IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02475-CMA-NYW

KATIE CORRIGAN,

Plaintiff,

v.

BOARD OF TRUSTEES OF THE METROPOLITAN STATE UNIVERSITY OF DENVER,
DAVE HADEN, individually and in his official capacity,
BRIAN BAGWELL, individually and in his official capacity,
LYNANN BUTLER, individually and in her official capacity, and
LORI KESTER, individually and in her official capacity,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Nina Y. Wang

This matter comes before this court for recommendation on Defendants the Board of Trustees of the Metropolitan State University of Denver (the "Board"), Dave Haden, Brian Bagwell, Lynann Butler, and Lori Kester's (collectively, "Defendants") Motion to Dismiss (or "Motion"), filed December 16, 2019. [#23]. The presiding judge, the Honorable Christine M. Arguello, referred the Motion to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b) and the Memorandum dated December 17, 2019, [#24]. This court concludes that oral argument will not materially assist in the resolution of this matter. Accordingly, upon review of the Motion and associated briefing, the applicable case law, and being fully advised in its premise, this court respectfully **RECOMMENDS** that the Motion to Dismiss be **GRANTED**.

BACKGROUND

This court draws the following facts from the Amended Complaint and the exhibits attached to the Motion to Dismiss.[1] Plaintiff Katie Corrigan ("Plaintiff" or "Ms. Corrigan") was a student at Metropolitan State University of Denver ("MSU") "majoring in Human Services and concentrating in Mental Health Counseling." [#22 at ¶¶ 3, 8]. Plaintiff alleges she qualifies as a disabled individual under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, because she suffers from depression, attention deficit hyperactivity disorder ("ADHD"), and substance addiction. [*Id.* at ¶¶ 9-10]. During the fall 2017 semester Ms. Corrigan enrolled in three courses and because of her disabilities, she applied for and received accommodations from MSU's Access Center. [*Id.* at ¶¶ 8, 13-17; #23-1]. These accommodations were in effect during the fall 2017 semester and included limited breaks during class and the ability to sit and stand as needed. [#22 at ¶¶ 15-17; #23-1].

Ms. Corrigan attended classes on August 29 and 30, 2017, respectively. [#22 at ¶¶ 18, 22]. Following each class, Plaintiff's professors claimed Ms. Corrigan was disruptive during class—interrupting lecture, asking numerous questions, and even lying on the floor to nurse a foot injury. *See* [*id.* at ¶¶ 19-24; #23-2; #23-3]. Despite being aware of Ms. Corrigan's accommodations, her professor Defendant Brian Bagwell ("Defendant Bagwell" or "Mr. Bagwell") submitted a report to MSU's CARE TEAM detailing Ms. Corrigan's disruptive behavior, including constantly interrupting the lecture

[1] Defendants attach several documents that Plaintiff references in the Amended Complaint, which appear authentic and central to Plaintiff's claims. Thus, this court considers the documents when analyzing the Motion to Dismiss, without converting this Motion to one for summary judgment. *See Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019).

to ask questions or make comments and lying on the floor on her back blocking the path to the door" and "accused Plaintiff of possibly using alcohol and possibly being homeless." [#22 at ¶¶ 25-26, 36-39; #23-2].

On or about September 1, 2017, Ms. Corrigan received a letter from the Student Conduct Coordinator in the Dean of Student's Office, informing her of her professors' complaints and explaining that she may have violated the Student Code of Conduct. [#22 at ¶¶ 29-31; #23-3]. Plaintiff then met with Defendant Dave Haden ("Defendant Haden" or "Mr. Haden"), the Associate Dean for Student Engagement and Wellness, on or about September 5, 2017. [#22 at ¶ 32]. Mr. Haden allegedly informed Ms. Corrigan that she need not be concerned with the September 1, 2017 letter so long as her "behavior did not continue." [*Id.* at ¶ 33].

Mr. Bagwell, however, accused Plaintiff of continuing to be disruptive, leading to a meeting with Messrs. Bagwell and Haden and a representative from MSU's Access Center on September 7, 2017, at which these individuals informed Ms. Corrigan "that they believed [Plaintiff] could not be successful at MSU and that she should withdraw." [*Id.* at ¶¶ 40, 43-46]. Because Ms. Corrigan was not inclined to withdraw, Messrs. Bagwell and Haden informed Ms. Corrigan she would need to agree to certain conditions to maintain enrollment at MSU. *See* [*id.* at ¶ 47]. Ms. Corrigan alleges that on September 11, 2017, Defendant Lynann Butler ("Defendant Butler" or "Ms. Butler") informed Ms. Corrigan that she would be required to complete substance abuse treatment before being allowed to enroll in any Human Services coursework or attend classes. *See* [*id.* at ¶ 49].

Then, on or about September 12, 2017, Mr. Haden informed Plaintiff that she was suspended from "MSU effective immediately and until [s]ummer 2018," subject to her

completion of substance abuse treatment and a determination of her readiness to resume Human Services coursework. [*Id.* at ¶¶ 51-53; #23-4 at 1]. Ms. Corrigan alleges that the suspension was based on her disruptive behavior that occurred after her September 5, 2017 meeting with Mr. Haden, which Ms. Corrigan alleges was simply her "exercising the reasonable accommodations she was provided by the Access Center." [#22 at ¶¶ 54-55; #23-4 at 1].

Plaintiff appealed Mr. Haden's suspension decision, which Defendant Lori Kester ("Defendant Kester" or "Ms. Kester") accepted; and based on Ms. Kester's recommendation, Mr. Haden reconsidered his determination and placed Ms. Corrigan on probation. *See* [#22 at ¶¶ 57-61; #23-5]. Believing probation to be a more onerous sanction than suspension, Plaintiff appealed this determination to Ms. Kester, who denied the appeal. *See* [#22 at ¶¶ 61-63].

Believing Defendants' disciplined her because of her disabilities, Ms. Corrigan initiated this civil action on August 29, 2019. *See* [#1]. Pursuant to her operative Amended Complaint, Plaintiff asserts claims for (1) violations of § 504 of the Rehabilitation Act ("RA"), 29 U.S.C.§ 794, against the Board ("Claim 1"); (2) violations of Title II of the ADA, 42 U.S.C. § 12132, against the Board ("Claim 2"); (3) breach of the duty of good faith and fair dealing against the Board ("Claim 3"); (4) breach of contract against the Board ("Claim 4"); (5) violations of Ms. Corrigan's various constitutional rights pursuant to 28 U.S.C. § 1983 against Defendants Bagwell, Butler, Haden, and Kester (collectively, the "Individual Defendants") ("Claim 5"); and though styled as a claim, (6) injunctive relief ("Claim 6"). *See generally* [#22].

Defendants moved to dismiss the Amended Complaint on December 16, 2019. [#23]. Defendants argue the court should dismiss Claims 3, 4, and 5 for lack of federal subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and should dismiss all claims for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See generally* [*id.*]. Plaintiff has since responded to the Motion to Dismiss and Defendants replied. *See* [#25; #26]. Because the Motion is ripe for Recommendation, I consider the Parties' arguments below.

LEGAL STANDARDS

I. Rule 12(b)(1) of the Federal Rules of Civil Procedure

Federal courts are courts of limited jurisdiction and, as such, "are duty bound to examine facts and law in every lawsuit before them to ensure that they possess subject matter jurisdiction." *The Wilderness Soc. v. Kane Cty., Utah*, 632 F.3d 1162, 1179 n.3 (10th Cir. 2011) (Gorsuch, J., concurring). Indeed, courts have an independent obligation to determine whether subject matter jurisdiction exists, *Cellport Sys., Inc. v. Peiker Acustic GMBH & Co. KG*, 762 F.3d 1016, 1029 (10th Cir. 2014), even in the absence of a challenge from any party, *1mage Software, Inc. v. Reynolds & Reynolds, Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006). Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may bring either a facial or factual attack on subject matter jurisdiction, and a court must dismiss a complaint if it lacks subject matter jurisdiction. *See Pueblo of Jemez v. United States*, 790 F.3d 1143, 1147 n.4 (10th Cir. 2015). For a facial attack the court takes the allegations in the Complaint as true; for a factual attack the court may not presume the truthfulness of the Complaint's factual allegations and may consider affidavits or other documents to resolve jurisdictional facts. *Rural Water Dist. No. 2 v.*

City of Glenpool, 698 F.3d 1270, 1272 n.1 (10th Cir. 2012) (citing *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995)). The burden of establishing jurisdiction rests with the party asserting jurisdiction. *See Kline v. Biles*, 861 F.3d 1177, 1180 (10th Cir. 2017).

II. Rule 12(b)(6) of the Federal Rules of Civil Procedure

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Walker v. Mohiuddin*, 947 F.3d 1244, 1248-49 (10th Cir. 2020) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cummings v. Dean*, 913 F.3d 1227, 1238 (10th Cir. 2019) (internal quotation marks omitted). In making this determination, the "court accepts as true all well-pleaded factual allegations in [the] complaint and views those allegations in the light most favorable to the plaintiff." *Straub v. BNSF Ry. Co.*, 909 F.3d 1280, 1287 (10th Cir. 2018). In some instances, like here, the court may consider materials beyond the complaint if the documents are central to the plaintiff's claims, referred to in the complaint, and the parties do not dispute their authenticity. *See Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019).

ANALYSIS

Because Defendants move for dismissal under Rules 12(b)(1) and 12(b)(6), this court turns first to Defendants' arguments implicating this court's subject matter jurisdiction. *Cunningham v. BHP Petroleum Great Britain PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005) (holding that once a federal court determines that it is without subject

matter jurisdiction, it must not proceed to consider any other issue). Then, this court proceeds with an analysis of Defendants' arguments under Rule 12(b)(6) for those claims that this court concludes subject matter jurisdiction exists.

I. Dismissal Under Rule 12(b)(1) – Claims 3, 4, and 5

Defendants move to dismiss Claims 3, 4, and 5 for lack of federal subject matter jurisdiction for two reasons. First, they argue the Board and the Individual Defendants (sued in their official capacities) are immune from Claims 3, 4, and 5 under the Eleventh Amendment of the United States Constitution, which bars suit against a state in federal court. *See* [#23 at 5-6; #26 at 1-2]. Second, they argue the Board is immune from Claims 3 and 4 under the Colorado Governmental Immunity Act, because these claims sound in tort which the Colorado Governmental Immunity Act precludes.[2] *See* [#23 at 6-7; #26 at 1-2].

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This immunity extends to suits by citizens against their own state or its agencies in federal court. *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995). "Only a state or 'arms' of a state may assert the Eleventh Amendment as a defense to suit in federal court." *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999). For claims brought pursuant to § 1983, a claim against a state official sued in her official capacity "is, in all

[2] Because this court finds that the Eleventh Amendment bars Claims 3 and 4 brought against the Board, it does not reach Defendants' Colorado Governmental Immunity Act arguments, but notes that Plaintiff did not respond to such arguments. [#25].

respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Thus, the Eleventh Amendment bars suits against state officials sued in their official capacities for monetary damages pursuant to § 1983. *See Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 (10th Cir. 2010) ("§ 1983 does not abrogate a state's sovereign immunity").

A. Claims 3 and 4

As to Plaintiff's state law claims for breach of the duty of good faith and fair dealing (Claim 3) and breach of contract (Claim 4) asserted only against the Board, I conclude the Eleventh Amendment bars these claims. I therefore respectfully **RECOMMEND** that the Motion to Dismiss be **GRANTED** in this regard and Claims 3 and 4 be **DISMISSED**.

First, there appears no dispute that the Board is an arm of the State of Colorado and therefore may invoke Eleventh Amendment sovereign immunity. *Compare* Colo. Rev. Stat. § 23-54-102(6) (transferring all duties and powers formerly performed by the trustees of the state colleges in Colorado to the Board) *with McLaughlin v. Bd. of Trustees of State Colleges of Colorado*, 215 F.3d 1168, 1170 (10th Cir. 2000) (holding that the Board of Trustees of State Colleges of Colorado waived its sovereign immunity by removing the plaintiff's § 1983 claims to federal court). *Cf. Harrison v. Univ. Of Colorado Health Scis. Ctr.*, 337 F. App'x 750, 753 (10th Cir. 2009) (concluding that the University of Colorado was an arm of the state given that the Colorado Constitution considers educational institutions supported by the State a State institution, and that this included divisions and employees in their official capacity within the University of Colorado).

Second, "a federal court must apply Eleventh Amendment immunity to claims based on state law as well as those based on federal law." *Smith v. Plati*, 56 F. Supp. 2d

1195, 1201 (D. Colo. 1999). And the *Ex parte Young* exception does not apply to state law claims, as Eleventh Amendment immunity applies to state entities regardless of the relief sought. *See id.* at 1202.

Accordingly, absent any waiver of Eleventh Amendment immunity by the Board, the Eleventh Amendment bars Claims 3 and 4. *See Norris v. Univ. of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1021 (D. Colo. 2019) (dismissing the plaintiff's breach of contract claim against the University of Colorado because no waiver of sovereign immunity occurred); *Smith*, 56 F. Supp. 2d at 1201 (holding that the Eleventh Amendment barred the plaintiff from pursuing state law claims against the university-defendant). No such waiver appears in the record here.

B. Claim 5

As to Plaintiff's § 1983 claim (Claim 5) asserted against the Individual Defendants, I respectfully conclude Eleventh Amendment immunity bars only Plaintiff's request for monetary damages against the Individual Defendants in their official capacities. I therefore respectfully **RECOMMEND** that the Motion to Dismiss be **GRANTED** insofar as Claim 5 seeks monetary damages from the Individual Defendants in their official capacities on subject matter jurisdiction grounds.

Claim 5 alleges violations of Plaintiff's Fourteenth Amendment equal protection and procedural due process rights. *See* [#22 at ¶¶ 110-30]. But Ms. Corrigan does not specifically articulate in which capacity (i.e., official, individual, or both) she asserts Claim 5 against the Individual Defendants. [*Id.*] Though she refers to them as "Individual Defendants," she alleges only that "[a]t all relevant times Defendants were acting under the color of state law in their capacity as employees at a public university." [*Id.* at ¶ 113].

She requests compensatory and punitive damages arising from the Individual Defendants' alleged constitutional violations. [*Id.* at ¶¶ 128, 130]. But the briefing on the Motion to Dismiss from both sides, however, makes clear that Plaintiff is at least asserting Claim 5 against the Individual Defendants in their official capacity. *See*, *e.g.*, [#25 at 3-4].

To the extent Ms. Corrigan asserts Claim 5 for money damages against the Individual Defendants in their official capacities, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983," and thus sovereign immunity bars such a claim. *Ross v. The Bd. of Regents of The Univ. of New Mexico*, 599 F.3d 1114, 1117 (10th Cir. 2010) (internal quotations omitted) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)). In her Response to the Motion to Dismiss, Ms. Corrigan argues Eleventh Amendment immunity does not bar Claim 5 in so far as she seeks prospective injunctive relief against the Individual Defendants in their official capacities. [#25 at 3]. Ms. Corrigan contends she seeks an order from the court requiring "Defendants to modify their policy and remove Plaintiff from probation and to allow Plaintiff to attend classes in the human services department." [*Id.*]. According to Ms. Corrigan, she adequately pleads the Individual Defendants' connection to the challenged disciplinary actions and their authority to grant such injunctive relief. [*Id.*].

Ms. Corrigan is correct that an exception to Eleventh Amendment immunity exists for claims for prospective injunctive relief against state officials sued in their official capacities. *See Johns*, 57 F.3d at 1552 (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). Pursuant to *Ex parte Young*, "a plaintiff may avoid the Eleventh Amendment's prohibition on suits against states in federal court by seeking to enjoin a state official from

enforcing an unconstitutional statute." *Collins v. Daniels*, 916 F.3d 1302, 1315 (10th Cir. 2019) (internal quotation marks omitted); *see also Rounds v. Clements*, 495 F. App'x 938, 941 (10th Cir. 2012) (noting, "*Ex parte Young* permits suit against state employees for prospective relief whether the employee happens to be sued in his individual or official capacity.").

The trouble is, Ms. Corrigan does not seek injunctive relief for her § 1983 claim (Claim 5). [#22]. Though she separately identifies injunctive relief as her "Sixth Claim," injunctive relief is not a separate cause of action but is actually a request for a certain type of relief. *Brickert v. Deutsche Bank Nat'l Tr. Co.*, 380 F. Supp. 3d 1127, 1141 (D. Colo. 2019). In the paragraphs where she specifically sets out Claim 5, she claims only monetary damages. *See* [#22 at ¶¶ 128, 130]. There is no mention of any type of injunctive relief associated with her § 1983 claim. Indeed, even "Claim 6" for injunctive relief only identifies § 504 of the RA, the ADA, and "the contract for educational services" as bases for such relief. *See* [*id.* at ¶¶ 132-36]. And Ms. Corrigan, who has been represented by counsel since the inception of this action, cannot amend her operative Complaint through statements made in conjunction with the Motion to Dismiss. *See In re Qwest Communications Int'l., Inc*., 396 F. Supp. 2d 1178, 1203 (D. Colo. 2004) ("The plaintiff[ ] may not effectively amend his Complaint by alleging new facts in his response to a motion to dismiss.").

Nevertheless, insofar as Judge Arguello may be inclined to overlook Plaintiff's formal deficiency in the Amended Complaint that was not raised by Defendants' in their Motion to Dismiss*, Doe v. Univ. of Colorado, Boulder through Bd. of Regents of Univ. of Colorado*, 255 F. Supp. 3d 1064, 1081 (D. Colo. 2017) (declining to dismiss a

constitutional claim that had not been pleaded pursuant to 42 U.S.C. § 1983 because "[j]ustice would be little served were this Court to dismiss Plaintiff's second cause of action simply as a result of such an easily rectified pleading deficiency"), this court proceeds to considering whether Ms. Corrigan has sufficiently pleaded prospective relief to bring her within the *Ex parte Young* exception to Eleventh Amendment immunity.

"'In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (brackets and internal quotation marks omitted)). Defendants contend that Ms. Corrigan's request for injunctive relief is retrospective because it seeks to overturn MSU's disciplinary decision—conduct that happened in the past. *See* [#26 at 2]. Defendants also assert that Ms. Corrigan's "vague and unsupported request" to overturn Defendants' policy "cannot overcome constitutional immunity," and Defendant Bagwell, as a professor and not policymaker, is not a proper Defendant. *See* [*id.*].

Ms. Corrigan seeks to enjoin Defendants from further disciplinary action, remove her from probation, and allow her to attend classes in the Human Services department. [#22 at ¶¶ 133, 135]. Essentially, Ms. Corrigan seeks reinstatement, which is fairly categorized as prospective relief. *See Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1232-33 (10th Cir. 2004) ("Reinstatement of employment is a form of prospective equitable relief that is within the doctrine of *Ex parte Young*."); *Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186, 1198 (10th Cir. 1998) (holding that the plaintiff's request for reinstatement

to the night shift was prospective relief allowed under *Ex parte Young*); *cf. Doe*, 255 F. Supp. 3d at 1081 (concluding expungement was prospective relief that was allowed under *Ex parte Young*); *Johnson v. W. State Colorado Univ.*, 71 F. Supp. 3d 1217, 1230 (D. Colo. 2014) (same).

Though Ms. Corrigan complains of injuries that occurred in the past, she requests relief that affect Defendants' future actions. *See Garcia v. Metropolitan State Univ. of Denver*, No. 19-CV-02261-RBJ, 2020 WL 886219, at *9 (D. Colo. Feb. 24, 2020) ("Ms. Garcia's requested injunctions prohibiting enforcement of sanctions and immediate reinstatement contemplate prospective relief as well."). And while this court agrees that Ms. Corrigan must identify the Defendants' policy at issue before any injunctive relief could be awarded, her failure to do so now does not entitle the Individual Defendants to Eleventh Amendment immunity. Nor is it fatal that Defendant Bagwell is only a professor, because Ms. Corrigan alleges Defendant Bagwell actually participated in the conduct at issue. *See id.* at *7 ("As long as Ms. Garcia's complaint alleges specific facts showing that defendants have sufficient connection with the act or conduct, she may join those parties under *Ex Parte Young*."). Accordingly, the Eleventh Amendment does not bar Ms. Corrigan's request for injunctive relief against the Individual Defendants in their official capacities, though as discussed in detail below, this court recommends dismissal of Claim 5 on other grounds.

Though neither Party addresses whether Ms. Corrigan asserts Claim 5 against the Individual Defendants in their individual capacity, to the extent she does so, sovereign immunity "is not implicated . . . because any award of damages will be satisfied from the individual's personal assets and will not be paid from the state treasury." *Cornforth v.*

Univ. of Oklahoma Bd. of Regents, 263 F.3d 1129, 1133 (10th Cir. 2001). Because the Amended Complaint could be fairly read as asserting Claim 5 against the Individual Defendants in their individual capacity, this court assumes that it does and finds that any such claim is not precluded by the Eleventh Amendment.

II. Dismissal Under Rule 12(b)(6) – Claims 1-6

Defendants also move to dismiss Plaintiff's Amended Complaint in its entirety for failure to state plausible claims for relief. Because this court recommends dismissing Claims 3 and 4 pursuant to Rule 12(b)(1), the following analysis focuses only on Claims 1, 2, 5, and 6.

A. Claims 1 and 2 – Violations of the RA and ADA

Defendants move to dismiss Claims 1 and 2 because Ms. Corrigan fails to allege that she is a qualified individual with a disability or that Defendants discriminated against her "solely" because of her alleged disability. *See* [#23 at 8-10; #26 at 3-5]. Plaintiff counters that she pleads that she suffers from the disabilities of depression, ADHD, and substance abuse, which substantially limit "her major life activities of learning, thinking, and concentrating." [#25 at 4]. She further contends Defendants discriminated against her because of her disability. *See* [*id.* at 5-7]. But even assuming Ms. Corrigan is a qualified individual with a disability, I respectfully conclude she fails to allege that Defendants discriminated against her because of her disability. Accordingly, I respectfully **RECOMMEND** that the Motion to Dismiss be **GRANTED** in this regard and Claims 1 and 2 be **DISMISSED**.

Title II of the ADA commands, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of

the services, programs, or activities of a public entity[.]" 42 U.S.C. § 12132. Likewise, § 504 of the RA prohibits exclusion of a disabled individual from "any program or activity receiving Federal financial assistance" because of that individual's disability. 29 U.S.C. § 794(a). Because the ADA and RA "involve the same substantive standards, [courts] analyze them together." *Miller ex rel. S.M. v. Bd. of Educ. Of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1245 (10th Cir. 2009) (citation omitted). Thus, a viable claim under the ADA requires Ms. Corrigan to allege (1) she is a qualified individual with a disability; (2) she was excluded from participation in or denied the benefits of the Board's services, programs, or activities; and (3) such exclusion was due to her disability, *J.V. v. Albuquerque Pub. Sch.*, 813 F.3d 1289, 1295 (10th Cir. 2016), while a viable RA claim requires the additional element that the entity receive federal funding, *see Hollonbeck v. United States Olympic Comm.*, 513 F.3d 1191, 1194 (10th Cir. 2008).

Relevant here, to establish the requisite discrimination, Ms. Corrigan must allege that Defendants:

1. intentionally discriminated against her,
2. engaged in conduct that had an unlawful impact on her, or
3. failed to provide a reasonable accommodation to her.

Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 919 (10th Cir. 2012). Ms. Corrigan appears to invoke the first (disparate treatment) and third (failure to accommodate) theories in her Amended Complaint. For the following reasons, this court respectfully concludes Ms. Corrigan fails to allege disability discrimination under either theory.

Intentional discrimination may arise if Defendants were deliberately indifferent to the "strong likelihood" that their conduct would "likely result in a violation of [Ms. Corrigan's] federally protected rights," though it is not necessary to show ill will or animosity towards the disabled person. *Barber ex rel. Barber v. Colo. Dep't of Rev.*, 562 F.3d 1222, 1228-29 (10th Cir. 2009) (internal quotation marks omitted). Ms. Corrigan must allege, however, Defendants' "knowledge that a harm to a federally protected right was substantially likely" and Defendants' "failure to act upon that likelihood." *Havens v. Colorado Dep't of Corr.*, 897 F.3d 1250, 1264 (10th Cir. 2018) (ellipsis and internal quotation marks omitted). As to the second prong, "failure to act is a result of conduct that is more than negligent, and involves an element of deliberateness," and requires an investigation into what accommodations the particular plaintiff needs. *Barber ex rel. Barber,* 562 F.3d at 1229 (brackets and internal quotation marks omitted). Failure to provide a reasonable accommodation, on the other hand, constitutes discrimination "only if Ms. [Corrigan] could not otherwise obtain the same benefits made available to nondisabled individuals." *Taylor v. Colorado Dep't of Health Care Policy & Fin.*, 811 F.3d 1230, 1236 (10th Cir. 2016). But this requires Ms. Corrigan to allege the Board had "knowledge that [she was] disabled, either because that disability [was] obvious or because [she] (or someone else) ha[d] informed the [Board] of the disability." *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1196 (10th Cir. 2007)

Ms. Corrigan alleges her disabilities include depression, ADHD, and substance abuse, which substantially limit her major life activities of learning, thinking, and concentrating and "make it difficult for [her] to stay still and focused for such an extended period of time." [#22 at ¶¶ 10, 12, 36]. Because of her disabilities, Ms. Corrigan received

accommodations of "tak[ing] limited breaks during class" and "stand[ing] and sit[ting] as needed," among others. *See* [*id.* at ¶ 14; #23-1 at 1]. According to Ms. Corrigan, Defendants disciplined her for exercising these reasonable accommodations, and therefore discriminated against her because of her disabilities and failed to provide reasonable accommodations. *See* [#22 at ¶¶ 20, 26, 30, 33, 35-37, 40, 46-47, 49, 52, 53, 54-63, 66, 70-73, 82-86, 94-100].

Defendants argue they disciplined Ms. Corrigan because she was disruptive in class and violated the MSU Student Code of Conduct, not because of her disabilities. *See* [#23 at 9-10; #26 at 5]. Defendants contends Ms. Corrigan's disciplinary record contradicts her assertions that Defendants disciplined her for exercising her reasonable accommodations, and neither the ADA nor the RA prohibit Defendants from disciplining Ms. Corrigan for misconduct, even if that misconduct relates to her disabilities. *See* [#23 at 9-10; #26 at 3-5]. I respectfully agree.

To start, this court focuses upon the well-pleaded allegations of the Amended Complaint as well as the documents that Plaintiff incorporates into such Amended Complaint. *See GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-85 (10th Cir. 1997) (permitting the court to consider certain materials outside the pleading on a Rule 12(b)(6), because "otherwise [] a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied."). There is only one allegation that any actions arose from Ms. Corrigan's exercise of reasonable accommodations of taking limited breaks and sitting and standing as need, i.e., Mr. Bagwell's post-September 6, 2017 complaints that "Ms. Corrigan was continuing to be disruptive in class citing her taking breaks and standing and sitting during the class."

See [#22 at ¶ 40]. Most allegations, conversely, involve other classroom behavior, such as constantly interrupting lectures, becoming confrontational when a question went unanswered, and lying on the floor and blocking the door—conduct that does not appear related to Ms. Corrigan's reasonable accommodations or her alleged disabilities. *E.g.*, [*id.* at ¶¶ 18-26]. Indeed, the Amended Complaint alleges that when Ms. Corrigan learned of a possible violation of the MSU Student Code of Conduct, the letter cited Plaintiff for being "disruptive, consistently interrupting other students in multiple classes," [*id.* at ¶¶ 29-31], and Mr. Haden confirmed that the issue was "primarily about [Plaintiff] asking too many questions during class," [*id.* at ¶¶ 32-33]. These allegations, even taken as true, fail to adequately allege that Defendants had knowledge that their conduct was substantially likely to violate Ms. Corrigan's federally protected rights and were then deliberate in failing to act on that likelihood. *See Havens*, 897 F.3d at 1264.

Next, Plaintiff alleges various Defendants discriminated against her for exercising her reasonable accommodations and being disabled by:

- suggesting she withdraw from MSU or agree to substance abuse treatment;
- precluding her from further Human Services coursework;
- initially suspending her for exercising her reasonable accommodations;
- placing her on probation for exercising her reasonable accommodations; and
- effectively dismissing her from MSU.

[*Id.* at ¶¶ 41-66, 70-73]. But again, these instances appear to relate to Ms. Corrigan's disruptive classroom behavior, not her reasonable accommodations or her attempts to exercise them. Indeed, the correspondence attached to the Motion to Dismiss contradict

her arguments regarding disability discrimination. Plaintiff alleges Mr. Bagwell complained that Ms. Corrigan was "difficult to keep on point and constantly interrupted the lecture to ask questions or make comments," was "laying on the floor on her back and blocking the path to the door," and was "at times rambling and not on point," [#23-2 at 1], which mirrored earlier complaints about Ms. Corrigan's behavior, *see* [#22 at ¶ 20]. Aside from her lone allegation that Mr. Bagwell complained of Plaintiff exercising her reasonable accommodations as being disruptive, the remainder of Ms. Corrigan's disciplinary record cites her continued disruptive behavior, despite several discussions about it, as the reasons for her sanctions. *Compare* [#22 at ¶ 40] *with* [#23-3 at 1; #23-4 at 1; #23-5].

Ms. Corrigan also alleges she sought and received accommodations for her alleged disabilities, including the ability to take limited breaks during class and the ability to stand and sit as needed in class, which were memorialized in an ADA Accommodation Notification Letter provided to Ms. Corrigan's professors from the MSU Access Center. [#22 at ¶¶ 13-15]. She was also provided accommodations with respect to notetaking; limited extensions to complete timed in-class writing assignments; use of assistive technology in class; accessible course handouts; the use of a laptop/tablet for taking notes and completing in-class assignments; and the amount of time for test-taking. [#23-1]. She fails to allege facts that would allow a factfinder to conclude that Defendants were deliberately indifferent to her federally protected rights, *see J.V.*, 813 F.3d at 1298 (holding that bare allegations of deliberate indifference were insufficient to establish that the defendants were more than negligent in failing to provide training regarding the handling of special needs students), or discriminated against her for exercising her reasonable accommodations. *Cf. Buhendwa v. Univ. of Colorado at Boulder*, 214 F.

App'x 823, 827 (10th Cir. 2007) (granting summary judgment on the plaintiff's RA claim because the "alleged discrimination she experienced was not based on language-induced test-taking anxiety, but was instead caused by the fact that she fell asleep during the examination."). Indeed, the allegations that Ms. Corrigan points to in her Response, *see* [#25 at 5-6], do not relate to the exercise of the accommodations provided by MSU and reflected in the ADA Accommodation Letter—there was no accommodation that permitted Ms. Corrigan to lie on the floor on her back and block the path to the door, *see* [#23-2], or allowed for disruptive behavior, *see* [#23-3]. And her Amended Complaint attributes the need to sit on the floor and keep her foot elevated to a foot injury, which is not alleged to be associated with her identified disabilities of depression, ADHD, or substance addiction. [#22 at ¶¶ 10, 24].

To the extent Ms. Corrigan believed further accommodations were needed to foster her participation in class, she fails to allege that her disabilities were so obvious as to need additional accommodations or that she requested additional accommodations that were denied. *See J.H. ex rel. J.P. v. Bernalillo Cty.*, 806 F.3d 1255, 1262 (10th Cir. 2015) (finding no violation of the ADA where an accommodation may have been necessary, but the plaintiff "did not identify a needed accommodation."); *cf. Profita v. Regents of the Univ. of Colorado*, 709 F. App'x 917, 922-23 (10th Cir. 2017) (approving of the notion that a school need not excuse either past misconduct or past poor performance as a reasonable accommodation because this amounted not to an accommodation, "but a second chance to better control [a] treatable medical condition." (internal quotation marks omitted)).

At most, it reasonable to infer that Ms. Corrigan's disruptive behavior may have been a manifestation of her disabilities. *See e.g.*, [#23-4 at 1]. But Plaintiff's allegations that Defendants' failure to excuse Ms. Corrigan's disruptive behavior, even taken as true, do not state a cognizable claim under the ADA or the RA; nothing suggests "a school may not regulate a student's conduct if that conduct is a manifestation of a disability," "so long as [the] action is not taken by reason of the student's disability." *J.V.*, 813 F.3d at 1296 (concluding there was no evidence that the defendant's conduct was "by reason of" the plaintiff's disability where the defendant regulated disruptive classroom behavior, regardless of whether it was a manifestation of the plaintiff's disability). Accordingly, this court finds that Ms. Corrigan fails to allege facts to support discrimination because of her disability for purposes of her RA (Claim 1) and ADA (Claim 2) claims.

B. Claim 5 – Constitutional Violations Pursuant to 42 U.S.C. § 1983

Defendants move to dismiss Claim 5 against the Individual Defendants because Ms. Corrigan fails to allege the deprivation of her equal protection or procedural due process rights under the Fourteenth Amendment. Further, Defendants argue the Individual Defendants are entitled to qualified immunity because Ms. Corrigan fails to plead the violation of a clearly established right. In considering Defendants' arguments in the context of the two prongs of the qualified immunity analysis, I respectfully **RECOMMEND** that the Motion to Dismiss be **GRANTED** and Claim 5 be **DISMISSED** in its entirety.

Qualified Immunity

The doctrine of qualified immunity protects government officials from individual liability for actions carried out while performing their duties so long as their conduct does

not violate clearly established constitutional or statutory rights. *Washington v. Unified Gov't of Wyandotte Cty.*, 847 F.3d 1192, 1197 (10th Cir. 2017). To facilitate the efficient administration of public services, the doctrine functions to protect government officials performing discretionary actions and acts as a "shield from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Once a defendant has asserted a defense of qualified immunity, the burden shifts to the plaintiff who must establish that (1) the defendants violated a constitutional right, and (2) the right was clearly established at the time of the defendants' action. *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015). Courts, however, have discretion to consider the prongs in either order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

When, as here, a defendant moves to dismiss a plaintiff's § 1983 claim based on qualified immunity, "the plaintiff must allege sufficient facts that show—when taken as true—the defendant plausibly violated his constitutional rights, which were clearly established at the time of violation." *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012). Ms. Corrigan's Amended Complaint need not contain all the necessary factual allegations to sustain a conclusion that the Individual Defendants violated clearly established law. *See Robbins*, 519 F.3d at 1249 (recognizing that such a heightened pleading standard is not required). The Amended Complaint needs to satisfy only the minimum pleading requirements as articulated in *Twombly* and discussed above. *Id*.

1. Equal Protection

Constitutional Violation. "An equal protection violation occurs when the government treats someone differently than another who is similarly situated." *Penrod v. Zavaras*, 94 F.3d 1399, 1406 (10th Cir. 1996). The Equal Protection Clause does not guarantee nor suggest that the law may never draw distinctions between individuals, nor does it provide a safeguard against arbitrary or unlawful governmental action like the Due Process Clause; rather, it requires there be some rational reason for the distinction. *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th Cir. 2012). To survive a motion to dismiss, a plaintiff must identify specific examples of similarly situated individuals and how they were treated differently—general allegations that others were treated differently will not suffice. *See Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216-19 (10th Cir. 2011).

Defendants argue Ms. Corrigan fails to allege Defendants treated her differently from others who were similarly situated to Ms. Corrigan and did so for a discriminatory purpose. [#23 at 13]. I respectfully agree. Ms. Corrigan's sole allegation regarding an equal protection violation is that Defendants discriminated against her from exercising her reasonable accommodations. *See* [#22 at ¶ 123]. But as discussed, she fails to sufficiently plead disability discrimination, and she fails to allege any examples where Defendants treated similarly situated individuals differently. For instance, there are no allegations that other students who were cited as being disruptive in class were not disciplined or received less discipline. *See* [*Id.*]. Accordingly, this court finds that Ms.

Corrigan fails to plead a cognizable constitutional claim, and thus the Individual Defendants are entitled to qualified immunity as to Plaintiff's equal protection claim.[3]

2. Procedural Due Process

Because Ms. Corrigan asserts her procedural due process claim against the Individual Defendants who are state actors, the claim arises under the Fourteenth Amendment. The Fourteenth Amendment Due Process Clause states, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Whether the individual Defendants denied Ms. Corrigan procedural due process depends on: (1) whether Ms. Corrigan possessed a constitutional interest in her continued education at MSU and, if so, (2) whether the Individual Defendants afforded her an appropriate level of process to protect that interest. *See Koessel v. Sublette Cty. Sheriff's Dep't*, 717 F.3d 736, 748 (10th Cir. 2013).

First, I conclude Ms. Corrigan had a constitutionally protected interest in her education at MSU. *See Couture v. Bd. of Educ. of Albuquerque Pub. Sch.*, 535 F.3d 1243, 1257 (10th Cir. 2008) ("In *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), the Supreme Court declared that public school students have a protected property interest in public education and a liberty interest in their reputations, and therefore are entitled to certain procedural due process protections within the educational context."); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1181 (10th Cir. 2001).

[3] Because I find that Ms. Corrigan has not met the first prong of qualified immunity, I need not reach the second prong to consider whether such right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (holding that a district court, within its sound discretion, can consider either prong of the qualified immunity analysis first, and qualified immunity may be appropriate on a failure of either prong).

Second, I consider whether the probation imposed by Defendants caused more than a *de minimis* interference with her constitutionally protected property interest. [#23 at 11; #26 at 5]. *See Couture* 535 F.3d at 1257 (explaining that *de minimis* deprivations do not require any procedural safeguards, but complete deprivation, such as exclusion for a length of time, requires notice and some kind of hearing). In Response, Plaintiff points the court to her allegations that she was "effectively dismissed from MSU when Defendant Butler, without giving Plaintiff notice or an opportunity to be heard, prohibited Plaintiff from attending classes in the human services department, the department of her major." [#25 at 7 (citing [#22 at ¶¶ 49, 65-66, 121)]. According to Ms. Corrigan, this effectively dismissed her from MSU, and she received no opportunity to address Defendant Butler's sanction. *See* [*id.* at ¶¶ 65-66, 121-23].

But as Ms. Corrigan concedes in her Amended Complaint, her suspension that required her to complete substance abuse treatment and establish her readiness to return to the Department of Human Services academic program prior to returning to MSU, *see* [#23-4], was superseded by Mr. Haden's change of his initial sanction of suspension to probation. [#22 at ¶¶ 49-61; #23-5 (acknowledging overturning the suspension)]. Though this court takes all well-pleaded facts as true, factual allegations that are contradicted by documents properly before the court are not considered well-pleaded facts that the court must as accept as true. *See GFF Corp.*, 130 F.3d at 1385; *Rader v. Citibank N.A.,* 700 F. App'x 817, 819 (10th Cir. 2017). Accordingly, Ms. Corrigan's allegations that Defendant Butler has barred her from taking Department of Human Services coursework effectively dismissing her from MSU [#22 at ¶ 65] is belied by the record, and therefore not taken as true.

Further, Ms. Corrigan alleges that "an open-ended term of probation that would hang over Plaintiff's head for the rest of her time at MSU was more severe a punishment than the original suspension that did not include a probationary period." [#22 at ¶ 61]. But such a statement is not a factual allegation, taken as true, that allows a factfinder to conclude that the probation is more than a *de minimis* interference with her constitutionally protected interest in her education at MSU, given that any "more intensive" sanction is triggered off a violation of the Code of Conduct. [*Id.*; #23-5]. For instance, Ms. Corrigan makes no allegations as to whether she was precluded from MSU between September 12, 2017, when she was informed of her suspension, and October 17, 2017, when Mr. Haden reconsidered and overturned the suspension in favor of probation. *See generally* [#22]. Ms. Corrigan also alleges no facts that she attempted to return to MSU under such probation, but was precluded from attending classes, subjected to unwarranted discipline, or deprived of her reasonable accommodations. [*Id.*]. Indeed, Ms. Corrigan does not even allege that she attempted to return to MSU at all. [*Id.*]. Instead, Ms. Corrigan's allegation that her probation is a more severe punishment than the original suspension is simply speculation that is insufficient to allow a factfinder to conclude that the interference with her interest in pursuing her education at MSU was anything more than *de minimis*.

Having concluded so, this court does not proceed in considering whether Ms. Corrigan has adequately pleaded facts that the Individual Defendants failed to afford her an appropriate level of process or whether either right was clearly established as of the time of the alleged violation. *See Pearson*, 555 U.S. at 242. Accordingly, this court finds that Ms. Corrigan fails to plead a cognizable constitutional violation, and thus the

Individual Defendants are entitled to qualified immunity as to Plaintiff's procedural due process claim.

C. Claim 6 – Injunctive Relief

Defendants also move to dismiss Ms. Corrigan's claim for injunctive relief (Claim 6), because she premises this claim on violations of the ADA, RA, and Colorado common law and she fails to plead viable claims under these causes of action. Thus, Defendants argue, she is not entitled to injunctive relief. [#23 at 14]. As set forth above, injunctive relief is not a separate cause of action, but rather a type of relief associated with particular claims. *Brickert*, 380 F. Supp. 3d at 1141. Having recommended that all of Ms. Corrigan's substantive causes of action be dismissed, this court also respectfully **RECOMMENDS** that Ms. Corrigan's request for injunctive relief also be **DISMISSED**.

CONCLUSION

For the reasons stated herein, this court respectfully **RECOMMENDS** that:

(1) Defendants' Motion to Dismiss [#23] be **GRANTED**;

(2) Claims 1 and 2 be **DISMISSED** for failure to state a claim;

(3) Claims 3 and 4 be **DISMISSED** for lack of subject matter jurisdiction;

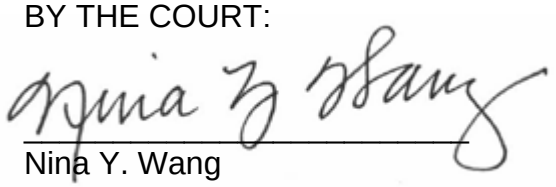
(4) Claim 5 be **DISMISSED** for lack of subject matter jurisdiction to the extent Plaintiff seeks monetary relief from the Individual Defendants in their official capacities, and **DISMISSED** for failure to state a claim in all other respects; and

(5) Claim 6 be **DISMISSED** given the Recommendation to dismiss all substantive causes of action.[4]

[4] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for

DATED: April 22, 2020

BY THE COURT:



Nina Y. Wang
United States Magistrate Judge

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the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).