medical knowledge. (ECF No. 14-1, Ex. H, I, J, K, M). Unfortunately, the board decided to end Plaintiff's residency since he could not improve significantly and his ineptitude was endangering patients. (ECF No. 14-1, ¶ 51) ("No extra time at this point, months or years would prepare [Plaintiff] for independent safe practice."); (ECF No. 14-1, Ex. B–K, M). His failure to progress to the expected level of competency as a third-year pediatric resident and failure to follow the probation objectives outlined in his probation letter jeopardized patient welfare. *Id.* Therefore, this Court should not permit Plaintiff to amend his complaint because he cannot show that he was terminated *solely* because of his disability.

B. Plaintiff's proposed Amended Complaint fails to state a failure to accommodate claim upon which relief can be granted.

A reasonable accommodation is a change in workplace conditions that would enable an employee to perform the essential functions of the job. *Trahan v. Wayfair Maine, LLC*, 957 F.3d 54, 65 (1st Cir. 2020). However, "[a] requested accommodation that simply excuses past misconduct is unreasonable as a matter of law." *Id.* After all, federal disability law does not oblige

an employer to accommodate an employee's disability retroactively.² *Id.*; *Lottinger v. Shell Oil Co.*, 143 F.Supp.2d 743, 758, 768 (S.D. Tex. 2001). ("Thus, the ADA [and accordingly, the Rehabilitation Act] does not insulate an employee from adverse action taken by an employer because of misconduct in the workplace, even if his improper behavior is arguably attributable to an impairment."). "The Equal Employment Opportunity Commission's ("EEOC") Enforcement Guidance makes clear that the requirement to provide reasonable accommodations under the [act] is 'always prospective,' and that 'an employer is not required to excuse past misconduct even if it is the result of the individual's disability.'" *Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1316 (10th Cir. 2017). There exists no obligation to initiate the interactive process to identify a reasonable accommodation during the interim between misconduct and eventual termination. *See Green v. Medco Health Sols. of Texas, LLC*, 947 F. Supp. 2d 712, 729 (N.D. Tex. 2013), *aff'd sub nom. Green v. Medco Health Sols. of Texas, LLC*, 560 F. App'x 398 (5th Cir. 2014).

In other words, "[w]hen an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be 'too little, too late.'" *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 90 (1st Cir. 2012). "Such a request is better understood as a plea either for forgiveness or for a second chance." *Trahan* 957 F.3d at 65; *see also Rose v. Laskey*, 110 Fed. Appx. 136, 138 (1st Cir. 2004) (per curiam) (finding that plaintiff's presentation of therapist's letter requesting leave of absence after plaintiff threatened supervisor with violence was "untimely" as well as unreasonable); *Hill v. Kan. City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (finding accommodation request untimely when employee

² Section 504 of the Rehabilitation Act incorporates portions of the ADA by reference. *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422, 426 (5th Cir. 2016).

made request only after committing two rule violations that “she knew would mandate her discharge”).

Here, Plaintiff knew an adverse employment action was imminent when he was placed on suspension, on December 23, 2021. (ECF No. 14-1, K). Specifically, he was notified that he had violated the terms of his Probation Objectives and that concerns existed that the performance of his duties were seriously compromised or may constitute a danger to patients. *Id.* He was notified that the program had 30 days to conclude an investigation and determine the next course of action. *Id.* After that notice, in January 2022, Plaintiff proposed to rectify his employment by requesting disability accommodations. (ECF No. 14-1, Ex. L, N). Thus, Plaintiff’s request followed workplace misconduct—when termination was looming. The request should not be viewed as an accommodation proposal at all; instead, it was a request for forgiveness or a second chance. *Trahan* 957 F.3d at 65.

Finally, disability law does not recognize “informal” requests for accommodation. An employee seeking accommodation for a mental disorder, where the limitations and necessary accommodations are not open and obvious, has the burden to specifically identify not only a disability, but *also* disclose the resulting limitations *and* suggest reasonable accommodations. *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165–66 (5th Cir. 1996). Only *after* an employee has made “such” a request, can there be a duty to engage in an interactive process to specifically identify a reasonable accommodation. *Brown v. Kastle Sys. of Tex. LLC*, No. CIV.A H-08-02888, 2010 WL 3342219, at *17 (S.D. Tex. Aug. 25, 2010) (citing *E.E.O.C. v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621 (5th Cir. 2009)). If an employee simply mentions having an impairment, as in this case, the employee has not met his initial burden. (ECF No. 14-1 at ¶ 24). In this case, as discussed, Plaintiff’s proposed Amended Complaint shows that Plaintiff did not

make a formal request for an accommodation until termination was looming. The proposed Amended Complaint does not allege that he specifically requested a disability accommodation, much less disclosed the limitations of his condition or requested any specific accommodations for his disability prior to that date.³ (ECF No. 14-1 at ¶ 24). Further, it is “[i]n general, the responsibility of the individual with the disability to inform the employer that an accommodation is needed.” *Miles-Hickman v. David Powers Homes, Inc.*, 589 F. Supp. 2d 849, 867, n. 38 (S.D. Tex. 2008). Thus, even if Plaintiff had received accommodations in the past, he still had the obligation to inform his employer that he needed them again, prospectively, by submitting a request identifying his disability, specifying what accommodations he desired, and identifying the specific mental limitations justifying the need for such accommodations—*before* termination was looming. *See Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999) (finding no liability when employer made efforts to accommodate employee but specific limitations of disability were unknown and employee had not previously requested specific accommodation that had been denied). But Plaintiff seemingly concedes he requested accommodations not prospectively, but to avoid termination for past misconduct and performance. *See* (ECF No. 14-1 at ¶ 43).

TTUHSC was under no obligation under the Rehabilitation Act to ignore his prior misconduct and performance. Plaintiff had been given numerous opportunities to correct his deficiencies within the residency program, but to no avail. As in *Jones*, Plaintiff’s request was “too little, too late.” Whether his behavior was a result of his disability is irrelevant. Thus, as a matter

³ The Court is not bound to accept the merely conclusory statement that Plaintiff requested “informal accommodations.” *Iqbal*, 556 U.S. at 678 (2009). The determination that the request meets the legal definition of a “request for accommodation” is a legal conclusion. This statement could be simply referring to a mere request for an instructor’s assistance with an assignment or altering a deadline for homework. “Informal request” is not defined, vague, and insufficient to meet Plaintiff’s pleading obligations.

of law, it is futile to allow Plaintiff to amend his complaint, and the Court should deny Plaintiff's Motion for Leave.

C. Plaintiff's Amended Complaint fails to state a due process claim.

1. TTUHSC has sovereign immunity from claims brought under Section 1983.

When the court lacks statutory or constitutional power to adjudicate a case, the case is properly dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). Generally, "[t]he burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citation omitted). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001).

Eleventh Amendment immunity is a jurisdictional bar. *U.S. v. Tex. Tech. Univ.*, 171 F.3d 279, 285 (5th Cir. 1999) (citing U.S. Const. amend. XI). "The Eleventh Amendment bars claims against a state brought pursuant to [Section] 1983." *Aguilar v. Tex. Dep't of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998); *see also Rosas v. Univ. of Tex. at San Antonio*, 793 F. App'x 267, 272 (5th Cir. 2019) ("Congress did not abrogate state sovereign immunity for Title VIII or §§ 1983, 1985, or 1986 claims.") (citing *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999) (per curiam)). Furthermore, the "Eleventh Amendment cloaks Texas Tech University and TTUHSC with sovereign immunity as state institutions." *Tex. Tech. Univ.*, 171 F.3d at 289 n.14; Tex. Educ. Code § 110.01) (establishing TTUHSC as state institution under control of Texas Tech Board of Regents). Thus, TTUHSC has sovereign immunity from Plaintiff's Section 1983 claim. Even if Plaintiff were granted leave to amend his complaint to bring a Section 1983 claim against TTUHSC, the Court would lack jurisdiction over it, and it would be subject to

dismissal under Rule 12(b)(1). Since amendment would be futile, the Court should deny Plaintiff's Motion.

2. Plaintiff's Section 1983 claim fails to state a claim upon which relief can be granted.

"To state a section 1983 claim, 'a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.'" *James v. Tex. Collin Cnty.*, 535 F.3d 365, 373 (5th Cir. 2008) (quoting *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000)). Plaintiff's proposed First Amended Complaint seeks to allege that his procedural and substantive due process rights were violated and further alleges that TTUHSC was the "person" who committed this violation. These claims would fail as a matter of law.

i. Section 1983 does not permit claims against state institutions.

The State of Texas (including its agencies) are not subject to suit under § 1983.⁴ The express language of § 1983 permits suits against a "person."⁵ *See* 42 U.S.C. § 1983. It is well-established that a state is not a "person" subject to suit under § 1983. *See, e.g., Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Stauffer v. Gearhart*, 741 F.3d 574, 583 (5th Cir. 2014) (per curiam). Thus, to the extent Plaintiff seeks to allege a Section 1983 claim against TTUHSC, that claim would be subject to dismissal under Rule 12(b)(6) as well because TTUHSC

⁴ Accordingly, Section 1983 also does not abrogate the State's sovereign immunity. *Quern v. Jordan*, 440 U.S. 332, 340–45 (1979); *Price v. Shorty*, 632 F. App'x 211, 212 (5th Cir. 2016) (per curiam). Neither suits for money damages nor for declaratory or injunctive relief may be brought against a state agency absent a valid waiver or Congressional abrogation of sovereign immunity. *See Cozzo v. Tangipahoa Par. Council-President Gov't*, 279 F.3d 273, 280–81 (5th Cir. 2002); *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013).

⁵ Further, a government entity "cannot be held liable under § 1983 on a *respondeat superior* theory." *Price v. Elder*, 175 F. Supp. 3d 676, 679 (N.D. Miss. 2016) (citing *Monell v. Dept. of Soc. Serv. of City of NY*, 436 U.S. 658, 698 (1978)); *Berry v. Texas Woman's Univ.*, 528 F. Supp. 3d 579, 601 (E.D. Tex. 2021) (citing *Connick v. Thompson*, 563 U.S. 51, 60 (2011)) (noting it is well-settled that *respondeat superior* and other theories of vicarious liability are inapplicable in Section 1983).

is not a ‘person’ within the meaning of Section 1983.” *Welch v. Tex. Tech. Univ. Health Serv. Ctr.*, No. 2012 WL 5986424 at *4 (N.D. Tex. Nov. 7, 2012) (citing *Will*, 491 U.S. at 65-66).

ii. Plaintiff has not alleged a violation of his procedural due process rights.

Even if TTUHSC could constitute a person for purposes of Section 1983, Plaintiff’s proposed Amended Complaint fails to allege a violation of either his procedural due process or his substantive due process. The threshold requirement for any due process claim is the government’s deprivation of a liberty or property interest. *DePree v. Saunders*, 588 F.3d 282, 289 (5th Cir. 2009). The Supreme Court employs a two-step analysis to determine whether an individual’s procedural due process rights have been violated. *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010). The Court first examines “whether there exists a liberty or property interest which has been interfered with by the State;” then it “examines whether the procedures attendant upon that deprivation were constitutionally sufficient.” *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

Plaintiff alleges that he has a “constitutionally protected property [interest] in his position at TTUHSC as a Third-Year Resident in the Pediatrics Program” and that as a member of the residency program he “had a constitutionally protected valid entitlement to continued employment at the University.” (ECF No. 14-1 ¶¶ 81, 83). The Fifth Circuit has declined to confirm whether such entitlement to (property interest in) a medical residency certification exists. *Ekmark v. Matthews*, 524 Fed. App’x 62, 63 (5th Cir. 2013) (only assuming that appellant had property interest in residency for the sake of the argument); *see also Board of Curator of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 85 (1978) (only assuming the existence of some interest while holding that she received all that the Fourteenth Amendment would require). Rather, the Fifth Circuit has instead focused on the process the medical resident received. Without deciding whether a medical resident has a liberty or property interest in their residency, the Fifth Circuit has consistently held

that even if that interest were to exist, the due process deserved is more akin to the due process a student receives rather than employee. *Ekmark*, 524 Fed. App'x at 63 (“In the context of due process, medical residents are students rather than employees of the hospital.”) (citing *Shaboon v. Duncan*, 252 F.3d 722, 729 (5th Cir. 2001)).

Furthermore, the Fifth Circuit has drawn another distinction “between the process required for students facing discipline and academic actions that require ‘far less stringent procedural requirements.’” *Ekmark*, 524 Fed. App'x at 64 (quoting *Horowitz*, 435 U.S. at 86). In doing so, the Fifth Circuit has emphasized that “physicians and administrators directing residency programs are in the best position to determine which candidates are suited to progress through the program and have satisfactorily completed the requirements for certification.” *Id.* (citing *Davis*, 882 F.2d at 974). Thus, “[a]dverse academic actions against medical residents require only the minimum procedure of notice and not a hearing.” *Id.* (citing *Horowitz*, 435 U.S. at 90; and *Shaboon*, 252 F.3d at 731). “It is well-known that the primary purpose of a residency program is not employment or a stipend, but the academic training and the academic certification for successful completion of the program.” *Davis v. Mann*, 882 F.2d 967, 974 (5th Cir. 1989).

Here, Plaintiff was given a probation letter on December 17, 2021, suspended on December 23, 2021, and recommended for dismissal on January 7, 2022; his recommendation for dismissal was reviewed by an Appeal Review Subcommittee at an appeal hearing in February 2022 that Plaintiff requested before any final determination was made by TTUHSC. (ECF No. 14-1 ¶ 19, 55; Ex. J, K, M). Plaintiff was informed that his probation was due to concerns given his medical knowledge, patient care, and professionalism. (ECF No. 14-1, Ex. J). When Plaintiff was suspended, he was informed that it was for having violated the terms of his probation and that Plaintiff's performance constituted a danger to patients. (ECF No. 14-1, Ex. K). When he was

recommended for dismissal, Plaintiff was informed that it was due to performance that presents a serious compromise to acceptable standards of patient care, unprofessional conduct towards his patients and colleagues, failure to progress to the expected level of competency as a third-year pediatric resident, and failure to follow the probation objectives outlined in his probation letter that jeopardized patient welfare. (ECF No. 14-1, Ex. M). He appealed the decision and was afforded a hearing. (ECF No. 14-1, ¶ 55).

Plaintiff's proposed Amended Complaint clearly demonstrates that Plaintiff was dismissed for academic reasons because his dismissal "rested on the academic judgment of school officials that [he] did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal." *Harowitz*, 435 U.S. at 89-90. Thus, Plaintiff was not even entitled to a formal hearing. *Eckmark* 524 Fed. App'x at 64; *see also Shaboon* 252 F.3d at 731 (Appellant not entitled to any type of hearing as a matter of law when dismissed on academic grounds); *Horowitz*, 435 U.S. at 90. But he received one and simply disagrees with the outcome. Accordingly, Plaintiff was given sufficient due process before his dismissal.⁶

The due process owed to Plaintiff was that the University "fully [inform him] of the faculty's dissatisfaction with [his] clinical progress and the danger that this posed to timely graduation and continued enrollment." *Wren v. Midwestern State Univ.*, No. 7:18-cv-00060-O-BP, 2019 WL 3099408 at *13 (N.D. Tex. June 25, 2019) (quoting *Horowitz*, 435 U.S. at 85 (internal quotations removed)). Plaintiff was given such notice and opportunity to respond. He was informed of the dissatisfaction the faculty had with his clinical progress as evidenced by the fact

⁶ Even if a formal hearing is required by TTUHSC policy, the University's "rules do not establish the constitutional floor of due process." *Eckmark*, 524 Fed. App'x at 64 (citing *Levitt v. Univ. of Tex. at El Paso*, 759 F.2d 1224, 1230 (5th Cir. 1985)). When the procedures actually given comport with due process, even if a university does not follow its own rules, one cannot state a procedural or substantive due process claim. *See Levitt*, 759 F.2d at 1229 (rejecting assertion that failure to follow university disciplinary procedure rules violated due process).

that he was placed on probation and the probation letter not only informed him why he was on probation but that “occurrence on [his] part of any unsafe practice or unprofessional incidents may result in the recommendation that [he] be dismissed immediately from [the] program.” (ECF No. 1-11 at 3). He not only had the opportunity to respond to the advance notice before termination, he in fact did so by sending a letter to the Committee that decided the board recommended his dismissal. (ECF No. 14-1, ¶ 48). Further, he was given a hearing to respond to this recommendation before it was finalized. (ECF No. 14-1, ¶ 55). For these reasons, *assuming arguendo* Plaintiff had a property interest Plaintiff in completing his residency, because he was informed of the University’s dissatisfaction with him and the danger that that posed to his timely graduation, provided multiple and ample opportunities to respond (and correct the behavior), and was given a hearing, Plaintiff received all the process he was due. His proposed Amended Complaint does not state a procedural due process claim, and his Motion for Leave to Amend should be thus denied as futile, for this reason as well.

iii. Plaintiff has not alleged a violation of his substantive due process rights.

“Substantive due process analysis is appropriate only in cases in which government arbitrarily abuses its power to deprive individuals of constitutionally protected rights[.]” *Simi Inv. Co., Inc. v. Harris Cnty. Tex.*, 236 F.3d 240, 249 (5th Cir. 2000); *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cr. 1988) (internal quotation marks and citations omitted). The Supreme Court has held that “decisions in the academic setting are subject to ‘a narrow avenue for judicial review’ under a substantive due process standard.” *Wheeler v. Miller*, 168 F.3d 241, 249 (5th Cir. 1999) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 227 (1985)). When reviewing these decisions, the court “may not override [the decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not

actually exercise professional judgment.” *Ewing*, 474 U.S. at 225. This is because “[w]hen judges are asked to review the substance of a genuinely academic decision, ... they should show great respect for the faculty’s professional judgment.” *Id.*

As previously stated, the Fifth Circuit has declined to state that a person has a property or liberty interest in their medical residency. *Assuming arguendo* that Plaintiff had such an interest, the complaint fails to demonstrate that the decision to terminate him was “beyond the pale reasoned academic decision-making when viewed against the background of [his] entire [residency].” *Wheeler*, 168 F.3d at 250. Plaintiff’s proposed Amended Complaint demonstrates that the decision to place him on probation was based on low-test scores, multiple examples of serious patient related incidences, and poor professionalism. (ECF No. 14-1, Ex. G–K, M). These are all valid academic decisions for placing Plaintiff on probation and eventually terminating him from a medical residency program, where the safety and care of patients’ lives are at risk.⁷ There is no indication whatsoever that his dismissal was beyond the pale, shocking, or even surprising, given the stated reasons for the dismissal—which Plaintiff fails to specifically refute. *See, e.g.*, (ECF No. 14-1 at § VI). As such, Plaintiff’s proposed Amended Complaint does not state a substantive due process claim against, and his Motion for Leave to Amend should be thus denied as futile, for this reason as well.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff’s Motion for Leave to File First Amended Complaint. Plaintiff’s proposed Amended Complaint fails to allege facts showing that he was terminated solely because of his disability. In fact, the allegations in and attachments to the

⁷ As in *Shaboon*, only the process required for academic—not disciplinary—decisions was warranted, because he was not terminated *solely* for disciplinary reasons. 252 F.3d at 731.

proposed Amended Complaint actively demonstrate that discriminatory animus against his mental impairment was not the reason for termination, much less the sole reason. There were at least four reasons, discussed *supra*. As for the reasonable accommodation claim, the proposed Amended Complaint demonstrates that Plaintiff did not request accommodations until after he had committed terminable offenses, when termination was looming. Thus, TTUHSC could not be held liable on a reasonable accommodation claim even if the Plaintiff were permitted to amend his Complaint.

Further, Plaintiff's Section 1983 claims against TTUHSC are barred by sovereign immunity, and the University does not qualify as a person for purposes of Section 1983. Yet, even the state could be sued under Section 1983, Plaintiff's proposed Amended Complaint fails to allege: 1) that he did not receive notice, an opportunity to respond to such notice, or a hearing; nor 2) that TTUHSC's grounds for placing Plaintiff on probation, suspension, recommendation for dismissal, and ultimately termination after a hearing on the reasons for the recommendation for dismissal were such a departure from accepted academic norms that the faculty's professional judgment, which should be showed a great deal of respect, should be overturned—even at the pleading stage.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

JAMES LLOYD
Deputy Attorney General for Civil Litigation

KIMBERLY GDULA
Division Chief, General Litigation Division

/s/ Joseph Keeney
Joseph Keeney
State Bar No. 24092616
Assistant Attorney General
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4090
Facsimile: (512) 320-0667
Joseph.Keeney@oag.texas.gov

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served through the electronic case manager on all parties who have entered an appearance using the CM/ECF system on December 22, 2023.

/s/ Joseph Keeney
JOSEPH KEENEY
Assistant Attorney General