

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARK TICER,
Plaintiff,

v.

GREGORY YOUNG, et al.,
Defendants.

Case No. 16-cv-02198-KAW

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

Re: Dkt. No. 11

Plaintiff Mark Ticer brings this suit against Defendants Gregory Young and the Board of Trustees of the California State University ("CSU"), alleging violations of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973, as well as intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. (Compl., Dkt. No. 1.) Pending before the Court is Defendant CSU's motion to dismiss Plaintiff's complaint. (Def's. Mot., Dkt. No. 11.) Upon consideration of the moving and responding papers, as well as the arguments presented at the August 18, 2016 motion hearing, and for the reasons set forth below, the Court GRANTS IN PART AND DENIES IN PART Defendant CSU's motion to dismiss.

I. BACKGROUND

A. Factual background

In 2000, Plaintiff was accepted as a student in San Jose State University's ("SJSU") Biomedical, Chemical, and Materials Engineering ("BCME") Department. (Compl. ¶ 7.) Plaintiff suffers from chronic schizophrenia, which results in a fear of people that can cause him serious emotional problems. (Compl. ¶¶ 8, 9.) Plaintiff registered with the SJSU Disability Resource Center ("DRC") in March 2001. (Compl. ¶ 8.) The DRC determined that Plaintiff was eligible to

1 participate in the Chemical Engineering Program as a disabled student, and that Plaintiff was
2 eligible for extended time on exams as an accommodation. (*Id.*) The DRC also issued Plaintiff a
3 DRC identification card. (*Id.*)

4 Plaintiff alleges that he experiences medication problems and other disability-related issues
5 that can lead to delays with his homework assignments. (Compl. ¶ 9.) While he was usually able
6 to complete the assignment by the due date, he occasionally had difficulty delivering them on time
7 due to his fear of people. (*Id.*) Almost every professor accepted Plaintiff's homework assignments
8 after Plaintiff showed them his DRC card and explained the delay. (*Id.*) However, in Fall 2003,
9 Plaintiff took ChE190 with Professor Gregory Young, who was the BCME Department Associate
10 Chair (and later the full Department Chair) and Plaintiff's academic advisor. (Compl. ¶¶ 12, 13.)
11 Professor Young required that homework assignments be submitted during the first five minutes
12 of class. (Compl. ¶ 13.) When Plaintiff met with Professor Young to explain that his homework
13 was late due to his disability, Professor Young still refused to accept the assignment. (*Id.*) Later
14 that semester, Plaintiff proposed e-mail delivery of his homework several times, but Professor
15 Young would become angry and "scold[] Plaintiff while complaining about the inconvenience that
16 the email solution would cause him." (Compl. ¶ 14.) Professor Young's syllabus stated that an
17 exam could be excused if he was presented with a written request. (Compl. ¶ 15.) Plaintiff
18 provided a written request, explaining that he had a fear of people that caused emotional
19 difficulties on the day of the exam. (*Id.*) Professor Young became angry and said he did not have
20 time to constantly allow Plaintiff to make up his exams, said Plaintiff could not pass the class with
21 these problems, and told Plaintiff that he should change his major. (*Id.*)

22 On December 16, 2003, Plaintiff met with the BCME Department Chair, Dr. Allen, to ask
23 if she would support an incomplete ("I") grade in Professor Young's class, which would extend the
24 time for Plaintiff to complete the class. (Compl. ¶ 16.) Plaintiff explained his disability, but Dr.
25 Allen allegedly responded by telling Plaintiff that the engineering program would be too difficult
26 for Plaintiff with these problems, and suggesting he change his major. (*Id.*) That day, Dr. Allen
27 sent Plaintiff a letter stating that his work in Professor Young's class did not warrant an incomplete
28 grade, but an unauthorized withdrawal ("U"). (Compl. ¶ 17, Exh. H.) She identified four classes

1 that Plaintiff had outstanding "I" or "W" grades in, and suggested that Plaintiff seek assistance
2 from the DRC's academic advisor and the SJCSU Counseling Center. (*Id.*) She did not advise
3 Plaintiff to seek counseling within the BCME Engineering Department, which Plaintiff contends is
4 evidence that she was pressuring him to seek a new major. (Compl. ¶ 17.) Plaintiff later
5 completed the four classes he had outstanding "I" or "W" grades in, receiving grades of A, B, B,
6 and A-. (Compl., Exh. Q.)

7 Because Professor Young was the only professor who taught ChE190, Plaintiff re-enrolled
8 in Professor Young's class in Fall 2004. (Compl. ¶ 21.) When Plaintiff asked Professor Young to
9 accept his homework late, Professor Young became angry and refused. (*Id.*) Professor Young
10 also refused to accept the homework by e-mail, and told Plaintiff that he could not work as an
11 engineer if he could not turn his homework in on time. (*Id.*) Plaintiff became frightened by this
12 conduct. Because he believed he could not ask Dr. Allen for help without her pressuring him into
13 picking a new major or dismissing him from the program, he withdrew from the ChE190 class.
14 (*Id.*)

15 In 2006, Professor Young told Plaintiff that his previously completed engineering classes
16 were going to expire and that he would need to retake the classes. (Compl. ¶ 22.) Professor
17 Young also told Plaintiff that he would not be able to graduate and that it would be a waste of both
18 Plaintiff's and Professor Young's time to continue his engineering studies. (*Id.*) Plaintiff learned
19 in 2015 that he could have asked for an alternative to retaking the classes, but Professor Young did
20 not offer him any alternatives. (Compl. ¶ 23.) Professor Young again pressured Plaintiff into
21 changing his major. (Compl. ¶ 22.) Plaintiff refused, and repeated his expiring classes. (*Id.*)

22 Plaintiff again registered for Professor Young's ChE190 class in Fall 2006. (Compl. ¶ 24.)
23 Professor Young refused to accept Plaintiff's late homework assignments and did not allow
24 Plaintiff to make up exams, preventing Plaintiff from passing the class. (*Id.*) Plaintiff contends
25 that when he did deliver his homework assignments in time, he received high scores. (*Id.*, Exh. I.)

26 In January 2007, Professor Young and Dr. Allen were in a BCME faculty meeting to
27 discuss Plaintiff's grade point average dropping below 2.0 in the Junior Core Chemical
28 Engineering Classes. (Compl. ¶ 25, Exh. J.) The drop was due to Plaintiff receiving a D in

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1 Professor Young's ChE190 class. Despite this, the faculty advised Plaintiff to enroll in ChE160A,
2 a higher-level course that was only taught by Professor Young. (Compl. ¶¶ 25, 26.)

3 Plaintiff enrolled in Professor Young's ChE160A class in Spring 2007. (Compl. ¶ 27.)
4 Plaintiff contends that enrolling in the class caused him fear, anxiety, and apprehension, as he
5 worried that Professor Young would prevent him from passing the class which in turn could
6 disqualify him from the program. (*Id.*) During the semester, Plaintiff had a medication problem
7 that prevented him from delivering a homework assignment in time. (Compl. ¶ 28.) When he
8 asked Professor Young to accept the late homework, Professor Young got angry, denied the
9 request, and told Plaintiff that he would fail the class if he had another late assignment. (*Id.*)
10 Professor Young also told Plaintiff he would have to repeat the ChE190 class if he did not change
11 his major. (*Id.*) Plaintiff dropped out of the class. (*Id.*)

12 Plaintiff re-enrolled in Professor Young's ChE190 class in Fall 2007, per Professor
13 Young's requirement. (Compl. ¶ 30.) Professor Young again refused to allow Plaintiff to turn in
14 his homework late. Professor Young later told Plaintiff that he had to complete the ChE190 class
15 because he would not sign a class withdrawal request. Plaintiff became frightened and stopped
16 attending the class. (*Id.*)

17 From 2008 to 2009, Professor Young left SJSU on sabbatical. Plaintiff was able to
18 complete additional courses during his sabbatical. (Compl. ¶ 31.) When Professor Young
19 returned, Plaintiff re-enrolled in Professor Young's ChE190 class in Fall 2009. (Compl. ¶ 32.)
20 Plaintiff stopped attending due to emotional problems caused by the presence of Professor Young,
21 and took a break from the semester. (*Id.*) In Spring 2010, Plaintiff took two courses that he had
22 completed at community college but that Professor Young told him to repeat. (Compl. ¶ 33.)
23 However, due to "his years of negative experience" with Professor Young, his disability worsened
24 and he was unable to complete the classes. (*Id.*) Plaintiff did not return to SJSU in Fall 2010, and
25 was authorized a medical leave of absence in January 2011 by Dr. Gleixner, the Associate Chair of
26 the BCME Department. (Compl. ¶¶ 34, 35.)

27 In September 2011, Plaintiff tried to extend his medical leave, which required Professor
28 Young's signature. (Compl. ¶ 36.) Professor Young refused to sign "because he was not a

1 psychiatrist," told Plaintiff that he should have been dismissed from SJSU long ago, and that
2 Plaintiff had been wasting everyone's time. (*Id.*) Professor Young also criticized Dr. Gleixner for
3 approving the first medical leave of absence. (*Id.*) Plaintiff became frightened and reported
4 Professor Young's behavior to Dr. Allen. (Compl. ¶ 37.) Dr. Allen expressed no concerns about
5 Professor Young's behavior, but approved the medical leave extension. (*Id.*)

6 Plaintiff did not return to SJSU after the medical leave expired, due to his prior encounter
7 with Professor Young. (Compl. ¶ 38.) When Plaintiff attempted to get a medical leave extension
8 during the Spring 2013 semester, the SJSU Office of the Registrar denied the request. (*Id.*)

9 During the medical leaves, Plaintiff became concerned that he would lose his tuition
10 payments from the Department of Rehabilitation ("DOR"). (Compl. ¶ 39.) To explain his
11 problem with Professor Young, Plaintiff wanted to chart his homework scores and present his
12 findings to the DOR. (*Id.*) To show the scores were authentic, Plaintiff met with Professor Young
13 in December 2013, requesting official copies of his homework records. (Compl. ¶¶ 39, 40.)
14 Professor Young said he would contact Plaintiff if he found the records. (Compl. ¶ 40.) However,
15 when Plaintiff contacted DOR to schedule an appointment, he learned that DOR had closed his
16 file in December 2011. (Compl. ¶ 41.) He contacted Professor Young to let him know the
17 information was no longer needed, but Professor Young e-mailed him the homework data from
18 Fall 2006 regardless. (*Id.*)

19 In 2014, Plaintiff decided he wanted to return to SJSU, which would require reopening his
20 file with DOR. (Compl. ¶ 42.) He again wanted to chart his homework scores, as he was
21 concerned that DOR would deny him financial support due to his difficulty passing Professor
22 Young's classes. (*Id.*) On April 21, 2014, Plaintiff met with Professor Young to ask for the
23 homework records. (Compl. ¶ 43.) Upon seeing Plaintiff, Professor Young became angry. (*Id.*)
24 When Plaintiff explained he wanted his remaining homework records for his DOR reinstatement,
25 Professor Young gave him his homework record from the ChE160A class. (Compl. ¶¶ 43, 44.)
26 The record also included Plaintiff's record in his exams and lab work, even though Plaintiff had
27 not requested this information. (Compl. ¶ 44, Exh. N.)

28 On April 23, 2014, Plaintiff returned to Professor Young's office. (Compl. ¶ 45.)

1 Professor Young was angry to see him. (*Id.*) Plaintiff again asked for the homework records,
2 requesting that they be presented in the same format as the record sent by Professor Young in
3 December 2013. (*Id.*) Professor Young agreed, but told Plaintiff the records would not help his
4 reinstatement with DOR. (*Id.*) Plaintiff also explained he would need academic counseling to
5 return to the Chemical Engineering Program, and Professor Young replied that he was not eligible
6 to return. (Compl. ¶ 46.) Plaintiff asked Professor Young to authenticate the December 2013
7 record, but Professor Young refused. (*Id.*) As Professor Young was preparing the new records,
8 Plaintiff explained that only homework data was needed. Professor Young replied that he was
9 preparing what the DOR needed to see, and began scolding Plaintiff, telling Plaintiff that this was
10 a waste of his and the DOR's time. (*Id.*) Professor Young told Plaintiff not to return to his office,
11 then ordered Plaintiff to follow him outside of his office and into an area where there were other
12 students and staff members. Professor Young continued to insult and accuse Plaintiff in front of
13 others, telling him that he did not know what he was doing, that he was causing trouble, and that
14 he was wasting Professor Young's time. (*Id.*) Professor Young handed him the homework record
15 (which again contained information about the incomplete exams and labs) and continued to scold
16 him as Plaintiff left. (*Id.*, Exh. O.) During this incident, Plaintiff's distress was so severe that he
17 could not breathe. (Compl. ¶ 47.) He has been suffering from severe Post-Traumatic Stress
18 Disorder since. (Compl. ¶ 48.) Plaintiff also believes that by providing him with a homework
19 record with information about the incomplete exams and labs, Professor Young was trying to
20 "encourage a negative response by the DOR to Plaintiff's reinstatement efforts." (Compl. ¶ 49.)

21 In August 2014, Plaintiff reported the April 23, 2014 incident to SJSU's Ombudsperson
22 Office. (Compl. ¶ 50.) Plaintiff spoke to the Human Resources Department, but no one ever
23 contacted him to investigate or report any action taken. (*Id.*) On October 23, 2014, Plaintiff filed
24 a claim with CSU's Office of the Chancellor, Risk Management and Public Safety Department.
25 (Compl. ¶ 51.) CSU stated it would investigate the April 23, 2014 incident, but that the other
26 events were untimely. (Request for Judicial Notice ("RJN"), Exh. 2 (Dkt. No. 11).)

27 **B. Procedural background**

28 Plaintiff filed this action on April 22, 2016. On May 16, 2016, the summons as to

1 Defendant Young were returned unexecuted, and Defendant Young has not been served or
 2 appeared in this case. (Dkt. No. 10.) On June 3, 2016, CSU filed the instant motion to dismiss,
 3 along with a Request for Judicial Notice. (Def.'s Mot., Dkt. No. 11.) On June 30, 2016, Plaintiff
 4 filed a "Motion to Dismiss All State Claims Pursuant to Federal Rules of Civil Procedure 41(a),"
 5 requesting that the Court dismiss all of the state claims. (Dkt. No. 19.) On July 6, 2016, the Court
 6 issued an order construing Plaintiff's filing as a voluntary dismissal of the state law claims for
 7 intentional infliction of emotional distress, negligent infliction of emotional distress, and
 8 negligence, and dismissed the state claims. (Dkt. No. 20.) On August 9, 2016, Plaintiff filed his
 9 opposition to CSU's motion to dismiss. (Pl.'s Opp'n, Dkt. No. 26.) Plaintiff did not file an
 10 opposition to the Request for Judicial Notice. On August 23, 2016, CSU filed its reply. (Def.'s
 11 Reply, Dkt. No. 27.)

12 II. LEGAL STANDARD

13 A. Request for judicial notice

14 A district court may take judicial notice of facts not subject to reasonable dispute that are
 15 "capable of accurate and ready determination by resort to sources whose accuracy cannot
 16 reasonably be questioned." Fed. R. Evid. 201(b); *United States v. Bernal-Obeso*, 989 F.2d 331,
 17 333 (9th Cir. 1993). A court may, therefore, take judicial notice of matters of public record.
 18 *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

19 B. Motion to dismiss

20 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss based
 21 on the failure to state a claim upon which relief may be granted. A motion to dismiss under Rule
 22 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250
 23 F.3d 729, 732 (9th Cir. 2001).

24 In considering such a motion, a court must "accept as true all of the factual allegations
 25 contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation
 26 omitted), and may dismiss the case or a claim "only where there is no cognizable legal theory" or
 27 there is an absence of "sufficient factual matter to state a facially plausible claim to relief."
 28 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing

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Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009); *Navarro*, 250 F.3d at 732) (internal quotation marks omitted).

A claim is plausible on its face when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"Threadbare recitals of the elements of a cause of action" and "conclusory statements" are inadequate. *Iqbal*, 556 U.S. at 678; *see also Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim."). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (internal citations omitted).

Generally, if the court grants a motion to dismiss, it should grant leave to amend even if no request to amend is made "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations omitted).

III. DISCUSSION

A. Request for judicial notice

Defendants ask that this Court take judicial notice of: (1) the "CSU Claim Form" submitted by Plaintiff on October 23, 2014, and (2) CSU's November 14, 2014 response, stating that CSU would investigate the April 23, 2014 event. Plaintiff did not file an opposition to Defendants' request for judicial notice, and so Plaintiff is not deemed to dispute the authenticity of any of the exhibits. The Court may take judicial notice of the filing date and content of the CSU Claim Form, and of the filing date and content of CSU's response as these documents are a matter of public record which set forth facts "capable of accurate and ready determination by resort to

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1 sources whose accuracy cannot be reasonably questioned." *Clarke v. Upton*, 703 F. Supp. 2d
2 1037, 1042 (E.D. Cal. 2010) (taking judicial notice of tort claims and their rejection by the
3 county).

4 **B. Statute of limitations**

5 CSU argues that Plaintiffs' claims concerning events other than the April 23, 2014
6 interaction between Plaintiff and Professor Young are time-barred.¹

7 Title II of the ADA states: "no qualified individual with a disability shall, by reason of
8 such disability, be excluded from participation in or be denied the benefits of the services,
9 programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42
10 U.S.C. § 12132. Because "Title II does not contain an express statute of limitations," the Court
11 "borrow[s] the statute of limitations applicable to the most analogous state-law claim, so long as it
12 is not inconsistent with federal law or policy to do so." *Sharkey v. O'Neal*, 778 F.3d 767, 770 (9th
13 Cir. 2015) (internal quotation omitted). The Ninth Circuit has held that "California Government
14 Code § 11135 provides the most analogous state-law claim to a Title II claim" as § 11135
15 "provides an almost identical state-law counterpart to Title II," and that a three-year statute of
16 limitation applies. *Id.* at 771, 773.

17 Section 504 of the Rehabilitation Act provides: "[n]o otherwise qualified individual with a
18 disability in the United States . . . shall, solely by reason of her or his disability, be excluded from
19 the participation in, be denied the benefits of, or be subjected to discrimination under any program
20 or activity receiving Federal financial assistance" 29 U.S.C. § 794. Like Title II, the
21 Rehabilitation Act does not contain its own statute of limitations, so the Court must look at the
22 most analogous state-law claim. *Kramer v. Regents of Univ. of Cal.*, 81 F. Supp. 2d 972, 973
23 (N.D. Cal. 1999). Post-*Sharkey*, the district court in *Hartline v. National University* held that a
24 claim under Section 504 of the Rehabilitation Act "is most closely analogous to a personal injury
25 claim or to an Unruh Act claim," and thus applied a two-year statute of limitations. No. 2:14-cv-
26 635 KJM AC (PS), 2015 WL 4716491, at *5 (E.D. Cal. Aug. 6, 2015). The Ninth Circuit,

27 _____
28 ¹ At the hearing, CSU clarified that it was not arguing that the California Torts Claim Act applied
to the federal claims.

1 however, has explained that "Title II of the ADA was expressly modeled after § 504 of the
2 Rehabilitation Act," and that the same analysis applies to both. *Duvall v. Cty. of Kitsap*, 260 F.3d
3 1124, 1135 (9th Cir. 2001). Given that Title II and § 504 create the same rights and obligations,
4 *see Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1055 n.1 (9th Cir. 2004), it would seem that
5 § 11135 would also provide the most analogous state-law claim to a § 504 claim, thus creating a
6 three-year statute of limitations. *See Sharkey*, 778 F.3d at 771.

7 Even assuming a three-year statute of limitations for both the Title II and § 504 claims, the
8 vast majority of Plaintiff's allegations take place more than three years prior to the filing of his
9 complaint on April 22, 2016. The only wrongful event that occurred after April 22, 2013 is
10 Plaintiff's April 23, 2014 meeting with Professor Young.² Otherwise, the last interaction Plaintiff
11 had with Professor Young was in September 2011, when Professor Young denied a medical leave
12 extension that was then approved by Dr. Allen. (Compl. ¶¶ 36, 37.) SJSU's Office of the
13 Registrar denied another medical leave extension during the Spring 2013 semester, but Plaintiff
14 does not specify an exact date for this denial nor does he appear to base his Title II or
15 Rehabilitation Act claims on this denial. (Compl. ¶¶ 38, 63, 75.) Thus, the majority of Plaintiff's
16 allegations are time-barred.

17 In his opposition, Plaintiff argues that allegations that fall outside the statutory period are
18 not time-barred because: (1) the continuing violations doctrine applies, and (2) Plaintiff is bringing
19 a "hostile learning environment" claim. (Pl's. Opp'n at 5.)

20 **1. Continuing violations doctrine**

21 "The continuing violations doctrine extends the accrual of a claim if a continuing system of
22 discrimination violates an individual's rights up to a point in time that falls within the applicable
23 limitations period." *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 822 (9th Cir. 2001). The
24 Ninth Circuit originally recognized two methods to establish a continuing violation. "First, the
25 plaintiff may show a serial violation by pointing to a series of related acts against one individual,
26

27 ² Plaintiff also met with Professor Young on December 2, 2013, but states that Professor Young
28 was "approachable" on that day and does not allege any wrongful action during that meeting.
(Compl. ¶ 40.)

1 of which at least one falls within the relevant period of limitations." *Id.* "Second, a plaintiff may
2 show a systematic policy or practice of discrimination that operated, in part, within the limitations
3 period-a systemic violation." *Id.* (internal quotation omitted). The Supreme Court subsequently
4 rejected the "serial violation" method, explaining that "discrete discriminatory acts are not
5 actionable if time barred, even when they are related to acts alleged in timely filed charges. Each
6 discrete discriminatory act starts a new clock for filing charges alleging that act." *Nat'l R.R.*
7 *Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). Thus, to succeed on a continuing
8 violations theory, Plaintiff must challenge a "systematic policy or practice of discrimination."

9 Plaintiff does not allege a systemic policy or practice. The Ninth Circuit has explained that
10 a pattern-or-practice claim "cannot be based on 'sporadic discriminatory acts' but rather must be
11 based on discriminatory conduct that is widespread throughout a company or that is a routine and
12 regular part of the workplace." *Cherosky v. Henderson*, 330 F.3d 1243, 1247 (2003). In
13 *Cherosky*, the four plaintiffs requested permission to use a respirator at work, which the employer
14 denied pursuant to its policy of prohibiting respirators except where air contaminants exceeded
15 regulatory limits. *Id.* at 1245. The Ninth Circuit found that this did not constitute a pattern or
16 practice because the plaintiffs did not attempt to show that the employer "widely discriminates
17 against employees with disabilities or that it even routinely discriminates with respect to respirator
18 requests." *Id.* at 1247. Moreover, the plaintiffs did not assert that the general rule prohibiting
19 respirators was discriminatory. Instead, the plaintiffs were challenging the "individualized
20 decision" to deny the accommodation request, and "[t]hese individualized decisions are best
21 characterized as discrete acts, rather than as a pattern or practice of discrimination." *Id.*; *contrast*
22 *with Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, Case No. C06-5125 SBA,
23 2009 WL 2982840, at *2 (N.D. Cal. Sept. 14, 2009) (applying continuing violations doctrine
24 where the plaintiffs expressly challenged the defendants' reliance on inadequate guidelines and
25 procedures that failed to ensure necessary access).

26 Here, although Plaintiff alleges that Professor Young "engaged Plaintiff with a pattern of
27 discrimination involving deliberate indifference," Plaintiff is not challenging a systemic policy or
28 widespread practice of discrimination that is a regular part of the school environment. Instead,

1 Plaintiff is ultimately challenging Professor Young's individual decision not to accept late
2 homework. As to the other allegations that Professor Young required Plaintiff to retake certain
3 courses or that BCME advised Plaintiff to take a class that they did not expect him to pass, there is
4 no allegation that these decisions were made according to system-wide policy or practice. In fact,
5 with respect to SJSU itself, Plaintiff alleges that "virtually all SJSU professors" accepted his late
6 homework assignments or allowed Plaintiff to make up his exams, further emphasizing that
7 Professor Young's refusal to accept late homework from Plaintiff was not according to any
8 systemic policy or practice by SJSU. (*See* Compl. ¶ 10.) The Court finds that Plaintiff has not
9 adequately alleged a continuing violation against the university.

10 **2. Hostile learning environment**

11 In the alternative, Plaintiff argues that there was a "hostile learning environment." (Pl's.
12 Opp'n at 5-6.) In *Morgan*, the Supreme Court explained that "[a] hostile work environment claim
13 is composed of a series of separate acts that collectively constitute one 'unlawful employment
14 practice.'" 536 U.S. at 117. If an act contributing to the hostile work environment claim falls
15 within the statutory period, the entire duration of the hostile environment claim can be considered
16 because all of the acts are part of the single claim. *Id.* at 117-18.

17 As an initial matter, the parties dispute whether the Ninth Circuit recognizes a hostile
18 learning environment claim under the ADA or Rehabilitation Act. In *Garedakis v. Brentwood*
19 *Union School District*, the district court declined to recognize a hostile learning environment
20 claim, noting that "this court was unable to locate any decision by the Ninth Circuit or by any
21 district court within the Ninth Circuit recognizing a claim of hostile educational environment
22 under the ADA or § 504, against a school board." -- F. Supp. 3d --, Case No. 14-cv-4799-PJH,
23 2016 WL 1718270, at *10 (N.D. Cal. Apr. 29, 2016). Outside of this circuit, the district court in
24 *Guckenberger v. Boston University* found that a hostile learning environment claim did exist under
25 the ADA and Rehabilitation Act. 957 F. Supp. 306, 313 (D. Mass. 1997). Based on the statutory
26 language, it explained that "[b]oth statutes apply to discrimination by educational facilities in
27 receipt of federal funds, and neither limits its prohibitions to discrimination in the employment
28 context." *Id.* Further, the statutory language "is substantially similar to Title IX of the Education

1 Amendments of 1972, which courts have held is the statutory basis for hostile learning
2 environment claims based on sexual harassment." *Id.* The district court thus concluded that "there
3 is a cause of action under the ADA and the Rehabilitation Act for a hostile learning environment
4 when harassment based on a student's disability has the purpose of unreasonably interfering with
5 the individual's performance or of creating an intimidating , hostile, or offensive environment."
6 *Id.* at 314 (internal quotation and modifications omitted). This conclusion was "consistent with
7 the express congressional purpose in enacting the ADA to 'address the major areas of
8 discrimination faced day-to-day by people with disabilities.'" *Id.* (quoting 42 U.S.C. § 12101(b)).

9 Although the Court finds the *Guckenberger* court's holding persuasive, it is not clear
10 Plaintiff's hostile learning environment claim would be timely based on the April 23, 2014
11 meeting between Plaintiff and Professor Young. As CSU pointed out at the hearing, Plaintiff was
12 no longer a student, but was seeking to return to the program. Because Plaintiff was no longer a
13 student, the April 23, 2014 meeting was not a part of the hostile learning environment that
14 Plaintiff alleges took place when he was still a student. At best, it provides additional evidence of
15 Professor Young's hostility towards him, but the single incident itself is not sufficient to establish
16 a hostile learning environment claim. Plaintiff does not allege that an incident within the statute of
17 limitations occurred while he was still enrolled.

18 3. Tolling

19 The Court concludes, however, that Plaintiff may be able to allege facts to support a tolling
20 argument. At the hearing, Plaintiff indicated that the reason he did not bring his claims sooner
21 was because he was not aware that he had a claim, as he believed that his problems were due to his
22 disability or medication. "Equitable tolling applies when the plaintiff is prevented from asserting a
23 claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances
24 beyond the plaintiff's control made it impossible to file a claim on time." *Stoll v. Runyon*, 165
25 F.3d 1238, 1242 (9th Cir. 1999). The Ninth Circuit has held that "mental incompetence
26 constitutes a ground for equitable tolling . . . when mental incompetence precludes a person from
27 asserting his rights during the proper time period" *Brockamp v. United States*, 67 F.3d 260,
28 263 (9th Cir. 1995), *rev'd on other grounds by United States v. Brockamp*, 519 U.S. 347 (1996);

1 *see also Garcia v. Brockway*, 526 F.3d 456, 465 (9th Cir. 2008) (citing *Brockamp* for the
2 proposition that equitable tolling may be appropriate "if a medical condition prevented a plaintiff
3 from filing suit"). Here, Plaintiff explained that it was not until he was diagnosed with Post-
4 Traumatic Stress Disorder resulting from his interactions with Professor Young that he realized he
5 had a claim; in short, Plaintiff was impaired and could not recognize his claims. Moreover,
6 Plaintiff explained that Defendants created an "illusion" that everything was proceeding properly
7 and that no accommodations were available to him. For example, Professor Young and Dr. Allen
8 both refused to give him accommodations, instead telling him to change his major, and the faculty
9 told him to take Professor Young's class without affording him any accommodations despite
10 knowing of his prior problems passing Professor Young's class without accommodations. Plaintiff
11 further stated during the hearing that it was not until 2014 that he understood that the lack of
12 accommodations was a problem that supported a claim.

13 The Court will therefore dismiss Plaintiff's claims based on events outside the statutory
14 period with leave to amend, so that Plaintiff can plead additional facts to support an equitable
15 tolling argument. In addition to the facts stated during the hearing, Plaintiff should explain when
16 he was incapacitated and for what period, as well as when and why he realized he had a claim.
17 Plaintiff should also provide additional facts as to what accommodations he was entitled to,
18 including what, if any, accommodations the DRC and SJSU were to provide him.³

19 **C. Disability discrimination claim**

20 CSU next argues that Plaintiff cannot establish his Title II or Rehabilitation Act claim.
21 (Def.'s Mot. at 7.) To make a prima facie case under the ADA or Rehabilitation Act, Plaintiff
22 must allege: (1) that he is disabled under the Act; (2) he is "otherwise qualified" to participate in or
23 receive the benefit of the public entity's services, programs, or activities; (3) he was either

24
25 ³ Under the relevant statutes, an individual is not entitled to any accommodation that he requests.
26 Rather, "an educational institution is not required to make fundamental or substantial
27 modifications to its programs or standards; it need only make reasonable ones." *Zukie v. Regents*
28 *of Univ. of Cal.*, 166 F.3d 1041, 1046 (9th Cir. 1999). "[T]he issue of reasonableness depends on
individual circumstances of each case," including a showing that the institution satisfied its "duty
to gather sufficient information from the disabled individual and qualified experts as needed to
determine what accommodations are *necessary* to enable the individual to meet the standards in
question." *Wong*, 192 F.3d at 818 (internal quotations and modifications omitted).

1 excluded from participating in or denied the benefits of the public entity's services, programs, or
2 activities, or was otherwise discriminated against by the public entity; and (4) the exclusion, denial
3 of benefits, or discrimination was because of his disability. *E.R.K. ex rel. R.K. v. Haw. Dep't of*
4 *Educ.*, 728 F.3d 982, 992 (9th Cir. 2013) (internal quotation omitted); *see also Duvall*, 260 F.3d at
5 1135. Because the Court has dismissed without prejudice Plaintiff's claims as to events occurring
6 before April 22, 2013 as time-barred, the Court focuses its analysis on the April 23, 2014 meeting
7 between Plaintiff and Professor Young.

8 **1. Standing**

9 CSU contends that Plaintiff lacks standing as to the April 23, 2014 event because he was
10 not a student at the time. (Def's. Mot. at 8.) Plaintiff concedes that he was acting more akin to an
11 applicant at this time. (Pl's. Opp'n at 6.) Neither party provides any case law on whether an
12 applicant has standing to invoke the ADA. The Court has not found case law on this issue in this
13 Circuit, although the Ninth Circuit has recognized that a job applicant can bring an ADA claim.
14 *E.g., Cooper v. Neiman Marcus Grp.*, 125 F.3d 786, 790 (9th Cir. 1997) ("Discrimination under
15 the ADA is defined as limiting, segregating, or classifying a job applicant in a way that adversely
16 affects the opportunities or status of such applicant or employee because of the disability of such
17 employee") (internal quotation and modification omitted); *Humphrey v. Memorial Hosps. Ass'n*,
18 239 F.3d 1128, 1133 (9th Cir. 2001) ("Under the ADA, the term 'discriminate' is defined as
19 including not making reasonable accommodations to the known physical or mental limitations of
20 an otherwise qualified individual with a disability who is an applicant or employee . . .") (internal
21 quotation omitted). Outside of this Circuit, at least one court has permitted a prospective student
22 to bring an ADA and Rehabilitation Act claim against a school. *E.g., Wolff v. Beauty Basics, Inc.*,
23 887 F. Supp. 2d 74, 75 (D.D.C. 2012) (denying motion to dismiss ADA and Rehabilitation Act
24 claim of a deaf prospective student where the school would not provide interpreter services for
25 classes).

26 The Court finds that Plaintiff has standing to bring his claims based on the April 23, 2014
27 meeting, even if he was not enrolled as a student. Plaintiff was seeking to return to the program,
28 and thus is comparable to a job applicant or a prospective student. To adopt CSU's position that

1 Plaintiff lacked standing simply because he was not a student would allow a school to discriminate
2 against an applicant solely on the basis of disability without any consequence. This would be
3 contrary to the statutes, which seek to prevent qualified individuals with a disability from being
4 excluded from participation in the activities of a public entity based on their disability alone.
5 Absent any case law in support of CSU's position, the Court declines to limit the ADA's protection
6 to enrolled students only.

7 **2. Merits of the disability claim**

8 CSU also argues that Plaintiff does not have a disability as defined by the ADA. An
9 individual is disabled where the individual has "a physical or mental impairment that substantially
10 limits one or more major life activities of such individual." 42 U.S.C. § 12102(1). Congress has
11 since passed the ADA Amendments Acts of 2008, the purpose of which "was to reject that the
12 terms substantially and major in the definition of disability under the ADA need to be interpreted
13 strictly to create a demanding standard for qualifying as disabled" *Doe v. Samuel Merritt*
14 *Univ.*, 921 F. Supp. 2d 958, 965 (N.D. Cal. 2013) (internal quotations omitted). "According to the
15 regulations, the term substantially limits 'is not meant to impose a demanding standard' and
16 determining 'whether an impairment "substantially limits" a major life activity should not demand
17 extensive analysis.'" *Id.* (quoting 29 C.F.R. § 1630.2(j)(1)(i), (iii)).

18 The Court wholly rejects CSU's argument that Plaintiff lacks an impairment because "the
19 only activity allegedly limited by plaintiff's disability is that of getting to one class on time."
20 (Def.'s Mot. at 9.) By narrowly focusing on one effect of Plaintiff's disability, CSU completely
21 ignores that Plaintiff has alleged that he suffers from chronic schizophrenia, and that this has
22 resulted in a fear of people that causes serious emotional problems, such as when he is suddenly
23 exposed to the population of students. (Compl. ¶¶ 8, 9.) It was this fear of people that allegedly
24 prevented Plaintiff from getting to class on-time. In short, Plaintiff has alleged that he has
25 problems interacting with other people, which the Ninth Circuit has specifically recognized as a
26 major life activity "because interacting with others is an essential, regular function, like walking
27 and breathing." *McAlindin v. Cty. of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999). The Court
28 finds that Plaintiff has adequately alleged a disability.

1 As for CSU's remaining arguments regarding the merits of Plaintiff's claim—whether
2 Plaintiff was excluded from CSU's services, whether Plaintiff was a victim of discrimination, and
3 whether the discrimination was because of Plaintiff's disability—CSU's arguments focus
4 exclusively on Plaintiff's pre-April 23, 2014 allegations, and do not address the April 23, 2014
5 meeting. (*See* Def.'s Mot. at 9-11.) Because the Court rejects CSU's arguments that Plaintiff lacks
6 standing or a disability, the Court DENIES CSU's motion to dismiss the disability discrimination
7 claims based on the April 23, 2014 meeting and any subsequent events.

8 IV. CONCLUSION

9 The Court GRANTS CSU's motion to dismiss the ADA and Rehabilitation Act claims
10 based on events prior to April 22, 2013. The dismissal is without prejudice, and Plaintiff has leave
11 to allege facts, if possible, to demonstrate that tolling of the statute of limitations should apply in
12 this case. The Court DENIES CSU's motion to dismiss the ADA and Rehabilitation Act claims
13 based on the April 23, 2014 meeting with Professor Young and subsequent events. Plaintiff has
14 forty-five (45) days from the date of this order to file a First Amended Complaint. Plaintiff is on
15 notice that the First Amended Complaint will supersede the original complaint, such that it will be
16 treated as nonexistent. *See Armstrong v. Davis*, 275 F.3d 849, 878 n.40 (9th Cir. 2001), *abrogated*
17 *on other grounds by Johnson v. California*, 543 U.S. 499 (2005). For this reason, Plaintiff shall
18 properly identify the legal and factual bases for all of his claims, free of any reference to any prior
19 complaint.

20 IT IS SO ORDERED.

21 Dated: September 9, 2016

22 
23 KANDIS A. WESTMORE
24 United States Magistrate Judge
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