

P O R T E R | S C O T T

A PROFESSIONAL CORPORATION

Nancy J. Sheehan, SBN 109419

Katherine L.M. Mola, SBN 264625

350 University Avenue, Suite 200

Sacramento, California 95825

(916) 929-1481 (telephone)

(916) 927-3706 (facsimile)

nsheehan@porterscott.com

kmola@porterscott.com

Attorneys for Defendants

REGENTS OF THE UNIVERSITY OF CALIFORNIA, TRACY GRISSOM

and PAUL CODY

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RYAN CLIFFORD,

CASE NO. 2:11-CV-02935-JAM-GGH

Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT**

vs.

REGENTS OF UNIVERSITY OF
CALIFORNIA; TRACY GRISSOM (as
individual); PAUL CODY (as individual); And
Does 1 through 50, Inclusive,

Date: April 18, 2012

Time: 9:30 a.m.

Courtroom: 6

Defendants.

Complaint Filed: 11/4/11

First Amended Complaint Filed: 1/19/12

This matter comes before the Court on a Motion to Dismiss Plaintiff Ryan Clifford's First Amended Complaint by Defendants Regents of the University of California, Tracy Grissom, and Paul Cody. Doc. # 8. Plaintiff filed an Opposition to the Motion. (Doc. # 11) Defendants filed a Reply to the Opposition. Doc. # 14.

The hearing on this Motion was held on April 18, 2012. Plaintiff was represented at the hearing by Lisa Holder. Defendants were represented by Nancy Sheehan and Katherine Mola of Porter Scott. For the reasons set forth below, Defendants' Motion is GRANTED WITH PREJUDICE.

1 I. FACTUAL AND PROCEDURAL BACKGROUND

2 In the Fall of 2007, Clifford transferred to the University of California, Davis. He was
3 majoring in communication and had plans to attend UC Davis' graduate school program. Prior to
4 joining the AEPi fraternity, he had excellent grades and was admitted to the Dean's Honor List in
5 Spring 2008 for his academic excellence. FAC, ¶ 6.

6 A. Alleged Sexual Harassment of Plaintiff by AEPi Fraternity Members

7 Plaintiff pledged the Chi Delta chapter of the AEPi fraternity, a registered student
8 organization at UC Davis, in the Fall of 2008. As a registered organization, AEPi was bestowed with
9 certain privileges by UC Davis. FAC, ¶ 7. AEPi is a Jewish fraternity. Plaintiff was the only pledge
10 (out of 24) who was not of the Jewish faith. Plaintiff alleges that was targeted for the harshest form
11 of hazing by fraternity members, known as "ratfucking," because of his non-Jewish religious
12 affiliation. FAC, ¶ 10.

13 On October 17-18, 2008, AEPi hosted a mandatory, alcohol-filled retreat in Lake Tahoe.
14 Pledges were compelled by active and alumni members of the fraternity to drink inordinate amounts
15 of alcohol and consume beverages containing unknown narcotic substances, and were threatened with
16 harm if they did not comply. Plaintiff alleges that he was drugged and sexually assaulted by members
17 of the fraternity when they pulled off his clothing, touched his penis, and made sexual comments
18 during the course of the retreat. FAC, ¶ 11.

19 On October 18, 2008, a parent contacted the UC Davis police to report forced drinking and
20 hazing violations during the Lake Tahoe retreat. A police officer went to the fraternity house in
21 response to the call. That night at the retreat, the pledges were drilled and threatened with regard to
22 the parent's phone call. FAC, ¶ 12. Also on October 18th, UC Davis campus police responded to a
23 call from a UC Davis student regarding the hazing at the Lake Tahoe retreat. FAC, ¶ 13. Three days
24 later, on October 20, 2008, Clifford's mother contacted AEPi's National Headquarters to report the
25 hazing. Plaintiff contends that the fraternity and the University knew the call was made by Ms.
26 Clifford. FAC, ¶ 14.

27 On November 5, 2008 Clifford and other pledges reported to the fraternity house for an
28 official fraternity event. They were then taken to an alumni's house for compelled drinking of

1 excessive amounts of alcohol, which Plaintiff refused to do. Plaintiff alleges that he was forced to
2 wear a padded vest and was punched in the stomach by a fraternity member and a pledge. When they
3 returned to the fraternity house, it was occupied by intoxicated members. AEPi member Daniel
4 Sacher pressured Plaintiff to drink and play drinking games. FAC, ¶ 16. At the conclusion of the
5 drinking game, Sacher grabbed Plaintiff from behind, choked him, and stomped on his right foot,
6 resulting in severe injury. Plaintiff contends he was assaulted by Sacher in retaliation for breaking
7 AEPi's "code of silence." FAC, ¶ 17.

8 Plaintiff attended a "Hell Week" event hosted by AEPi a few weeks later on November 18,
9 2008. At the event, the fraternity members chided and intimidated him, laughed at him for having a
10 broken foot, threatened to stomp on his foot again, and reenacted the night when he was attacked and
11 his foot was crushed. They also used the plaintiff as their form of entertainment by removing his
12 crutches and almost all of his clothes while poking fun at him and his foot injury. FAC, ¶ 21. The
13 following day, he returned for another "Hell Week" event where he was ordered to watch videos of
14 sexual violence against women and express to fraternity members how those videos related to him.

15 Plaintiff discontinued his relationship with the fraternity in Winter 2009. FAC, ¶ 23.
16 Thereafter, he claims he was approached by fraternity brothers several times and asked why he was
17 not attending fraternity meetings. On one occasion, a member pulled out his cell phone and reported
18 to someone that he saw Clifford on campus. Plaintiff further contends that "members" glared and
19 continually stared at him during classes in an intimidating and threatening manner. Plaintiff alleges
20 the threats were made in retaliation for his breaking AEPi's "code of silence." FAC, ¶ 24. In his
21 original complaint, Plaintiff alleged these acts occurred in "Winter 2009." Comp., ¶ 28. In the
22 amended complaint, Plaintiff contends these acts took place "in Fall 2009 including December 2009."
23 FAC, ¶ 24. The Court takes judicial notice of the fact that the UC Davis Winter quarter in 2009 ran
24 from January 2, 2009 to March 21, 2009. (See section II B, *infra*.)

25 **B. Allegations Regarding Defendant Paul Cody**

26 Cody works in the UC Davis Office of Student Programs and Activities Center. FAC, ¶ 25.
27 On October 28, 2008 he met with the President of AEPi and contacted AEPi national headquarters
28 regarding the allegations of hazing at the October 2008 Lake Tahoe retreat. *Id.* On November 3,

1 2008 Cody placed AEPi on conditional registration for seven months for hazing violations.
2 University policy dictates that the conditional registration period last for a minimum of one year.
3 FAC, ¶ 26. As part of the conditional registration process, AEPi was instructed to submit a detailed
4 pledge education program to the University for review by November 26, 2008. FAC, ¶ 27.

5 University policy required diligent and consistent follow up and monitoring of organizations
6 on conditional registration. FAC, ¶ 28. Plaintiff alleges that after AEPi was placed on conditional
7 registration status, neither the University nor Cody followed-up with the fraternity until June 22,
8 2009, three weeks after the University was notified of Plaintiff's state court lawsuit against the
9 fraternity.¹ Id. Plaintiff further contends that in the Summer of 2009, Cody tried to conceal
10 information regarding AEPi's conditional registration status and limit his follow-up with AEPi.
11 FAC, ¶ 34.

12 C. Allegations Regarding Defendant Tracy Grissom

13 Grissom was Plaintiff's Advisor for Undergraduate Education. In Fall 2008, Plaintiff told
14 Grissom of the AEPi event wherein he was sexually assaulted by fraternity members. He also told
15 her that pledges were compelled to drink excessive amounts of alcohol and unknown narcotic
16 substances, smoke weed, subjected to harm for not complying with any orders, and subjected to
17 demeaning and humiliating acts as part of the initiation process. He advised Grissom that he was
18 afraid to be on campus due to continuing hazing, assault, and fear of more retaliation. Clifford also
19 told Grissom that he was the only pledge who was not Jewish. He alleged she did not take any action
20 in response. FAC, ¶ 31.

21 In Winter 2009, Plaintiff complained to Grissom again about the hazing and assaults by AEPi,
22 as well as his fear of retaliation. Plaintiff alleges no action was taken to address or remedy his
23 continuing distress. FAC, ¶ 32. In Spring 2009, Plaintiff informed the Office of the Dean of
24 Students of continuing emotional and physical distress caused by attending classes with members of
25 the fraternity who sought to intimidate him. During this time period, the University was informed of
26 the state lawsuit that had been filed against the fraternity which set forth the severity of Plaintiff's

27 _____
28 ¹ On May 15, 2009, Plaintiff filed a complaint for damages against Alpha Epsilon Pi, Chi Delta, and Daniel Sacher, in
Yolo County Superior Court regarding the alleged hazing. See Defendants' Request for Judicial Notice, Exhibit 3.

1 emotional injuries and distress. Thereafter, Grissom advised Plaintiff to withdraw from classes and
2 discontinue his attendance at UC Davis. Plaintiff withdrew from his classes, his academic standing
3 declined, and he lost his financial aid. FAC, ¶ 33.

4 Plaintiff re-enrolled at UC Davis in the Fall of 2009 on a part-time basis. He advised the
5 Office of the Dean of students that he was undergoing extensive medical treatment and under
6 psychiatric care due to injuries he sustained at the initiation events. He began to experience severe
7 neck and back pain. In November 2009², Grissom told Plaintiff to drop out of classes at the end of
8 the semester, indefinitely, until things “blew over.” Plaintiff dropped out of his classes, and lost the
9 graduate school recommendations he had previously secured. FAC, ¶ 35.

10 In Winter 2010, Clifford continually informed his advisors that he had been hazed and
11 assaulted and was afraid of being on campus for fear of further retaliation. Plaintiff alleges
12 GRISSOM advised him to take classes at a community college and not return to UC Davis, and that
13 thereafter, despite repeated attempts to meet with Grissom, she would not communicate with him.
14 FAC, ¶ 36.

15 D. Allegations Regarding Plaintiff’s Graduation from UC Davis and Events in 2010 and
16 2011

17 In Winter 2010, Plaintiff filed a complaint with Francine Freitas with the Office of the Dean
18 of Students, notifying the school of his distress in continuing to attend classes given the presence of
19 fraternity members. He requested that he be allowed to graduate despite being 6.5 units short of what
20 was required. The request was denied, and personnel from the Office of the Dean advised him to
21 take classes at another school. FAC, ¶ 39. In Spring 2010, Clifford took courses online at the Rio
22 Hondo and Woodland Community Colleges. He received his degree from UC Davis at the end of
23 Spring Quarter 2010, one year behind his scheduled graduation date. He could not attend the
24 graduation ceremony due to fear of reprisals by fraternity members attending the graduation
25 ceremony. FAC, ¶¶ 40-41.

26
27
28 ² In the original complaint, Plaintiff claimed this took place on November 2, 2009. The amended complaint reflects a
more vague time period of “November 2009.”

1 After graduating, Plaintiff and/or his parents continued to complain to various University
2 officials about the alleged assault and hazing by AEPi. Between June 2010 and June 2011, Plaintiff
3 claims to have complained to nine different University employees about the events that had occurred
4 with AEPi in 2008. FAC, ¶¶ 42-51. None of these complaints were directed to Grissom or Cody. *Id.*

5 Plaintiff filed his original complaint on November 4, 2011. Doc. # 1. Counsel for Defendants
6 sent a meet and confer letter to Plaintiff's counsel addressing numerous deficiencies in the original
7 complaint, including issues pertaining to the statute of limitations. Doc. # 8-3, and Exhibit A thereto.
8 Thereafter, Plaintiff filed a first amended complaint on January 19, 2012, which is the subject of the
9 motion to dismiss. Doc. # 7. The First Amended Complaint asserts the following claims for relief:
10 (1) 20 U.S.C. § 1681 (Title IX) against the University; (2) 42 U.S.C. § 1983 for violations of the
11 Equal Protection and Due Process clauses of the Fourteenth Amendment against Grissom and Cody;
12 (3) 42 U.S.C. § 1983 for violations of the First Amendment against Grissom and Cody; (4) California
13 Civil Code § 52.1 against the University; (5) negligence against the University, Grissom, and Cody;
14 and (6) intentional infliction of emotional distress against the University, Grissom, and Cody.

15 II. OPINION

16 A. Legal Standard

17 1. Motion to Dismiss

18 A party may move to dismiss an action for failure to state a claim upon which relief can be
19 granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In considering a motion to dismiss, the
20 court must accept the allegations in the complaint as true and draw all reasonable inferences in favor
21 of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1975), overruled on other grounds by Davis
22 v. Scherer, 468 U.S. 183 (1984); *Cruz v. Beto*, 405 U.S. 319, 322 (1972). Assertions that are mere
23 "legal conclusions," however, are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S.
24 662, 129 S. Ct. 1937, 1950 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).
25 To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that
26 is plausible on its face." *Twombly*, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails
27 to state a claim supportable by a cognizable legal theory. *Balistreri v. Pacifica Police Department*,
28 901 F.2d 696, 699 (9th Cir. 1990).

1 Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow
2 leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a). “Dismissal with
3 prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could
4 not be saved by amendment.” Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th
5 Cir. 2003).

6 B. Request for Judicial Notice

7 Defendants filed a request for judicial notice that asks the Court to take judicial notice of the
8 following documents: (1) Plaintiff’s original complaint; (2) Plaintiff’s first amended complaint;
9 (3) Plaintiff’s complaint for damages against Alpha Epsilon Pi, Chi Delta, and Daniel Sacher, filed in
10 Yolo County Superior Court (case number CV09-1282) on May 15, 2009; and (4) the UC Davis
11 Office of the Registrar’s Class Schedule and Registration Guide for Winter Quarter 2009. Doc. # 8-
12 2. Pursuant to Federal Rules of Evidence 201, “the court may judicially notice a fact that is not
13 subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial
14 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot
15 reasonably be questioned.” Plaintiff filed an objection to Exhibits 3 and 4 to the Request for Judicial
16 Notice. Doc. # 12. Defendants filed a reply to the objection. Doc. # 15. The Court grants the
17 request for judicial notice of Plaintiff’s original and amended complaint in the present action because
18 those documents are already before the Court.

19 The Court also grants the request for judicial notice of Exhibit 3, Plaintiff’s initial complaint
20 for damages against Alpha Epsilon Pi, Chi Delta, and Daniel Sacher. The Court may take judicial
21 notice of filings in state court actions where the state court proceedings have a direct relation to the
22 matters at issue. Bennett v. Medtronic, Inc., 286 F.3d 801, 803, fn.2 (9th Cir. 2002) (“[W]e may take
23 notice of proceedings in other courts, both within and without the federal judicial system, if those
24 proceedings have a direct relation to matters at issue.”) (internal citations omitted)

25 The Court also grants the request for judicial notice of Exhibit 4, the UC Davis Office of the
26 Registrar’s Class Schedule and Registration Guide for Winter Quarter 2009, because the Court may
27 take judicial notice of a information from a government website when that fact “is not subject to
28 reasonable dispute because it can accurately and readily be determined from sources whose accuracy

1 cannot reasonably be questioned.” Fed. R. Evid. 201; Denius v. Dunlap, 330 F.3d 919, 926 (7th Cir.
2 2003); Laborers Pension Fund v. Blackmore Sewer Constr. Inc., 298 F.3d 600, 607 (7th Cir. 2002).

3 C. Claims for Relief

4 1. First Claim for Relief – 20 U.S.C. § 1681 (Title IX)

5 The First Claim for Relief is brought under Title IX of the Education Amendments of 1972,
6 against Defendant University. Title IX provides that “[n]o person in the United States shall, on the
7 basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to
8 discrimination under any education program or activity receiving Federal financial assistance.” 20
9 U.S.C. § 1681(a). Plaintiff’s Title IX claim is based on alleged deliberate indifference by the
10 University in responding to his complaints of alleged sexual harassment. FAC, ¶ 61. In order to state
11 this type of Title IX claim, Plaintiff must plead facts showing that the deliberate indifference, at a
12 minimum, caused him to undergo sexual harassment or be vulnerable to it. Davis v. Monroe County
13 Board of Education, 526 U.S. 629, 644-45 (1999).

14 Defendant University first argues this claim is barred by the statute of limitations. Plaintiff
15 contends his claim is timely under the continuing violation doctrine. The statute of limitations for a
16 Title IX claim is determined by state law governing personal injuries. Stanley v. Trustees of
17 California State University, 433 F.3d 1129, 1134-36 (9th Cir. 2006). In California, the limitations
18 period for a personal injury claim is two years. Cal. Code Civ. Proc. § 335.1. Although the length of
19 the statute of limitations is governed by California law, federal law governs when the claim accrues.
20 Elliot v. City of Union City, 25 F.3d 800, 801-02 (9th Cir. 1994). Under federal law, a claim accrues
21 when the plaintiff knows, or should know, of the injury which is the basis of the cause of action.
22 Kimes v. Stone, 84 F.3d 1121, 1128 (9th Cir. 1996). Since Clifford filed his original complaint in
23 this action on November 4, 2011, his Title IX claim must be based on alleged misconduct and
24 resulting injury that occurred on or after November 4, 2009.

25 Clifford’s claim is clearly based on alleged conduct that occurred before November 4, 2009.
26 Specifically, Plaintiff contends he was sexually assaulted by AEPi members on October 17, 2008
27 (FAC ¶ 11); on November 6, 2008, an AEPi member crushed his foot during a hazing-type activity
28 (FAC ¶ 30); a fraternity member “chided and intimidated” him on November 18, 2008 (FAC ¶ 21);

1 and fraternity members “forcibly removed his crutches and ordered him to watch videos of sexual
2 violence against women” on November 19, 2008 (FAC ¶ 22). Plaintiff further contends that the
3 University became aware of the drunken Tahoe weekend on October 18, 2008 after a parent and a
4 student reported the alleged hazing. FAC ¶¶ 12-13. To the extent Plaintiff attempted to base his Title
5 IX claim on any of these events, he is precluded from doing so because they occurred outside of the
6 limitations period.

7 Plaintiff contends his Title IX claim is saved by the continuing violation doctrine. In order for
8 that doctrine to apply, Plaintiff must plead some facts indicating that he was subjected to a hostile
9 environment on the basis of his sex during the limitations period. Stanley v. Trustees of California
10 State University, supra, 433 F.3d at 1136. As noted above, he must plead facts showing that
11 deliberate indifference on the part of the University caused him to undergo harassment on the basis of
12 sex, or made him vulnerable to it. Davis v. Monroe County Board of Education, supra, 526 U.S. at
13 644-45.

14 The first amended complaint contains only one reference to alleged conduct by Plaintiff’s
15 fraternity brothers that took place after November 4, 2009. Plaintiff contends that in “Fall 2009
16 including December 2009” he was approached by fraternity brothers and interrogated about why he
17 was not attending fraternity meetings. Plaintiff also alleges a fraternity member pulled out his cell
18 phone and reported to someone that he saw Plaintiff on campus, and that members glared and
19 continually stared at him during classes, because he broke a code of silence. FAC, ¶ 24. This
20 allegation is insufficient to invoke the continuing violation doctrine because there is no indication the
21 purported conduct is based on Plaintiff’s sex. During the hearing on the motion, counsel for Plaintiff
22 did not identify any facts showing the person(s) who engaged in alleged conduct based on sex in
23 October and November of 2008 were the same person(s) who glared at, stared at, and questioned him
24 in 2009. The reasonable inference drawn from the facts alleged in the first amended complaint is that
25 to the extent any glaring or staring occurred, it was because Plaintiff pledged AEPi and then
26 discontinued his association with the fraternity.

27 Plaintiff further argues that the continuing violation doctrine applies because the mere
28 presence of AEPi members on campus is sufficient to create a hostile educational environment based

1 on sex, relying on Patricia H. v. Berkeley Unified School District, 830 F.Supp.1288 (C.D. Cal. 1993).
2 In that case, the plaintiffs were 10 and 12 years old, and alleged that they had been sexually molested
3 by a teacher. The court held the mere presence of an alleged harasser could be enough to create a
4 hostile environment in that particular case because of “the very severity of the molestation, and the
5 grave disparity in age and power between [the victims and the accused].” Id. at 1296-97. Here, in
6 contrast, Plaintiff was an adult who claimed he was assaulted by peers during a fraternity event. The
7 fact that members of the fraternity continued to attend classes at a large university campus after the
8 alleged assault is insufficient to support a claim for hostile environment type harassment based on
9 sex.

10 Defendant University also contends there are insufficient facts asserted to hold it liable under
11 the standard set forth in Reese v. Jefferson School Dist. No. 14J, 208 F.3d 736, 739 (9th Cir. 2000).
12 In order to state a claim for harassment based on sex in an educational setting, Plaintiff must plead
13 and ultimately prove: (1) the University exercised substantial control over the harasser and the
14 context in which the harassment occurred; (2) the sexual harassment was so severe, pervasive, and
15 objectively offensive that it deprived him of access to educational opportunities or benefits by the
16 school; (3) the University had actual knowledge of the harassment; and (4) the University acted with
17 deliberate indifference to the known harassment. Id. The only facts alleged that can be said to
18 involve conduct based on sex are those relating to the sexual assault in Lake Tahoe and being forced
19 to watch pornographic movies during a rush event. FAC, ¶¶ 11 and 22. The fact that Plaintiff
20 willingly continued to participate in AEPi events for a period of time after these alleged incidents
21 undermines any argument that he was subjected to severe or pervasive conduct. Further, there are no
22 facts alleged showing the University had knowledge of sex based harassment of Plaintiff before these
23 incidents, or that it had substantial control over the alleged harassers and the context in which the
24 events occurred. Ostrander v. Duggan, 341 F.3d 745, 750-51 (8th Cir. 2003).

25 Plaintiff had an opportunity to cure his complaint via amendment. The allegations in the first
26 amended complaint are insufficient to sustain the Title IX claim. Therefore, Defendant’s Motion to
27 Dismiss Plaintiff’s First Claim for Relief is GRANTED WITH PREJUDICE.
28

2. Second Claim for Relief – 42 U.S.C. § 1983 Based on Violation of the Fourteenth Amendment Equal Protection and Due Process Clauses

Plaintiff's Second Claim for Relief against Defendants Grissom and Cody is brought under 42 U.S.C. § 1983 for alleged violations of his rights under the Fourteenth Amendment. To prevail in a § 1983 action against state actors for the deprivation of rights, privileges, or immunities secured by the Constitution and laws, a plaintiff must show that:

(1) acts by the defendants (2) under color of state law (3) deprived him of federal rights, privileges or immunities and (4) caused him damage. Section 1983 is not itself a source of substantive rights, but merely provided a method for vindicating federal rights elsewhere conferred. Accordingly, the conduct complained of must have deprived the plaintiff of some right, privilege or immunity protected by the Constitution or laws of the United States.

Thornton v. City of St. Helens, 425 F.3d 1158, 1163-64 (9th Cir. 2005) (internal citations omitted). Plaintiff appears to assert two Fourteenth Amendment claims: one under the Equal Protection Clause based on gender discrimination, and a second for alleged violations of due process.

Plaintiff contends Grissom and Cody violated his rights under the Equal Protection Clause by failing to address his complaints of harassment, although they had previously intervened for female students. FAC, ¶ 62. The applicable statute of limitations for a § 1983 claim in California is two years. Torres v. City of Santa Ana, 108 F.3d 224, 226 (9th Cir. 1997); Cal. Code Civ. Proc. § 335.1. Thus, this claim must be based on events that occurred, or failed to occur, on or after November 4, 2009.

The claim against Cody is time-barred. The last alleged event involving him took place in "Summer 2009," when he purportedly "limited his follow-up of AEPi in order to avoid the generation of information regarding the conditional registration." FAC, ¶ 34. The time period covered by the term "Summer 2009" is before November 4, 2009, and thus outside of the limitations period.

With respect to Grissom, this claim is also time-barred to the extent it is based on alleged conduct or failure to act that took place prior to November 4, 2009. The Court notes that in the original complaint, Clifford alleged that his last contact with Grissom was on November 2, 2009. Doc. # 1, ¶ 31. After counsel for Defendants sent a meet and confer letter to Plaintiff's counsel pointing out that date was beyond the limitations period, Plaintiff amended the allegation in a manner

1 so as to make the date reference more obtuse (his last contact with Grissom was in “November
2 2009”). FAC, ¶ 35. The Court interprets this as a tacit admission that Plaintiff cannot further amend
3 his complaint to make timely allegations against Grissom.

4 Plaintiff alleges that in Winter 2010, Grissom advised him to take classes at a community
5 college and not return to UC Davis, and that she refused to communicate with him despite his
6 repeated attempts. FAC, ¶ 36. Plaintiff argues that a reasonable inference can be drawn that
7 GRISSOM “would not have taken this lax and contemptuous approach to a female advisee reporting
8 such offensive sexual harassment by fraternity brothers.” However, the first amended complaint is
9 bereft of any facts supporting a claim that Grissom actually treated female students differently than
10 she responded to Plaintiff. The Court is not required “to accept as true allegations that are merely
11 conclusory, unwarranted deductions of fact, or unreasonable inferences.” In re Gilead Scis. Sec.
12 Litig., 536 F.3d 1049, 1056-57 (9th Cir. 2008). Therefore, this claim cannot be maintained.

13 Plaintiff did not oppose Defendants’ motion to dismiss his due process claim, either in his
14 opposition or at the hearing on the motion.

15 The deficiencies with this claim cannot be cured by further amendment. Therefore,
16 Defendants’ Motion to Dismiss Plaintiff’s Second Claim for Relief is GRANTED WITH
17 PREJUDICE.

18 3. Third Claim for Relief – 42 U.S.C. § 1983 Based on Violation of First
19 Amendment Protections

20 The Third Claim for Relief, asserted against Defendants Grissom and Cody, is brought under
21 42 U.S.C. § 1983 for alleged violations of Plaintiff’s rights under the First Amendment. To establish
22 a First Amendment retaliation claim Plaintiff must show that: (1) he was engaged in a constitutionally
23 protected activity; (2) Defendants’ actions caused him to suffer an injury that would chill a person of
24 ordinary firmness from continuing to engage in that activity; and (3) Defendants’ adverse actions
25 were substantially motivated by Plaintiff’s exercise of a constitutionally protected right. Keenan v.
26 Tejeda, 290 F.3d 252, 258 (5th Cir. 2002).

27 Plaintiff contends Grissom and Cody retaliated against him for filing his state court lawsuit
28 against AEPi by counseling him to withdraw from school and rejecting a grievance application.

1 FAC, ¶ 63. Defendants argue this claim is barred by the two-year statute of limitations, and that
2 Plaintiff has failed to plead sufficient facts to support his claim.

3 As discussed above, the last alleged wrongful act by Cody took place in Summer 2009. Thus,
4 the claim against him is time-barred. Similarly, to the extent the claim against Grissom is based on
5 any conduct that occurred prior to November 4, 2009, it too is untimely. Plaintiff has not pled any
6 facts indicating Grissom knew about his lawsuit against AEPi at the time she allegedly made a
7 recommendation in the Winter of 2010 to take courses at a community college and not return to UC
8 Davis, or refused to meet with him. FAC, ¶ 36. This is fatal to his retaliation claim. Moreover,
9 “counseling” or “advising” Plaintiff to withdraw from school is not the equivalent of forcing him to
10 leave school. Plaintiff alleges he graduated from UC Davis, albeit not on the timetable he may have
11 originally envisioned.

12 Plaintiff cannot cure the deficiencies of this claim by further amendment. Therefore,
13 Defendants’ Motion to Dismiss Plaintiff’s Third Claim for Relief is GRANTED WITH PREJUDICE.

14 4. Fourth Claim for Relief – Cal. Civil Code § 52.1

15 The Fourth Claim for Relief, which is asserted only against the University, is brought under
16 California Civil Code § 52.1. In order to state a claim under this statute, Plaintiff must plead facts
17 showing violence or intimidation by threat of violence by the accused defendant. Cabesuela v.
18 Browning-Ferris Indus., 68 Cal.App.4th 101, 111 (1998); see also Winarto v. Toshiba America
19 Electronics Components, Inc., 274 F.3d 1276 (2001). Speech alone is insufficient to support this type
20 of claim; in order to be actionable, the speech itself must threaten violence and places the victim in
21 reasonable fear of violence. Cal. Civ. Code § 52.1(j).

22 Plaintiff has not alleged any acts of violence or threats of violence by any University
23 employees. His contention that he was “systematically harassed” is not the equivalent of a violent act
24 or threat of the same. Plaintiff cannot cure the deficiencies of this claim by further amendment.
25 Therefore, Defendant’s Motion to Dismiss Plaintiff’s Fourth Claim for Relief is GRANTED WITH
26 PREJUDICE.

1 5. Fifth Claim for Relief – Negligence

2 The Fifth Claim for Relief, asserted against all Defendants, is based on common law
3 negligence. Plaintiff alleges Defendants owed him a duty of fiduciary care; that they “negligently and
4 carelessly retained and failed to properly supervise, train, and control AEPi;” and that as a result of
5 “the negligent retention and supervision of defendant entities and each of them,” he suffered injuries
6 including “permanent physical injury, beatings, threats” and severe mental anguish. FAC ¶¶ 66-70.
7 Defendants moved to dismiss this claim based on the statute of limitations and various state law
8 immunities.

9 As discussed above, the statute of limitations for personal injury in California is two years.
10 Cal. Code Civ. Proc. § 335.1. It is clear from reading the First Amended Complaint that Plaintiff is
11 attempting to hold Defendants liable for injuries sustained in October and November 2008, namely,
12 the alleged sexual assault and foot stomping. Plaintiff’s claim is barred because he did not file his
13 complaint until November 4, 2011, more than two years after the events giving rise to the alleged
14 injuries.

15 California Government Code § 815(a) provides that, except as otherwise provided by statute,
16 “a public entity is not liable for an injury, whether such injury arises out of an act or omission of the
17 public entity or a public employee or any other person.” Thus, “in the absence of some constitutional
18 requirement, public entities may be liable *only* if a statute declares them to be liable. Becerra v.
19 County of Santa Cruz, 68 Cal.App.4th 1450, 1457 (1998). Plaintiff contends that Peterson v. San
20 Francisco Community College, 6 Cal.3d 799 (1984) provides the requisite statutory basis for a
21 negligence claim against the UNIVERSITY. Peterson is inapposite because it addressed the issue of
22 whether a public university may be liable under California Government Code § 835 for maintaining a
23 dangerous condition of public property which, together with the criminal act of a third party, causes
24 injury to a student. There is no allegation in this case that the University maintained property in a
25 dangerous manner, causing injury to Plaintiff. California Government Code § 815(a) bars this claim
26 against the University.

27 Defendants Grissom and Cody are immune from liability pursuant to California Government
28 Code § 820.2, which provides “[e]xcept as otherwise provided by statute, a public employee is not

1 liable for an injury resulting from his act or omission where the act or omission was the result of the
2 exercise of the discretion vested in him, whether or not such discretion be abused.” The Court finds
3 this immunity bars this claim against Grissom and Cody. Nicole M. v. Martinez Unified Sch. Dist.,
4 964 F.Supp. 1369, 1389-90 (C.D. Cal. 1997) (superseded by statute as stated in Sandoval v. Merced
5 Union High Sch., 2006 U.S. Dist. LEXIS 28446, pp. 4-6); Davison v. Santa Barbara High Sch. Dist.,
6 48 F.Supp.2d 1225, 1227 (C.D. Cal. 1998).

7 Plaintiff cannot cure any of these deficiencies by further amendment. Therefore, Defendants’
8 Motion to Dismiss Plaintiff’s Fifth Claim for Relief is GRANTED WITH PREJUDICE.

9 6. Sixth Claim for Relief – Intentional Infliction of Emotional Distress

10 The Sixth Claim for Relief is a state law claim for intentional infliction of emotional distress,
11 asserted against all Defendants. Plaintiff contends Defendants concealed, ignored, and dismissed his
12 complaints, treated him with deliberate indifference despite having a fiduciary duty to do otherwise,
13 retaliated against him by counseling him to drop out of school, discriminated against him on the basis
14 of his sex, and concealed evidence and thwarted his efforts to obtain redress through the courts.
15 FAC, ¶ 71.

16 For the same reasons discussed with respect to Plaintiff’s negligence claim, the Court finds
17 this claim is untimely because it was brought more than two years after the conduct at issue.
18 Moreover, the University is immune from liability for this common law claim pursuant to California
19 Government Code § 815(a) and Grissom and Cody are provided with immunity under California
20 Government Code § 820.2.

21 Plaintiff cannot cure any of these deficiencies by further amendment. Therefore, Defendants’
22 Motion to Dismiss Plaintiff’s Sixth Claim for Relief is GRANTED WITH PREJUDICE.

23 7. Punitive Damages Claim Against Defendant University

24 Defendant University has moved to dismiss the request for punitive damages against it. In
25 light of the Court’s ruling on each claim, this request is moot. Nonetheless, the Court also dismisses
26 the request for punitive damages because the University is immune from such damages. Cal. Gov.
27 Code § 818; Barnes v. Gorman, 536 U.S. 181, 189-90 (2002).

